The Promise Scotland's position on a 'right to return' to care

Summary

This paper has been prepared with the support of Clan Childlaw and Mark Allison (Westwater Advocates). It represents the views of The Promise Scotland on how the Children (Care, Care Experience and Services Planning) (Scotland) Bill could be amended to enshrine a statutory 'right to return' to care into Scots Law.

Although there are provisions within the Children (Scotland) Act 1995, our view is there is scope for these to be strengthened and tightened, with a focus on implementation. The proposals in this paper aim to be pragmatic, closing the gaps where children and young people fall though so the conclusions of the Independent Care Review can be met in full.

Background

The Independent Care Review concluded that "young adults for whom Scotland has taken on parenting responsibility must have a right to return to care and have access to services and supportive people to nurture them" (the promise, Pg 92). This reinforces pre-existing Scottish Government policy which is clear that "care leavers must be able to return to care placements or a more supportive care setting—if and when they meet with any difficulty" (Staying Put Scotland, 2013)

The Independent Care Review found that "many care experienced young adults have told the Care Review that they felt abandoned and ill prepared as they moved from childhood into adulthood" (the promise, Pg 92).

Ensuring that children and young people have a clear and accessible right to return to care where their transition has not progressed as planned, or as hoped, would help prevent avoidable hardship, instability, and the risk of experiencing youth homelessness when a move on from care has not been successful. Such a right would enable care experienced young people to access appropriate support at the point of need, improving their stability and strengthening their ability to move on from care successfully over time.

This approach would better reflect the support typically available to young people within family settings, where moves towards independence are often gradual, flexible and non-linear. It would also align with the intent of the promise, which states that "Scotland must be a parent that encourages young people toward a life of independence, self-reliance and stability, but also recognises that, often, young people will need to stay 'at home' or come home for some time and at various times" (The Promise, p.92).

The proposed changes are intended to ensure that difficulties experienced when moving on from care do not escalate into enduring crises for young people. Providing the option of a return to care, for a period tailored to individual needs, would better support young people to address emerging challenges and enable more effective planning for their future.

These changes are not intended to foster over reliance on support. Rather, they aim to ensure that young people are not left to face periods of need or instability in isolation. Evidence gathered through the 'Moving On' Change Programme indicates that such an approach would be of particular benefit to young people who are unable to access Continuing Care due to resource constraints; those experiencing periods of ill health; those placed in unsuitable or poor-quality accommodation after leaving care; those at risk of youth homelessness; and those facing relationship breakdown or other significant difficulties.

The Promise Scotland's position

The Promise Scotland has been clear that the Children (Care, Care Experience and Services Planning) (Scotland) Bill should be amended at Stage 2 to enshrine a statutory right for children for whom Scotland has a parenting responsibility to return to settings of care and support. This includes accommodation and support in terms of the Children (Scotland) Act 1995 and the principle that when a care experienced child or young person experiences "difficulty" they should have a fundamental right to return to accommodation settings of care and support rather than youth homelessness where there is no additional right or access to services (see, for example, Staying Put Scotland, 2013)

In order to do this, we think the following areas should be addressed:

1. Strengthen the duty to accommodate children in terms of s25 of the Children (Scotland) act 1995.

2. Strengthen return-to-care rights for young people aged 18–21

3. Create a route to Continuing Care for care experienced children and young people who return to care

4. Create a right to remain in and return to Continuing Care up to the age of 26

Taken together, we believe that this will constitute a statutory 'right to return to care'.

Although (as stated below) certain rights already exist through the Children (Scotland) Act 1995, our understanding is that many of these rights are currently poorly understood by local authorities and other duty bearers, applied inconsistently and that implementation is undermined by resource pressures such as availability of suitable accommodation and use of homelessness route to accommodation.

As a result, care experienced children and young people who find themselves without a home after leaving care are directed to homelessness services or local housing associations; placed in unstable, unsuitable adult temporary 'homeless' accommodation for extended periods; end up in accommodation which is not suitable for children and/or for welfare needs; and do not have planned, relationship based support. They do not have equity with their non-care experienced peers who can return home, when and if they need to, into adulthood. **We think this needs to change.**

If the existing provisions were working well and all children and young people felt that the right to return to care already was in place the promise would not have

concluded that there was a need to address this. Implementation of the existing duties is key—to ensure that care experienced children and young people's statutory rights are respected and the duties in the legislation are met is robust and enforceable.

The proposals to extend Aftercare and advocacy in the Children (Care, Care Experience and Services Planning) (Scotland) Bill are important, **but they do not constitute a right to return to care**, and as such we continue to believe that further changes are necessary.

The Promise Scotland's view is that this should be done pragmatically, with a clear focus on the implementation of existing duties—but the opportunity should not be lost to ensure that the right to return to care is clearly set out in Scots Law. Some of the suggested amendments are minor—but in our view they make a substantive difference to the way the law is interpreted and implemented and consequently ensure that all children and young people for whom Scotland has taken on parenting responsibility can return to care in the way that the promise intended.

They should also be accompanied by a clear resourcing and implementation strategy, and a plan for commencement/ sequencing and communicating the changes to care experienced children and adults and members of the workforce (see below relating to 'implementation').

The current law

Children aged up to 18 – Right to Care

- A child (under 18)who is looked after and accommodated has a right to remain in care as long as they need that care. 'Care' includes, but is not limited to, accommodation.
- A child (under 18) who has previously left care, and subsequently becomes in need of care, has a right to care – including the provision of accommodation suitable for a child, and suitable for their individual welfare needs.
- Local authorities have a mandatory duty to provide care, including accommodation suitable for their individual welfare needs, to children who need it.[1]
- This duty applies even where a child might be eligible for accommodation under another route.[2,3]
- The 'need' for care includes consideration of the child's individual wishes, particularly for children who are old enough to live independently. Generally, such children need not be provided with care where they do not wish it.

[1] Children (Scotland) Act 1995 s25(1)
[2] Although, as framed, section 25 does not explicitly make clear that this duty cannot be delegated (for example, to local authority housing departments or homelessness teams)
[3] These points are, however, reflected in case law in England in respect of the equivalent s.20 of the Children (Scotland) Act 1989: *R(A) v Croydon London Borough Council [2009] PTSR 1011*, per Ward LJ at para 75; approved by the House of Lords in *R(G) v Southwark London Borough Council [2009] 1 WLR 1299*

- When children are under 16, accommodation cannot be provided under section 25(1) if a person who has the right to regulate the child's residence[4] and is willing to provide accommodation objects.[5]
- The exercise of these duties is intended to be informed by a comprehensive and child-specific assessment of need. That includes the duties in Chapter 1 of the Children (Scotland) Act 1995[6] and in the Looked After Children (Scotland) Regulations 2009[7].

Young people aged 18–21 – Right to Accommodation

- Local authorities have a discretionary duty to provide accommodation to a young person (under 21) if the local authority decides this would safeguard or promote their welfare.[8]
- This is a discretionary duty, which relates to provide accommodation only. As a discretionary duty, this means that a local authority is not obligated to provide accommodation – even if they assess that it would safeguard or promote the young person's welfare to do so.
- The young person is not "looked after". As presently framed, the local authority has no duty to assess their needs or plan their care or provide relationship-based care and support.
- A child who 'returns to care' under s25(1) – and so, before they turn 18 - is eligible for Continuing Care under s.26A when they subsequently leave care.
- A young person who is provided with accommodation under s25(3) which then ends is, even if theoretically eligible for Continuing Care[9] unlikely in practice to be able to gain same.
- A young person who left care when they were 16 or over and is accommodated under s25(3) is entitled to Aftercare.[10] However, a young person who leaves care before they are 16 and is subsequently accommodated (over 18) under s25(3) does not acquire entitlement to Aftercare.

[4] Children (Scotland) Act 1995, s.2(1)
[5] Section 25(6) is framed with reference to objection, rather than consent. This is a subtle but important distinction (there is English case law on this in respect of the equivalent s.20(7) of the Children Act 1989), it means that the duty is engaged the moment the need crystallises unless and until someone objects, rather than having to go and seek consent prior to being able to provide accommodation.
[6] In particular, those in s.16 and 17
[7] A formal assessment of need should cover all of the requirements of regulation 4, and there should be, at all times, a care plan for the child which meets the requirements of regulation 5.
[8] s.25(3)
[9] A child who moved from s.25(1) to s.25(3) on there 18th birthday, and who was provided with different accommodation, might technically be eligible in terms of s.26A(1) and (2), but that would be to return to the accommodation they were in when they ceased to be looked after, not the accommodation they were subsequently in. Even if they wanted to return to their prior accommodation, the right is likely to be defeated by the terms of either s.26A(5)(b) or s.26A(7)(b) as a result of the passage of time. The same difficulties would arise if a child returned to care sometime after their 18th birthday, unless the same accommodation was still available.
[10] s29

Looked after and accommodated care leavers over 16 – Right to Continuing Care

- Young people who are looked after and accommodated when they leave care after 16 have the right to Continuing Care until 21.[11] Local authorities have a mandatory duty to provide Continuing Care to looked after and accommodated children who leave care after 16, unless the child was in secure accommodation; the accommodation they were in immediately before ceasing to be looked after was a care placement and the carer is unwilling/unable to provide the placement; or the local authority considers that providing care would significantly adversely affect the welfare of the young person.[12]
- Continuing Care has a specific definition, as 'the same accommodation and other assistance' as was being provided immediately before the child ceased to be looked after. Thus, it does not deal with a situation where a young person's accommodation needs change, or a young person is still in need of accommodation but the particular accommodation cannot be provided for one of the foregoing reasons.
- Young people are entitled to remain in Continuing Care until they are 21, if they need and want to, unless the accommodation ceased to be available or the local authority considers that providing the care would significantly adversely affect the welfare of the person. Again, this means that young persons who may still need accommodation, but the existing accommodation ceased to be available, cannot avail themselves of the right to Continuing Care and must depend upon meeting one of the other statutory provisions.
- When a young person leaves Continuing Care there is no right to return, irrespective of their needs.

The changes The Promise Scotland is proposing

The Promise Scotland has been working alongside Clan Childlaw to consider what needs to change. We believe amendments should be made at Stage 2 of the Children (Care, Care Experience and Services Planning) (Scotland) Bill to strengthen the right to care and accommodation and create a mandatory duty on local authorities to support a 'return to care.'

The duties must therefore be explicitly clear that returning to accommodation and support in terms of the Children (Scotland) act 1995 – which we call 'the right to return to care' should be the default, that children and young people must not be made homeless on leaving care and placed in unsuitable accommodation and that the duty to accommodate and provide Continuing Care should be extended. Assessments, planning, and wellbeing must be central to all decision making about care experienced children and young people's accommodation.

In order to do this we propose that the Scottish Government should:

[11] s26A
[12] S.26A(5)

1. Strengthen the duty to accommodate children in terms of s25 of the Children (Scotland) act 1995.

- The law should explicitly state that children who lack suitable accommodation or care are owed a duty to be accommodated under s25. This should apply equally to care experienced children who have previously left care, unless they are eligible for Continuing Care.
- This should remove any perceived discretion that allows local authorities to decide that a child without a home does not require accommodation and care, or the provision of accommodation should be delegated elsewhere (for example, to local housing authorities).
- No child or former looked after child should be treated as homeless and/or accommodated in adult homeless accommodation. They should be offered accommodation under s25 of the Children (Scotland) Act 1995.
- No care experienced child should be in receipt of Aftercare without first being offered accommodation under s25 of the Children (Scotland) Act 1995.
- The performance of these statutory duties should be explicitly tied to adequate and child/young person-specific assessment of need. Children and young people should not experience inconsistent, arbitrary or poorly thought through decisions about important matters such as their welfare and accommodation needs. The aim should be that every child is receiving the care and accommodation which is most suitable to their individual needs.

What difference would this make in practice?

The current legislative framework entitles children (all those under the age of 18) to return to care. Strengthening this framework would help ensure that young people are not expected to continue living independently where their move on from care has not progressed as planned.

This would reduce the risk of care experienced children and young people being made homeless or required to remain in inappropriate or unstable living arrangements, at a point when a return to s25 accommodation and support would be more appropriate. While existing legislation may give children the right to return to care, it does not establish a clear enough entitlement to guarantee that children and young people's welfare needs are met.

2. Strengthen return-to-care rights for young people aged 18–21

- Make the duty to provide accommodation to care experienced young people to safeguard or promote their welfare mandatory, rather than discretionary.
- To ensure that the right to Continuing Care subsists for eligible young people for as long as their welfare requires, rather than ending for reasons unrelated to their welfare.

What difference would this make in practice?

The current legislative framework enables local authorities to provide care and accommodation to children and young people up to the age of 21 where it is assessed that this would safeguard or promote the young person's welfare. Continuing Care – remaining in the same accommodation with the same support up to 21 - is mandatory for all young people who are looked after and accommodated when they leave care over 16. However, evidence from the Independent Care Review and the Moving On Change Programme indicates that some young people were not provided with Continuing Care because their 'placement' was unable to offer this, or because the local authority was prioritising wider resource pressures and the needs of other children within the care system.

This creates a risk that young people move on from care not as a result of their own readiness, aspirations or capacity for independence, but due to system constraints. The current discretionary approach to providing a return to care for young people where a transition has not progressed as planned does not adequately protect them from homelessness and support them to withstand the impact of these pressures on young people's early adulthood.

To address this, a right to return to care for those under the age of 21 must be clear, accessible and consistently implemented.

3. Create a route to Continuing Care for care experienced children and young people who return to care

- Where a child or young person returns to care or accommodation they should have the benefit of Continuing Care and Aftercare when they leave care or accommodation, in the same way they would have had they remained in care continuously.
- Young people who have been deemed to require accommodation under s.25(3) should have the same entitlement to care, Continuing Care and Aftercare as other former looked after children.
- Whilst proposed changes may address entitlement to Aftercare, they do not put such young persons on an equal footing in respect of Continuing Care. Aftercare is not a substitute for Continuing Care and using it as such disadvantages children who returning to care. Firstly, Continuing Care, by definition, includes a right to accommodation. **Accommodation can be provided as part of Aftercare, but there is no right to accommodation.** Secondly, Continuing Care gives a risk to continuity of support. While a local authority could provide the same support to a child as Aftercare, there is no right to have the same support. The 1995 Act recognises that Continuing Care is the starting point, and takes precedence over Aftercare where a young person might be eligible under both provisions.[13] Bringing young people returning to care

[13] Section 29(2A)

within Continuing Care is, therefore, consistent with existing, long-term Scottish Government policy (see, for example, Staying Put, 2013) and statutory intention.

What difference would this make in practice?

Young people who return to care should be able to access support that is equitable with that available to other care experienced young people, including Continuing Care and Aftercare. The legislative framework must enable this, to avoid the creation of unnecessary "cliff edges" in support described in the promise.

4. Create a right to remain in and return to Continuing Care up to the age of 26

- To have equity with non-care experienced young people who can return to live with their families, care experienced young people should be able to remain in and return to Continuing Care if their welfare requires it, and to prevent homelessness and living in unsuitable accommodation after leaving care.
- To ensure that section 26A is the default for eligible young people who need accommodation, ensuring that they have access not only to accommodation, but also to other necessary supports, up to the age of 21.
- To create a pathway to continued accommodation and other assistance for young persons over age 21 whose welfare requires it, thereby avoiding 'cliff edge' or arbitrary outcomes at age 21.
- This will involve significant discussions about implementation, resourcing and availability of and access to suitable homes for young people. These discussions must take into account a) Scotland's cross party support for and commitment to the promise; b) The proposed trajectory for the numbers of children and young people in care to decline as the promise is kept; c) The need to consider tools such as delayed commencement and sequencing of provisions; d) The need for a full review of the implementation and resourcing of all provisions relating to children and young people leaving care in Scotland to ensure their rights are fully upheld and the intent of the legislation is operational in practice.

What difference would this make in practice?

Evidence from the 'Moving On' Change Programme highlights the potential benefits of extending Continuing Care beyond the age of 21, particularly for young people engaged in further and higher education. Extending eligibility would enable young people to remain in their existing care placements for the duration of their studies, providing greater stability and removing the need to meet housing costs through rent during this period.

Such an approach would align with the vision set out in the promise, which states that "young people must be encouraged to 'stay put' in their setting of care for as long as they need to. Rules, regulations and systems must support that approach" (The Promise, p.92).

Implementation

It is clear from the evidence heard by the Children and Young People and Education Committee that there are significant concerns from local authorities and other stakeholders about duty bearers' ability to implement both existing duties and the new ones set out in the Children (Care, Care Experience and Services Planning) (Scotland) Bill. The Promise Scotland is cognisant of these concerns and agrees that there is a need to work collaboratively as part of the work to implement the promise to identify where further resources are required to implement the changes needed to keep the Promise. This includes ensuring there are sufficient resources in place to implement the proposed changes set out within this paper. For this reason, The Promise Scotland recommends that these changes are:

1. Sequenced fully in order to ensure public bodies have enough time to adequately prepare for them.
2. Set within the context and understanding of Scotland in 2030 when the promise is kept. By 2030 the expectation is that there will be fewer children and young people experiencing care, and therefore fewer children and young people who would require the duties set out within this paper to apply. This is important context when considering the required resourcing.

Additionally there is a need to consider whether overarching statutory guidance should be produced, to replace 'Staying Put' (2013) to give clarity and certainty to both local authorities and young people as to what their rights should look like in practice.

Conclusion

Taken together, The Promise Scotland believe that amendments in these areas would represent a statutory 'right to return' in line with the conclusions from the Independent Care Review. They will also provide important strengthening and clarity in respect of existing statutory rights and provisions, to the benefit of looked after children and care experienced young persons.