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# Children's human rights under COVID-19: learning from children's rights impact assessments

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## ABSTRACT

Policy responses to COVID-19 have had dramatic impacts on children's human rights, as much as the COVID-19 pandemic itself. In the rush to protect the human right of survival and development, new policies and their implementation magnified the challenges of taking a children's rights approach in adult-oriented systems and institutions. This article explores these challenges, drawing on learning from the independent Children's Rights Impact Assessment (CRIA) on policies affecting children in Scotland during 'lockdown' in spring 2020. The article uses concepts from childhood studies and legal philosophy to highlight issues for children's human rights, in such areas as children in conflict with the law, domestic abuse, poverty and digital exclusion. The analysis uncovers how persistent constructions of children as vulnerable and best protected in their families led to systematic disadvantages for certain groups of children and failed to address all of children's human rights to protection, provision and participation. The independent CRIA illuminates gaps in rights' accountability, such as the lack of children's rights indicators and disaggregated data, children's inadequate access to complaints and justice, and the need for improved information to and participation of children.

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## Introduction

Writing over a year since the COVID-19 pandemic started in 2020, a narrative is well-rehearsed. While responses to the pandemic show the potential for the impossible to become possible, they have also highlighted long-standing issues and exacerbated a range of troubling inequalities.<sup>1</sup> This narrative is as applicable for children and children's human rights, as it is for other groups and issues.

In the rush to protect the human right of survival and development for children, families and others in their communities, the emergency policies<sup>2</sup> and their implementation magnified the challenges in taking a children's rights approach in adult-oriented systems and institutions. This article explores such challenges, drawing on policy analysis

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undertaken in Scotland. The Children and Young People's Commissioner, Scotland (henceforth, the Commissioner) asked the Observatory of Children's Human Rights Scotland to undertake an independent Children's Rights Impact Assessment (henceforth, independent CRIA) on the COVID-19 policies that most affected children living in Scotland. This was an intensive exercise undertaken from 11 May until 19 June 2020, intended to unveil and inform the accumulating concerns that children's human rights were being violated in the urgent response to the pandemic.

The article first seeks to orient the reader to CRIAs as a policy instrument, how the independent CRIA was undertaken in Scotland, and the context of children's human rights in Scotland. The article then presents some key sensitising concepts from childhood studies and disaster studies, to help understand overarching themes arising from the independent CRIA. The analysis then considers how the arguably well intended prioritisation of health, survival and development led to children being conceptually and practically 'hidden' in their families and excluded from public spaces and institutions. It goes on to consider the repercussions of constructing children as 'vulnerable' as well as the vulnerability of children's rights in policy making. The article concludes by questioning the application of children as vulnerable, and as particularly vulnerable. Going forward, to ensure compliance with children's human rights, the article recommends greater emphasis on children's rights accountability to mitigate and improve policies, both in relation to pandemic responses and future incorporation of rights into domestic law.

### ***Children's rights impact assessments***

Children's Rights Impact Assessments (CRIAs) are a means to analyse and predict the impact legislation, policy or budgetary allocations have on children and the fulfilment of their rights. The European Network of Ombudspersons for Children provide the following definition:

A Children's Rights Impact Assessment examines the potential impacts on children and young people of laws, policies, budget decisions, programmes and services as they are being developed and, if necessary, suggests ways to avoid or mitigate any negative impacts.<sup>3</sup>

CRIAs apply a human rights analysis to a particular group – children and young people – and thus sit within the suite of human rights impact assessments. As discussed by McCall-Smith,<sup>4</sup> their value arguably lies in moving away from the performativity of presenting activities, to concentrating on the actual or potential impacts of the ensuing practices on people's human rights. Further, they can identify negative impacts (and how to mitigate them) and identify further positive impacts (and how to amplify them). The independent CRIA sought to evaluate the actual and likely impacts on children's human rights of the COVID-19 policies. It further aimed to look ahead: what could be learnt should there be another lockdown? for services more generally post-pandemic? and for the CRIA process itself?

The independent CRIA was unusual, in terms of covering a number of policies rather than a single one, responding to policies that were already in place, the impacts of which were unfolding,<sup>5</sup> and being undertaken by experts rather than officials in public bodies.<sup>6</sup> Policies were selected because they were introduced by the UK or Scottish Governments

in response to the COVID-19 pandemic and impacted children in Scotland. An initial screening was conducted by the Commissioner's Office to identify the core policies. Nine teams of academic and other experts undertook intensive analysis of these policies, in light of human rights obligations and available evidence, on key subject areas. The teams followed a CRIA template, adapted from the Scottish Government's Children's Rights and Wellbeing Impact Assessment.<sup>7</sup> An overview report was then compiled, that drew in key findings from these subject areas as well as addressing other key human rights issues arising. To support the process throughout, a database of evidence was collated, and additional specialists were asked to contribute and review before, during and in the final stages of the independent CRIA. A particular effort was made to include evidence from children and young people, of which there were several quantitative and qualitative sources, as well as evidence from the Children's Parliament and the Scottish Youth Parliament who are founding members of the Observatory of Children's Human Rights Scotland.<sup>8</sup> The Commissioner's Young Advisers considered the independent CRIA's findings and produced their own recommendations; the Children's Parliament worked with children to ensure a child-friendly version of the independent CRIA was published.<sup>9</sup>

The independent CRIA was undertaken in favourable conditions for children's human rights. Scotland is emerging as a world leader in promoting human rights generally and children's human rights in particular. The United Kingdom, as the State Party, ratified the UN Convention on the Rights of the Child in 1991 and has thus been obligated for over 30 years to operationalise the UNCRC in practice and policy. Scotland has long had separate legislation and legal jurisdiction in areas such as education, social services, health, family and criminal law, and this was only extended since Scottish devolution and the (re)establishment of the Scottish Parliament in 1999. The Scottish Government has increasingly articulated a commitment to human rights generally, with the establishment of the First Minister's Advisory Group on Human Rights Leadership and to children's human rights specifically. For nearly two decades, the Scottish Government has used variations of the slogan 'making children's rights real' as an organising principle of its childhood policy.<sup>10</sup> Thus, children's human rights should have been a central feature of policy-making under COVID-19.

However, the independent CRIA found children's human rights were far from a central feature. Fundamentally, the policies introduced to respond to the COVID-19 pandemic sought to protect the health of children and their families, thus respecting their human rights of health, survival and development under the UNCRC and other international human rights treaties. Government was under unprecedented pressure to develop new policies to respond to the pandemic and particularly the first 'lockdown' from 23 March to 29 May 2020, where virtually all people were required to remain indoors, to minimise face-to-face social contact, and to have restricted access to public spaces. The Scottish Government took steps to consider children's rights: for example, it undertook and published three children's rights and wellbeing impact assessments<sup>11</sup> on three key COVID-19 policies and mapped out its responses according to the 11 recommendations of the UN Committee on the Rights of the Child.<sup>12</sup> It established working groups to regularly review and plan for policy and practice responses, for childhood-related services, and published updated information and actions.<sup>13</sup> Efforts, for example, were made to prevent digital exclusion of children, particularly in relation to

home-school learning, to set up systems that could address child protection and domestic abuse, and to ensure basic needs for food were met. Nonetheless, the independent CRIA highlighted key areas that raised significant concerns for children's human rights in Scotland, such as:

- Detrimental short-, medium- and long-term impacts on children and young people's physical, mental and oral health, on their levels of physical activity and their education.
- Harmful restrictions, delays, and suspension of specific legal rights for children and young people in such areas as young offenders' institutions, criminal justice more generally and child protection, additional support needs in education, young carers' assessments, state care, acute mental health needs, birth registration and civil justice.
- The shift to digital communication and learning excluded some children and young people who had disadvantaged access and/or who had particular communication needs.
- Certain children and young people risked being even more disadvantaged, across areas from health to play to education, including those with disabilities, with additional support needs, who were carers, who were from Gypsy/Traveller communities, who were from black, Asian and minority ethnic communities, who were from socio-economically disadvantaged households, and who were refugees or asylum seekers.
- Restrictions of movement risked criminalising young people aged 16 to 17 initially, increased vulnerability for children and young people who were not safe in their households, and prevented children and young people having physical contact with friends and family members who were not living in their households.
- Worsening economic inequalities, which were not adequately dealt with by social security changes nor alternatives to free school meals.
- Face-to-face educational and early years provision were restricted to children of key workers or who were 'vulnerable', which initially had poor take up due to stigma, limited transport, and other reasons.
- The lack of information for children and young people, the lack of engagement with children and young people in policy decision-making, and the lack of disaggregated quantitative data on children and young people.

The independent CRIA goes far further, with an extensive and specific list of gaps and problems for children's human rights as a result of the COVID-19 policies. In a context where there was such official government and policy commitment to children's human rights, why were there so many gaps and violations of them?

### ***Sensitising concepts: children and childhoods in disasters***

Childhood studies provide key conceptual ideas that can help us understand the gaps and violations for children's human rights. As developed particularly in the 1990s in the Global North, childhood studies put forward that childhood was a social category that was worth considering in its own right. And, as with other social categories like race,

gender or disability, childhood could be understood as a social construction and socially constructed. This was effectively explained by Prout and James:

A child's immaturity is a biological fact: but how this immaturity is understood and how it is made meaningful is a cultural one.<sup>14</sup>

The dominant constructions of childhood, in the Global North, depicted children as vulnerable, dependent, innocent and incompetent. Rather than recognising children's expressions of agency, children were valued as future capital and human investments: as 'human becomings' rather than 'human beings', as Qvortrup famously wrote.<sup>15</sup>

In response, James and Prout suggested a new paradigm for understanding and researching childhood. Several points are particularly useful for our consideration here:

- Childhood is a variable of social analysis
- Children's social relationships and cultures are worthy of study in their own right
- Children are and must be seen as active in the construction and determination of their own social lives, the lives of those around them, and of the society in which they live
- Proclaiming a new paradigm of childhood is also part of reconstructing childhood in society<sup>16</sup>

The social constructions of childhood have profound implications for policy. If children are predominantly perceived as vulnerable and dependent, then protectionist strategies are privileged that emphasise parental responsibilities and child safety. If children are predominantly considered 'empty vessels' and future citizens, then educational and related social training are emphasised to ensure children grow up to be contributing and responsible adults. In contrast, if children are constructed as having contributions to make and rights to be fulfilled, then policies recognise children as individuals in their own right (and not solely dependents on their parents), for the integrity of their own persons, reputation and status, and for their own participation in decisions that affect them. Children's rights, and particularly the UNCRC, can be analysed for presenting their own constructions of childhood, which present children as being rights-holders but entitled 'to special care and assistance'.<sup>17</sup>

More radical social movement ideas of oppression and discrimination have been slower to come to childhood studies but are beginning to be articulated by the concept of adultism.<sup>18</sup> Essentially the concept recognises that embedded power relations create attitudes, systems and institutions that privilege adult norms; as Sundhall describes:

Thus, adulthood becomes naturalized and at the same time age becomes a legitimate power order when it comes to the age categorization of children, since children's subordination is regarded as something natural and often desirable; children are viewed as 'under development' and in need of adult protection and care.<sup>19</sup>

Attitudes, systems and institutions need not be maliciously intended, and the people involved may be acting with the best of intentions. But the privileging of adult norms can result in systematic disadvantages, discrimination against or oppression of children. To give examples from the UK, 'mosquito devices' remain available to be bought online in the UK, for individuals or businesses who want to dissuade children from using certain spaces. The devices emit a noise irritating and potentially painful to children and young

people, but which are generally not heard by adults.<sup>20</sup> The school starting age for children remains low across UK jurisdictions (e.g. age five in Scotland), in comparison to other European countries. This is justified primarily as encouraging children's literacy and numeracy skills, but there are strong counter-arguments that suggest this is too early for many children to benefit, children who start school later than their peers do better academically, and play-based provision would be of greater benefit to children.<sup>21</sup> Child poverty is in fact family poverty but children can be disadvantaged in social security systems that penalise parents who are not taking on paid employment<sup>22</sup> or by the 'two-child benefit cap' in the UK that restricts the amount of social security benefit that larger families can receive.<sup>23</sup> By concentrating on childhood as a social category, these problematic dimensions are illuminated.

Children are generally not recognised as political agents, are excluded from democratic voting at younger ages and policy-making, and thus risk having their views and issues side-lined.<sup>24</sup> Further, the concept of intersectionality shows how oppression by age and stage can intersect with other forms of oppression, which are more often rehearsed, such as gender, sexual orientation, ethnicity and race.<sup>25</sup> Thus concepts of adultism are particularly challenging to current constructions of child-adult relations: certain accepted modes of policy and practice can be analysed as failing to meet or indeed breaching children's rights – even if the modes were developed expressly to improve children's lives.

These ideas of adultism can be applied to the societal response to disasters. For example, reviews of climate change research found that children were positioned as passive victims with no substantive roles to help address climate risks.<sup>26</sup> Based on their extensive experience in places that have faced disasters around the world, the international non-governmental organisation (NGO) PLAN powerfully writes:

During a disaster, the physical survival needs of children (safe water, food, shelter, clothing, primary health care) are usually given a very high priority. But observation indicates that other needs and rights, which are also essential for children, like being protected from abuse and harm, education, rest, leisure, privacy and the right to participate freely in matters which affect them are too often overlooked.<sup>27</sup>

The analysis goes further, arguing that the disaster literature tends to confine children to three areas. First, they are subsumed under studies of women. Second, the literature provides a 'medicalised' narrative of disaster that limits children to social work and trauma responses, all focusing on how adults can return children to 'normal life' as soon as possible. Third, children become the media's representation of disasters – icons of passive and needy victims who need rescuing. Thus, children's physical survival may well be prioritised in disaster responses but not their wider range of human rights; they may be iconic in public perceptions<sup>28</sup> but their perspectives and contributions under-acknowledged; and efforts are to return to the children to 'normal' childhood, rather than asking more fundamental questions of what childhood is and what it could and should be.

Disasters can be highly testing to the regular practices of Government and services,<sup>29</sup> particularly as the widescale and pervasive nature of the COVID-19 pandemic was unfamiliar in Scotland. The timescales for reacting and being proactive were far shorter than usual government business and democratic deliberation; the lack of sound research and other reliable information to base sound decisions was both unsettling and problematic.



The infrastructure of government and service providers were themselves shaken as individuals were affected personally, adaptations needed to be swiftly made, and information and policy implementation had to be rolled out at great speed. Governance and government have their own complexities: for example, Scotland has devolved powers, with others reserved to the UK Government (such as on asylum and refugee policy); the Scottish Government and Parliament have national policy responsibility, but responsibility for implementation largely falls to other public bodies including local government. These very real-world constraints and complexities need to be recognised in considering the policy responses to COVID-19, for children in Scotland. No country has been identified, at the time of writing, as being exemplary in holding up children's human rights during the COVID-19 pandemic.<sup>30</sup>

As Scotland moves forward with UNCRC incorporation into its domestic law, questions of State accountability to children and for children's rights become even more pressing. The power of the social science concepts and insights reviewed here is that they unveil underlying assumptions and suggest alternatives. As applied below, they provide ways to consider the independent CRIA's findings, in how the emergency policies constructed children and childhood and the ensuing impact on children's human rights – and to outline alternatives that position children and childhood in different ways that better respect, safeguard and facilitate their rights.

### **Hidden in families: children under COVID-19 policies**

Lockdown restrictions resulted in the closure of public spaces and public institutions to children. Playgrounds were shut; children, as well as adults, were restricted to one bout of outdoor exercise a day; most public spaces for recreation and leisure, retail or arts were closed and, because of concerns to maintain social distancing, online grocery shopping was encouraged or, at most, one adult was permitted to shop alone. Further, institutions and spaces of state intervention, support and services were largely closed including: schools and early year provision (except for children deemed 'vulnerable' and/or had parents who worked as key workers); youth and community services; and certain court, tribunal, other formal review and appeals processes, and birth registrations. The State retreated and children were 'hidden' within their family households.

Qvortrup wrote in 1994 about how children were familialised in the Global North, conceptually and morally placed within their families even though they were increasingly institutionalised in early years and school settings for most of their years and waking hours.<sup>31</sup> Children's geographies have a long history of research that finds children and especially youth routinely excluded from public spaces populated by adults, whether commercial or in the open air, in the Global North.<sup>32</sup> The COVID-19 policies went even further, as they closed public spaces and institutional places for children and confined children physically to their family households, making children increasingly dependent on their parents or other care-givers in their households. With this shift from public to private spaces for children, implementation of children's human rights depended even more on their households' living circumstances and their parents/carers, with less direct reach from the State in terms of supporting services.

Early on, the Scottish Government recognised that this posed particular risks to certain children. Families are not safe places for all children, with particular concerns



about child protection and domestic abuse. Both State social work services and NGO services were charged to support children and families in these situations: for example, through extending funding for helpline services available digitally and by telephone, to NGOs to provide further information and services, and hiring extra social workers.<sup>33</sup> While family households might generally be the best way to protect children, it was recognised that for some children the increased reliance on them made children more – rather than less – at risk. Thus, the Scottish Government went beyond most responses to disasters (see above), to consider children’s rights to be protected from abuse or harm.

The reliance on parental care and family households becomes even more evident, when considering how policies failed to meet the rights of children who were ‘out of place’. One State response was not to recognise children *as* children<sup>34</sup> if they were in the wrong places: initially, young people who were 16 or 17 years old were treated as adults and could receive Fixed Penalty Notices for breaking lockdown restrictions. Such notices could result in a fine and a criminal trajectory. After this was raised as a children’s human rights issue, this provision was amended but not retrospectively for any children who had been found in breach. The State failed to respond to groups of children whose rights were already precarious. During the initial policy responses to the pandemic, there was little focus on the rights of children of refugee and asylum seekers or the rights of Gypsy/ Traveller children, even though research pre-pandemic identified these groups as being at particular risk of rights’ violations, and that these risks were likely to be exacerbated by the COVID-19 pandemic and the policy responses.<sup>35</sup> Policies often assumed ‘traditional’ ideas of families and of childhood. Reports of supermarkets challenging parents who shopped with children revealed assumptions about family functioning and forms that do not hold true for all children.<sup>36</sup> There were assumptions that only adults had caring responsibilities, leaving young people with caring responsibilities struggling to access support for themselves and those they cared for.<sup>37</sup> Young people faced barriers to shopping online (which required a minimum shop for example and payment by debit or credit card) or difficulties in accessing shops in person.<sup>38</sup> In other words, a strong construction of children as being safe in and dependent on their families, in their households, underpinned COVID-19 policies. This exacerbated problems and undermined the rights of the many children whose circumstances did not fit into traditional constructions of childhood and families, in certain types of household spaces.

The disaster literature suggests that children’s rights to health tend to be prioritised in disaster responses but not their full range of rights. The independent CRIA analysis similarly found an extensive range of children’s rights that policies had removed or ignored. What was surprising was that so many of them seemed *unnecessarily* removed or ignored. For example, the Lord President’s guidance<sup>39</sup> on children’s contact with their non-residential parent made no mention of considering a child’s best interests as the paramount consideration (the standard for court orders under S.11 of the Children (Scotland) Act 1995 for family law) or even as a primary consideration as required by Article 3 of the UNCRC. Birth registration was suspended, even though birth certification is known to contribute significantly to child protection and preventing child trafficking.<sup>40</sup> Despite Scotland’s lead in involving children and young people, individual rights to have views considered in decision-making were often deleted from requirements or not included in new ones, while the anger of young people (as well as others) at how school exams were cancelled and appeals handled eventually led to a

Government commissioned review.<sup>41</sup> The value of the CRIA process was demonstrated when new health guidance was changed, after intervention by the Commissioner, so that it became more rights compliant.<sup>42</sup> Thus, in the immediacy of COVID-19 policy responses, a range of children's rights were not always addressed. Instead, they were undermined, and even deleted, despite being in place pre-pandemic. Other rights to provision – whether for education, mental health provision and reviews, access to play – and to participation – were often not substantially met in the policies. The lack of attention given to *all* of children's rights is troubling, especially as under the UNCRC, children's rights are recognised not only as interdependent but of equal importance.<sup>43</sup> The independent CRIA does not identify why this full range of children's rights were not considered, as the rationale was not documented in the accessed policy papers. As discussed above, the COVID-19 pandemic created immense pressures on the State and disrupted the established ways of decision-making, planning and implementation in Scotland. But the analysis here points out that some of the gaps might have been avoidable if children's human rights had been given greater prominence and if a rights-based approach were embedded in systems, institutions, and ways of working.

The independent CRIA did not have all the evidence that it needed, which was understandable but limiting. Evidence that had been collected prior to the pandemic might be indicative but not necessarily conclusive. Evidence collected in the early months of the pandemic was not robust by academic standards, either because it had been collected for policy-influence rather than research reasons or was in the early stages of collection and/or analysis. More problematically, the process highlighted how little of the available data available answered children's human rights questions nor was the data sufficiently disaggregated to know whether or how particular groups were at risk of having rights' violations. In Scotland and the UK more generally, there is considerable investment in statistical data collection both in administrative data and funded large-scale longitudinal and cohort studies. But these have not been constructed with children's human rights in mind. Children are excluded from many regular large-scale surveys as respondents (e.g. Scottish Crime Survey). Scotland does not have robust systems for collecting data on how State duty-holders respect, protect and fulfil children's human rights. Such realisations underline the need to reconsider statistical investments and design a suite of children's human rights indicators for Scotland, which can allow for constructive monitoring and accountability, once the UNCRC (Incorporation Scotland) Bill is implemented.

In summary, the good intentions of Government to respond to COVID-19 were firmly stated, which included considerations of children and (in Scotland) of taking a human rights approach.<sup>44</sup> The Government went beyond PLAN's critique of disaster responses, as children's rights to be protected from abuse and harm were considered as well as their rights to physical survival. Nonetheless, children remained at risk of not having all their rights respected, recognised, and fulfilled, as policies so firmly constructed them as being best within their families and excluded from public spaces and institutions. This had ensuing repercussions for children who were at risk within their families or who were out of place. This suggests that children's human rights have not yet permeated how decision-makers respond, with responses returning to needs-based and wellbeing concerns with the emergency response and many other human rights of children being set aside.

## Vulnerability of children and of rights

The notion of vulnerability is being reclaimed in legal philosophy, as a new and improved way to consider law.<sup>45</sup> It is grounded in the observation that all people are vulnerable, that vulnerability is a universal and inevitable condition of being human, because we are embodied. If we recognise that all people are vulnerable and dependent, then law should be based on that premise rather than on the rational, autonomous and independent man assumed by traditional liberal theory of rights. According to Fineman, the State then must take on a more proactive role, than in liberal theory, to ensure care is valued, social relations encouraged, protection is given as needed and resources are provided to ensure resilience. Fineman contends that vulnerability offers routes to stronger obligations on the State to ensure equality.<sup>46</sup>

However, recognising vulnerability under COVID-19 policies did not always support the recognition or the realisation of children's human rights. As the independent CRIA found, the actions of the State produced and had disproportionate and negative consequences for children and even more so for particular groups of children, demonstrating a form of adultism. While vulnerability may be universal, it was more acute for children as a group, and even more acute for particular groups of children.<sup>47</sup> The independent CRIA's findings illuminated which children and which rights were made vulnerable as a result of the State's response to the pandemic. For example, restrictions in young offenders' institutions left young people confined to their cells, with very limited or no contact with family members, and access to education and other activities halted. Yet, the particular vulnerabilities of young people to suicide and mental health problems were not specifically considered nor their particular claim for early release as children.<sup>48</sup> When the particularities of children's position and status were not considered, COVID-19 policies did not always ensure that the human rights of all children were equally protected.<sup>49</sup>

Vulnerability may well be an intrinsic part of the human condition; however, being labelled as vulnerable within current social structures does not generally result in children's empowerment nor does it necessarily advance their interests. Rather, the label of vulnerability often has negative consequences for children. It is frequently bound up with paternalistic discussions about children's capacity and is used as a rationale by adults to gatekeep and limit children's human rights, especially their participation rights.<sup>50</sup> In social policy discourses, to be vulnerable remains the exception not the norm and rarely offers emancipation. There is stigma associated with being viewed or perceived as vulnerable. Vulnerability is used euphemistically to describe particular populations of children who are 'at risk' or who are 'on the margins'. During the pandemic, there were strong policy for and media discourses on 'vulnerable children'.<sup>51</sup> Children categorised as vulnerable were permitted to attend school and early years provision. In this context, attendance was largely a safeguarding measure, prioritising children's protection and safety, rather than a means to realise children's rights to education, social relationships or other rights like play. However, far fewer children attended early years and school provision than had been anticipated, with indicative evidence of families not recognising themselves as vulnerable, not accessing information on the support available, not wanting to be labelled as 'vulnerable' and/or experiencing practical barriers like transportation to and from hub schools.<sup>52</sup> Provision for 'vulnerable children' was not accessed as the State had anticipated.

Fineman argues that inequalities are far from inevitable: rather society and its institutions produce and reproduce them.<sup>53</sup> Thus, in its actions, the State has the potential to address and reverse inequalities. However, as discussed above, under COVID-19 policies the State largely retreated from children's lives and confined children to their families. Fineman argues families alone cannot mitigate or ameliorate individuals' vulnerability. As a structure, families are themselves vulnerable and, as the independent CRIA confirmed, families are not necessarily 'safe havens' for children. So, in retreating, rather than addressing inequalities, the State produced and exacerbated certain inequalities experienced by children.<sup>54</sup> In not meeting the positive obligations to children that the vulnerability thesis demands, the State created a 'vacuum' where children's human rights were increasingly exposed to breaches. This serves as a persuasive example of how the State, albeit perhaps inadvertently, responded in adultist ways that systematically disadvantaged children as a group.

## Conclusion

Despite seemingly progressive advancement towards 'making children's rights real' in Scotland, the pandemic uncovered that fragility of embedding children's human rights in policy-making. The pandemic placed extreme pressures on the State, upturning normal processes of decision-making, implementation, and provision, particularly in a State based on democratic deliberations, governed by the rule of law, and having complex welfare provision. The distribution of powers between the UK Government, the Scottish Government and other public bodies added complexities in policy-making let alone for implementation. The scale of response needed was unprecedented in living memory in Scotland, and those involved in responding faced very real constraints and dilemmas. In this disaster situation, efforts to safeguard rights to survival and development were foremost. The rights of children to protection from abuse and harm were recognised. The resulting policies, however, led to other rights of children being disregarded and children as a group being disadvantaged.

The concept of adultism recognises that children can be systematically disadvantaged not because of adults' bad intentions but because of the pervasiveness of adult norms and the resulting power relations. In the policy responses to the COVID-19 pandemic, children were not always recognised as rights-holders and thus their rights were not always supported and promoted. This was evident from the lack of participation of young people to decisions about exams and their own rights to appeal, to the closure of schools, to the remaining access to public and consumer services skewed towards adults. The lens of children's human rights makes explicit the risks to children, and particular groups of children, from COVID-19 policies. These policies largely constructed children and childhood as vulnerable, dependent and best protected in their families. This had significant and negative consequences for the human rights of children who were 'out of place' or whose childhoods did not fit with these normative ideas about childhood.

Through its retrenchment, the State largely left children to be subsumed and made invisible in families. This recalibration left children and their human rights at risk. In making children increasingly dependent on their families, existing inequalities were exacerbated. The prioritisation of rights to survival and development, understandable under disaster conditions caused by the pandemic, led to a widespread failure to

recognise the equal value and interdependence of children's human rights. The independent CRIA revealed how rights to participation, education, birth registration, access to justice and to services were *unnecessarily* set aside. Children were excluded from decisions that had profound impacts on their human rights. These decisions and those who made them were, and remain, largely unaccountable to children. Taken together, this underscores the continued importance of recognising children and childhood as critical categories for policy and legal analysis, as well as recognising children as a social group with particular rights and needs that need particular safeguarding.

Fineman's work on vulnerability promises routes to achieving substantive equality. Yet, our analysis found theorisations of vulnerability inadequate to tackle adultism that arises from largely adult-orientated systems and public institutions. Conceptualisations of 'vulnerable children' did not ensure that children's human rights were advanced. Ideas of universal vulnerability mask the unequal position that children have in society and in public institutions. Failure to acknowledge or attend to such structural issues risks further entrenching inequalities and the systematic disadvantages experienced by children and by specific groups of children. The independent CRIA found labels of vulnerability were sometimes rejected by children and their families because such labels continued to bring stigma, while other children and their families did not recognise themselves as vulnerable even though they might have been eligible. Rather than a lever for advancing the interests or position of children, we found vulnerability an oppressive categorisation, which may act as a further barrier to children claiming their human rights. Only perhaps when vulnerability is truly claimed as universal, by those currently in power and powerful, will it be useful to apply to childhood policy.

A State that is positive and proactive in its obligations to its citizens is a cornerstone of Fineman's vulnerability thesis. However, the pervasive construction of childhood vulnerability in COVID-19 policies was not found sufficient to ensure the State did proactively meet its obligations to children. Accountability is necessary to a human rights framework, and indeed multiple forms of accountability, as part of the relationship between rights-holders and duty-bearers. At the core of a human rights framework is a recognition of human dignity and a requirement that, at a minimum, rights must be respected.<sup>55</sup> Thus a human rights framework assists constructing childhood as worthy of attention and children's rights as requiring respect and protection.

Due to emerging concerns in Scotland that COVID-19 policies did not recognise children's human rights adequately, the resulting independent CRIA assisted in making visible the systematic disadvantages experienced by children. In doing so, the independent CRIA made explicit the actual or potential breaches to children's human rights – and suggested ways to mitigate them. It provided learning for subsequent lockdowns and ensuing priorities. For example, recommendations were made on how to address digital exclusion, to prioritise outdoor learning and provision once restrictions were lifted, and to address food poverty. It illuminated gaps in children's human rights accountability, such as the lack of children's rights indicators and disaggregated data, accessible opportunities for children to appeal and complain when their rights were being breached, and information for and participation of children and young people. As Scotland moves to incorporating the UNCRC into domestic law, the independent CRIA shows the value of such impact assessments to surface, discuss and mitigate

children's human rights violations and – even more importantly – maximise the fulfilment of their rights.

## Notes

1. For example, Clare Bamba et al., 'The COVID-19 Pandemic and Health Inequalities', *Journal of Epidemiology and Community Health* 7, no. 11 (2020): 964–8; The Scottish Government, *The Impacts of COVID-19 on Equality in Scotland*, (2020) <https://www.gov.scot/publications/the-impacts-of-covid-19-on-equality-in-scotland/> (accessed June 11, 2021).
2. The definition of 'policies' is not settled in the academic literature. This article uses a wide definition of policies, from legislation to official guidance to administrative action, by government or other institutions (see <https://www.cdc.gov/policy/analysis/process/definition.html> (accessed August 19, 2021)). The specific policies analysed by the independent CRIA can be found in E Kay M Tisdall, Mary-Ann Powell, Katie Reid and Grace Kong, *Independent Children's Rights Impact Assessment on the COVID-19 Response in Scotland*, (2020), <https://cypcs.org.uk/coronavirus/independent-impact-assessment/> (accessed June 11, 2021).
3. European Network of Ombudspersons for Children (ENOC), *A Guide on How to Carry out CRIA*, (2020), <http://enoc.eu/wp-content/uploads/2020/12/ENOC-Common-Framework-of-Reference-FV.pdf>, p. 11. (Accessed June 4, 2021) Technically, according to ENOC's latest position, the commission was for a 'Children's Rights Impact Evaluation' as it was undertaken after the policies were introduced.
4. See this issue.
5. For example, Payne distinguishes between *ex ante* CRIAs that examine the *potential* impacts on children and *ex post* CRIEs (child rights impact evaluation) that appraise the effects policies have *had* on children. Lisa Payne, 'Child Rights Impact Assessment as a Policy Improvement Tool', *The International Journal of Human Rights* 23, no. 3 (2019): 408–24.
6. These differences from typical CRIA approach are further discussed in the special journal's editorial (see \*\*).
7. And from learning of two recent reviews: Maren Backbier, Solène Didio-Girard, Sofie Elise Quist, Erin Fisher, Jacqueline Jahnel, Sophia Lane, Jana Riemsdagh, Eva Munoz, and Georgia Strachan, *A children's rights approach: recommendations to the Scottish Government on refining children's rights and wellbeing impact assessments in Scotland*, (2019), <https://www.togetherscotland.org.uk/media/1302/crwia-report-group-a-214.pdf> (accessed June 11, 2021); Ivane Chitashvili, Helene LJ Combes, Katie Gillespie, Klára Kipielová, Sania Khan, Kenya Murakami, Nurjan Rakymova, Leonie Schmid, and Guncha Sharma, *Recommendations and notes on Scottish children's rights and well being impact assessments*, (2019), <https://www.togetherscotland.org.uk/media/1303/crwia-report-group-b.pdf> (accessed June 16, 2020).
8. A full list of these sources is available in the independent CRIA.
9. A full description of the methodology can be found in Appendix 10 of the independent CRIA.
10. For overview of children's rights in Scotland, see Andressa M. Gadda, Juliet Harris, E. Kay M. Tisdall and Elizabeth Millership, 'Making children's rights real': lessons from policy networks and Contribution Analysis', *The International Journal of Human Rights* 23, no. 3 (2019): 392–407; E. Kay M. Tisdall, *The Childhood Policy Landscape in Scotland: a case study*, (2020), <https://www.thebritishacademy.ac.uk/publications/childhood-policy-landscape-scotland-case-study/> (accessed June 11, 2021).
11. At the time of writing, children's wellbeing and children's rights are combined in one impact assessment. For more information, see <https://www.gov.scot/publications/childrens-rights-wellbeing-impact-assessments-crwia-guidance/> (Accessed June 4, 2021). The three CRWIAs are: Scottish Government, *Coronavirus (Scotland) Bill: child rights and wellbeing impact assessment*, (2020), <https://www.gov.scot/publications/coronavirus-scotland-bill-child->



- rights-welfare-impact-assessment/ (accessed June 11, 2021); Scottish Government, *Coronavirus (Scotland) (No.2) Bill: child rights and wellbeing impact assessment*, (2020), <https://www.gov.scot/publications/coronavirus-scotland-no-2-bill-child-rights-welfare-impact-assessment/> (accessed June 11, 2021); and Scottish Government, *The Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020: CRWIA*, (2020), <https://www.gov.scot/publications/education-miscellaneous-amendments-coronavirus-scotland-regulations-2020-childrens-rights-well-being-impact-assessment/> (accessed June 11, 2021).
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  14. Alan Prout and Allison James, 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems', in *Constructing and Reconstructing Childhood*, ed. A. James and A. Prout (London: The Falmer Press, 1990), 7.
  15. Jens Qvortrup, 'Childhood Matters: An Introduction', in *Childhood Matters. Social Theory, Practice and Politics*, ed. J. Qvortrup, M. Bardy, G. Sgritta, and H. Wintersberger (Vienna. Aldershot: Avebury, 1994).
  16. Alan Prout and Allison James, 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems', in *Constructing and Reconstructing Childhood*, ed. A. James and A. Prout (London: The Falmer Press, 1990).
  17. UNCRC, Preamble.
  18. The concepts adultism and childism are not settled in childhood studies literature. For discussions and debates see Priscilla Alderson, 'Adultism', in *The Sage Encyclopaedia of Children and Childhood Studies*, ed. Daniel Cook, (2020), <https://www.doi-org.ezproxy.is.ed.ac.uk/10.4135/9781529714388.n17> (accessed June 11, 2021); John Wall, 'From childhood studies to childism: reconstructing the scholarly and social imaginations', *Children's Geographies*, (2019), DOI: 10.1080/14733285.2019.1668912; Rebecca Adami and Katy Dineen K, 'Discourses of Childism', *International Journal of Children's Rights* 29, no. 2 (2021): 353–70.
  19. Jeanette Sundhall, 'A Political Space for Children? The Age Order and Children's Right to Participation', *Social Inclusion* 5, no. 2 (2017): 164–71, 165.
  20. See <https://cypcs.org.uk/positions/mosquito-devices/#:~:text=Mosquito%20devices%20are%20machines%20that,of%20international%20human%20rights%20law> (accessed June 11, 2021).
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33. Scottish Government, *Vulnerable Children Report 15 May 2020*, (2020), <https://www.gov.scot/publications/vulnerable-children-report-15-2020-scottish-government-solace/pages/footnotes/> (accessed June 11, 2020).
34. Article 1 of the UNCRC defines children up to the age of 18: 'For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.
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48. See Dyer and \*\*, this issue.
49. For a related argument, see Anna Grear, 'Embracing vulnerability: Notes towards human rights for a more-than-human world', in *Embracing Vulnerability: the challenges and implications for law*, ed. D. Bedford and J. Herring, (London: Routledge, 2020).
50. E. Kay M. Tisdall, Fiona Morrison and Judith Warburton, 'Challenging undue Influence? Rethinking Children's Participation in Contested Child Contact', *Journal of Social Welfare and Family Law* 43, no. 1 (2021): 8–22.
51. For example, this was included in the 2020 Scottish Government reports' titles cited in this article.
52. For evidence, see independent CRIA.
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