

## Submission to United Nations Committee on the Rights of the Child Children's Rights and Alternative Care June 2021

The Children and Young People's Commissioner Scotland<sup>i</sup> welcomes the opportunity to provide inputs to inform the UN Committee on the Rights of the Child's Day of General Discussion. This submission focuses on the challenges to human rights faced by care-experienced children and those at risk of entering care in Scotland. It draws on existing research.<sup>ii</sup>

### Background

The alternative care system comprises [foster care](#), [kinship care](#), [residential care](#), and [secure care](#). As at 31 July 2020, there were [14,458 Looked-After Children](#) in Scotland.

The current alternative care system is not sufficiently rights-based or adapted to children's needs. Care-experienced young people in Scotland face multiple barriers to their human rights. They are affected by poor system design, resulting in instability and uncertainty, inadequate care standards, and isolation. Barriers include separation of siblings due to limited resources or placements for siblings, insufficient sibling contact, and inadequate access to necessary supports, including for their mental health. Care-experienced young people face discrimination and are [more likely to leave school earlier with fewer qualifications](#) and live in poverty. They often face placement changes at short notice and regular changes in social workers and carers. Their views are often not considered prior to entry into, during, and when planning for leaving care.

An [Independent Care Review](#), conducted from 2017-2020,<sup>iii</sup> [found](#) a lack of data and a bureaucratic, fragmented care system, in which young people's voices are not sufficiently heard or valued. The Commissioner co-chaired the rights working group of the Review with a care-experienced co-chair. The Review recommended over 80 systemic, rights-respecting changes to the care system, including transforming services to support children and families, with a focus on early intervention and user-centred systems.<sup>iv</sup> The outputs included [a ten-year implementation plan](#), an [analysis](#) of the required legislative change, [resources](#) on the [necessary, effective financial investment](#) needed, and a [child-friendly version](#).<sup>v</sup>

### Children and young people's experiences

The Commissioner has met with many care-experienced young people, who have consistently told him of feeling unloved, living in uncertainty and being moved before feeling ready, not being listened to, and not knowing or understanding their human rights and how to access them. Other concerns they have raised include the age of leaving care,<sup>vi</sup> poor understanding from some professionals of care entitlements, being in conflict with the law due to the low age of criminal responsibility, access to education, healthcare, and housing.

In 2018 during two children's rights workshops with care-experienced young people, they identified several human rights violations, including of UNCRC articles 3, 4, 8, 12, 16, 19, 20, 25, 27, and 40.<sup>vii</sup>

#### Young people told us...



I feel unloved

I feel  
uncertainty

People aren't  
listening

I don't know or  
understand my rights

## They're concerned about...



professionals not understanding care entitlements

getting education, healthcare and housing

the age they leave care

### Issues



I've lost trust



I have no safe space or privacy



I'm not listened to or involved in what affects me

They described experiencing a loss of trust, a lack of safe space and privacy, and not being listened to or involved in processes concerning them. They were unaware of their rights or faced barriers to accessing information about their rights and their situation. They also highlighted the impact of these systemic violations on their mental health.

### How can adults help?

**Speak** to us. **Listen** to us.  
**Support** us. **Encourage** us. **Be kind**.

#### *Young people said:*

Create an environment that enables us. Always respect our rights: at all stages, in all decisions. Give us support tailored to our individual needs. Make sure we know more about rights, and that society does too. Make sure people who work with us know our rights. We need access to money. We need support to contact families and make plans to see friends. We need more advocacy workers.

### Current legislation, policy, and practice in Scotland

The applicable legislation and policies are complex, overlapping, and sometimes contradictory. While the protections exist in legislation, sometimes the legislation has not come into force or implementation is insufficient. This framework can be complex to understand and navigate.

- [Children \(Scotland\) Act 1995](#)
- [Human Rights Act 1998](#)
- [Getting It Right For Every Child \(GIRFEC\) 2006](#)
- [Adoption and Children \(Scotland\) Act 2007](#)
- [Guidance on Looked After Children \(Scotland\) Regulations 2009](#)
- [Looked After Children \(Scotland\) Regulations 2009](#)
- [Children's Hearings \(Scotland\) Act 2011](#)
- [Children and Young People \(Scotland\) Act 2014](#)
- [Children \(Scotland\) Act 2020](#)
- [United Nations Convention on the Rights of the Child Incorporation \(Scotland\) Bill](#)

The review of the [National Guidance for Child Protection](#) is welcome. However, it requires comprehensive redrafting to ensure that children's rights and statutory rights are mainstreamed throughout as well as any practice and training materials introduced to support implementation.

In March 2021, the Scottish Parliament voted to [incorporate the UNCRC into domestic Scots law](#).<sup>viii</sup> It takes a maximalist approach and requires [Child Rights Impact Assessments \(CRIA\)](#) to be conducted on strategic decisions. It allows for full realisation of children's rights at domestic level and for all stakeholders, including children, to better hold the Scottish Government accountable regarding children's rights, including concerning alternative care. Once the legislation has been commenced, children's rights can be meaningfully scrutinised in budgets and decision-making. Enforceability of compliance will be more robust. The Commissioner will be able to take more direct action when children's rights are not realised, with new powers to take proceedings if a public authority is acting incompatibly with the UNCRC.

### ***Definition of a child***

There is an inconsistent approach to the definition of a 'child' in Scotland law. In some law a child is defined as someone under 16, meaning 16- and 17-year-olds are considered as adults and are denied the human rights and child protection safeguards to which they are entitled. This is particularly relevant for [Children's Hearings referrals](#).<sup>ix</sup> The Government has consulted on increasing the age to 18 for Children's Hearings, and there is strong support for this change, but it must be done urgently and applied across all areas of law.

### ***Lack of early intervention and effective family support services***

Under the [2014 Children and Young People \(Scotland\) Act](#), a range of services must be available to children and families to support them to stay together and prevent children entering care. These include parenting support and [family group decision-making services](#).<sup>x</sup>

Inconsistent access to family support services, insufficient funding, and a lack of early intervention are key challenges. The [reduction in local authority funding](#) has affected family support provision. Delivery is inconsistent nation-wide, as services are provided by local authorities and third sector organisations. The [short-term, insecure grant funding status](#) for many services can create uncertainty about service continuity and negatively affect staff. In particular, [financial pressures, including on placements and resources, demographic changes, a lack of human resources, and legislative changes](#), have affected social work. There is also a [lack of specialist support](#) for families where parents have a learning disability. Furthermore, services focus on permanence planning and rapid decision-making.

Community-based support and early intervention to resolve issues before families reach crisis point, with which no stigma is associated, is essential to ensuring high-quality support for children and families, preventing children entering care, and reducing the numbers of children in care.

[Corporate parents](#) hold a central role in the care system but can often seem inaccessible or unsupportive to young people as well as not working in a 'joined-up' manner. They must [work collaboratively](#) to ensure effective service delivery and that the young people with whom they interact feel supported. The 2014 Act put corporate parents on a statutory footing.

The age of criminal responsibility in Scotland remains at 8 years old. Despite [campaigns](#) by the Commissioner and interventions by the UN Committee on the Rights of the Child and the Council of Europe Commissioner for Human Rights, recent [legislation](#) only intends to raise the minimum age of criminal responsibility to 12, and even this has not yet been commenced. However, referrals to Children's Hearings on offence grounds have stopped for under-12s.

### ***Financing of care services***

The [Independent Care Review](#) found that £942 million<sup>xi</sup> was spent annually on the formal care system and £198 million annually on services. The costs of the care system – both the operational costs and the economic costs of failing to deliver high-quality alternative support that allows

children to survive, thrive, and meet their full potential - have significant implications. A preventive, early intervention model, with intensive, multi-agency family support, can be more cost-effective than the current model.

A fragmented approach to funding support services and a focus on individual care budgets, instead of individual support packages, can hinder effective, high-quality support. Where budget-holders adopt a flexible, collaborative approach, complex funding packages have been successful, ensuring children, particularly disabled children, can stay at home.

### ***Children's Hearings***

The [Children's Hearings system](#) is a child-centred, welfare-based system, which makes decisions for children who require compulsory measures of supervision, care, and protection, including those accused of having committed an offence. The legal framework is set out in the [Children \(Scotland\) Act 1995](#) and [Children's Hearings \(Scotland\) Act 2011](#). There are [commitments](#) in Scotland to review the legislative underpinning of the Children's Hearing System, to ensure it upholds the conclusions of the Independent Care Review, is compliant with the UNCRC, and facilitates child friendly justice.

Meaningful participation of children is currently inconsistent in hearings, children [continue to report](#) that they are not always adequately supported to participate, particularly younger children and older children in conflict with the law. Enhanced [access to advocacy](#) support for children was commenced in late 2020.

Children's views on sibling contact [have often not been recorded](#) throughout proceedings. From July 2021, changes to the [Rules of Procedure](#) in Children's Hearings will give siblings a greater role in hearings. Children have regularly told the Commissioner about the pain of separation and frustration at systemic barriers, which can prevent them from even asking for contact. Contact arrangements can vary in type, frequency, and quality, and tend to become less frequent over time.

### ***Secure care***

In Scotland, secure care is the only setting in which a child can be in alternative care and deprived of their liberty. We have undertaken [an investigation into the rights compliance](#) by local authorities when authorising the use of secure accommodation and the detention of children on care and protection grounds. There is an existing concern in Scots law that calls into question compatibility with human rights standards and law where children can be detained and deprived of their liberty by local authority chief social work officers without judicial scrutiny or review.

### ***Alternative care in the context of the Covid-19 pandemic***

The pandemic has exacerbated existing issues with the care system and created further challenges, including increased risk of infection within care settings and restricted family and professional contact rights. Concerns are particularly exacerbated for children in secure care, who were required to self-isolate if another child in the centre developed Covid-19 symptoms. This is a significant restriction for children who have already experienced distress.

With schools closed, and other services operating virtually, if at all, many children in vulnerable situations, including those at risk of entering care and in care, became less visible to services designed to protect and support them. Child protection visits continued in-person where necessary, while virtual visits took place for others. Child protection and social services referrals decreased at the start of the pandemic, due to a lack of contact from universal services, extended family, or the local community, who may identify issues. However, calls to helplines from families [seeking support increased](#).

Children in alternative care settings have been affected by rolling shutdowns due to staff or children testing positive for Covid-19; closing to all external visitors for 14 days at a time.

Children's homes have reported repeat periods of isolation, which have often prevented any meaningful direct, face-to-face contact with family, friends, communities, and professional contacts such as lawyers, advocacy, health, and social services. As digital access has not been systematically available, online family and professional contact has also been restricted. Children experienced significant reductions in access to education and recreation, due to restrictions in secure accommodation, mental health wards, and other alternative care settings, exacerbating concerns around isolation.

Assessments and placement have been affected by the pandemic. The UK [Coronavirus Act 2020](#) provided a power to suspend legal duties on local authorities to assess the needs of disabled children, care-experienced children, and young carers. These assessments provide an essential rights protection, and this change has affected the appropriate delivery and prioritisation of cases.

Under the UK [Coronavirus Act 2020](#), children in Scotland are defined as under 16 and not 18 as in other UK nations. The [Coronavirus \(Scotland\) Act 2020](#) amended the Children's Hearings system, including changes to the administration of justice and extensions of timeframes for compulsory supervision orders. These risk breaching children's fair trial and participation rights. Hearings moved online, raising additional concerns around access, privacy, and effective participation.

Emergency legislation extended the length of court hearings and time limits for detention in secure care or appealing against detention, making it more difficult to challenge whether children have been deprived of their liberty through legal means, as a last resort and for the shortest time. This happened without meaningful public consultation, or parliamentary scrutiny. Children in secure care have seen restrictions of their fair trial rights, due to restricted participation in legal processes, and limited supports to allow children to participate effectively online.

Participation of children in decisions concerning them, particularly related to the pandemic, remains inconsistent at all levels: individual, group, local, and national. This particularly affects care-experienced and disabled children, and those in conflict with the law.

### **Cross-border placements**

There is a lack of sufficient and disaggregated data regarding the numbers of all children deprived of their liberty, including alternative care, in Scotland. The Commissioner has specific concerns about the use of unregulated, alternative care placements, and privately managed, residential care homes without the necessary legal, procedural, and human rights safeguards. There are no 'Deprivation of Liberty orders' available in Scots law,<sup>xii</sup> yet children from England, Northern Ireland and Wales have been placed in Scotland, far from their home, families, and communities. They are deprived of their liberty in alternative care settings outside of the protections they are entitled to under Scots law, statutory childcare and protection schemes. These placements are not monitored by the National Preventive Mechanism.

The legal rights and safeguards of these children have been consistently debated in court<sup>xiii</sup> and the UK Supreme Court and the Court of Session<sup>xiv</sup> are currently considering<sup>xv</sup> whether it is lawful to deprive a child of their liberty in an unregistered, unregulated children's home as 'secure accommodation.' These cases concern children in intra-country cross-border placements where the regulations and domestic laws differ and where children's rights largely fall under the reserved powers and responsibilities of the Scottish administration, as opposed to the UK.

### **Care leavers: Challenges and support required**

In Scotland, care leavers face multiple challenges upon leaving care, are disproportionately affected by poverty, and more likely to be homeless than their peers. The [Children and Young People \(Scotland\) Act 2014](#) introduced new care leavers' rights.

- **Continuing care:** the right to the same accommodation and support they received while in care until age 21.
- **End-of-care planning:** the right to have views considered, a full welfare assessment of continuing in their placement prior to leaving care, and a written decision.
- **Aftercare:** an assessment of care leavers' eligible needs, a plan for advice, guidance and assistance<sup>1</sup> to meet eligible needs, a written decision about eligible needs, and the right to appeal regarding the assessment.

The [Care Leaver Covenant](#) - a commitment from public, private and voluntary sector organisations to support care leavers - aims to help them transition to independent living.<sup>xvi</sup> It has significant support, which must be matched by concrete actions and inclusion in corporate parents' plans.

Despite the strong legal and policy framework, poor and inconsistent implementation of these obligations, particularly variations between local authorities, means that care leavers' rights are often not realised. Barriers include limited or no resources, local authorities' allocation policies, and a lack of knowledge and awareness of how to enforce care leavers' statutory rights, and relevant training, resulting in lower confidence among practitioners.

Care leavers have reported not knowing about their entitlements, rights, and how to challenge failure to have these respected and fulfilled.<sup>xvii</sup> The Commissioner has received reports that young people are moved on from continuing care before they are ready. Care-leavers are not a homogeneous group and support must be tailored around disability, sexual orientation and gender identity. Continuing care must be implemented correctly and fully in a manner consistent with children's best interests.

## Good practices

The Scottish Government and other stakeholders have adopted several positive steps, which are starting points for ensuring quality care for young people and contributing to the development of a child-rights compliant system. The multi-agency partnerships that have been created in government legislation and policy, notably GIRFEC, have increased collaborative working of public services for children. These positive steps include:

- A free university place to care-experienced young people who meet the minimum entry standards and [support of a full bursary](#)
- [Council Tax exemptions](#) for care leavers
- The [Care Leaver Covenant](#)
- Establishment of [Champions Boards](#) in local authorities and Community Planning Partnerships across Scotland<sup>1</sup>
- The [Pinky Promise](#) – child-friendly version of the Independent Care Review's report

## Recommendations

In order to achieve an ideal child rights-compliant alternative care system, which prevents children entering care, the Scottish Government should:

- Adopt a child rights-based approach to alternative care, founded on effective, early intervention and prevention of separation of families, where in children's best interests. This includes strengthening family support and community-based services and child protection and social support systems, and allocating the necessary financial and human resources, especially for early intervention services for families in vulnerable situations.
- Implement all of the Independent Care Review's recommendations as a matter of urgency.
- Amend all necessary legislation in Scots law to ensure that all under-18s are defined and recognised as children.

- Ensure siblings are only placed separately if it is in their best interests and in line with their views. Where siblings have been separated, ensure that regular, high-quality contact takes place, if in their best interests and in line with children's views.
- Where children are in residential care, ensure they are placed in specialist residential provision suited to their needs, near their home where appropriate and in their best interests, with the necessary legal safeguards.
- Ensure proper and regular inspections by the Care Inspectorate of all placements, including 'unregulated placements.'
- Ensure that young people are supported, listened to, and engaged in all decisions about their family environment and care.
- Sign and ratify the Third Optional Protocol to the UNCRC on a complaints procedure.
- Ensure that children can access age-appropriate information concerning family services, alternative care, and human rights.
- Collect and analyse high-quality, disaggregated data to understand need and measure the impact of legislation and policies on children and their rights.
- Ensure thorough recording and monitoring of children's rights throughout the care process to determine whether approaches are effective and in line with human rights obligations.
- Concerning all decisions regarding secure care: record and consider children's views, explain decisions to children, and send them written confirmation.
- Ensure children in care and care leavers have access to the highest attainable standard of mental health support.

**To support care leavers:**

- Recognise the life-long impact of care experience and adopt a human rights-based approach to the transition to adulthood.
- Ensure full implementation of care leavers' rights through sufficient funding and resources, awareness-raising, and training.
- Ensure care leavers are actively involved in all stages of care and aftercare processes.

**Concerning the Covid-19 pandemic and future public health, environmental, and social emergencies:**

- Adopt an effective, child rights response to emergencies, which protects and benefits those in the most vulnerable situations, including children at risk of entering care and in care.
- Ensure comprehensive, tailored support is accessible in the event of further restrictions, particularly given the number of children becoming "newly vulnerable."
- Ensure that all children can access high-quality child protection, support, and mental health services on an equal basis to enable them to recover from the pandemic's impacts, including through allocating sufficient financial and human resources.
- Conduct CRIA on future legislation, policy, and practice concerning children and Child Rights Impact Evaluations, particularly concerning pandemic-related laws, policies and practice to inform and improve future responses.
- Meaningfully engage with all children in decisions concerning them.
- Develop a child rights-based approach to budgeting, which allows for transparent and measurable budget allocation.

## References

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- <sup>i</sup> The Commissioner's mandate extends to age 21 for care-experienced young people.
- <sup>ii</sup> See the following resources: [Report on an Expert Review of the Provision of Mental Health Services, For Young People Entering and in Custody at HMP YOI Polmont](#), Children and Young People's Centre for Justice Report, [Rights Respecting? Scotland's Approach to Children in Conflict with the Law](#), UNICEF UK Report '[A Rights Based Approach to Youth Justice in the United Kingdom](#)' 2020, and CYPCS, 2020, '[Older Children in Conflict with the law: Independent Child Rights Impact Assessment on the Covid-19 response](#)'; 2021, [Statutory Duties in Secure Accommodation: Unlocking Children's Rights](#).
- <sup>iii</sup> The Review consulted with more than 5,500 people, over half of whom were young people in care and care-experienced adults. The others were families and members of the unpaid and paid workforce.
- <sup>iv</sup> Four core elements were identified: i.) young people's experiences must always be the basis of all decisions about their lives, ii.) building and maintaining life-long relationships, iii.) equality in all areas for care-experienced children with their peers; and iv.) keeping families together where it is safe to do so.
- <sup>v</sup> The [Promise team](#) has been established to support the changes, starting with its first [three-year plan](#).
- <sup>vi</sup> The [average care-leaving age](#) in Scotland is 16-18.
- <sup>vii</sup> These took place during [Who Cares? Scotland's](#) summer camp for care-experienced young people.
- <sup>viii</sup> The Bill should enter into effect within six months.
- <sup>ix</sup> For example, if a 16- or 17-year-old's parents die, the child concerned cannot enter the care system and does not have the protections and entitlements to which children are entitled. Currently only 16- and 17-year-olds already within the Children's Hearings system can be referred or have their order continued until they are 18. See more below concerning the Children's Hearings system.
- <sup>x</sup> Family group decision-making is also affected by the non-statutory footing of [Part 12](#) of the 2014 Children and Young People (Scotland) Act.
- <sup>xi</sup> Including for the Children's Panel, Children and Families Social Work, Children's Hearings Scotland, the Scottish Children's Reporters' Administration and the Looked-After Children Pupil Equity Fund.
- <sup>xii</sup> As distinguished from English, Welsh, or Northern Irish law
- <sup>xiii</sup> The Children's Commissioner for England's [report](#) discusses the debates in the High Court and the Supreme Court around legal and human rights threshold tests for lawful deprivation of liberty, capacity of the child, and parental consent.
- <sup>xiv</sup> The highest court in Scotland
- <sup>xv</sup> In the matter of [T \(A Child\) \(Appellant\) UKSC \(Judgment pending\)](#), Case ID: UKSC 2019/0188.
- <sup>xvi</sup> It allows public, private and voluntary sector organisations to pledge support, including apprenticeships, work experience, free or discounted goods and services. All support will help care leavers to transition to independence and includes CV training and accommodation for care leavers in higher education. Every care leaver has a personal adviser who can provide information on Care Leaver Covenant offers.
- <sup>xvii</sup> See our [Rights to Care guide](#), developed with Who Cares? Scotland.