



# Children's Care and Justice Bill

Consultation on Policy Proposals

## About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have almost 500 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs and interested professionals. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of each and every one of our member organisations. Members' own responses should also be taken into account.

## Introduction

Together (Scottish Alliance for Children's Rights) welcomes the opportunity to comment on policy proposals for the Children's Care and Justice Bill. Our response analyses the plans from a children's rights perspective. It draws upon the articles of the United Nations Convention on the Rights of the Child (UNCRC), guidance set out in General Comment 24,<sup>1</sup> the Council of Europe's Guidelines on Child-friendly Justice<sup>2</sup> and other instruments.

Together recognises that children who engage in harmful behaviour are some of the most vulnerable in society and are often victims and witnesses of harm themselves. As such, they require responses that are centred around their care, protection and reintegration. The UN Committee on the Rights of the Child is clear that strictly punitive approaches are contrary to children's human rights.<sup>3</sup> Further, we recognise that those impacted by children's harmful behaviour are often children themselves and require special care and attention to ensure their rights are simultaneously met. As stated in the Council of Europe's Guidelines on Child-friendly justice, *all* children "be they a party to proceedings, a victim, a witness or an offender – should benefit from the 'children first' approach".<sup>4</sup>

Scottish Government has made a commitment to incorporate the UNCRC into law to the maximum extent of its powers.<sup>5</sup> It is vital that existing legislation, policy and practice across all areas are assessed for compatibility with the UNCRC. An audit of existing legislation will help identify gaps and the action required to address these. This audit must not be a 'one off' event but updated on an ongoing basis and in line with evolving international standards. At all times it must be remembered that the UNCRC sets a *floor* and not a ceiling for rights protection. It sets out the basic *minimum* standards beyond which countries can and should strive.<sup>6</sup> As such, there must be an expectation that Scotland goes beyond the bare minimum – in the context of children's care and justice and beyond - if it is to truly deliver a 'gold-standard' for children's rights in Scotland.

We are grateful to have had sight of the submission by the Children and Young People's Centre for Justice (CYCJ) and have drawn from this in preparing our own response.

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<sup>1</sup> [CRC/C/GC/24](#).

<sup>2</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), CM/Del/Dec(2010)1098/10.2abc-app6.

<sup>3</sup> [CRC/C/GC/24](#); Para 76.

<sup>4</sup> Council of Europe (2010). [Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice](#), p8.

<sup>5</sup> [UNCRC \(Incorporation\) \(Scotland\) Bill](#).

<sup>6</sup> Article 41 UNCRC. See also [CRC/C/GC/24](#); Para 38.

## Part 1: Raising the Maximum Age of Referral to the Principal Reporter

### Information

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

**Yes – in limited circumstances.**

Together welcomes that the maximum age of referral to the Principal Reporter will be increased, recognising that the UNCRC defines a child as under 18 years old.<sup>7</sup> The change will partially address concerns voiced by the UN Committee on the Rights of the Child in 2016 that the UK needed to do more to prevent children being drawn into the adult justice system.<sup>8</sup> We recognise that raising the age of referral will result in more children coming through the Children’s Hearings System on offence grounds, including the potential for more serious offences.

Currently, the level and type of information that victims receive varies depending on whether the child’s case is dealt with via the Children’s Hearings System or the criminal justice system. Together recognises that each system serves a distinct purpose and, as such, it is appropriate that distinct measures are available. Any changes to the existing system must be rights-based, with the aim of upholding the rights of both the child who is alleged to have engaged in harmful behaviour and the victim (who is often a child themselves).

Together recognises the important role that information plays for victims (particularly child victims) in having their experiences validated and knowing that harmful behaviour has been taken seriously. All children have a right to information and the right to have their views heard and taken into account (Articles 12-13 UNCRC). Children also have the right to recovery from trauma (Article 39). From the perspective of the child who engaged in harmful behaviour, the provision of information to victims has clear implications for their right to privacy under Article 16 UNCRC (and Article 8 ECHR) alongside implications for data protection. Accordingly, it is crucial that careful consideration is given to the type of information that may be provided to victims and the level of detail this should contain. For further discussion please see our answer to Question 2.

The Council of Europe Guidelines on Child-friendly Justice state:

*“In every judicial case, from the very first contact with the justice system and on each and every step of the way, all **relevant and necessary** information should be given to the child. This right applies equally to children as victims, alleged perpetrators of offences or as any involved or affected party....However, there might be situations where information should not be provided to children (when contrary to their **best interests**)”<sup>9</sup> (emphasis added)*

The UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime promote a similar approach whereby child victims and their families should receive information that is “**feasible and appropriate**” to provide.<sup>10</sup>

Accordingly, an assessment will need to be made as to which information is “relevant”, “necessary” and “appropriate” to share in any given case, taking into account the best interests of *all* children involved. As such, the disclosure of information should not be automatic but instead based on a careful

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<sup>7</sup> Article 1 UNCRC

<sup>8</sup> CRC/C/GBR/CO/5.

<sup>9</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*. p38, para 50.

<sup>10</sup> ECOSOC Resolution 2005/20. *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime: Paras 19-20.*

consideration of the specific case and circumstances of the children. Information sharing must be proportionate and the rules on what information can be shared and when must be set out clearly. We support CYCJ's position that information should only be shared on the grounds of public protection and following a rigorous process. Specifically on best interests, the Council of Europe Guidelines state: "[t]he best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the child".<sup>11</sup> The Guidelines also emphasise that the best interests of the child must always be considered in combination with other children's rights such as the right to be heard. Together would welcome the possibility for the Principal Reporter to seek representations from the child who has engaged in harmful behaviour as part of the Reporter's assessment of whether sharing particular information is appropriate.

It must be emphasised that any information intended for child victims is communicated in a child-friendly manner and in a format which they will be able to understand. General (as opposed to 'case-specific') information should explain in simple terms why some information cannot be shared.

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

**Yes – in limited circumstances.**

See generally our answer to question 1.

We note that when a child is currently referred to a children's hearing, victims receive a combination of 'general' and 'case-specific' information. General information includes details about the Children's Hearing System and how Scotland treats children in conflict with the law. Case-specific information includes the outcome of the referral, i.e. whether a hearing was arranged and, if so, the outcome of that hearing. However, the victim is not informed of any conditions attached to an order. For example, if a condition is attached to a Compulsory Supervision Order that the child must not approach or contact the victim then the victim is not informed of this. This means they cannot know if the conditions are not being complied with, or able to alert the relevant authority. This can be contrasted with the criminal justice system where victims are informed of protective orders made in relation to them.

Again, the question of what information should be shared with victims requires a careful balancing of rights. For victims, receiving information about conditions that relate to them is a pre-requisite to sharing any views or concerns, including about their safety. Where the victim is a child, such information can help uphold their right to be free from all forms of harm (Article 19) – including psychological harm – as it reassures them that action has been taken to protect them from reoccurrence. For example, we know from members working with young survivors of domestic abuse that information on the measures applied to someone who has perpetrated abuse are essential to victims being able to regain a sense of safety and begin emotional recovery from trauma (see Article 39). We know from the Everyday Heroes project that young survivors often feel excluded from information during the justice process and that this can feel unfair and scary.<sup>12</sup> They say that communication ceases often when they felt most scared, including on the release of the perpetrator, and that information is important to help them feel prepared and in control. We also know from the Victims Task Force (albeit looking at adult experiences) that practical measures preventing contact - and knowledge of them - are essential to a sense of safety after abuse. On the other hand, children who engage in harmful behaviour have a right to privacy and must be protected from any harm which could arise as a result of information being shared (see Articles 16 and 19).

<sup>11</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p18.

<sup>12</sup> Everyday Heroes (2018). *Justice Report*, p9.

Taking these factors into account, we believe that SCRA should be empowered to share further information with victims about measures that relate to them in limited circumstances (e.g. where there is a condition that the child must not approach or contact the victim). This disclosure must not be automatic. As noted in our answer to question 1, a rigorous assessment must take place to determine what information is “relevant”, “necessary” and “appropriate” to share. This assessment must take into account the best interests of all children involved (accused, witnesses and victims). Information should only be shared in the interests of public protection and where proportionate. Where these tests are not met, information should not be shared.

## Access to Support

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

### Yes

All people who have been harmed have a right to support, regardless of the age of the person believed to have caused harm, the nature of the harm caused, or which system is considering the case. As an alliance of children’s organisations, we are particularly interested in the support provided to child victims and their families. The provision of timely, effective and trauma-informed support plays a key role in upholding children’s right to recover from trauma (Article 39 UNCRC).

The Council of Europe Guidelines promote an interdisciplinary, child-friendly approach to support and call for “specialised and accessible support and information services, such as online consultation, help lines and local community services” to be set up which are free of charge.<sup>13</sup> The Guidelines also call for the establishment of child-friendly centres - akin to the Bairns’ Hoose model - where children can receive therapeutic support.<sup>14</sup> Across all of these settings, professionals must receive appropriate support, training and practical guidance in order to guarantee and implement children’s human rights.<sup>15</sup>

We note that child victims and families have identified shortcomings with the existing support system, both in terms of coordination, access to, and forms of support available. In line with Article 12 UNCRC, it is vital that children and their families are involved in designing the support that would meet their needs. Utmost care must be taken to ensure this engagement is trauma-informed. We hope that ongoing work to develop the Bairns’ Hoose will provide insight into what sort of support children and their families require.

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

### Yes

Children repeatedly tell us about the importance of relationships in making them feel safe, heard and respected.<sup>16</sup> The availability of a consistent, supportive adult can help children build trust and develop a feeling of greater control and agency in systems which may otherwise feel daunting. We hope that a

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<sup>13</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p34, para K.

<sup>14</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p34, para J.

<sup>15</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p34, para L.

<sup>16</sup> Together (2022). *State of Children’s Rights in Scotland*.

single point of contact who can help coordinate children's access to support would help to address children and families' concerns that current provision can feel disjointed.

If Scottish Government progresses these plans, it is crucial that the single point of contact receives the necessary training in children's human rights, child development, trauma-informed practice and child-friendly communication skills. Reference should be made to the Common Core of Skills, Knowledge and Understanding for the Children's Workforce in Scotland.<sup>17</sup>

### **Protection for people who have been harmed and preventative measures**

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

**No**

It is crucial that the welfare-based approach of the children's hearings system is maintained. Any reforms which seek to amend or enhance the existing measures risk distorting the ethos of the system and risk running counter to the UNCRC.

We support CYCJ's position that the existing measures within the children's hearing system are adequate in delivering the desired level of care and protection.

**Question 6:** Should Movement Restriction Conditions (MRCs) be made available to children who do not meet the current criteria for secure care?

**Yes – in limited circumstances**

We support CYCJ's response to this question.

### **Maximising the use of the children's hearings system and supports to children beyond the age of 18**

**Question 7:**

Should any of the below options be considered further?

1. *Enabling all children under the age of 18 to be remitted to the Principal Reporter for advice and disposal in their case even where they had initially been prosecuted and have pled, or been found, guilty*
2. *Promoting wider use of the existing ability for the children's hearings system to require support to be offered to a young person on a voluntary basis following the termination of any CSO by virtue of that individual turning 18.*
3. *Increasing the age to which children can remain subject to measures through the children's hearings system for a period beyond the child's 18th birthday.*

**Yes.**

#### **Maximising the use of Children's Hearings System for under 18s:**

Together supports the maximum use of the children's hearings system for all under 18s. The UNCRC defines a child as a person under the age of 18.<sup>18</sup> The UN Committee and Council of Europe Guidelines are clear that justice systems must treat *all* under 18s as children. The Scottish system does not currently meet this standard. 16- and 17-year-olds are frequently treated as adults in the eyes of the law. For

<sup>17</sup> Scottish Government (2012). *Common Core of Skills, Knowledge & Understanding and Values for the "Children's Workforce" in Scotland.*

<sup>18</sup> Article 1 UNCRC

example, while 16- and 17-year-olds with a Compulsory Supervision Order (CSO) benefit from the care and support of the children’s hearings system, their peers of the same age *without* a CSO go through the adult system. Both cohorts face the same situations, scenarios and risks, yet they are treated in two very different ways. Not only does this approach fail to recognise and treat all children as children, it also discriminates against certain groups in breach of Article 2 UNCRC. This is just one example of where Scots law falls below UNCRC standards by applying narrower definitions of who is a child – other examples include legislation on mental health, incapacity, marriage,<sup>19</sup> criminal law, and consent to medical treatment. These examples demonstrate why an audit of legislation is required to identify gaps in UNCRC compliance.

In 2016, the UN Committee expressed concerns at the number of children tried in adult courts.<sup>20</sup> It called on the UK and devolved administrations to “ensure that children in conflict with the law are *always* dealt with within the juvenile justice system up to the age of 18 years” (emphasis added). Maximising the use of the children’s hearings system would help Scotland meet this standard and reflect its commitment to fully embed the UNCRC into law.

### Supports to children beyond 18:

The UN Committee commends countries that extend child justice systems to those aged 18 and older.<sup>21</sup> It says this approach is in keeping with the developmental and neuroscience evidence that shows brain development continues into the early 20s. As such, we support the extension to children beyond 18 in principle. We defer to the views of our member organisations who support this age group on what these supports should look like.

**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

All efforts to maximise use of the children’s hearings system should be guided by the UNCRC, General Comment 24, Council of Europe Guidelines on Child-friendly Justice and other relevant international instruments. All professionals involved will need ongoing training to ensure that they understand children’s human rights, child and adolescent development, child-friendly communication and trauma-informed practice.

## Part 2: Children and the Criminal Justice System

### Children at Court

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

1. A re-examination of the decision-making framework between which system should deal with a child’s case (CHS or justice);
2. The continued use of traditional court settings whilst recognising local innovations and good practice;
3. Making changes to practice, conduct and support in court – e.g. having dedicated courts for children, no wigs/gowns, all sit round same table, child-friendly information;

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<sup>19</sup> *Marriage (Scotland) Act 1977.*

<sup>20</sup> *CRC/C/GBR/CO/5: Para 78(b).*

<sup>21</sup> *CRC/C/GC/24: Para 32.*



4. Other, taking into account *The Promise* statement that “traditional criminal courts” are not appropriate for children.

**Yes.**

Together agrees with *The Promise* that “Scotland must consider how to ensure that children have the totality of their cases dealt with in an environment that upholds their rights and allows them to effectively participate in proceedings. Traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard”.

The UNCRC is clear that “whenever appropriate and desirable” children’s actions should be responded to “without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected”.<sup>22</sup> This is emphasised in General Comment 24 which notes the “especially harmful effects of contact with the criminal justice system”<sup>23</sup> and that “diversion should be the preferred manner of dealing with children in the majority of cases.” The UN Committee further notes that “States parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate.”<sup>24</sup> Accordingly, we echo and support CYCJ’s comments around ensuring as many children as possible are diverted from entering any formal system (either CHS or justice) and that the range of offences which can be referred to Early and Effective Intervention should be expanded.

The Council of Europe Guidelines state that where diversion from formal proceedings is not possible, there should at least be separate specialised courts for children. The Guidelines state: “as far as possible, any referral of children to adult courts, adult procedures or adult sentencing should not be allowed.”<sup>25</sup>

Both General Comment 24 and the Council of Europe Guidelines set out a range of steps for ensuring court processes and environment are less intimidating.<sup>26</sup> We note that many of these suggestions are reflected in **option 3**. We view these suggestions as a *minimum* to improve the experience of children and young people who are prosecuted in court. However, our strong preference is for all under 18s to be removed from the scope of the adult system.

## Children in custody

**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**

The UNCRC is clear that deprivation of a child’s liberty must only be used as a last resort and for the shortest appropriate period of time. The UN Committee has said there are only “few situations” in which a child’s detention is justified.<sup>27</sup> As such, Together’s strong view is that deprivation of liberty, whether in secure care or a YOI, should be minimised as far as possible with a strong preference for alternative, community-based supports. Deprivation of liberty must only be used where these alternatives are unlikely to be successful in managing identified risks. We note the UN Committee’s statement that deprivation of liberty should only be used for “older children” and that countries should set a lower limit below which children may not legally be deprived of their liberty “such as 16 years of age”.<sup>28</sup>

<sup>22</sup> Article 40(3)(b) UNCRC.

<sup>23</sup> CRC/C/GC/24: Para 6(c).

<sup>24</sup> CRC/C/GC/24: Para 16.

<sup>25</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p.85, para 125.

<sup>26</sup> Council of Europe (2010). *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, pp.29-30.

<sup>27</sup> CRC/C/GC/24: Para 6(c)(v).

<sup>28</sup> CRC/C/GC/24: Para 89.

Where children *are* deprived of their liberty, the UNCRC is clear that they must be treated with humanity, respect and in a manner that takes into account their needs.<sup>29</sup> Together's position is that these standards are unlikely to be met in Young Offenders Institutions. By contrast, secure care offers relationship-based, therapeutic, trauma-informed support. As such, Together believes that where no alternatives are possible and deprivation of liberty is required as a last resort, that this should be in secure care. There are a range of reasons for this, including better educational and mental health support, reliability of access to healthcare, better provision for family contact, shorter waiting times for support and needs assessments, and prohibition on pain-inducing restraint.

**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**

Children who have caused the most serious degrees of harm, and who face significant periods of detention remain, first and foremost, children and must receive the same level and nature of care as their peers based on their own individual needs. We refer the Scottish Government to the findings of the Children and Young People's Commissioner Scotland investigation into secure accommodation for further details.<sup>30</sup>

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

**Yes.**

We note the inconsistencies in practice referred to in CYCJ's submission. We echo and support their conclusions.

### **Anonymity**

**Question 13:** Do you agree that the three below changes related to anonymity should be made?

- 1) That the judge's discretion to make an exception to identify a child accused should be further limited. Instead of this being permissible when in the public interest, instead this should only apply when the court is satisfied this is necessary for the purpose of protecting the public from serious harm and/or in the interests of justice
- 2) That legislative change is made to enable a child's right to anonymity to apply from their first contact with the criminal justice system, including pre-charge.
- 3) That the post-18 automatic identification of children who have come into conflict with the law aged under 18 ceases. Where a child has been convicted of an offence aged under 18, their right to anonymity should be maintained into adulthood, unless it is determined subsequent to the child turning 18 that, for reasons of protecting the public from serious harm and/ or the interests of justice, such identification is necessary. That anonymity should persist until that young person turns 26.

**Yes to all changes (subject to caveats noted below).**

The UNCRC is clear that a child's right to privacy must be respected during *all stages* of proceedings (Article 40(2)(b)). In General Comment 24, the UN Committee states that a child's details should be kept

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<sup>29</sup> Article 37(c) UNCRC.

<sup>30</sup> CYPSC (2021). *Investigation: Secure Accommodation*.



strictly confidential and closed to third parties except those directly involved in the investigation, adjudication and ruling on the case.

The UN Committee goes on to state that authorities should “refrain from listing the details of any child, or person *who was a child at the time of the commission of the offence*”, granting lifelong protection from publication regarding crimes committed as children. The rationale is that “publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child’s reintegration and assumption of a constructive role in society. *States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media*” (emphasis added).<sup>31</sup> As such, we oppose the suggestion that anonymity should only be extended to age 26 and believe this should instead be a lifetime guarantee.

This above principle is reiterated in the Council of Europe Guidelines on Child-friendly justice.<sup>32</sup> A limited exception is permitted in relation to serious offences, “inter alia for reasons of public safety or when employment of children is concerned”. This chimes with Scottish Government’s move away from exceptions in “public interest” towards exceptions necessary to protect the public from “serious harm”. The Council of Europe Guidelines note one further exception may be made in the very limited circumstances where publication is in the best interest of the child concerned.<sup>33</sup>

### Part 3: Secure Care

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

#### Yes

We echo and support CYCJ’s response to this question.

Current complexities in routes to secure care have significant implications for all children, particularly those aged 16/17 years, accessing age appropriate and trauma informed settings. We note that this results in inconsistencies in practice. As such, we are concerned that children’s right to be free from discrimination under Article 2 UNCRC is not being upheld. A clearer, cohesive process that upholds the rights of all children is needed to ensure that all children who need support have access to it at the time when it is needed. We welcome Scottish Government’s commitment to ensure that all children have a legislative route to secure care where this is deemed necessary and appropriate.

We further welcome the intention of reducing financial disincentives to placement in secure care which currently result from local authorities being required to fund secure care placements, in contrast to placements in YOI which are funded by Scottish Ministers. We echo CYCJ’s concerns that the current marketized model of secure care pits services against each other and creates barriers to collaboration and sharing of good practice.

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

#### No

We echo and support CYCJ’s response to this question.

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<sup>31</sup> *CRC/C/GC/24: Paras 69-79.*

<sup>32</sup> *Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, p32, Para 83*

<sup>33</sup> *Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, p62-63, Paras 61-62.*

We note that the definition of secure accommodation refers to its purpose as restricting liberty rather than ensuring safety, security, needs, strengths and risks, and trauma-informed care. The definition has not been updated since GIRFEC and is in need of review, particularly as Scotland moves towards incorporation of the UNCRC.

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

**Yes through all routes.**

Please see generally our answer to question 10 which sets out the benefits of secure care, as opposed to detention in a YOI. Children's access to secure care is another example of Scotland's multi-tiered approach to children due to conflicting definitions of 'a child'. These inconsistencies must be addressed through an audit of legislation across all areas (care, justice and beyond) as we move towards incorporation of the UNCRC.

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

**Yes**

We welcome the intention of reducing financial disincentives to placement in secure care. The current situation, whereby local authorities are required to fund secure care placements whereas detention in YOI is funded by Scottish Ministers, creates a financial disincentive for local authorities where the termination of a child's CSO or failing to offer a secure care placement to court may enable them to avoid the cost accrued through secure care. This may be a factor in the very high levels of children held on remand across Scotland. In General Comment 24, the UN Committee says that "[s]tates parties should ensure that there are no incentives to deprive children of their liberty and no opportunities for corruption regarding placement, or regarding the provision of goods and services or contact with family".<sup>34</sup> It is our view that the current system risks breaching this recommendation.

All decisions relating to children should seek to maximise their rights, rather than deliver the "cheapest" option. Reforms in this area should emphasise the importance of child rights budgeting in line with the UNCRC. This approach means taking children's human rights into account when making decisions about allocating resources, as well as embedding human rights standards into the processes through which these decisions are reached. More information on the approach can be found in chapter 7 of [Together's State of Children's Rights Report 2022](#).

We echo CYCJ's concerns that the current marketized model of secure care pits services against each other and creates barriers to collaboration and sharing of good practice.

### **Current funding and placement arrangements**

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

**Possibly – this should be explored further.**

The current marketized model of secure care means that units are placed in a competitive environment and need to ensure a high degree of occupancy to be financially viable. This has led to increased reliance on cross-border placements in response to falling Scottish use of secure care. This can lead to a range of outcomes, such as lack of choice and shortage of placements for Scottish children, as well as children from across the UK being placed far from their family and support networks.

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<sup>34</sup> [CRC/C/GC/24: Para 95\(e\)](#).

Developments in this area should take into account findings from The Promise which included recommendations as to what an approach to secure care should look like.<sup>35</sup>

## Secure transport

**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.**

We echo and support CYCJ's response to this question. In particular, we note the recent consultation where children stated they would like to travel with someone known to them, preferably their social worker or a member of secure care services staff.

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

**No answer.**

## Age thresholds

**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.**

In General Comment 24, the UN Committee states that those detained in children's settings should not be moved into adult settings simply by reason of turning 18. These young people should be able to remain in the children's setting if it is in their best interests and provided this is not contrary to the best interests of the children in the facility. The UN Committee commends countries that extend child justice systems to those aged 18 and older on the basis that this is more in line with developmental and neuroscience evidence that shows brain development continues into the early 20s.<sup>36</sup>

The length and appropriateness of extension should be determined on a case-by-case basis. Factors to be taken into account include: the length of their remaining custodial sentence/remand, the maturity and personality of the young person, their educational needs, their vulnerabilities, their wider best interests and the best interests of their peers in the facility.

## Part 4: Residential Care and Cross-Border Placements

### Cross-border placements

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

**Yes.**

We echo and support CYCJ's response to this question.

In General Comment 24, the UN Committee emphasises the need to ensure that children who are deprived of their liberty can retain contact with family through correspondence and visits. It notes that to facilitate contact, children should be placed in facilities that are "as close as possible" to the family home. Any exceptional circumstances that would limit such contact (which presumably includes cross-

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<sup>35</sup> *The Promise (2020). Secure care.*

<sup>36</sup> *CRC/C/GC/24: Para 32.*

border placements) “should not be left to the discretion of the authorities” and should instead be clearly set out in law.<sup>37</sup>

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

**Yes.**

We echo and support CYCJ’s response to this question.

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

**Yes.**

We note recent evidence by the Children and Young People’s Commissioner Scotland to the Scottish Parliament’s Education, Children and Young People Committee which highlighted challenges relating to the inspection of residential childcare. Specific reference was made to childcare which is registered with the Care Inspectorate but not subject to inspection on account of the Care Inspectorate’s limited powers. The Care Inspectorate has themselves voiced concern over the measures available to it. The Bill should address this situation to ensure that the Care Inspectorate can identify provision which fails to meet the needs and rights of children placed within residential care.

**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.**

Children in cross-border residential and secure care placements are often many hundreds of miles away from their family, friends and support network (including social workers). This can lead to feelings of isolation and lack of support. Access to independent advocacy can help address these needs, whilst also playing an important role in ensuring the child’s rights are being upheld. A local advocate has the benefit of being familiar with the nuances of the Scottish system. They should also have a role in supporting the child to access legal advice where this is required to uphold their rights. For more information on ensuring children’s access to justice and child-friendly complaints processes, please see chapter 5 of [Together’s State of Children’s Rights Report 2022](#).

## **Use of restraint in care settings for children**

**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.**

Our members have expressed a range of ongoing concerns about the use of restraint in residential (in addition to non-residential) settings. These concerns include: lack of clear definition for ‘restraint’ in Scots law or policy leading to inconsistencies in approach and data recording;<sup>38</sup> that practical application of existing Holding Safely guidance varies widely;<sup>39</sup> restraint continues to be used as an inappropriate

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<sup>37</sup> *CRC/C/GC/24: Para 94.*

<sup>38</sup> *Together (2019). State of Children’s Rights in Scotland, p.53. See also CYCJ’s response to the current consultation.*

<sup>39</sup> *Who Cares? Scotland (2019). Children (Equal Protection from Assault) (Scotland) Bill: Supplementary Evidence on Restraint. <https://www.whocarescotland.org/wp-content/uploads/2019/02/WCS-Supplementary-Evidence-on-Restraint.pdf> [Date accessed: 6.9.16]*

reaction to challenging behaviour rather than as a last resort;<sup>40</sup> gaps in data collection, monitoring and publication.

Guidance and the law should clearly reflect the content of General Comment 24 and address recommendations made by the UN Committee to the UK/Scotland in 2016.

In General Comment 24, the UN Committee is clear that restraint must only be used where:<sup>41</sup>

- The child poses an imminent threat of injury to themselves or others;
- All other means of control have been exhausted;
- There is close, direct and continuous supervision of a medical and/or psychological professional;
- All incidents of use of restraint are recorded, monitored and evaluated to ensure that use is reduced to a minimum.

The UN Committee goes on to specify that restraint must:

- Never be used to secure compliance;
- Never involve deliberate infliction of pain;
- Never be used as a means of punishment;

In 2016, the UN Committee expressed concern about the ongoing use of restraint in residential (and non-residential settings) and called on the UK and devolved governments to ensure that restraint is used “*exclusively to prevent harm to the child or others and as a last resort*”. The UN Committee also called on the UK/Scotland to “*systematically and regularly collect and publish disaggregated data on the use of restraint and other restrictive interventions on children in order to monitor the appropriateness of discipline and behaviour management for children in all settings, including in education, custody, mental health, welfare and immigration settings*”.<sup>42</sup>

## Part 5 – Age of Criminal Responsibility

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

**No.**

At 12 years old, the current minimum age of criminal responsibility is a violation of children’s human rights. The UN Committee is clear that the minimum age of criminal responsibility should be *at least* 14 years old.<sup>43</sup> The Council of Europe Commissioner for Human Rights emphasised similar to Scottish Government during the passage of the relevant legislation.<sup>44</sup> By not urgently addressing this matter, Scotland is falling behind the international standards that it seeks to uphold, and allowing hundreds of children each year to needlessly be drawn into contact with criminal justice processes, with all the negative outcomes and stigmatisation that this entails.

Together believes the review should be undertaken as soon as possible. Once the UNCRC (Incorporation) (Scotland) Act is in force, the existing legislation will be vulnerable to challenge. The Scottish Government should prevent the need for costly and unnecessary proceedings by reviewing the minimum age without delay.

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<sup>40</sup> Kendrick, A. (2014). *Protecting and Safeguarding Children in Care: A Review of Developments in Services for Children in Care in Scotland*. [https://www.celcis.org/files/2414/3878/4325/Protecting\\_and\\_Safeguarding\\_Children\\_in\\_Care\\_v3.pdf](https://www.celcis.org/files/2414/3878/4325/Protecting_and_Safeguarding_Children_in_Care_v3.pdf) [Date accessed: 7.9.16]

<sup>41</sup> *CRC/C/GC/24*: Para 95(f).

<sup>42</sup> *CRC/C/GBR/CO/5*: Paras: 39(b), (c), (d).

<sup>43</sup> *CRC/C/GC/24*.

<sup>44</sup> Commissioner for Human Rights (2018). *Letter to Maree Todd, Minister for Children and Young People*.

## Part 6: Assessing Impact

**Question 28:** What, if any, do you see as the data protection related issues that you feel could arise from the proposals set out in this consultation?

Please see our responses to questions 1 and 2 which relate to information about the child who has caused harm being shared with the person who has been harmed.

**Question 29:** What, if any, do you see as the children's rights and wellbeing issues that you feel could arise from the proposals set out in this consultation?

All of our responses consider the children's human rights implications of the proposals. The Bill has the potential to significantly change the manner in which children who come into conflict with the law are treated by the state and other corporate parents. A Child Rights Impact Assessment (CRIA) should be used to gain more detailed understanding of the impacts of proposed reforms (positive, negative and neutral), allowing changes to be identified and addressed at an early stage. CRIAs should not be seen as one-off processes and should be updated on an ongoing basis. More details on Child Rights Impact Assessments can be found in chapter 8 of [Together's State of Children's Rights Report 2022](#).

**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?

A Child Rights Impact Assessment (CRIA) should be used to gain more detailed understanding of how the proposed reforms could be felt differently by certain groups.

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For further information, please contact Maria Doyle, Legal & Policy Manager

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