

**CBF/PABSS Event
House of Lords
10th February 2020**

Restraint and Seclusion in Schools

I would like to thank Baroness Hollins for hosting this event and the CBF/PABSS for inviting me to speak here today.

I've been asked to talk about the work our office has done on this issue in Scotland but I have to say up front that none of that work would have happened if it hadn't been for the tireless advocacy of Beth Morrison, Kate Sanger and many others whose experiences are reflected in the research published today.

They deserve huge credit and admiration for acting as fierce human rights defenders on behalf of their children, for using their own experiences in a really powerful way to demand change. They are all what we in Scotland would call "unfearties".

The role of the Commissioner and his office is very simple. To promote and safeguard children's human rights in Scotland. And it is important to start by making that clear - **this is a human rights issue**. We can't say this often enough. When children go to school they have the right to:

- Be kept and to feel safe,
- To have access to an education that develops their personality, talents and abilities to their fullest potential – without discrimination
- To be protected from cruel, inhuman or degrading treatment.
- To exercise bodily autonomy
- To not be unlawfully deprived of their liberty.

However, the research presented today makes clear that all too often, for all too many children, those rights are not realised. It also makes clear the fact that children with disabilities are particularly vulnerable to experiencing restraint and seclusion in school.

Human rights are not aspirational policy goals. They are legal commitments. When we talk to younger children about human rights we often explain them as promises made by the Government. And we explain that human rights are universal. They apply to everyone. That

means disabled children have all the same rights as other children. In fact, they are entitled to additional protections as a response to the needs arising from their disability.

In our *No Safe Place* investigation report, published in December 2018, we set out the human rights breaches experienced by children who have been unlawfully restrained or secluded.

Restraint that doesn't meet the tests (last resort, minimum necessary force, minimum necessary time, only for the purpose of preventing harm to the child or another person, and never for the purpose of punishment or discipline) may well constitute cruel, inhuman and degrading treatment or punishment in terms of Article 3 of the ECHR and Article 37 of the UNCRC.

Restraint of any kind is an interference in the child's right to bodily integrity in terms of Article 8 of the ECHR and Article 16 of the UNCRC. In order to be justified it must be lawful, necessary and proportionate. That requires staff to have a clear understanding of the practical application of those legal tests.

The practice of seclusion, where a child is locked in a room they cannot leave, poses a serious risk of violating a child's right not to be unlawfully deprived of their liberty in terms of Article 5 of the ECHR.

However, our investigation found that

- Nobody knows how many children are being restrained or secluded - or both - in Scotland.
- Nobody knows how many children are injured as a result of restraint or seclusion
- Local authority guidance on restraint and seclusion is inconsistent and highly variable in content and quality. 4 of the 32 local authorities did not have any guidance at all
- Where guidance did exist, it often did not tell staff clearly what they need to do to respect children's rights
- At national level, the Scottish Government had produced just 2 pages of guidance on restraint and seclusion which inappropriately frames it solely in terms of behaviour management and exclusions. It ignores the wider context around ASN, child protection and safeguarding, trauma informed practice and presents the child as a problem.

What's striking is that for years, families and campaigners have been raising these cases, but they have often been dismissed as one-off failings. The result of poor individual practice. But the findings of our report, and the scale of restraint and seclusion – more than 700 cases across the UK, more than 400 of them in Scotland - revealed in the research tells us that this is not a series of one-off failings. Rather it is a systemic failure.

Viewing this through a human rights lens makes clear that in fact this is a failure of the State. A failure of government to do its job and ensure that children's human rights are

respected, protected and fulfilled. A failure to put in place a robust legal and policy framework to govern the use and recording of restraint and seclusion.

In our report, we called on the Scottish Government to make reasonable and proportionate use of the powers at its disposal to remedy that failing. To put in place human rights based national guidance and to ensure all incidents of restraint and seclusion were properly recorded.

As Elly has made clear, we are talking about children who are communicating distress, and the adults around them not having the direction, guidance, training or support to understand their needs and properly respond. And as a result children have been traumatised, injured and excluded from education.

That's why, when the Scottish Government indicated that it did not intend to comply with our recommendations, we chose to work with our colleagues at the Equality and Human Rights Commission Scotland to bring judicial review proceedings against Scottish Ministers for breach of their obligations under Articles 3,5, 8 and 14 of the ECHR and various provisions of the Equality Act 2010. We wanted to hold them accountable to those legal obligations. To hold them accountable to the promises they had made to Scotland's children.

And it worked. The Deputy First Minister has agreed to produce national human rights based guidance on reducing restraint and seclusion and to take steps to improve the recording of incidents. Guidance and recording aren't silver bullets but they are the first step towards consistent, lawful, accountable practice. They are the framework good practice hangs from, and the lens that allows us to identify it. They help to set a positive culture and empowers the many staff who want to get this right for the children in their care.

There's a lot still to do, but there is an opportunity to embed a human rights based response which recognises that their behaviour is most likely caused by unmet need or unrecognised trauma. And to remember that all behaviour is communication – what is the child trying to tell us and how can we best respond?

We know the vast majority of staff don't want to restrain and seclude children but if people aren't given the tools, training, guidance and support to do something else then it will keep happening.

Some the first words you read when you open the investigation report are an account called "My Philosopher Brother", by a young girl reflecting on her brother's experience of being restrained. And the testimony of children and families runs throughout the report to provide context and to remind us of the real and long-lasting impact restraint and seclusion can have. That is as it should be. A rights based approach is about putting the human dignity and experiences of children at the centre of our discussions. It is why this research is so important and why we insisted that the Scottish Government involve children and families directly in the development of the new national guidance.

The front cover of the report features the words children used to describe restraint and seclusion – *Scared, Sad, Confused, Lonely* - they reflect the imbalance of power that children are all too aware of. A rights based approach recognises that imbalance. Recognises that children don't have the same political power as adults, they don't have the same economic power and our systems of redress are difficult for them to access. It is therefore incumbent upon all of those *in* power to make special efforts to ensure that children's rights are respected, protected and fulfilled.

You may have seen that the Independent Care Review was published in Scotland last week. The review heard from care experienced children who had been restrained. They explained how frightening, painful and embarrassing the use of restraint was. And that they were restrained for the most part in times of acute distress. The Review has delivered a clear message. "Scotland must strive to become a nation that does not restrain its children."

You may also be aware that in Scotland, the government has committed to incorporate the UNCRC into domestic law by the end of the current session of the Parliament in 2021. That's important because the UNCRC is special. It is the most rapidly and widely ratified international human rights treaty in history. It proclaims children's status as human beings and rights holders, not just as passive objects of care and charity. And it starts with the premise that children should grow up in a family environment of *happiness, love and understanding*.

That should be something we can all unite behind.

Nick Hobbs

Head of Advice and Investigations