

Further written evidence submitted by Article 39 (CSWB 58)

CHILDREN AND SOCIAL WORK BILL

Changing the Children Act 1989 to permit looked after children in England and Wales to be detained in secure accommodation in Scotland

Summary

Children's Minister Edward Timpson MP tabled amendments in early December, which significantly alter the law relating to the placement of looked after children in secure accommodation, by allowing their detention in Scotland. Lack of places available in secure accommodation in England has precipitated this legislative change.

We are not aware of any consultation, impact assessment or policy document explaining this major change, which would allow children from England to be lawfully placed hundreds of miles from home, severely curtailing meaningful contact with their families, friends, social workers, independent reviewing officers, independent visitors, advocates and lawyers. Many of the safeguards for children living in residential care, including secure accommodation, are further seriously threatened by New Clauses 2-9. A court may make a secure accommodation for a period of three months initially; this can be extended for a maximum period of six months at any one time.¹

The Children Act 1989 states that looked after children from England and Wales who have sufficient understanding may not be placed abroad (including Scotland), without the consent of the child and those with parental responsibility. (There was a similar requirement for consent in the legislation preceding the 1989 Act²). The Government's New Schedule 1 seeks to remove this right from children and parents. This cannot be said to be a 'tidying up' exercise: it is a significant change.

We recognise the legal urgency faced by the courts in safeguarding the welfare of individual children from English local authorities already placed in secure accommodation in Scotland – see recent cases below. However, we are far from convinced that changing primary legislation so that children from England may be detained on welfare grounds in Scotland is an appropriate policy response, since this change interferes with fundamental aspects of children's welfare, including their contact with family and friends, identity and sense of belonging and educational stability. There are clear implications for children receiving health care, including therapeutic interventions, where transfers between Scottish and English providers could exacerbate waiting times or disrupt counselling relationships, for example.

These legal changes are likely to make the protection of children's human rights even more difficult, since it will be English courts supervising the child's detention, and professionals based in England who will be responsible for monitoring their individual welfare and progress. Moreover, the amendments remove the need for secure accommodation reviews (with an independent element) of children placed in secure accommodation in Scotland, thereby creating inequality of protection. This could be a breach of the child's human rights.

¹ Regulations 11 and 12, The Children (Secure Accommodation) Regulations 1991.

² Section 24, Child Care Act 1980.

There has been a 21% reduction in places in England across the past six years, from 293 in 2010 to 232 in 2016.³ Sir Martin Narey's review of residential care concluded that the reduction in places is "troubling" and he urged the Department for Education "to consider how they might encourage alternative providers from the voluntary and private sector to enter the secure care market".⁴ The Government accepted this recommendation, together with Narey's proposal for the creation of a Residential Care Leadership Board.⁵

We ask members of the Public Bill Committee to support New Clause 27 tabled by Shadow Children's Minister Emma Lewell-Buck MP, which we hope will ensure the amended legislation is subject to meaningful consultation with children, families and service providers, and robustly reviewed by the Residential Care Leadership Board and others within the two-year time frame.

1. Article 39 is a new charity which promotes and protects the rights of children living in institutional settings. We take our name from the part of the United Nations Convention on the Rights of the Child (UNCRC), which entitles children who have been subject to abuse and mistreatment to recover in an environment where their health, self-respect and dignity are nurtured.

Secure accommodation law

2. The Children Act 1989 requires that local authorities avoid the need for children in their area to be placed in secure accommodation.⁶
3. Looked after children (those who are the subject of a care order⁷ or are accommodated⁸) are the only children who can be detained in secure accommodation on welfare grounds. The power to deprive looked after children of their liberty may be rescinded by a person with parental responsibility who has the right to remove a child from accommodation, where they have been accommodated under Section 20 of the Act.⁹
4. Section 25 of the Children Act 1989 prescribes the circumstances in which a child looked after by a local authority in England or Wales may be deprived of their liberty by placement in secure accommodation:

(a)that—

(i)he has a history of absconding and is likely to abscond from any other description of accommodation; and

(ii)if he absconds, he is likely to suffer significant harm; or

(b)that if he is kept in any other description of accommodation he is likely to injure himself or other persons.

³ National Statistics (July 2016) Children accommodated in secure children's homes: 31 March 2016, available here <https://www.gov.uk/government/statistics/children-accommodated-in-secure-childrens-homes-31-march-2016> (see Table 3).

⁴ Narey, M. (July 2016) Residential care in England. Report of Sir Martin Narey's independent review of children's residential care, page 32.

⁵ Department for Education (20 December 2016) Government response to Sir Martin Narey's Independent review of residential care.

⁶ Paragraph 7(c), Schedule 2, Children Act 1989.

⁷ Section 31, Children Act 1989.

⁸ Section 20, Children Act 1989.

⁹ Section 25(9), Children Act 1989.

5. Local authorities must appoint at least three persons – with at least one not employed by the local authority – to review the keeping of the child in secure accommodation within one month of the inception of the placement and then at intervals not exceeding three months.¹⁰ Secure accommodation reviews must consider whether or not:

“(a)the criteria for keeping the child in secure accommodation continue to apply;

(b)the placement in such accommodation in a community home continues to be necessary; and

(c)any other description of accommodation would be appropriate for him,

and in doing so shall have regard to the welfare of the child whose case is being reviewed.”¹¹

6. The wishes and feelings of the child, his or her parents and any independent visitor must be taken into account wherever practicable.¹² If the panel believe the criteria for depriving the child’s liberty no longer apply, or another placement would be more appropriate, an urgent review of the child’s care plan must be convened, chaired by his or her independent reviewing officer.¹³ It is unlawful for a child to be detained in secure accommodation on welfare grounds, when the Children Act 1989 criteria no longer applies.

Looked after children living abroad

7. The Children Act 1989 prohibits a local authority from placing a looked after child abroad (that is, outside England or Wales) without court authority. The Act prevents the court from making such an order, unless it is satisfied that—

“(a)living outside England and Wales would be in the child’s best interests;

(b)suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;

(c)the child has consented to living in that country; and

(d)every person who has parental responsibility for the child has consented to his living in that country.”¹⁴

8. The child’s consent can be dispensed with where it is deemed he or she does not have sufficient understanding. Parental consent can similarly be discarded where it is believed the parent is unreasonably withholding permission.¹⁵

Government amendments

9. New Clause 1 allows for New Schedule 1, which seeks to make the following very significant amendments to the Children Act 1989:

- a. Change to Section 25 of the Act so that children looked after by English or Welsh local authorities may be detained in secure accommodation in Scotland

¹⁰ Regulation 15, The Children (Secure Accommodation) Regulations 1991.

¹¹ Regulation 16, The Children (Secure Accommodation) Regulations 1991.

¹² Regulation 16, The Children (Secure Accommodation) Regulations 1991.

¹³ Department for Education (April 2015) Guide to the children’s homes regulations including the quality standards. Paragraph 1.44.

¹⁴ Paragraph 19(1), Schedule 2, Children Act 1989.

¹⁵ Paragraphs 19(3) to 19(5), Schedule 2, Children Act 1989.

- b. Change to the Children’s Hearings (Scotland) Act 2011 so that secure accommodation orders made in England may be enforced in Scotland, including by arrest of a child who runs away from premises in Scotland
 - c. Removal of the requirement to obtain the child’s and parents’ consent (as far as is practicable) for placement in secure accommodation abroad (that is, outside England and Wales)
 - d. The application of Regulations 1 and 10 to 13 of The Children (Secure Accommodation) Regulations 1991 to Scotland. This means children placed in Scotland will lose their right to independent periodic review, a vital safeguard which supports the court authorisation and review process.¹⁶
10. These amendments directly concern children’s right to liberty (Article 5, European Convention on Human Rights), their right to maintain their family relationships (Article 8) and their right to due process (Article 6. We are not aware of any Government impact assessment or policy document accompanying these amendments.

Placement in secure accommodation in Scotland – without legal authority

11. The legal cases that led to these amendments concluded in October 2016, when the Court of Sessions agreed orders which gave authority to High Court orders permitting the placement of three children in secure accommodation in Scotland. The local authorities looking after these children are Cumbria County Council, Stockport Metropolitan Council and Blackpool Borough Council.

12. In July and September 2016, the President of the High Court Family Division, Sir James Munby, had heard the case of two children (one looked after by Blackpool Borough Council, the other by Cumbria County Council) who had been placed in secure accommodation without legal authority in Scotland. Sir James Munby explained:

“These particular issues arise because of the shortage of places in secure accommodation units in England, so that local authorities and courts in England, particularly in the north of England, whether on the Northern Circuit or the North-Eastern Circuit, look to making use of available places in secure accommodation units in Scotland. Precise data are not available, but such material (including anecdotal material) as exists suggests that there have been at least five such cases.”¹⁷[Our emphasis].

13. Sir James Munby proposed a solution:

*“what now stand revealed are serious lacunae in the law which, I suggested, need urgent attention. If that is so, and I entirely recognise that others may take a different view, then the question rises as to how the problem should be addressed. On one view, **it is the kind of problem which is admirably suited for consideration by a Law Commission – perhaps, given the subject matter, jointly by the Law Commission of England and Wales and the Scottish Law Commission.** That is one possibility. No doubt there are others. But it seems to me that something really does need to be done.”¹⁸[Our emphasis].*

14. By the time the children’s cases reached the Court of Session, both the UK and Scottish Governments had decided to amend the primary legislation. Lord Drummond in the Court of Sessions noted:

¹⁶ Contained in Regulations 15 to 16.

¹⁷ [2016] EWHC 2271 (Fam) [2].

¹⁸ [2016] EWHC 2271 (Fam) [74].

“If it were not for the statements made to us on behalf of the Lord Advocate about proposed legislation, we would have concurred with [Sir James Munby’s] suggestion. As it is, however, as discussions are in progress between the Scottish and United Kingdom governments about remedying the problem in the legislation, a reference to the Law Commissions should not be necessary.”¹⁹

Research evidence

15. A recent study on the use of secure accommodation commissioned by the Department for Education, and published shortly after these amendments were tabled, notes: “It was not unusual for children to be placed in faraway secure settings as these were the only ones available. Sending children away meant disrupting their (often fragile) connections with family and other support networks, and with local services. This could add to the stress of what was already an extremely stressful experience for a child, and could make transition back into the community more difficult.”²⁰ The researchers concluded “it would be helpful” for the legal framework for using secure accommodation for child welfare reasons “to be reviewed”, though this was not in relation to **out-of-country** placements.²¹
16. Research about demand for ‘welfare beds’ in secure accommodation, commissioned by the Department for Education, observed in 2012: “The general preference among LAs was to place children as close to home as possible, because it was believed this generally led to better outcomes, although the decision was also influenced by the specific needs of the young person and by where there was a vacancy. Placements nearby were also preferred because they avoided the extra social worker and reviewing officer time associated with travelling to SCHs located a long way from the home authority”.²²
17. The Office of Children’s Rights Director held discussions with children in nine secure units in England during 2009. At that time, there were 18 such units in England. There are now 14.²³ Children were asked about the best and worst aspects of living in secure accommodation. On the worst, the Children’s Rights Director reported:

“The most usual worst thing we heard about being in a secure unit was the loss of freedom and being locked up. Being in a secure unit stops you from doing things and takes you away from your family and friends.”²⁴

Conclusion

18. Since these significant legal changes are proposed because of lack of provision in England for extremely vulnerable looked after children, and they will potentially lead to very negative outcomes for children, we hope members of the Committee will support New Clause 27.

¹⁹ [2016] CSIH 92 [38].

²⁰ Hart, D. and La Valle, I. (2016) Local authority use of secure placements. Research report April 2016. Published by DfE 21 December 2016, page 62:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/579128/Local_authority_use_of_secure_placements.pdf

²¹ Hart, D. and La Valle, I. (2016) Local authority use of secure placements. Research report April 2016. Published by DfE 21 December 2016, page 70.

²² Mooney, A., Statham, J, Knight, A. and Holmes, L. (2012) Understanding the market for secure children’s homes. Summary report. A rapid response study for the Department for Education. Childhood Wellbeing Research Centre, page 9.

²³ National Statistics (July 2016) Children accommodated in secure children’s homes: 31 March 2016, available here <https://www.gov.uk/government/statistics/children-accommodated-in-secure-childrens-homes-31-march-2016> (see Table 3).

²⁴ Morgan, R. (2009) Life in secure care. A report by the Children’s Rights Director for England. Ofsted, page 9.

NC27

★ To move the following Clause—

“Placing children in secure accommodation elsewhere in Great Britain

(1) Schedule (Placing children in secure accommodation elsewhere in Great Britain) ends at the end of the period of two years beginning with the day on which this Act is passed.”

Member’s explanatory statement

This new clause would revoke provisions in the Bill that enable local authorities in England and Wales to place children in secure accommodation in Scotland, and vice versa, two years after the Act comes into force.

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