



**STATUTORY DUTIES
IN SECURE
ACCOMMODATION:
UNLOCKING
CHILDREN'S
RIGHTS**



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INTRODUCTION

Taking away a child's liberty is one of the most serious restrictions a state can impose on a child's human rights. It has deep and long-lasting consequences, particularly

on a child's emotional and social development. For children who have been traumatised already, often as a result of abuse or neglect, the impacts of being deprived of their liberty can be devastating and irreparable.

The human rights framework provides a high standard of protection against children being deprived of liberty. It must be a last resort, used for the shortest possible time, and be in the best interest of the child. It must also be in accordance with all of the procedural protections provided by law.

The United Nations Committee on the Rights of the Child (CRC) has repeatedly called on States to do more to address the detention of children, including in its General Comment 24¹. The recent report of the UN Global Study on Children Deprived of Liberty² reinforced the directions from the CRC, and called on States to ensure better protections against arbitrary and unlawful deprivation of a child's liberty. These calls have also been reflected by the Council of Europe's human rights mechanisms.

Scotland is failing to properly respect children's rights through its practice of depriving children of their liberty. This investigation is part of our wider work to address the breaches of both substantive and procedural rights in relation to children deprived of their liberty in a variety of settings, including, police and court custody cells,

Young Offenders Institutions, immigration detention facilities, mental health units and residential care placements. This includes the failure to treat all under 18s as children in law, the low age of criminal responsibility, and the availability of secure care beds as a consequence of the current commissioning model (see Appendix 2 for more detail).

The investigation focuses on one aspect of compliance with the human rights framework – the procedural protections that exist around decisions to place children in secure accommodation. It examines whether children may have been unlawfully deprived of their liberty as a result of failure to comply with legal duties designed to respect, protect and fulfil their human rights. It does not consider situations where children are placed in secure accommodation by the Court, or by local authorities from outwith Scotland.

¹ <https://undocs.org/CRC/C/GC/24>

² <https://undocs.org/A/74/136>

"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

-Article 37(b) UNCRC

These duties are set out in regulations which provide for the child's right to participate effectively in decision-making about them; an important safeguard within domestic and international law. The regulations also make clear that children must be told about their right to an effective remedy and be able to challenge the lawfulness of their deprivation. This is a critical pre-requisite for children's access to justice.

While the number of children placed in secure accommodation is rightly, relatively small, we became concerned that a breach of procedural rights through failure to properly follow regulations was occurring. In the absence of compliance with these statutory safeguards, the children may have been unlawfully deprived of their liberty.

This investigation has been deliberately targeted to complement rather than duplicate wider work in this area, including the Independent Care Review and The Promise, by focusing specifically on an identified concern about performance of legal

duties. It will inform work on the future of secure accommodation, including implementation of the Secure Care Pathway and Standards³, and its place within the alternative care, penal and justice systems. There is a need to consider more fully the extent to which Scotland respects the rights of children deprived of their liberty in all settings.

With the additional focus on accountability mechanisms required by implementation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill⁴, we must also work proactively to ensure that there is a robust and rights-compliant process for all decisions to deprive children of their liberty.



Bruce Adamson
Children and Young People's Commissioner Scotland

"In all the legal processes that surround the decision to place a child or young person in a Secure Care setting, their rights must be upheld. They must be consulted and given the chance to express their views and they must be told about their legal rights of appeal. That must not be done in a tokenistic way, but through a culture of care that upholds rights in a way that meets their needs and helps them understand their legal protections".

-Report of the Independent Care Review

³ <https://www.gov.scot/publications/secure-care-pathway-standards-scotland/>

⁴ At time of writing the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill has been unanimously passed by the Scottish Parliament, but has not yet received Royal Assent.

EXECUTIVE SUMMARY

- ▶ The investigation relates to the powers and performance of statutory duties by Chief Social Work Officers (CSWOs). These duties protect the human rights of children placed in secure accommodation to be consulted in decisions, to have those decisions recorded and explained, and to be informed of their rights to appeal.
- ▶ Between 1 August 2018 and 31 July 2019, the investigation examined the cases of 118 children placed in secure accommodation, across 27 local authority areas. These children were detained for between 14 and 572 days.
- ▶ The evidence provided to us varied between local authorities and demonstrated an inconsistency of approaches by CSWOs.
- ▶ Overall, there was little evidence of consultation with children during the critical 72-hour period following the hearing's authorisation. Even where there was evidence that consultation had taken place, and where views were said to have been expressed by children, those views were not routinely recorded.
- ▶ It was relatively rare for there to be evidence of notifications of the CSWOs' decisions being sent to children, as required by the Regulations. Where correspondence was sent to a child, the reasons were not always clearly explained, particularly how the child's views had been taken into account to inform the decision.
- ▶ It was clear that not all children had been formally notified of their appeal rights. However, there were some examples of good practice, where children were informed of their rights and pointed towards supportive adults who could assist them to appeal if they wished to do so.
- ▶ This raises serious questions about the extent to which children are meaningfully involved in decision-making and creates gaps in their records, which will impact on the ability to understand their own history later in life. It means that too often children have been denied the information necessary to enable them to challenge decisions to deprive them of their liberty.
- ▶ The lack of evidence of compliance with legal duties suggests that a significant number of children placed in secure accommodation between 1 August 2018 and 31 July 2019 may have been unlawfully deprived of their liberty for at least part of their detention.

- ▶ In response to the investigation, a number of authorities have already taken steps to review or amend aspects of their processes, policies or guidance. We welcome this constructive approach, which will lay the groundwork for further work around implementation of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.
- ▶ All local authorities must now take steps to ensure they are complying with existing laws and should review previous cases in light of the investigation's findings.
- ▶ The Scottish Government must work with partners to consider whether the existing laws is compatible with the UNCRC and make any amendments necessary to strengthen legal protections for children's human rights.
- ▶ Alongside any legal changes, consistent rights-based best practice, guidance and training must be identified and aligned with implementation of the UNCRC.
- ▶ The investigation has also revealed a scrutiny gap in relation to compliance with these legal duties at both local and national levels. The Scottish Government, COSLA and other partners must ensure robust scrutiny and accountability mechanisms are in place, through individual organisations, multi-agency partnerships and national inspection arrangements.
- ▶ As part of our office's work on implementation of the new UNCRC legislation, we intend to visit each of the secure care centres as soon as it is safe to do so, in order to listen to children and young people discussing their experiences.



METHODOLOGY AND PROCESS

Since the creation of the office's Advice and Investigations Team in 2017, we have developed our model of investigations. Our intention is to use the power as a strategic tool, in a targeted way, to identify and address issues affecting children's human rights. In making the decision about using our powers we consider a range of different factors and criteria; including the scope, scale and urgency of the alleged rights breach; the vulnerability of the children and young people involved; the resource and expertise we can bring to bear; what other work is taking place on the issue; and the potential outcome we could achieve. The decision to invoke our legal powers on this issue was based on a careful assessment against these criteria. The possibility that significant numbers of children had been unlawfully deprived of their liberty merited investigation.

On 10 December 2019, we wrote to all 32 Chief Social Work Officers (CSWOs) seeking:

- *The number of children looked after by your authority who were placed in secure accommodation between 1 August 2018 and 31 July 2019 on the authorisation of a Children's Hearing*
- *In the case of each child, the date on which the authorisation was made by the hearing*
- *In the case of each child, the length of time the child was accommodated in secure*
- *In relation to each of these children, anonymised copies of records or correspondence produced and sent in fulfilment of your legal duties as set out in Regulations 4 and 5 of the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013*

We asked for the evidence of compliance with the regulations to be anonymised in order to strike the correct balance between the level of information required for the Commissioner to exercise his statutory function, and the need to respect the privacy rights of the children concerned in accordance with Article 8 of the European Convention on Human Rights (ECHR) and Article 16 of the UNCRC.

Having received responses from all 32 local authorities early in 2020, we intended to publish the investigation report before the 2020 parliamentary summer recess. However, the onset of the global coronavirus pandemic, and the nationwide lockdown that followed in March 2020, meant that the office had to adjust its focus and priorities. Much of our resource was diverted to respond to the developing and ongoing human rights crisis, which had, and continues to have, profound impacts on children and young people's lives across a wide range of policy areas⁵, including children deprived of their liberty.

⁵ <https://cypcs.org.uk/coronavirus/independent-impact-assessment/>

In order to give us the time and space needed to respond to the pandemic, we made a decision to postpone further analysis of the data and publication of the report. Instead, we took the interim step of writing to all CSWOs reminding them of their ongoing legal duties to children who might be placed in secure accommodation during the pandemic. We also met with the national CSWO group and with Social Work Scotland to discuss the progress of the investigation.

In recent months, we were able to return to the investigation again and conclude the analysis of the data with the assistance of the Children and Young People's Centre for Justice (CYCJ).

This report presents the evidence and responses from CSWOs and our analysis, as well as laying the foundations for the next stage of the work of our office on the human rights of children deprived of their liberty in all settings.



CHILDREN'S HUMAN RIGHTS

"The right to personal liberty is one of the oldest and most important human rights."

-The United Nations Global Study¹⁵ on children deprived of their liberty

The right to be protected from unlawful deprivation of liberty is reflected in a number of international human rights treaties. For the purposes of this investigation, the most relevant is Article 5 of the European Convention on Human Rights (ECHR) which was incorporated into UK law through the Human Rights Act 1998. Article 5 provides that no one shall be deprived of their liberty except in a defined set of circumstances (explained in more detail later in this report) and in accordance with a procedure prescribed by law.

Children have the same ECHR rights as adults in terms of deprivation of liberty, and are entitled to additional protections under international law which recognise their vulnerability. Fundamentally, children have the right to grow up in a family environment and not to be separated from their parents (Arts 9 and 16 UNCRC). Where a child cannot be safely cared for with their family, the child has the right to care and protection from the state in an alternative care setting.

Article 37 of the UN Convention on the Rights of the Child (UNCRC) provides that depriving children of their liberty shall be done only in accordance with the law, as a measure of last resort and for the shortest appropriate period of time. It requires that children have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. The UNCRC also provides that in all actions concerning children, the best interests of the child shall be a primary consideration (Art 3 UNCRC) and that children have the right to express a view freely and have that view given due weight in all decisions affecting them (Art 12 UNCRC).

Children's rights under the ECHR and UNCRC are reflected in Scots law and practice through a statutory process that requires deprivation of liberty to be authorised by a court or a Children's Hearing, and for lawful implementation of the authorisation to be subject to the performance of specified duties by the Chief Social Work Officer (CSWO).

These statutory duties are set out in the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013. They are:

- to consult with the child;
- to record the information obtained through that consultation along with the decision and reasons;
- to notify the child of the decision and their right of appeal in writing within 72 hours.

⁶ <https://digitallibrary.un.org/record/3813850?ln=en>

The regulations make clear that, in the event these duties are not complied with inside 72 hours, the CSWO will be deemed to have made a decision not to implement the hearing's authorisation. Any further deprivation of liberty would therefore be unlawful unless founded on separate legal authority.

In 2019, we were made aware of concerns that these duties were not being complied with in all cases. The effect if those concerns were upheld would be that some children in secure accommodation had been unlawfully deprived of their liberty in violation of Article 5 ECHR.

The purpose of the investigation is not to challenge the appropriateness of the decision by CSWOs, Children's Hearings or Courts to place a child in secure accommodation. The law provides that depriving a child of their liberty should always be a measure of last resort, but one which in exceptional circumstances may be necessary and proportionate as the only means by which a child can be kept safe. Nor is it the purpose of the investigation to question the motivations or good faith of those charged with making the difficult decisions to authorise or implement deprivation of liberty decisions, or of those providing secure care for the most vulnerable children and young people. We appreciate that professionals are acutely aware of the weight and impact of their decisions on children.

It might therefore be tempting to see the need to evidence the performance of the CSWO's duties as merely an exercise in administrative compliance, but this is to misunderstand the purpose of these protections in law. They recognise the significant level of interference in children's human rights when they are deprived of their liberty, the often acute vulnerability of the children concerned, and the imbalance of power between a child and the State. Legal duties exist to fetter the exercise of that power and to ensure not only that human rights standards are complied with, but that compliance can be evidenced as an integral part of the accountability process. In the event that a child wishes to appeal or otherwise challenge their detention, the records of decision-making will form an important part of the evidence and

HUMAN RIGHTS FRAMEWORK

The UN Convention on the Rights of the Child (UNCRC) contains a number of Articles relevant to deprivation of liberty. We have summarised the most relevant Articles and provisions below.

Article 2 Every child has the right not to be discriminated against

Article 3 The best interests of a child should be a primary consideration in any action that would have an impact on them

Article 9 Children have the right not to be separated from their parents unless it is in their best interests and happens through a legal process

Article 12 Children have the right to express a view and have it taken into consideration when decisions are made about them

Article 15 Children have the right to freedom of association and peaceful assembly

Article 16 Children's rights to privacy and family life should be respected, which includes the right to bodily integrity

Article 20 Children have the right to protection and support if they are unable to live with their family and to maintain meaningful contact with their parents and family

Article 37 Children have a right to be protected from cruel, inhuman or degrading treatment or punishment, and a right not to be deprived of their liberty unlawfully or arbitrarily

Article 39 Children have the right to support to recover from abuse and trauma

legal justification. In that respect, the records are a fundamental part of providing the right to a fair hearing, to effective remedies and access to justice.

But there is a further, and perhaps less obvious, significance to these duties. Care experienced children and young people have spoken powerfully of the importance to them of proper recording of their care journey. Reflecting that testimony, the Independent Care Review recommended that "...those with care experience must hold and own the narrative of their stories and lives"⁷. Among other things that means the ability to look back later in life, to understand the decisions made and the reasons for them.

The level of interference in human rights inherent in depriving a child of their liberty means that secure accommodation should be reserved for those whose needs cannot be met in any other environment or place of safety. Research carried out by The Children and Young People's Centre for Justice (CYCJ) in 2018 and 2019,⁸ found children in secure accommodation had backgrounds characterised by disproportionate exposure to factors including poverty; physical, emotional and sexual abuse; neglect; domestic abuse and substance misuse. These factors are critical in informing the appropriate nature and level of statutory protections that are required to protect the rights of these children.

A child deprived of their liberty is a child deprived of agency, autonomy and association; of the right to make free choices about where to go, what to do, and who to spend time with (Art 15 UNCRC). It is in these circumstances particularly – where so many decisions are made by professionals rather than by the child – that incomplete records leave gaps in a child's understanding of their own life. Full and accurate recording therefore also supports children's rights to identity (Art 8 UNCRC), rights to a fair hearing and due process (Art 6 ECHR), and rights to respect for private and family life and bodily integrity (Art 8 ECHR, Arts 9 and 16 UNCRC).

HUMAN RIGHTS FRAMEWORK

The European Convention on Human Rights (ECHR) contains a number of Articles relevant to deprivation of liberty. We have summarised the most relevant Articles and provisions below. These are incorporated into UK law through the Human Rights Act 1998

Article 5

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty except in specific cases and in accordance with a procedure prescribed by law. Everyone deprived of their liberty shall be entitled to take have a court consider whether that detention is lawful and release them if not

Article 6

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence

⁷ https://www.carereview.scot/wp-content/uploads/2020/03/The-Promise_v7.pdf

⁸ <https://www.cycj.org.uk/wp-content/uploads/2020/07/ACEs-Places-and-Status.pdf>

DOMESTIC LAW POLICY AND PRACTICE

Section 83(6) of the Children's Hearings (Scotland) Act 2011 sets out the legal criteria for a hearing to authorise a placement in secure accommodation:

- (a) that the child has previously absconded and is likely to abscond again and, if the child were to abscond, it is likely that the child's physical, mental or moral welfare would be at risk,
- (b) that the child is likely to engage in self-harming conduct,
- (c) that the child is likely to cause injury to another person.

As noted above, the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013 ("the 2013 Regulations") places a number of duties on the CSWO following an authorisation made by a Children's Hearing. Regulation 4 provides that the CSWO is under a duty:

- (a) to consult and take into account the views of—
 - (i) the child, taking into account the age and maturity of the child;
 - (ii) each relevant person in respect of the child;
 - (iii) the head of unit;
- (b) to assess—
 - (i) whether one or more of the conditions specified in section 83(6) (compulsory supervision order), 87(4) (medical examination order) or 88(3) (warrant to secure attendance), of the Act continue to apply in respect of the child; and
 - (ii) whether placement in secure accommodation would be in the child's best interests; and (c) to take into account the decision to make the relevant order or warrant referred to in section 151(2) of the Act and the reasons for that decision.

Regulation 5 goes on to provide that

(1) Where the Chief Social Work Officer carries out the requirements specified in regulation 4 and makes a decision whether to implement the secure accommodation authorisation, the Chief Social Work Officer must, within 72 hours of receiving the decision mentioned in regulation 4(3)(c) comply with the requirements at paragraph (2).

(2) The requirements are—

- (a) to record—
 - (i) the decision of the Chief Social Work Officer;
 - (ii) the reasons for reaching that decision;
 - (iii) the information obtained in carrying out the consultation requirements at regulation 4(3)(a);

(b) to send notice of the decision to—

- (i) the child, where taking account of the child's age and maturity, the Chief Social Work Officer considers that the child is capable of understanding the effect of the decision;
- (ii) each relevant person in respect of the child;
- (iii) the head of unit;
- (iv) the Principal Reporter;

(c) to send with the notice the reasons for making the decision;

(d) to inform the child and each relevant person in respect of the child—

- (i) of the right to appeal the decision under section 162 of the Act;
- (ii) where the decision is a decision not to implement the secure accommodation authorisation, that they may require the decision to be reviewed.

(3) Where the requirements at paragraph (2) are not complied with within 72 hours of receiving the decision as mentioned in paragraph (1), the Chief Social Work Officer will be deemed to have made a decision not to implement the secure accommodation authorisation.

The legislation and regulations are supported by a policy approach grounded in the Getting It Right for Every Child framework for assessment and planning to meet children's wellbeing needs, which requires a rights-based approach for all decision-making.

PRACTICE GUIDANCE

The Scottish Government produced practice guidance⁹ on implementation of the CSWO's duties in 2013. The guidance makes clear that the purpose of the duties:

"...is to ensure that the process around the placement of a child in secure accommodation is fair, transparent and in the best interests of the child. It is expected that through the implementation of these regulations the rights of the child within the secure accommodation decision-making process will be strengthened and that decision-making practice will become more standardised and consistent throughout Scotland."

The guidance is not generally prescriptive in terms of how the duties should be carried out, but does provide some useful statements of purpose that can guide assessment of compliance. For example, in relation to the duty to consult:

⁹ <https://www.gov.scot/publications/good-practice-guidance-implementation-secure-accommodation-authorisation-scotland-regulations-2013/pages/2/>

"The central aim of consultation should be to ensure that a holistic view is taken of the child which includes their needs and strengths. The Chief Social Work Officer must be able to evidence that they have made a robust and defensible decision."

On recording:

"Careful consideration should be given to how information obtained in the consultation will be recorded so that, in the event of an appeal or audit, it will be possible to retrace the decision-making process."

"The decision and the reasons for reaching that decision should be recorded in such a way that they are clear and easy to understand. Reasons given for the decision should be specific and should be related back to:

- *the secure conditions outlined in sections 83(6), 87(4) and 88(3) of the 2011 Act,*
- *the identified needs of the child and how secure accommodation is best placed to meet these needs,*
- *and why a placement in secure accommodation is, at this time, in the best interests of the child."*

And on communication of appeal rights:

- *"...the notice must be specific about the reasons for the decision and these must be clearly articulated to ensure that they have the best chance of being understood."*

SECURE CARE PATHWAY AND STANDARDS

The Secure Care Pathway and Standards¹⁰ were published at the end of 2020 and further embed the importance of children being fully informed and involved in all decisions relating to deprivation of liberty, from a rights-based and trauma-informed perspective.

"I am involved and influence any discussions about potentially restricting my liberty and any decision to recommend secure care in a way that works for me."

"I understand my rights, including any right to appeal the decision to restrict my liberty."

The Secure Care Standards (extract)

¹⁰ <https://www.securecarestandards.com/>

FINDINGS AND ANALYSIS

During the period we examined, and within the scope of the investigation, there were 118 children placed in secure accommodation across 27 local authority areas. A small number of children were placed in secure accommodation multiple times across the year. A small number of local authorities did not place any children in secure accommodation in this period (Clackmannanshire, East Renfrewshire, Inverclyde, North Ayrshire, Comhairle nan Eilean Siar).

Before we consider compliance with the legal duties, there are a number of pertinent contextual observations to make about the evidence that was provided to us. We did not consider the reasons underpinning decisions, so drawing any further conclusions on these points is beyond the scope of this investigation, but they should inform discussions about the future of secure care and decisions about the most appropriate and flexible model through which to deliver on the recommendations of the Independent Care Review.

Length of placement

The length of time in secure accommodation for individual children ranged from 14 days to 572 days. Human rights law requires that children may only be deprived of their liberty only for as short a time as possible, so lengthy stays in secure accommodation require particularly close scrutiny. Any future model will need to consider the extent to which lengthy deprivation of liberty is appropriate and what safeguards need to be in place for these children.

Emergency placements

A number of the placements were made on an emergency basis under Regulation 7 of the Secure Accommodation (Scotland) Regulations 2013. This means each child was placed in secure accommodation, initially under the unilateral authority of the Chief Social Work Officer (CSWO) and without any prior scrutiny from a court or Children's Hearing. Thereafter, a Children's Hearing took place within 72 hours to authorise the placement.

This reminds us that secure accommodation is sometimes used as an emergency response to a crisis situation rather than as part of a planned response to meet a child's needs. Any future models of secure accommodation, together with the existing regulatory powers and child protection laws will require scrutiny and assessment of compatibility with the UNCRC.

Challenges for CSWOs

Whilst we acknowledge that CSWOs often face challenges in gaining meaningful participation and engagement of vulnerable and often highly distressed children within tight statutory timescales, the legal duties exist to ensure compliance with the child's human rights.

The speed and complexity of decision-making within the care system can be disorientating for children, and this is likely to be particularly so where they are experiencing significant or multiple vulnerabilities, or where they have reached crisis point. It is right that the onus is placed on professionals to evidence that they have done all they can to respect, protect and fulfil the child's rights.

Good practice reviews

A large number of authorities (Aberdeenshire, Argyll and Bute, Dumfries and Galloway, Dundee, East Dunbartonshire, East Lothian, Edinburgh, Falkirk, Glasgow, Highland, Midlothian, Moray, North Lanarkshire, Perth and Kinross, South Lanarkshire, Stirling, West Lothian) indicated that in the course of gathering evidence for the investigation they had identified the need to review or amend aspects of their process, policy or guidance. We very much welcome this approach, which reflects a constructive engagement with the purpose of the investigation. We anticipate that it will stand those authorities in good stead for any future discussions and for their work on implementation of the United Nations Convention on the Rights of the Child (Incorporation) Scotland Bill.



COMPLIANCE WITH DUTIES

Our findings are set out in the form of data tables (at Appendix 1) and commentary. In each case, we have also responded specifically to areas where authorities have raised points or arguments with which we disagree. This is in order to explain how we have interpreted the evidence provided to us.

Consultation with the child and recording of views

The first of the legal duties (in Regulations 4 and 5) is to consult with the child (and others) and to record the information gathered in that consultation, including the child's views.

Child's view not expressed

A number of authorities provided records for individual cases stating that "it had not been possible" to obtain the child's views. The reasons cited included mental health, distress, vulnerability and risk of absconding.

In every case, the child has a right to participate in decision-making and the responsibility to facilitate that is, rightly, on adult professionals through an assessment based on the child's individual circumstances. We accept that there may be circumstances where a CSWO may take all reasonable steps to try to consult but is not able to ascertain the child's views in detail within the permitted 72 hour period. These should be exceptional cases. Even if a child refuses to engage that refusal to engage is itself a view, and the fact that they were informed of their rights should be recorded as such.

In all cases the importance of additional safeguards such as access to legal representation or independent advocacy is clear. We would expect case records to reflect the steps taken to seek the child's views and any representations made on behalf of the child.

As the UN Committee on the Rights of the Child (CRC) makes clear in its General Comment No. 12¹¹, participation is a process, and requires an ongoing relationship between adult decision makers and children. Even where a child may not initially be willing or able to engage, attempts should be made to ascertain the child's views throughout the placement process and beyond. While there was evidence that views previously expressed by the child had been considered (for example views expressed at the Children's Hearing), we observe that it was not always apparent from the records what steps had been considered and taken to ascertain the child's views on being detained in secure accommodation during the 72-hour consultation period.

¹¹ <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

Lack of evidence

We note that several authorities (Dundee, East Dunbartonshire, East Lothian, Perth and Kinross, Shetland, South Ayrshire) all asserted in at least one case each that they were confident that consultation had taken place but did not provide evidence, (such as a copy of an explanatory letter to the child, or a case record recording the child's views) to support this assertion. The absence of evidence means that compliance with the requirements of the regulations cannot be substantiated.

Emergency placements

It is important to make clear that in cases where a child is placed in an emergency under Regulation 7 and is therefore already in secure when the children's hearing takes place, there remains a human rights obligation on the CSWO to consult with the child at all stages and there is still a legal requirement to consult after the hearing in order to discuss with the child the reasons and legal justification for the emergency placement authorisation and the decisions. This is true even where consultation with the child took place to inform the decision to make an emergency placement. The lack of requirement for judicial authorisation or judicial review of these unilateral placements right to appeal Regulation 7 placement is again a matter which will require scrutiny in fulfilling duties under ECHR and UNCRC.

In some cases where the child was placed under Regulation 7, evidence was provided of consultation, or of the child's views, prior to the authorisation by the CSWO which respects the child's rights. However, as noted above, it is our view that there remains a requirement in law to consult the child subsequent to the hearing's decision to authorise the placement.

Evidence of Consultation

Overall, there was little evidence of consultation with the child during the critical 72-hour period following the hearing's authorisation, though many authorities expressed confidence that it had taken place, and some outlined the processes they expected to be followed.

In doing so, a number of authorities referred to children being consulted directly by social workers but this was rarely evidenced, for example by a record or note of the discussion. While we welcome practice approaches which prioritise personal contact and relationships as an essential element of a rights-based process, there is still a need to ensure the proper recording of the child's views and the ways in which authorities sought to obtain them. The documentation did not often record these interactions and in some cases they appeared to have been sourced from the recollections of the professionals themselves in order to inform the response to the investigation. Needless to say, this would make it extremely difficult for a child to look back at their experience and understand how decisions had been made and on what basis.

We note that most authorities provided evidence of consultation with the child that took place prior to the hearing, for example to inform decisions made by secure screening groups. Whilst this is to be welcomed, and is consistent to some degree with an approach that prioritises children's Article 12 rights, we disagree that it meets the specific requirements of the duties in Regulations 4 and 5.

While pre-hearing consultation with the child is essential, not least to inform the decision to make an emergency placement and to support the recommendation made to the hearing, they are not a substitute for consultation with the child once the authorisation has been made. While detention may have seemed to the child a remote prospect in advance of the hearing, it has now become a reality. The child's view may have changed or developed in the intervening period. The hearing's reasons for authorising secure accommodation may also be different from those put forward in the social work report and it is important that the child understands and can respond to the legal basis for their detention. As noted above, an approach to participation that is fully compliant with Article 12 requires an ongoing relationship and discussions between professionals and the child at each and every key decision-making point.

We note that even where there was evidence that consultation had taken place, and where views were said to have been expressed by children, those views were not routinely recorded. In one case there was a form which allowed the child's agreement or disagreement with the decision to be recorded via a tickbox. This made clear the child's view in the broadest sense, but there was no space where the child's reasons for holding that view could be set out.

Overall, these findings raise serious questions about the extent to which children are meaningfully involved in decision-making, and make clear that too frequently there are gaps in the record which will impact on the child's ability to understand their own history later in life. As noted previously, it would present serious challenges for the local authority to evidence compliance with their duties, in the event a child chose to exercise their appeal rights against the decision.

In light of this, we very much welcome the action taken by many authorities to critically review and amend their processes to address these issues.

NOTIFICATION IN WRITING OF DECISION AND APPEAL RIGHTS

The duty in Regulation 5 is to notify the child in writing of the decision and reasons within 72 hours, and to provide them with information on their right of appeal.

Letters from the Children's Reporter

Some authorities provided a letter from the Children's Reporter to the child, setting out the hearing's decision as evidence that the child had been notified of the decision and their appeal rights. We do not agree this is evidence of compliance with the duty in Regulation 5. The duty on the Chief Social Work Officer (CSWO) is related to the decision taken by them and the Head of Unit, on whether to implement the authorisation, not the one taken by the hearing. Following an authorisation by the hearing, the CSWO is required to exercise their own professional judgment on whether to place the child in secure. The reason for that decision may be distinct therefore from the hearing's reasons (even though they may be expressed in similar terms). The letter from the Children's Reporter post-hearing cannot capture that decision or the reasons for it.

Similarly, the right of appeal against the CSWO's decision to place the child in secure accommodation is separate in law from the right to appeal the Children's Hearing's decision. Communication of one right does not automatically serve to communicate the other, and in any case, the duty is on the CSWO not on the Children's Reporter to communicate the appeal rights to the child.

Evidence of Notification

Most local authorities were able to evidence that these formal communications had been sent to the child. This was perhaps due to it being easier to record and retain copies of letters than detailed discussions with a child. However, there were still authorities who were not able to provide evidence of compliance with the Regulations.

Where correspondence was sent to the child, the reasons for the decision were not always clearly explained. In some cases they simply set out the legal threshold for consideration of secure accommodation – often as a straight 'copy and paste' from the legislation – and were not adapted to the individual circumstances of the child. We do not consider that this practice would assist the child in understanding why they had been deprived of their liberty, and it falls short of the requirement in the Practice Guidance for the reasons to be "specific".

Again, we note that the absence of clear recording of decisions and reasons would likely create challenges for local authorities in the event a child wished to appeal the CSWO's decision.

There was little evidence of children being formally notified of their appeal rights. The practical consequence is that children may have been denied the information necessary to challenge decisions to deprive them of their liberty. This cannot be acceptable. In

some cases this was said to have been discussed with the child by the social worker. As we note above, we welcome an approach based on face-to-face contact, trust and relationships but the regulations require notification to be in writing and there remains a need for these interactions to be properly recorded. Should the child wish to communicate with a legal representative, or challenge the decision in court, the absence of documentation would present real challenges.

We note, and welcome the examples of good practice (Aberdeen City, East Ayrshire, North Lanarkshire) where children were informed of their rights and pointed towards supportive adults who could assist them to appeal if they wished to do so.

CONCLUSION

The investigation has demonstrated that very few local authorities have fully complied with their legal duties. As a result, in our view a significant number of children placed in secure accommodation between 1 August 2018 and 31 July 2019 may have been unlawfully deprived of their liberty for at least part of their detention. This is of serious concern and requires action.

IMMEDIATE NEXT STEPS

A number of CSWOs indicated when providing evidence that they had taken steps to review their policy and practice. We welcome this approach. In the short term, all local authorities must ensure they have undertaken a similar process. The legal basis must be clear to ensure that all children in secure accommodation are being lawfully detained.

Based on the documents we were provided, we found it challenging in many cases to piece together the events and decisions that led to the child being placed in secure accommodation. We note that if it was hard for us, it would likely be just as difficult for a young person trying to understand this critical part of their life story. As part of these processes, a more thorough and consistent approach to record keeping which respects the rights of children and young people to an identity (Art 8 UNCRC), and to respect for their private and family life (Art 16 UNCRC, Art 8 ECHR) is required.

The investigation has also revealed a scrutiny gap in relation to compliance with these legal duties. It is clear that no functional mechanism exists within local authorities, multi-agency partnerships, or at a national level via the Care Inspectorate or the National Preventative Mechanism, to ensure that legal duties are being complied with. If there were, the issues raised by this investigation would have been picked up and addressed at some point in the last seven years. It is critical that this shortfall is remedied both in the short-term and within any decisions that are taken on the future of secure care.

In the short-term, local authority elected members, with the support of COSLA, and multi-agency partnerships will need to ensure that there are mechanisms in place which enable them to effectively fulfil their responsibilities in relation to governance, accountability and legal compliance.

LONGER-TERM ACTION

Beyond this, the Scottish Government must lead on the further work that is necessary to progress the issues raised by this investigation. The focus of this work should be ensuring that law, policy and practice fully respects, protects and fulfils children's human rights. It may involve consideration of the effectiveness of existing procedural safeguards and the need for different or additional statutory measures, as well as a review of the roles and responsibilities which exist within the system currently.

It will need to take place within the context of the work being undertaken by the Promise Team, and as an integral part of the work towards implementation of the UNCRC Act. This national discussion will need to involve the Scottish Government, COSLA, Social Work Scotland, CSWOs, the Care Inspectorate, and secure care providers, among others. Most importantly, children and young people with experience of secure accommodation must be involved in the discussions over what best practice looks like. The Commissioner's office intends to visit each of the secure units as soon as it is safe to do so, in order to listen to children and young people and discuss their experiences.

As part of this work, Scottish Government and public authority partners should consider what scrutiny measures can be put in place at a national level – for instance via existing inspection mechanisms – to assure compliance with these specific legal duties and human rights obligations. This might include additional duties on inspectorates, or a commitment to oversight by the National Preventive Mechanism for all environments where children are deprived of their liberty.



APPENDIX 1 - DATA TABLES

LOCAL AUTHORITY	Number of children placed	Number where evidence of consultation was provided	Number of children who are recorded as having expressed a view	Child's views recorded	Comments
Aberdeen City	2	0*	0	0	*No views ascertained due to vulnerability of the child in each case
Aberdeenshire	3	0	0		
Angus	2	1*	0	0	*View not ascertained in one case but no explanation as to why
Argyll and Bute	2	0*	0	0	*View not ascertained in one case due to vulnerability of the child
Dumfries and Galloway	3	0*	0	0	
Dundee	6	0*	0	0	*Asserted that consultation took place in all but one case, but no evidence provided.
East Ayrshire	1	1	1	1	
East Dunbartonshire	1	0*	0	0	*Consultation asserted in cover letter but not evidenced or recorded
East Lothian	5	0*	0	0	*1 case asserted could not obtain views due to child's distress. 4 cases where the LA was confident consultation had taken place but not evidenced
Edinburgh	17	0*	0	0	Consultation evidenced prior to Children's Hearing in some cases but not within 72-hour period
Falkirk	4	2*	2	2**	*1 child's views not able to be ascertained as unable to meet. No reason provided **1 child's agreement or disagreement with decision recorded via tickbox but not views in any detail
Fife	8	0*	0	0	*2 cases recorded as not able to obtain child's views due to risks to child and/or staff. 1 case "unable to locate record"

Glasgow	18	0	0	0	
Highland	7	0*	0	0	*Some correspondence provided but was dated 12-17 months after admission to secure
Midlothian	2	0	0	0	
Moray	3	0*	0	0	*In one case stated that child knew they could phone social work if they wished to express a view
North Lanarkshire	5**	5	3*	3***	*Form has a section for child's views and is supposed to include date discussed with the child. Date of discussion was not provided and in 2 cases views appeared to have been copied across from previous report unchanged **Dates of hearings and meetings redacted from documents presented a challenge *** Disagreement with decision recorded but no detail as to why
Orkney	1	0	0	0	
Perth and Kinross	1	0*	0	0	*Assertion that views of young person considered but no evidence provided
Renfrewshire	4	0	0	0	
Scottish Borders	5	5	5	0*	*Children's views not recorded
Shetland	1	0*	0	0	*Asserted that child's views taken into consideration but not evidenced
South Ayrshire	3	0*	0	0	*1 case assertion that child's views taken into consideration but no evidence provided
South Lanarkshire	2	0	0	0	
Stirling	2	1	1	1	
West Dunbartonshire	5	3*	3	0**	*1 case where child's views not obtained due to risk of violence. **Child's views not recorded
West Lothian	5	0	0	0	

LOCAL AUTHORITY	Number of children placed	Number where evidence of notification in writing was provided	Number which included reasons	Number which included information on appeal rights	Comments
Aberdeen City	2	2	2	2*	Also provided information about forthcoming contact from Children's Rights Officer
Aberdeenshire	3	1	1	1	
Angus	2	0	0	0	
Argyll and Bute	2	0	0	0	
Dumfries and Galloway	3	0*	0	0	Asserted compliance with regulations but no evidence provided Asserted that writing to the child separately from the Reporter re appeal rights would "confuse" them
Dundee	6	0*	0	0	*Asserted that all children were sent a letter but no evidence provided
East Ayrshire	1	1	1	1*	*Also indicated that someone would support the child to appeal if they wanted to
East Dunbartonshire	1	0	0	0	
East Lothian	5	3	3	0	
Edinburgh	17	9	9	0	
Falkirk	4	3	3	3	
Fife	8	0*	0	0	*1 case record could not be located
Glasgow	18	0	0	0	
Highland	7	0	0	0	
Midlothian	2	0	0	0	
Moray	3	0	0	0	
North Lanarkshire	5	5	5	5*	*Suggests child can speak to independent advocate to access appeal rights
Orkney	1	0*	0	0	*Asked social worker to discuss the process with the child

Perth and Kinross	1	0	0	0	
Renfrewshire	4	0	0	0	
Scottish Borders	5	5	5	5	
Shetland	1	0*	0	0	*Child verbally notified
South Ayrshire	3	3	3	1	
South Lanarkshire	2	1	1	1	
Stirling	2	0*	0	0	*Letter provided for one case but dated outwith scope of investigation
West Dunbartonshire	5	0*	0**	0**	* Form states that it should be sent to child but no evidence provided that it had been eg provision of covering letter ** Form does include reasons and appeal rights information but again, no evidence that it had actually been sent to the child
West Lothian	5	0*	0	0	*4 cases included a form certifying compliance with duties but no further evidence (eg copies of letters to the child) provided. 1 case no paperwork provided

APPENDIX 2 - CHILDREN DEPRIVED OF THEIR LIBERTY

This office has conducted work in the last two years on the impact of cross-border placements on the availability of secure accommodation for young people living in Scotland, and has expressed concern about a commissioning model whose financial viability is based on occupancy rates.¹ We also have very serious concerns about an increasing practice of English/Welsh children being deprived of their liberty in non-secure Scottish residential care homes by English courts exercising their inherent jurisdiction; not least as these children fall entirely outwith the protection of the Scottish statutory provisions under scrutiny in this report. To that end, the Commissioner intervened in cases at the Court of Session and the UK Supreme Court to ensure children's rights arguments are placed before the courts.

We have continued to fight for Scotland to stop using the criminal law to address children's harmful behaviour and to treat all under 18s as children as required by the UNCRC². Scotland's age of criminal responsibility is, at the time of writing, eight years – one of the lowest in the world. Legislation to raise the age to 12 has not been fully commenced, and even when brought into force will mean Scotland is still two years below the absolute minimum age of 14 established by international human rights bodies including the CRC³.

We contributed to the inspection of Polmont YOI⁴ and the Expert Review of Provision of Mental Health Services which followed the tragic deaths of young people detained in custody⁵. Along with the HM Chief Inspector of Prisons in Scotland, we called for a review of the appropriateness of any child under the age of 18 being deprived of their liberty in Young Offenders Institutions and prison-like settings.⁶ We have also raised serious concerns with the Scottish Prisons Service about the authorisation of pain-inducing restraint techniques on children in Polmont – a practice wholly at odds with Scotland's obligations under international law. We are concerned that children as young as 11 continue to be detained in custody in police detention, often for minor offences and without the necessary legal protections being put in place.

¹ <https://www.scotsman.com/news/politics/urgent-solutions-needed-solve-scotlands-secure-care-crisis-msps-told-1408086>

As the impact of Covid-19 began to become clear, expert bodies including the UN Committee on the Rights of the Child recognised that the pandemic's effect on children in places of detention was a serious concern⁷ and a risk to their rights to life, liberty and health. Factors including increased risk of infection within facilities where children were detained, limitations on rights to family contact, and reduced opportunities to access professional supports such as mental health, all combined to exacerbate the impact of deprivation of liberty.

In the course of our pandemic work, we criticised the Scottish Government's failure to ensure specific provision was made for children under the Release of Prisoners (Coronavirus) (Scotland) Regulations 2020, and raised concerns with the Scottish Parliament about the conditions for children in Polmont during the pandemic, as well as the situation faced by children detained on remand⁸. A number of children detained on remand have also been identified as potential trafficking victims, and we are working to ensure that Scotland does not prosecute and detain children who have been criminally exploited.

All these matters bear considerable further attention and the office will continue to engage as part of our ongoing work around children in conflict with the law, including by reporting issues to the United Nations Committee on the Rights of the Child.⁹



⁷ https://yjlc.uk/wp-content/uploads/2020/04/CRC-statement-INT_CRC_STA_9095_E1.pdf

⁸ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20200525_CYPtoMM.pdf

⁹ <https://cypcs.org.uk/wp-content/uploads/2020/12/crc-report-2020.pdf>



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