Children (Care and Justice) (Scotland) Bill – Stage 1
Education, Children and Young People Committee
Evidence of the Children and Young People's Commissioner Scotland.
March 2023

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

This bill provides a key opportunity for Scots law to be brought into line with the UNCRC, whilst extending the protection of children's hearings and the Kilbrandon principles to all children. We therefore welcome this bill in principle, however our view is that it requires amendment to ensure children's human rights, as understood in the 21st century, are fully respected, protected and fulfilled.

There are also significant missed opportunities with this legislation. The Scottish Government's consultation included a range of issues which have not been included in the bill, for example around additional support for victims, particularly child victims; the use of restraint and seclusion and the review of the minimum age of criminal responsibility.

Our response to the Scottish Government consultation sets out the human rights context for this bill and we make reference within this evidence to the European Convention on Human Rights (ECHR)[1] and the UNCRC[2], in particular:

- Article 3 UNCRC on the best interests of the child.
- Article 16 UNCRC on the right to privacy and family life.
- Article 37 UNCRC on a child's right to liberty and freedom from torture or other cruel, inhuman or degrading treatment or punishment.
- Article 40 UNCRC on the rights of children in conflict with the law
- UNCRC General Comment No. 24 (2019) on children's rights in the child justice system[3].
- Article 3 ECHR on the prohibition of torture.
- Article 5 ECHR on the right to liberty and security.
- Article 6 ECHR on the right to a fair trial.
- Article 8 ECHR on the right to respect for private and family life.
- Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.[4]

[1] European Convention on Human Rights. https://www.echr.coe.int/documents/convention_eng.pdf
[2] CYPCS. United Nations Convention on the Rights of the Child. https://www.cypcs.org.uk/rights/uncrc/
[3] UN Committee on the Rights of the Child. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F24&Lang=en
[4] Council of Europe. https://www.coe.int/en/web/children/child-friendly-justice

Age of referral and definition of a child

We welcome the increase in the age of referral to children's hearing proposed in section 1 of the Bill and the changes made to the Criminal Procedure (Scotland) Act 1995 by section 8 to ensure that "child" is understood as meaning any person under the age of 18 year in line with Article 1 of the UNCRC.

Restraint, seclusion and restrictive practices

In our investigation into the use of restraint and seclusion in Scottish schools[5], we highlighted the interference it represents with the child's right to respect for their private life under Article 16 of the United Nations Convention on the Rights of the Child (UNCRC); Article 8 of the European Convention on Human Rights (ECHR); and Article 17 of the Convention on the Rights of Persons with Disabilities (UNCRPD). In order to avoid a breach of the child's rights, the interference must be lawful, necessary and proportionate. In more extreme cases, restraint may result in a breach of the child's right to protection from injury, violence and abuse under Article 19 of the UNCRC. It may even constitute cruel, inhuman or degrading treatment or punishment under Article 37 of the UNCRC; Article 3 of the ECHR; and Article 15 of the UNCRPD. For these reasons, restraint must be clearly and consistently defined, and subject to the tests of lawfulness, necessity and proportionality which need to be applied by staff who are expected to use these techniques.

We are disappointed that the Bill does not contain any statutory provisions which address the unlawful use of restraint and seclusion on children in care settings in Scotland. We note that an overwhelming majority of respondents at consultation stage considered that guidance and the law should be made clearer around the restraint of children.[6] In particular, many respondents noted significant concern about how restraint is used in Scotland: often to achieve behavioural compliance rather than solely for the purpose of keeping children and/or those around them safe.

We continue to hear evidence that restraint and seclusion is being used in schools and other care settings in a way that breaches the rights of children. It is imperative that unlawful practices of restraint and seclusion are eliminated as a matter of urgency.

For this reason, we repeat our call to the Scottish Government to put in place a single coherent legal framework to cover every circumstance in which children in the care of the State may be subject to restraint, seclusion or restrictive practices: including in education, the care system, places of detention and mental health settings.[7] We consider that this Bill is an appropriate vehicle for achieving this objective. Failure to grasp this opportunity would represent a generational failure to protect children's rights. The urgency of the issue means we have moved well beyond a position where this can be just an option for consideration in future legislation.

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[5] CYPCS, 2018. No Safe Place: Restraint and Seclusion in Scotland's Schools. https://www.cypcs.org.uk/resources/no-safe-place/

[6] Scottish Government, Children's Care and Justice Bill - policy proposals: consultation analysis. Page 72 . https://www.gov.scot/publications/childrens-care-justice-bill-policy-proposals-consultation-analysis/documents/

[7] CYPCS, 2022. Response to Children Care and Justice Bill Consultation, Page 16. https://www.cypcs.org.uk/resources/care-and-justice-bill-consultation/

We consider that the Bill must provide for clear rights-based definitions of the terms 'restraint' and 'seclusion'. This is important to ensure a clear and consistent approach across all local authorities, and to allow for accurate monitoring of data. We also recommend that mandatory recording and reporting is included in the Bill, given the gravity of the rights infringements involved.

There will remain a need for sector-specific guidance targeted at minimising and eliminating restraint and seclusion. For example, we have broadly welcomed the Scottish Government's draft guidance on physical intervention in schools,[8] which takes into account many of the findings and recommendations from our 2018 investigation into the use of restraint and seclusion as a form of behaviour management.[9] However, our response to the draft guidance, emphasised the need for any guidance to be placed on a statutory footing and linked to an overarching statutory framework.[10]

Compulsory Supervision Orders (CSOs) (sections 2-7)

Deprivation of a child's liberty is one of the gravest interferences in children's human rights permitted by Scots law. Children's right to liberty and security is outlined in Article 5 of the ECHR and Article 37 of the UNCRC and any deprivation or restriction of this right must be accompanied by appropriate procedural safeguards to be lawful and subject to tests of necessity and proportionality. In particular, ECHR Article 5 which is incorporated into Scots law via the Human Rights Act 1998, outlines the conditions under which a person, including a child, can be deprived of their liberty. In the case of children, Article 37 is clear that any deprivation of liberty should 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".

<u>Directions authorising restriction of liberty (section 2)</u>

The UN Committee on the Rights of the Child's General Comment 24 on the rights of children in conflict with the law defines a deprivation of liberty as:

> "*Any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by any judicial, administrative or other public authority."*[11]

As outlined in the Explanatory Notes, when a CSO is made, a children's hearing can authorise the person in charge of a children's home to restrict a child's liberty. This section does not change this power, but through the insertion of new section 83(2A) attempts to clarify that this does not equate to a deprivation of liberty.

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[8] Scottish Government, Physical intervention in schools: draft guidance, published 21 June 2022. https://www.gov.scot/publications/included-engaged-involved-part-3-relationship-rights-based-approach-physical-intervention-scottish-schools/

[9] No Safe Place: Restraint and Seclusion in Scotland's Schools, December 2018. https://www.cypcs.org.uk/resources/no-safe-place/

[10] CYPCS, 2022. Response to Physical Intervention in Schools Draft Guidance. https://www.cypcs.org.uk/resources/response-to-physical-intervention-in-schools-draft-guidance/#_ftn1

[11] UN Committee on the Rights of the Child. General Comment No. 24 (2019) on children's rights in the child justice system. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F24&Lang=en

Our view is that it is entirely possible that a restriction of liberty under section 83(2)(b) could constitute an unlawful deprivation of liberty as outlined by UNCRC Article 37 and ECHR Article 5 if it met the tests that have been outlined by the courts.

New section 83(2A) does not therefore prevent a child being unlawfully deprived of their liberty.

We do see the potential for such a power to be necessary in an emergency situation. Our view is that rather than attempting to redefine this power, the potential for it to constitute an unlawful deprivation of liberty should be mitigated by amending section 83(2)(b) to provide authorisation only for time-limited restrictions which are subject to review by children's hearings, which would provide procedural safeguards in line with those outlined by UNCRC Article 37(d) and General Comment 24.

Movement restriction conditions (MRCs) (section 4)

Our view is that the Bill's proposals around MRCs are not compatible with children's human rights. Although imposition of an MRC is a less significant interference in a child's human rights than a placement in secure care, the gravity of an MRC should not be unstated. They have the potential to result in a serious interference in the human rights of a child and may in some circumstances constitute a deprivation of liberty under the terms of Article 5 of the ECHR, as confirmed in ECHR case law.[12] Even if viewed as a restriction on liberty, rather than a deprivation of liberty, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) state that "restrictions on personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum".[13]

In our response to the Scottish Government consultation ahead of this Bill, we stated that electronic monitoring should only be used where absolutely necessary and only as an alternative to secure care. We are therefore concerned that in fact the proposals contained within this Bill considerably broadens the criteria for imposing MRCs, allowing them to be imposed in situations where there is a risk (as opposed to a substantial or serious risk) to the child's "physical, mental or moral welfare" or a risk of harm, including psychological harm (defined as causing fear, alarm or distress) to another person. We would be extremely concerned if this resulted in an increase in the number of children subject to MRCs unless there is an equivalent reduction in children placed in secure care.

We note that when originally introduced into the children's hearings system, MRCs came along with a package of intensive support, and evaluation identified that support as the crucial element, not the restriction itself[14]. Our understanding is that this intensive support has fallen away in many cases. Any proposal to extend the use of MRCs should also take this into account.

[12] *Guzzardi v Italy* no. 7367/76, ECHR 1980

[13] United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Para 17.1(b) page 10. https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf

[14] Scottish Government. *Evaluation of Intensive Support and Monitiring Services within the Children's Hearings System.* https://dera.ioe.ac.uk/9517/1/0064165.pdf

This section requires amendment in order to ensure compatibility with human rights law. The criteria for MRCs in section 4(2)(b) (i.e. new section 4A of the 2011 Act) must be amended, for example by referring to "significant risk" or "severe harm".

Given the potential for an MRC to constitute a deprivation of liberty, our view is that in all cases where one is being considered, children should be automatically entitled to legal representation as is the case for secure care orders, in line with s v Miller.[15]

Secure accommodation authorisations (section 5)

Secure care is Scotland's main form of deprivation of liberty for children. Children can be deprived of their liberty not only as a result of offending behaviour but also for their own safety or the safety of others. Despite the welfare-based approach of the children's hearings system and focus on care and support in secure care, it nonetheless constitutes a grave interference with children's rights and must be compliant with the terms of Article 5 ECHR.

We are concerned that the conditions for a secure care authorisation, particularly when amended by section 5, are too broad, and risk non-compliance with Article 5 ECHR, particularly with regard to moral welfare or causing psychological harm (defined as causing "fear, alarm and distress"). This threshold is too low. As with the criteria for MRCs we feel that a qualification such as "significant risk" or "severe harm" would better protect against disproportionate interference in children's right to liberty.

Anonymity, reporting restrictions and provision of information to victims (sections 6, 12 and 13)

The Scottish Government consultation ahead of the publication of this Bill included a range of proposals which we feel would have strengthened the realisation of the rights of both adult and child victims to support for their recovery and rehabilitation and their right to a remedy. This included access to additional support and proposals for a single point of contact. We are disappointed that these proposals have not been taken forward and instead, Scottish Government has concentrated once more on provision of information on the outcome of hearings. This represents a one-dimensional understanding of victims' needs and is not a substitute for wider support.

In preparing our response to that consultation[16], we gathered the views of a group of our young advisors, who recognised the impact a lack of information has on victims, but also the importance of ensuring that the rights of children in conflict with the law are protected. But, as we highlighted, much of the dialogue around victims rights is centred on the adult justice system. The UNCRC requires us to take a different approach where harm is caused by a child. Provision of detailed information on outcomes of hearings has the potential to constitute a significant interference with children's rights. Seeking to better support victims in other aspects of their experience would provide a better balance between competing rights.

[15] S and Miller [2001]

[16] CYPCS, 2022. Response to Children Care and Justice Bill Consultation. https://www.cypcs.org.uk/resources/care-and-justice-bill-consultation/

Anonymity for children involved in suspected criminal offences

It is important to recognise the importance of the right to anonymity for a child accused. In this regard, no child who commits an offence under the age 18 should be publicly identified in any situation, at any time. This position reflects international standards. 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.[17].

Likewise, children who have been the victim of, or a witness to, suspected criminal offences are entitled to special protections to safeguard their rights to privacy, protected by Article 8 ECHR and Article 16 UNCRC.

We welcome the introduction of additional anonymity protections for child accused, victims and witnesses. We note that current automatic anonymity protections for children under Section 47 of the Criminal Procedure (Scotland) Act 1995 are limited in scope. For example, currently under Section 47(3)(a), where the child is a witness in criminal proceedings and the accused is an adult, then the current restriction on publication only applies if the court so directs. In these circumstances therefore, the right to anonymity for child victims or witnesses is not automatic and is contingent on judicial discretion. The current Bill could address this issue by repealing Section 47(3)(a).[18]

We note that these proposals complement proposals to introduce an automatic right of anonymity for complainers (both adult and child) in sexual offences cases in Scotland, and we would draw the Committee's attention to our response to the Scottish Government's Improving Victims' Experiences of the Justice System.[19]

In a social media age, it is vital that anonymity protections for child victims and accused are triggered at the earliest stage possible. We therefore welcome the inclusion of Section 12 to the Bill, which would introduce restrictions on the reporting of suspected criminal offences involving children. This addresses the current gap in the law whereby child accused and victims can legally be identified prior to the commencement of formal criminal proceedings.[20]

We consider that the Bill could be clearer on when anonymity protections are triggered before the formal commencement of criminal proceedings. Currently, it is not clear when suspicion is crystallised. One approach would be to activate the right when a report is made to a police officer that an offence has been committed. This minimises the window of opportunity within which a child accused or victim could be

[17] UN Committee on the Rights of the Child. *General Comment No. 24 (2019) on children's rights in the child justice system.* https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F24&Lang=en paragraphs 66-71

[18] See Section 13(2)(c)(ii) of the Bill

[19] CYPCS, 2022. *Improving victims experiences of the justice system: consultation.* https://www.cypcs.org.uk/resources/victims-consultation/

[20] It has been affirmed by the High Court of Justiciary that the anonymity protections contained in Section 47 only apply once criminal proceedings have commenced. See Frame v Aberdeen Ltd 2005 SCCR 579.

identified. This would have the benefit of providing legal certainty, both for child accused and victims to understand their rights, and for the media in understanding restrictions on reporting.[21]

We welcome the Bill's amendments to the definition of publication under Section 47(4) of the Criminal Procedure (Scotland) Act 1995. The current definition only extends reporting restrictions to traditional forms of broadcast media, including newspapers and television. It is not clear whether internet-based services or information displayed by a third party on social media are covered by this provision. We consider that the Bill's definition of publication, being any "speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public" is sufficiently wide enough in scope to cover publication on the internet or social media. This definition also aligns with the definition of 'publish' in the context of reporting restrictions in the Children's Hearings System.[22]

In relation to child accused, we note that the Bill only extends automatic anonymity until the child reaches the age of 18 or the conclusion of the criminal proceedings (whichever is later).[23] As we explained in our consultation response, these provisions are insufficient[24]. While we recognise the Bill allows for judicial discretion to extend anonymity to a later date, we are of the view that anonymity for child accused should apply automatically for life. This is consistent with international standards.[25]

For the same reasons, we do not support the Bill's provisions which would maintain the current power under section 47(3) for the court, or the Scottish Ministers, to dispense with reporting restrictions if it is in the public interest to do so. We recognise the inclusion of additional safeguards to the exercise of judicial discretion in these circumstances, including the requirement that a report from the relevant local authority is obtained first,[26] and an appeal mechanism.[27] Notwithstanding, we are not able to envisage any scenario whereby it would ever be in the best interests of a child accused to have his/her anonymity lifted at the conclusion of criminal proceedings. Even if this were to be the case, the power should not rest with Ministers.

We note these provisions would apply equally to child victims. We recognise that in some circumstances, child victims (particularly child complainers in sexual offences cases) may choose to waive their right to anonymity in order to speak publicly about their experience. We would again draw attention to our response to the Scottish

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[21] See in this regard the response of the Glasgow Caledonian University Campaign for Complainer Anonymity to the Scottish Government's Improving Victims' Experiences of the Justice System, published 2022, at page 5. https://researchonline.gcu.ac.uk/ws/portalfiles/portal/68293232/Campaign_for_Complainer_Anonymity_response_2_.pdf

[22] See Section 182 of the Children's Hearings (Scotland) Act 2011

[23] See Section 13(2)(a). Automatic anonymity for child accused would continue to apply if the proceedings end with an acquittal or they are discontinued.

[24] CYPCS, 2022. Response to Children Care and Justice Bill Consultation, Page 9. https://www.cypcs.org.uk/resources/care-and-justice-bill-consultation/.

[25] UN Committee on the Rights of the Child. *General Comment No. 24 (2019) on children's rights in the child justice system.* paragraphs 66-71. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F24&Lang=en

[26] See Section 13(2)(d)

[27] See Section 13(3)

Government's Improving Victims' Experiences of the Justice System, which addresses this particular point.[28] It is vital that this Bill does not have the unintended consequence of re-traumatising child victims by criminalising them if they choose to waive their right to anonymity without seeking permission of the court first. It may be that this can be addressed by prosecutorial guidance published by the Lord Advocate.

Age of Criminal Responsibility (section 10)

Scotland's age of criminal responsibility (ACR), currently 12, remains below the internationally accepted minimum age of 14 years and is incompatible with the UNCRC. Our office, together with partners from Scottish civil society and the international human rights community highlighted this incompatibility during the passage of the Age of Criminality (Scotland) Act 2019.

The 2019 Act required a review of the age of criminal responsibility to take place within 3 years, however the significant delay in implementation of the Act means that this will not be completed until 2024 – five years after the Act passed. It is not acceptable for Scotland to continue to have an ACR below internationally acceptable minimum for this long.

In our consultation response, we recommended that the current Bill be used to raise the age of criminal responsibility to 14 as a matter of urgency, in line with the recommendations of both the UN Committee on the Rights of the Child[29] and the Parliamentary Assembly of the Council of Europe[30] as confirmed by the Council of Europe Commissioner for Human Rights,[31] with the review concentrating on measures needed to raise the age to at least 16. This Bill would have been an excellent opportunity to address this and ensure that Scotland's age of criminal responsibility was compatible with the UNCRC.

Steps to safeguard welfare and safety of children in criminal proceedings (section 14)

We welcome the changes made to the 1995 Act by section 14, which ensure consistency in courts duties with regard to the welfare and participation of a child accused, in both solemn and summary proceedings. We note that whilst "welfare" is often treated as synonymous with "best interests" in Scots law, there are at times differences in interpretation and would welcome amendments to ensure legislation more closely reflects Article 3 of the UNCRC.

Referral or remittal to the Principal Reporter of children guilty of offences (section 15)

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[28] CYPCS, 2022. *Improving victims experiences of the justice system: consultation.* pages 7-8https://www.cypcs.org.uk/resources/victims-consultation/

[29] UN Committee on the Rights of the Child. *General Comment No. 24 (2019) on children's rights in the child justice system.* https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F24&Lang=en

[30] Parliamentary Assembly of the Council of Europe, 2010. *Resolution 2010 (2014) Child friendly justice: from rhetoric to reality.* https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21090&lang=en

[31] Council of Europe Commissioner for Human Rights, 2019. *Commissioner provides evidence to the Scottish Parliament on the age of criminal responsibility.* https://www.coe.int/en/web/commissioner/-/commissioner-provides-evidence-to-the-scottish-parliament-on-the-age-of-criminal-responsibility

Section 15 ensures that in most cases where children are prosecuted in court, they can be referred or remitted to a children's hearing, even if they are not already subject to a CSO. We welcome this change. We are concerned, however, that there remains discretion not to request advice from a children's hearing where the child is within 6 months of turning 18.

Detention of children in prisons (sections 16-19)

It is already Scottish Government's intention that no child should be imprisoned, even in a Young Offenders Institution (YOI), and the number of children in Polmont HMYOI has decreased significantly over the past two years. Indeed, for much of this year the number of children in Polmont was in the low single figures. However, the last two weeks (at time of writing – 16 March 2023) there has been a sharp increase.[32] In our view this strengthens the argument for immediate legislative change to ensure children cannot be placed in Polmont.

As we outlined in our response to the Scottish Government's consultation on this Bill, there were numerous concerns about conditions in Polmont during the pandemic, including potential breaches of children's right to freedom from cruel, inhumane and degrading treatment in line with Article 3 ECHR and Article 27 UNCRC[33]. There continue to be serious concerns about the mental health support available to young people, not least from HM Chief Inspector of Prisons[34] and we were disappointed Ministers chose not to take forward her proposals to remove all children from prison when they were made last year.

We have repeatedly raised concerns that the vast majority of children placed in Polmont are untried and that it is not always seen as a last resort for serious or violent crimes. In the last two years we have been made aware of cases where a child has been remanded to Polmont for failing to appear as a witness and where child victims of trafficking were imprisoned contrary to Scotland's obligations in terms of the non-punishment principle.

As a result, we are pleased that this Bill will ensure this is no longer possible and, given the progress already achieved in reducing the number of children in Polmont, call on these sections to commence immediately upon royal assent. Likewise, we welcome that the abolition of remand centres will now be confirmed by primary legislation.

Secure care (sections 20-23)

We are broadly supportive of these sections which clarify definitions and duties with regard to the provision of secure care in Scotland and ensures that all children who are detained in secure care are treated as looked after children and therefore

[32] Scottish Prison Service, 2023. *SPS Prison Population:* https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx

[33] CYPCS, 2022. Response to Children Care and Justice Bill Consultation, Page 8. https://www.cypcs.org.uk/resources/care-and-justice-bill-consultation/

[34] HMIPS, 2019. Report on an expert review of the provision of mental health services, for young people entering and in custody at HMP YOI Polmont. https://www.prisonsinspectoratescotland.gov.uk/publications/report-expert-review-provision-mental-health-services-hmp-yoi-polmont

extends to them the local authority duties within section 17 of the Children (Scotland) Act 1995.

We note that the changes in section 17(6) permit children to remain in secure care beyond the age of 18 years. General Comment 24 states that although children who are deprived of their liberty are to be separated from adults, this *"does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility".*[35]

Prevention of children being remanded or sentenced to Polmont HMYOI may result in an increase in the number of children in secure care however the aim should be to continue to reduce the overall number of children. We will continue to monitor the number of children deprived of their liberty closely.

Cross Border placements (section 24-25)

General concerns

We have long-standing concerns that the practice of placing children from England and Wales on Deprivation of Liberty orders in Scottish residential care settings 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. These children have been removed from the oversight of Scottish inspection/regulatory agencies; local authorities (including child protection, social work and education professionals); Children's Reporters; Police Scotland; health services; advocacy organisations; and members of the local Community Planning Partnerships.

On 23 June 2022, the Scottish Government introduced the Cross-border Placements (Effect of Deprivation of Liberty Orders) Regulations 2022 ("the Regulations").[36] The Regulations, which are now in force, make provision for Deprivation of Liberty orders made under the inherent jurisdiction by the High Court in England and Wales or by the High Court of Justice in Northern Ireland, to be recognised in Scotland as if they were Compulsory Supervision Orders (CSOs), subject to certain conditions. The Regulations allow for recognition of the Deprivation of Liberty order in Scots law for a period of up to 3 months. Where the order is continued beyond that period, the order can continue to be treated as if it were a CSO for renewable periods of up to 3 months (Regulation 5).

[35] UN Committee on the Rights of the Child. *General Comment 24.* https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsqIkirKQZLK2M58RF%2F5F0vEnG3QGKUxFivhToQfjGxYjV05tUAIgpOwHQJsFPdJXCiixFSrDRwow8HeKLLh8cgOw1SN6vJ%2Bf0RPR9UMtGkA4

[36] https://www.legislation.gov.uk/ssi/2022/225/contents/made

In our written[37] and oral evidence[38] to the Scottish Parliament's Education, Children and Young People Committee, we set out our clear view that the Regulations fall short in the following key ways:

- They do not provide for any equivalent protections in terms of legal process which would align with those experienced by a 'Scottish' child deprived of their liberty.
- They do not place any statutory constraint or limit on the residential units into which the child may be placed (for example by requiring them to comply with the same or analogous standards as the Secure Care providers).
- They do not make provisions for the involvement of Scottish public authorities in an assessment of whether the placement meets the child's needs and whether their rights in domestic law are being upheld.
- While they provide access to Scottish advocacy, they provide no guaranteed right of access to legal advice and representation and therefore no support to challenge failure to respect their rights in terms of Scots law.

We remain concerned that 9 months since coming into force, the Scottish Government have yet to produce any evaluation of the Regulations, including disaggregated data on the number of children subject to Deprivation of Liberty orders who have been placed in Scottish residential care settings under the Regulations. While the Nuffield Family Justice Observatory has produced high level data trends on the number of applications before the High Court of England and Wales National Deprivation of Liberty Court, we note that this data does not give a clear picture on the number of applications which relate to children placed in residential care settings in Scotland.[39] There is clear need for publicly accessible and robust quantitative data, and also qualitative research on the experiences of children who have been placed in residential care settings in Scotland from other jurisdictions. This is vital to ensure transparency and accountability. We are aware of 19 placements made since the regulations came into force in July, a doubling of the rate, but cannot say for certain if we have received notification of all the orders made.

We continue to hear examples of children from England and Wales who have been deprived of their liberty in Scotland under conditions which have not fully respected their rights under the ECHR and UNCRC (particularly in relation to their rights to education and to the highest attainable standard of health).

In particular, we have been made aware of examples of children living in dire placements in Scotland, who are subject to final High Court authorisations of their detention. These children have not had any practical means to challenge their detention or gain access to information about their rights under Scots law. They have no access to an English solicitor, no access to a local Scottish lawyer, Guardian, or social worker. Owing to the distance of placements, the children have had little to no

[37] CYPCS, 2022. *Briefing for Education, Children and Young People Committee, Cross-border Placements (Effect of Deprivation of Liberty Orders)*. https://www.cypcs.org.uk/resources/the-cross-border-placements-effect-of-deprivation-of-liberty-orders-scotland-regulations-2022/

[38] 18 May 2022, Education, Children and Young People Committee. https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/rai-18-05-2022?meeting=13760&iob=124874

[39] *National deprivation of liberty court: Latest data trends – January 2023.* https://www.nuffieldfjo.org.uk/resource/national-deprivation-of-liberty-court-latest-data-trends-january-2023

facilitated contact with their family, in breach of their rights to family life protected by Article 8 of the ECHR

These issues raise urgent questions about how robust the safeguards contained in the Regulations are. In particular, we have no clarity on how the mechanism set out in the Regulations which allows for the Scottish Government to enforce the placing local authority's duties in relation to the child has been operating.

The Bill

In meetings with Scottish Government officials during the consultation stage, our office was repeatedly assured that the Regulations were to be regarded as a short term measure, with the current Bill representing the longer term 'vehicle' for addressing cross-border placements. We are therefore disappointed that the current Bill's provisions on cross-border placements lack detail, and do not appear to address all the concerns set out in our written and oral evidence on the Regulations, particularly as regards parity of protections.

In particular, we note that Section 25 is largely a framework provision, with further detail being added at a later date. Until such time, we assume that the Regulations will continue to be in force. For the reasons set out above, we do not consider this to be an acceptable position. The available evidence shows that children affected by cross-border placements are amongst the most vulnerable, with complex health and wellbeing needs.[40] It is vital that the above-mentioned concerns are addressed as a matter of urgency, and this Bill must be the vehicle for doing that.

We note that the scope of Section 25 of the Bill is limited. The main effect of the provision is to allow the Scottish Government to introduce regulations to recognise a deprivation of liberty order as though it were a CSO or ICSO. That would largely replicate the effect of the existing Regulations. While we note that Section 25(b)(iv) has the potential to place additional responsibilities on local authorities, for example in relation to the provision of education services, the lack of any further detail makes it difficult to effectively scrutinise at this stage.

Under Scots law, a child who is "looked after" by a Scottish local authority is automatically assumed to have additional support needs in terms of the Education (Additional Support for Learning) (Scotland) Act 2004 and must be assessed for a Co-ordinated Support Plan. However, children placed in Scotland from England and Wales are not automatically treated as having additional support needs. The Bill would not change this position and clarity is required on how a child will be assessed, and whether they can challenge any assessment or adequacy of provision to the Health and Education Chamber of the First-tier Tribunal for Scotland

We recognise that the underlying cause of the increase in cross-border placements stems from the chronic lack of suitable provision for highly vulnerable children, and insufficient social protection when children and families are first struggling with

[40] Roe, A, 2022 *What do we know about children and young people deprived of their liberty in England and Wales? An evidence review*. Nuffield Family Justice Observatory. https://www.nuffieldfjo.org.uk/resource/children-and-young-people-deprived-of-their-liberty-englandand-wales

trauma and extenuating needs in England and Wales.[41] While Scotland cannot legislate to address the chronic shortage of suitable provision in England and Wales, there are clear legislative measures which the Scottish Parliament can and must take to ensure parity of protection for children subject to deprivation of liberty orders who are placed in Scotland. In addition, the Scottish Parliament must act as a human rights guarantor and recognise that these children are now in Scotland, and accordingly Scottish public authorities' statutory and human rights duties are triggered.

Accordingly, we are of the view that substantial amendments to the Bill will be required to adequately address the issues raised above. We would propose amendments along the following lines:

- Section 25 of the Bill does not contain any time frames for how long a Deprivation of Liberty order is to be recognised for. In view of the emergency nature of these placements, any initial placement should only last for a maximum of 22 days (which would align it with a Scottish ICSO), pending a team around the child meeting involving the child, both local authorities and the health board which can provide the High Court with assurance that the placement is in the child's best interests and meeting their needs. Further recognition orders should be made up to three months (and up to a maximum of six months). This would address the problem of cross-border placements being allowed to 'drift on' without any opportunities for review.
- Within 72 hours of the child being placed in the Scottish care home, the receiving 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.
- The Bill 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.
- We suggest that the Scottish Parliament consider including a provision similar to that in section 7 of the UNCRC (Incorporation)(Scotland) Bill. We consider that this will ensure that children and young people have an effective remedy to challenge any rights violations.

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. We are therefore generally supportive of Section 24 of the Bill, which would regulate care services providing residential accommodation to children subject to a deprivation of liberty order.

In particular, we welcome the creation of a power, set out at Section 24(2) of the Bill, which would allow for the Scottish Government to prepare and publish specific standards and outcomes for residential accommodation where children subject to deprivation of liberty orders are placed. As we set out in our evidence at consultation

[41] Article 39's response to Scottish Government's Cross-border placements of children and young people into residential care in Scotland: policy position paper (28 January 2022). https://article39.org.uk/resources/article-39-publications/article-39s-response-to-scottish-governments-cross-border-placements-of-children-and-young-people-into-residential-care-in-scotland-policy-position-paper-28-january-2022/

stage,[42] these standards 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). This is vital to ensure parity of protection for children subject to deprivation of liberty orders.

Anti-social behaviour orders relating to children (section 26)

The section amends the Antisocial Behaviour etc. (Scotland) Act 2004 so that "child" means any person below the age of 18, bringing that legislation in line with the UNCRC. As outlined in the Explanatory Notes, the exception is with parenting orders, which will continue to apply only in respect of children under the age of 16.

Parenting orders are seldom used but they may have the potential to be a useful tool to support children to remain in the family home. We would welcome a review of the use of parenting orders as part of the wider ongoing work around support for children at risk of coming into conflict with the law.

Commencement (section 31)

The continuing imprisonment of children in Polmont HMYOI is unacceptable, particularly given the serious concerns which exist about the mental health support available. Given the Scottish Government's commitment to ending the imprisonment of children we feel that sections 16, 17 should come into force immediately upon royal assent. Although there has been substantial progress in reducing the number of children in Polmont over the last 12 months, the recent uptick in numbers demonstrates the need for immediate commencement[43].

In relation to cross border placements, our view is that sections 24 and 25 should also come into force immediately upon royal assent. Our view continues to be that the regulations introduced in 2022 fail to provide adequate human rights protections for children placed in Scotland from other jurisdictions.

For further information, please contact Megan Farr, Policy Officer at megan.farr@cypcs.org.uk or 07803 874 774 or Cameron-Wong McDermott, Policy Officer at cameron-wong.mcdermott@cypcs.org.uk or 07703 569 998

[42] CYPCS, 2022. Response to Children Care and Justice Bill Consultation, Page 13. https://www.cypcs.org.uk/resources/care-and-justice-bill-consultation/

[43] Scottish Prison Service. SPS Prison Population. 2023. https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx