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- Individual
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- Yes
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Response to the Scottish Government Children's Care and Justice Bill Consultation on Policy Proposals

June 2022

[Who Cares? Scotland](#) is Scotland's only national independent membership organisation for care experienced people. Our mission is to secure a lifetime of equality, respect, and love for care experienced people in Scotland and we currently have over 3000 members. At the heart of Who Cares? Scotland's work are the rights of care experienced people, and the power of their voices to bring about positive change. We provide individual relationship-based independent advocacy and a range of participation and connection opportunities for care experienced people across Scotland. We work alongside Corporate Parents and various communities to broaden understanding and challenge stigma faced by care experienced people. We work with policy makers, leaders, and elected representatives locally and nationally to shape legislation, policy and practice. We do this collaboratively to build on the aspirations of [The Promise](#) and secure positive change.

This response provides comment on proposals from the Scottish Government for [a new Care and Justice Bill](#). This is an important opportunity to create policy reform to improve the youth justice and care systems in Scotland. Below are key messages from our response.

Children and the criminal justice system

- We support moving away from adult criminal courts for children who come into conflict with the law, including the option to use the Children's Hearings System as an alternative.
- Alternatives to YOIs should be community-based disposals, with secure care used only as a measure of last resort and for the shortest appropriate time, ensuring rights are fully upheld.
- Every child referred to the CHS for an offence must understand the process and their views must be included in decisions made about offending behaviour.
- There must be clear access to legal advice and representation, including access to legal aid and funding for any child in care and justice systems.
- Independent advocacy must be available, alongside skilled legal professionals who specialise in criminal and human rights law, to realise children's Article 12 rights.
- As an independent advocacy provider we do not see an adequate level of support being provided for young Care Experienced people who have been sentenced or are on remand.

Secure care

- Any decision to deprive a child of their liberty must be done in an environment that is nurturing and supports rehabilitation, while upholding the children's rights.
- No child coming into conflict with the law should be placed in prison or a YOI. Instead, they should be able to access therapeutic services, in an environment which allows rehabilitation.
- Secure care is more capable than Young Offenders Institutions of respecting, protecting and fulfilling the rights of children (including Article 37 of the UNCRC, and Article 5 ECHR.)
- However, further work is needed for secure care to be a truly rights-respecting service for all children and young people deprived of their liberty.
- The definition of 'secure accommodation' must be updated, this must be carried out with children, young people and adults who have experience of secure care.

- Any changes to the use and purpose of secure care must be co-designed alongside Care Experienced people who have lived in, or still live in, secure settings in Scotland.
- Current pathways for children to be placed in secure care are too complex and need to be simplified and fully understood across services. This will also help to clarify the purpose of secure care and what the service can offer to young people, including how it meets children's rights.
- Secure transport must be better regulated, current transport arrangements are not trauma-informed or rights respecting for children who enter and then live in secure care.
- Only where there is a lack of alternatives to detention, all children who are on remand or sentenced should be able to remain in secure care beyond their 18th birthday if they choose to, as well as all young people in secure for their own safety who make an informed choice to stay in this placement with legal authority once they reach 18.
- It is in the best interests of a young person on remand or serving a sentence to stay in a more therapeutic environment once they turn 18, than to be moved to an adult prison.

Residential care and cross-border placements

- For children in cross-border placements, it is vital they are offered a local independent advocacy worker to realise their right to be heard, under Article 12 UNCRC.
- We want to see children and young people in secure or residential care afforded the same protection from physical punishment as children living at home with their parents or carers.
- A national set of standards for residential care would allow a high bar to be set for residential provision.
- We want to see stronger oversight, monitoring and accountability role for the Care Inspectorate to regulate residential placements across Scotland.

Age of criminal responsibility

- We are in favour of the MACR being reviewed as soon as possible, before the 3-year statutory review period.

Consultation response

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

Yes

- If yes, which option(s)?

Options 1 and 3

Please give reasons for your answer, including any positive or negative implications of any of the proposals.

Options 1 and 3 should be further explored as we think they are the most rights-respecting, age-appropriate and vitally, legally enforceable options proposed. They allow the CHS to support children for longer, rather than them needing to go through adult courts once reaching a certain age.

This is in line with UN Committee on the Rights of the Child's General Comment 24 (2019) on children's rights in the child justice system (CRC/C/GC/24) (p.7), which states that 'the child justice system should apply to all children above the minimum age of criminal responsibility but below the age of 18 years at the time of the commission of the offence' and 'child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process.'

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fG%2f24&Lang=en

As an experienced advocacy provider for over 40 years, we know these options are most likely to safeguard and support Scotland's children towards positive outcomes and destinations. As we set out in our response to the public consultation on this issue in October 2020, 'this proposed change to the age of referral has the potential to shift culture and practice increasingly towards one which recognises the importance of providing support, guidance and legal protection for as long as possible in a child's life.'

<https://www.whocaresscotland.org/wp-content/uploads/2020/10/Response-to-Raising-the-Age-of-Referral-to-the-Reporter-Consultation-Oct-2020.pdf>

However, assessment to use a Compulsory Supervision Order beyond 18 must be considered case by case based on the child's needs. A CSO is an invasive legal order in a child's life and must be carefully considered by panels as to whether it would continue to be necessary for a young person.

We don't think Option 2 should be considered any further, as 'promoting wider use' of discretionary powers will result in resource-driven decision-making and patchy support across Scotland.

For example, children no longer legally defined as 'looked after' before they turn 16 are not eligible for aftercare, although Aftercare legislation in Part 10 of the Children and Young People (Scotland) Act allows for local authority discretion in providing support. We know from our advocacy work that children whose CSO ends before they are 16 routinely do not have access to formal Aftercare support, missing out on many entitlements.

We also know that the overall implementation of Continuing Care and Aftercare support under the current legislation is patchy for eligible 'care leavers', as evidenced by CELCIS:

- https://www.celcis.org/application/files/5816/4751/7713/continuing_care_an_exploration_of_implementation.pdf
- <http://www.celcis.org/media/resources/publications/Throughcare-and-aftercare-in-scotlands-local-authorities.pdf>

Many young people who are legally eligible for support are not receiving a formal assessment for their needs. Clan Child Law notes this as an 'area of concern', that the 'failure to implement the right to Continuing Care is one area where we often see rights breaches', focussing 'decision-making on resources and capacity, and away from the individual needs of the young person.'

<https://www.clanchildlaw.org/blog/guidance-continuing-care-welfare-assessments>

Therefore, for options 1 and 3 to be effective, legislation to extend the support provided from the CHS for children turning 18 must be explicit about the rights to support which must be provided on an opt-out basis by the responsible local authority. These rights must be legally enforceable and compulsory for local authorities and related statutory services.

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 support the move away from adult criminal courts for children who come into conflict with the law, including the option to use the CHS as an alternative arena to support children who have committed offences. As the Children and Young People’s Centre for Justice (CYCJ) have made clear in their response, the CHS has a greater range of options available to support children who commit offences and means all children in these positions will have their welfare considered as a priority in any decision-making about their futures.

However, we would like to stress that if the CHS will be used as the predominate legal mechanism to receive more criminal cases where children have come into conflict with the law, there must be changes to the way it operates. In an adult criminal court, although not child-friendly, there is a clear right to legal representation for every young person. We would expect the same standard of ‘guarantees for a fair trial’ as set out in General Comment 24 (pp. 8-12) for children in the CHS, and the right to a fair trial (Article 6 of the European Convention on Human Rights) as protected by the Human Rights Act 1998.

This access to legal advice and representation must also include clear access to legal aid and funding. This should be made available via the Scottish Legal Aid Board, who are also a named Corporate Parent in Scotland. We have previously submitted evidence on the importance of legal aid to be considered in legal processes which children interact with here:

<https://www.whocaresscotland.org/wp-content/uploads/2019/09/Who-Cares-Scotland-Legal-Aid-Response-1.pdf>

As raised previously by Clan Childlaw, when children and young people try to gain legal representation for a hearing, the legal aid process currently requires lawyers to demonstrate there is a legal issue before aid will be granted. This assumes that children’s hearings are not equivalent legal decision-making bodies and that their decisions have less legal status than decisions about adults made in the court system. These are legal decisions which have lifelong impact and the option to access the right to child-centred legal support should always be made available and affordable for those that want it:

<https://www.clanchildlaw.org/Handlers/Download.ashx?IDMF=3a0091dd-20a7-4cb9-939a-d07e5cba8ab7>

We also have knowledge of practice in the CHS in the past where children who have been referred to the Reporter on offence grounds have not understood that decisions made via the CHS can result in a criminal record. All children and young people must have an understanding that convictions received at a children’s hearing can result in a long-term criminal record that could appear on a Disclosure check. All professionals involved in the CHS must also be aware of the consequences of dealing with offences via the CHS instead of a criminal court: <https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-response-to-consultation-on-PVG-Remedial-Order-2018-Nov-17-1.pdf>. The UN Committee on the Rights of the Child recommends the removal of children’s criminal records when they reach 18 (see General Comment 24).

In line with the Scottish Government’s implementation plan to Keep The Promise and Sherriff Mackie’s review of the Children’s Hearings System, any move towards children who come into conflict with the law being referred to the Reporter instead of tried in a criminal court must also include clear legislation that supports the realisation of Article 12 of the UNCRC to participate in decision-making processes. For every child being referred to the CHS for an offence, we must ensure they understand the process and that their views are included and listened to explicitly in hearings about offending behaviour.

The provision of the right to independent advocacy, alongside skilled legal professionals who specialise in criminal and human rights law, will be key in realising children's Article 12 rights. As an advocacy provider, we have extensive experience of working closely in collaboration with legal professionals to provide high-quality support to uphold the rights of young people in the CHS.

Panel members in the CHS, Reporters and any service providing advocacy or legal advice and services, must all receive adequate specialist training and upskilling to support young people referred, who would currently be tried via the Scottish criminal courts. This is especially important for offences which result in the longest sentences, or which are the most serious in risk and harm.

Question 9: Should any of the above options be considered further?

Yes

- **If yes, which option(s)?**

Option 4

Please give reasons for your answer, including any positive or negative implications of any of the options. We are particularly interested in implications for people who have been harmed

Yes, Option 4 should be considered in order to Keep The Promise. See answer to question 8 for potential implications of creating an alternative process to traditional criminal court settings.

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

Yes

Please give reasons for your answer

We support ending the use of prisons and YOIs for children, and the Children's and Young People's Centre for Justice (CYCJ's) response that alternatives to deprivation of liberty – 'community-based disposals' – must be implemented. Secure care should be used only as a measure of last resort and for the shortest appropriate period of time.

We think secure care is more capable than YOIs of respecting, protecting and fulfilling the rights of children, including implementing Article 37 of the UNCRC, and Article 5 ECHR. Article 37 states that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.'

However, we do not want to see this policy change result in a large expansion of the secure care estate in Scotland. We set out below that UNCRC and ECHR rights in secure care must be urgently reviewed, without delaying this necessary policy change to Keep the Promise.

The leading principles for the use of deprivation of liberty of children, as well as the procedural rights and rights about treatment of children and conditions for detention in Article 37 UNCRC must be front and central. The principles include:

'(a) the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; and (b) no child shall be deprived of his/her liberty unlawfully or arbitrarily.' (General Comment 24 p.14).

We fully support the intention of The Promise Scotland (p.91) to end the use of Young Offender's Institutions for all children: 'Young Offenders Institutions are not appropriate places for children and only serve to perpetuate the pain that many of them have experienced. There are times where it is right for children to have their liberty restricted, but that must only be done when other options have been fully explored and for the shortest time possible and in small, secure, safe, trauma informed environments that uphold the totality of their rights.'

<https://www.carereview.scot/wp-content/uploads/2020/02/The-Promise.pdf>

Any decision to deprive a child of their liberty must be done so in an environment that is nurturing and supports rehabilitation, while protecting and upholding the child's fundamental human rights. We have extensive experience providing independent advocacy to children living in secure units across Scotland and have specific contracts to provide advocacy for secure settings, such as Kibble, Good Shepherd, and Rossie Young People's Trust.

Our advocates tell us that our members experience these environments as better suited than prisons to provide supportive relationships and better outcomes, with specific services and child rights-based approaches. Secure units have mandatory education, a higher staffing ratio and better training for staff on vital areas such as trauma, compared to a YOI. We know that inappropriate detention of children alongside adults in Polmont YOI, for example, has flagged to the UN Committee Against Torture by the CYPCS, and health and wellbeing standards were found to be poor by HMIPS in 2019:

<https://www.cypcs.org.uk/news-and-stories/statement-on-hmips-inspection-report-into-polmont-yoi/>

We have extensive experience providing independent advocacy to children living in secure units across Scotland and have specific contracts to provide advocacy for secure settings, such as Kibble, Good Shepherd, and Rossie Young People's Trust. These environments are far better suited than prisons to provide supportive relationships and realise children's rights, with specific services and approaches in place for children.

Nevertheless, the provision of secure care needs further work to be a truly rights-respecting service for all children and young people deprived of their liberty, as per Article 20 UNCRC, including independent checks to hold duty-bearers to account. In June 2021, the Children and Young People's Commissioner Scotland (CYPCS) carried out an investigation into whether local authorities were complying with laws around placing children in secure accommodation:

<https://www.cypcs.org.uk/investigations/investigation-secure-accommodation/>

It found that some children's human rights had been breached because there was no evidence those children had been consulted following the decision of a children's hearing to authorise secure accommodation.

There was little communication provided to help their understanding about why they had been detained, and crucially, many had not been told about their right to appeal. A significant number of these children may have been unlawfully held for at least part of their detention. The Commissioner recommended that local authorities urgently ensure compliance with existing laws, and the Scottish Government reviews the law in light of The Promise and UNCRC Incorporation Bill implementation.

The Promise (p.83), which recognises that children in secure care must have their rights upheld, including access to healthcare, family contact and education. Some other rights we are concerned about in secure care include:

- We are concerned about continuing practices in secure care of restraint, placement in a dark cell (lights being turned off as punishment) and solitary confinement – disciplinary measures which violate Article 37 of the Convention (see p.16 of General Comment 24).
- During the Covid-19 pandemic, an advocacy worker supported children in a secure care setting in Scotland who were being forced to isolate alone for seven days upon arrival, as a blanket policy. Enforcing solitary confinement of a child should not be used for any child and any separation from others must be for the shortest possible time as a measure of last resort to protect the child or others, and under the close supervision of a suitably trained staff member (see p.16 of General Comment 24). We raised this rights issue with Scottish Government in April 2021 and the Covid-19 Residential Childcare Care Guidance was then not updated to include specific practice for secure care settings until July 2021.
- 'Not all secure Care Experienced Young People in Scotland have outreach access to sexual health care', according to a recent study by Dr Janine Simpson from NHS Scotland. All children have the

right to support they need to live and grow (Article 6 of the UNCRC) and the right to good quality healthcare (Article 24 of the UNCRC). Good quality support for sexual health is a key part of realising these rights.

<https://www.stor.scot.nhs.uk/bitstream/handle/11289/580326/Secure%20CEYP%20SHNA%202022%20Final.pdf?sequence=1&isAllowed=y> (p.10)

- Young people on remand who live in secure care can experience difficulties setting up a bank account, impacting on their rights to education (Article 28) and social security (Article 26 UNCRC). One advocacy worker recently supported a young person living in secure care who needed to physically visit a bank with a form of I.D. to set up an account. However, due to the conditions of their remand, they were unable to leave the safe centre they were accommodated in. This meant the young person was unable to receive their Educational Maintenance Allowance they were entitled to and the advocacy worker discovered this was an issue impacting other young people living in the secure care unit.

The Care Inspectorate which regulates secure care providers in Scotland should work with the CYPCS to urgently review UNCRC and ECHR rights in secure care, however, we do not believe that this should result in any further delays to this much needed policy change to Keep the Promise.

There must be inspection against and compliance with the Secure Care Pathway and Standards Scotland (<https://www.securecarestandards.com/>), which articulates what all children in or on the edges of secure care should expect across the continuum of intensive supports and services.

Any changes to the use and purpose of secure care must also be co-designed alongside Care Experienced people who have lived in, or still live in, secure settings in Scotland, in line with Article 12 UNCRC.

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

Please give reasons for your answer

As previously set out, no child that comes into conflict with the law should be placed in prison or a YOI. Instead, they should be able to access therapeutic services, in an environment which allows rehabilitation. Alternatives to YOIs should be community-based disposals and then secure care only as a measure of last resort, for the shortest appropriate period of time and where UNCRC and ECHR rights are fully upheld. This should be the case for all children, no matter the length or type of the sentence.

We also recognise that any inclusion of children in secure care who are serving significant post-18 custodial sentences and/or where behaviour poses the greatest risk means that placements such as secure care must adapt to ensure all children living in the environment are safe and supported. Our advocacy workers already see practice in secure placements in Scotland where children are housed in different units dependent on the risk factors and behaviours which led to their secure care, to ensure every child feels safe, supported and can thrive. and feel supported.

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

Yes

Please give reasons for your answer

- **If yes, please provide details of how could this be achieved**

Care Experienced people should have lifelong rights to support as needed, no matter their experience with the justice system. As an independent advocacy provider, we have supported young Care Experienced

people who have been sentenced or are on remand, and those who have finished their sentences and moving back into communities. We do not see an adequate level of support being provided.

For example, one advocacy worker shared that they were supporting a 'care leaver' aged 21. The young person had recently left prison and was struggling to open a bank account as they had no valid form of I.D. The advocacy worker felt they were going in circles, because the bank would only accept a letter from the Job Centre or Doctor instead of a formal I.D. – yet the young person was also unable to receive benefits and support from the Job Centre due to this lack of identification. The advocacy worker was trying to help the young person to rebuild their life, but it proved extremely difficult, and they felt the young person had been left with no support to do this in advance of leaving prison. In these situations, the local authority responsible for providing Aftercare support should have been able to support the young person, as they were an eligible care leaver under Part 10 of the Children and Young People (Scotland) Act 2014 (the 2014 Act).

Another advocacy worker shared an example of a 17-year-old young person they were supporting, who had very recently been taken off their Compulsory Supervision Order. This young person was sentenced to 100 days in a YOI and had previously been living in residential care. The advocacy worker was told that the residential home would be giving up the young person's bed and that they were unsure what to do with the young person's belongings. This was explained as necessary due to a waiting list of other young people needing to be placed in the residential house. Due to the short sentence, the advocacy worker was concerned that the young person's rights to Continuing Care were not being respected, and that they may be left without a home to return to once serving the sentence. The young person's rights to Continuing Care are protected by Part 11 of the 2014 Act.

It is clear from just these two examples that the Aftercare and Continuing Care rights of 'care leavers' impacted by remand and sentencing have not always been respected.

This is compounded by the issues we set out in our answer to Question 7 around rights breaches in the failure to implement the right to Continuing Care, and the legal gap many previously looked after young people experience by not being eligible for aftercare if they left care before their 16th birthday, in Section 66 of the Children and Young People (Scotland) Act 2014, and older Care Experienced people experience with the age cap of 26 (Section 67 of the Act).

A strengthening of rights to lifelong support for Care Experienced people would advance equality for Care Experienced people as a community of rights-holders, ensuring equal opportunity to access their human rights in areas such as housing, education, aftercare support, financial support and mental health support.

Question 15: Do you feel that the current definition of “secure accommodation” meets Scotland’s current and future needs?

No

Please give reasons for your answers

- **If no, please provide details of how this could be changed**

We believe the current definition of 'secure accommodation' must be updated and clarified to clearly articulate the purpose of secure care in a way that can be understood by young people, practitioners and the wider public. This must be carried out with children, young people and adults who have experience of secure care.

The definition should include the different pathways to secure care for children and young people and make clear the eligibility criteria needed. There is currently a stigma around the use of 'secure care', which can be viewed as a punishment for children and young people.

An updated definition must consider how to make clear that secure care is a therapeutic support service, rather than another 'prison-like' setting. Even though liberty is restricted, it should be seen as one of the alternative options to the setup of Young Offenders Institutions.

We would also like to see further exploration of why and how secure care is used for young people who are at severe risk due to their mental health, rather than being a risk to others. Currently, it is unclear how secure care fits with other therapeutic options such as secure mental health wards, and how it links with existing health services which specialise in mental health crisis.

We are also aware that secure care can be used due to a lack of suitable alternatives for a young person who is at serious risk of harm. We would like the Scottish Government to review alternative to secure provisions, such as Intensive Support services and specialist mental health interventions. We want to see a wider range of options for what could be provided for young people who currently come into secure care.

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

Yes

Please give reasons for your answer

- **If yes, please provide details of what this approach should look like**

Please see our answer to question 15 on the definition of secure care for more detail. The current pathways for children to be accommodated in secure care are far too complex and need to be simplified and fully understood across services. This will also help to clarify the purpose of secure care and what the service can offer to young people, including how it meets children's rights.

It is particularly important that any new approach for considering placement in secure care clearly articulates why and how secure care is used for children who are at risk due to severe mental health issues. A new approach must explore whether this service is being used because of a lack of suitable alternatives, such as therapeutic secure mental health wards.

We also want any new national approach on placement to include how the child's views can be fully embedded into decision-making, including clear understanding about whether they want to live in a secure unit. We know from advocacy practice that there are young people who choose to stay in secure care.

Question 19: Is provision needed to enable secure transport to be utilised when necessary and justifiable for the safety of the child or others?

Yes, secure transport must be better regulated. See our answer below.

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

Yes

Please give reasons for your answer

- **If yes, please provide details of these factors**

We are extremely concerned at the rights abuses taking place in the provision of secure transport, engaging Article 3 of the ECHR, on freedom from torture and inhuman or degrading treatment or punishment, and contrary to the procedural safeguards in Article 37 UNCRC, expanded by General Comment 24. Current practice does not Keep the Promise or uphold Secure Care Standards.

We have worked with Kibble Education and Care to hold a consultation with young people living in the safe centre on how they arrived at Kibble. From the views gathered, it is clear that current transport arrangements are not always trauma-informed or rights respecting for children who enter and then live in secure care. The majority of young people said either the police, or existing secure care transport

organisations (Wrixon Care, GEOAmev) took them to the Safe Centre. Several young people said they were handcuffed throughout the journey.

Journey times varied as some young people were being transported from the main campus at Kibble, others spoke of journeys lasting up to 8 hours to get there.

The young people were asked to explain what they knew about where they were going and why, when being transported to secure care. This question seemed to provoke a strong emotional response from most of the young people that gave a detailed answer. Eight of the young people felt they had been lied to about where they were going or the nature of why they were going to the secure centre. Two young people said they knew because their social worker told them, one knew because the court let them know, another said that their lawyer gave them 'two options', one secure unit or another one.

The theme of deception ran through more than half of the young people's stories about what they knew about their destination. Another young person described their experience of being transported to the Safe Centre on Christmas Eve: 'I woke up and (staff member) came into my room. He said do you want to go to McDonalds? I said, "Sound man, let's go". I put my best tracksuit on. On the journey there, he asked me "what are you getting?". I said, "A Big Mac mate". We were on the M8, then he passed by McDonalds. I said to him, "McDonalds is that way". He said, "You're going to secure mate."'

Despite the use of deception, some young people said they were able to figure out what was happening by the way it was done. Young people described various issues with their journeys to secure care, including not being given adequate toilet breaks, not receiving anything to eat for long periods of time and being too hot or uncomfortable during the journey: 'I hadn't had anything to eat that day. My mum told the police that. So, when we stopped at McDonalds, I thought I would get something to eat. But I didn't. It was just to change over. It wasn't until the next morning that I got something to eat.' They also described drivers speeding at high speeds on the journey or being unsafe in the way roads were being navigated. A couple of young people also described feeling fearful.

When asked what would make the experience better, some young people would have liked to have gotten some food for the journey or a drink. Some wished they hadn't been handcuffed; others wished there had been a USB port for their phone.

Others made observations about who they felt should have brought them to the Safe Centre and were clear about the reasons why. One person shared that their previous experience with the police meant it was difficult when they were the ones to take them to the Safe Centre and would have preferred their social worker to be with them instead.

The majority of the young people living at the Safe Centre feel they were deceived and brought there under false pretences. From their testimonies, it appears there was a lack of clarity on behalf of the young people and what they knew about where they were going and in some cases, why they were going there.

Current practice must change to prevent further rights abuses and to Keep The Promise. Any specialist transport provision to secure care must be designed alongside young people who have experience of secure care as per Article 12 UNCRC.

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?

Yes

If yes, for all children or only those who are remanded or sentenced?

All children

If yes, how long for?

For as long as the child's needs require it

Please give reasons for your answers

We need to carefully balance the following principles:

- Community support and ‘community disposal’ should be what we are striving for. There must be further investment in supportive intermediate settings so that young people leaving secure care are able to access the support they need. Children must not be held in secure care long-term because there are inadequate options for them within the community.
- Any care placement should be there for as long as is in the person’s best interests
- Deprivation of liberty is an extremely serious intervention in the private life of an individual and should only happen when there is serious risk of harm to the individual or to others. Any deprivation of liberty should be lawful and for the shortest appropriate period of time.

Only where there is a lack of alternatives to detention, all children who are on remand or sentenced should be able to remain in secure care beyond their 18th birthday if they choose to, as well as all young people in secure for their own safety who make an informed choice to stay in this placement with legal authority once they reach 18.

Before making any changes, the Scottish Government must clarify the lawful basis for extending a young person’s placement in secure care beyond 18. For children in secure due to offence grounds, there should be a clear lawful basis for a young person to have their liberty restricted if they have a sentence of a certain length. However, if a child is in secure for welfare reasons, we need to understand the legal basis to continue to restrict liberty beyond 18. How will the new Bill interact with current mental health legislation? For young people in secure aged 18+, the UNCRC will no longer apply, so ECHR rights must continue to be respected, protected and fulfilled.

The young person’s view on whether they want to stay in secure care beyond 18 should also be a central part of decision-making, with legal advice and representation when required. Young people should be made fully aware of the alternatives to secure care for their particular situation, including community support/disposal, through independent advocacy. This informed participation upholds Article 12 UNCRC. Independent advocacy and legal advice and representation should be available for all children in secure care, as they need it.

The Promise states: ‘Children who enter Secure Care must receive all that they need to support healing and rehabilitation.’ If an individual reaches the age of 18 and still needs support from secure care to continue, they must be able to access this as they grow older.

The Children and Young People (Scotland) Act 2014 (the Act) raised the age young people can stay in care to 21. The Act, and the accompanying Part 11 (Continuing Care) Guidance emphasises the importance of continuity of relationships and the expectation that ‘staying put’ in positive Continuing Care arrangements becomes the new ‘norm’ for Scotland’s looked after children and young people. The Promise states: ‘Children who enter Secure Care must receive all that they need to support healing and rehabilitation.’ If an individual reaches the age of 18 and still needs support from secure care to continue, they must be able to access this as they grow older.

It is in the best interests of a young person on remand or serving a sentence to stay in a more therapeutic environment once they turn 18 and have stability in their placement, than to be moved to an adult prison and experience a loss of relationships they have built.

Who Cares? Scotland advocacy workers have also previously advocated for young people who wanted to stay in secure care because they were settled, held good relationships with staff, and did not feel confident they would be able to be safe in another setting. If a young person was in this situation beyond their 18th birthday we believe it necessary and in their best interests to listen to their views and be able to accommodate their choice to stay in care, in line with Staying Put guidance:

<https://www.gov.scot/publications/staying-put-scotland-providing-care-leavers-connectness-belonging/>

Transitions to move on from a care placement must happen when a young person feels ready and at a pace which is appropriate for them.

The Promise (p.84) is clear that:

- Arbitrary age-cut offs must end, and practice should evolve to be flexible around an individual's situation based on the stage of life they are at.
- For young people in secure care who are leaving to live within the community, it is crucial that they are provided with the opportunity to make a graduated transition out of care with holistic support in place.
- Children leaving secure must receive support that ensures that the transition out of such a restricted environment happens with thought, planning and care (p84).

As previously stated, ongoing implementation issues with Continuing Care must also be addressed. There must be further investment in supportive intermediate settings so that young people leaving secure care are able to access the support they need. Children must not be held in secure care long-term because there are inadequate options for them within the community. Deprivation of liberty is an extremely serious intervention in the private life of an individual and should only happen when there is serious risk of harm to the individual or to others.

Local authorities are not obliged to provide Continuing Care to a young person if they were accommodated in secure care immediately before ceasing to be 'looked after'. We know that once young people become involved in the justice system, they can often struggle to access support.

Ongoing implementation issues with Continuing Care must also be addressed. Young people are frequently unaware of their right to Continuing Care and professionals are often unsure of how to implement this in practice. We know from our advocacy work that this can result in young people not receiving consistent information about their entitlements. The fact eligible young people must have been born on or after 1st April 1999, to benefit from Continuing Care is not consistently understood. The cut-off age for Continuing Care is also not understood widely or consistently.

Some local authorities are applying the legislation in an inflexible way, rather than honouring the principles of 'Staying Put' guidance. It is important this option is offered and properly explained to every young person turning 18 in secure care, as well as the option to receive independent advocacy.

- https://www.celcis.org/application/files/5816/4751/7713/continuing_care_an_exploration_of_implementation.pdf
- <https://www.whocaresscotland.org/wp-content/uploads/2018/12/WCS-Response-to-Continuing-Care-Scotland-Amendment-Order-2019.pdf>

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

Yes

Please give reasons for your answer

- **If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice**

A national set of standards would allow for a high bar to be set in terms of residential provision and can be useful tools for advocacy to ensure children's rights are met in any residential home. We believe that this would also help children know what they should expect in residential care and support the adults in their lives to champion their rights to the best possible standards of living.

Any pathways and standards must be rights-focused and take a human rights-based approach in how they are developed. This would include carefully developing the resource alongside Care Experienced people across Scotland. Such standards would also need to have a clear mechanism for enforcement and monitoring. They must also include accessible accountability mechanisms to be put in place if a provider failed to meet the standards, including child-friendly complaints mechanisms, as we know it can be difficult

for children to use formal complaints mechanisms currently in place via the Care Inspectorate and Local Authorities.

We would also like further clarity as to how a new set of pathways and standards for residential care would impact the experiences of young people living in cross-border placements. Any standards developed must also have coherence with existing legislation and policy guidance in Scotland to ensure they are enforceable and implemented fully. For example, linking clearly with the National Health and Social Care Standards in place:

<https://hub.careinspectorate.com/national-policy-and-legislation/health-and-social-care-standards/>

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

Yes

Please give reasons for your answer

- **If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice**

We would like to see a much stronger oversight, monitoring and accountability role for the Care Inspectorate to regulate residential placements across Scotland.

As recognised in proposals for the Bill, this is especially important for any new residential and secure care placements which are being created or are adapting to meet needs of children in cross-border placements. We are concerned about an unintended consequence of cross-border placements being that as residential placements decrease, a parallel increase takes place in the number of cross-border placements into secure care. The Scottish Government have recognised this, and we expect to see clear plans into how this will be prevented.

The Care Inspectorate need clear oversight of any provider moving to supply placements for such young people and this must include ensuring the standards across any registered residential placements are rights-respecting and in line fully with The Promise.

Any increased role for the Care Inspectorate must include robust methods to understand the experiences and perspectives of Care Experienced people living within residential care and other settings they regulate.

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

If yes, please provide details of how you think this should operate in practice

Who Cares? Scotland is a national independent advocacy organisation for Care Experienced people. We know from 40 years of experience that independent advocacy is essential for children to be able to have a voice in formal processes and their day-to-day care. For children in cross-border placements who have been removed from their local communities, it is vital they are offered a local independent advocacy worker to realise their right to be heard, under Article 12 UNCRC.

We have previously shared our views with Scottish Government on cross-border placements and reiterate again that cross-border placements must end. As long as they do exist, children in cross-border placements must have timely access to independent advocacy, which is specialist in nature:

https://www.whocarescotland.org/wp-content/uploads/2022/01/Cross-border-placement-temporary-legislation_WCS_Jan-22.pdf

Advocacy must take a human rights-based approach, by being relationship-based to build trust and empower children to share their views and feelings with their advocate. They must be independent from all service providers to assure accountability and integrity, working with children to enable them to fully

participate in decisions about their care and explain the formal complex processes around them in an accessible way.

Formal legal representation and advice must also be made available to children living in cross-border placements, which we know can work well in complement with an advocacy service.

We have found that when advocacy is explained by an advocate, uptake is almost 100% by children and young people compared to if it is offered by other professionals, such as a social worker or CHS panel member. With secure and residential care placements often being the most costly, there is a risk some providers or local authorities choose not to commission independent advocacy for the children and young people in cross-border placements.

While the Promise is clear that lifelong advocacy should be available for all Care Experienced people, children in cross-border placements in Scotland are not entitled to the same supports or rights as Scottish children. This runs contrary to the fundamental principle of universality of children's rights. A legal expectation on cross-border providers to commission advocacy is essential to upholding this group's human rights.

We have concerns about the continuity of relationships between a young person and their advocacy worker if the young person returns to England or Wales. An advocacy model for cross-border placements must take into account that Scottish and English advocacy workers building strong relationships with young people living in cross-border placements is key to good outcomes for the young person if they leave Scotland. Scottish advocacy workers commissioned to work in cross border placements will need specialist training on English law that applies to these young people and how some Scottish policy levers and rights they may normally utilise to support other children will not apply.

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?

Yes

- **If yes, please provide details of how this could be achieved**

We want to see children and young people in secure or residential care afforded the same level of protection from physical punishment as children living at home with their parents or carers. The current legislation and guidance on restraint is not explicit enough on how restraint can be used and creates ambiguity in practice.

Our evidence

Our Care Experienced members' experiences speak to the immediate and lasting impacts restraint practice can have.

These include:

- Triggering previous traumatic experiences of abuse
- The emotional impact of seeing those around you being restrained
- Physical injuries.

Our evidence from advocacy practice and from our Care Experienced members highlights that the practical application of restraint varies widely and can be used too often to manage behaviour and is used more frequently than required:

- For example, a young person has received advocacy support when they were injured during a restraint, which resulted in a carpet burn to the face. They saw restraint being used to prevent or in anticipation of possible violent behaviour. The young person felt that alternative ways of deescalating their behaviour should have been attempted and that the staff were too quick to use

physical restraint as a way of managing behaviour. The advocacy worker challenged the frequency of the use of physical restraint as it was felt by the young person that it was not being used as a last resort. – Advocacy Case Study, 2018

- ‘I was sitting eating... in a room. I wasn’t aware I wasn’t meant to be eating there and 3 staff came in and picked me up and carried me out of the room and then I got restrained for about 10 minutes or something. One staff member was holding me on my left arm, another was on my right arm, a third was on my legs and a fourth was on my feet. I was in a restraint on the ground. I got restrained for nothing. I’ve got a few carpet burns on my knee and they’ve ripped a hole in my trousers. When they finally let go of me a member of staff called me a ‘pleb’.’ – Account from a Care Experienced young person receiving advocacy, 2018.

Ultimately, we believe the use of restraint for behavioural management negatively impacts how children and young people in care can experience love and kindness from those who care for them. Care Experienced people have also shared with us that restraint practice is often carried out by staff who they felt were stressed or angry, and had options to deescalate the situation in more appropriate ways. We know how distressing restraint is for children and remain deeply concerned that they are not being consistently protected from violence.

Children’s rights

All children have a right to be protected from violence and pain-compliance techniques such as restraint, including under Articles 19 and 37 UNCRC and Articles 3 and 8 ECHR. In 2016, the UN Committee on the Rights of the Child’s Concluding Observations called on the UK to ‘abolish all methods of restraint against children for disciplinary purposes in all institutional settings, both residential and non-residential.’ Furthermore, it called for a ban on any technique designed to cause pain to children and that restraint in used as a last resort, used solely to ‘prevent harm to the child or others.’

In February 2019, Who Cares? Scotland gave evidence to the Equalities and Human Rights Committee on the Children (Equal Protection from Assault) (Scotland) Act 2019 that the definition of assault should include restraint used in care settings.

- <https://www.whocaresscotland.org/wp-content/uploads/2019/02/WCS-Evidence-for-EHRiC-on-Equal-Protection-from-Assault.pdf>
- <https://www.whocaresscotland.org/wp-content/uploads/2019/02/WCS-Supplementary-Evidence-on-Restraint.pdf>

The Committee responded that although the EPA 2019 would not cover the use of restraint in regulated care settings for looked after children, there would be further work undertaken to explore how the issue could be tackled further. In the Children (Equal Protection from Assault) (Scotland) Bill Stage 1 Report, the Committee stated: ‘We note the difference between the restraint used to keep a child from running into the road, or from reaching for a pan of boiling water, and the restraint described by Who Cares? Scotland and Amy-Beth Miah. Restraint in care settings is an area we believe requires much wider scrutiny, although we do not think that this Bill is the vehicle for that scrutiny.’

The need for clarity and scrutiny

Reports over the last 30 years have consistently highlighted the many concerns with restraint practice. Despite this evidence, the ‘Holding Safely’ guidance on restraint has not been updated since 2013 and we are still seeing that ‘restraint as a last resort’ is far too open to interpretation. In particular, guidance on restraint must be made clearer than permitting use in ‘reasonable circumstances’ as this language is not clear enough on what is acceptable and unacceptable practice.

Without clear law and guidance prohibiting restraint except in the most extreme cases where the child poses an imminent threat of injury to themselves or others, and only when all other means of control have been exhausted’ (UNCRC General Comment 24), we do not believe Scotland will see the necessary reduction in use to uphold children’s rights and ensure children in care feel safe and loved. In line with the 2019 Equal Protection Act, The Promise and Scotland’s commitment to the UNCRC, there can be no place for restraint to be used as a behaviour management tool in children’s care settings.

Therefore, we welcome action from the Scottish Government to create further protection and clarity of rights for Care Experienced people.

<https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2019/5/16/Children--Equal-Protection-from-Assault---Scotland--Bill-Stage-1-Report#>

We also welcome an investigation similar to that of restraint of children with disabilities in schools following the CYPCS' investigation and judicial review with EHRC in 2019 of restraint in secure care, and any national guidance must embed a human rights based response:

<https://www.cypcs.org.uk/news-and-stories/restraint-and-seclusion-are-still-real-issues-in-scotlands-schools/>

Data

The Promise is clear that Scotland must 'strive to become a nation that does not restrain its children' (p86). The recent 'Promise Oversight Board – Report One' stated that 'the lack of data available on how many incidents of restraint are taking place in Scotland causes us significant concern.

<https://thepromise.scot/assets/UPLOADS/DOCUMENTS/Promise%20Oversight%20Board%20Report%20ONE%20FINAL.pdf>

We agree with The Promise Oversight Board that the lack of progress on further regulation and exploration of the use of restraint in care is deeply concerning.

All restraints and use of seclusion must be recorded and reported by residential care homes, secure care settings, Young Offenders Institutions and health and education settings so that progress towards the cessation of the practice can be monitored nationally.

https://bettercarenetwork.org/sites/default/files/2022-05/promise_oversight_board_report_one_final.pdf

The consultation paper states that data on the use of restraint in secure care is not publicly available, and only selected cases are reviewed by the Care Inspectorate, while all services are required to record all restraint incidences. Article 37 UNCRC requires that 'States should record, monitor and evaluate all incidents of restraint or use of force and ensure that it is reduced to a minimum.' (General Comment 24 UNCRC).

Complaints

Finally, the current Care Inspectorate complaints process can feel inaccessible to young people. Many do not know they have the option to do so, do not know how to make a complaint, or are worried what the consequences for themselves will be if they make a complaint about the staff responsible for their care.

In order to implement the UNCRC in Scotland, we must empower young people to be able to raise issues about their care in confidence through a clear child-friendly complaints process, and ensure care providers are held accountable when necessary. Young people who are subject to poor restraint practice should be offered independent advocacy and financial redress.

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?

No

- **If no, what period do you think is appropriate?**
- **If a shorter review period, how should the Scottish Government to address the lack of review findings or data to inform such a change?**

We are in favour of the MACR being reviewed as soon as possible and would like to see it reviewed before the 3-year statutory review period. It must be reviewed sooner as we have significant qualitative evidence from Care Experienced people on the significant harm that criminalisation in childhood has.

Our evidence on the need for a higher MACR is available here:

- <https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Report-on-the-Criminalisation-of-Care-Experience-April-2018.pdf>
- <https://www.whocaresscotland.org/wp-content/uploads/2016/07/WCS-response-to-consultation-on-Minimum-Age-of-Criminal-Responsibility-June-16.pdf>

Care Experienced people have told us examples such as:

- Being stopped by the police because they know they are in care or they know their family
- A young person was charged with assault for pinching a boiled carrot at staff member with a spoon
- A young person was charged with criminal damage for smashing a plate: 'The police do get phoned when you are in a unit. Like if you were at home they wouldn't phone the police.'
- Staff may use the police as a threat to encourage certain behaviour: 'Staff working on night shift are quick to call police and this resulted in young people receiving charges. There is less staff on a night shift, so they feel more vulnerable. Night-time is a really vulnerable time for a young person when charged, they can't contact legal representation or get hold of advocates.'
- Of being treated as an adult or unfairly when coming into contact with the police and justice system:
 - 'They say if you're old enough to do all that I can speak to you like that' (14 year old female)
 - 'They treat you like you're 18, but you're not' (14 year old female).
 - 'When I got lifted the policeman grabbed me and slammed me into the ground' (16 year old male).
 - 'They always put handcuffs on really tight to antagonise people. They ask if you have any marks on you, but you don't get any medical help' (17 year old male).

The Promise (p86) states that children who come into conflict with the law need care and protection rather than punishment. The UN Committee on the Rights of the Child has called on States to follow the extensive scientific evidence about child development and raise the minimum age of criminal responsibility higher than the absolute minimum of 14 and setting an age of 15 or 16.

Scotland has intentions to be the best place in in the world to grow up but has a minimum age of criminal responsibility two years below the minimum acceptable international standard of 14. Scotland must review and raise the MACR with urgency to protect the current generation from a harmful justice system, reduce the impact of prejudice against care experienced people and to Keep the Promise.

Question 30: What, if any, do you see as the main equality related issues that you feel could arise from the proposals set out in this consultation?

Children with disabilities must be considered as an equality group who will be significantly impacted. Scottish Government must understand the support required for disabled children to access non-instructed advocacy.

There must be consideration as to how this law will interact with mental health legislation, as said above. This is especially important in light of the ongoing Mental Health law review to better incorporate UNCRPD.

Should you wish to discuss the contents of this response, please contact:

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