Education, Children and Young People Committee

10th Meeting, 2023 (Session 6), Wednesday 22 March 2023

Children (Care and Justice) (Scotland) Bill

Introduction

This morning, the Committee will hear evidence regarding the Children (Care and Justice) (Scotland) Bill.

A SPICe briefing on the Bill is available online.

Committee meeting

The Committee will be taking evidence from two panels at its meeting today.

Panel One

The Committee will take evidence from representatives from—

- Scottish Children's Reporter Administration (SCRA)
- Police Scotland
- Crown Office and Procurator Fiscal Service (COPFS)

Panel Two

The Committee will then take evidence from representatives from—

- Children and Young People's Commissioner Scotland (CYPCS)
- Clan Childlaw
- Children and Young People's Centre for Justice (CYCJ)

Supporting information

A SPICe briefing, prepared for Panel 1, is included in **Annexe A** of this paper.

Police Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Children's Reporter Administration and the Scottish Courts and Tribunals Service have provided written submissions ahead of the meeting today. These are included at **Annexe B.**

A SPICe briefing, prepared for Panel 2, is included in **Annexe C** of this paper.

Submissions from the Children and Young People's Centre for Justice (CYCJ) and Clan Childlaw and CYPCS are included at **Annexe D** of this paper.

Work by other Committees

The Criminal Justice Committee is a designated secondary committee on this Bill.

The Finance and Public Administration Committee is currently undertaking a Call for Views on the Bill's Financial Memorandum. This is due to close on 2 April 2023.

Education, Children and Young People Committee Clerking Team
17 March 2023

Annexe A

Education, Children and Young People Committee

Wednesday 22nd March 2023 (Session 6)

Children (Care and Justice) (Scotland) Bill- Stage 1 Scrutiny

Introduction

The Children (Care and Justice) (Scotland) Bill was introduced on 13 December 2022. The Education, Children and Young People Committee is the designated lead committee and will be looking at the Bill alongside the Criminal Justice Committee.

This briefing is to support Members' first evidence session considering the Bill by providing a short narrative of what the Bill seeks to do, a brief overview of the children's hearing system and the wider policy context.

The Bill makes changes to the law in relation to the care of children and the involvement of under 18s in the criminal justice system. This includes courts that hear cases relating to children and the places where children can be detained.
This briefing provides a brief overview of the key provisions in the Bill which deal with changes to the children's hearing system, criminal justice and criminal procedure involving children. (Further detail is available in the SPICe briefing on the Bill).

The briefing also summarises written evidence which has been received from witnesses at the time of writing.

In its informal session with the Bill team, the Committee discussed the Lord Advocate's Guidelines on offences committed by children which may require them to be jointly reported to both the Crown Office and Procurator Fiscal Service and the Scottish Children's Reporter Administration. The briefing also provides an overview of those guidelines.

Overview of the Bill

Part 1 changes the age of referral to a children's hearing from 16 years old to 18 years old and removes statutory barriers to 16- and 17-year-olds being referred to the Principal Reporter to access the children's hearing system, both for welfare and on criminal grounds. It also contains some related measures, geared to assisting the raising of the age of referral.

Part 2 relates to children in the criminal justice system, including the framework on reporting of criminal proceedings involving children, remittal between the courts and children's hearings, children in police custody, and looked after children status in relation to detained children. Part 2 also makes provision for ending under 18s being detained in young offenders' institutions (YOIs), with secure accommodation services being the alternative where a child requires to be deprived of their liberty. There is also a regulation-making power around extending secure accommodation until the age of 19 in certain circumstances.

Part 3 changes the statutory definition of secure accommodation. It also legislates on the support, care and education that must be provided to children accommodated there. Moreover, it provides regulation-making powers regarding the approval framework of secure accommodation services by the Scottish Ministers. Part 3 also makes provision around regulation and recognition of cross- border care placements.

Part 4 makes two changes: it extends the meaning of child to under 18s in the Antisocial Behaviour etc. (Scotland) Act 2004; - and repeals Part 4 (provision of named persons) and Part 5 (Child's Plan) of the Children and Young People (Scotland) Act 2014. As Parts 4 and 5 have never been in force, the repeal does not affect the existing named person or child's plan practice.

Children's Hearing System

Background to the current system

The Children's Hearing System was introduced in 1971 following the Kilbrandon Report of 1964 and the Social Work (Scotland) Act 1968. Kilbrandon recommended a welfare-based system to provide an integrated approach to children who had committed offences and children in need of care and protection. It assumes that the child who has committed an offence is just as much in need of protection as the child who has been offended against. It is a lay tribunal which does not have the formality of the normal courts. The legislation was substantially revised in the Children (Scotland) Act 1995 but the key principles have remained constant.

The Children's Hearing System is legislated for in the Children's Hearings (Scotland) Act 2011 (referred to throughout as 'the 2011 Act'). The 2011 Act consolidated existing legislation and made mostly structural changes to the Children's Hearing System. This followed a period of review which started around 2004 and coincided with the development of the 'Getting it Right for Every Child (GIRFEC)' approach to improving outcomes and supporting the wellbeing of children and young people.

Hearings are organised and administrated by the Scottish Children's Reporter Administration (SCRA) when children are referred for hearings.

A list of reasons, known as 'grounds' outline why a child may be considered to be at risk form the basis of a referral to a children's hearing. Any person (private individuals, teachers, social workers, health professionals, police etc.) can refer a child to SCRA, who will consider whether grounds exist for a hearing. Section 67 of the 2011 Act sets out the grounds on which a Reporter may refer a child to a children's hearing.

Children's Hearing Improvement Partnership (CHIP) guidance summarises the statutory criteria for referrals set out in the 2011 Act as follows:

> "(a) the child is in need of protection, guidance, treatment or control; and (b) it might be necessary for a Compulsory Supervision Order to be made in relation to the child. The Local Authority and the Police must refer a child when the criteria apply. Any other person may do so."

Once a referral is made to the children's reporter, the reporter must decide whether there is enough evidence to establish the ground and considers whether a compulsory supervision order is necessary. Only if both are met will a hearing be called.

The Children's Hearings (Scotland) Act 2011 sets out who may attend a children's hearing in relation to a child as a 'Relevant Person'. People automatically considered to be Relevant Persons are:

- Any parent, whether or not they have parental rights or responsibilities.
- Any person who has court-appointed parental rights or responsibilities relating to the child.

Other people, such as foster carers and kinship carers, are not automatically considered to be Relevant Persons. However, a Pre-Hearing Panel or a children's hearing can decide whether someone can be deemed as a Relevant Person. This is done by taking into consideration whether the person has had significant involvement in the upbringing of the child.

How does the Children's Hearing System work?

The following gives a very brief overview of the main stages of a hearing. Throughout, the procedures are informed by the key principles of the system which are:

- the welfare of the child is the paramount consideration
- an order will only be made if it is necessary (i.e. the state should not interfere in a child's life any more than is strictly necessary), and
- the views of the child will be considered, with due regard for age and maturity

The hearing should have the character of a discussion about the child's needs. A sheriff court is generally only involved if grounds of referral are in dispute or not understood, a child protection or child assessment order is required or there is an appeal against a decision of a hearing.

The aim is to balance the 'lay' character of the system with the guarantees of individual rights afforded by a court system.

Anyone can make a referral to the reporter, but in practice most referrals are made by the police[1]. The reporter investigates and decides whether a hearing is required. This decision is based on whether there is sufficient evidence that a statutory ground for referral has been met and if so, whether compulsory measures of supervision are needed.

If a hearing is required, the reporter arranges that and three members of the local children's panel 'as far as practicable' are selected to form the hearing. The child and relevant persons have a duty to attend a hearing unless they are excused. They also have a right to attend (although the relevant person can be excluded temporarily from a hearing).

At the hearing, the grounds for the referral must either be accepted by the relevant persons and child or established by the sheriff in order to proceed. In considering the case, everyone should have the opportunity to participate freely. If necessary, a relevant person can be temporarily excluded if this is needed to allow the child to express his or her views or to prevent distress to the child, along with other grounds outlined in Section 20D of the 2011 Act. A safeguarder, whose role is to protect the child's interests, can be appointed at any time during the hearings process. A child or relevant person can be represented at a hearing and there is state funding available in particular circumstances for legal representation. A scheme for children has been available since 2002 and this was extended to relevant persons in June 2009.

Once the case has been considered the hearing can;

- continue the case (i.e. defer decision to a later hearing)
- discharge the referral
- refer for voluntary support including restorative justice (if child aged 8 to 17 and referred on an offence ground)
- make a compulsory supervision order and an interim CSO.

A compulsory supervision order can set out where the child is to live and with whom he or she will have contact. It can have any condition attached to it including, authorising placement in secure accommodation, requiring a medical examination or a 'movement restriction condition' (electronic tagging) and imposes duties on the relevant local authority. It can be reviewed at any time and will cease to have effect unless it is reviewed within a year.

The local authority must implement a compulsory supervision order. If it does not do so, the hearing can ask the national convener to apply to the sheriff principal for an enforcement order.

Appeals can be made by the child (where considered to have the capacity) or relevant person to the sheriff and then to the Sheriff Appeal Court or Court of Session.

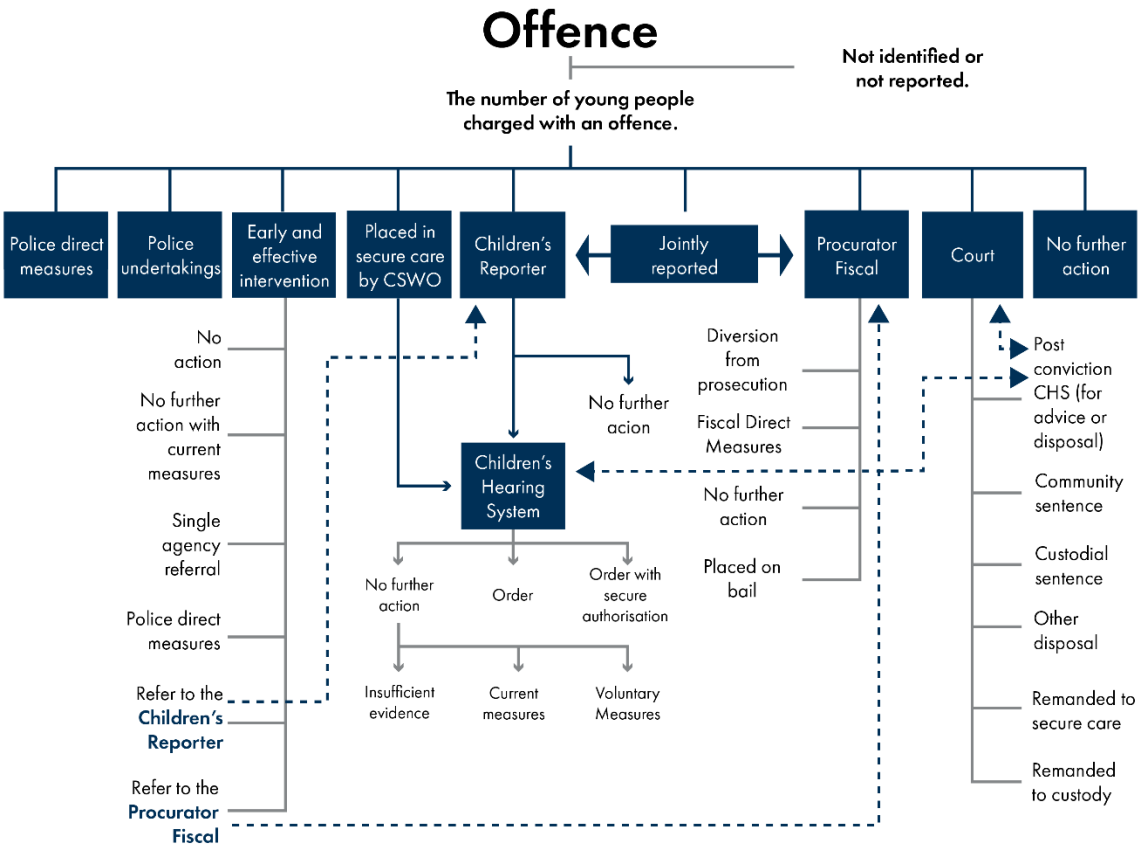
Although the above gives an outline, the detail of the hearings system is quite complex. For example, in addition to the above, it provides for the emergency protection of children through consideration of child protection orders and for various warrants and orders for the removal of children to a place of safety or for a medical assessment. There are strict time limits with regard to the detention of children which vary according to the circumstances in which an order is sought. Part of the complexity is a result of the need to ensure that emergency protection or any detention of a child is followed up timeously with full consideration of the child's needs.

Offences

Where a child over the age of prosecution is reported to the police, the Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children applies. This requires the police to jointly report certain cases to the Procurator Fiscal and the Principal Reporter.

If the child is not jointly reported, the police will deal with the child in the most appropriate way, for example through police direct measures (for example, a warning, fine or unpaid community work), by reference to early and effective intervention (for example a referral to targeted intervention or a response required from a single agency), or refer to the Principal Reporter if it is considered that compulsory measures may be required.

Image 1 provides an overview of the Current youth justice system



Source: Children and Young People's Centre for Justice, Journey through Justice.

Offences reported to have been committed by 16- and 17-year-olds

Under the Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children, certain offences alleged to have been committed by 16- and 17-year-olds are currently jointly reported to the Procurator Fiscal and the Children's Reporter if:

- they are subject to a CSO *or*
- where they were referred to the Principal Reporter before their 16th birthday, but where a decision has *not yet* been made either to make them subject to a CSO, not to refer them to a Children's Hearing or to discharge the referral.

The 16 or 17-year-olds who fall out with the Lord Advocate's guidelines are either reported to the Procurator Fiscal only or are dealt with through local Early and Effective Intervention arrangements as part of police direct measures.

This currently has the effect that two 16-year-olds may be treated differently at reporting simply as a result of their prior involvement with the Children's Hearing system.

In all jointly reported cases, the decision as to whether the case will be prosecuted or referred to the Children's Reporter is made in consultation between the Procurator Fiscal and Children's Reporter, with the Procurator Fiscal making the final decision. In jointly reported cases, there is a presumption in favour of referral to the Children's Reporter. This presumption can be set aside where it is in the public interest to prosecute.

In assessing whether the public interest resides in prosecution, the Procurator Fiscal may consider the following factors including:

- whether the gravity of the offence is such that solemn proceedings may be justified
- the impact of the offence on the victim
- any pattern of serious offending by the child

Age of referral to children's hearings

Part 1 will enable all children under the age of 18 to be referred to the Principal Reporter removing existing restrictions on eligibility for 16- and 17-year-olds to access the children's hearing system- both for welfare and criminal grounds. It also contains some related measures, geared to assisting the raising of the age of referral.

Section 1 will amend section 199 of the Children's Hearing (Scotland) Act 2011 which currently defines a "child" as anyone under the age of 16 or over who have been referred to the hearings system before they turn 16 in order for the hearings system to deal with them or 16- and 17-year-olds if they are already subject to a CSO.

This would provide the opportunity for children to be referred or remitted to a children's hearing up to 18 and also covers non offence referrals too. The Crown Office and Procurator Fiscal Service will however continue to have discretion to prosecute.

Currently if a child has not had prior involvement in the children's hearing system, then the child can only be referred to the Principal Reporter if they are under 16.

The hearings system can still deal with some 16-year-olds provided they were referred to the system before turning 16 and those 16-17 who are already subject to a compulsory supervision order as outlined earlier in this briefing, as well as children who are remitted from court.

In practice this means that two young people both aged 16 can commit the same crime but will be dealt with differently. While one could have their case heard by the children's hearing system in a welfare-based system the other may need to be heard by the courts.

One key issue for the Parliament will be to determine whether extending the children's hearing system to cover all those under 18 years old is appropriate and/or goes far enough. Members will also consider how to ensure that individuals will be able to receive the best support intended. The breadth of the definition of a child will also be a key driver of the costs of the policy.

The parliament must also consider the powers available within the court system that are not currently available at children's hearings like the ability to grant bail or a community sentence.

The SCRA forecasts an additional 3900-5300 referrals of between 2600-3400 children as a result of extending the age of referral as proposed. Referrals do not always lead to a hearing being convened. In terms of hearings the forecast is for an additional 80 to 150 hearings on offence grounds and 650 to 1200 on non-offence grounds annually. Equating to 730-1350 additional hearings per year.

The Bill consultation also considered whether the children's hearing system should have a scope post-18 to prevent 'cliff-edges' where a young person transitions from one forum to another. However, analysis from the Scottish Government highlighted barriers to taking such an approach, including maintaining the hearings system as a model solely pertaining to children and in terms of the rights of adults.

Compulsory Supervision Orders

A CSO is a formal order made by a Children's Hearing or less commonly by a sheriff for children who need additional protection or support.

When a CSO is made, it means a child's local authority must perform duties in relation to the child's needs and supporting their family as set out in section 83 of the 2011 Act. It also means there are certain rules the child may have enforced, such as living in secure care or a children's house, away from their family.

Prior to a child's hearing, reporters prepare a statement of grounds setting out the grounds for a CSO and supporting facts. CHIP guidance explains:

> "The Hearing may only proceed to consider whether to make a Compulsory Supervision Order if the child, and relevant persons present at the Hearing, accept a ground, or a ground is found established by the Sheriff."

Children have the right to attend court, though the sheriff may decide they do not have to. The child or young person and their parents or carers have the right to have a lawyer represent them in court.

The Policy Memorandum to the Bill states that the measures in part 1 of the Bill do not affect the constitutional independence of the Lord Advocate and Procurators Fiscal who will retain the discretion to begin criminal proceedings and to prosecute children in

court, where appropriate. The Bill takes forward measures to enhance the ability for protective and preventative measures to be made available through this system, as well as promote information to those who have been harmed.

Section 2 and 5 amends section 83 of the 2011 Act to make it clear that an authorisation to the person in charge of a place in which a child is required to reside, to restrict the liberty of the child, does not include an authorisation to deprive the child of their liberty.

One of the measures currently in a CSO is a requirement that the child reside at a specified place. If a CSO includes such an authorisation the Bill clarifies that this does not include deprivation of liberty.

Section 5 of the Bill amends the secure accommodation authorisation criteria so that if a children's hearing considers it necessary to deprive a child of their liberty it would need to include in the CSO a secure accommodation authorisation. That measure attracts special legal safeguards for the child's protection.

Movement restriction conditions (MRC) are a measure on a CSO restricting a child's movements and requiring the restrictions to be monitored by way of an electric monitoring device.

An MRC can be included in a CSO only where certain criteria are met:

- The hearing or the sheriff is satisfied that it is necessary to include an MRC in the order, AND
- The child has previously absconded and is likely to abscond again, and if the child were to abscond it is likely that the child's physical, mental or moral welfare would be at risk, and/ or
- The child is likely to engage in self-harming conduct, and/or
- The child is likely to cause injury to another person.

The provisions in the Bill decouple the MRC criteria from that of secure accommodation authorisations and can apply without the prerequisite of absconding.

In addition, the new test for an MRC moves to consideration of 'harm' rather than 'injury' and also makes it clear that it can be applied where it is necessary to help the child to avoid causing physical or psychological harm to others.

The Policy Memorandum states:

> "The new test would mean the MRC would be available as an option for panel members to protect both the child and others from harm where the child's physical, mental or moral welfare is at risk. This would cover situations to stop

> the child self-harming as well as to stop putting themselves at risk of further conflict with the law by approaching a specified person or place." (Page 14).

MRCs involve giving a child intensive support and monitoring the child's compliance by means of an electronic monitoring device which uses radio frequency technology to monitor the child.

Section 4 amends section 83 of the 2011 Act to apply a new set of conditions for the purpose of including a movement restriction condition in a CSO where:

- A child's physical, mental or moral welfare is at risk
- A child is likely to cause physical or psychological harm to another person.

These conditions cover a broader range of circumstances than the current conditions. For example, it might limit a child's movement to a certain address where a known abuser lives, a place where there is a risk of sexual exploitation, or a locale where the child is known to buy drugs.

A child cannot "breach" an MRC as such, in the sense that it would not result in automatic referral to a hearing. It is for the implementation authority to decide whether the child is not complying with an MRC and if so, to give notice to the reporter to require a review of the CSO. This will be an ordinary review hearing and requires the standard period of notification.

A key consideration will be broadening the definition to include the likelihood of causing psychological harm.

Members could also consider the use of MRCs. MRCs do not come with the same protections that a CSOs have such as access to a solicitor. The Bill also does not specify the surrounding support available to those with an MRC.

Part 2

The Policy Memorandum to the Bill states that the measures in Part 2 of the Bill aim to enhance the rights of all children aged under 18 in the criminal justice system, recognising that their treatment requires to be distinct from adults, whilst retaining the constitutional autonomy of the courts and judiciary.

In Part 2, provisions have been introduced to reflect the updated definition of a child (i.e., under 18) in criminal proceedings. A number of safeguards are enhanced through further development of responses to children in police custody; the framework for reporting on criminal proceedings involving children; and for children at court. There are also provisions which seek to maximise the ability of the courts to remit the cases of children who have pled or been found guilty of an offence to the children's hearings system for advice or disposal.

Further provisions relate to the remand, committal, and detention of children. These include removing the ability for children under aged 18 to be remanded or sentenced to detention in young offenders' institutions (YOIs) or prisons, instead requiring that where a child is to be deprived of their liberty, this should normally be in secure accommodation. Finally, local authority duties in relation to children deprived of their liberty in secure accommodation, and cross-border placements of children in secure accommodation are also covered.

Involvement of children in criminal proceedings

The Policy Memorandum to the Bill points out that the meaning of "child" for the purposes of the Criminal Procedure (Scotland) act 1995 ("the 1995 Act") is currently defined by reference to section 199 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). Currently, in the context of the children's hearings system, while all under 16s will be children for the purposes of the 1995 Act, some 16- and 17-year-olds will also be children if they are already involved with the children's hearings system.

The Bill will amend the definition of "child" in the 1995 Act meaning that "child" will now mean the same in both the children's hearings system and the criminal justice system, namely a person under 18.

Prosecution of children

In Scotland, the age of criminal responsibility is currently 12. Section 42 of the Criminal Procedure (Scotland) Act 1995 currently provides that children aged 12 to 15 who commit an offence may only be prosecuted if the Lord Advocate authorises the prosecution. Children aged 16 or over can be prosecuted without this authorisation, although a child of this age who offends while already subject to a compulsory supervision order may be referred back to a children's hearing.

Section 10 of the Bill will amend section 42 of the 1995 Act so that all children over the age of criminal responsibility (all those aged over 12 and under 18) may be prosecuted only if the Lord Advocate authorises it.

Safeguards for children involved in criminal proceedings

Children in police custody

The Scottish Government has stated that its policy in this area has been developed to ensure that there is a more consistent approach to the upholding of children's rights when in police custody. With the amended definition of 'child' as proposed in the Bill, the intention of the changes regarding safeguards in the Bill would mean that all children under age 18 will have enhanced rights when in police custody.

The Criminal Justice (Scotland) Act 2016 ("the 2016 Act") makes provision for what happens if a child is arrested and taken into police custody.

Under the 2016 Act, a child who the police believe is under 16 or one who is subject to a CSO, must be kept in a place of safety until they can be brought to court. While every effort is made to avoid detaining children in police stations, which can be

frightening and intimidating, it is sometimes not practicable to hold a child anywhere else. In taking a decision to hold a child in police custody, the wellbeing of the child is a primary consideration. Guidelines issued by the Lord Advocate set out a presumption of liberty, unless such factors such as the seriousness of the offence, a significant risk to victims or witnesses, and the nature and timescale of further enquiries, justifies police custody.

Where a child is being prosecuted for an offence and is in police custody and is not to be liberated, the place of safety where they are to be held must not be a police station unless it would be impracticable, unsafe, or unadvisable for reasons of the child's health to be kept anywhere else. The provisions in the Bill extend these considerations to all under 18s, and except in the limited circumstances described, children should not be kept in police stations.

The 2016 Act also provides that where a child is brought into police custody, a parent of the child the child must be informed (if one can be found) and the relevant local authority must also be informed. A key change proposed by the Bill is that the relevant local authority will now be informed when any child under 18 is in police custody. This is to ensure that the local authority can visit the child if it decides that this would best safeguard and promote the child's wellbeing. It is clear that being brought into police custody under any circumstances can be an intimidating experience and for many children, they may also be vulnerable and require appropriate support.

With regard to parents of a child in custody being informed, for those children under 16, their parents will always be informed and asked to attend unless the local authority advises that this would be detrimental to the best interests and wellbeing of the child. The Policy Memorandum points out that from age 16, and respecting the evolving capabilities of the child, the Bill will ensure that a child will have the choice to nominate that another adult other than a parent is notified of their being in custody (subject to the possible intervention of the local authority as noted above). The child can also request that no notice is sent or ask that no adults attend the police station. In such circumstances, the local authority would be informed to ensure that every child has someone notified of their situation.

Other provisions in the 2016 Act include the right to have a solicitor present while being interviewed by the police. In certain circumstances, the right to have a solicitor present can be waived. However, this is deemed to be an important right by the Scottish Government and an important safeguard for children in such circumstances. Therefore, the Bill amends the relevant provisions in the 2016 Act so that no child under 18 can waive the right to have a solicitor present at a police interview.

Restrictions on reporting

The Bill includes a number of provisions relating to the reporting of suspected offences or proceedings involving children.

In Scotland, the identification of a child either as an accused person or as a witness is relatively rare. This is in line with the United Nations Convention on the Rights of the

Child (UNCRC) where a child's general right to privacy is given additional attention where a child is in conflict with the law.

The Policy Memorandum states that there are arguments surrounding the public identification of children who commit offences in childhood. On the one hand, there are those that suggest that identification relates to the principles of open and transparent justice, which are important in ensuring the integrity of and accountability of the justice system and upholding public confidence. Others point to identification as being at odds with children's rights or justified, arguing that this should never be permitted, and that anonymity should be lifelong. It is also acknowledged that stigmatisation is entirely detrimental to the promotion of rehabilitation and can have severe consequences with regard to a child's future development and life chances.

Currently, provisions in the Criminal Procedure (Scotland) Act 1995 govern reporting restrictions where proceedings involve children where a child (under 18) is the accused. In such cases, there is an automatic prohibition on newspaper reports or sound and television programmes revealing the identity of the child or any other child involved in the proceedings. These restrictions also apply to a witness under 18 years old where the accused party is a child. However, where the accused is not a child, the reporting restrictions apply to any other child involved in the proceedings only if directed by the court.

Whether a child appearing in court is the accused or a witness, the court has the power to dispense with reporting restrictions at any point in the proceedings, and the Scottish Ministers have the same power but only when proceedings have concluded.

The Bill includes provisions which deal with restrictions on the reporting of (a) suspected offences involving children, and (b) proceedings involving children.

With regard to the restriction on reporting of suspected offences involving children, the Bill makes it an offence to publish information that is likely to lead to the identification of a person suspected of committing an offence at a time when they were under 18. The same offence applies with regard to the likely identification of a person under 18 who is a victim or witness to such an offence. The restrictions imposed will only apply if there are no proceedings in a court in respect of a suspected offence. If proceedings are raised at court, the restrictions in the Bill cease to apply and the restrictions contained in the 1995 Act become relevant.

The Bill also includes provisions which deal with applications to dispense with the restrictions imposed by the Bill. Applications to have the restrictions dispensed with can be made to a sheriff by the police, a prosecutor, the person whose information is the subject of the restrictions, or by a media representative. A sheriff may dispense with the restrictions if they are satisfied that it would be in the interests of justice to do so. Before dispensing with restrictions, the sheriff must have regard to the wellbeing of the person whose information is restricted and also whether any persons should be given the opportunity to make representations.

With regard to restrictions on reporting of proceedings involving children, the Bill makes a number of amendments to the 1995 Act.

It is currently an offence under the 1995 Act to include information in a newspaper report, or in a sound or television programme that would be likely to lead to the identification of a child involved in criminal proceedings. The Bill, taking into account advances in technology and other forms of media, includes other forms of speech, writing or communication which are addressed to the public.

The Bill also provides that identifying information about an accused person must not be published if the person was under 18 at the alleged date of the commission of the offence, and that any information must not be published at the commencement of proceedings. The restrictions apply until the date on which the person whose information is protected reaches the age of 18 or the proceedings are concluded, whichever is the later, unless the person was the accused and the proceedings end with an acquittal or are otherwise discontinued. In that case, the reporting restrictions apply for the lifetime of the person.

The Bill also makes provision, with regard to an accused person, that the court must not dispense with restrictions unless it has taken into account a report from a relevant local authority regarding the person's circumstances. The Bill also provides for appeals against decisions to dispense with restrictions.

Remit to children's hearing from criminal courts

The Policy Memorandum to the Bill points out that the children's hearings system and criminal justice system currently interact in certain limited circumstances, including the ability of the court, where considered appropriate, to remit a child's case to the hearings system for advice and/or disposal where a child has pled or been found guilty. The circumstances in which a child's case can be remitted vary depending on the child's legal status, age (if not already subject to measures through the hearings system), court and proceeding type. As a result, not all children can benefit from the option of remittal to the hearing system, where more age and stage appropriate, welfare-based, and holistic support could be provided to meet the child's needs.

Section 49 of the Criminal Procedure (Scotland) Act 1995 includes provisions that govern what the courts may do when a child pleads, or is found guilty of an offence, and deals with the interrelationship of the hearings system and the criminal justice system as set out above. It provides that the court may seek advice from a children's hearing as to the appropriate disposal to make in a child's case, may remit the child's case to a children's hearing for that hearing to dispose of the case, or can dispose of the case itself, either immediately or after getting advice from a children's hearing. These options depend on the age of the child, whether the child is subject a CSO, whether the court is a Justice of the Peace Court, the Sheriff Court, or the High Court, and whether the proceedings are solemn proceedings or summary proceedings. For example, where a child is subject to a CSO, the sheriff court must seek advice from a children's hearing before it can dispose of the child's case.

The Bill makes a number of changes to the 1995 Act with the main one being that no distinction is made between a child subject to a CSO and a child who is not. In this regard, all under 18s will now be treated the same way.

With regard to the provisions in the Bill, in summary cases, the court will be required to either request advice on the disposal of the child's case from a children's hearing or to remit the case to the hearing for disposal. The court can also proceed straight to remitting the case to a children's hearing for disposal without first requesting advice, but it cannot generally dispose of the case itself without first requesting advice. The exception is where the child is within 6 months of turning 18. Where that it is the case, and the court considers that it would not be practicable to either seek advice or remit the case for disposal, the court may dispose of the case itself. There are also exceptions for certain offences, and where an offence comes under section 51A of the Firearms Act 1968, or section 29 of the Violent Crime Reduction Act 2006, then the court must dispose of the case itself[1].

In sheriff court solemn cases, the Bill provides that the sheriff has a choice. To either request advice for a children's hearing, to remit the case to a hearing for disposal, or to dispose of the case without a remit. However, before disposing a case without a remit, the sheriff must request advice from a children's hearing. The sheriff can also choose to move to dispose of the case without requesting advice in two circumstances: (a) either where the sheriff determines that it would not be in the interests of justice to do so, or (b) where the child is within 6 months of turning 18 and the sheriff considers that it would not be practicable to request advice before disposing of the case.

In solemn cases in the High Court, the Bill provides that court will have discretion as to how to proceed, so may request advice before deciding how to dispose of the case or remit the case to a children's hearing (with or without first requesting advice), or dispose of the case itself (again, with or without first requesting advice).

Remand, committal, and detention of children

The Policy Memorandum to the Bill states that significant progress has been made in reducing the number of children who required to be deprived of their liberty, including being held in custody. This builds on the Whole System Approach under the Youth Justice Vision that wherever possible, no under-18s should be detained in Young Offenders' Institutions (YOIs), including those on remand.

The policy approach adopted by the Scottish Government is that instead, secure accommodation and intensive residential and community-based alternatives should be used where trauma informed approaches are required for the safety of the child being detained and those around them.

As such, the relevant provisions in the Bill are intended to ensure that any child who is to be deprived of their liberty will receive rights-based psychologically and trauma informed responses in age appropriate and therapeutic environments, which will normally be secure accommodation. The Bill is also seeking to end the use of YOIs (and prisons) for all children aged under 18.

It is important to point out that where a child is to be considered for placement in secure accommodation, there needs to be a significant level of concern about any

[1] These provisions involve firearms offence for which minimum sentences apply.

risks that the child's behaviour may present either to themselves or others and as such, all alternative options to meet the child's needs must have been considered.

Remand and committal of children before trial or sentence and detention of children on conviction

The Bill makes a number of amendments to the 1995 Act in these areas.

Section 16 and 17 of the Bill make two main changes. The first, which is consequential to the change made to the meaning of 'child' for the purposes of the 1995 Act, is to ensure that the provisions that apply to children apply to all persons under 18, regardless of whether they are subject to a Compulsory Supervision Order or not.

The Explanatory Notes to the Bill point out that currently, some provisions of the 1995 Act refer to a person under 16 rather than to a 'child' and distinguish between children aged 16 and above subject to CSOs and those not subject to CSOs. The other main change in the Bill is to provide that a child cannot be held on remand or sentenced to detention in a young offenders' institution. Generally, as a result of these amendments, children will be held in secure accommodation.

The Policy Memorandum to the Bill points out that these provisions do not interfere with a court's ability to deprive children of their liberty where this is deemed to be necessary, they simply change where a child can be detained. In cases of remand, the place of detention would either be secure accommodation if the court requires this, or a place of safety to be determined by the local authority, which could include secure accommodation. Essentially, children under 18 can no longer be committed to a prison or YOI.

Also, where a child is sentenced to detention under summary proceedings, this will be in a residential establishment chosen by the local authority, which again, could include secure accommodation. Where a child is sentenced under solemn proceedings, the Scottish Ministers will direct where the child is to be placed – this cannot be a prison or YOI but may be secure accommodation.

The Bill also provides that the Scottish Ministers may make regulations relating to children detained in secure accommodation through a criminal justice route, which may include providing that a child may remain in secure accommodation up to a maximum age of 19. This will remove the current requirement for children to automatically leave secure accommodation when they turn 18 and is intended to provide support, stability, continuity of care and maintain relationships which will be essential for rehabilitation and gradual transitions from secure accommodation.

Although a young person may subsequently transfer to a young offender's institution as part of their sentence, it is considered that the period spent in secure accommodation will enable them to benefit from the support and stability required to assist them in preparing for adulthood and any future transitions to a YOI.

Local authority duties in relation to detained children

The Policy Memorandum to the Bill states that local authorities already have duties to assess the wellbeing of children where there may be concerns about their welfare, and to work in cooperation with other service providers to assess their needs and provide coordinated support as necessary.

Where a child is a looked after child, there are additional duties on corporate parents. If the child ceases to be looked after on or after their 16th birthday, they will have additional entitlements to support as care leavers, including aftercare potentially up to the age of 26. The Policy Memorandum points out that currently, most children in secure accommodation are looked after children and on leaving secure accommodation could be care leavers. However, if they are not regarded as care leavers, they would not benefit from such entitlements.

In enabling any child who is detained in secure accommodation whether on remand or following sentence, it is likely that more children will be placed in secure accommodation who are not regarded as looked after children and therefore would not have corporate parenting or aftercare entitlements. Many of these children will be vulnerable and will, more often than not, have been subject to trauma and adverse childhood experiences. It follows that they will require support at all points in their journey through the criminal justice system whether at the point of remand, sentence and on their return to their families and communities.

To that end, the Bill is seeking to provide parity by enabling any child who is sentenced or remanded to secure accommodation to be treated as if they were a looked after child for the duration of their placement. It also provides that children who are detained will be afforded the same aftercare and support as these apply to former looked after children.

Secure accommodation/ cross border placements

Children and young people can currently be placed in residential care settings in Scotland from other UK jurisdictions. These are known as cross-border placements and can often occur without Scottish authorities being aware that the children are in Scotland.

The Policy Memorandum to the Bill points out that The Promise stated that the acceptance of children from other parts of the UK cannot be sustained when it is not demonstrably in those children's best interests to be taken to a place with no connections or relationships. These placements can result in children and young people being separated from their families, and community support and services. This can impact on planning for the child and may also impact on their human rights. The Promise is also clear that current commercial practices regarding cross-border placements, where they are purchased by a local authority in another UK jurisdiction, must end. The Scottish Government's position is that cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child.

In order to manage issues of increasing capacity for cross-border placements, the Bill provides that any new care service providers must tailor provision to Scotland's particular needs, for example by increasing scrutiny and communication around proposed new services. The Bill will also extend the reach of the Care Inspectorate to have an increased role in relation to the registration, regulation, and oversight of care settings where cross-border children are accommodated.

Lord Advocate's Guidelines on Joint Reporting

The Lord Advocate's Guidelines on offences committed by children contain guidance to police officers in Scotland on the categories of offence which must be jointly reported to both the Procurator Fiscal and the Children's Reporter. The Guidelines point out that in terms of the relevant provisions in the Criminal Procedure (Scotland) Act 1995, chidren under the age of 12 in Scotland cannot be prosecuted in respect of any criminal conduct and will therefore not be jointly reported to the Procurator Fiscal.

In general terms, the Guidelines point out that Police Officers must have regard to the United Nations Convention on the Rights of a Child (UNCRC). In particular, the best interests of the child should be a primary consideration, in terms of Article 3 of the UNCRC and the views of the child should be taken into account in terms of Article 12.

Any discussion with COPFS around whether a case requires to be jointly reported should include consideration of the best interests of the child accused and any child victims or witnesses, including any views expressed by the child or children, where known. Where it is identified that a case requires to be jointly reported, Police Officers should ensure that the report submitted makes reference to any views expressed by the child or children, where known, and any other relevant information that is material to the best interests of the child or children. This should include details of any discussions with other agencies or the child's representatives.

There are three categories of offence which require to be jointly reported:

- Category 1 – offences which require by law to be prosecuted on indictment2 or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest. These include common law offences which would always be prosecuted in the High Court e.g. murder, rape and treason. Other offences which are normally indicted in the High Court include culpable homicide, and attempted murder.
  Other offences which may fall into this category include assault with intent to rape, and assault with intent to rob involving the use of firearms. There are also a number of offences within the Sexual Offence (Scotland) Act 2009 that can be prosecuted on indictment.

- Category 2 – Offences alleged to have been committed by children aged 15 years or over which in the event of conviction oblige or permit a court to order

2 An indictment is simply a court document which sets out the charges against the accused in solemn (more serious) cases.

disqualification from driving. Currently, this category applies excusively to children aged 15 years or over. Children will be prosecuted for this type offence only if the Procurator Fiscal considers that it would be in the public interest to obtain a disqualification which would still be in force when the child became 16 and that in the event of conviction it was likely that the court would impose such a disqualification. Minor Road Traffic Act offences carrying a liability to discretionary disqualification should not normally be reported.

- Category 3 – this category relates to offences committed by children who are aged 16 or 17, and who are classified as children by section 199 of the Children's Hearings (Scotland) Act 2011. Currently, in terms of that section, the definition of "a child" includes: a person aged 16 and 17 years who is subject to a compulsory supervision order; or a person over the age of 16 years who was referred to the Principal Reporter before they turned 16, but a `relevant event' has not yet occurred.

A 'relevant event' is defined as being:

- The making of a compulsory supervision order;
- The notification to the person that the question of whether a compulsory supervision order should be made will not be referred to a children's hearing; or
- The discharge of the referral to the Principal Reporter.

However, there is no requirement to jointly report the child to the Procurator Fiscal and the Children's Reporter if the offence falls within the Framework on the use of Police Direct Measures and Early and Effective Intervention for 16- and 17-year-olds. Such offences should be submitted to the Children's Reporter alone.

Written evidence

Police Scotland

In principle, Police Scotland are supportive of the provisions in the Bill which seek to widen access to the Children's Hearings System, citing a rights based approach which is consistent with the UNCRC.

However, Police Scotland state that the legislative landscape and the definition of a child/young person is complex and would need simplified to accommodate these shifts in policy.

Police Scotland note that the changes to the scope and age at which a child is defined in the Children's Hearing (Scotland) Act 2011 will have a significant impact on other pieces of legislation, from a policing perspective, most notably the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2016. This will extend beyond the legal definition and must take account of the change in demand for and capacity of systems and provisions to manage such a change.

Police Scotland also recognises the need for the victim of harm to be informed about the manner in which the harm caused to them has been addressed. However, further

acknowledge that this must be balanced with the rights of the child who has caused the harm, in particular owing to the potential further ramifications of any disclosures that may be made to a victim, or carers for a child victim. The overall consideration is that Police Scotland has a responsibility to both those who harm and those who have been harmed. This will include children in conflict with the law, and where there is a victim, this too is often a child.

Police Scotland also point out that changes brought about by the Bill in relation to children in police custody, will result in an increased demand on resources. For example, where a child in conflict with the law has been arrested and taken into police custody, and in all the circumstances mean that the child should appear before a court, legislation provides that they should be held in a place of safety until their appearance.

When seeking such a place of safety Police Scotland often encounter issues around availability of such places which results in the child being held in a police cell. This is not an area where Police Scotland is directly able to influence and gives no option other than for the child to remain in a cell, much against Police Scotland's wishes. Police Scotland note that this demand will increase when we consider 16- and 17-year-old young people in custody, who at this time, do not require a place of safety.

Nicole Beattie and Graham Ross Senior Researchers, SPICe Research

17th March 2023

Annexe B

Police Scotland Submission

Education, Children and Young People Committee - Wednesday 22nd March 2023

Children (Care & Justice) (Scotland) Bill

1. Access to the Children's Hearings system

The Bill widens access to the Children's Hearings system to all 16 and 17 year olds and in principle, Police Scotland is supportive of this rights based approach that seeks to be compatible with UNCRC.

The legislative landscape and the definition of a child/young person is complex and would need simplified to accommodate these shifts in policy.

The changes to the scope and age at which a child is defined in the Children's Hearing (Scotland) Act 2011 will have a significant impact on other pieces of legislation, from a policing perspective, most notably the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2016. This will extend beyond the legal definition and must take account of the change in demand for and capacity of systems and provisions to manage such a change. **This will be explored further in our response to the Financial Memorandum.**

The ability to refer all 16- and 17-year-olds to the Principal Reporter would lead to an increase in the number and range of cases being dealt with by the children's hearings system, including offence cases. Remitting these children to the Reporter for advice and disposal will require necessary resourcing and training at CHS.

Careful consideration is needed if this route is not available in every case and also to support Sheriffs to make use of the remittal option. Acknowledging this may involve Lord Advocate guidelines for offences suitable for remittal, clear protocols will be required to ensure equity of service for young people across jurisdictions.

Any changes and increase in the powers of the CHS must have meaningful support and services behind such commitments. It is our view that such a rightly ambitious vision for our children and young people must be matched by an investment in resource, including equipping professionals to meet these expectations.

We are aware of, and consulting with the CHS Review Working Group. It is our view that having a CHS equipped in both capacity and capability will be essential to fulfil any of these options.

2. **Compulsory Supervision Orders**

The Bill makes several changes to Compulsory Supervision Orders (CSO) and Police Scotland supports the additional protective measures under a CSO which are not presently accessible via the children's hearings system, including prohibiting the child from entering a specified place or description of place, and from approaching, communicating with or attempting to approach or communicate with (whether directly or indirectly) a specified person or class of person, and recourse to a movement restriction condition.

Any changes and increase in the powers of the CHS must have meaningful support and services behind such commitments. It is our view that such a rightly ambitious vision for our children and young people must be matched by an investment in resource, including equipping professionals to meet these expectations, particularly support around the child.

3. **People who have been harmed, including children and information to a person who has been affected by a child's offence or behaviour**

Police Scotland recognises the need for the victim of harm to be informed about the manner in which the harm caused to them has been addressed. However, we further acknowledge that this must be balanced with the rights of the child who has caused the harm, in particular owing to the potential further ramifications of any disclosures that may be made to a victim, or carers for a child victim.

The overall consideration is that Police Scotland has a responsibility to both those who harm and those who have been harmed. This will include children in conflict with the law, and where there is a victim, this too is often a child.

Recognising the need to balance the rights, our view is that support should be made available to those who have been harmed. It was highlighted that the Interagency Referral Discussion (where the victim is a child) and future Barnahus/Bairn's Hoose may perhaps help fill the gap that is felt to exist currently in Scotland.

Experience from feedback and research for The Bairn's Hoose is that victims want a single person who can provide the information they are looking for rather than having to find different people in different services. It would be helpful if the nominated person has the ability to easily access information to provide feedback and so perhaps an employee of COPFS and/or CHS.

4. **Children in police custody**

The changes to the age at which a child is defined in the Children's Hearing (Scotland) Act 2011 will have a significant impact on the Criminal Procedure (Scotland) Act 1995 and the Criminal Justice (Scotland) Act 2016. This will extend beyond the legal definition and must take account of the change in demand for and capacity of systems and provisions to manage such a change.

Where a child in conflict with the law has been arrested and taken into police custody, and in all the circumstances mean that the child should appear before a court, legislation provides that they should be held in a place of safety until their appearance.

When seeking such a place of safety Police Scotland often encounters issues around availability of same which results in the child being held in a police cell. This is not an area where Police Scotland is directly able to influence and gives no option other than for the child to remain in a cell, much against Police Scotland's wishes. This demand will increase when we consider 16- and 17-year-old young people in our custody, who at this time, do not require a place of safety.

Police Scotland have built a children's custody suite in Glasgow. This is currently subject to internal evaluation. It is recognised that whilst the design and internal structure seek to mitigate the impact of being in custody on the child, the most appropriate option would be a suitable place of safety. In some cases, this may be secure care.

Police Scotland supports the principle that all children should have access to the correct support irrespective of the harm they have caused. It is our view that this is in keeping with UNCRC, and in the best interests of the child.

Crown Office and Procurator Fiscal Service

Written Submission to the Scottish Parliament's Education, Children and Young People Committee in relation to the Children (Care and Justice) (Scotland) Bill

Introduction

1. The Crown Office and Procurator Fiscal Service (COPFS) welcomes the policy intent underpinning the Children (Care and Justice) (Scotland) Bill (the "Bill").

2. Significantly, from a prosecutorial perspective, the Bill amends the legal definition of a child and broadly enables all children under the age of 18 to be referred to the Children's Reporter.

3. Prosecutorial action will remain an option. For example, in relation to serious offending, in circumstances where the public interest requires an order not available to the Children's Hearing system, or, importantly, where the Children's Hearing system may have insufficient time to deal with a child before they reach the age of 18 years.

4. This submission focusses on the aspects of the Bill which are most relevant to the system of prosecutions in Scotland.

Existing COPFS policy and practice

5. To assist the Committee, a summary of the Crown's current approach to offences alleged to have been committed by children (under the age of 18 years) is set out below.

Jointly reported cases

6. In terms of section 61 of the Children's Hearing (Scotland) Act 2011 (the 2011 Act), where a police constable reports a child to the Procurator Fiscal, they must also submit the report to the Principal Reporter (the "Reporter") at the Scottish

Children's Reporter Administration ("SCRA"). Such cases are described as "jointly reported" cases.

7. The Lord Advocates Guidelines on offences committed by children (the "Lord Advocate's Guidelines") provide guidance to police officers in relation to those cases which require to be jointly reported. Currently, not all cases involving a child as an alleged offender require to be reported to both the Procurator Fiscal and the Reporter. For the Committee's reference, a copy of the Lord Advocate's Guidelines can be found at **Annex 1**.

Prosecution Policy

8. Where a child is jointly reported, the prosecutor must consider whether there is sufficient credible and reliable evidence to establish that an offence was committed and what action, if any, is in the public interest.

9. COPFS prosecution policy in relation to the prosecution of children is as follows:

> "For accused aged 16 or 17 and subject to supervision there is a presumption in favour of such cases being dealt with by the Reporter and criminal proceedings should only be taken where there are compelling reasons in the public interest to do so.
>
> For all individuals under 18 years of age the approach will be outcome focussed with a rebuttable presumption against prosecution in Court.
>
> Where a child is aged 16 or 17 and is not subject to supervision, there is a presumption that an alternative to prosecution will be in the public interest. Where there is an identifiable need which has contributed to the offending, diversion should be actively considered.
>
> It will be in the public interest to prosecute the individual in the following circumstances:
>
> > Where the offence is of such gravity that it should be prosecuted on indictment. The assessment of the gravity of the offence will

include a consideration of the impact of the offence on the victim amongst other factors.

Where it would be in the public interest to secure an outcome not available through an alternative to prosecution, such as the recording of the offending on the Sex Offenders Register or where a Non-Harassment Order or disqualification from driving is likely to be the disposal of the court.

Where there is a pattern of serious offending."

UNCRC

10. The publicly available Scottish Prosecution Code (**Annex 2**) provides, in line with of Article 3 of the United Nations Convention of the Rights of the Child (UNCRC), that "where the accused and/or the victim or witness is a child, the best interests of the child are required to be treated as a primary consideration and to be given appropriate weight, along with other relevant considerations, in assessing the public interest"

Agreement with the SCRA

11. Jointly reported cases are subject to discussion between the Procurator Fiscal and the Reporter, albeit the final decision on any individual case rests with Procurators Fiscal.

12. COPFS and SCRA have published an agreement which governs decision making as between the two organisations (the "Agreement"). A copy of the Agreement is provided at **Annex 3**.

13. Specifically (at page 8, paragraph 33), the Agreement provides that:

> "In relation to any child who has been jointly reported, there is a presumption that the child will be referred to the Reporter in relation to the alleged offence.

In assessing whether this presumption should be overridden because it is considered to be in the public interest to prosecute the child, prosecutors shall take into account the following factors:

Where the child is aged 15 years or over, the offence is such that a disqualification from driving is likely to be the disposal of the court.

- In all cases:
    - whether the gravity of the offence is such that the child should be prosecuted on indictment;
    - whether there is a pattern of serious offending by the child;
    - whether there are services within the Children's Hearing System that are currently working with the child in relation to the child's offending behaviour and offending related needs, and/or any programmes that the child is involved in that are addressing such behaviour or needs and the extent of the child's engagement with those services;
    - whether any such services within the Children's Hearing system could become involved in working with the child in relation to his/her offending behaviour or offending related needs;
    - whether any possible decision open to the Children's Reporter or a Children's Hearing is likely to suitably address the child's needs and behaviour and any risk that the child may present;
    - whether there is likely to be an adverse effect on the victim if the child were to be prosecuted; and
    - any health or development issues (e.g., that the child has ADHD or learning

difficulties) that may indicate that the child's needs and behaviour would be best addressed within the Children's Hearing system.

- The assessment of the gravity of the offence will include a consideration of the impact of the offence on the victim, amongst other factors."

14. The agreement between COPFS and SCRA will need to be updated to reflect the increased age of referral.

Changes proposed by the Bill

Clause 1 – Age of referral to children's hearing

15. Currently, only children aged under 16 years, or children aged 16 or 17 years who are subject to a compulsory supervision order may be referred to the Reporter and, where appropriate, to the children's hearing system.

16. Clause 1(2)(a) of the Bill proposes to amend section 199(1) of the 2011 Act to amend the definition of a child from being, "a person who is under 16 years of age", to "a person who is under 18 years of age".

17. This will increase the age at which a child can, in law, be referred to the Reporter to 18 years for all children.

Impact on COPFS policy and practice

i. Lord Advocate's Guidelines

18. Prosecution policy is a matter for the Lord Advocate. The Lord Advocate's Guidelines on offences committed by children (Annex 1) will require to be updated to reflect the amended definition of a child. Detail of any change to prosecution policy, in this regard, will be considered in due course.

19. It is anticipated that not all children aged 16 or 17 years will require to be jointly reported. It may be appropriate for some children to be reported only to the Reporter.

20. However, the provisions of the Bill may present practical limitations, in certain circumstances, on the ability of the Reporter, and the Children's Hearing system, to deal with offending behaviour by children. For example, a child aged 17 years, who may otherwise have been suitable for referral to the Reporter, may require to be jointly reported, and the case retained by the Procurator Fiscal, where there is insufficient time for the Children's Hearing system to adjudicate on, and respond to, the offending behaviour. The background for this is explained in paragraph 9 of the Financial Memorandum to the Bill:

"The Bill consultation queried whether the children's hearings system should have remit post-18, to prevent 'cliff edges' where a young person transitions from one forum to another. However, further analysis has confirmed fundamental barriers to such an approach, in terms of maintaining the hearings system as a model solely pertaining to children and designed around them, and in terms of the rights of adults. Therefore whilst the Bill enables under-18s to be referred, due to the time taken for a referral to the Reporter to progress and for a hearing to convene and put meaningful measures in place which can take effect, this essentially means in practice children up to around 17-and-a-half will have the ability to be referred."

21. Further, children involved in alleged road traffic offending may require to be jointly reported where the offence would merit disqualification from driving or endorsement of any driving licence is considered to be in the public interest. This is anticipated in the Policy Memorandum, which notes that:

"As outlined in the policy memorandum accompanying the Bill, it is likely that these will be retained in the criminal justice system for prosecution anyway given that measures such as penalty points and disqualification from driving are not available in the hearings system, albeit measures have been included to support remittal for advice and/or disposal."

22. In addition, there may be some children who require to be jointly reported because, whilst the offending behaviour might ultimately be prosecuted on summary complaint, their behaviour represents a risk to a specified individual or the public and the appropriate outcome may be an order only available to a

court. For example, making the child subject to notification requirements in terms of the Sexual Offences Act 2003, or the subject of a non-harassment order.

23. The proposed changes to compulsory supervision orders in **clauses 3 to 5** are noted. These changes may enable such risks to be managed and mitigated within the Children's Hearing system. However, in some circumstances, this may not be possible and the availability of a specific statutory order, as mentioned above, may be deemed in the public interest.

24. Notably, the fact that a case is jointly reporting does not necessarily mean that a prosecution, or indeed in any further involvement of the criminal justice system, will follow. Each jointly reported case will require to be considered on its facts and circumstances to determine the appropriate response in the public interest.

Clause 10 - Prosecution of children over age of criminal responsibility

25. Clause 10 amends section 42 of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) so that no child (under the age of 18) may be prosecuted for any offence, "except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate; and no court other than the High Court and the sheriff court shall have jurisdiction over such a child for an offence" (section 42(1) of the 1995 Act).

Impact on COPFS practice and policy

i. Instance or Instruction of the Lord Advocate

26. It is in the public interest in some circumstances to prosecute children aged 16 or 17 years, including on summary complaint. The Bill will require prosecutors to obtain the specific authority of the Lord Advocate before commencing proceedings against any child under the age of 18.

27. Prosecutions of children aged 16 or 17 years on summary complaint do not currently require the specific authority of the Lord Advocate. The requirement for Crown Counsel to consider the circumstances of such cases will have resource implication for COPFS.

ii. Justice of the Peace Court changes

28. A consequence of clause 10 of the Bill is that the Justice of the Peace court will no longer have jurisdiction for children aged 16 or 17 years. Any prosecution will require to be in the Sheriff Court or High Court. It is noted that many road traffic cases involving children aged 17 years (who hold a driving licence or otherwise) would currently be prosecuted in the Justice of the Peace court.

Clause 15 - Referral or remit to Principal Reporter of children guilty of offences

29. Clause 15 of the Bill amends section 49 of the 1995 Act in relation to the courts ability to remit cases to the Children's Hearing system once a child has pleaded guilty to, or been found guilty of, an offence.

30. The court will be permitted to disqualify a child from driving or impose penalty points on their licence in road traffic offences alongside referring the circumstances of the offending behaviour to the Children's Hearing for consideration.

31. Further, the Bill permits the court to impose notification requirements in terms of Part 2 of the Sexual Offences Act 2003, even where the case is otherwise remitted to the children's hearing.

Impact on COPFS policy and practice

32. This change will not have a direct impact on COPFS policy and practice however, we would offer the following observation.

33. The Bill may create competing sentencing obligations. Clause 15 does not permit a court to make other types of order, for example, a non-harassment orders (NHO), whilst otherwise remitting a case to the Children's Hearing.

34. For example, when sentencing a case involving offending in terms of section 1 of the Domestic Abuse (Scotland) Act 2018 or a case aggravated by domestic abuse (in terms of Section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016), a court has a duty (section 234AZA of the 1995 Act) to consider making an NHO in relation to the complainer and any relevant child in such cases. The court is required to make an NHO unless the court decides

that there is no need for the victim, or any relevant child to be protected by such an order. If the court decides not to make an NHO it must explain the basis of reaching this decision.

35. A potential conflict arises if the accused is a child. The court may consider that the best outcome for the child is to remit the case to the Children's Hearing (the child's UNCRC rights would require to be considered), but the court may also consider that an NHO is appropriate (taking account of section 234AZA). The court will not be permitted to do both.

List of Annexes

Annex 1 Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children

Annex 2 Prosecution Code

Annex 3 Joint agreement – Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter

Submission from the Scottish Children's Reporter Administration

Children (Care and Justice) (Scotland) Bill – call for views from the Education, Children and Young People Committee of the Scottish Parliament

The Scottish Children's Reporter Administration (SCRA) welcomes the opportunity to respond to this call for views on the Children (Care and Justice) (Scotland) Bill.

The children's hearing is Scotland's distinct statutory approach, in which concerns about a child's circumstances (whether about the care or treatment of the child by adults or the behaviour of the child) are considered by children's reporters and then by panel members in a children's hearing, who make a decision about whether there needs to be compulsory professional involvement with the child and family.

In the Children's Hearings system:

- the needs of children or young people are addressed through one holistic and integrated approach which considers all the circumstances of the child and the child's welfare
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making
- the rights of children and families are respected.

Our Vision: Children and young people will be listened to, protected and supported to realise a positive future where they are safe, valued and respected.

Our Mission: We protect and support Scotland's children and young people, by making high quality decisions, upholding their rights and working collaboratively as compassionate, inclusive corporate parents to enable the most positive and personalised experience of the Children's Hearing.

Our Values: Our values are the shared motivations, beliefs and behaviours that underpin all that we do.

- Supportive: we work with kindness to support children, young people and families, our Partners and each other.
- Child-centred: children and young people are at the heart of everything we do.
- Respectful: everyone is respected and treated fairly, inclusively and lawfully.
- Accountable: we are responsible for our decisions, our ethics and our learning.

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

SCRA firmly supports this proposal. It is both consistent with, and a logical conclusion of, Scotland's intention to incorporate the United Nations Convention on the Rights of the Child (UNCRC) into domestic law. In addition the proposal finally implements recommendation 4 of the Child Protection Systems Review: Protecting Scotland's Children and Young People: It is Still Everyone's Job.

There are a number of important observations we would make.

- Children aged up to 18 already come to children's hearings and can remain on a compulsory supervision order (CSO) until their 18th birthday when that is in their best interests. Therefore, children's reporters and children's hearings are already making decisions about 16 and 17 year olds.
- Currently there is a different approach to 16 and 17 year olds depending on whether they are subject to a CSO or open referral to the reporter. If they are subject to a CSO or open referral, a 16 or 17 year old can be referred to the children's reporter (and referred to a children's hearing by the reporter) if a new concern arises. If they are not subject to a CSO or open referral, they cannot be. The Bill will remove this difference.
- The Bill will enable more 16 and 17 year olds to benefit from the child-centred approach of the Childrens Hearings system where that is determined to be in their best interests.
- The Bill recognises the vulnerability of some 16 and 17 year olds who require support and intervention on a compulsory basis, including those who require that intervention to protect them.

We have included some brief case scenarios in an appendix to this response. These scenarios illustrate the potential benefits that the Bill might bring.

Although the changes in the Bill are important, alongside that change in legislation there is a need to ensure effective services are available to all 16 and 17 year olds on both a voluntary and compulsory basis. We are aware of particular gaps in services in some areas for children in this age group, particularly where there are concerns about mental health and sexual offending.

More broadly in terms of resources, we are of the view that the proposal will require an early commitment from the Scottish Government on the redistribution of resources between existing spending lines and a significant allocation of resources for all elements of the Children's Hearings system (Children's Hearings Scotland, SCRA and local authority social work in particular). Without this investment we are concerned that the intent behind this expansion on the age of referral will not meet

its goals because the current resource arrangements do not have adequate resilience and capacity.

A key concern of the Child Protection Systems Review (referred to above) was to ensure that children aged 16 and 17 are offered equal protection from abuse, harm and exploitation and have access to the full range of help and supports that are available to children under 16. It was concerned that 16 and 17 year olds were prevented from accessing those support and protection through fact of their age alone, leaving them exposed to potential risk and harm whilst still widely considered as children. The change in the age of referral will go a long way to address that concern. However, as we have already said, alongside that legislative change, there is a need for effective services.

Whilst we welcome the proposal to treat all those under 18 as children who can access the Children's Hearings system, we recognise that there can be inconsistencies in how the law treats 16 and 17 year olds. For example, only one parental responsibility persists beyond age 16 (the responsibility to provide a child with direction and guidance) and a child aged 16 or 17 may legally marry. In this context, it is important to make the committee aware of an aspect of children's hearings procedure. When a children's hearing is arranged for a child of any age, the child's parents and some carers (referred to collectively as "relevant persons" in the legislation) will be notified and involved in any children's hearings proceedings (this includes them receiving full papers for the hearing). This remains the case when the child is aged 16 or 17. That will continue if the Bill becomes law, and the likely impact of the Bill is that there will be many more children of that age attending children's hearings.

However, it is also important to note that there are provisions that enable:

- relevant persons to be excluded from proceedings at a children's hearing or sheriff court, and
- papers to be withheld from a relevant person.

In both situations, particular criteria must be met before these decisions are made.

We are not recommending any change to the position of parents and some carers when a child is aged 16 or 17, but thought it important to alert the committee to this.

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?

We firmly support this proposal. The most effective way of dealing with the vast majority of children who are involved in offending is to comprehensively deal with the factors and issues which underlie their offending. This is informed by the contemporary evidence base on adversity, trauma, exclusion, and social and

economic disadvantage. This sits in direct contrast to the evidence base for criminal prosecution of children – which does not address any potential causal factors in their lives and demonstrably risks immersion in further crime.

It is important that there is a clear understanding (at a professional, political and societal level) that the proposals in the Bill regarding the age of referral are about opening up the *possibility* of all 16 and 17 year olds who offend being dealt with in the Children's Hearings system. Some children will still require to be prosecuted, albeit in an environment that respects children's rights. The legislation will not change the fact that children may still be prosecuted, but we welcome that it takes steps to ensure that children's rights are better respected when they are.

In addition, we envisage that many 16 and 17 year olds who commit offences will be dealt with through Early and Effective Intervention (EEI) without being referred to the children's reporter and the Children's Hearings system. EEI is an aspect of the Scottish Government's Whole System Approach response to offending and involves the police and local partners responding to offending on a voluntary basis with the agreement of the child and their family. Most children under 16 who are charged with an offence are not referred to the reporter but are responded to through EEI. We envisage that this will also remain the case, and will continue to be appropriate, for 16 and 17 year olds if the law is changed. The Youth Justice Improvement Board's (YJIB) Whole System Approach Group has given a high priority to work on further embedding EEI across Scotland.

There will be no change to the role of the Lord Advocate. It will be for the Lord Advocate to revise her guidelines to the police on the reporting of children in the light of the change brought about by the Bill. This will ensure that prosecution remains an option when she considers it appropriate in the public interest. SCRA are already in discussions with COPFS regarding that revision to the guidelines.

When a child is jointly reported to procurator fiscal and the children's reporter, COPFS and SCRA have an agreement regarding how decisions will be reached about whether the procurator fiscal or children's reporter will deal with the case. We are already in discussions with COPFS about what revisions to our joint agreement will be required in the light of the Bill.

As noted in response to question 8, if a 16 or 17 year old is subject to a CSO or open referral, they can be referred to the children's reporter if a new concern arises. This means that 16 and 17 year olds who commit offences are already being referred to the children's reporter, and referred to a children's hearing by the reporter where appropriate. The Bill will mean that referral to the children's reporter is a possibility for all 16 and 17 year olds who offend, and not just those who are subject to a CSO or open referral.

Any compulsory intervention that is put in place through a children's hearing will require to end at the child's 18th birthday. Therefore, the closer a child is to 18, the less likely it is that the Children's Hearings system will be able to put in place a compulsory intervention that can last long enough to be effective. This will have implications for what is said regarding decisions about children aged 16 and 17 in

both the Lord Advocate's Guidelines and the joint agreement about jointly reported cases.

As we said in relation to question 8, there is a need to ensure effective services are available to all 16 and 17 year olds on both a voluntary and compulsory basis. In the context of children who have committed offences, this will be particularly important to give local communities the confidence that offending behaviour continues to be responded to effectively, even if there is no response through the criminal justice system.

As also said in relation to question 8, the change is likely to require the redistribution and allocation of resources and significant improvement and consistency of support and available services to children and young people.

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

Section 2. Compulsory supervision orders: directions authorising restriction of liberty

We support this change and agree that it will be helpful to make clear that a measure under section 83(2)(b) of the Children's Hearings (Scotland) Act 2011 (the 2011 Act) does not include authorisation to deprive the child of their liberty. However, this kind of measure is very infrequently included in a CSO or interim CSO, and so the practical benefit will be very limited.

Section 3. Compulsory supervision orders: prohibitions

A CSO and interim CSO can already include a measure that requires the child to "comply with any other specified condition" (section 83(2)(h) of the 2011 Act). This wide power means that a children's hearing can already include in a CSO a measure in identical terms to the proposed measures in section 3. As a result, we consider this section to be unnecessary.

It is important to note that if the children's hearing makes one of these prohibition measures in relation to a victim of the child's offending, the existing powers to provide information to victims will not enable the Principal Reporter to inform the victim of this measure. Previously, legislation enabled the Principal Reporter to provide information about the "disposal" of the case by a children's hearing (under section 53 of the Criminal Justice (Scotland) Act 2003). This allowed wider information about the decisions that had been made to be communicated. .

As reflected in the Policy Memorandum, the right of a victim to receive information about their case must be carefully balanced against the right to privacy of the child responsible (recognising that this is an important aspect of article 40 of the UNCRC). If consideration is given to amending the powers of the Principal Reporter so that he can provide information to a victim about one of these prohibition measures (where appropriate), we would be supportive of that change. We think that would be a

proportionate response that would balance appropriately the rights involved. However, it must be recognised that this information would be provided within the context of the ethos of the Children's Hearings system. Paragraph 72 of the Policy Memorandum states that the "intention is not to change the ethos of the Children's Hearings system into something akin to a criminal court system by bringing in penalties for non-compliance, the existing review mechanism already allows for adjustment to be made to the child's CSO if necessary". Although this was in the section on movement restriction conditions (MRC) (see below), the comment applies equally to the proposed prohibitions in section 3. We strongly support this policy intention and the need to ensure that the ethos of the Children's Hearings system is not altered by the Bill.

Section 4. Compulsory supervision orders: movement restriction conditions

The explanatory notes say the new test will cover circumstances where, due to the child's vulnerability, the child is encouraged by others into situations where the child can be harmed or abused, for example the movement restriction condition (MRC) might specify an address where a known abuser lives, a place where there is a risk of sexual exploitation, or a locale where the child is known to buy drugs or to meet up with others to drink alcohol. This is not possible using the current technology which requires a receiver box being located in the place the child is restricted to or from.

When considering MRCs, a significant consideration is the provision and importance of an intensive support service alongside the restriction that is monitored by the electronic tag. The provision of that intensive support is not dependent on there being a MRC and electronic tag – the implementation authority can provide that support in response to a child's needs regardless of whether there's a MRC and tag.

We recognise there may be merit in decoupling the test for a MRC from that for a secure accommodation authorisation, particularly in not requiring a history of absconding. However, given the degree of restriction of liberty involved in a MRC, we think that there still requires to be a significant threshold for a MRC.

Although there not an intention to change the ethos of the Children's Hearings system, we believe there is a real risk of unintended consequences that the child's inability to comply with a MRC may lead to increasing of intervention inappropriately, particularly where intensive support is not being provided as is intended.

We note that section 4 amends the regulation-making powers of Scottish Ministers in relation to MRCs. We note from the Delegated Powers Memorandum that the amendments intend to provide greater flexibility in relation to MRCs to keep up with emerging technology, including the use of GPS technology when available as a method of monitoring a child's movements or whereabouts. Whilst we appreciate the need to future-proof the regulation-making power, we do have concerns about the potential use of this technology in monitoring a child. We would like to have more details about how monitoring using GPS would be done and how the data collected would be managed, to ensure it could be used proportionately.

Section 5. Compulsory supervision orders: secure accommodation authorisations

We note that section 5 will amend one of the criteria for the making of a secure accommodation authorisation so that it refers to a likelihood to cause "physical or psychological harm" (which includes fear, alarm and distress) to another person, whereas currently the criterion refers to a likelihood to cause "injury".

Since children's hearings could first make a secure accommodation authorisation (or it's equivalent) in the 1980s, a likelihood to injure another person has been part of the criteria. We are not clear why there is a need to change this. We are not aware of situations where a hearing would like to make a secure accommodation authorisation on the basis of a likely psychological harm to another person, but have been unable to because the test involves likely injury.

However, we do recognise that this amendment relates to only one of 3 criteria, any one of which must be satisfied before a secure accommodation authorisation can be made. In addition, we recognise that:

- the criterion is "that the child is likely to cause physical or psychological harm to another person *unless the child is kept in secure accommodation*"
- section 83 also says that the children's hearings must consider the other options available (including a MRC) and must be satisfied that it is necessary to include a secure accommodation authorisation in the order.

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

The Bill should not affect the provision of services and support to children (or any person) who have been harmed by another child. It is vital that such services are provided, and that Getting it Right for Every Child means getting it right for those children who have been harmed by another child, as well as for those who cause harm. Whilst the focus of the children's reporter and children's hearing is on the child who may require a compulsory order, that should not diminish the right of a child victim (or any victim) to get the support they require.

If a child victim is required to give evidence as a witness in court proceedings arising from a children's hearing, they will be entitled to the same special measures as if they were a witness in criminal proceedings. Similarly, an adult vulnerable witness will be entitled to the same special measures as in criminal proceedings.

We think it important to take care not to categorise some children as perpetrators and some as victims. Many children who have committed offences have also been victims of offences, often committed by other children[3]. Many will have experienced considerable trauma in their lives. Therefore many of the 16/17 year olds who

[3] See for example, The Links Between Victimization and Offending, Edinburgh Study of Youth Transitions and Crime (2004) https://www.edinstudy.law.ed.ac.uk/wp-content/uploads/sites/36/2019/10/5Victimization.pdf

commit offences and will be impacted by the changes in the Bill may themselves have been victims.

It must be remembered that the changes in the Bill are not only about 16 and 17 year olds who have committed offences. There will many children of that age who have not offended but will benefit from the Bill as they can access the support available through a children's hearing. Many of them will be victims, whether from the actions of other children or adults (see examples in the appendix).

The Bill will not affect the ability of a restorative justice service to become involved. Whilst work is ongoing to ensure it is available nationally, as made clear in the Scottish Government's restorative justice action plan, restorative justice should be available when a child is responsible for the harm, as well as when an adult is responsible.

As is reflected in the Policy Memorandum, there is a clear difference between the ethos of the Children's Hearings system and the criminal justice system. Children's hearings are not criminal justice settings or criminal proceedings. An acceptance of the welfare-based, child-centred approach of the Children's Hearings system in and of itself creates some limitations on the rights of victims. However, as stated earlier, whilst the Bill opens up the possibility of children being dealt with in the Children's Hearings system, some will still require to be prosecuted. Therefore where a criminal justice response is required in order to ensure the necessary protection for a young person who has been harmed, this will remain an option for COPFS.

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?

As the Principal Reporter's existing practice (through SCRA's Victim Information Team) is to inform victims of their right to receive information, this change to create a duty to do so (subject to some exceptions) makes little difference in practice.

We welcome that there are exceptions when the duty will not apply, as this recognises that there will be a small number of cases where it would not be in the best interests of a child to provide the information or it would not be appropriate in the particular circumstances.

As stated earlier in the answer to question 10 (regarding section 3), the existing powers to provide information to victims will not enable the Principal Reporter to inform the victim of a protective measure of the type proposed in section 3. If consideration is given to amending the powers of the Principal Reporter so that he can provide information to a victim about one of the proposed prohibition measures, we would be supportive of that change. However, that would be on the assumption that the Principal Reporter will continue to decide not to do so in the small number of cases where it would not be in the best interests of a child to provide the information or it would not be appropriate in the particular circumstances.

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?

The proposals have significant resource implications for SCRA. These are considered in the Financial Memorandum to the Bill and we will respond separately with our comments on that.

In our response to question 9, we said that the closer a child is to 18, the less likely it is that the Children's Hearings system will be able to put in place a compulsory intervention that can last long enough to be effective (because any CSO must end at the child's 18th birthday). We agree with the decision of the Scottish Government (set out in paragraph 100 of the Policy Memorandum) not to take forward the option of extending the Children's Hearings system beyond age 18. We also agree with the extension of the duty to provide support beyond 18 in section 7.

However, we are concerned about the possible implications of the absence of any power to impose compulsory intervention of some kind beyond the age of 18. Although not for this Bill, the absence of such a power is likely to have particular implications for any future consideration of raising the age of criminal responsibility beyond 12. We recognise the challenges in creating an appropriate legislative framework for compulsory intervention beyond the age of 18, but see the need for this to be considered.

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?

Where the changes are simply consequential on the change to the age of referral to the children's hearings, we welcome the change.

Where the changes relate to particular aspects of criminal procedure, we welcome the policy intention but will not comment on the specifics given that we have no direct involvement in the proceedings (other than section 15 – see below).

Section 15. Referral or remit to Principal Reporter of children guilty of offences

We agree with the approach in section 15, enabling more children aged 16 and 17 to benefit from remittal from the criminal court to the Children's Hearings system.

In principle, we agree with the intention behind the provision that will enable the criminal court to disqualify a child from driving, impose penalty points on their licence or impose a Sexual Offence Notification Requirement, whilst also remitting the child's case to a children's hearing. We can see merit in the criminal court having the power to make a particular regulatory order for a specific limited purpose, whilst the children's hearing addresses the child's behaviour and wider needs. Given what we have said about any order from a children's hearing ending at age 18, it is particularly important that the criminal court has the power to make these orders if it is necessary for them to extend beyond the child's 18th birthday.

Given the importance we attach to preserving the ethos of the Children's Hearings system, we do not think it would be appropriate for a children's hearing to have the power to impose these orders, disqualifying a child from driving, imposing penalty points on the person's licence, or making the child subject to the notification requirements relating to sex offenders registration.

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?

We welcome the policy intention but will not comment on the specifics given that we have no direct involvement in the proceedings.

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?

Children from outwith Scotland who are placed here can be referred to the children's reporter due to concerns about them (principally if they are charged with an offence). Therefore the Principal Reporter has a potential direct interest in this issue.

So long as the child remains in Scotland, it is likely to be legally competent for the reporter to refer that child to a children's hearing and for the children's hearing to make a CSO or interim CSO. However, given that the child will already be subject to a compulsory order from their home jurisdiction, it is unlikely to be appropriate for a children's hearing to also make an order.

We share the concerns expressed in the policy intention of ensuring that there is greater accountability placed on the authorities outwith Scotland that place children in Scottish residential care and the care service providers that seek to accommodate those children.

What are your views on the proposals set out in Part 4 of the Bill?

We welcome the amendment of the Antisocial Behaviour etc. (Scotland) Act 2004 so that the definition of a child is consistent with the UNCRC and the rest of the Bill.

Do you have any comments on the impact assessments accompanying this Bill?

No

APPENDIX

Case examples:

The following scenarios are not uncommon and are offered as a means of demonstrating the potential benefits of the proposed change being made for young people aged 16 and 17.

Jane

Jane has just turned 16 and lives with her parents and two sisters aged 14 and 12. She has a learning disability and rarely leaves her home. She confides in her sisters that she has been sexually abused by her father for the past three years. Police and social work are then informed.

There is not sufficient evidence to prosecute her father and her mother does not believe that anything happened.

Currently the two younger sisters could be referred to a children's hearing on the basis that they may be in need of a compulsory supervision order (CSO) under s 67(2)(c), given their close connection with a person who has committed a Schedule 1 offence. The hearing could then consider whether both girls should be looked after away from home or other measures put in place to protect them.

At present Jane could not be referred to the reporter as she is over 16. It may be possible to carry out a child protection investigation, however the inability to refer Jane to the Principal Reporter would limit the powers available to those seeking to protect her. She could be made subject to an Adult Support and Protection investigation however that would depend on her capacity and whether she meets the statutory tests.

If the Bill become law, the benefits to Jane and her siblings would be as follows:

- All the girls would be within the same system with similar rights; at present the inability to refer Jane - the victim in this instance – to the Children's Hearing system must be confusing for all three girls.
- It would offer an opportunity for a wider assessment of Jane's needs and provide supports such as therapy for trauma, even if her parents do not believe her.
- An advocate or lawyer could be appointed to ensure Jane's voice is heard during the proceedings if she is unable otherwise to participate effectively.
- The children's hearing can give full consideration of the facts of the case and decide to how best to protect both Jane and her siblings.
- It can validate Jane's allegations; her status as a victim would be acknowledged.

Simone

Simone is 16 and was subject to a CSO for seven years, having been referred on grounds of lack of parental care. She had been in a children's unit for 18 months when

a children's hearing terminated her CSO at her impassioned request. She subsequently left the unit after an argument with a staff member and moved back in with her mother. Her mother has significant alcohol problems and has now contacted the social work department because:

- Simone is frequently out late at night and has been brought home under the influence of alcohol by the police.
- Simone has physically assaulted her mother.
- Simone is often in possession of money that she cannot account for and has been seen in the company of older men, most commonly an adult male in his 40's who has connections to the sex industry.

Simone refuses to meet a social worker. Her mother claims that she has said she is scared of some of the people she is in contact with. She cannot be referred to the Principal Reporter due to her age and because she is no longer subject to a CSO. If Police are called due to her actions towards her mother, she may be charged with an offence which would then be considered by the Procurator Fiscal and which may result in her appearing in court.

If the Bill becomes law, Simone's circumstances could be discussed at a children's hearing, either on grounds of being exposed to persons whose conduct is likely to cause her harm (s67(2)(e)), or in relation to her own conduct and its impact on herself or others (s67(2) (m)). The hearing could consider whether a CSO - either at or away from home - would be both necessary and advantageous, whilst a measure could be included to restrict her from seeing specific individuals, thus affording her greater levels of protection.

Without such protection it is likely Simone will encounter increased vulnerability and continue to being exploited by others, whilst she may continue to pose a risk of harm to her mother.

Lee

Lee is 16 and was subject to a CSO for three years due to a succession of motor vehicle thefts and being absent from home. A children's hearing terminated the CSO because he had made genuine progress, securing a placement on a training programme and residing with foster carers who were prepared to continue to care for him regardless of whether there was a CSO in place or not. Two months after the hearing which terminated his CSO, Lee was charged with assault of a teenager who had previously assaulted his younger brother. He has now been cited to court to face these allegations.

The court referral process would take a number of months to conclude and introduce uncertainty into Lee's life. If found guilty the court could seek advice from a children's hearing and could then remit the case to a children's hearing for disposal. A conviction in court could lead to entry into the prison estate or being made subject to a Community Payback Order, both of which may introduce Lee to antisocial peer groups and influences.

If the Bill becomes law the police could refer Lee to the Principal Reporter as a result of the assault. This would allow consideration of whether to refer Lee to a children's hearing in order to assess whether a further period of compulsory supervision would be of benefit, or alternatively allow voluntary support and guidance from social work and associated services. It is likely that actions by the reporter would take place within a far shorter time frame than through the adult justice system, and would be in keeping with the Whole System Approach to youth justice.

Harry

When he was aged 15½, Harry moved to live with foster carers on a voluntary basis because his relationship with his parents had deteriorated beyond repair a. Harry got on well with the foster carers but shortly after his 16th birthday, after an argument with his foster father, he left their home.

Harry is now homeless and using heroin. He met his ex-foster mother in the street and talked of ending his own life. He is vulnerable to involvement in offending, accidental overdose, the long term effects of his current situation and the risks of self-harm. If not for his age he could be referred to the Principal Reporter on the basis of 67(2)(l) misuse of drugs or 67(2)(m) conduct likely to harm himself.

A Children's Hearing could result in him being made subject to a CSO that could lead to stable accommodation, provision of advice and guidance that enables him to enjoy greater safety and coordination of the various supports that he requires.

Summary

Whilst these are four fictional accounts, they are not atypical of the circumstances that impact on young people at a particularly vulnerable age, and highlight the challenges faced by 16- and 17-year-olds who do not have access to the Children's Hearing System. Common benefits of being able to refer to the Principal Reporter include:

- A children's hearing is based on the welfare principle and keeps the child at the centre of discussions, planning and decision making.
- Regular reviews can take place to consider any change of circumstances.
- It ensures regular social work contact and assessment of needs.
- It may prevent an escalation of problems, leading to commission of further offences, damage to the child or others and unnecessary use of custody.

Scottish Courts and Tribunals Service letter to the Committee, dated 17 March 2023

Dear Convener,

Children (Care and Justice) (Scotland) Bill – Evidence Session – 22 March 2023

I thank you for the invitation to attend the Education, Children and Young People Committee evidence session on 22 March 2023. The Scottish Courts and Tribunals Service (SCTS) provides administrative support to the courts and tribunals in Scotland and their judiciary and therefore does not play any role in the decision making processes involved in criminal proceedings involving children or in relation to the Children's Hearings system.

The SCTS, given its functions, considers that there is a limited amount of information that it can provide to the Committee to assist in its consideration of the general principals of the Bill. Therefore, as discussed with the Clerk, we would offer the written submission below to the Committee in lieu of attendance at the Committee session. We are content that this submission be presented as evidence to the Committee and for it to be published in accordance with standard procedures.

The submission is provided by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals in Scotland and therefore does not include the views of the Judiciary.

Background

By way of background we have set out below how, from an SCTS perspective, the courts currently deal with criminal court cases involving children and applications from the Principal Reporter in Children's Hearing cases.

- Child accused in criminal cases – in summary proceedings section 142 of the Criminal Procedure (Scotland) Act 1995 provides that the court should make adjustments to safeguard the child's safety and wellbeing. The hearings are held in private with no public present. The sheriff and those present in court do not wear wigs/gowns and the sheriff would explain the charge to the child in simple language that is suitable to their age and understanding. A parent or guardian may attend unless the court orders otherwise. There may be a person supporting the child such as an appropriate adult, but they are not appointed by the court. Where a child is unrepresented in any proceedings, the parent or guardian of the child may assist him in conducting his defence in terms of Rule 6.3 of the Criminal Procedure Rules 1996.

  Likewise, in solemn proceedings in the sheriff court and the high court, the court will determine the measures it deems appropriate, which may include those measures listed above. A child accused will only appear at the sheriff court and high court. They do not appear in the justice of the peace courts.

- Children's Hearings – applications made to the court

  Process for applications to the sheriff where grounds are not accepted - when these are lodged at court they will be passed to a sheriff. The sheriff will consider whether to appoint a safeguarder, unless one has been appointed by the Children's Hearing, and whether a curator ad litem is required. Safeguarders are appointed through Children 1st, a panel managed and operated on behalf of the Scottish Ministers.

  All hearings will be assigned a date for a hearing on evidence within 28 days and in cases where the sheriff considers that the child is too young to understand the grounds of referral a procedural hearing will be fixed within 7 days.

  The sheriff must, so far as is practicable, give the child the opportunity to express their views, and take those views into account in coming to decisions.

  The hearings may be adapted to take into account the welfare of the child with the hearings being in private and with no wigs/gowns being worn by the sheriff or court practitioners. The hearings may also be in another building or less formal room (subject to local arrangements/ available accommodation).

- Children involved as witnesses in court proceedings – under the Victims and Witnesses (Scotland) Act 2014, in criminal proceedings a child witness is deemed to be a person under the age of 18. They will be entitled to special measures which can include the use of a live television link from either the court building or a remote site, use of a screen, a supporter, evidence in chief in the form of a recorded prior statement, evidence taken by a commissioner and / or also excluding the public from the court while the witness gives evidence.

  We have provided more information on the developments of facilities for these special measures later in this response.

  We work closely with our partners to build on the standards of service for victims and witnesses and a joint protocol details our commitment in this area.

Developments in Child Friendly Practice and Procedure

The SCTS has already taken a number of steps which aim to improve the experience of children involved in court proceedings. The SCTS recognises that attending a court to give evidence can be a daunting experience, especially for children. In response to those concerns the SCTS has developed and opened a new Evidence Suite in Glasgow, which can be used in criminal proceedings, providing a non-court venue for witnesses giving evidence by using a live TV link on the day of a court hearing; or by having their evidence taken by a commissioner and pre-recorded in advance of a trial.

Additionally, Scotland's first purpose-built justice centre opened in March 2020 which provides a bespoke Evidence suite and facilities for children and vulnerable witnesses to give their evidence by live link and evidence by commission. Our bespoke suites at Glasgow and Inverness have been designed to provide more intimate and informal spaces to make child and vulnerable witnesses more comfortable, to facilitate the giving of their best evidence in a less traumatic way. The suites benefit from specified and specially designed waiting rooms, which include support spaces and sensory equipment to improve the experience of those attending to give evidence. Work has commenced on providing designated evidence by commission and evidence giving facilities in Edinburgh and further facilities are planned for Aberdeen based on aspects of the Inverness and Glasgow models.

These new facilities offer a 'step change' for children and vulnerable witnesses, and demonstrate our commitment to improve the facilities and service we offer. The SCTS remains committed to the further development and expansion across a wider geographical reach, where possible, of similar facilities.

Potential Impact of the Bill on the SCTS:

As noted in our call for views response, whilst the Bill provisions will result in a reduction in criminal proceedings involving children, we anticipate an increase in applications to the sheriff which are associated with Children's Hearings. I have provided more detail in relation to these below.

- **Applications to the sheriff where grounds are not accepted** – these types of applications come to the court where the supporting facts specified in the statement of grounds at the Children's Hearing is/ are not accepted by the child or relevant person(s). The sheriff is required to make a determination whether the grounds are established or not. Although there may be a rise in these applications as a result of the rise in cases being considered by the Children's Hearing they will not happen in every case therefore the potential impact on the SCTS is difficult to determine.

- **Applications for extensions to interim compulsory supervision orders (ICSO)** - an ICSO can be made where the Hearing defer their final decision and the child is not currently subject to a compulsory supervision order. These orders only last for a short period of time and where they require to be extended this decision must be made by a sheriff. Where a higher number of cases are to be considered by the Children's Hearings system it is likely that the number of these applications for extension may rise, however, again this will not happen in every case and therefore, as with the applications referred to above, the impact on the SCTS is difficult to determine.

- **Appeals to the sheriff against the decision from a children's hearing** - many decisions made by a Children's Hearing may be appealed to the sheriff. Appeals can be lodged by the child, a relevant person(s) or a safeguarder. Time limits for appeals to be disposed of by the sheriff vary, but can be as short as within 3 days. As such, a rise in these appeals may impact on court programming. As

mentioned previously, this will not happen in every case and therefore, the impact on the SCTS is difficult to determine.

The SCTS cannot provide any further comment on the potential impact of the Bill at this stage, however if there is anything further that the SCTS can provide to assist the Committee, please do not hesitate to contact me.

Annexe

Scottish Courts and Tribunals Service response to the Call for Views for Children (Care and Justice (Scotland) Bill

I refer to the above Call for Views, to which I respond on behalf of the Scottish Courts and Tribunals Service (the SCTS). The response is submitted by the SCTS acting in its role to provide efficient and effective administration to the courts and tribunals and does not include the views of the Judiciary.

Whilst the proposals in the Bill are likely to reduce the volume of hearings involving child accused in the criminal courts, there may be an impact on other types of court procedure. For example, we anticipate an increase in:

- appeals to the sheriff against the decision from a children's hearing under section 154 (which must be disposed of within 28 days);
- appeals to the sheriff against a decision from a children's hearing under sections 157, 160, 161, 162 (which must be disposed of within 3 days)
- applications for extensions to interim compulsory supervision orders (ICSO) (hearing must be before the expiry of the current ICSO) ; and
- applications for review of grounds determinations (hearing must be no later than 28 days after the day on which the application is lodged).

As set out above there are strict timescales for hearing these applications/appeals and as a result may impact on court programming. Additionally, these applications may involve vulnerable witnesses and therefore require the use of special measures. The availability of the appropriate equipment and the staff required to facilitate the measures sought within the required timescales may also impact on court programming. We cannot estimate how extensive this impact will be at this stage as it is unclear how many applications/appeals to the court would be made.

The Bill also makes provision which gives the court, in solemn proceedings involving children, the discretion to require the court to sit in a different building or room from that usually used or to sit on different days from other courts in the building and to take other steps to modify the court proceedings. Whilst we appreciate that the provisions leave it to the discretion of the court whether or how to do so, and similar provision is already made in the Criminal Procedure (Scotland) Act 1995 for summary proceedings, we are unclear how it is envisaged this would work in practice, particularly at a trial diet where a jury is present.

We also anticipate that there will be I.T. system changes required as a result of the provisions in the Bill. The costs associated with these changes cannot be determined at this stage.

Annexe C

Education, Children and Young People Committee

Wednesday 22nd March (Session 6)

Children (Care and Justice) (Scotland) Bill- Stage 1 Scrutiny

Introduction

The Children (Care and Justice) (Scotland) Bill was introduced on 13 December 2022. The Education, Children and Young People Committee is the designated lead committee and will be looking at the Bill alongside the Criminal Justice Committee.

This briefing is to support Members' second evidence session considering the Bill by providing a short narrative of the current policy context, an overview of research on youth justice and children's rights.

Under 18s

In 2021/22, 10,494 children in Scotland were referred to the Children's Reporter:

- 8,691 on non-offence grounds; and
- 2,398 on offence grounds.

The figure of 10,494 children referred to the Reporter in 2021/22 equates to 1.2% of all children in Scotland.

Within this, 1.0% of all children were referred on non-offence grounds and 0.5% of all children aged between eight/twelve and 16 years were referred on offence grounds.

The number of children referred to the Reporter has increased for the first time since 2006/07 following fourteen consecutive years of decrease. The Reporter suggests that this is most likely an impact of Coronavirus and lockdowns rather than any wider system trend. Therefore, any conclusions drawn from this data should be treated with caution.

In 2020/21, 595 children aged 16 and 17 were proceeded against in a criminal court.

Under current arrangements, some children aged 16 and 17 who are prosecuted in the criminal courts are held in young offenders' institutions (YOIs). This may be as:

- remand prisoners – those held in custody prior to trial (untried) or convicted awaiting sentence (CAS)
- sentenced prisoners – those serving a custodial sentence.

The following table provides information on the number of prisoners aged 16 or 17 during the years 2016-17 to 2021-22. No children under that age were held as prisoners during the period.

The figures are taken from the Scottish Government statistical bulletin Scottish Prison Population Statistics 2021-22 (2022). They are broken down into:

- number of individuals – the number of 16- and 17-year-olds who spent any time being held in custody during the year[4]
- average daily population – the average daily number of 16- and 17-year-old prisoners during the year.

Table 1: Prisoners aged 16 to 17

year		2016-17	2017-18	2018-19	2019-20	2020-21	2021-22
number of individuals							
remand	untried	155	105	108	75	56	54
	CAS	116	88	84	57	26	22
sentenced		106	77	75	39	17	8
average daily population							
remand	untried	16	12	13	10	12	10
	CAS	9	7	7	5	2	2
sentenced		37	24	28	16	7	3

Source: Table M1, Scottish Prison Population Statistics 2021-22 (Scottish Government 2022).

Although prisoners aged 16 and 17 were generally held in YOIs rather than adult prisons, there have been occasions where individuals have been held in adult prisons. For example, the Scottish Government has advised that one under-18 prisoner was held on remand in HMP Inverness during 2021-22.

Rights Respecting Research

Lightowler, in her report, 'Rights Respecting? Scotland's approach to children in conflict with the law', concluded that many children in conflict with the law in Scotland "do not experience 'justice' in the true meaning of the word". She focuses specifically

[4] The Scottish Government has advised that one individual can be counted in multiple categories within a single year (e.g. untried and sentenced), so column sums in the table will not produce accurate totals. However, an individual who occupies the same category more than once during a year is counted only once (e.g. if they receive custodial sentences over multiple occupancy periods).

on children aged 16 and 17 and concludes that Scotland's approach to such children is "not rights respecting". The principal reason for this is that Scots law does not adopt a universal definition of a child as a person under the age of 18 years, including in relation to child justice.

Many 16- and 17-year-olds in Scotland are not recognised as children and are thus excluded from the child justice system and subject to adult processes and dispositions in the criminal justice system.

Research by the Scottish Children's Reporter Administration

Research by the Scottish Children's Reporter Administration (SCRA) into children aged 12 to 15 years involved in offending and referred to the Children's Reporter and Procurator Fiscal in Scotland found that:

- 63% of children had home addresses in areas ranked within SIMD5 quintiles 1 and 2 which are areas classified as deprived
- 65% were living at home with their parent(s) and over a quarter (26%) were in residential care (including secure accommodation)
- 32% of children were recorded as having mental health concerns and around a quarter (23%) of children were reported to have self-harmed, attempted suicide and/or displayed suicide ideation
- almost half of children (48%) were reported as being victims of parental neglect
- a quarter of children (25%) were victims of parental violence and/or aggression
- almost a quarter of children (24%) had been bullied
- 14% of children were victims of sexually harmful behaviour and/ or sexual abuse. Girls were almost five times more likely to be reported as victims of sexually harmful behaviour and/or sexual abuse than boys (39% girls; 8% boys)
- 40% had parent(s) who had committed offences. Almost a fifth of children (18%) had a parent(s) who had served a custodial sentence

Whole System Approach

The Children (Care and Justice) (Scotland) Bill is part of the wider Scottish Government reforms to the youth justice system. Whole System Approach (WSA) is the Scottish Government's programme for addressing the needs of young people involved in offending.

WSA focuses on the importance of different organisations and professions working together to support children and young people.

It looks to offer tailored support and management based on individual needs and takes into account differing backgrounds and demographics.

The key areas of focus are around early and effective intervention, opportunities to divert young people from prosecution, court support, community alternatives to secure care and custody, managing young people who present at risk to harm and improving integration into the community.

Age of Maturity

Annexe 1 includes a summary of the age that children have access to rights under the age of 18 in Scotland.

Youth Sentencing

The University of Edinburgh recently undertook research on behalf of the Scottish Sentencing Council, concluding that sentencing should take account evidence that the brain does not fully mature until at least the age of 25.

In order to inform its development of a guideline on sentencing young people, the Scottish Sentencing Council asked the University of Edinburgh to carry out a systematic review of the current neurological, neuropsychological, and psychological evidence on the cognitive maturity of younger people.

The review found that the adolescent brain continues to develop into adulthood and does not reach full maturity until approximately 25-30 years of age.

One of the main findings was that during adolescence and within normal individual development, an imbalanced growth pattern is observed between the brain regions governing emotion and mood, like the amygdala, and those involved in executive functions (those that provide the cognitive abilities which are necessary for prosocial behaviour, successful goal planning and achievement), like the prefrontal cortex.

Converging findings suggest that this latter brain region is the last to reach maturity, leaving adolescents with immature and compromised core cognitive abilities for much of this developmental period. This immaturity, when coupled with the increased motivation to achieve rewards observed to coincide with puberty, is thought to be the most likely underlying mechanism contributing to the poor problem solving, poor information processing, poor decision making, and risk-taking behaviours often considered to typify adolescence. Evidence in the review suggests that the influence, or presence, of peers further exacerbates these tendencies.

In addition to these normative trajectories of adolescent neurocognitive development, cognitive maturation may be hindered or compromised by several factors including traumatic brain injury, alcohol and substance use, psychiatric and neurodevelopmental disorders and adverse childhood experiences, all of which have the potential to inhibit and disrupt typical development.

Notably, the review found that adolescent cognitive maturation varies between individuals, and will not be the same for every individual, particularly when impacted upon by the environmental factors listed. Thus, the nature of adolescent cognitive development is not a process that allows us to specify an exact age at which cognitive maturity is definitively reached at an individual level.

The review did not recommend the use of stringent age ranges in sentencing guidelines, and recommended that the brain's continued growth, until as late as 25-30 years of age, and the resulting cognitive immaturity, is considered during judicial processes involving adolescents and young people.

The Edinburgh Study

The Edinburgh Study of Youth Transitions and Crime is a programme of research that spans more than two decades and involves over 4,000 individual cohort members who were attending schools in Scotland's capital city in 1998. The most recent phase of the Study (phase eight) followed-up with cohort members at age 35. The main conclusions from the research were:

- Most people who offend during adolescence stop by early adulthood; however, desistance (stopping) is a not the same for everyone and does not necessarily remain constant over time.

- Key factors that inhibit desistance from offending in adolescence and early adulthood include: an impulsive personality, engaging in drug use, and experiencing frequent crime victimisation.

- Individuals who continue to offend beyond the age of 25 are significantly more vulnerable than those who stop by age 18, with a history of both adverse experiences and serious offending behaviour in childhood.

- Early involvement in serious offending has a significant impact on the likelihood, longevity and severity of youth and adult criminal justice contact; however, many of those who engage in serious offending have no contact with justice organisations.

- Pathways of criminal conviction from childhood to early adulthood vary considerably depending on people's early life circumstances, and are associated with a wide range of behavioural, familial, contextual and experiential factors. However, those who come persistently into contact with the justice system over time tend to be amongst the poorest and most vulnerable people in the study's cohort.

- Early and intensive formal system contact (especially care experience) is strongly associated with later justice system contact and a range of other negative outcomes.

- People who have contact with the criminal justice system are not necessarily more likely to desist from offending and, indeed, for some people it may act as a catalyst for continued offending into adulthood.

- Formal system contact is typically experienced by individuals as a set of barriers and hazards to be negotiated, but positive change relies on key individuals (such as youth workers or foster carers) who provide strong and consistent support.

- Successful outcomes typically involve achieving modest social norms (such as family, home and employment); however, change is often precarious, especially amongst those who have a poor start in life.

- Holistic approaches, which work across policy portfolios (education, economy, housing, and justice), and which target risk factors across communities rather than risky individuals in childhood and adolescence, are likely to be successful in driving down offending and conviction across the life-course.

Information to victims

Another aim set out in the Policy Memorandum is around information-sharing with victims, balanced with the rights of the child. The Bill creates a statutory obligation for the Children's Reporter to inform a person entitled to receive information of their right to that information subject to certain exceptions.

Information-sharing in relation to the children's hearings system is enshrined in legislation which makes provision for victims to request information from the Children's Reporter. Information can only be provided where it would not be detrimental to the best interests of the referred child, or any other child, and where it is appropriate to provide the information. The legislation established certain factors that the Children's Reporter is to consider when deciding whether providing information would be appropriate.

The provisions in the Bill require the Children's Reporter to inform a person entitled to receive information of their right to that information, where it is practicable to do so, and subject to certain exceptions. The provision also provides the Children's Reporter with the discretion to inform a relevant person (within the meaning of section 4 of the 2011 Act) as well as or instead of a victim, where the victim is a child.

This reframes the existing provisions which give the Children's Reporter the discretion to advise a person entitled to information of that right. Under current practice the Children's Reporter writes, where possible, to a person entitled to information under the 2011 Act now to advise them of their right. Accordingly, these provisions would place that current practice on a statutory footing.
Article 16 of the UNCRC states:

> "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. The child has the right to the protection of the law against such interference or attacks."

Cross Border Placements

Existing Regulations ("the 2013 Regulations") made under the Children's Hearings (Scotland) Act 2011 allow for the placement of children and young people from England and Wales or Northern Ireland into residential units in Scotland.

Similarly, section 10 of the Children and Social Work Act 2017 provides for cross border placements into secure accommodation in Scotland.

The Government have committed to incorporating children's human rights into Scots law to the maximum extent possible. The Scottish Government has similarly committed to implementing the findings and recommendations of 'the Promise', which explicitly highlighted the concerns for children's human rights when they are removed from their family, community and country and detained in Scotland.

> "Scotland must stop selling care placements to Local Authorities outside of Scotland. Whilst this review is focused on children in Scotland there must be acknowledgement that accepting children from outside Scotland is a breach of their fundamental human rights. It denies those children access to their family support networks and services. It also skews the landscape for Scotland so that there is a lack of strategic planning for children meaning that children can be put in inappropriate settings if demand has spiked." (The Promise, p110)

Children's Rights

Two key policy objectives of the Bill are to place children's rights at the heart of the system and to ensure that the Bill meets human rights requirements now and in the future. The two most relevant conventions are the **United Nations Convention on the Rights of the Child** (UNCRC) and the **European Convention on Human Rights** (ECHR).

The Bill is also set in the context of the Scottish Government's commitment to Keeping the Promise, Getting it Right for Every Child and the Whole System Approach to Youth Justice.

The UNCRC

The UNCRC is a wide-ranging convention including civil, social and economic rights. While there are specific provisions relating to juvenile justice and state protection of children, the key principles relate to the best interests of the child (article 3) and the views of the child (article 12).

3(1). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

12(1). States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

12(2). For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Scottish Government intends to fully incorporate the United Nations Convention on the Rights of the Child (UNCRC) into law. The UNCRC Incorporation (Scotland) Bill was passed in March 2021, but cannot be enacted following the Supreme Court's judgement that it goes beyond the powers of the Scottish Parliament. The Scottish Government has restated its commitment to full incorporation but the timescale and process for this is not yet clear.

Full incorporation of UNCRC would ensure rights-based approaches are taken, and rights breaches are prevented, giving children access to legal redress if their rights are breached. While full incorporation of UNCRC has not yet been achieved, it remains the case that recent policy and legislation for children's care and protection in Scotland have been informed by UNCRC.

Article 1 of the UNCRC states that "for the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."

The United Nations Committee on the Rights of the Child (CRC) has repeatedly called on States to do more to address the detention of children, including in its General Comment 24. The recent report of the UN Global Study on Children Deprived of Liberty reinforced the directions from the CRC, and called on States to ensure better protections against arbitrary and unlawful deprivation of a child's liberty.

The Convention on the Rights of the Child introduces for the first time in an international human rights treaty, the concept of the 'evolving capacities' of the child. This principle recognises that as children acquire enhanced competencies, there is a diminishing need for protection and a greater capacity to take responsibility for decisions affecting their lives. The Convention allows for the recognition that children in different environments and cultures, and faced with diverse life experiences, will acquire competencies at different ages.

European Convention on Human Rights

The Bill also seeks to ensure that legislation is in line with the European Convention on Human Rights.

This includes Article 5 which ensures the right to liberty and security – protecting citizens from having freedom arbitrarily taken away. This right is particularly important for children and young people held in the criminal justice system.

Article 6 is about procedural fairness in courts, guaranteeing a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. In S v Miller 2001 SLT 531, the court found that a children's hearing constituted civil proceedings which engage article 6(1) rights.

Nicole Beattie, Senior Researcher, Further and Higher Education, SPICe Research

17th March 2023

Annexe 1

In Scotland, the definition of a child varies in different legal contexts, but statutory guidance which supports the Children and Young People (Scotland) Act 2014, includes all children and young people up to the age of 18.

Where a young person between the age of 16 and 18 requires support and protection, services will need to consider which legal framework best fits each persons' needs and circumstances. The national guidance for child protection in Scotland gives more detail about this and explains how professionals should act to protect young people from harm in different circumstances (Scottish Government, 2021).

The following is not intended to be an exhaustive list of the rights acquired by children and young people.

At age 12 you can:

- consent to your own adoption;
- be held responsible for a crime you committed;
- be taken to court but only for serious crimes;
- authorise the removal of organs and tissues after their death, or to opt-out of their removal;
- make a will; and
- apply for child maintenance for yourself.

At age 12 you are presumed to be mature and old enough to:

- express views about a major decision about you by your parents or others caring for you;
- express a view about matters a court has to decide (such as who you should live with or spend time with);
- instruct a lawyer in a civil matter;
- request access to your personal records; and
- make a freedom of information request from a public authority.

Before 16 you may:

- consent to any surgical, medical or dental procedure or treatment where, in the opinion of a qualified medical practitioner attending you are capable of understanding the nature and possible consequences of the procedure or treatment; and
- instruct a solicitor, in connection with any civil matter, where you have a general understanding of what it means to do so.

At age 16 you can:

- leave home without your parent or guardian's consent;
- get a full-time job and pay National Insurance;

- leave school;
- enter into a legally binding contract;
- consent to surgical, medical, or dental procedures and treatments;
- marry or register a civil partnership;
- consent to lawful sexual activity;
- drive a moped and invalid carriage;
- apply for a UK passport on your own behalf;
- vote in elections to the Scottish Parliament and Scottish local authorities;
- get a skin piercing; and
- record a change of name officially.

At age 17 you can:

- drive a small vehicle, a motorbike or a tractor.

At age 18 you can:

- buy and sell alcohol, vaping products or tobacco;
- place a bet;
- change your legal sex;
- join the army without parental consent;
- serve as a juror in both civil and criminal cases; and
- vote in UK elections.

Annexe D

Children and Young People's Centre for Justice

Submission of 17 March 2023

Introduction

The Children and Young People's Centre for Justice (CYCJ) works towards ensuring that Scotland's approach to children and young people in conflict with the law is rights-respecting, contributing to better outcomes for our children, young people and communities.

We produce robust internationally ground-breaking work, bringing together children and young people's contributions, research evidence, practice wisdom and system know-how to operate as a leader for child and youth justice thinking in Scotland and beyond. CYCJ's contribution to the youth justice sector in Scotland was defined in our 2020 evaluation as three-fold:

"...it produces information which is of use, and robust, for its audience; it offers boundary-spanning linkages to break down the silos between organisations, services, and kinds of practice; and it maintains a focus on seemingly intractable issues in the sector, providing a multi-pronged approach to untangling and unsettling the barriers to change" (Stocks-Rankin, 2020).

In doing so, our focus is on three key activities:

- Participation and engagement: amplifying the voices of children and young people;
- Practice and policy development: developing, supporting and improving justice for hildren and young people;
- Research: Improving our understanding of justice for children and young people.

These activities are underpinned and connected by communication and knowledge exchange work, which is focused on improving awareness of evidence in different forms, and supporting dialogue between different perspectives, types of knowledge and viewpoints.

Uniquely we provide support to individual practitioners and, for service development, to develop the vision of youth justice in Scotland and across a resource level, relationship level, and system development level. It is recognised that it is "...the ability to work at the highest echelons on policy making and governance and into the depth and detail of day-to-day practice that makes CYCJ effective" (Stocks-Rankin, 2020).

CYCJ is primarily funded by the Scottish Government and based within the University of Strathclyde. Our position both within a University and the additionality of funding beyond the Scottish Government are features that support our autonomy.

The team comprises a range of professional roles including social workers, psychologists and researchers, who have fulfilled frontline and managerial positions in social work and social care. Team members have also had experience of receiving, or a close family member or friend having received, social care or social work support.

Children's Care & Justice Bill

CYCJ is supportive of the Children's Care and Justice Bill and welcomes the potential change that it could bring. It is a progressive piece of legislation that is based on evidence which will be essential if Scotland is to meet the requirements of the United Nations Convention on the Rights of the Child (UNCRC).

CYCJ believe that wherever possible children who come into conflict with the law should be kept out of the adult criminal justice system which has few adaptations or accommodations to ensure children can participate effectively or that their procedural rights are meaningful, and either be diverted from formal systems altogether, or have their needs met through the Children's Hearings System. Currently in Scotland, many children are getting drawn into the adult focused criminal justice system due to the dual system approach, as well as the legalities around the definition of a 'child'. This results in complex processes that can be difficult to understand.

Children in conflict with the law are some of the most vulnerable in our society and it is recognised that their behaviour is often a reaction to their circumstances and experiences. The Children's Care and Justice Bill has the potential to significantly change the way in which Scotland responds to children when they come into conflict with the law, which ensures that all their rights are adhered to in line with the UNCRC and as a result harmful behaviour is reduced.

The United Nations Convention on the Rights of the Child

In 2008, the UNCRC 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. As well as specific UNCRC articles in relation to juvenile justice and children appearing in adult courts (Article 40) and inhumane treatment and deprivation of liberty (Article 37), Scotland must ensure that we also meet its four 'general principles' of non-discrimination (Article 2), best interest (Article 3), survival and development (Article 6) and participation (Article 12). The UN Committee reinforced the requirement for all children under the age of 18 to be treated as children in its revised 'General Comment No 24 (2019) on children's rights in the child justice system.' This principle echoes the Council of Europe Guidelines on child friendly justice (2010), which sets out basic rules that Council of Europe

members should follow when adapting justice systems to meet the specific needs of children.

Children in Conflict with the Law

Many children who are in conflict with the law in Scotland do not experience 'justice' in the true meaning of the word. "There is no justice in taking traumatised children; holding them solely responsible for their actions; putting them through processes they don't understand and are unable to participate in; blaming and stigmatising them whilst failing to give them what they need; putting barriers in the way of loving and caring relationships; and taking existing supports and opportunities away from them" (Lightowler; 2020, p2).

Recent research has established a strong association between children who have experienced some form of trauma and adversity and those engaging in harmful or risk-taking behaviours. (SCRA, 2022; McAra and McVie, 2022). The Edinburgh Study for Youth Transitions and Crime reported that experiences of poverty and trauma in childhood were strongly associated with offending behaviour in adolescence and early adulthood (McAra and McVie, 2022). Children who are involved in offending behaviour, particularly children who may be committing more serious and/or violent offences, are themselves vulnerable, with complex needs and experience social adversity (Burnam & McVie; 2017; Nolan, Dyer, & Vaswani; 2018). This adversity can be compounded by the myriad negative effects of growing up in poverty.

"Poorer children, children with an autism spectrum disorder, children with a learning difficulty and children who experience the 'care system' are significantly more likely to face the formal justice system, even when their behaviour is the same as children who are wealthier, face less significant challenges or have strong supports in place. To Scotland's great shame evidence shows that despite the stated intentions of policy and practice, our justice system overwhelmingly criminalises excluded and disadvantaged children for behaviours that are ignored or accepted from our better off children" (Who Cares? Scotland, 2018, p. 3).

Criminal Courts

The recognition of the impact of prolonged exposure to stress and trauma in childhood resonates with the central premise of the Kilbrandon Report: that many children who present a significant risk of offending behaviour are often highly vulnerable, with complex needs (Scottish Government, 2018).

The Independent Care Review (2020, p. 41) stated that: "Despite the principles of Kilbrandon that aimed to ensure a welfare-based approach to offending, a significant number of children involved in offending behaviour are dealt with in criminal courts rather than through the Children's Hearing System…Traditional criminal courts are not settings in which children's rights can be upheld and where they can be heard."

Evidence also highlights that bringing children into adult justice systems can have a detrimental impact on their future behaviour and outcomes, often leading to further offending and more serious disposals (McAra and McVie, 2022). Agencies should

maximise every opportunity to prevent children from entering the criminal justice system to prevent these lifelong consequences.

In Scotland, “the substantial number of young people that continue to be prosecuted and a higher imprisonment rate than most other European countries, including a disproportionate number of looked after or formerly looked after children or young people, remains a source of concern” (Scottish Government, 2018, p.4).

Tackling the cause and impact of offending behaviour through addressing the wider needs of the child and keeping them out of the formal criminal justice system, wherever possible, is a key objective of the Scottish Government's vision and action plan (2021). From evidence, the majority of children who end up in court could have had their behaviour addressed and supported more effectively through the Children’s Hearing System (Dyer, 2016).

Detention

Taking away someone’s liberty, locking them up…away from home, away from family and friends. It is one of the most serious decisions a state can impose and raises profound ethical questions. It has deep and long-lasting consequences. For a child, it is particularly damaging because they miss out on critical stages of their emotional and social development; ‘depriving a child of liberty, is to deprive that child of his/her childhood’ (Nowak, 2019, p. 168). For children who have been traumatised already, from experiences of abuse or neglect, the impacts of being deprived of their liberty can be devastating and irreparable. In prison settings, however well managed, there is a risk of bullying, abuse and violence which compounds existing trauma and adversity and potentially introduces new traumatic experiences (Lightowler et al, 2020).

The Global Study on Children Deprived of Liberty found that children experience “…fear, isolation, trauma and harm in addition to discrimination, stigma and disempowerment” (UNCRC, 2019, p. 8). The negative impact of detention contributes to poor physical and mental health, lack of access to education, a high rate of recidivism, family breakdown and unemployment, resulting in higher costs for the State in the long term (Justice for All, 2019). It is also recognised that the removal of children from their families and communities to secure care or custody interferes with processes and factors generally thought to promote desistance, including developmental processes, positive links with the community, family ties, employment and housing (Rutherford, 2002). This has led the UNCRC (2019, p. 23) to conclude “deprivation of liberty constitutes a form of structural violence against children” and the treatment of children during these times may amount to torture.

Even very short periods of detention can have a disproportionate and negative impact on children’s physical, emotional and cognitive wellbeing and development due to their developmental stage (Mendez, 2015). In recognition of this, Article 37(b) of the UNCRC (1989) states that “no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.

Scotland has known of these detrimental effects for some time, as documented in the HMIPS Inspection Report (2019) of HMP YOI Polmont which offers an expert review of the provision of mental health services, for young people entering and in custody. This is well illustrated by ‘Oscar’ a 16 year old child who said:

A wee boy tried to kill himself the other day... He [judge] sent him here for seven days when he should be in secure. He’s just a wee boy not cut out for prison (Nolan, Dyer & Vaswani, 2017).

Fiona Dyer
Director
CYCJ

Submission from Clan Childlaw

INTRODUCTION

Who We Are

Clan Childlaw is Scotland's law centre for children and young people. We exist to protect and strengthen children's rights and improve their lives. Our lawyers regularly represent children and young people in court, at Children's Hearings, and in important meetings. We protect the rights of children we work with and make sure their voices are heard.
We offer training, resources, and a free helpline to make the law easier to navigate for people who support children and young people.

We work with children and young people every day, so we can see when the law is not working properly to protect children's rights. We ask decision makers and lawmakers to change the law and the way the law is used to make sure that children and young people's rights are a reality in Scotland.

Summary

This response provides comment on the Scottish Parliament's Education, Children and Young People Committee's call for view on the Children (Care and Justice) (Scotland) Bill at stage 1.

Our response builds on our submission to the Scottish Government's public consultation last year. It has been developed from our experience of representing children and young people in court and at Children's Hearings, particularly those children who have faced the prospect of secure care, have been jointly referred or have been referred to the Children's Reporter on offence grounds.

Based on this experience our key messages are:

1. We support the changes to the definition of the child in both the Children's Hearing (Scotland) Act 2011 and the Criminal Procedure (Scotland) Act 1995. This will undoubtedly be beneficial to the 16 and 17 year olds not on CSOs, who were previously excluded from referral to the Children's Hearing System.

2. However, this change only allows the possibility of referral to the CHS. The joint referral process will determine whether or not the young person is referred under this new provision. No changes are proposed to this system. We have concerns about its compatibility with Article 12 of the UNCRC. The Bill is a missed opportunity to address this.

3. While more children than before may be referred to the CHS, the Bill also increases the powers available to the Children's Hearing to place limitations on the movement and behaviour of the children referred to it. Children are less likely to be offered legal representation in the CHS than those appearing in court. This is a significant risk to children's rights. The current system of merit based access to legal aid for offence grounds should not continue and amendments to the legal aid regulations should be made.

4. The uncoupling of MRCs from secure care orders, and the lowering of the threshold that needs to be met to allow consideration of their use is a cause for concern. MRCs used in conjunction with other restrictive measures contained in the Bill could amount to a deprivation of liberty. At the same time the automatic right to a solicitor may fall away when an MRC is considered without consideration of a secure order. This lowering of the threshold along with a potential absence of legal representation could mean a breach of Article 5 and 6 of the ECHR, along with Article 37 of the UNCRC.

5. The proposal to ensure that all children who need to be deprived of their liberty for reasons of public safety will be placed in secure care rather than YOI or prison is to be welcomed. However, more emphasis should be placed on community support alongside this change.

6. While the changes made to the existing criminal justice and procedure are welcomed they do not go far enough in making a system designed for adults fit the needs of children. A juvenile justice system needs to be developed to adequately protect their rights.

7. Consideration should be given to deferring the granting of regulatory making powers in relation to secure care until after the wider secure care review process has concluded. Any recommendations from that review should be considered in primary legislation.

8. We remain disappointed that the Scottish Government have stated in terms that the practice of cross border placements will continue. In this context the measures proposed in the Bill do not provide adequate protection of children's rights.

Response to Stage 1 Consultation Questions

Children's Hearings System

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

Definition of a Child

Part one of the Bill relates to proposed changes to the Children's Hearing System (CHS). Section 1 makes changes to the age of referral to the children's hearing. Amended s199 of The Children's Hearings (Scotland) Act 2011 now defines a child as a person up to the age of 18 not 16. In principle Clan Childlaw are in favour of this amendment. It brings the definition in line with the definition of child contained in the United Nations Convention on the Rights of the Child [UNCRC]. Through an amendment made in section 8 the change also tracks through to the Criminal Procedure (Scotland) Act 1995.

Prior to this change young people aged 16 and 17 who had been arrested for offending behaviour, and were not already subject to a Compulsory Supervision Order [CSO], could not be referred to the Children's Reporter as an alternative to prosecution under the joint referral process. This change means that all children who are arrested can be dealt with in the CHS rather than in the adult criminal justice system. This is undoubtedly positive for this group of young people.

The Policy Memorandum indicates that the circumstances in which a child will be referred to the CHS is specified in legislation and guidance. It states that this legislation and guidance – known collectively as the joint referral process – ensures joint reporting to the COPFS and the Children's Reporter in appropriate circumstances. This should result in a bespoke decision being made about whether the child should be prosecuted. The Lord Advocate's Guidance for the Police, and The Procurator Fiscal and Children's Reporter Guidance are structured in a way that, despite the changes in the Bill, the most serious offences will still be prosecuted in the adult criminal justice system.

In 2017/18, 99% of the children who were prosecuted in courts in Scotland were aged 16-17. The majority, 689, of their offences were miscellaneous (which includes breach of the peace, common assault, drunkenness), 437 were 'other crimes', 195 were crimes of dishonesty, 206 were motor vehicle offences, 115 were non-sexual crimes of violence, 91 were prosecuted for fire-raising or vandalism, and 43 were sexual crimes (Lightowler, 2020: p55 and p57). Whilst the Bill might change how the vast majority of these children who commit the less serious offences are treated, it would do little to improve the response for the small but significant number of children committing more serious offences who would still, in the majority of cases, go to an adult court. Adult court – despite the changes in the Bill – is not an appropriate forum for children to be prosecuted.

The Joint Referral Process

Over and above our concern in relation to the children who would not be diverted from prosecution, we also have concerns about transparency and participation in the joint referral process, which have not been addressed by the proposed amendments. Indeed, no changes to this process are being proposed in the Bill at all, and we consider this to be a missed opportunity. Although the Lord Advocates' Guidance makes reference to the UNCRC and specifically states that the views of the child should be taken into account when the decision to prosecute or refer to the CHS is made, there is no clear process as to how and when that will happen. The reference to taking views into account 'where known' indicates that there is no formal process or obligation to do so in every case. Article 12 of the UNCRC states:

'1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.'

The guidance does not specifically provide this opportunity. On occasions where we have been instructed to act on behalf of a child in this situation it is far from clear who should be contacted to discuss the matter, nor what the legal mechanism is to ensure the child's voice is heard. This is a potential breach of Article 12 of the UNCRC.

Furthermore, there has been a missed opportunity of adding a tier of checks and balance here. If the case is referred to the adult court for prosecution it is not current practice for the Sheriff to query this when the case first calls. Nor does this decision making appear within the court papers provided to the accused. Many criminal practitioners representing the accused are solely criminal practitioners. They have no experience or knowledge of the CHS. In our experience this makes it highly unlikely that this decision would be challenged once the case has actually been marked by the Crown Office and progressed through the criminal courts.

The Bill is an opportunity to ensure that this process is compliant with the UNCRC, and that opportunity has been missed.

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?

As stated above, in principle we are in favour of the plans for most offences committed by 16 and 17 year olds to be dealt with through the CHS. However, the changes only mean that it would be possible for those aged 16 and 17 who are not subject to a CSO when they are charged with committing an offence to be dealt with through the CHS. It does not mean that they will be. The joint referral process which

determines whether a young person is prosecuted or sent to the CHS has not changed.

It should also be noted that the Financial Memorandum is clear that it bases its modelling on children who are 17.5 or younger when they commit an offence. Any older and they are considered to be beyond the age that a CHS can impose an order on them, once the time taken to formulate grounds, collate papers and convene a panel is taken into account. Therefore, financial modelling has been carried out on the basis of a cut off of 17.5 not 18. This limits the impact of the amendment.

In any event, while the proposed changes may divert more children and young people into the CHS, Part one also increases the power of the Children's Hearing to place limitations on the movement and behaviour of children referred to it. As we will detail later in this response these restrictions can be used to protect children for whom there are concerns about their safety, but can also be used as a consequence of behaviour that would not meet a criminal standard in court. When you consider that children and young people in a Children's Hearing are less likely to be offered legal representation than those appearing in court this seems a significant risk to children's rights. When children do not comply with these limitations their actions may attract sanctions and, potentially, criminalisation. These orders may also impact their future prospects through disclosure requirements.

As a consequence, it is Clan's view that the expansion of automatic access to legal advice in Children's Hearings is of such importance in the context of these changes that this needs to be reviewed as part of this Bill and not deferred to the wider review of the CHS. This will be discussed further below.

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

Introduction

There are some significant changes to the measures that can be included in CSO. Additional restrictive measures can now be included on a CSO, such as a prohibition on a child entering a specified place or description of place; along with a prohibition on the child approaching, communicating with or attempting to approach or communicate with (whether directly or indirectly), a specified person or class of person. Alongside these restrictions there has been an uncoupling of movement restriction conditions [MRCs] from secure care orders and a lowering of the threshold that needs to be met to allow a consideration of their use. This is a cause for concern.

Movement Restriction Conditions

The criteria/lowering the threshold

The Policy Memorandum indicates that the intention of these changes is to broaden the circumstances in which an MRC may be imposed. By decoupling it from the secure care criteria they can be used in a wider range of situations. The criteria that the Children's Hearing must now consider before imposing an MRC is:

S83 of Children's Hearing (Scotland) Act 2011

(4) A compulsory supervision order may include a movement restriction condition only if –

(a) one or both of the conditions mentioned in subsection (4A) applies, and

(b) the children's hearing or, as the case may be, the sheriff is satisfied that it is necessary to include a movement restriction condition in the order.

(4A) The conditions referred to in subsection 4(a) are –

(a) That the child's physical, mental and moral welfare are at risk,
(b) *That the child is likely to cause physical or psychological harm to another person*.

In this context 'psychological harm' includes fear, alarm and distress.

These new criteria represent a significant lowering of the threshold. The policy position that the second criteria moves away from injury to harm – in recognition of the potential psychological harm that can be caused to the public by the behaviour of another - is perhaps an understandable one. However, the definition of psychological used in the amendment opens up the possibility that a young person may be put on an MRC for behaviour that falls well below any criminal threshold. The use of 'fear, alarm and distress' indicates a subjective test verified only by the victim. The definition is not caveated by an objective measure of what might equate to 'fear, alarm and distress'. In both the criminal and civil sphere where the resultant harm is used to help prove the nature of the behaviour to be penalised, there is an objective measure built in. In Breach of the Peace – or a breach of s 38 (1) of the Criminal Justice and Licensing (Scotland) Act 2010 – an offence is committed if the behaviour of the individual is 'likely to cause a reasonable person to suffer fear or alarm'. There also needs to be intention to cause fear and alarm or recklessness as to the impact. In other words it does not matter whether witnesses to the behaviour were actually scared or alarmed by it, just that fear or alarm would have been a reasonable reaction to it. Similarly under the Protection of Harassment Act 1997, harassment is defined as someone acting in a way which causes 'distress and alarm'. This requires to be accompanied either by an intention to cause harassment or the behaviour occurring 'in circumstances where it would appear to a reasonable person to be harassment'.

There is no objective element to the definition of psychological in this Bill, and without clarity surrounding this criteria there is a risk that children could be placed on MRCs, and have their liberty and behaviour restricted for a far wider range of behaviour than is envisaged by the Government. If those restrictions amount to a deprivation of liberty that could also amount to a breach of Article 5 of the ECHR and Article 37 of the UNCRC.

The significance of the lowering of this threshold is very well summed up by the Sheriffs' and Summary Sheriffs' Association in their consultation response. They highlight that if a restriction of movement was to be considered in a criminal court it would only be done:

'a. Where such a condition is necessary to secure the subject's compliance with the standard conditions of bail, which include a prohibition on further offending on bail and upon interference with witnesses. A restriction of the type under consideration would not be imposed unless there was a significant possibility that the subject would otherwise require to be remanded in custody.

b. By way of sentence, only in cases where the offence and circumstances of the offender are of sufficient gravity to warrant a custodial sentence. The protection of the public is one of a number of factors which the sentencing court may have regard to when considering the manner of disposal and whether the circumstances meet the custody threshold. A Restriction of Liberty Order can only be imposed following adjournment for a Criminal Justice Social Work Report. Such reports shed light on potential issues of vulnerability as well as the consequential risk to others within a household should the offender's liberty be restricted.'

As such the proposal to extend MRCs to those who do not meet the criteria for secure care would not be consistent with the general approach currently adopted in relation to adult accused persons.

MRC threshold test should not be lower than that for secure care as this would be a disproportionate measure to take in the circumstances described. If secure care criteria is not reinstated the proposed criteria needs to be amended to include an objective element to the definition of psychological harm.

Safeguards and provision of support

There is also great emphasis placed in the Policy Memorandum on the fact that the current guidance in relation to MRCs contains safeguards in relation to necessity and duration that should be applied when an MRC is granted. It is also confirmed that an MRC should not be used unless there is an intensive support package which can be costly. Yet, despite acknowledging the expense involved in the use of MRCs, and having a stated policy intention to broaden the circumstances in which they can be used, the Financial Memorandum makes no allowance for their increased use leading to concerns that any MRC will not be accompanied by the right level of support. Without that support the child or young person may not comply with the order and be brought back to the Children's Hearing for further (possibly more restrictive) measures.

The consequences of non-compliance with an MRC are not laid out in the Bill. The Policy Memorandum states that there is no such thing as a 'breach' but acknowledges that the implementation authority decides whether the child is not complying with an MRC and if so, gives notice to the Children's Reporter to require a review of the CSO. While this is an ordinary review hearing, the children's hearing considering the CSO could include more restrictive measures on the order. Given the lowered threshold for being placed on an MRC (see above), this could represent a significant up-tariffing of behaviour and its management.

Up-tariffing could be an unintended consequence of the lowering of the threshold test for MRCs, and a failure to adequately fund MRCs. The threshold test for MRCs should not be lowered.

Deprivation of Liberty and MRCs

One of the changes in the Bill to CSOs is a clarification to an existing power that, where an order authorises, those in charge of a child or young person's home are entitled to restrict a child's liberty to the extent that the person considers appropriate. The Bill now caveats that with new s83 (2A) which states that this power does not extend to authorisation to deprive a child of their liberty. While on the face of it this reinforces that the only circumstances in which a child can be deprived of their liberty in Scotland is in authorised secure care accommodation, this simple subsection does not achieve that aim. The distinction between restriction of liberty and deprivation of liberty is a fine one, and cannot rest on an interpretation by a domestic authority.

Article 5 of the ECHR contains protections for individuals against arbitrary deprivation of their liberty by state officials. Article 5(1) states that:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority'

When considering what amounts to a deprivation of liberty it is clear from case law from the European Court of Human Rights [ECtHR] that courts will not be bound by the legal conclusions or definitions used by States as to whether or not there has been a deprivation. There will be an assessment of the specific circumstances affecting the individual [*Khlaifia & Ors v Italy [GC] 2016*]. It is also clear, that the distinction between a deprivation of liberty and a restriction is a question of degree and intensity [*Guzzardi v Italy 1980*]. The sort of criteria that will be considered in an assessment of this nature are type, duration, effects and manner of implementation of the measure in question [*Guzzardi v Italy 1980*].

Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts.

Children are subject to special protection through the UNCRC – which this Government has pledged to incorporate. Article 37 is relevant to considerations here too. In addition, and in accordance with *General Comment No 24 (2019) of the CRC on 'Children's Rights in the Child Justice System'* [GC 24], it is noted where deprivation of liberty is justified as a last resort, States should ensure that its application is for older children only, is strictly time limited and is subject to regular review.

Lawful detention

Under current regulations and guidance an MRC can confine a child to their home for a set period during a 24 hour period, as long as that does not exceed 12 hours. It can also be used to ensure that a child does not go to a certain place or area. It can be used in conjunction with an order specifying that a child or young person should not be near or contacting a certain person or limiting access to their phone or mobile devices. It is not difficult to see that in some circumstances, depending on the combination of orders applied on a CSO, and with an MRC used to monitor compliance with them, that an MRC could amount to a deprivation of liberty. Unlike a secure care order it can be imposed for up to 6 months before a review, and is not restricted to children over the age of 12. This runs contrary to GC 24 and is a potential breach of Article 37 of the UNCRC.

In addition we would question whether a deprivation of this nature could be considered lawful in terms of Article 5 (1) of the ECHR. While a secure accommodation order has been found to be a lawful deprivation in line with Article 5(1) [see the case of *S v Miller (No1) 2001 S.L.T 531*], the threshold legality test is higher for secure accommodation, the safeguards more stringent and intensive therapeutic and educational support is provided to the child when they are resident there. For MRCs the threshold test has been considerably lowered, the safeguards are less stringent and it is unclear the level of support that might accompany it. These factors may take it out of Article 5(1)(d) as a potentially arbitrary deprivation and not being for the purpose of 'educational supervision', risking any deprivation of liberty of this kind being unlawful.

Provision of Legal Advice and deprivation of liberty

Since 2001 and the case of *S v Miller (No1*) it has been accepted that *'in proceedings before a children's hearing where a deprivation of liberty is at stake, in principle the interests of justice call for legal representation'*. The Legal Aid Regulations were changed following that case, and where *'the children's hearing is likely to consider it might be necessary to include a secure accommodation authorisation in an order, and any deferred hearing following that'* the child is entitled to *'automatic children's legal aid'* (where there is no means or merits test).

To give effect to that SCRA Practice Direction 22 notes that in this circumstance the Children's Reporter is to contact SLAB as soon as possible and SLAB must arrange for a solicitor to be made available to the child. There is a duty solicitor scheme running in the CHS to ensure that this happens.

Until now MRCs have been considered at the same time, and under the same criteria, as a secure care accommodation order. A child has always had a solicitor present to consider the merits of the application and to ensure that their rights are protected.

By uncoupling the MRC from the secure care criteria and process, this automatic right to a solicitor may also be removed, where an MRC is considered separately from a secure care order. Given our concerns about the restrictions that can be placed on a child through these MRC orders, and the question of whether they might

amount to a deprivation of liberty, the absence of a solicitor is in contradiction to Scottish common law, and in potential breach of Article 6 ECHR rights.

In addition Article 37 of the UNCRC states that States Parties shall ensure that:

'…

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

The lack of legal representation may also contravene Article 37 rights.

An amendment to the Legal Aid regulations is required to ensure that a solicitor is automatically available for children where a Children's Hearing is likely to consider an MRC so that the Article 6 of the ECHR and Article 37 of the UNCRC rights of children and young people are not breached.

Secure Care Orders

Threshold Test

Changes have also been made to the threshold test for secure accommodation orders. One or more of the criteria have to be fulfilled for secure care to be considered. One of those criteria is:

'that the child is likely to cause physical or psychological harm to another person unless the child is kept in secure accommodation'

The same issues as highlighted in the threshold test for MRCs applies here. The lack of objectivity in the definition of psychological is of concern and needs to be changed.

In relation to the criteria that considers risk of absconding, there is no reference to balancing that risk against the risk of the harm to the child that being placed in secure care may cause.

Medical Examination Order

Threshold Test

Changes have also been made to the threshold test for medical examination orders. One or more of the criteria have to be fulfilled for a medical examination order to be considered. One of those criteria is:

'that the child is likely to cause physical or psychological harm to another person unless the child is kept in secure accommodation'

The same issues as highlighted in the threshold test for MRCs applies here. The lack of objectivity in the definition of psychological is of concern and needs to be changed.

In relation to the criteria that considers risk of absconding there is no reference to balancing that risk against the risk of the harm to the child that being placed in secure care may cause.

Warrant to Secure Attendance

Threshold Test

Changes have also been made to the threshold test for medical examination orders. One or more of the criteria have to be fulfilled for a warrant to secure attendance to be considered. One of those criteria is:

'that the child is likely to cause physical or psychological harm to another person unless the child is kept in secure accommodation'

The same issues as highlighted in the threshold test for MRCs applies here. The lack of objectivity in the definition of psychological is of concern and needs to be changed.

In relation to the criteria that considers risk of absconding there is no reference to balancing that risk against the risk of the harm to the child that being placed in secure care may cause.**4. What impact (if any) do you think the Bill could have on young people who have been harmed by another young person?**

We would defer to the views of organisations that represent the interests of child victims for an assessment of the impact this Bill will have on them.

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?

Section 6 of the Bill places a duty on the Children's Reporter to inform people, who have a right to request information about the disposal of a child's case by the CHS, that they have that right. This appears to apply where the Principal Reporter has 'information which suggests an offence' or behaviour that would be an offence should they be over 12'. This moves the responsibility on the Principal Reporter to one where there is discretion to notify a person of their right, to that of a duty - where it is practicable to do so, and subject to certain exceptions.

Although this seems like a relatively minor shift, care needs to be taken in relation to disclosure of information in this context. A disclosure to one person can very easily be broadcast with the use of social media, and lead to stigmatisation of the child alleged to have committed the offending behaviour. Where the person affected by the child's behaviour is also a child, both children have enhanced rights and protection in relation to data sharing. The Principal Reporter requires to balance the rights and best interests of both children involved.

Guidance on the balancing of rights between the child subject to the Children's Hearing disposal and the child victim should be included in the Bill, or there is a clear risk of rights infringement.

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?

Lack of access to legal Advice

In our response considering the proposed changes to the test for an MRC we noted that one of the unintended consequences of that was that a child may no longer have an automatic right to a solicitor at any hearing which considered making that measure. We referred to the case *of S v Miller (No1) 2001 S.L.T 531*, where the Inner House of the Court of Session considered whether the absence of access to legal aid for representation in the Children's Hearing (as then was the case) breached Article 6 of the ECHR. In short, their Lordships concluded that it did. Any consideration of offence grounds, in particular, engaged the child's civil rights – particularly Article 8 (right to a family life) and potentially Article 5 (right to liberty). The Court held that under Article 6, where deprivation of liberty was at stake, the interests of justice called for legal representation and that might require that a child should be given free legal representation. Following that judgement, the Legal Aid Regulations were amended to allow advice by way of representation {ABWOR] as an automatic right in any hearing which might consider a secure care order (a deprivation of liberty). In addition, the Children's Reporter has a duty to advise the child of this and make a referral to SLAB. There is a duty solicitor scheme in operation.

In all other cases, however, ABWOR can only be applied for and considered on the basis of a means and merit assessment. In other words ABWOR is not granted as a matter of right, nor is there any duty on the part of the Children's Reporter to ensure a child knows about this option to obtain legal advice. This means that in cases where a child has been referred on offence grounds, a child can be asked to agree these grounds without access to legal advice. This matters because of the potential consequences of agreeing offence grounds to the future employability of the child. Offence grounds are libelled in the same way as a criminal charge would be, with reference to the crime and the behaviour that supports that the crime has been committed. Where they are agreed by the child (without a hearing on evidence, and with no automatic right to legal advice) they can be disclosed in PVG checks years after the grounds have been agreed. Only if the child refuses to agree the grounds, and the matter is referred to the Sheriff Court, will they be referred to a solicitor.

Notification of access to legal aid is not done at the hearing, although it is included in documentation. However, the seriousness of the consequences of agreeing offence grounds – that it will be treated as a criminal conviction in certain disclosure contexts – is not, in our view, adequately explained. At no point is the impact of the disclosure of the criminal offence explained to the child.

Where a child has been referred on offence grounds there is a reference made at the bottom of the letter stating that:

'*Rehabilitation of Offenders Act 1974*

If a ground which is accepted or established is an offence committed by the child, then it will form a record that may have to be disclosed at a later date to potential employers. A leaflet explaining the Act in more detail is enclosed if the statement of grounds specifies an offence by the child.'

In our experience the leaflet does not always accompany the letter.

If the child does have sight of the leaflet there is then reference to the possibility of obtaining legal advice. There is no duty scheme for offence grounds. In our view the provision of information in this way is not enough to protect the child's rights.

As highlighted in *S v Miller*:

'…it is important to bear in mind that many of the children who appear before hearings will be young, unable to read well and unused to expressing themselves beyond the circle of their family and friends, especially adults whom they do not know. I find it quite impossible to conclude that all the children appearing before a hearing would be able to understand, far less to criticise or to elucidate, all the reports and other documents and all the factors which the hearing may be called upon to consider…'

In the *S v Miller* case the offence grounds were far from straight forward, with the possibility that the child acted in defence of another. Yet under current arrangements a defence, that may not be obvious to him on the face of the charge, may go unexplored as he could still simply agree the grounds without any referral to a solicitor. Considering these factors, and the potential impact on the child, Lord Penrose considered that in these circumstances *'special treatment of allegations of criminal conduct is justified'.*

Even now, with the potential for merit based ABWOR, the CHS expects a child to be able to fully read and understand the documentation, leaflet and what the implications of the Rehabilitation of Offenders Act 1974 mean for him and then make an active choice to instruct a solicitor to provide him with advice and representation.

In our view this does not adequately protect children's rights, and without an extension of the duty scheme to cover offence grounds (and MRCs) there is a potential Article 6 ECHR breach.

The current system of merit based access to legal aid for offence grounds should not continue and an amendment should be made to the legal aid regulations to include MRC hearings and offence grounds referrals as an automatic right and extend the duty scheme accordingly.

Criminal Justice and Procedure

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?

We are pleased to note that there is a recognition in the Bill of the importance of legal advice for children who are charged with a criminal offence. Ensuring that children under the age of 18 cannot refuse access to a solicitor adds a vital layer of protection for these vulnerable individuals. The same recognition needs to be made to those children who are referred to the Children's Hearing. See our earlier answer.

The other changes are, in general, welcome but they do not go far enough in making a system designed for adults fit the needs of children. For those children not referred to the Children's Hearing system a juvenile justice system requires to be developed to adequately protect their rights.

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?
This is a welcome change to ensure that 16 and 17 year olds who need to be deprived of their liberty for reasons of public safety will be placed in secure care rather than a YOI or prison. There is significant evidence demonstrating that YOI/prison is not a safe environment for such young people or the best setting to address challenging behaviours and provide appropriate care and support. However, there is a wider concern that some children will be placed in secure care who it would be possible to support in the community. There is therefore again a need to ensure that children have their rights respected, for instance, to housing and financial support, and where necessary they have access to legal advice and representation in order to hold public authorities to account when they fail in their duties to them.

Residential and Secure Care

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?

Secure Care

Section 22 of the Bill amends the definition of secure accommodation. The Policy Memorandum indicates that this is to ensure that the definition is fit for the future and adequately reflects the purpose, role and function of secure accommodation services. It does this by confirming that the purpose of secure accommodation is to deprive a child of their liberty and that a service providing this type of accommodation must be approved by the Scottish Ministers and registered as such with the Care Inspectorate.

Section 23 is used to clarify that whilst a child may be deprived of their liberty this can only be done where there is support, care and education provided for the purpose of safeguarding and promoting their welfare and meeting their needs. It also grants regulation making powers to the Scottish Ministers to regulate the approval of secure accommodation services, including powers to apply criteria to the approval such as conditions, duration etc. This is an attempt to simplify this process.

These powers need to be considered in the broader context of reform. This Bill's own amendments will remove all children from being sent to YOI and allow them to be accommodated in secure care accommodation instead. There is a wider review on going in relation to what the future provision for secure care in Scotland will look like. There is also ongoing consideration of changes to the funding of secure accommodation.

The powers being granted to the Scottish Ministers in relation to approving secure accommodation could be used to support these broader considerations, the outcome of which we do not yet know. Of particular concern is the thought that there could be a split in secure care accommodation between welfare cases and offence cases and a reintroduction of similar conditions to YOI for those deprived on their liberty on offence grounds.

The proposed use of affirmative procedure for these regulatory making powers means that significant changes to secure care provision could be made without the level of scrutiny reserved for primary legislation. These future changes could impact on children's rights and should not be left to secondary legislation.

Consideration should be given to deferring the granting of these powers until after the review process has concluded, and making any changes through primary legislation.

<u>Cross Border Placements - Care Services Regulation</u>

Firstly we are disappointed that that the Scottish Government have stated in terms that although they agree that cross-border placements should only occur in exceptional circumstances that *'until the lack of secure and residential care elsewhere in the UK, .., is addressed, the practice of cross border placements into Scotland will continue'.*

This runs contrary to #keepingthepromise which states that by 2024:

'there must be a strategic planning process for children and young people in Scotland that reflects the aims and principles of the promise and ends the practice of cross border placements'.

The provisions in the Children (Care and Justice)(Scotland) Bill do not do this.

According to the Policy Memorandum in order to better 'manage' cross border placements the Bill focuses on registration, notification and regulation with and by the Care Inspectorate.

Section 24 relates to the regulation of care services providing residential accommodation to children. It seeks to amend s50 of the Public Services Reform

(Scotland) Act 2010 by allowing the Scottish Ministers to prepare and publish specific standards and outcomes applicable to care services relating to children. This power specifically relates to the provision of residential accommodation for children in accordance with arrangements made for cross border placements. For all other services in that Act the preparation and publication of standards and outcomes is a mandatory process. For cross border placements it is discretionary.

This reinforces the two tier system that is in place for children residing in residential care who are from Scotland, as set against those who are placed from across the border.

For children being moved miles away from family support networks the impact of their placement on their rights can be greater than for children placed close to home. Children placed long distances from their homes conflicts with their fundamental rights as it denies them access to their family support networks and services. This is in potential breach of Article 8 of the ECHR and Article 3 of the UNCRC. Any interference with these rights should only occur where it is necessary, in accordance with the law and where adequate safeguards as to the child's wellbeing are in place.

The Bill leaves whether to apply any requirements, standards and outcomes to residential homes providing cross border placements to the discretion of the Scottish Ministers. If they are to be imposed there is no guidance as to what these should be. While this applies to all types of accommodation, it is of particular concern in the context of accommodation being provided to detain children and young people from across the border in non-secure accommodation.

As a minimum any accommodation in which a child is deprived of their liberty should replicate the secure care criteria and standards and the Bill should state that in terms.

Section 24 also makes a new notification provision for providers who plan to include cross border placements within their residential establishments. Where a new provider proposes a new service they will have to declare whether they intend to include cross border placements within their residential establishment. That notification requires to be given to the local authority and health board. Confirmation that those notifications have been given needs to be included in any application to the Care Inspectorate. This is to ensure that provision of services is in place, or this expansion can be factored into future decision making. The provisions are very much identified as a first step to ensuring that local authorities are kept informed of new providers. In the meantime the Scottish Government is exploring further options for the future regulation of cross border placements. Further regulatory power is also provided in this amendment and relates to powers contained in the 2010 Act. It allows the Scottish Ministers to impose specific requirements on any care service which intends to provide accommodation to children on cross border placements. Again, while this applies to all types of accommodation, it is of particular concern in the context of accommodation being provided to detain children and young people from across the border in non-secure accommodation.

As a minimum any accommodation in which a child is deprived of their liberty should replicate the secure care criteria and standards and the Bill should state that in terms.

Leaving such important protections to discretionary secondary legislation does not allow the level of scrutiny required to ensure adequate protections are put in place to protect the rights of these children.

Cross Border Placements: Effects of orders made outwith Scotland.

Section 25 of the Bill provides more framework powers to the Scottish Government to recognise any English orders as a CSO in the same way that the Cross-Border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 do. These Regulations regulate the recognition of Deprivation of Liberty Orders [DOL Orders] made in the High Courts in England, Wales and Northern Ireland. These Regulations simply place notification requirements and conditions and obligations on placing authorities in the rest of the UK to ensure the recognition of the DOL order without the need to go to court to do so. It provides no real protection or oversight by any Scottish bodies to ensure that children's rights are being protected while they are in Scotland. We have set out our views in earlier consultations on the effectiveness of these Regulations and we remain in full support of the Children and Young Person's Commissioner Scotland's [CYPCS} position in relation to this. In short these regulations do not adequately protect the rights of children placed in Scotland on DOLs orders.

Our experience of the Regulations so far have not been positive. Children who arrive in Scotland are often placed in remote accommodation with little access to educational and psychological support. The offer of advocacy provided for in the Regulations is not being taken up in the vast majority of cases, and – due to the distance from the home local authority – contact with social work and family is infrequent or non-existent. In one instance the standard of accommodation that the child had been placed in gave rise to child protection concerns. In addition we have seen a case where the protections in the Regulations (in relation to duration of the DOL order) were breached, but with no oversight in Scotland this had gone unnoticed. Despite these deficits, the suggestion in section 25 of the Bill seems to be that similar measures as provided for in these Regulations should be considered for other types of cross border orders. Given our concerns, and the fact that these Regulations were meant to be a temporary fix until a full review was undertaken in the context of this Bill, this proposal is not something that we would support.

Apart from these framework powers there is no specific solution to the issues that have been raised in relation to DOL orders and their regulation. The powers are all discretionary, and there is no specificity as to what further safeguards – if any - might be put in place in the future. The extensive use of framework powers takes any proposed future measures out of the scrutiny that inclusion in primary legislation would provide.

Our primary position is that the Bill should directly address the concerns raised in relation to the DOL orders and the inadequacies in the current

Regulatory regime. The CYPCS has provided the Government with suggested amendments and protections to be included. In addition, any further proposed regulation of cross border residential accommodation used for DOL placements should meet the standards set out for secure care accommodation.