

Who Cares? Scotland's Response to the Justice Committee Call for Evidence on the Children (Scotland) Bill

November 2019



Who Cares? Scotland [WC?S] is an independent advocacy and influencing organisation working with people who have experience of the care system. We provide direct advocacy to children and young people with care experience, as well as opportunities for local and national participation. WC?S aims to provide care experienced people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures and processes they are often subject to solely because of their care experience. At WC?S we ensure the voice of the care experienced population of Scotland informs everything we do as an organisation.

We welcome the new Children (Scotland) Bill (the Bill) and the Family Justice Modernisation Strategy (the Strategy) both as opportunities to modernise key aspects of family law. The changes proposed have the potential to ensure firstly that Care Experienced people have their voices heard and listened to by courts at any age within our court system and secondly that the relationships between brothers and sisters in care are protected, nurtured and remain lifelong. These are the two areas we will focus on in our response. However, we also replied to the Scottish Government consultation last year and would encourage the committee to read through this in full, in order to understand our members' views on a wide range of issues included in the Bill and the Strategy.¹

Voice of the child in court

From our advocacy work, we know that there can be a lack of consistent, high-quality practice in how courts involve children and young people in their formal processes, and this means they are often not listened to or included in decision-making. Article 12 of the United Nations Convention on the Rights of the Child states that children must be able to express their views and "...be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."² Therefore, for Scotland's legal system to be UNCRC compliant, ahead of incorporation of this set of international rights into domestic law, the court process must be transformed to ensure children and young people's views are at the heart of the decision-making process. This call for change is also made clear in a recent blog published by specialists on child participation rights, on the 'Children's Participation in Family Law' website.³

The creation of the Children's Hearing System in Scotland already recognises that a different approach is needed to hear from children and young people when making decisions about important changes to their life circumstances. Yet, there is no mainstreamed child-centred approach across Scotland's courts to ensure children and young people are heard within

¹ [Who Cares? Scotland \(2018\) Response to the Review of Part 1 of Children \(Scotland\) Act 1995.](#)

² <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

³ [Morrison, F., Friskney, R. and Tisdall, K. \(2019\) 'THE CHILDREN \(SCOTLAND\) BILL – PROGRESS TOWARDS COMPLIANCE WITH THE UNCRC?'](#)

court decision-making - the Bill and the Strategy are both excellent opportunities to remedy this.

Do you agree with the approach taken in the Bill to remove the presumption that a child aged 12 or over is of sufficient age and maturity to form a view?

We strongly agree with the removal of the presumption that a child must be 12 years old in order to form a view. As an organisation that provides independent advocacy to children and young people in care, we promote the fact that every child, regardless of age, has the right to form a view if they wish to do so. This is echoed by Care Experienced members of WC?S who were consulted last year on this area of the Bill. Those who answered this question unanimously voted for removing the age of 12 presumption.⁴

Discussions by members in favour of removing the presumption centred around the view that *“children should always be consulted and have their views heard in court”*⁵ and *“regardless of age, [you] should have a view of what happens in your life.”* One young person stated that *“they should have a say but be able to change their minds”*, recognising that views can change and develop over time. In one of the groups, they discussed the example of a baby, where one young person said that because they had no literal voice, *“the court should look at interactions of the child with the parent. How the child feels matters.”*

However, the removal of the presumption must come alongside new resources and approaches to facilitate participation from those under 12 to engage meaningfully with the court process and should not result in young children being expected to fit into a system designed for adults. We share the concerns of academics working in the field of child participation rights, that the Bill’s “introduction of ‘capability’ in Sections 11ZB(2) and elsewhere in the Bill pose a risk to particular groups of children (e.g. young children and children with learning disabilities).”⁶ This is why there must also be clear guidance on how a child under 12 will be supported to give a view and to understand whether they want to.

In relation to judging ‘capability’ and the context of when a child gives a view, members did have concerns, such as for working with very young children who they felt could be influenced by adults in their lives:

“If a child can’t hold a conversation, how can they properly express an opinion?”

“A 12-year-old shouldn’t necessarily be put in that position, it’s about maturity, can they manage it?”

“Young people have to be a certain age to be mature enough to have a say, 6, 7, 8 is too young.”

“A 6-year olds brain is like a ‘sponge’.”

“Whatever a 6-year-old is taught, that’s all they know.”

This illustrates the importance of employing a child-centred approach and building a relationship with the child, in order to understand family dynamics and the context of their lives when supporting the child to communicate their views to the court. It should not lead

⁴ [Who Cares? Scotland \(2018\) Response to the Review of Part 1 of Children \(Scotland\) Act 1995.](#)

⁵ Direct quotes from Care Experienced members of Who Cares? Scotland are included within quotation marks and italicised.

⁶ [Morrison, F., Friskney, R. and Tisdall, K. \(2019\) ‘THE CHILDREN \(SCOTLAND\) BILL – PROGRESS TOWARDS COMPLIANCE WITH THE UNCRC?’](#)

to cases where a child's view is automatically discounted from the court process and they are deemed without 'capability' altogether.

Do you agree that it should be left to the court to decide the most suitable way of obtaining a child's views?

This is difficult to answer if the process by which a court deems a 'suitable way of obtaining a child's view' is still unclear on the face of the Bill and within the Strategy. An agreed national approach for all courts should be established, to ensure all children, no matter where they happen to be living, have equal opportunity to express their views. This approach for courts should be developed in partnership with third sector organisations who specialise in supporting children and young people and importantly, be produced by children and young people who have had experience of sharing their views with courts. It is important that any approaches or agreed methods to obtain the views of children should be tested out to ensure they are effective, before implementing this nationally.

It would be concerning to allow individual courts to decide, based purely on discretion of professionals working in that court, their own approach to obtaining a child's view. We recognise that courts will need flexibility to adapt their approaches, as each case in court is unique and the range of children and young people involved will be wide and varied in age, capacity and maturity. However, leaving the court to decide without robust guidance and understanding of child-centred practice could rely on certain Sheriffs adopting a best practice approach voluntarily – rather than following a nationally agreed approach underpinned by the Bill and the Strategy. This is especially important when deeming if a child has capacity to form a view if under 12, as even with the presumption removed, there will need to be an agreed process which deems whether the child wants to and can express their views on a court case.

How do you think children should be given the opportunity to express their views?

Care Experienced members of WC?S have shared a range of ideas of how they want courts to better listen to and act on the views of children and young people. Firstly, it is important to emphasise that asking the child or young person to physically attend court and express their views is not often the best practice. Some members shared the emotions the child might be going through and that they should be supported in the process, potentially by not physically being in the court room:

"It's scary going to court, maybe someone could go for them to share their views."

"Can be traumatizing for children going to court, they need to be protected from this."

"Children shouldn't need to go to court. They could write down their views and opinions."

"Having to say in front of your parents that you don't want to see them is really difficult."

Instead, much of the discussion focused around how the child or young person could be supported by a trusted adult, with whom they had built a relationship, in order to communicate their views to the court in other ways:

"Before going to court, someone should get to know the child and get their views over time – like advocacy."

“Should be able to share your views with people you can trust.”

The child or young person being able to trust the adult supporting them was a recurring theme in discussion with members. There were comparisons to using a relationship-based advocacy model, which could be adapted for when children want to give a view to the court. It was stressed that for this kind of approach to work effectively, enough time must be given for the child to be informed appropriately in order to form a view and to build up the trust to express their views to the person supporting them.

There was also emphasis on those working for the courts to do more work to understand the perspective of children and young people during a case:

“Sheriff needs to have a deeper understanding of what it’s like to be that child, rather than just listening to the parents.”

“Every child deserves to be heard. They could have people from Who Cares? or the judge could talk to children separately and explain things in a way they can understand. “

This linked with one member’s suggestion to bring the court to the child, so that professionals involved could create a safe space that was comfortable for the child involved. One member suggested younger children could choose spaces they felt relaxed, depending on age, for example a soft play setting for a very young child.

Another member also highlighted that disability can be a barrier to communication and that *“there should be someone who understands and knows about disability to help the young person.”* Members also emphasised that children part of a sibling groups must be given their own opportunities to feed in their views, rather than, for example, relying on the eldest sibling to speak for younger children in the family.

A variety of methods to gain a child’s view and suggested professionals who could be involved in this were shared by members, to support a child’s voice be heard by the court:

- Cosy, safe, comfortable environment
- Art and creative methods
- Speaking to a judge directly
- Having a Safeguarder
- Having an Independent Advocacy Worker
- Via video, either to give views directly or recorded session of worker speaking to the child.
- Typing up your views on a computer
- Using story work methods
- Play therapists
- Using a lawyer
- Emailing the court
- Voice recording
- Emoji sheet
- Court liaison officer, there to represent young people in family court
- A Children’s Rights worker

There should be a varied suite of options and methods available to children and young people interacting with courts, in order to ensure as wide a variety of capacities and age ranges can be accommodated when feeding views into the court process. The committee must ensure in the implementation of the Bill, that children and young people are meaningfully involved in the development of these methods and approaches.

Relationships of brothers and sisters in care

Who Cares? Scotland has campaigned for decades for the rights of brothers and sisters in care to stay together and to be supported to keep their connections to each other throughout their lives. We urge the committee to recognise the importance of the changes which both the Bill and the Strategy seek to bring about in relation to prioritising the relationships of brothers and sisters. There has been a systemic failure to ensure Care Experienced people's Right to Family Life is upheld, as enshrined by Article 8 in the Human Rights Act 1998.⁷ We know first-hand from providing independent advocacy to children and young people in care for 41 years that the impact of being separated from your family can have lifelong consequences and is a form of loss, which is both avoidable and unjustifiably resource driven. In 2017, we created a report of Care Experienced members views on sibling relationships, which further highlights the lived experience of separation:

"When I was younger, I'd define my family as mother and brothers. It was worse being taken away from my brothers than my mother. The relationship with your mum, you can get that relationship back. With my brothers, it's difficult going back after six years – it's not something you can get over. There's so many things you miss."⁸

This is why we are a core partner of the voluntary and award-winning coalition '[Stand Up For Siblings](#)' (SUFS). We work with this group to connect our members with opportunities to share their lived experiences and their ideas on what needs to change in order to strengthen this campaigning effort.⁹ We fully support the evidence submitted to the Justice Committee by the SUFS group and urge the committee to consider the response alongside our own, when considering the changes relating to brothers and sisters in care.¹⁰

Placing brothers and sisters together in care

The new duty on local authorities to place brothers and sisters in care together, as part of the Strategy, is an incredibly important step in ensuring separation of family does not happen unless in extreme safeguarding situations. The decision-making process behind placement decisions must be transformed in all local authorities in Scotland, so that separation becomes the exception rather than the rule. We have extensive evidence on the impact of separating brothers and sisters in care when this is not necessary to do so, both through members sharing their experiences and through our advocacy workers supporting children and young people in care.

"Lots of us know what it's like to be a sibling. "Borrowing" each other's clothes and watching your favourite TV shows together. I missed a lot of that. I want to make sure that when sibling groups are taken into care, everyone around them can honestly say that they did everything possible to keep them together."¹¹

⁷ [The Human Rights Act 1998](#)

⁸ [Who Cares? Scotland \(2017\), Young Radicals Report: Sibling Separation and Contact.](#)

⁹ Members of WC?S in 2018, shared their stories with SUFS [through a blog](#) and [a video](#), which we suggest the committee views to further understand the lived experience of sibling separation.

¹⁰ Stand Up For Siblings (2019) *View of the Stand Up For Siblings coalition on the Children (Scotland) Bill and family Justice Modernisation Strategy.*

¹¹ [Many of our members have shared their stories of separation from brothers and sisters, such as Chloe, in a blog on our website.](#)

We understand that the amendments to Looked After Children (Scotland) Regulations 2009, where this new duty will sit, will come into force at the same time as the Bill. Therefore, whilst we recognise that the financial memorandum provided applies only to the provisions of the Bill and not the Strategy, there must be recognition of the significant financial investment local authorities will need to implement co-placement of siblings as the new norm. This includes costs of changing the culture and practice of those placing children and young people into care and the physical resourcing of more care placements for sibling groups. In the current system, around 40% of children in adoptive or permanent fostering families are living apart from all of their birth siblings, with around 70% separated from at least one of their birth siblings.¹² This research from 2017 shows that even within fostering and adoption processes alone, the numbers of siblings being separated are large¹³ and this will take time and concrete resources to reduce.

We urge the committee to scrutinise the resource implications of implementing this new duty as part of the 2009 Regulations, otherwise this could fail to create real change. There must also be accountability alongside the new duty, for local authorities to record and publish numbers of sibling groups separated when placed into care.

‘Contact’ with siblings: Do you agree that local authorities should be required to promote contact between a child and any siblings or other people with whom the child has a sibling-like relationship?

Yes. We strongly agree that local authorities should be responsible for promoting and maintaining relationships between brothers and sisters, in the (hopefully rare) cases where sibling groups have to be separated for safeguarding reasons. This must be the responsibility of local authorities to resource, in order to ensure that ‘contact’ is high-quality, tailored to the family involved and remains consistent throughout their lives.

Members have shared that a ‘sibling’ should be defined by the child or young person involved and not by the adults in their lives. This includes any relationships the children or young people involved deem as ‘sibling-like’, which can be formed through shared experiences. In the consultation carried out with members last year, one young person described that *“family doesn’t just mean one thing”* and it was clear throughout the workshops that these relationships are different for each young person and are not always biological.¹⁴ This is why we welcome the more inclusive definition of ‘sibling’ included within the Bill. As one young person living in residential care stated: *“No-one should say who is your family. It’s up to the person. Family isn’t blood, it’s trust”* and explained they had been told to think of the other young people in their unit as *“just people you live with.”*

The current construct of ‘contact’ for children and young people in care is often defined by the capacities and resources of adults in their lives and professionals working within the care system and not by what they need to maintain connections with those they love and care about.

¹² [Jones, C. and Henderson, G. \(2017\) Supporting Sibling Relationships of Children in Permanent Fostering and Adoptive Families.](#)

¹³ *Ibid.*

¹⁴ [Who Cares? Scotland \(2018\) Response to the Review of Part 1 of Children \(Scotland\) Act 1995.](#)

“When I left care, I didn’t see my younger brothers and sisters. It would have helped if social work had made more of an effort and didn’t stop me coming to contact because I was a care leaver.”¹⁵

Many Care Experienced members shared experiences in the consultation response, of how ‘contact’ happens.¹⁶ The role of staff and social work in contact processes was commented on, one young person said: *“lack of staff should not be used as an excuse, staff is not an excuse.”* There was a perception that arranging and supporting contact is an additional expectation for staff, with one person sharing that they felt professionals *“just care about getting stuff done.”* Another member shared that there should be *“more expectations on social workers to facilitate contact.”* Yet, social workers, as the key professionals in deciding whether contact happened, were also perceived as having *“too many cases, so contact is pushed aside and not a priority”*. This created a sense of not being valued and that *“kids are seen as just a number.”*

One group of young people during the consultation spoke about how being allowed more contact with family members was a predictor of bad news coming from social work or the professionals in their lives. They perceived contact being used as tool by professionals and that *“extra contact is used as a way to break bad news.”* A couple of members raised issues around seeing those they are close to on Christmas Day and over weekends, which can be difficult due to staff capacity and shift patterns.

The instability and varied frequency of the types of contact they had experienced came through significantly, for example: *“I only see him face to face every three months”*. One young person said, *“it always changes”* and that they needed to *“chase it”* to make sure it happened. This discussion prompted one young person to share their story: *“I had to go to church to have contact with my wee brother.”* This was not formally arranged contact through the courts, but members have shared that ‘contact’ can be about communication, maintaining relationships and keeping in touch with people more generally – rather than being part a formal process. As one young person put it: *“a facetime call more often can mean a lot to a person.”*

Communication about relationships is key and members have shared that there can be a complete lack of communication about what is happening to family members and those they have relationships with, as there can be confusion about why a relationship has been deemed unsafe or unable to continue – instead the ‘contact’ just stops or slowly declines in frequency. We acknowledge there will be circumstances which arise where remaining in touch with someone may become unsafe or not possible – but this must be explained and also revisited if the situation is able to change in the future and can result in them being able to get back in touch. The drawing of a sibling by one member, ‘Case Study 1’, illustrates the impact of ‘contact’ not being promoted and maintained.



Case Study 1

During the consultation with members in 2018, one young person drew her younger sister who she doesn’t get to spend as much time with as she would like. The young person was visibly upset by this, and therefore didn’t want to share much in terms of discussion.

¹⁵ [Who Cares? Scotland \(2017\), Young Radicals Report: Sibling Separation and Contact.](#)

¹⁶ [Who Cares? Scotland \(2018\) Response to the Review of Part 1 of Children \(Scotland\) Act 1995.](#)

Through our advocacy experience, we understand how the relationships between siblings in care can be treated and understood by professionals. In both case studies included below, the provision of independent advocacy was key to ensuring that sibling contact and relationships were maintained and promoted. Our hope is that this new duty will mean advocacy workers no longer need to advocate for the rights of children and young people affected by the care system to be a part of each other's lives when they are separated. The first case study highlights the complexities around further siblings being born after children come into care and the second case study illustrates how sibling relationships can become estranged and deprioritised in the lives of the children and young people involved.

Advocacy Case Study 1¹⁷

An advocacy worker was working with two young people in foster care. Their Mum was expecting a baby and they wanted to meet the baby when born. The advocacy worker contacted the social worker to ask for the two young people to be able to visit their baby sibling. The social worker discussed the concerns they had about the young people seeing their baby sibling and referred to research which stated that it could be detrimental to the young people to introduce them to the baby. The baby might not remain in the care of its Mum, thus the young people could experience loss. The advocacy worker argued on behalf of the young people, stating they had capacity to understand the current situation and the social worker should meet with them to discuss this.

After the initial parenting assessment, the baby moved home to live with their Mum. The young people met their baby sibling once, then they didn't see them for a few weeks. It was decided that they could see the baby once every six weeks.

The young people had both a Children's Hearing and a Look After and Accommodated Review coming up in the space of two days of each other. When they met their advocate individually, they each commented that they wanted to see their baby sibling more often. One young person said, "I feel like my baby [sibling] doesn't recognise me and that makes me sad." The other young person said, "my baby [sibling] changes so much in 6 weeks [they] always looks different."

It was decided at the Looked After and Accommodated Child Review that the young people would see their baby sibling every two weeks when they had supervised contact with their Mum. Both young people were really happy about this. They came up with suggestions for activities and things to do during their time together with their Mum and baby sibling.

Advocacy Case Study 2

An advocacy worker was supporting a young person in foster care. The young person explained that they had three younger siblings, each living in different foster placements across Scotland. The young person did see one of his younger siblings once every couple of months, but they hadn't seen the other two siblings in five years and wished to do so. The advocacy worker then started advocating for the young person to meet his other two siblings. This was raised with the social worker and then a review was held, where the young person could express their views about wishing to see their siblings.

The professionals involved in the meeting gave several reasons as to why the siblings hadn't seen each other in five years. Reasons given were:

¹⁷ Gender has been anonymised to protect the identity of those involved in the advocacy case studies.

- *Breakdown in placements meant the children were unsettled so it wouldn't be in their best interest to meet at that time.*
- *The younger siblings hadn't expressed an interest in seeing their older sibling.*

During this time, the advocacy worker was also asked to support one of the younger siblings involved, and this young person also asked to see all his siblings. At the time of meeting the advocacy worker, this young person did not see any of the sibling group.

The advocacy worker was able to advocate on behalf of both the young people in the sibling group. Two of the four siblings finally met each other for the first time in five years and a couple months later, the initial young person met his youngest sibling. The arrangement currently in place for the four siblings is that they each see one sibling once a month. This means they see each other four times in total, over a year long period.

The experience of advocacy we have, and the views Care Experienced people have shared with us, show how current 'contact' arrangements can be difficult and can negatively impact children and young people. These experiences should be learned from, to create a more holistic and positive approach to promoting and maintaining sibling-like relationships.

We would be concerned if the approach involved utilising the current model used for parental contact, to include sibling relationships. This is because Care Experienced people want the very idea of 'contact' to be expanded away from a formal process of seeing someone for an hour a month, to an approach which looks at the strengthening and maintaining of connections and loving relationships, when these are safe to continue. Quality time to build bonds and share family life together are key for children and young people, who are cared for away from their closest connections and family members.

Instead, the approach local authorities adopt in 'promoting' sibling relationships must be centred around what the child or young person involved needs to make this happen. Every child or young person will want to engage differently with their family and with those they hold close relationships with, and members have emphasised that this should not be dictated by someone else's view. Members have shared that social media and other forms of communication should and can be used to ensure relationships are maintained, in addition to physically meeting up.

Financial Memorandum

A new approach to maintaining sibling relationships means significant financial resources will need to be set aside by local authorities to maintain the relationships of Care Experienced people living apart from their family members and those they have close connections to. There can be concrete financial barriers to facilitating high-quality opportunities for brothers and sisters to be together, especially if they live far apart. Again, it is important that there are varied methods available for maintaining relationships. Therefore, we are greatly concerned by the lack of resource included in the financial memorandum to support local authorities to implement this new duty. Instead, it currently states that: "Local authorities are already bound to implement their duties under Article 8 of the European Convention of Human Rights to protect the rights of children to family and private life which would include promoting contact. There is no new burden created by these duties but the provisions give greater prominence of the requirement to do so..." We urge the committee to question the feasibility of the new duties to promote contact becoming a reality, without a further investigation into cost implications.