



Who Cares? Scotland

Response to Equalities and Human Rights Committee Inquiry: Human Rights and the Scottish Parliament

March 2018

About us

Who Cares? Scotland (WC?S) is an independent advocacy and membership organisation. We are celebrating our 40th anniversary in 2018 and our vision, which was created with care experienced people, is to secure a lifetime of equality, respect and love for care experienced people in Scotland.

To find out more about how we will do this, please:

- Find information about our strategic plan for 2018 – 2022 by visiting this link - <https://www.whocaresscotland.org/what-we-do/strategic-plan-2018-2022/>
- Read more about our 40 years of representing the care experienced community by visiting this link - <https://www.whocaresscotland.org/40th-birthday-year-2018/>

To understand why this vision matters to care experienced people, please:

- Read the blogs they have created, which are available via this link - <https://www.whocaresscotland.org/who-we-are/blog/>
- Take 5 minutes to watch this video which was created with our members - <https://vimeo.com/239422128>

Introduction

First and foremost, we believe that listening to the voice of care experienced people will be key to the success of this inquiry. In their daily lives, care experienced people are subject to the authority of many adults whose day-to-day decisions can have an enormous impact on the enjoyment of their human rights. Many public bodies and authority figures have duties outlined in law towards care experienced people. Consequently, they also have power over the experiences through childhood and then into adulthood that a care experienced person has. This is in stark contrast to that of non-care experienced people. As such, care experienced people are particularly vulnerable to an abuse of power that neglects their rights. At the same time, care experienced children and young people are not generally able to rely on their parents to stand up for their rights in the same way that non-care experienced children and young people can. Unfortunately, this can contribute to their rights being overlooked in a variety of scenarios.

For example, our members have told us;

- They often feel their voice is not listened to when they attend Children's Hearings;

*"The form I can fill in with my views is useless and no-one reads it. I was 16 years old before I even knew I could even talk to the panel. We weren't told we could do that. I would have participated better if I knew I could speak to them, but I didn't, so I just kicked off."*¹

- They were not given the opportunity to maintain relationships with their siblings;

*"When I was brought into care, overnight I was shipped all the way from **** to ****. That pulled the first straw out of the relationship with my family. When I was in care, every so often I'd go months with no contact with my brothers at all. Every time you're apart the relationship is weakened."*²

- They feel physical restraint is sometimes used as a punishment rather than a last resort;

*"Police came in and restrained me, put white things on my wrists and then they put something on my mouth, so I couldn't spit on them. I they got off me for 2 minutes I would explain why I was kicking off. They got the wrong person, the police wanted to charge me, I was greeting and crying."*³

- Their education suffers because of decisions such as multiple placement moves, and being taken out of school to attend Hearings;

"My exam stress is combined with stress from moving placements and not knowing where I'm going to be living!"

¹ Education and Skills Committee, The Children's Hearings System - Taking Stock of Recent Reforms, 5th Report, 2017 (Session 5)

² Who Cares? Scotland, Sibling Separation and Contact, Young Radicals Report, 2017

³ Who Care? Scotland, consultation with young people within secure care setting, 2017

“I don’t think the additional stress I experience is accommodated the way other people’s stress is.”⁴

“I had seven or eight hearings...I was taken out of school during my prelims. This made me angry because I wanted a job as soon as I came out of school, but instead I had to go to college and do a course I didn’t want to do. If I hadn’t been pulled out of school, I wouldn’t have been sitting exams at foundation level.”⁵

- They are not provided with sufficient support in terms of mental health;

“I didn’t know where to go. I didn’t have a social worker, so my sister had to help me.”⁶

- And, even with the recent improvements to continuing care and aftercare, when leaving care, they are still not provided with sufficient support in terms of housing;

“It’s like okay you’re out your placement now you’re not really our problem? We’ll find time and money for you, if we can, but you’re not a priority anymore when in fact that’s the demographic that’s at most risk I’d say.”⁷

This shows that human rights – including the right to participate; the right to family life; freedom from degrading treatment; the right to education; the right to health; the right to an adequate standard of living; and many other rights besides – are particularly significant for care experienced people. As such, we believe it is vital that this committee listens to the voice of care experienced people when considering human rights and the Scottish Parliament.

Q1. Participation and engagement

Article 12 of the UNCRC encompasses every child’s right to have their voice heard and considered in decisions that affect them. As such, it is vital that the Scottish Parliament has methods of participation and engagement with care experienced children and young people to ensure they can express their views in relation to the Parliament’s work.

Good practice

There are already some excellent examples of participation and engagement with care experienced children and young people in Scottish political life.

- **The Children and Young People (Scotland) Act 2014** - members of the Education and Culture committee went out of their way to meet with care experienced people on several informal and formal occasions, during the passing of the Children and Young People (Scotland) Act 2014. Important changes were made to care because of this engagement and listening to care experienced voices.

⁴ Who Cares? Scotland, Assessment Arrangements Young Radicals report, March 2017.

⁵ Who Cares? Scotland, response to Education and Skills Committee, Children’s Hearings System – Taking Stock of Reforms, March 2017

⁶ Who Cares? Scotland, response to consultation on Scottish Government Mental Health strategy “Mental Health in Scotland – a 10-year vision”, September 2016

⁷ Who Cares? Scotland, response to Consultation on The Draft Continuing Care (Scotland) Amendment Order 2018, November 2017

- **1000 Voices** – this began as a manifesto call to action ahead of the 2016 Scottish Parliamentary Election from Who Cares? Scotland. All political party leaders committed to listening to 1000 care experienced voices should they become First Minister, and, since the election, the First Minister has taken this commitment very seriously and personally engaged in a wide range of participation and engagement activities. This also included the establishment of the Independent Care Review.
- **Formal evidence sessions to parliamentary committees** – as part of the Children and Young People (Scotland) Bill process, care experienced young people directly gave evidence to the Education and Culture Committee, which was convened by Stewart Maxwell, MSP. Since then, a precedent was established for more regularly including care experienced people in formal committee process, especially where they were reviewing policies or legislation or practice which directly or indirectly affect their lives. This included the Inquiry led by the Equal Opportunities Committee in the previous session ‘Having and Keeping a Home – steps to preventing youth homelessness (follow up) - <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/74872.aspx>

However, there is currently no guarantee that participation and engagement of this sort will be repeated or grow.

As such, we believe a more systematic approach, that mainstreams participation and engagement into the daily work of the Scottish Parliament, is needed. One international example that should be considered, is Ireland’s *National Strategy on Children and Young People’s participation In Decision-Making*⁸ and we would recommend the Scottish Parliament reviews whether a similar approach could be adopted or improved upon for Scotland.

Awareness of rights

More needs to be done to ensure that care experienced children and young people, and the people who support them, are aware of their rights. Under the Children and Young People (Scotland) Act 2014, the Scottish Parliament is responsible for scrutinising how corporate parents are meeting their duties, including the duty to promote care experienced people’s rights. As such, we recommend the Scottish Parliament takes steps to ensure that corporate parents are aware of human rights in a care context and are promoting these rights to care experienced people themselves and to others.

As a representative organisation, we share responsibility for helping care experienced children and young people to understand their rights and resulting entitlements. This is done routinely as part of our advocacy relationships with children and young people. However, we are also securing opportunities to work in partnership with other agencies to do this too. For instance, we are currently working with the Children and Young People’s Commissioner Scotland to produce a human rights toolkit that we hope will help “make rights real for care experienced people” and become a valuable resource for corporate parents too.

⁸ For further information, please see: <https://www.dcy.gov.ie/docs/national-strategy-on-children-and-young-people-s-participation-in-decision-making/3456.htm>

Advocacy

This year will mark Who Cares? Scotland's 40th anniversary. That is 40 years of delivering professional, independent, one-to-one advocacy to care experienced children and young people. Our advocates will support a young person to express their views whenever a decision is being made about their lives, in both formal, and informal settings. Our advocacy is relationship-based and child-centred. Our approach involves an Advocate being alongside the young person, understanding what is important to them, helping them understand their options, and then helping them to put across their views. An important part of this approach is talking to the young person to make sure they understand their rights, and then, where appropriate and agreed with the young person, talking to relevant decision makers about the young person's situation and needs by reference to their rights.

We strive to provide advocacy that helps young people feel respected, included, listened to and understood. Advocates make this direct contribution to the well-being of children and young people every day across Scotland - as determined by the SHANARRI indicators set out in the Children and Young People (Scotland) Act 2014. Advocates also support children and young people in care to understand their rights as established in the UNCRC. Our advocates are independent to any care services a young person receives – this is crucial because we want young people to be supported and understood with no conflict of interest.

“This time two years ago, I would never have imagined being in the place I am in today, but my independent advocate, Beth, did. She helped me articulate what I wanted to say without me getting angry or upset and she listened and cared about my views and opinions.”⁹

The top three recurring advocacy issues which we support children and young people in care with, are:

1. Staying in touch and having positive relationships with family – “Contact”.
2. When decisions are made about their lives - “Formal processes” such as looked after children reviews and Children’s Panel meetings.
3. When plans are being made about their lives – “Care planning”.

Through this work we have found that the understanding of human rights amongst professionals is not as in-depth as it should be.

While there are no official figures available that we are aware of, we estimate that less than 20% of Scotland's looked after population have access to independent advocacy support. In our view, this figure needs to be 100%.

There have been some positive steps forward in this regard. For instance, we welcome where The Children's Hearings (Scotland) Act 2011 has brought in a duty on the chair of children's panels to make children and young people aware of the availability of advocacy. However, the relevant provisions (section 122) have not yet been brought into force so that the Scottish Government has time to ensure that there is sufficient level of provision to

⁹ A care experienced person's account of their advocacy experience with WC?S, Education and Skills Committee Children's Hearings System – Additional Information, 7th April 2017.

meet any potential increase in demand. We have been working with the Scottish Government to explore how best to approach this and see this as potentially a big step forward.

However, we do not believe the current provisions go far enough. We believe that all care experienced people across Scotland should have a **right to independent professional advocacy**. The accepted and respected role of an advocate in any setting and across many societies, is to support and empower people to be able to express their views and assist them in making informed decisions on matters which influence their lives.

Young people living in care and care leavers are required to contend with life-changing decisions and formal meetings on a frequent basis throughout their childhoods, without the statutory right to independent advocacy support. Article 12 of the UN Convention on the Rights of the Child, makes very clear that every child has the right to say what they think in all matters affecting them and to have their views taken seriously. Advocacy helps to make that right a reality for those children and young people who, for whatever reason, would not otherwise be able or allowed to share their views.

Through advocacy relationships, we can help children and young people to realise their rights in childhood, alongside effective and full participation in the structures that affect their lives. This encourages them to grow into confident and socially active adults. It is widely recognised that active citizenship has the potential to strengthen the position of traditionally excluded and socially disempowered groups by encouraging stability and social growth.

United Nations Convention on the Rights of the Child

Finally, we believe that incorporation of the UNCRC is one of the most important steps that the Scottish Parliament could undertake to empower care experienced children and young people, and we strongly encourage the Committee to consider what steps it could take to progress incorporation. We will expand on this recommendation in relation to Q3 on accountability but mention it here also because, in addition to the additional legal protections it would provide, incorporation is perhaps the best possible way to increase awareness of children's human rights.

Q2. Scottish Parliamentary procedure and process

Involving children and young people

The Scottish Parliament has a duty to ensure children's rights are considered and embedded in Scottish legislation. This is particularly important in relation to care experienced children and young people who are at greater risk of abuse of their rights, and who are unlikely to have parents able to help them stand up for their rights. As such, involving care experienced children and young people in the procedures and processes of the Scottish Parliament is one of the most important ways of ensuring children's rights are considered and embedded in Scottish Legislation.

As mentioned above, some Committees have taken steps to involve care experienced children and young people in specific inquiries, but a broader approach that mainstreams involvement of care experienced children and young people into all relevant work needs to

be adopted to ensure that these examples of good practice do not become isolated incidents.

We support the recommendation from Together Scotland¹⁰ to create child friendly calls for evidence for inquiries and inviting children and young people to give evidence (and allowing this to be given in creative ways). Listening to the voice of care experienced children and young people is ultimately the best way to ensure that Scottish Parliamentarians are aware of the issues that affect them and the ways in which their rights are, or could be, infringed.

As mentioned above, we also recommend this Committee considers what steps the Scottish Parliament could take to progress incorporation of the UNCRC into Scots' law. Bringing this international treaty into our domestic law and constitution, would ensure that Scottish Parliamentary procedure and process is always in line with children's rights.

Making care experience a protected characteristic

We would like to draw the Committee's attention to our Lifetime of Equality campaign.¹¹ Over the years we have heard lots of examples of young people being treated differently because they are care experienced.

This includes examples of:

Stigma:

*"With some children's homes where they put them in residential areas, they know they're going to get petitions at the doors, they know people are going to complain."*¹²

Harassment:

*"I was working in a place and I'd already learnt, don't tell anyone. I can't remember why they had to ask my address, but people started hiding their handbags."*¹³

Direct discrimination:

*"A teacher found out I was in care and as a result she constantly questioned me about cheating on essays and then had an invigilator stand over me for most of my higher exam."*¹⁴

And indirect discrimination:

*"[The] issue I had with the doctor when I was in care was trying to make my own appointments and they said 'No' because I was 15 and they were like 'Can I speak to your mum or dad?' and I was like 'No'. And then – for a while anyway – they wouldn't speak to my staff."*¹⁵

¹⁰ Please see: http://www.togetherscotland.org.uk/pdfs/HRSP_Response_FINAL.pdf

¹¹ For more information on the campaign, please see: <https://www.whocarescotland.org/what-we-do/campaigns/lifetime-of-equality/>

¹² Who Cares? Scotland Anti-Discrimination Workshop, Wednesday 7 February

¹³ *Ibid*

¹⁴ Who Cares? Scotland response to consultation on Draft Statutory Guidance Standards in Scotland's School etc. Act 2000, November 2016

¹⁵ Who Cares? Scotland Anti-Discrimination Workshop, Wednesday 7 February

Due to examples like this, as an organisation, Who Cares? Scotland believes that care experience should be made a protected characteristic. This would provide care experienced people with protection from discrimination and harassment because of their care identity and would ensure that Scottish Parliamentary processes and procedures consider the potential effects that decisions and legislation might have on care experienced people.

Such a step would also reflect the rights encompassed by Article 20 of the UNCRC, which states that children and young people in care *“shall be entitled to special protection and assistance provided by the State”*.

We are aware that there are some questions over the Scottish Parliament’s competence in this area. Equal opportunities are indeed a reserved matter; however, this is subject to certain exceptions. These exceptions were recently added to by the Scotland Act 2016. Section 37(3) introduced a new exception allowing the Scottish Parliament to introduce legislation that *“supplements or is otherwise additional to provision made by [the Equality Act 2010]”*.

On the face of it, it therefore seems clear that the Scottish Parliament could now introduce legislation to supplement or add to provisions of the Equality Act 2010 including adding additional protected characteristics. The Hansard report from the second sitting also makes it clear that the exception was intended to be broad enough to allow this:

“We are giving the Scottish Parliament the ability to go further. An example is the ability of the Scottish Parliament to introduce new protected characteristics on top of the nine already in the Equality Act 2010, which include sex, race and disability.”¹⁶

As such, we recommend the Committee reviews the Scottish Parliament’s competence in relation to equal opportunities and considers what steps the Scottish Parliament could take to progress making care experience a protected characteristic.

Q3. Accountability

Advocacy

As mentioned above, this year will mark Who Cares? Scotland’s 40th anniversary and our 40th year of delivering independent, one-to-one advocacy to care experienced children and young people. As well as being one of the best possible ways to empower care experienced children and young people to make them more aware of their rights, advocacy is also one of the best possible ways to help hold decision makers to account when they do not fully respect care experienced children and young people’s rights. There are a great many accountability mechanisms available to care experienced children and young people. For example, appealing against a decision, escalating an issue to highlight poor practice, speaking to an elected representative, engaging with relevant Scottish Parliamentary processes, instructing a solicitor to go to court, reporting bad decisions to regulatory bodies or the Children and Young People’s Commissioner. However, these can be daunting steps for anyone to take, and particularly so for vulnerable children and young people. A good

¹⁶ Committee: 2nd sitting (Hansard): House of Lords 19 January 2016, column 676, per Lord Dunlop.

relationship with an Advocate will make all these accountability mechanisms much more accessible to care experienced children and young people.

However, as mentioned above, the number of care experienced children and young people who receive professional advocacy is extremely low. We believe that every care experienced child or young person should have a statutory right to independent professional advocacy and we would recommend the Scottish Parliament does everything within its power to make such a right a reality.

United Nations Convention on the Rights of the Child

The Scottish Parliament has the power to “observe and implement international obligations”.¹⁷ This means the Scottish Parliament could choose to incorporate UNCRC into domestic legislation. We fully support the Scottish Youth Scottish Parliament’s “Right Here, Right Now” campaign and believe that incorporation of the UNCRC would be the best way to ensure that the UNCRC is being followed here in Scotland. As mentioned above, we recommend incorporation of the UNCRC partly on the basis that this would be the most effective way to increase awareness of children’s rights, but more fundamentally because this would be the best possible way to ensure the Scottish Parliament and other decision makers can be held accountable for any failures to fully respect care experienced children and young people’s rights.

Taking this step would be firmly in line with, and a natural progression from, the duties of the Scottish Ministers under the Children and Young People (Scotland) Act 2014 to take any appropriate steps that “*would or might secure better or further effect in Scotland of the UNCRC requirements*”¹⁸.

In addition to ensuring the UNCRC is followed, we believe incorporation would also provide an incredible opportunity to enhance our understanding of human rights and the importance of love. As the First Minister recently stated:

*“Arguably the most important right of all is the right to be loved.”*¹⁹

Whilst not a free-standing right, love is mentioned in the preamble to the UNCRC which states that every child should grow up in “*an atmosphere of happiness, love and understanding*”.

When incorporating the UNCRC, we recommend the relevant legislation explicitly recognises the importance of love. We recommend this is done in a way that means the incorporating legislation requires all incorporated UNCRC rights to be interpreted considering the above words of the preamble, so that all consideration of children’s rights also considers a child’s right to love.

Summary of key recommendations

¹⁷ Paragraph 7(2)(a) of Schedule 5 of the Scotland Act 1998

¹⁸ Section 1(1), Children and Young People (Scotland) Act 2014

¹⁹ Kilbrandon lecture, Strathclyde University, 23 November 2017. Transcript available here: <https://news.gov.scot/speeches-and-briefings/kilbrandon-lecture-strathclyde-university>

- **Listen to the voice** of care experienced people – this will be key to the success of this inquiry and is something with which we would be happy to assist.
- **Mainstream participation and engagement** in the daily work of the Scottish Parliament and review whether an approach like Ireland’s *National Strategy on Children and Young People’s participation In Decision-Making*²⁰ could be adopted or improved upon in Scotland.
- **Create child friendly calls for evidence** for inquiries and inviting children and young people to give evidence (and allow this to be given in creative ways).
- **Introduce a statutory right to independent professional advocacy** for every care experienced child or young person in Scotland. This would empower care experienced children and young people to be aware of their rights, assist them to meaningfully participate in decision making processes that directly affect their lives, and support them to access existing accountability mechanisms on occasions when their rights are not fully respected.
- Consider the steps the Scottish Parliament can take to **make care experience a protected characteristic**.
- **Incorporate the UNCRC** into Scotland’s domestic law and constitution. This is one of the most important steps that the Scottish Parliament could undertake to empower care experienced children and young people to understand their rights and ensure that the Scottish Parliament and other decision makers can be meaningfully held to account.

If you wish to discuss the content of this response, please get in touch:

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²⁰ For further information, please see: <https://www.dcyv.gov.ie/docs/national-strategy-on-children-and-young-people-s-participation-in-decision-making/3456.htm>