

Aberlour Response to the Scottish Government Children's Care and Justice Bill Consultation

June 2022

About Aberlour

Aberlour is Scotland's largest, solely Scottish children's charity. We work with vulnerable, disadvantaged and marginalised children, young people and families, providing services and support in communities across Scotland. We help to overcome significant challenges, including the impact of drugs and alcohol on family life, growing up in and leaving care, poor mental health, living with a disability, or the impact of poverty and disadvantage. We aim to provide help and support at the earliest opportunity to prevent problems becoming intractable or spiralling out of control. We are committed to **#KeepThePromise** and to the incorporation of the United Nations Convention in the Rights of the Child (UNCRC).

Our Vision is ***'to give every child the chance to flourish and, through this, contribute to building a fairer and more equal society'***. Our Mission is to deliver that vision by supporting children and families affected by poverty, discrimination, adversity, addiction, disability and trauma, within residential and community settings. We understand that not all children are born with an equal chance and are committed to beating poverty and discrimination.

Aberlour is a member of the End Child Poverty coalition and is committed to combatting the impact of poverty and disadvantage on the children and families we work with, as well actively campaigning to see a Scotland where no child grows up in poverty. We deliver the Aberlour Urgent Assistance Fund which provides financial support via small grants to families and young people aged 21 and under living anywhere in Scotland and experiencing extreme financial hardship.

Introduction

At Aberlour we work with children, young people and families who have experience of care and many who come into contact with the justice system. Through our residential children's houses and fostering service we provide safe, nurturing and loving homes for children who cannot live with their families. We know that children in care are disproportionately more likely to come into contact with the justice system and we aim to support and protect the rights of children and young people we support who do. We also support children looked after at home and their families, including families where children are at significant risk of being taken into care. We work with families to prevent and mitigate the challenges in their lives that can create and increase risk to children's wellbeing and welfare.

Many of the children and families we work with have experience of significant and lifelong trauma and encounter multiple adversities in their lives. We deliver intensive family support services in communities around the country, supporting families who are struggling due the often multiple and

intersecting challenges they face. These most often include domestic abuse, parental and children's mental health concerns, drug and alcohol use, housing issues, social isolation, financial insecurity, as well as children in the family having already been taken into care. Poverty and disadvantage are key factors which impact the lives of the majority of families we support.

Our response to this consultation has been informed by our experience of supporting children and families affected by trauma, adversity and disadvantage and who have had contact with the care and justice systems, as well as by the voices and views of the children, young people and families we work with.

We have chosen not to respond to this consultation paper in full, but instead have responded to those questions within the paper where we are able to provide comment based on our knowledge and experience, and which are relevant to work we do and the children, young people and families whom we support.

Raising the Maximum Age of Referral to the Principal Reporter

Qu.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 some circumstances.

It is our opinion that information sharing must remain proportionate and in accordance with existing legal protections in relation to how information on all children is used and shared. Any approach to the sharing of information needs to respect and respond to the rights of all children in equal measure and must continue to reflect the fundamental principles of the Children Hearings System (CHS) as child centred and concerned with the best interests of all children who come into contact with it.

Article 16 of UNCRC protects a child's right to privacy¹, and so we believe the sharing of information about children in conflict or in contact with the law must only occur where there is no other way to manage risk and where the sharing of that information is necessary for the safeguarding of themselves or others.

We support the recommendation on information sharing by the review into Improving the Management of Sexual Offences Cases, led by Lady Dorrian². The review recommended provision of further accessible information for people who have been harmed on how the Children's Hearing System works and the different procedures and restrictions on the provision of information that apply.

¹ <https://www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf>

² <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2021/03/18/improving-the-management-of-sexual-offence-cases>

We believe instances in which the sharing of information may be necessary are where a person is subjected to a measure that relates directly to person harmed (e.g. a no contact order). Sharing information in such circumstances would allow the person harmed to know what the terms of such an order are and, therefore, to know if and where such an order has been breached.

Qu.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.

Please see our answer to Qu.1

Qu.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.

We agree with the Centre for Youth and Criminal Justice in their evidence and recommendations on supporting child victims in their report *Rights Respecting? Scotland’s approach to children in conflict with the law*³:

“Where children cause harm to other people those harmed are usually other children. However, the child victim is largely ignored in our justice systems in terms of both their participation in justice processes and in ensuring they receive appropriate care and support. Scotland would benefit from specifically considering child victims and what could be done to improve their experience, particularly where they have been harmed by another child”.

We support the development of the Bairns Hoose (Barnahus) model⁴, which aims to guarantee trauma-informed and responsive recovery, support and justice for all children in Scotland who have been victims, witnesses or who have been harmed. Article 39 of the UNCRC insists that all children have a right to recovery from trauma and that the necessary support must be available for children who require it⁵. We recognise most often children who have caused harm are themselves the victims of abuse or have experienced significant trauma. Therefore, we also believe such trauma-informed and responsive recovery and support should be extended to children who have caused harm, and this should be the eventual ambition for the Bairns Hoose.

The current development of the Bairns Hoose is a crucial step towards realising the core recommendations of The Promise on how Scotland responds to and supports traumatised children, as well as children’s right to recovery as laid out by the UNCRC. However, in order to ensure that such a new model of support can work for all children we believe there must be focus on developing

³ <https://cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf>

⁴ <https://www.children1st.org.uk/help-for-families/bairns-hoose/>

⁵ <https://www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf>

the model without distracting from its primary aim of supporting child victims and witnesses in the first instance. The learning and experience of delivering the Bairns Hoose for these children will inform how such support can be extended in time to all children who need it, including those who have caused harm.

Before and until the Bairns Hoose model has been implemented across Scotland, it is necessary to make sure that all children who have been harmed have access to trauma-informed and responsive recovery and support. We believe that for children who live with their families this can best be provided through the delivery of holistic, whole family support, with relevant agencies, including third sector, health and social work partners, working together to respond to the needs of the whole family to ensure therapeutic, emotional and practical support is in place for the child and their family.

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

Yes, in principle.

However, privacy and proportionality of information sharing as outlined previously needs to be considered. We are also cautious about taking any approach that replicates previous efforts at developing policy on information sharing that could not be implemented due to incompatibility with existing human rights law. It is correct that support offered for children and their families should prevent the child or their family from having to repeat their story multiple times and the potential re-traumatising effects of having to do so. We believe the Bairns Hoose model can provide an approach that prevents this, where a single place of contact will provide such consistent, child focused support with all relevant agencies working together without the need to share stories multiple times as the child comes into contact with different agencies and support services.

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

Yes, with caveats.

We refer to our previous answer to Qu.1 on proportionate and necessary information sharing that protects children's rights. Where measures through the CHS can be amended or enhanced for the protection of people who have been harmed, as well as for all children in contact with the CHS, then that should be welcomed. This should include the continuing use of technology to ensure that all children can participate remotely if they choose, if that better meets their needs and helps provide better protection and support. However, we are clear that any efforts to improve how the CHS works for all children it has contact with must ensure it is rights-respecting, child-centred and trauma-informed and responsive and is working in the best interests of the child. We are concerned that any proposed changes may detract from those key principles for all children who are in contact with the CHS. Therefore, we would caution against looking to introduce aspects of the adult justice system into the CHS, even where that is as a result of an effort to enhance the system for children who have been harmed.

Qu.7: Maximising the use of the children’s hearings system and supports to children beyond the age of 18. Should any of these options be considered further?

Yes.

Option 1 – We support this proposal and believe that all children under 18 as defined by the UNCRC, should be remitted to the Principle Reporter for advice and disposal. Children involved in patterns of offending behaviour are often those most in need of support. Therefore, it is essential that we ensure the underlying drivers of these behaviours are addressed through support and protection, not through punitive measures or traditional adult justice systems. The *Scottish Sentencing Council Guidelines on sentencing young people*⁶ are directly informed by research highlighting the significant transitional life phases that young people experience throughout teens into mid-twenties, where young people are most in need of support. This guidance intends that a young person’s development and the likelihood of the impact of trauma and exposure to adversity for young people who enter the criminal justice system is taken into consideration as a mitigation when sentencing by the courts. Equally the CHS must also take into consideration young people’s development in this way and help navigate young people away from criminal justice responses by focusing on support and protection needs. We also believe such an approach would be consistent with children’s right to recovery from trauma as established by Article 39 of the UNCRC⁷.

Option 2 – We support this proposal to promote the wider use of the existing ability for the CHS to require support to be offered to a young person on a voluntary basis following the termination of any CSO when an individual turns 18. The importance of planned and supported transitions at key phases of life and development is crucial and there is a risk for young people when their support comes to an end that they potentially face a ‘cliff-edge’ where support falls away entirely. It is also our opinion that chronological age alone as a benchmark is unhelpful, overly simplistic and fails to allow recognition of the developmental needs of individual children and young people – as outlined previously – which require careful consideration, particularly where children have experienced trauma and other forms of adversity. Connecting this support with existing aftercare duties also feels appropriate, but we believe this should not result in ongoing support only being offered to care leavers.

Option 3 – We support this proposal and further highlight our comments in relation to understanding and recognising the development of young people affected by trauma and adversity.

Children and the Criminal Justice System

Qu.9: Children at court. Should any of these options be considered further?

Option 1 – We believe the proposal to re-examine the decision-making framework between which system (CHS or Justice) should deal with a child’s case should be considered. UNCRC is clear on the definition of a child and we believe such an approach would be consistent with Scotland’s

⁶ <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>

⁷ <https://www.unicef.org.uk/wp-content/uploads/2016/08/unicef-convention-rights-child-uncrc.pdf>

commitment to incorporate UNCRC. We believe it is correct that the CHS deals with all cases for those under 18, not only those under 16 or subject to children’s hearing measures at the time of their offence.

Option 2 – We do not support the proposal for the continued use of traditional court settings whilst recognising local innovations and good practice. We believe that traditional court settings are not appropriate for children and we should be working to remove the need for children to appear in such spaces. We do not believe that we can rely on pockets of ‘local innovation’ alone and are concerned that however innovative they may be, they would still expose children to adult justice environments that we should be looking to steer children away from. We should continue to develop and learn from local innovations and use these findings to inform development of national structures and legislation, but ultimately we need a consistent and fair approach to responding to all children who find themselves in conflict with the law. Except in circumstances where 16 and 17-year olds are charged with the most extreme and serious charges, such as rape or murder, children should not be exposed to the adverse effects of involvement in adult justice systems such as court and the potential that can provide for becoming retraumatised. The Promise is clear on the role of courts in children’s experience of the justice system: *“Traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard”*.

Option 3 – We support these proposals to make changes to practice, conduct and support in court. However, we do not believe they should be seen as an alternative to extending use of referral to the CHS. All under 18s should be referred to the CHS, but where a crime has been committed where the sentence is set in law, or there requires a parallel response from the courts (e.g. driving ban), these arrangements would support child-centred management in safe, trauma-informed, rights-respecting spaces. We believe such changes take specific developmental needs of children into greater consideration and responds to The Promise recommendation that: *“Scotland must 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”*.⁸ Although the changes described would create more child-friendly justice structures, we must recognise the potentially wide-ranging and damaging effects of childhood criminal records that prosecution can result in⁹. This is still true even when prosecution occurs in court structures which are intended to be ‘child-friendly’. We caution against the risk that these arrangements become the default for children who should otherwise be referred to the CHS.

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

Yes.

We believe that no child should be detained in a YOI. The Scottish Government has already committed to end the use of YOIs for 16 and 17-year olds in favour of care-based alternatives, and we welcome that commitment being restated in this consultation paper. Regardless of how we term

⁸ https://www.carereview.scot/wp-content/uploads/2020/03/The-Promise_v7.pdf

⁹ <https://cycj.org.uk/wp-content/uploads/2020/01/Rights-Respecting-Scotlands-approach-to-children-in-conflict-with-the-law.pdf>

them, YOIs are prisons and is part of a system designed for adults, which is neither trauma-informed nor child-centred. The consultation paper rightly outlines that the majority of children in YOIs at any given time are on remand (76-94% in 2021¹⁰) and have not been found guilty of any crime. Therefore, we must look to ensure these young people are provided with appropriate alternatives to YOIs that prioritise their care, support and protection.

Qu.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.

We believe this is an option for sentencing which should be removed so that a consistent approach is taken to all children in Scotland, in line with both UNCRC and The Promise, and not left to local or individual discretion by sheriffs or judges. Children who have committed the most serious of crimes, who are displaying extreme distress or pose a risk of serious harm to themselves or others, are the most in need of care and support. We believe that secure care options are better places to provide this through specialist multi-disciplinary teams.

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

Yes.

We need to guarantee consistent care and support for care leavers that fulfils their rights and entitlement to continuing care. The Promise highlights that: *"for care-leavers deprivation of liberty should warrant a re-assessment of that young person's needs and welfare, along with the provision of aftercare support..."*¹¹. We know there is a disproportionate number of care experienced people in the justice system. The Scottish Prison Service estimates that the number of young offenders with care experience in custody is around 40%¹². Coming into contact with the justice system should not mean that any care leaver does not get the support they are entitled to. It is crucial to ensure that local authorities are taking all steps to provide appropriate support to all care leavers in line with the principles of The Promise, including when a young person is in custody.

Qu.13: Anonymity. Do you agree that the proposed changes related to anonymity should be made?

Yes.

We would support a move to life-long anonymity for crimes committed by children who are under 18. Regardless of the nature of the offence the principle should still remain that the offender was a

¹⁰ <https://cycj.org.uk/wp-content/uploads/2020/12/Bail-and-Remand-in-Scotland-final-report-1.pdf>

¹¹ https://www.carereview.scot/wp-content/uploads/2020/03/The-Promise_v7.pdf

¹² <http://www.sps.gov.uk/Corporate/Publications/Publication-7393.aspx>

child at the time of the offence. We would point again to the *Scottish Sentencing Council Guidelines on sentencing young people* which highlight the impact on development of young people who have experience of trauma and adversity¹³.

The potentially damaging personal and social effects anonymity laws and privacy rights for children attempt to mitigate may only be postponed rather than prevented through the lifting of anonymity later in life. Public persecution and stigma attached to a crime may also affect a child's family, including future children. If anonymity is lifted at any future point it would likely impact on employment prospects and the ability to reintegrate into society would likely be compromised and result in an increased likelihood of re-offending.

Residential Care and Cross-Border Placements

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

We are unsure about the development of new pathways and standards where this is not part of wider efforts to help develop a culture of values-led practice that results in children and young people who live in residential settings feeling nurtured and loved. Pathways and standards can be useful for ensuring a minimum quality of care and support that children and young people can and should expect when they are unable to live with their family. However, we believe it is important to consider whether new pathways and standards will in and of themselves guarantee the quality of relationships that children and young people have with the adults who support them in residential settings.

The children and young people who live with us in our Sycamore cluster of children's houses tell us they feel the requirements of regulation and inspection as they currently are make their homes feel more like work places. Making sure we provide nurturing homes and loving environments for our most vulnerable children and young people will only happen as a result of ensuring a confident workforce which feels empowered to provide care and support which is focused on consistent values of compassion, empathy and love. We can only make this happen consistently for all children and young people in residential care through focusing on how we improve and influence culture and practice for all those who care for and support those children and young people.

If it is agreed that new pathways and standards are a necessary part of how this change can be achieved, then there are examples of best practice for how they can be developed in collaboration with children and young people in residential care. The Standards for Secure Care published, in 2020 and co-produced with people with experience of Secure Care, were supported and strongly praised by both Scottish Ministers and COSLA as part of an overhaul to improve children and young people's rights.

Children and young people have the right to know what to expect from their care and support experiences and should have a voice in setting standards which determine what that looks like. We

¹³ <https://www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf>

support the co-production of any standards which are intended to guide and influence practice in areas which have an impact on children and young people's lives, and we will always advocate for the meaningful participation of children and young people to inform the development of policy and decision making that affects them.

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

No.

We understand the intention for this proposal but believe an unintended consequence would be that it could result in the reduction or closure of national residential services delivering specialist therapeutic support for children from across Scotland, such as Aberlour's Sycamore Service. Where those services are located in a particular local authority but may provide a limited number or no care placements for children from that area it could be deemed through a local strategic needs assessment that it is not needed. Therefore, such an assessment could work against the interests of children in need of specialist therapeutic residential care in other parts of the country, where this cannot be provided in the area where they live.

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

We believe it is important to consider whether an increased role for the Care Inspectorate will improve the likelihood of ensuring nurturing, loving homes for children who cannot live with their family. The Promise states that: *"The Inspection of residential settings must focus on the children's experience of the relationships. Inspection must be led primarily by what those who live in residential homes say and how they feel they are being cared for"*. Our children and young people who live with us in our residential children's houses tell us they already feel that any sense of homeliness is affected by current regulation and inspection requirements. Therefore, we believe any review of the role of regulation and inspection in children's residential services must focus on what children and young people tell us makes them feel cared for, safe and loved, and how that can be inspected against in a way that promotes a sense of home.

Qu.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.

Independent advocacy is crucial for all children in residential and secure settings to ensure their rights are supported and protected.

Qu.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.

Aberlour is a member of the Scottish Physical Restraint Action Group working with other stakeholders to advocate for and influence policy and practice around reducing the use of physical restraint. Aberlour is also working alongside partners, including Kibble and Glasgow City Council, to help inform and influence practice that helps to reduce and avoid the use of physical restraint in residential children's houses.

Over the last three years Aberlour has undertaken a programme of work – Safer Places to Live and Work – with the aim of ending the use of restraint entirely in our residential children's houses. This has been a collaborative project with children and young people who live with us and the adults who provide their care and support. We have been able to develop alternatives to the use of restraint by working in partnership with our children and young people to help us change culture and practice in a way that better responds to children and young people who experience significant distress. As a result of this work we have been able to reduce the use of physical restraint in our children's houses by more than 90% (Aberlour Internal Data, 2022).

We are clear from our experience that by ensuring trauma informed and responsive approaches to how we respond to children in significant distress, including therapeutic spaces and nurturing, loving environments in our children's houses, we can change practice fundamentally. Not only are alternatives to the use of physical restraint effective, but the number of incidents that may have escalated to a point which resulted in the use of physical restraint in the past now rarely, if ever, occur.

Article 19 of the UNCRC guarantees children's right to protection from violence and to be kept safe. The practice of physical restraint, even when the intention is to keep children safe, is likely in many circumstances to breach this right due to lack of effective training or guidance which often results in physical restraint being used when alternative approaches can and should be used instead. The Promise is also clear that: "*Scotland must strive to become a nation that does not restrain its children*"¹⁴. Therefore, we support the call by the Children and Young People's Commissioner to see national human rights-based guidance on the use of physical restraint¹⁵. We believe any legislation, policy and guidance intended to reduce and avoid the use of physical restraint must be driven by the ambition to end the use of physical restraint entirely, not only in children's residential services but in all settings and circumstances.

Age of Criminal Responsibility

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

¹⁴

<https://thepromise.scot/assets/UPLOADS/DOCUMENTS/2020/10/The%20Promise%20Secure%20Estate%20Briefing%20Autumn%202020.pdf>

¹⁵ <https://www.cypcs.org.uk/news-and-stories/restraint-and-seclusion-are-still-real-issues-in-scotlands-schools/>

We believe the review should be brought forward at the earliest opportunity recognising the role of the Advisory Group and the fact that it has already been established for three years. There is substantial international evidence, as well as a significant body of expert opinion here in Scotland, pointing to the benefit of a further increase in ACR. We do not believe there is a requirement to wait a further 3 years to begin this process.

For further information contact Martin Canavan, Head of Policy & Participation
Martin.Canavan@aberlour.org.uk