



Competition and Markets Authority  
By e-mail: [children@cma.gov.uk](mailto:children@cma.gov.uk)

14 April 2021

To whom it may concern,

### **Children's social market study – invitation to comment**

We welcome the CMA's examination of the children's social care market. As your invitation to comment acknowledges, there are significant differences between the children's social care sector in Scotland and that in England and Wales, with private sector provision playing a smaller role and a requirement for all accommodation and placements to be approved and monitored by the Care Inspectorate.

These variations are a consequence of significant differences in the legal and policy landscape in Scotland. For example, the existence of a holistic welfare-based care and justice system (the Children's Hearings System). Work to implement the report of the independent review of children's social care (The Promise) may result in further divergence.

Most significantly, Scotland is in the process of incorporating the United Nations Convention on the Rights of the Child (UNCRC) into domestic law. This will require constructive challenge to law, policy and practice in order to ensure the rights of children in State care are respected, protected and fulfilled.

Whilst we acknowledge the limitations placed on the CMA by legislation, we encourage the review to take a human rights-based approach, which recognises the underlying purpose of all aspects of the care system – to deliver on the State obligations to children. Taking a human rights based approach would not only strengthen this review, but inform future improvements in law, policy and practice. Our colleagues at the Scottish Human Rights Commission have details on the use of human rights based approaches, as well as a case study on adult health and social care, on their website.<sup>1</sup> Particular attention should be given to children's human rights as set out in the UNCRC, the UN Guidelines for the Alternative Care of Children<sup>2</sup>. These recognise not only the rights held by all children, but reflect the additional duties placed on the State where it is necessary to remove a child from the care of their parents.

In respect of private provision, consideration should also be given to the UN Guiding Principles on Business and Human Rights and the UK Government's commitment to

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<sup>1</sup> <https://www.scottishhumanrights.com/projects-and-programmes/human-rights-based-approach/>.

<sup>2</sup> <https://www.refworld.org/docid/4c3acd162.html>

implementing these.<sup>3</sup> Specifically, the UN Committee on the Rights of the Child, in General Comment 16<sup>4</sup>, recognizes that whilst ‘ there is no international legally binding instrument on the business sector’s responsibilities vis-à-vis human rights ... duties and responsibilities to respect the rights of children extend in practice beyond the State and State-controlled services and institutions and apply to private actors and business enterprises.’

We would therefore suggest that a human rights based approach for children’s social care services must require state and non-state actors, including privately funded and managed children’s social care facilities to undertake effective due diligence and compliance with international human rights law and standards.

In Scotland, the system already only permits certain types of children’s social care which includes ‘secure accommodation’ to be provided under a strict regulatory framework. However, recent concerns have identified the use of privately managed residential children’s social care facilities operating to deprive children of their liberty outwith the Scottish statutory and regulatory framework. We anticipate that the implementation of the UNCRC (Incorporation) (Scotland) Bill (when enacted) compatibility duties will provide further rights protections for children in alternative children’s social care.

We will shortly be publishing the results of our investigation into secure care and would be happy to meet with you to discuss the issues raised once it has been published.

Yours faithfully

**Megan Farr**  
Policy Officer

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<sup>3</sup> <https://www.gov.uk/government/publications/implementing-the-un-guiding-principles-on-business-and-human-rights-may-2020-update>

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[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en)