Children's Care & Justice Bill
Scottish Government Consultation on Policy Proposals

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government.

Introduction

Our remit exclusively covers children and young people who are under 18, or are under 21 and care experienced. Certain questions in the present consultation relate to all persons over the age of 18. In line with our remit and mandate, we will limit our responses to issues relating to children and young people.

Question 1 – Where a person has been harmed by a child whose case is likely to proceed to the children's hearings system, should further information be made available to a person who has been harmed (and their parents if they are a child) beyond what is currently available?

People who have been the victim of harm, including any criminal offence, have the right to access support and information. Children are more likely to be the victims of crime than to cause harm to others and the right of child victims to an effective remedy is essential.

These rights are enshrined in international law, for example in the EU Victims Directive 2012/29/EU (transposed into Scots Law through the Victims' Rights (Scotland) Regulations 2015) and through several recommendations of the Council of Europe's Committee of Ministers. In their 2006 Recommendation on assistance to crime victims, the Committee of Ministers called on States to "ensure that victims have access to information of relevance to their case and necessary for the protection of their interests and the exercise of their rights".

The UN Committee on the Rights of the Child has formally set out its position on the right to a remedy in General Comment No. 5 (2003) on general measures of implementation of the UNCRC (Articles 4, 42 and 44, paragraph 6). The Committee clarifies that the right to an effective remedy exists under the UNCRC by interpreting that "for rights to have meaning, effective remedies must be available to redress violations" and "this requirement is implicit in the Convention". The Committee also highlights the need for special consideration for child victims. It states that "children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights" and recognises the need to ensure "effective, child-sensitive procedures available to children and their representatives […] child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts with necessary legal and other

assistance". Finally, the Committee explicitly recognises, as important elements of the right to an effective remedy, the right to "appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39".

It is important to recognise that much of the guidance on victim's rights in Scotland, for example the Victims' Code for Scotland, has been developed in relation to the adult criminal justice system. Taking a children's rights-based approach, it is important to balance the victim's right to information and support against the rights of the child as enshrined in the UNCRC and the European Convention on Human Rights ('ECHR').

We are of the view that the level and type of information currently shared by SCRA to a person who has been harmed by a child strikes the appropriate balance between the child's right to privacy and the need to ensure that people who have been harmed have access to information to prevent secondary victimisation and to facilitate their rehabilitation.

Children and young people have told us that providing some general information about the Children's Hearing System and the outcome of a referral to victims is important to provide a sense of closure and to build trust in the system.

> "I think that [a lack of information] leaves a vacuum in which there is a distrust which can build. In the absence of information, you maybe leave people feeling aggrieved, or feeling that things haven't come to a close. I think for that reason, if that information is anonymised or just very general information that there was a hearing held, and this happened, that would be beneficial for all, rather than saying nothing." *CYPCS Young Adviser*

Children and young people have identified the risks associated with sharing information to victims about a child whose case is likely to proceed to a Children's Hearing. Children and young people have raised concerns with us whether it is necessary to share more information than is currently available.

> "In a children's hearing the focus […] should be what's best for the child and if the intent of sharing this information isn't for the best interest, then why are you doing it anyway? […] If the child needs protecting and needs help, if someone's knowledge of the situation needs to be sacrificed to make sure that a child is in a safer environment then that's just what needs to happen." *CYPCS Young Adviser*

Children and young people also recognise that most crimes committed by children and young people are of the minor variety and have therefore highlighted the importance of taking a case by case approach to information disclosure.

> "You have to look at the balance of harms – where there could be a certain level of harm for the child involved, but where that harm is minimal and kept to the lowest extent, and it helps the victim to move on and find closure, then yes [there should be some general information shared]. […] But most offences by children and young people are minor, so this scenario isn't one that's going to come up often. This is even more reason why it should be dealt with on a case-by-case basis and the factors of each scenario should be looked at." *CYPCS Young Adviser*

Article 40 (2)(c)(viii), of the UNCRC states that the child has a right *"to have his or her privacy fully respected at all stages of proceedings"*. In their General Comment 24 (2019) on the rights of children in conflict with the law, the UN Committee on the Rights of the Child restated their view that the child's right to privacy should be fully respected during all stages of proceeding. Likewise, the Council of Europe Guidelines on Child Friendly Justice makes it clear that no information may be made available or published which could reveal or **indirectly enable** the disclosure of a child's identity.

In our evidence to the former Equalities and Human Rights Committee in December 2018 and January 2019, we highlighted the importance placed by international human rights standards on the avoidance of stigmatisation of children in conflict with the law. Failing to protect the privacy rights of children and young people in conflict with the law can have a profoundly negative impact on realisation of the child's right to recovery and rehabilitation.

Whilst provision of information is an important aspect of the right to an effective remedy, this must be balanced not only with the child's right to privacy but also the extensive evidence base on what constitutes an effective response to offending behaviour in children, not least the Edinburgh Study of Youth Transitions and Crime.

The information currently provided assists those harmed by children to understand: 1) how cases are dealt with; 2) the basis on which decisions are made; and 3) the tests applied in law at a general rather than case specific level. We are of the view that this assists all victims (including child victims) to have confidence that the system is appropriately responding to offending behaviour by children.

Question 2 – Where a person has been harmed by a child who has been referred to a children's hearing, should SCRA be empowered to share further information with a person who has been harmed (and their parents if they are a child) if the child is subject to measures that relate to that person?

No. We refer to our answer to Question 1.

Access to support

Question 3: Where a person has been harmed by a child who has been referred to the Principal Reporter, should additional support be made available to the person who has been harmed?

Yes.

Any child who has been harmed, whether by another child or by someone else, has a right to support to recover from their experience. As noted in our response to Question 1, under Article 39 UNCRC, children who have been the victim of rights violations have a right to physical and psychological recovery and social reintegration (see also General Comment no.5).

We support the development of the Bairn's Hoose in Scotland and feel that this is an important step in ensuring that children who are harmed by others receive the

support they need. It should be complemented by improved services for adult victims of crime.

Children and young people have told us that they agree that additional support should be made available to all victims of offending behaviour by children. One young person told us that the type of support available should be tailored to the individual needs of the person involved, particularly if the person is a child.

> "It's too easy to apply one set of guidelines to every scenario […] You should look at things differently when the person who has been harmed is a child. […] We know that trauma affects people in childhood differently than when you're an adult. Again, that's not always going to be the case, but there's enough research to back up this point. […] What does that support look like? Well, the easiest one is mental health – do they need to speak with someone? Do they need to be put in contact with a specialist? I don't think we should be telling someone if they've had this experience they shouldn't be getting this type of support if that's what they're asking for but, nor should we be saying you can get anything you like because this has happened to you. […] It all depends on what has happened and who it's happened to." *CYPCS Young Adviser*

Question 4: Should a single point of contact to offer such support be introduced for a person who has been harmed?

The principle of a single point of contact is an important one. In this regard, children and young people have stressed to us the importance of having someone available to signpost to support, rather than 'bombarding' people with support which can become overwhelming.

However, for children and young people it is often important for this person to be someone they already know and trust. This means the person most appropriate will differ from child to child and any system should be flexible enough to respond to the needs of individual children. It must also be voluntary and not rely on automatic information transfer processes or protocols in line with the child's right to privacy as outlined in Article 16 UNCRC and Article 8 ECHR.

One young person told us that:

> "When it comes to children it is important to make sure that they feel comfortable talking to the person, and they don't feel it's too formal. [The person should be someone] that they can contact and speak freely with and at a time that works for them, and also someone who you are close in age with is important." *CYPCS Young Adviser*

Where children already have an advocate or support worker they know or trust, this person should be empowered to act as a single point of contact, with the consent of the child (and where appropriate their parents or carers). For many children, the most appropriate point of contact may be someone within their school, for example their Named Person (if they have one). The child's views and their best interests

should be the primary concern when identifying an appropriate single point of contact for them.

> "I guess it could be useful if there's a young person involved, and there's already an established relationship in a school or maybe a psychiatrist or therapist that the young person has already been seeing, then that should be allowed to carry on if the person feels comfortable." *CYPCS Young Adviser*

The Bairn's Hoose, as it is implemented, will also have a role to play in providing support for children and young people and may well be an appropriate single point of contact, as well as a source of specialist support. This will particularly be the case where the child does not have an existing support worker or advocate.

Measures for protection of those harmed

Question 5 - Should existing measures available through the children's hearings system be amended or enhanced for the protection of people who have been harmed?

We agree with the Scottish Government's assessment that attempting to replicate measures available through the criminal justice system would fundamentally distort the ethos of the Children's Hearings system.

Question 6 - Should MRCs be made available to children who do not meet the current criteria for secure care?

No.

It is important to be clear at the outset that Movement Restriction Conditions (MRCs) refer to the restriction placed on a child's freedom of movement through the application of electronic monitoring technology. The Council of Europe's recommendations on electronic monitoring define it by three key characteristics: the monitored phenomenon; the devices and institutional arrangements needed; and the technology that is used. The two main electronic monitoring technologies used in child justice are radio-frequency and GPS-based technologies. These technologies use wearable devices (tags or bracelets), usually attached around the ankle, which are monitored remotely.

Electronic monitoring represents a significant interference with children's rights. Depending on the specific conditions, it can be a form of deprivation of liberty. The UNCRC is clear that to deprive any child of his or her liberty in any form constitutes a significant restriction that should only be imposed as a "last resort" and for the shortest period possible (Article 37 UNCRC).

The use of electronic monitoring technologies has implications for children's right to privacy, particularly with respect to: i) data which are collected; ii) the procedures which are required to enable effective monitoring; and iii) the degree to which the informed consent of the children and their families is sought and received.

In addition, electronic monitoring devices can have an adverse impact on children's participation in society, including education and their rehabilitation. Children may be

prevented from participating in activities due to concerns about the visibility of the devices, particularly in the summer months. Wearers report feeling stigmatised, scrutinised, and anxious about potentially breaking the conditions of their monitoring requirements and incurring further consequences. Families of a child or young person being monitored also experience this stress.

Electronic monitoring should therefore only be used with children and young people where absolutely necessary and appropriate, and not without other support in place. The use of electronic monitoring for a child or young person should take into account likely adverse consequences, and efforts should be made to mitigate them. Assessment of need should take into account the child and their environment and family needs, and wraparound support should be provided where required.

We also note that the findings of the Scottish Government's evaluation of Intensive Support and Monitoring Services (ISMS) within the Children's Hearings System. The most effective part of the ISMS provision was seen by almost all of those professionals interviewed as being the intensive support packages, rather than the MRC component. In terms of community accessing resources and maximising social inclusion, the intensive support packages appear to have increased young people's use of education, employment agencies and health agencies. Scottish Government should explore how to make that intensive support package more widely available without the need for the monitoring element.

Having regard to the above, we are of the view that the existing criteria for the use of MRCs under section 83(6) of the Children's Hearings (Scotland) Act 2011, read in conjunction with Scottish Government guidance for practitioners, strikes a fair balance between the rights and welfare of the child and the need to protect those who have been harmed. We consider any proposal to expand the use of MRCs would serve to undermine the ethos of the Children's Hearings system. Finally, we maintain that MRCs should only be used where the only other alternative would be to deprive the child of their liberty in secure care.

Raising age of referral beyond 18

Question 7 - Should any of the above options be considered further?

The UNCRC defines childhood as up to the age of 18 and we note that the UN Committee on the Rights of the Child has recommended in General Comment 24, that States should ensure a "non-discriminatory full application of their child justice system to all persons below the age of 18 years **at the time of the offence".**

Further research is required to explore the impact of referring people over the age of 18 to the Children's Hearing System where the offending behaviour occurred before they turned 18. This research should address whether any such proposal would distort the ethos of the Children's Hearings System.

We also note the ongoing review of the Children's Hearings System by Sheriff David Mackie. We await the publication of the findings of that review.

Our statutory remit covers children under 18, and young people up to the age of 21 who are care experienced. While we welcome the ongoing work in relation to young adults in conflict with the law, our primary focus is on the need to ensure that

children's rights are fully respected through the provision of a child rights-based system for all children.

Question 8 - Please give details of any other ways in which the use of the children's hearings system could be maximised, including how the interface between the children's hearings system and court could change

We agree with the Scottish Mental Health Law Review's recent consultation that the findings of various reviews, including their own and The Promise, together with the proposed reforms in services for care, justice, health and education should create a more consistent, human rights-based, and unified legal and judicial framework for children and young people.

Children and the Criminal Justice System

Question 9 - Should any of the above options be considered further? (see below)

Our position is that children under the age of 18 should not be prosecuted in adult courts unless it is in their best interests – and that is likely to be extremely rare. In General Comment 24, the UN Committee strongly recommends States make no exception for serious cases, stating these are "*usually created to respond to public pressure and are not based on a rational understanding of children's development".*

We feel that it is vitally important to ensure that children's right to a fair hearing is realised through measures which enable their full participation in procedures and support their understanding of what is happening and the consultation provides a range of options which would achieve this. What is appropriate for any individual child should be considered on an individual basis, with regard to their views on what would best support their needs.

We would welcome additional exploration of these proposals, particularly with additional participation in that process by children and young people with experience of court hearings, such as Youth Just Us.

Young Offenders Institutions (YOIs)

Question 10 - Where a child requires to be deprived of their liberty, should this be secure care rather than a YOI in all cases?

Question 11 - Should there be an explicit statutory prohibition on placing any child in a YOI, even in the gravest cases where a child faces a significant post-18 custodial sentence and/or where parts of a child's behaviour pose the greatest risk of serious harm?

Yes. There should be a total prohibition on children under the age of 18 being sent to a young offenders institution or other prison.

Children in custody in Scotland are amongst the most vulnerable in our society. However, as children who are in conflict with the law, they are routinely neither recognised nor treated as 'children in need' of care and protection, under Scots law.

For those children and young people in conflict with the law, their rights to liberty and security of person (Article 5 ECHR); protection from inhuman, degrading treatment or punishment (Article 3 ECHR); privacy and family life (Article 8 ECHR); fair trial and due process (Article 6 ECHR) must all be respected in line with the international standards of child-friendly juvenile justice (including the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), and the Standard Minimum Rules for the Treatment of Prisoners).

Article 5 of the ECHR is mirrored in Article 37(b) of the UNCRC (and explained by the Committee on the Rights of the Child in General Comment 24). The deprivation of liberty of a child should be a last resort measure, to be used only for the shortest possible period of time. However, in Scotland children are known to be incarcerated in YOIs, either on remand or after sentencing, where this is not the case. For example, research shows that in some cases, sheriffs remand children for low-level offences, lack of suitable accommodation, or minor breaches of bail, rather than because of serious risks posed by (or to) the child. This both breaches the UNCRC and does not constitute a proportionate and necessary limitation on the child's right to freedom under Article 5 ECHR.

The UN Committee on the Rights of the Child, in its Concluding Observations to the UK, criticised the use of penal institutions for children, calling on the UK and devolved governments to

> *"[e]nsure that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18…[and]…establish the statutory principle that detention should be used as a measure of last resort and for the shortest possible period of time and ensure that detention is not used discriminatorily against certain groups of children…that child detainees are separated from adults in all detention settings."*

We continue to hear of children being imprisoned inappropriately, including suspected victims of trafficking and that imprisonment is not being limited only to serious offences. Combined with widespread concerns about mental health care and other aspects of the regime at Polmont YOI, including those expressed by HM Inspector of Prisons, imprisonment in a YOI has no place in a human-rights based child justice system.

We have been particularly concerned at the number of children who have remained in Polmont YOI over the course of the Covid pandemic and the increasing proportion of these who are untried. At times the restrictions placed on children in Polmont YOI has breached children's rights to freedom from cruel, inhuman and degrading treatment under Article 3 ECHR and Article 37 UNCRC. A statutory prohibition on remanding children to a YOI is essential to properly respect children's rights.

Question 12: Should existing duties on local authorities to assess and support children and care leavers who are remanded or sentenced be strengthened?

Both the Scottish Government and local authorities have obligations to ensure that proper assessment and support are in place for children and care leavers who are remanded or sentenced. Those obligations will be strengthened by the UNCRC (Incorporation) (Scotland) Bill, which will require them to act compatibly with the UNCRC when discharging their duty to assess and support children in conflict with the law.

There is already a legal framework in place, including corporate parenting duties, however in practice there are significant inconsistencies and failures to provide support, which must be addressed.

In human rights terms, the duty to assess and support children in conflict with the law remain with the Scottish Government. It may choose to devolve the services which support realisation of these rights to service providers, including local authorities, other public authorities (such as the NHS or the Scottish Prison Service) or to private providers (such as those which run the majority of secure care children's homes).

The government may also choose to place legal duties on those service providers to ensure they meet specific duties. However, this does not absolve the government of its duty to not only ensure that rights are respected and realised but also to ensure maximum use of available resources are used to achieve this.

Anonymity

Question 13 - Do you agree that the three above changes related to anonymity should be made? (see below)

Our view is that judges should not have the discretion to make an exception to identify a child accused and that the child's right to anonymity should continue for life. No child who commits an offence under the age 18 should be publicly identified in any situation, at any time. The same should be true for any outcome from a Children's Hearing, for example where grounds for referral are accepted or established, on offending or any other grounds.

In General Comment 24, the UN Committee on the Rights of the Child emphasises "the right of a child to have his or her privacy full respected during all stages of the proceedings, in accordance with Articles 16 and 40 (in particular Article 40 (2)(b)(vii)). The Committee also calls for lifelong protection from publication regarding crimes committed by children, on the basis that it is likely to have a negative impact on access to education, work, housing and safety and as a result impede the child's reintegration and assumption of a constructive role in society (General Comment 24, paragraphs 66-71). Likewise, the Council of Europe Guidelines draws attention to the child's rights to privacy under Article 8 of the ECHR and Article 6 of the Council of Europe for the Protection of Individuals with regard to Automatic Processing of Personal Data (paragraphs 61-63).

We note that the disclosure system, which has the purpose of protecting vulnerable groups, is a separate issue. We outlined our position on disclosure in our evidence to the Scottish Parliament in relation to the Disclosure (Scotland) Act 2020, but we recognise that disclosure of serious offences is a necessary part of that system. Our

view is that a right not to be publicly identified as responsible for a crime does not preclude disclosure by Disclosure Scotland. Likewise if, in exceptional circumstances, it is appropriate to notify victims, this can be done in a way which does not make the information publicly available. The Committee on the Rights of the Child recommends that States parties automatically remove children's criminal records when they reach 18, or in exceptional cases retain them only following independent review. Our view is that it is for the State to make the case that an exception should apply, not for the child to be required to challenge retention.

Secure Care

Question 14 – Do you agree that the regulatory landscape relating to secure care needs to be simplified and clarified?

Question 15 - Do you feel that the current definition of "secure accommodation" meets Scotland's current and future needs?

Secure care is Scotland's main form of deprivation of liberty for children. Children can be deprived of their liberty for their own safety and/or the safety of others and not all children in secure are there as a result of offending behaviour, but any deprivation of liberty must comply with the conditions set out in Article 5 of the ECHR. While focussed on the care and support of the child, secure care nonetheless represents one of the gravest interferences with children's human rights in Scottish society. Despite the welfare-based approach of the Children's Hearing system and of secure care, deprivation of a child's liberty must be treated with the utmost seriousness.

We feel that all situations where a child can be deprived of their liberty, including where they are subject to a regime that severely restricts their liberty outwith the secure estate, be subject to the same regulatory framework and procedural safeguards. The right to liberty in Article 5 of the ECHR is not an absolute right, however the conditions and procedural safeguards which permit deprivation of liberty are outlined in detail in Article 5. Children have the same right to these safeguards whether they are deprived of their liberty in a prison, in a police cell, in a secure care home or in any other setting. This includes a right to judicial review for any deprivation of liberty and Scottish Ministers must ensure this is available to all children deprived of their liberty in any setting. This not currently the case.

Children in secure care are some of the most vulnerable in our society. Any location in which a child is deprived of their liberty must be subject to robust, human-rights based regulation. In line with the UN Guidelines for the Alternative Care for Children, registration must require minimum training requirements, including training on children's human rights and require regular, independent monitoring to ensure human rights standards are met (paragraphs 128-130). No child should be deprived of their liberty in a facility that is not registered.

We are concerned about a lack of joined up data on children in secure. It is essential that high quality data is available on all children deprived of their liberty in Scotland.

We have made clear our view that children subject to Deprivation of Liberty Orders of the High Court who are placed in residential or secure care in Scotland are entitled to the same oversight, support, and human rights protections (as per Scots

law and policy) as their ‘Scottish’ counterparts. We refer to our responses to Questions 22-25 in the Consultation.

Question 16 - Do you agree that all children under the age of 18 should be able to be placed in secure care where this has been deemed necessary, proportionate and in their best interest?

When a decision is made to place a child in secure care, their best interests must be the paramount consideration and this decision should be based on an individual human rights assessment for each child. Secure care should be an option where it is in a child’s best interests or necessary to prevent others from a significant risk of harm, but given the grave interference in human rights involved, the use of secure care as a disposal should be rare and carefully monitored.

Question 17 - Should the costs of secure care placements for children placed on remand be met by Scottish Ministers?

Scottish Ministers have a duty to ensure that all forms of alternative care are adequately funded and questions of funding should not form part of decision making for placements. The best interests of the child must be paramount and there must be parity of rights protections for all children under 18 who are in conflict with the law or deprived of their liberty for other reasons.

Central funding of some forms of care but not others increases the risk decisions are influenced by financial considerations. The introduction of the National Care Service provides an opportunity to consider funding of all forms of alternative care.

As previously stated, the human rights duties, including the duty to make best use of available resources, remains with the Scottish Government regardless of any decision to centralise or devolve funding.

Question 18 - Is a new national approach for considering the placement of children in secure care needed?

The number of children placed in secure care is relatively low. We feel that a national approach would support consistency and a better awareness of the role and types of support available, as well as ensuring that placement in secure is seen as a serious interference in human rights. It may also allow additional safeguards to ensure the best interests of the child is paramount. This could include ensuring that decisions on placements are not influenced by funding considerations and removing any veto by providers or local authorities.

Question 20 - Are there any other factors that you think need to be taken into account in making this provision for secure transport?

Children under 18 should not ever be transported in adult secure transport or in the company of adult prisoners. We have contributed comments to the draft National Secure Transport for Children Service Specification and are pleased to hear that

children's views are being taken into account by that group. However, we have expressed concern that the draft at present does not distinguish between policy and law, including international law, clearly enough, with the result that it is not clear which aspects of the specification are legal obligations. Reference should also be made to the full range of human rights treaties which are relevant to secure transport. It is also not sufficiently clear what is (and importantly is not) lawful use of restraint in Scotland.

Decisions about the appropriate transport for a child should be made on an individual basis, taking into account their best interests, based on national minimum standards to ensure consistency of approach.

Question 21 - Do you agree children should be able to remain in secure care beyond their 18th birthday, where necessary and in their best interests?

Children deprived of their liberty must be separated from adults. This requirement is reflected in the International Covenant on Civil and Political Rights (Article 10(2)(b)); the UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules, Rule 29); and the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules, Rule 13(2)). The UNCRC contains a strong presumption against detaining children with adults, which is rebuttable where it would be contrary to a child's best interests (Article 37(c). In contrast to other international instruments, Article 37 UNCRC applies to all forms of deprivation of liberty.

Taking this into account, we note that the proposal could have an impact on the rights of children and young people deprived of their liberty in secure care to be separated from adults.

Our statutory remit covers children under 18, and young people up to the age of 21 who are care experienced. While we welcome the ongoing work in relation to young adults in conflict with the law, our primary focus is on the need to ensure that children's rights are fully respected through the provision of a child rights-based system for all children.

We consider that further research is required to explore different models that help young people to transition from secure care, maintain continuity, and facilitate rehabilitation and reintegration into society.

Question 22: Do you agree with the introduction of pathways and standards for residential care for children and young people in Scotland?

Yes.

In our response to the Scottish Government's January 2022 policy position paper, we set out our position that current practice creates a "second class" of looked after children in care in Scotland, who are not subject to the full oversight, support, and human rights protections of the Scottish statutory systems. In our written submission to the Scottish Parliament's Education, Children and Young People Committee, we set out our view that the Cross-border Placements (Effect of Deprivation of Liberty

Orders) Regulations 2022 ("the Regulations") fall short of providing parity of protection for all children deprived of their liberty in Scotland. We also provided oral evidence to the Committee on the Regulations (transcript available here).

We welcome the Scottish Government's commitment to limit cross-border placements to the most exceptional of circumstances, and where they are in the best interests of the individual child (Article 3 UNCRC). Consistent with their right to private and family life (Article 8 ECHR), children's best interests are best served by being placed close to family, friends and cultural and community networks in all but the rarest occasions.

It is vital that no child in Scotland is deprived of their liberty except in accommodation which is authorised, regulated, and approved to the highest Scots law and human rights standards. On this basis, we welcome in principle the Scottish Government's proposal to introduce pathways and standards for residential care for children. These should align as far as possible with existing standards and pathways for children and young people placed in secure care, for example: Pathway and Standards 2020, the Health and Social Care Standards; and all national guidance, policy and training requirements governing the provision of Secure Accommodation providers in Scotland (for example, National Child Protection Guidance and requirements to have staff registered with the Scottish Social Services Council and other professional regulatory bodies).

Question 23: Do you agree that local strategic needs assessment should be required prior to approval of any new residential childcare provision?

Yes.

Children deprived of liberty retain their right to an education which develops their personality, talents and mental and physical abilities to their fullest potential, as well as their right to the highest attainable standard of health.

Many of the children involved in cross-border placements have significant and complex needs for mental health support and additional support for learning needs or disabilities. As research carried out by the Nuffield Foundation makes clear, the children who are affected by these proposed Regulations are amongst the most vulnerable, with complex health and wellbeing needs. Sufficient safeguards must be in place to ensure that the needs of disabled children and children with Additional Support Needs are met and the statutory and human rights duties of public authorities are fulfilled.

We are aware that the Scottish Government has developed practice documents to manage the relationships and information sharing between the placing local authority, the receiving local authority and the residential unit. While we welcome much of this, we strongly reiterate our comments about the necessity of ensuring that rights are protected in law. There must be full, comprehensive and holistic assessment across all services aligned with the National Practice Model and GIRFEC frameworks for assessment and planning, rather than the English law

model. The child and parents must be meaningfully involved in all decision-making for these needs assessments.

On this basis, we support placing a statutory requirement for a local strategic needs assessment to be carried out prior to approval of any new residential childcare provision.

We also consider that additional safeguards should be incorporated into any future Bill to ensure that the needs of children subject to Deprivation of Liberty orders placed in Scottish residential care are met. We have previously called for:

1. Within 72 hours of the child being placed in the Scottish care home, the Scottish local authority Social Worker and Mental Health professionals must make contact with and visit the child and if necessary, conduct assessments of needs under sections 22 and 23 of the Children (Scotland) Act 1995 and under relevant mental health legislation.
2. Within the 22-day period of the initial Deprivation of Liberty order, the placing and the receiving local authorities must convene a multi-agency, Team Around the Child meeting (under the Getting It Right for Every Child) (GIRFEC) policy framework for assessment and planning in children's services) with the child and family and provide a recommendation and report to the High Court about the suitability of the placement for the child and the plan for the continuing care and protection of the child.

Question 24: Do you agree that there should be an increased role for the Care Inspectorate?

Yes.

We have made clear our view that children subject to Deprivation of Liberty orders in Scottish residential care are entitled to the same oversight, support, and human rights protections (as per Scots law and policy) as their 'Scottish' counterparts.

We refer to our answer to question 22, and particularly our position that any new pathways and standards for residential care for children must be aligned, as far as possible, with existing standards and pathways for children and young people placed in secure care.

We endorse the recommendations contained in the Care Inspectorate's Distance Placements Exploration Report. We highlight in particular the recommendations made to care providers, including:

- Providers should satisfy themselves that placing authorities have consulted host authorities prior to placement to assess capacity, need and appropriateness of placement
- Where a child requires specialist health services such as CAMHS, the health service in the area authority should be consulted prior to placement.
- Providers should only accept children into placements where the UNCRC guidelines on direct contact with parents, carers, brothers, sisters, and friends can be adhered to.

- Before accepting placements, providers must satisfy themselves that the transportation of children to and from care placements is child-centred, trauma sensitive and adheres to human rights and UNCRC legislation.

We have made clear our view to Scottish Government the limitations of policy/practice documents and guidance in ensuring statutory duties are fulfilled and rights upheld. We strongly reiterate our comments about the necessity of ensuring that rights are protected in law. On this basis, to ensure that children's needs are appropriately matched to the care environment and provision they live in, we consider that statutory duties should be placed on the unit to only accept placements if the following criteria are met:

1. It is registered, regulated and inspected by the Care Inspectorate as a care home for children and young people and has a recent "adequate" (or better) inspection report.
2. It provides written confirmation to the placing local authority and the Care Inspectorate that it complies with the requirements of the UNCRC in upholding children's human rights and adheres to the Secure Care Standards and Pathway, 2020, the Health and Social Care Standards; and all national guidance, policy and training requirements governing the provision of Secure Accommodation providers in Scotland (for example, National Child protection Guidance and requirements to have staff registered with the Scottish Social Services Council and other professional regulatory bodies).
3. The Head of the care home has assessed and is satisfied that staff training and experience is sufficient to deliver the child's care plan, and to meet the individual child's needs.
4. It provides an undertaking to support, promote and facilitate regular and meaningful contact with the child's parents and family. A record of the assessment and undertaking must be made and provided to the placing authority for consideration by the High Court.
5. It receives written confirmation from the placing local authority that it has consulted with the receiving local authority and Health Board.

Question 25 - Do you agree that all children and young people living in cross-border residential and secure care placements should be offered an advocate locally?

Yes.

To ensure their full participation in proceedings concerning them, children subject to Deprivation of Liberty Orders and placed in Scotland must have:

- Access to information on their rights and entitlements in Scotland
- A means to challenge their continued detention in Scotland through effective remedies and access to justice
- Access to independent legal advice, representation and lay advocacy.

The clear and consistent messaging from care experienced children and young people, particularly during the Independent Care Review, is that they often feel like the decisions made in the care system happen to them rather than with them; instead of being supported to be active agents in their own lives, they are passive recipients of adult charity.

We therefore agree that all children deprived of their liberty should have access to advocacy services which are familiar with local services and provision and can help them understand and claim their human rights. The importance of face-to-face contact for these particularly vulnerable children cannot be underplayed, so it is even more important that children from outwith Scotland are provided with local advocates.

We note that the Regulations already provide that where a child becomes subject to a Deprivation of Liberty order which has effect as if it were a CSO, the Scottish Ministers must inform the child of the availability of children's advocacy services. We agree that this provision should be extended to all children living in cross-border residential and secure care placements.

We have however made clear our view that independent advocacy to children subject to a Deprivation of Liberty order is not a substitute for access to legal advice and representation. As noted in The Promise, the provision of advocacy does not replace rights to legal representation, rather the two roles have a separate, distinct and complementary purpose.

Access to independent and expert legal advice on protections under Scots law and human rights law is an important safeguard to ensure that the State's duties to the child are met. Children should be supported and empowered to exercise their rights and access legal remedies. We have been concerned that most children subject to Deprivation of Liberty orders and petitions in the Court of Session have not participated in the decision-making processes. It is critical that children placed in Scotland can challenge the placement, their treatment in care, and every Deprivation of Liberty order and that this is via judicial rather than administrative scrutiny and oversight.

We therefore consider that any future Bill, in addition to independent advocacy, must provide access to state funded legal advice and representation in relation to the child's legal and human rights, the relevant Scottish public authorities' statutory duties and the child's rights to access to justice and effective remedies under Scots law.

Restraint

Question 26 - Whilst there are standards and procedures to follow to ensure restraint of children in care settings is carried out appropriately, do you think guidance and the law should be made clearer around this matter ?

In 2018, we conducted an investigation into the use of restraint, restrictive practices and seclusion in Scottish schools. One of our recommendations was that *"The Scottish Government should publish a rights-based national policy and guidance on restraint and seclusion in schools. Children and young people should be involved at*

all stages of this process to inform its development. The policy and guidance should be accompanied by promotion and awareness raising."

Whilst our investigation was focussed on schools, the Commissioner has had longstanding concerns about the use of restraint, restrictive practices and seclusion in all types of care setting, including residential homes, secure care, hospitals, police custody and YOIs. Both The Promise and the Scottish Mental Health Law Review have recommended improved safeguards around the use of restraint and restrictive practices.

We would call for new statutory provisions on the use of restraint nationally in all settings and specifically for statutory guidance, building on the work of the Restraint Reduction Scotland Network. This should make clear what is required of providers and practitioners for a human rights-based approach and should be grounded in the assumption that restraint or restrictive practices should only happen rarely, when necessary to protect the child or others from serious harm.

Age of Criminal Responsibility

Question 27 - Do you agree that the review of the 2019 Act should take place, as set out, with the 3-year statutory review period?

This is a matter of urgency. The current age of criminal responsibility in Scotland is two years below the minimum internationally accepted minimum, as confirmed by the Parliamentary Assembly of the Council of Europe and the UN Committee on the Rights of the Child.

During the passage of the Age of Criminal Responsibility (Scotland) Act 2019, the Scottish Parliament received evidence from a number of international authorities, including the Council of Europe Commissioner on Human Rights and Committee on the Rights of the Child member Professor Ann Skelton that 14 was the absolute minimum internationally acceptable minimum age of criminal responsibility. Indeed, the Committee on the Rights of the Child restated its position the very week the 2019 Act passed.

There is clear international evidence that a higher age of criminal responsibility leads to more rights respecting outcomes.

It is unacceptable that it took 2 and a half years for Part 1 to come into force, during which time, Scotland continued to have the lowest age of criminal responsibility in Europe. This has also delayed the beginning of the 3 year review period, we feel the data gathering should have already taken place.

In light of the continued failure to meet international minimum standards we call for the minimum age of criminal responsibility to be increased immediately by this Bill to at least 14, with the review focussing on what is required to raise the age to 16 and beyond.

We note that the Scottish Government has confirmed that the review will consider all aspects of the 2019 Act and we would highlight our concerns regarding Parts 2, 3 and 4 of the Act, as highlighted in our evidence during the Act's consideration by the Scottish Parliament and during the passage of the Disclosure (Scotland) Act 2020. We continue to believe that these parts of the Act are incompatible with Scottish Ministers' obligations under the UNCRC and thus should be repealed.

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