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CARES?**  
SCOTLAND

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# Care and Justice (Scotland) Bill

Response to Stage 1 Call for Views by the  
Scottish Parliament's Education, Children and Young  
People Committee

March 2023

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[www.whocarescotland.org](http://www.whocarescotland.org)

# Who we are

[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 nearly 4000 members.

At the heart of our 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.

## Summary

This response provides comment on the Scottish Parliament's Education, Children and Young People Committee's call for views on the Care and Justice (Scotland) Bill at Stage 1. This is an important opportunity to create policy reform to improve the youth justice and care in Scotland, which will have a big impact on many of our Care Experienced members.

Our response builds on [our response to the Scottish Government's public consultation last year](#). It has been developed by drawing evidence from our independent advocates who hold relationships and have experience of providing advocacy to children and young people who will be, or would have been, directly affected by the proposed legislative changes. We have answered only the questions most relevant to our evidence and expertise.

### Key messages:

- In order to Keep The Promise, we support the move away from adult criminal courts and Young Offenders Institutions or prisons for children who come into conflict with the law, using the Children's Hearings System instead. However, in order to uphold the UNCRC, the Bill should be amended to ensure specific provision of independent and relationship-based advocacy, and to clarify children's rights to legal representation. The Scottish Government must provide sufficient resource to support the expansion of the Children's Hearings System.
- Expanding the use of prohibitive orders and Movement Restriction Conditions with their current criteria could put children in vulnerable situations in a worse position than adults in current legislation. We are especially concerned about the impact of these orders on children's rights to privacy, advocacy and legal representation, and we believe that they will exacerbate stigma about children in care.
- Instead, the provision of community intensive support packages and a contextual safeguarding approach should be made more widely available. This would consider how child protection systems can address the harm young people face beyond their families by making people and places safer.
- We welcome the Bill's proposed changes to existing Criminal Justice and Procedure, however, we want to reiterate our call to the Scottish Government to review the minimum age of criminal responsibility as soon as possible.

- On secure care, the Bill should:
  - Clarify guidance on the use of restraint in secure care.
  - Specify that therapeutic services are part of the care, education and support required.
  - Specify that the right to advocacy and legal representation must be provided.
- The Care Inspectorate should work with Scottish Ministers and the CYPCS to urgently review UNCRC and ECHR rights in secure care, without delaying this much needed policy change to Keep the Promise.
- We are deeply concerned at the practice of English Deprivation of Liberty orders being used to deprive children of liberty in unregulated settings. In line with Keeping the Promise, cross-border placements must end. As long as they do exist, children in cross-border placements must have timely access to relationship-based independent advocacy and legal representation, which is specialist in nature.

## Response to Stage 1 consultation questions

### Children's Hearings System

#### **1. The Bill widens access to the Children's Hearings system to all 16 and 17 year olds. What are your views on this?**

We agree. As an experienced independent advocacy provider for over 40 years, we know that 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.'

However, the Scottish Government must provide sufficient resource to support the expansion of the Children's Hearings System to ensure policy aspirations can be delivered fully.

#### **2. The Bill suggests that the law should be changed so that most offences committed by 16 and 17 year olds will be dealt with through the Children's Hearings system in future. What are your views on this?**

We agree. In order to keep The Promise, we support the move away from adult criminal courts for children who come into conflict with the law, with the CHS as an alternative arena to support children. However, in order to uphold the UNCRC, the Bill requires amendment to ensure specific provision of independent and relationship-based advocacy, and to clarify children's rights to legal representation.

As the Children and Young People's Centre for Justice (CYCJ) made clear in [their response last year](#) to the Scottish Government's public consultation on these legislative proposals, 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 in line with the Kilbrandon principles which underpin the CHS.

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, relationships-based advocacy by skilled advocacy workers, 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.

With the CHS expanding, we expect the need for the national children's hearings advocacy scheme to grow, created by the Scottish Government in 2020 and since expanded to support siblings' participation rights and children and young people placed in residential settings in Scotland under Deprivation of Liberty Orders (DOLs).

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 [UN CRC 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 / ECHR) 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.

[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 a 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.

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.

We also have knowledge of past practice 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 (see our previous response on this [here](#)). 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).

### **3. The Bill makes several changes to Compulsory Supervision Orders. What are your views on these proposed changes?**

Expanding the use of (prohibitive orders and) MRCs could undermine the ethos of the CHS, and instead, the provision of community intensive support packages and a contextual safeguarding approach should be made more widely available ([CYPCS, 2022](#)).

The criteria for the new prohibitions and movement restriction conditions (MRCs) are vague and do not recognise that either of these orders could also amount to a deprivation of liberty, subject to the specific conditions. Notwithstanding the other significant human rights concerns including the child's right to privacy, advocacy and legal representation.

We are deeply concerned that these orders are founded in stigma about children in care, which is rooted in media and literary stereotypes which influence how we think, without us realising (see [Each and Every Child](#)). Tagging children is stigmatising and can affect the child's participation in school and play, as well as their ability to recover from trauma and rebuild relationships.

The criteria for an MRC also lowers the threshold of risk required, for example:

'Absconding, self-harm, causing physical or psychological injury to another person, physical, mental or moral welfare being at risk.'

We are deeply concerned at the subjectivity which will be required in determining these specified conditions, in particular 'moral welfare'. This order would not be effective in protecting a young person who is a risk to themselves.

These orders put the onus, or punishment, on the child to remove themselves from harmful or exploitative contexts rather than on the child protection system to address the harm in the first place. Our advocates working in secure care said their young people prefer for adults and the law to protect them rather than putting the onus back on them. In contrast, our Adult Support and Protection (Scotland) Act 2007 places banning or 'protection' orders on the person causing the risk, not on the person at risk, but requiring their consent. Why wouldn't we protect children in vulnerable situations in the same way as we do adults?

A breach of prohibitions would result in a review of the CSO which could result in additional or more restrictive measures (like a MRC or secure care order being imposed). There is no mention of any support or care plan that would be put in place to address the root of the problem.

A [contextual safeguarding approach](#) would instead consider how child protection systems can address the harm young people face beyond their families by making people and places safer. This can be by expanding intensive support packages (which increase young people's use of education, employment and health agencies) by design, community safety, situational crime prevention, as well as targeting places or people for a child protection assessment and intervention.

This approach should be built into the legislative framework, and relevant partnerships should be encouraged for social work and the police with other adults in the extra-familial contexts that use or own places and spaces where young people might encounter abuse, who can be part of contextual intervention planning. Clear contextual outcomes would be set and monitored (for more info see [here](#)).

However, if these orders are kept in the Bill, the legal safeguards for the child's protection, and special procedures (which will now apply to the new way secure care is defined as a deprivation of liberty and regulated by the Bill) will not equally apply to the new CSOs.

In practice, the rights to advocacy and legal representation are not consistently upheld in the CHS unless a secure care order is being considered, and there will be no automatic availability of legal aid.

The Bill also lacks legal safeguards such as determining whether the order is necessary, whether less restrictive options have been considered, and a review process to ensure compatibility with Articles 5 and 6 of the ECHR as protected by the Human Rights Act 1998.

Therefore, the criteria would need to be amended to ensure these legal safeguards and special procedures are in place so that these orders are properly considered measures of last resort, and an advocate and a lawyer are available on the same basis as they are for a secure care CSO.

#### **4. Do you wish to say anything else about the proposals to increase the age at which young people can be referred to a Children’s Hearing?**

We are concerned that the financial memorandum states that 17.5-years-old ‘is likely the practical cut-off for offence referrals as this will allow time for grounds to be accepted or established where required, any order to be made and services put in place.’ ([para. 13](#))

While on the face of the Bill, children can be referred up to 18, this last 6 months should not be discarded as lost time, as the child is a child under the UNCRC during this time and the relevant date in human rights standards is the date the alleged offence was committed.

The [Council of Europe’s Guidelines on child-friendly justice](#) emphasise the importance of dealing with cases involving children expeditiously, recommending ‘minors are treated more rapidly, avoiding undue delay, so as to ensure effective educational action.’

We note the duty of the Principal Reporter in Part 1, to provide supervision and guidance after children turn 18 up to age 19. The reference to a cut-off at 17.5 should be clarified as the Bill receives parliamentary scrutiny to address these concerns under the UNCRC.

## **Criminal Justice and Procedure**

#### **5. The Bill makes several changes to existing Criminal Justice and Procedure. These are related to raising the age at which young people can be referred to the Children’s Hearings System. Do you have any comments on these proposals?**

We welcome these proposals, but want to reiterate our call to the Scottish Government last year to review the minimum age of criminal responsibility as soon as possible.

#### **6. The Bill changes the law so that young people aged 16 and 17 who are accused of or found guilty of an offence can no longer be sent to a Young Offenders’ Institution or a prison. What are your views on these proposals?**

We fully support these proposals which will help to keep The Promise.

For example: ‘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.’ ([The Promise 2020, p.91](#)).

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 secure care environments as better suited than prisons to provide therapeutic support and rehabilitation, 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 CYPCCS](#), and health and wellbeing standards were found to be poor by HMIPS in 2019.

However, community-based alternatives to deprivation of liberty must be implemented. We do not want to see this policy change result in a large expansion of the secure care estate in Scotland, or a conversion of former prisons or YOIs into secure care centres. 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.

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.' The Promise (p.83) recognised that children in secure care must have their rights upheld, including access to healthcare, family time and education.

Notwithstanding, we will set out below that UNCRC and ECHR rights in secure care must be urgently reviewed, as part of this necessary policy change to Keep the Promise.

## Residential and Secure Care

### **7. The Bill changes the way in which secure accommodation is regulated. It would also introduce regulation for cross-border placements (for example, a child placed in Scotland as a result of an order made in England). What are your views on the proposed changes?**

#### **Secure accommodation regulation**

##### ***Definition and support***

We welcome the re-framing of secure care as being provided for the purpose of depriving children of their liberty, to ensure the necessary procedural safeguards to comply with Article 5 of the European Convention on Human Rights (which concerns the right to liberty). However, [paragraph 104. of the explanatory notes](#) states that:

'Existing secure accommodation settings are designed so that the children accommodated there cannot leave freely and can be subjected to continuous monitoring or surveillance.'

We suggest that any future statutory guidance reflects the reality of 'move on' programmes (eg. at Kibble), where safe implementation of overnight stays at the child's next home are trialled.

We also 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 (see rights concerns outlined below). This Bill currently misses an opportunity to clarify guidance on restraint. For more evidence, see [our response to the Scottish Government last year](#).

Lastly, we recommend that the Bill should be amended in Section 23 to specify:

- That therapeutic services are part of the care, education and support required.
- That the right to advocacy and legal representation must be provided.

We also welcome that children detained by order of court in criminal proceedings will now be treated as 'looked after' by the local authority, including eligibility for after-care, financial support for education or training and case review.

We 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. One advocate said 'key to this is the secure care ethos of focusing on young people's level of need, rather than deed.'

### ***Standards and regulation***

We welcome the regulation by Scottish Ministers and the Care Inspectorate where services 'must provide the kind of care, education and support required to meet the health, educational and other needs of the children.' Our advocates report a lack of consistency across the centres and rights-based action plans with prescribed outcome could improve young people's rights.

Therefore, the Care Inspectorate should work with Scottish Ministers and the CYPCS to urgently review UNCRC and ECHR rights in secure care, without delaying 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.

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).

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.

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.



Other rights concerns about secure care include:

- Our advocates support some young people being kept in secure care for longer than required due to there being no available placements elsewhere.
- 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).
- How secure care is used for children who are at risk due to severe mental health issues. Secure care is not a solution to a lack of suitable alternatives, such as therapeutic secure mental health wards.
- We outlined our serious concerns about secure transport in [our response to the Scottish Government last year \(pp.10-11\)](#).
- 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 Covid19 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.
- 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.

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.

### **Cross-border placements**

We are deeply concerned at the practice of English Deprivation of Liberty orders being used to deprive children of liberty in unregulated settings.

[We have previously shared our views with Scottish Government on cross-border placements](#) and reiterate again that in line with Keeping the Promise, cross-border placements must end. As long as they do exist, children in cross-border placements must have timely access to relationship-based independent advocacy, which is specialist in nature:

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.

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.

## Anti-social Behaviour Order, Named Person and Child's Plan

### **8. What are your views on the proposals set out in Part 4 of the Bill?**

We agree that the age you can get an Anti-Social Behaviour Order from should increase from 16 to 18-years-old, as this is in line with our calls to increase the minimum age of criminal responsibility in line with the UNCRC.

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

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