



## Call For Views on Children (Care and Justice) (Scotland) Bill by Education Children and Young Person Parliamentary Committee

### Submission from Includem

#### Introduction:

Includem welcomes the Scottish Government's introduction of the Children (Care and Justice) (Scotland) Bill. Includem is a children, young people and family support charity that works with people to help them transform their lives. We provide intensive, bespoke support to children, young people and families in challenging circumstances. Our model of support is based upon building solid relationships of trust. Through this approach we can help children, young people and families make positive life choices and progress towards the type of future they want to live.

Includem works with children, young people and families in their own communities, planning support where and when they need it most. As a result, we frequently support young people in conflict with the law across the spectrum of offending behaviour from those at risk of offending to those leaving the secure estate or young offenders' institutions. Most young people are referred by Social Work, Police or Education and many are at risk of coming into conflict with the law regardless of why they have been referred. We consider that we are well placed to comment on the Bill.

#### Consultation Questions:

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

Includem welcomes this element of the Bill as respecting and promoting all children's rights and resolving current disparities in how these rights are realised for young people depending on their legislative status.

We support this measure for a variety of reasons, namely:

Compliance with United Nations Convention on the Rights of the Child and in particular would honour Article 1 which defines a child as anyone under the age of 18. Includem

recognises that this is one way Scotland can meet its obligations under the UNCRC to afford everyone under the age of 18 the rights associated with childhood.

### **Justice, fairness and rights**

In 2008, the United Nations Committee on the Rights of the Child underlined the importance of ensuring that all children in conflict with the law are always dealt with within the juvenile justice system and never prosecuted and tried as adults. It is therefore unfair that the support mechanism of the Children’s Hearing system is currently only available to some children, and that their peers who encounter identical situations, scenarios and risks are left in a far more precarious situation through the adult courts. Not only is the current scenario inequitable, unjust and unfair, but it fails to honour the rights of the child based on their age when they enter the system.

In the revised ‘General Comment No 24 (2019) on children’s rights in the child justice system, the United Nations Committee on the Rights of the Child reinforced the requirement for all children under the age of 18 to be treated as children.

While welcoming the widening of access to the Children’s Hearing system, includem are concerned about the new cut-off presumes that those over 17 and a half years of age will not be referred. The justification based on the time taken at the procedural level – including referral to the Principal Reporter, time to convene a hearing and then put meaningful measures in place to have effect – appears to prioritise what is suitable for the processes of institutions. While we understand the importance of maintaining the hearing system as a model for children, this justification fails to put the best interests of the child as the primary consideration. We are concerned that the reasoning that this is to protect their rights as future adults does not reflect their current rights as a child under the United Nations Convention on the Rights of the Child, which exists in recognition of the special protections needed by children. Given the Bill builds in opportunity for the Hearing to recommend continuation of support into a child’s 18<sup>th</sup> year, we do not understand why this presumption has been made for referrals and strongly support its removal.

### **Premature creation or terminations of Compulsory Supervision Orders**

Includem have experience of supporting children who have both had the premature termination of their Compulsory Supervision Order (CSO) prior to their 16<sup>th</sup> birthday due to their involvement in the adult court system but also young people placed on CSOs just prior to their 16<sup>th</sup> birthday or had them continued beyond their 16<sup>th</sup> birthday ‘just in case’. This situation arose because of the current inability for a child to be referred to the Principal Reporter after their 16<sup>th</sup> birthday. We believe that this decision does not meet the principle of minimum intervention and in some cases the level of intervention exceeds the need and results in increased risk for the young people of further involvement in the system. Research has consistently demonstrated that the biggest risk factor in continuing offending behaviour is contact with the criminal justice system.

A change in legislation will support children accessing the support and protection of the Children’s Hearing System when they need it and for as long as they need it without the current practice of premature terminations or preventative orders being put in place.

### **16 and 17 year olds in court**

Includem recognise that the widening of the age range in the Children’s Hearing System is for all children, whether they are being referred under care or justice grounds, however we welcome the probability that it will result in far fewer 16 and 17 year olds appearing in court.

Includem recognise that children get a faster and more supportive response when their offending behaviour is addressed through the Children’s Hearing system than through the courts. This faster and more supportive response increases the likelihood of children moving away from offending behaviour and ensures that their contact with the criminal justice system is holistic and child-centred.

Includem also recognises that the Children’s Hearing system responding to children in conflict with the law more quickly than the court system will have benefits for those who have been harmed by children. Those who have been harmed are less likely to have to give evidence in court and it could increase the use of Restorative Justice practices. Also given that the majority of those harmed by children are children themselves, it ensures that both those harmed and those whose behaviour causes harm are responded to in a child-centred way and outwith the adult justice system.

### **Legislative and Policy Alignment**

The legislative and policy framework that defines childhood is complex and contradictory. Maximising the use of the children’s hearings system would therefore go some way towards realising Article 1 on the United Nations Convention on the Rights of the Child, but would also reflect the spirit and content of the 2014 Children and Young People (Scotland) Act and Getting It Right For Every Child.

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

Includem welcome the intent within the bill for children in conflict with the law to have less contact with the adult justice system. We agree with the response to the flaws in this question as outlined in the response by the Children and Young People’s Centre for Justice. In particular we echo their call for an adjustment to the Lord Advocate’s guideline in

relation to Early and Effective Intervention (EEI) to ensure where possible children in conflict with the law enter neither the Children's Hearing system or the adult courts.

Includem welcome this approach for the reasons outlined in question one, in that it will be a timelier and child-centred response for children whose behaviour has caused harm and those harmed by their behaviour. We also reiterate our earlier argument that the Children's Hearing system supports better outcomes for children in conflict with the law than the adult courts. Maximising the use of the Children's Hearings System is a step towards providing a more trauma-responsive approach to episodes of harmful behaviour, recognising that this cohort of children experience vulnerabilities due to significant childhood adversities and experiences.

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

Includem welcome the changes that the bill will make to Compulsory Supervision Orders.

#### **Compulsory Supervision Order**

Includem welcome the power to prohibit a child to enter a particular location or to make communication with an individual as it could be beneficial in protecting others from harm and also support the child's decision making. We expect that these measures are most likely to be used when a child has been accused of targeting another person or persons. It may provide greater confidence amongst the public in the Hearings system's ability to respond to children and young people who would otherwise be subject to Bail conditions.

We also recognise that these steps could have some benefit in assisting children who are being exploited or are at risk of being exploited by others. We are concerned however that the measures may place the responsibility to remain safe on to the child and failure to adhere to the measures may have the unintended consequence of increased contact for the child with the Children's Hearing system, which we have already highlighted is the greatest risk of continued contact with the justice system over the course of their life. These measures need to be supported by robust guidance for social workers and panel members to ensure the measures are used cautiously and specifically, informed by a thorough risk formulation which considers the child's life in its entirety.

#### **Movement Restriction Condition**

Proposed changes to the criteria surrounding a Movement Restriction Condition (MRC) could enable more flexible and tailored support, including whole family support, which allows a holistic response to the child and family. We particularly welcome the use of MRCs to limit the use of secure care. Includem are of the view that where possible children

should be supported in their families and communities as it both respects their rights and results in better outcomes.

Includem support the call by CYCJ that an MRC must only be considered where there is a clear assessment and evidence as to how its intended use is proportionate to manage the level of potential harm, and interrupt or minimise the opportunity for the serious harm to occur.

Such provision must be accompanied by robust wraparound and individualised support for the child and their family that scaffolds them whilst addressing risk of harm, building on strengths, creating capacity and providing developmental opportunities.

In relation to using an MRC where a child is at significant risk of being harmed or exploited, we welcome the measure within the bill which support creative use of MRCs. We reiterate our earlier point about ensuring that these measures do not inadvertently place the burden of safety on the child and failure to comply to not result in more punitive measures which serve to blame the victim. Any use of MRCs in these circumstances need to be complemented by robust activity by services to disrupt those causing the harm to the child. The intent to protect the child needs to be carefully balanced with their rights to privacy, family life and access to education and play.

Regardless of whether MRCs are being used to support children whose behaviour is causing harm or those at risk of harm it should meaningfully meet the needs and manage the risks identified, and always alongside meaningful robust wraparound support. It is widely recognised that MRCs are most effective when accompanied by a robust and flexible support package which addresses the underlying challenges and risk factors in the child's life.

Includem supports CYCJ's suggestion that this Bill could be strengthened, and the rights of children could be better protected, by making specific provision for legal representation to be made available whenever an MRC was under consideration by a Hearing. Includem believe that children should always have access to legal representation when a decision is being considered that will restrict their liberty in anyway and also in recognition that the data generated by MRCs impinges on their right to privacy.

### **Secure authorisation**

Includem welcome the measures within the bill which allow for the continuation of secure care for those children who display very few signs of vulnerability or of posing a risk to themselves or others, but for whom the situation drastically deteriorates immediately upon, or soon after, leaving the secure environment.

We support CYCJ's reflection that the existing definition of psychological harm is perhaps too broad, and may lead to a greater number of children being deemed to have met the

secure care criteria than was intended by this Bill. The Bill’s proposal to include “fear, alarm and distress” as a feature of psychological harm could be interpreted in an overly liberal manner, particularly given the language associated in this clause and the wording of Section 38 of the Criminal Justice and Licensing Act of 2010, which replaced the common Scots law offence of Breach of the Peace. Consideration needs to be given to defining this clearly within the Bill to prevent this unintended consequence.

**4. What impact (if any) do you think the Bill could have on young people who have been harmed by another young person?**

Includem believe that the Bill could have a beneficial impact upon children who have been harmed by another child in two ways.

Firstly, by widening access to the Children’s Hearing system, it is more likely that the incident that has caused harm to the child will be responded to by the Children’s Hearing system rather than the courts. This will benefit children who have been harmed by other children through avoiding having to appear in court to give evidence, as well as a quicker response. The swifter process of the Hearings system should support recovery from trauma in a quicker manner than is currently possible.

Secondly, raising the upper age of referral will grant children aged 16 or 17 access to the Children’s Hearing System when they have been harmed and require additional care and support to recover, whether by an adult or another child. This could be episodes of sexual abuse, physical abuse, child exploitation in all its forms and other adverse circumstances and vulnerabilities.

**5. The Bill makes changes to the current law around when information should be offered to a person who has been affected by a child’s offence or behaviour. What are your views on what is being suggested?**

Includem supports the strengthening of current measures for information sharing in making it a duty for the Principal Reporter to inform people of their right to request information. We believe that this will go a long way to reassure the public and those harmed that the Children’s Hearing system is not ‘soft justice’. We also believe that receipt of appropriate and proportionate information will support greater uptake of Restorative Justice processes through greater transparency of the process. Fundamentally, we believe that any changes made to existing provision must achieve a rights-respecting solution for both the person who has been harmed, and the child who is believed to have caused that harm and lead to better outcomes for both.

Any sharing of information needs to be proportionate and rights respecting, ensuring a balance between only sharing information when absolutely necessary when responding to

episodes of harm (in compliance with The Beijing Rules) and ensuring those who have been harmed can exercise their rights where there are protective measures directly involving the person harmed, for example where there is a condition for the child not to approach the harmed person's house.

As with all legislation, the effectiveness of this bill will be in its implementation. Includem believes that the successful implementation of the bill requires clear decision-making matrix within the regulation that provide clarity on the circumstances within which information is shared or withheld, who is informed or not informed. The bill for example allows for the Principal Reporter to inform just the child who has been harmed, a relevant adult or both. The regulations should make it clear how this decision is arrived at, ensuring the child's right to information is carefully balanced with their right to protection. Includem is also mindful of the implications of increased information sharing in light of GDPR, Data Protection legislation and existing protections relating to personal information. Mechanisms should also be created to ensure that the frequency, volume and nature of information is shared and patterns analysed on an annual basis to ensure that the system is appropriately upholding the rights of all involved.

Includem agrees with CYCJ's call for a general, illustrative account of the difficulties and experiences children who cause harm have often experienced themselves, and what types of responses help them to recover from this and not harm others in the future, to be made available to those who have been harmed by a child. This will support their understanding of why certain information is not disclosable, and to aid their understanding of the children's hearings system.

As already stated we believe that additional information, where appropriately and proportionately shared would support increased opportunities for Restorative Practices to be used. These practices are shown to improve understanding of the context behind harmful behaviours and supports the healing process for the person who has been harmed. Consideration of these practices on all occasions where a child has caused another person harm should be built into Scotland's response to such behaviour.

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

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

Includem supports any actions which ensures that children whose behaviour has caused harm is responded to in accordance with The United Nations Committee on the Rights of

the Child General Comment No 24, which states that “every person under the age of 18 years at the time of the alleged commission of an offence has the right to be treated in accordance with the rules of juvenile justice, in a specific and specialized system, different from the criminal one applicable to adults” (2019, paragraph 37).

Raising the age of referral into the Children’s Hearing System will allow Scotland to meet its international obligations and own policy initiatives. Research consistently shows that for children and young adults to meaningfully participate in the justice system, an approach is needed that is child-centred. Includem believe that this best place for this to happen is the Children’s Hearing System.

This call for evidence does not ask specific questions about the safeguards proposed for children involved in criminal proceedings. Includem would like to address these in this answer. We welcome the safeguards as proposed and believe it is important that all children are protected from the consequences of their actions into adulthood, recognising their brain development and levels of maturity impacting on their decision making capacity. Broadly, and on a point of principle, includem believe that the identity of children who cause harm whilst under the age of 18 should remain undisclosed through that individual’s lifetime. As such includem believes that there are no circumstances where naming a child would serve the interests of the child or the community above the child’s long-term prospects of desistance, which is supported through maintaining anonymity.

As mentioned previously, the effectiveness of this legislation will be through its implementation. There are measures within Sections 11 – 14 that would benefit from a clear decision-making matrix within the regulations. For example, what is the threshold for disclosure to be in the interest of justice. Accepting the independence of the judiciary, it would be helpful to know what constitutes “not reasonably practicable” when it comes to taking measures to facilitate children’s participation in court proceedings, what mechanisms will be in place to review decision making on a local and national level, is there a duty to provide remedial action once barriers have been identified so that they do not continue to be barriers for other children? Where a child is co-accused with an adult, the court is required to have regard to the rights of the adult to ensure they can participate effectively in the proceedings. It would be helpful for the regulations to define how much regard and what has priority where the realisation of both parties’ rights might be in opposition to each other. Includem however cannot envisage a scenario whereby the adult would not also benefit from the measures taken to ensure a child’s participation.



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

Includem are fully supportive of this proposal. We have first-hand experience of supporting children in a Young Offenders' Institution (YOIs) and have witnessed the poor and sometimes tragic outcomes that result. Should a child be deprived of their liberty, it is imperative for their immediate and long-term wellbeing that this happens in a secure care environment. We agree with The Promise who concluded that “being placed in prison like settings is deeply inappropriate for children” (Independent Care Review, 2020: 82), and who called for all children to be removed from Young Offenders' Institutions by 2024.

However, we strongly believe that secure care should not be the only and direct alternative to a Young Offenders' Institution. There is significant evidence which shows that the most rights respecting approach would be to support the child within their community through robust and intensive support for them and their families. There needs to be greater provision of community-based services, faster and greater access to mental health support, including forensic mental health and access to universal support that diverts children away from harmful behaviour. Structural responses are needed to address barriers such as poverty, recognising that those who experience entrenched poverty are at greater risk of coming into conflict with the law. Includem were disappointed that the financial memorandum only considered the cost to Local Authorities for the provision of social work reports and representation at Children's Hearings. UK and national austerity have seen a significant decrease in Local Authority funded third sector provision of youth services and whole family support. Failure to account for the significant positive impact third sector support has in supporting children away from harmful behaviours in the financial memorandum may result in less effective implementation of the aspirations of this bill.

To support children to remain within the community when they have caused the most significant levels of harm, Scotland must develop a sector within which risk is fully embraced, understood and addressed, and more important sufficiently resourced.

Where it has been assessed that the risks can only be managed by depriving a child of their liberty then includem strongly believes that this must only be through secure care.

Secure care, as implied by its name, provides care, access to education and provision of therapeutic support to make the changes necessary to keep them and other safe, which is not available with YOIs. Includem also believe that secure care is best able to support the successful reintegration of a child into the family and community after a period of deprivation of liberty.

Given that most children return to their families after a period of care, including secure care, it is important that these relationships are promoted, and opportunity given to restore

any fractured relationships. Secure care better supports the child's right to family life as it has greater scope to support regular and meaningful visits, phone calls and other means of communication with family members. This supports continuation and restoration of the relationship key to a child successful reintegration into the community and known to support desistance from offending behaviour.

Includem believes that secure care centres are far better equipped to respond to the needs of children in a trauma informed way. Secure care provides higher staff to child ratios, specialist training on childhood development, a smaller and more home-like environment ensuring a more trauma-responsive experience for children.

Secure care centres are better able to provide the targeted interventions which seek to address the factors that have led to the harmful behaviour in a timely manner. They will also be available to all children, including those on remand, unlike YOIs who do not offer such supports for remanded children. Secure care therefore provides the best opportunity to support change in areas of a child's life, even for those who only experience short periods of deprivation of liberty.

Adherence to children's rights is another factor that should be considered when legislating over the use of secure care. YOIs continue to use pain-based restraint techniques, although are in the process of reviewing the suite of techniques and interventions that they utilise. Such measures are not employed within secure care, and as such the use of secure care rather than a YOI can help to protect children from experiencing episodes of harm.

Includem welcomes the provision within the bill which ensures that there is no distinction between those on a CSO and those who are not. Work is required to secure adequate capacity for Scottish children requiring secure care in Scotland; according to figures provided by CYCJ on 12 March 2023 there were only three available beds within the four independent secure centres. Continued use of Scottish secure provisions by English and Welsh local authorities plays a role in this.

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

The proposed amendments to the way in which secure care is regulated appear to enhance the level of care that is provided to children in secure care in Scotland. Understanding the importance of local care, and how distance can affect critical relationships for children and the way in which it breaches children's right, makes it hard to see many situations where a child should be placed in a cross-border placement.

Again the impact of this bill on cross-border placements, will be seen in its implementation. It could be that more children will be placed across the border as the legislation allows for more legal orders than CSO-equivalent orders to be accommodated in Scotland, providing the financial costs are met by the sending Authority. Without a change to the way in which secure care centres are funded, there is a risk that secure care beds will not be available to Scottish children when they need them. Includem would encourage consideration for how the regulations can support the decision making when consideration is being made to accepting a cross-border placement.

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

Whilst alteration to the definition of a child within the Anti-Social Behaviour Order (ASBO) legislation will lead to greater harmonisation across the legislative landscape, includem hope that the change to the legislation will not result in greater use of ASBOs. Includem have seen first-hand the consequences of ASBOs on the families we support. They experience them as stigmatising and serves to excluded them even further from their communities. It penalises children and families for the impact of structural disadvantage such as poverty and community deprivation which has known links to anti-social behaviour and places undue responsibility on children for circumstances they have little influence or control over. There is little evidence to show that the use of ASBOs is effective, particularly if they are not supported by robust whole family support which mitigate structural inequalities.