

CHILDREN (CARE AND JUSTICE) (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Children (Care and Justice) (Scotland) Bill introduced in the Scottish Parliament on 13 December 2022.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 22-EN);
- a Financial Memorandum (SP Bill 22-FM);
- a Delegated Powers Memorandum (SP Bill 22-DPM);
- statements on legislative competence by the Presiding Officer and the Scottish Government (SP 22-LC).

3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

4. Getting it Right for Every Child (GIRFEC)¹ policy recognises all under 18s as children, as does some domestic Scottish legislation and the United Nations Convention on the Rights of the Child (UNCRC)². The term ‘child’ or ‘children’ in this document therefore refers to that age-group, unless otherwise stated. ‘Young people’ is typically used to refer to those aged 18 to 26 years in keeping with wider legislation and policy developments. Further terms are explained at Appendix 1.

POLICY OBJECTIVES OF THE BILL

5. The Bill proposes a number of measures to improve experiences and promote and advance outcomes for children, particularly those who come into contact with care and justice services. Building on Scotland’s progressive approach to children’s rights in line with the UNCRC, the Bill’s provisions aim to increase safeguards and support, especially to those who may need legal measures to secure their wellbeing and safety. As the Programme for Government³ 2022/23 outlined: “*The Children’s Care and Justice Bill will help us Keep The Promise by ensuring that*

¹ [Getting it right for every child \(GIRFEC\) - gov.scot \(www.gov.scot\)](http://www.gov.scot)

² [The United Nations Convention on the Rights of the Child](http://www.unhcr.org)

³ [A stronger and more resilient Scotland: the Programme for Government 2022 to 2023 - gov.scot \(www.gov.scot\)](http://www.gov.scot)

children who come into contact with care and justice services are treated with trauma-informed and age-appropriate support and will put an end to placing under 18s in Young Offenders' Institutions...The Bill aims to improve experiences and outcomes for children in Scotland who interact with the children's hearing and criminal justice systems, as well as care settings and those who are placed across borders in exceptional circumstances".

6. The Bill has five parts, which are summarised here and detailed at greater length throughout this policy memorandum.

7. Part 1 makes changes in respect of the children's hearings system. It enables 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. This will enable more children to benefit from the protection, guidance, treatment or control that can be afforded via Scotland's unique age-appropriate, welfare-based children's hearings system. However, in relation to offending behaviour, this does 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. To support the transition into adulthood for a child who has required the protection of a compulsory supervision order, an extension has been made to the duties on local authorities to support a child up to the age of 19. It also makes provisions in respect of secure accommodation authorisations, covered below.

8. Provisions in Part 2 relate to children in the criminal justice system. The measures in this section aim to enhance the rights of children in the criminal justice system, recognising their treatment requires to be distinct from adults, whilst retaining the constitutional autonomy of the courts and judiciary. Associated provisions are made to reflect the updated definition of a child in respect of criminal proceedings and the prosecution of children. Safeguards are enhanced through further development of responses to children in police custody (section 11), the framework for reporting on criminal proceedings involving children (sections 12 and 13) and for children at court (section 14). Section 15 maximises 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. Sections 16 and 17 relate to the remand, committal and detention of children; this includes removing the ability for children 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. Section 18 amends definitions of YOIs and "young offender" to bring them into line with the changes made elsewhere in the Bill. Local authority duties to children deprived of their liberty in secure accommodation are covered in sections 20 and 21.

9. Part 3 relates to residential and secure care. The purpose and function of secure accommodation is clarified through updating the meaning of "secure accommodation" and "secure accommodation services" in current legislation (section 22 and 23). Section 23 also provides the Scottish Ministers with revised powers in relation to the approval for such services (as a prerequisite to the registration of those services with the Care Inspectorate) and in relation to the regulation of placements in secure accommodation. Provisions made at various points in the Bill ensure all children who require secure accommodation can access it, subject to robust safeguards, and help make the legislative background transparent and easier to understand. The overarching

policy aim is to ensure that all children who need it can remain in these age- and stage-appropriate, therapeutic environments facilities where they can benefit from the intensive care and support required at that point in time. The Scottish Government want to ensure the legislation relating to secure accommodation is fit for purpose now and in the future, and as far as possible is transparent and easier to understand.

10. It is the Scottish Government’s position that cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child. The provisions in section 24 will provide powers to impose bespoke requirements, and to publish standard and outcomes, in relation to registration with the Care Inspectorate of relevant care services providing cross-border placements. The provisions in section 25 also provide new regulation-making powers in relation to the recognition and effect of non-Scottish court orders relating to such placements, and to enable appropriate safeguards for the children affected. This will further build on the recent Deprivation of Liberty (DOL) order regulations,⁴ helping to address the complex and varied circumstances that result in such placements in Scotland, enabling appropriate conditions and requirements to be made in relation to those placements in a children’s rights-centred way.

11. The provisions in Part 4 relate to amending the age of a child for antisocial behaviour orders to align with changes made elsewhere in the Bill and repeal Part 4 (Provision of named persons) and Part 5 (Child’s plan) of the Children and Young People (Scotland) Act 2014.⁵ This upholds the commitment made by the Deputy First Minister to Parliament in September 2021.

12. Part 5 makes some necessary measures in relation to issues such as ancillary provisions, interpretation and commencement.

Policy Context

13. The Scottish Government wants all of our children and young people to feel safe, protected, loved and supported at every point in their life so that they can realise their full potential. This requires that children are treated respectfully, have their voices heard and their rights upheld.

14. For all children, especially those who need extra care and protection, it is crucial to ensure the correct support can be provided, at the right time, to meet their needs. Where children come into conflict with the law, providing the best support to address the causes of their behaviours can help children to reintegrate, rehabilitate and desist.⁶ In turn, this approach can prevent the causing of further harm and minimise the number of people experiencing such harm. As Lynch⁷ has concluded “*the best protection for society is a child who has been reintegrated successfully into society and where the causes of the offending have been addressed*”.

⁴ [The Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁵ [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁶ This is also in keeping with international human rights standards including under UNCRC.

⁷ [Towards a Principled Legal Response to Children Who Kill - Nessa Lynch, 2018 \(sagepub.com\)](https://www.sagepub.com)

15. The Bill builds on the policy and practice approaches enshrined in GIRFEC⁸ to improve outcomes for children by providing the right help, at the right time, from the right people. This requires the provision of a full continuum of services and supports, spanning preventative, early, protective and intensive interventions, which uphold and advance children's rights. Children's Services Planning Partnerships remain key to driving collaborative, holistic, and joined-up approaches which safeguard, support and promote wellbeing of children, young people and families across Scotland, through partnership development and delivery of each area's Children's Services Plan.

16. Moreover, the Scottish Government is committed to implementing the UNCRC as far as it is possible to do so within legislative competence. This internationally mandated children's rights treaty informs the Scottish Government's strategies and programmes and feeds into the Scottish Government's national outcomes. It sets out the rights that all children have and outlines what children need, to give them the best chance of growing up happy, healthy and safe. The UNCRC Incorporation (Scotland) Bill⁹ specifically defines the child as a person under 18 years of age. Measures in this Bill support Scotland's commitment to the implementation of UNCRC.

17. The Bill also supports the achievement of a Rights Respecting Approach to Justice for Children and Young People: Scotland's Visions and Priorities.¹⁰ The Vision represents a shared foundation between the Scottish Government and partners to keep children out of the criminal justice system, and promote the Whole System Approach (WSA) to preventing offending by children and young people focused on early intervention, diversion from prosecution and alternatives to secure accommodation and custody. It is also premised on international human rights standards and the recognition that early adverse contact with justice agencies is in itself a factor likely to heighten the risk of further offending behaviour, emphasising the importance of diverting children from criminal justice. This is because contact with the justice system is the biggest factor in influencing whether someone will continue offending.¹¹ It also has been suggested that the criminal justice system has not been designed specifically with children in mind,¹² with criminal trials being adversarial processes designed to determine guilt and to impose appropriate disposals. Evidence highlights that punitive responses to child offending increases the risk of reoffending, due to the knock on effect factors that support desistance such as educational attainment, employment, and future aspirations.¹³ By contrast diverting children from prosecution, has been demonstrated to facilitate desistance from crime and to be more cost-effective.¹⁴

18. Scotland's unique and internationally renowned children's hearings system dates back to the landmark Kilbrandon Report of 1964,¹⁵ furthering Scotland's welfare-based approach to

⁸ [GIRFEC resources - Getting it right for every child \(GIRFEC\) - gov.scot \(www.gov.scot\)](http://gov.scot)

⁹ [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

¹⁰ [A Rights-Respecting Approach to Justice for Children and Young People: Scotland's Vision and Priorities \(www.gov.scot\)](http://www.gov.scot)

¹¹ [Key Messages from CYCJ - Children and Young People's Centre for Justice](#) and [Edinburgh Study of Youth Transitions & Crime](#)

¹² [Use and impact of bail and remand in Scotland with children - Children's and Young People's Centre for Justice \(cycj.org.uk\)](http://cycj.org.uk)

¹³ Bernburg, J. & Krohn, M. (2003) 'Labelling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood', *Criminology* (Beverly Hills), 41(4).

¹⁴ For a summary see CYPCS [Older Children in Conflict with the Law](#)

¹⁵ [The KILBRANDON Report - gov.scot \(www.gov.scot\)](http://gov.scot)

children’s care and youth justice. It is founded on the premise that the care, protection and support needs of children – and any risks these children may face or parts of their behaviour may present – must be addressed in the context of the child’s whole life circumstances, whether those children are themselves in conflict with the law or are harmed.

19. The Independent Care Review¹⁶ published its report, *The Promise*¹⁷ in 2020. This told Scotland what it must do to make sure that all children and young people are loved, safe and respected so that they can reach their full potential. The Scottish Government is committed to Keeping The Promise by 2030. The Scottish Government’s implementation plan to achieve this was published on 30 March 2022 and has received cross-party support¹⁸ in the Scottish Parliament.

20. The Promise states: *“when children are before the courts on offence grounds, they must be dealt with in a way that is appropriate, proportionate, recognises their age and is trauma informed and responsive. 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. To ensure that all children benefit from the Kilbrandon approach to youth justice, there must [be] more efforts to ensure children stay within The Children’s Hearing system.”* Furthermore, *“Traditional criminal courts are not settings in which children’s rights can be upheld and where they can be heard.”*

21. Additionally, a Hearings System Working Group (HSWG) (a partnership between Children’s Hearings Scotland, the Scottish Children’s Reporter Administration and The Promise Scotland) has been created to rethink the underpinning structures, processes and legislation and oversee the redesign process for the children’s hearings system as set out in The Promise Plan 21-24 and Change Programme ONE.¹⁹ Therefore, whilst there are provisions in this Bill to raise the age of referral and to take measures which support that, development of the approach has been mindful of the need to respect the space of the working group and not pre-empt or supersede that work.

22. The provisions in the Bill are also based upon child and adolescent social, emotional, cognitive and psychological development and maturation.²⁰ The evidence further highlights the distinct needs of young people aged 18 onwards, moving into early adulthood, as well as the challenges young people experience in ‘cliff edges’ of support and systems determined only by chronological age and in transitions. The Scottish Government have therefore sought to promote needs-led, transitions based more on developmental ability and capacity. As such, whilst the reforms proposed in this Bill predominantly relate to under 18s, some of these extend to young people.

23. There will be occasions where, due to the level of concern about the risks of or actual significant harm that a child’s behaviours pose to themselves or others, it will be necessary to

¹⁶ [Independent Care Review – The root and branch review of Scotland’s care system.](#)

¹⁷ [The-Promise.pdf \(carereview.scot\)](#)

¹⁸ Scottish Parliament official report [Official Report \(parliament.scot\)](#)

¹⁹ [Change Programme ONE - The Promise](#)

²⁰ For example, as detailed in [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts \(scottishsentencingcouncil.org.uk\)](#)

deprive them of their liberty. It is the Scottish Government's position that the deprivation of liberty of a child should be a last resort, to be used only for the shortest possible period of time.

24. Children in secure accommodation and custody continue to be some of our most disadvantaged and excluded children in society.²¹ These children will often have already faced multiple adverse experiences, including abuse; neglect; household dysfunction; instability; community violence; deprivation; loss and bereavement, each bringing associated trauma. Many have significant mental health, emotional and wellbeing needs, albeit these are often undiagnosed and accessing support has been challenging or impossible. Where appropriate care and support is provided, this can encourage healthy development, improved current and future outcomes and opportunities to live a fulfilling life in the community.

25. While secure accommodation and YOIs can both deprive children of their liberty, the environments are distinctly different.²² Whilst it is recognised that YOIs have made great improvements, they are not primarily designed to be therapeutic environments, cannot offer the same level of trauma and attachment informed support, nor the high staff to child ratio sometimes necessary to meet the needs of these children. The difference in associated support is illustrated by the cost differences for YOI and secure accommodation, which is set out in the financial memorandum accompanying the Bill. Safe and trusting relationships are the cornerstone of promoting children's healthy development and positive outcomes but these are extremely difficult if not impossible to develop in a custodial environment such as a YOI. Different supports and interventions can also be afforded within each environment, including in respect of family support and contact, as well as the staff having different skills and qualifications. Children in secure accommodation are expected to engage with interventions and education, with services available at the point of need.

26. Regarding cross-border placements, the Promise was clear that funding models based on the acceptance of children from other parts of the UK cannot be sustained when it is demonstrably not in those children's best interests to be transported to an unknown place with no connections or relationships. Such placements can result in children and young people being separated and distanced from their families, peers, community support networks and services. This impacts on planning for the child and on their ability to maintain meaningful relationships. There are also concerns that this may impact on their human rights.

27. It is the Scottish Government's position that cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child. However, until the lack of provision for secure and residential care elsewhere in the UK, particularly in England, is addressed, the practice of cross-border placements into Scotland will continue. Courts in other jurisdictions can and do determine that the best option for a child is to be accommodated in a childcare setting located in Scotland. Scottish Ministers and the Scottish Parliament cannot prevent that, or regulate what happens in a court process in another jurisdiction which has made a legal decision, nor can they affect or re-litigate the outcome of that process.

²¹ For overview of evidence see [Children and young people in conflict with the law: policy, practice and legislation \(cycj.org.uk\)](https://www.cycj.org.uk)

²² As above

28. Therefore, the Bill measures aim to utilise levers available to Scotland and increase registration, regulation and oversight of care settings where cross-border children are accommodated. The Scottish Government continues to seek assurance from the UK Government and other UK administrations that prompt and effective action is being taken to find a solution to capacity issues.

29. The Scottish Government acknowledges that legislation reforms must be supported by the availability of robust services and evolving policy and practice to accommodate them. Care and justice agencies are essential in supporting the aims of the provisions within the Bill. Wider partners, including social work, local government, regulators, third sector organisations and mainstream public services also play a vital role via decision-making, resourcing and delivery of public services.

CONSULTATION

30. On 30 March 2022, the Minister for Children and Young People launched a public consultation on proposals around children's care and justice.²³ This consultation included proposals on:

- Raising the Maximum Age of Referral to the Principal Reporter;
- Children and the Criminal Justice System;
- Secure accommodation;
- Residential Care and Cross-Border Placements.

31. In respect of certain elements of these proposals, prior consultation had already been undertaken and specific proposals were consulted on. In respect of other matters, issues and objectives were highlighted, alongside options as to potential solutions for comments.

32. The consultation ran from 30 March 2022 to 22 June 2022, with 106 written responses submitted in total.²⁴ A total of 28 responses were received from individuals (26% of responses) and 78 responses from organisations (including local government/social work, third sector organisations, secure accommodation centres, police, the legal profession and bodies associated with the children's hearings system).

33. Key to the consultation process was listening to the views of children and young people themselves. To support engagement an easy read version of the consultation and young person's conversation guide were developed and published alongside the main document. Both of these resources were available for children and young people to use independently, as well as by professionals to facilitate individual or group discussions to help the children and young people they were working with to participate. Children's views tended to be gathered via focus groups or organisational activity, with five 'group' responses and nine individual responses received from

²³ [Supporting documents - Children's Care and Justice Bill - policy proposals: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot/supporting-documents-childrens-care-and-justice-bill-policy-proposals-consultation)

²⁴ [Children's Care and Justice Bill - policy proposals: consultation analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot/childrens-care-and-justice-bill-policy-proposals-consultation-analysis)

children and young people.²⁵ These included Our hearings, Our Voice; STARR; Youth Justice Voices; North Lanarkshire's Promise Team and Participation group TNT – Today Not Tomorrow; and the Good Shepherd Centre. Findings from children and young people were incorporated into the main consultation analysis, as well as being presented in their own sub-sections to ensure their views were considered in the same way as other respondents, and not seen as separate, but still given due prominence in the analysis report. A separate accessible analytical report was also published.²⁶

34. In addition, the Scottish Government worked with Children and Young Person's Centre for Justice (CYCJ) and the Scottish Youth Parliament (SYP) to carry out open and targeted sessions with children and young people.

35. The SYP WhatsYourTake Summer survey also generated 243 responses from children and young people. Although these were received too late to be part of the main consultation analysis, SYP's analysis was included in this report and informed policy development. The survey contained 2 questions which focused on maximising the use of the children's hearings system as opposed to the traditional criminal justice system, which the majority of respondents supported. Views were also sought on which, if any, potential changes in the criminal justice system should be made when it is dealing with children, with support across the different options varying. The children's hearings system, particularly information sharing, and criminal justice system were also the focus of a targeted workshop at the SYP Summer Sitting.

36. Overall, consultation responses highlighted broad agreement with the objectives and principles proposed. Some questions on specific policy areas received higher levels of agreement than others and in some cases, even where there was a high level of support, responses were caveated, often raising considerations about the complexities of implementation. Given that a significant number of the issues are at the border of interplay between childhood and adulthood, as well as the - at times - competing rights of all involved in any one situation, this is perhaps to be expected. There was also at times variation between and within individual and organisational responses, and children and young people and adult responses.

37. Alongside the consultation process, officials engaged with external stakeholders to highlight the proposals, encourage responses and seek feedback to support the development and refinement of policy positions. This included extensive engagement with external partners either on an individual or multi-agency basis and through inputs at existing groups and forums, including but not limited to:

- Children and Young People's Commissioner (CYPCS);
- Convention of Scottish Local Authorities (COSLA);
- Social Work Scotland (SWS);
- Scottish Courts and Tribunals Service (SCTS);

²⁵ It was assumed that all direct responses by individuals on to Citizen Space were from adult respondents, although it was not possible to ascertain the age of individuals. Several respondents, both individual and organisational, also drew upon their knowledge of the views and experiences of children and young people to shape their professional/adult responses.

²⁶ [Supporting documents - Children's Care and Justice Bill - policy proposals: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

- Crown Office and Procurator Fiscal Service (COPFS)
- The Lord President’s Private Office;
- The Judicial Institute;
- The Scottish Sentencing Council (SSC);
- The Scottish Prisons Service (SPS);
- Secure accommodation centres;
- The Promise Scotland;
- Children First;
- Victim Support Scotland;
- Community Justice Scotland;
- Child Policy Officers Network;
- Children and Young People’s Centre for Justice (CYCJ);
- Centre for Excellence for Looked After Children in Scotland (CELCIS);
- Care Inspectorate;
- National Youth Justice Advisory Group;
- Age of Criminal Responsibility Advisory Group;
- Youth Justice Improvement Board;
- Secure Care Group;
- Children’s Hearings Improvement Partnership.

38. This was supplemented with three roundtable sessions that were open to any interested stakeholders, co-facilitated with CYCJ. Workshops were also conducted at the national Youth Justice Conference in June 2022.

39. In addition, a “rapid review group” of key stakeholders (COPFS, Scottish Children’s Reporter Administration (SCRA), Police Scotland, Children’s Hearings Scotland (CHS) and Social Work Scotland) which was already established, was pivoted to focus on Bill considerations.

40. Further and more specific information on the results of the consultation is provided throughout this document, setting out in many areas the views of consultees alongside information on the policy objectives, provisions and alternative approaches considered. The Bill intersects with a wide range of other policies and public sector delivery measures, which it does not make direction on. As such this policy memorandum is focussed on the areas being taken forward in the Bill, therefore not all areas consulted on are reflected in this document. In particular, the Bill does not include provision in relation to raising the age of criminal responsibility, restraint or extending compulsory measures in the children’s hearings system beyond the age of 18.

PART 1: THE CHILDREN'S HEARINGS SYSTEM

41. This part of the Bill is made up of a number of interrelated provisions including:
- Raising the Age of Referral to the Principal Reporter
 - Movement Restriction conditions and prohibitions
 - Information to people who have been harmed
 - Extension of duty to provide support beyond 18
42. Other provisions in Part 1 are discussed elsewhere in this document.
43. Scotland's children's hearings system takes an integrated and holistic approach to care and justice.
44. It is built upon principles established by the Kilbrandon Report of 1964, the most fundamental being that children and young people who are in conflict with the law, as well as those who require care and protection for other reasons, should all equally be considered 'children in need'.
45. The children's hearings system was strengthened and modernised by the Children's Hearings (Scotland) Act 2011.²⁷ Children who are in need of care, protection, guidance or control are referred to the Principal Reporter to decide whether to call a children's hearing (in practice, this role is delegated to and carried out by local Children's Reporters, with this term used throughout this document). Where a child is referred, the Children's Reporter decides whether help or voluntary support are needed or whether a children's hearing should be convened. A children's hearing decides whether or not compulsory measures are in the best interests of the child. The hearing, composed of volunteer lay members of the Children's Panel, can decide to discharge the referral, make an order including a Compulsory Supervision Order (CSO), or place a duty on local authority to provide support to a child on a voluntary basis.
46. A CSO or Interim CSO (known as an ICSO)²⁸ can put measures on a child to live at a certain place, including away from their home or with a relative; to see or not to see named people; or be deprived of their liberty in secure accommodation. The child's case is kept under review and the measures on a compulsory supervision order can be changed. A parent or child can ask for a review of the CSO, which can take place three months after the date of the child's last hearing. The relevant Social Worker or the Local Authority can ask for a review of the CSO at any time. Where a child is placed in secure accommodation under a CSO they must have their case reviewed every three months and this condition can be extended for up to three months at a time, if necessary.

²⁷ [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

²⁸ Sections 83 and 86 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

Age of referral to the children’s hearing

Key background and policy context

47. In Scotland, children from the age of 12 (above the age of criminal responsibility)²⁹ can have their cases dealt with through the criminal justice system. The circumstances in which children aged 12-17 can be prosecuted are specified in legislation and guidance,³⁰ in practice resulting in joint reporting to the COPFS and the Children’s Reporter in appropriate circumstances which will result in a bespoke decision being made about whether the child should be prosecuted. There is an existing presumption that for these children an alternative to prosecution in court will be in the public interest, and in cases where an identifiable need has contributed to the offending, active consideration should be given to referral for diversion. However, where these children’s cases cannot be effectively managed through the available alternatives to prosecution and prosecutorial action is in the public interest, they are then prosecuted in the criminal courts.

48. Under current law, a child can only be referred to the Reporter over 16 if they are already subject to a Compulsory Supervision Order (CSO), or were referred before 16 and a decision to arrange a hearing or to make a CSO is pending.³¹ Children, over 16 can also, at the court’s discretion, be remitted to a hearing if they have pled guilty to or been found guilty of an offence. Therefore, children over 16 in conflict with the law are currently usually channelled to the criminal justice system which by necessity deals with all ages, and is not designed specifically for children. The children’s hearing system in contrast is a child-centred system, created for children and has continued to evolve and adapt in line with children’s rights and needs.³²

49. However, the UNCRC definition of “child”, domestic policies such as GIRFEC, the Whole System Approach (WSA),³³ and the national Child Protection Guidance³⁴ relate to all children under 18. Further, modern research into adolescent brain development shows that people may not be fully developed until their mid-twenties. So, a cut-off of age 16 (with some exceptions) is inconsistent with other approaches and with what the Scottish Government now know about children’s development.

Policy measures and objectives

50. The meaning of ‘child’ in the 2011 Act and related age-limited legislation will be amended to simplify and clarify that anyone under the age of 18 is considered a child.

51. Provisions in part 1 of the Bill provide the *opportunity* for children to be referred or remitted to a children’s hearing up to age 18, if this is appropriate, whether the child is in conflict

²⁹ [Age of Criminal Responsibility \(Scotland\) Act 2019 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

³⁰ [Lord Advocate’s guidelines: Offences committed by children | COPFS](#); [Decision making in cases of child accused | COPFS](#)

³¹ Section 199 [Children’s Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

³² For a summary of research in respect of the children’s hearings system see CYPCS [Older Children in Conflict with the Law](#). The Hearing System Working Group is currently considering how best to improve the children’s hearing system

³³ [Whole system approach to young offending - Youth justice - gov.scot \(www.gov.scot\)](https://www.gov.scot)

³⁴ [National guidance for child protection in Scotland 2021 - gov.scot \(www.gov.scot\)](https://www.gov.scot)

with the law or there are other reasons for the child needing the care and protection of a hearing. However, the discretion of COPFS to prosecute is not affected.

52. Various aspects of criminal proceedings legislation also rely on this definition of a child. The consequential impacts of this change have been individually assessed and where appropriate, change has been made. In doing so, efforts have been made to ensure the full range of disposals and options available through the criminal justice system remain and that there are no unintended consequences, whilst ensuring all children under 18 are treated the same way and can benefit from additional safeguards and supports where necessary. Section 8 therefore amends the definition of “child” in criminal proceedings legislation, and section 26 antisocial behaviour legislation. Likewise, section 10 of the bill extends certain existing arrangements regarding prosecution of children over the age of criminal responsibility to 18, as opposed to 16.³⁵ This means children can only be prosecuted on the instruction or instance of the Lord Advocate and children’s cases cannot be dealt with in the Justice of the Peace courts.

53. Additionally the special provisions that apply to children by virtue of schedule 1 of the Criminal Procedure (Scotland) Act 1995³⁶ are extended to include children up to age 18 (under section 9 of the Bill). This will allow the same protections for a child up to age 18 as currently exist for those under 17.

Alternative approaches

No change

54. The only alternative option via the children’s hearings system is to retain the current position that a child is 16 with the existing limited exceptions. However, this is inconsistent with the definition of “child” according to the UNCRC as it is intended to be incorporated into Scots Law, as well as being inconsistent with other domestic policies. In addition, without these changes not all children aged 16 and 17 will have the opportunity to be treated equally. Such an approach was therefore discounted.

An alternative non-adult system

55. Alternatively 16 and 17 year olds could be dealt with through another non-adult system, for example a youth court model. However, Scotland has no national programme or provision for this. The Bill does not seek to create such a new Scotland-wide youth court model and instead uses existing forums, given the specialism already afforded by the children’s hearings system. Moreover, pursuit of this approach would only relate to children in conflict with the law and would not bring equality of treatment and consistent access to support where there are concerns about a child’s care and welfare which is the purpose of the existing children’s hearing system.

³⁵ As per section 42(1) [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

³⁶ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#), sections 48, 50(5) and schedule 1

Consultation

56. In 2020, the Scottish Government launched a consultation to gather views on the principle of raising the age at which children can be referred to the Children’s Reporter to include all under 18s - whether on care, protection or offence grounds.³⁷

57. The consultation responses demonstrated overwhelming support to raise the maximum age of referral with the large majority of respondents indicating that the age should be raised to 18 for all cases.³⁸ Many of the themes outlined above regarding the reasons why all children should have the opportunity to be referred are reflected in the consultation responses.

58. As a result of previous consultation, raising the age of referral to the Children’s Reporter was not specifically asked about in the consultation on policy proposals that informed the Bill. Many respondents however utilised this as an opportunity to reiterate their support for this approach.

Movement restriction conditions and prohibitions

Key background and policy context

59. A movement restriction condition (MRC) is a measure on a CSO or ICSO restricting the child’s movements and requiring the restrictions to be monitored by way of an electronic monitoring device (or “tag”) attached to the child. Electronic monitoring cannot be used without intensive support which is key to the success or otherwise of the child’s compliance with the requirements of the MRC. Both a hearing and a sheriff may place an MRC on a child.

60. An MRC can be included in a CSO or ICSO only where certain criteria are met,³⁹

- 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.

61. There are extensive guidance and practice documents on the current use of Movement Restriction Conditions in the children’s hearings system. This includes Practice Directions produced by the SCRA, guidance produced by the Scottish Government and training materials

³⁷ [Child Care And Justice – Consultation On Raising The Age Of Referral To The Principal Reporter - Raising the age of referral: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

³⁸ [Children - raising the age of referral: consultation analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot)

³⁹ Section 83(4) [Children’s Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](http://legislation.gov.uk)

provided to children's hearing panel members who will make the decision on whether or not to place an MRC on the child.⁴⁰

62. An MRC also has to be accompanied by a child's plan including the provision of a crisis response service, being a service to be provided by or on behalf of the implementation authority, by way of immediate support for the child under reference to the child's plan, which must include a telephone contact facility, accessible on a 24 hours per day basis, for every day of the year, both by the child, by any person designated, and by any other person identified in the plan as requiring such access.

63. MRCs are put in place only where necessary and for the shortest period possible. The current test for an MRC is the same as that for secure accommodation. There have been very few MRCs being used in practice and as a result there has been no evaluation of their usage. The use of electronic monitoring equipment and intensive support package around the child makes this a costly measure, used as a bespoke measure to support the child as an alternative to secure accommodation in line with current guidance.

64. Whilst there is no such thing as a "breach" of an MRC that results in automatic referral to a hearing, 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. This is an ordinary review hearing and the children's hearing considering the CSO could include more restrictive measures on the order as necessary and proportionate (which could include a secure accommodation authorisation).

Policy measures and objectives

65. The policy intention is to broaden the circumstances in which a movement restriction condition may be imposed. The provisions decouple the MRC criteria from that for secure accommodation authorisations and can apply without the prerequisite of absconding. This is in recognition that it might be more proportionate for a child to have an MRC as a transition from secure accommodation, for example, thus allowing the hearing more flexible powers to support the child.

66. In addition the new test for MRC focuses on '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.

67. 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.

⁴⁰ The relevant legislation is the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](#) and [The Children's Hearings \(Scotland\) Act 2011 \(Movement Restriction Conditions\) Regulations 2013 \(legislation.gov.uk\)](#). Guidance includes [CHS Practice and Procedure Manual](#), [SCRA Practice Direction](#) and [Definitions - Movement restriction conditions in the children's hearing system: guidance - gov.scot \(www.gov.scot\)](#).

68. It is recognised that changes to MRC criteria could lead to the wider use of such measures, in particular if there is a concern that the child may need measures to avoid the need for secure accommodation or to allow a transition from secure accommodation. Clear parameters on when these measures could appropriately be used will require refreshed guidance for decision makers and social workers. The test of necessity remains so it must remain a proportionate measure. The key to successful use of MRC will remain the intensive support package that is alongside the electronic monitoring device.

69. In addition provisions are included emphasising that a CSO may contain measures prohibiting a child from approaching, communicating with or attempting to approach or communicate with (whether directly or indirectly) a specified person, or restricting a child's access to certain places. As with any measure on a CSO, these may only be applied where this is necessary and proportionate. Such measures may be applied without the need for an MRC, or, if necessary, in the case of restricting access to a place, such measures can be supported by an MRC, which would allow the measures to be electronically monitored. Any measure would continue to require the child's welfare as a primary consideration. However, the welfare of the child as a paramount consideration may be set aside where the level of the child's behaviour is such that members of the public require protection from harm, whether physical or not. Further training on when it is necessary to include these measures is likely to be appropriate.

Alternative approaches

No change

70. The current position is that a hearing or sheriff can only make an MRC when the secure accommodation criteria are met. This limits the options for a hearing or sheriff to make a measure of MRC.

71. The focus on 'injury' in the current test could be minimising the impact a child's actions may be having on others who may be harmed by distress or fear. The new test of 'harm' will allow consideration of what measure is needed to prevent a child causing harm to themselves or others, with potential benefits to those who may be harmed by the child. In addition, it bolsters the children's hearing system's ability to direct intensive support to a child to assist them from putting themselves in places or near persons where they can cause harm. This measure being available to a hearing may allow a child to be dealt with more appropriately by the children's hearing system than by an adult prosecution. The status quo does not therefore meet policy intentions.

Strengthen the children's hearings powers in the event of breach of MRC

72. It was considered whether a hearing should have an automatic power to impose a stricter measure on a child in the event of a breach of an MRC measure. This was ruled out as the existing review mechanism, which is triggered by a breach of an MRC, and would lead to the child's CSO being reviewed in its entirety is sufficient. The intention is not to change the ethos of the children's hearing 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.

Consultation

73. Respondents provided a range of reasons as to why current criteria for Movement Restriction Conditions (MRCs) should be changed, and given a different emphasis. Some responses that supported changing the criteria for MRCs emphasised the benefits of the MRC to individuals other than the child referred, although some concern was raised regarding this potentially shifting focus from the ‘best interests of the child’. Victim organisations and Police-related responses stressed that changing the criteria of MRCs was crucial for victim and public protection - especially in instances of domestic or sexual abuse - where there is a risk of ongoing harm to the victim. The need for victims to be aware of MRCs, to enable them to report any instances of non-compliance was also highlighted.

74. Responses from Delivery Organisations including Local Government/Social Work and Police-related organisations highlighted that changing the criteria for MRCs could be seen as being in the best interest of the child who has caused harm where it allows them to remain supported in the community. This was particularly emphasised by secure accommodation centre respondents, who highlighted that by the point at which a child is placed in secure accommodation, their welfare and protection needs are too high to be effectively dealt with in the community by an MRC. Changing the criteria for MRCs therefore was seen as providing an earlier intervention that can halt the trajectory into secure accommodation. Responses from Local Government/Social Work stressed that for this to be effective, MRCs cannot operate in isolation, but as part of a wider support package and robust wraparound services.

75. However, other respondents felt that the current criteria for MRC being the same as that for secure accommodation was appropriate. Many of these responses referenced existing international children’s and human rights standards around children’s liberty, in order to qualify the appropriateness of the current high threshold. Relatedly, it was also suggested that such measures can work against children’s best interests and extenuate feelings of stigma, stress and anxiety.

76. Another key concern that was expressed by both those who support and disagreed with this proposal was the current lack of evidence surrounding their usage or effectiveness. This was particularly raised by Local Government/Social Work respondents, who stressed that MRCs can be difficult to enforce, and that enforcement could hinder the development of meaningful therapeutic relationships. Decoupling from secure authorisation, but keeping the revised criteria dependent on the tests of necessity and proportionality, with revised guidance for children’s hearings will ensure that a measure of MRC will only be considered where appropriate.

Information to victims

Key background and policy context

77. Information-sharing in relation to the children’s hearings system is enshrined in legislation⁴¹ which makes provision for victims to request information from the Children’s

⁴¹ Sections 179A to 179C of the [Children’s Hearings \(Scotland\) Act 2011](#) . These provisions were inserted into the 2011 Act by section 27(1) of the [Age of Criminal Responsibility \(Scotland\) Act 2019 \(legislation.gov.uk\)](#). They came into force on 29 November 2019.

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.

78. These provisions were inserted into the 2011 Act by the Age of Criminal Responsibility (Scotland) Act 2019, albeit that Act was a vehicle for the introduction of broad-ranging information-sharing provisions for the children’s hearings system, rather than provisions which were consequential on the change in the age of criminal responsibility. As set out in the Child Rights and Wellbeing Impact Assessment⁴² produced to accompany the Bill which became that Act, these provisions support compliance with Article 16 (right to privacy) of the United Nations Convention on the Rights of the Child (UNCRC) by ensuring that decisions on information-sharing are carefully considered so as to protect the child who has been referred to the reporter and the victim.

79. The 2011 Act provides that the people entitled to make requests for information include the victim of an offence (or person harmed by a child’s behaviour), and relevant persons if the victim is under 16.⁴³

80. The Children’s Reporter may inform any of the parties listed above of their right to request information.

81. The Children’s Reporter can provide to a victim, or relevant person, information about:

- The reporter’s final decision on whether or not to arrange a children’s hearing, and
- The final outcome when a children’s hearing is arranged.

Policy measures and objectives

82. This is a finely balanced area. Care must be taken to ensure the Kilbrandon ethos of the children’s hearings system (which has the needs and welfare of the child who is subject to the referral at the centre), is not compromised. Crucially, children’s hearings are not criminal justice settings and the rights of the victim must be carefully balanced against the rights of the child.

83. 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 200⁴⁴ of the 2011 Act) as well as or instead of a victim, where the victim is a child.

84. This reframes the existing provisions which give the Children’s Reporter the *discretion* to advise a person entitled to information of that right. The Scottish Government understands that

⁴² [Age of Criminal Responsibility \(Scotland\) Bill: children’s rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot)

⁴³ “Relevant person” is defined in section 200 of the 2011 Act.

⁴⁴ [Children’s Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

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 simply seek to place that current practice on a statutory footing. The benefits of this are explained in more detail below.

85. This reframing of the ability to advise of the entitlement is informed by the Scottish Government's overarching intention for person-centred and trauma-informed responses to people who have been harmed, in a way that continues to strike the right balance between the rights of the child who has been referred to the reporter and victim, thus supporting continued compliance with Article 16 (right to privacy) of the UNCRC.

86. The change will also make it clear to victims that they can – subject to certain necessary exceptions – expect to have a clear understanding of their right to information from the Children's Reporter. The Scottish Government considers that placing the Reporter under an obligation to advise of this right creates desirable certainty for victims about how they can expect to be treated.

87. It is important to note that this change does not mean that a person entitled to receive information will automatically receive that information. The change is purely about creating a statutory obligation to advise of the right to the information, subject to certain necessary exceptions. Those exceptions cover the situations where it will not be possible or appropriate for a person to be advised of their rights. Firstly, the new provision makes it clear that the obligation only applies to the Children's Reporter where it is practicable for them to contact a victim. This reflects that in a small number of cases SCRA is unlikely to have the information necessary to contact a victim. The exceptions will otherwise cover the situations where it is not appropriate to contact a victim because consent to do so has been withheld or it would otherwise not be in their best interests, or relevant persons where such an approach could be detrimental to a child victim, or to certain other people.

88. At present, SCRA obtain contact information for parties entitled to receive information from information provided to them by Police Scotland. SCRA is also working with the COPFS to agree an exchange of information where a case is remitted to a children's hearing from the criminal courts. However, in a small number of cases the information SCRA possesses may not enable them to make contact with a victim, in which case SCRA cannot be required to advise a person of their right to request information.

89. SCRA may also be aware that a victim does not wish to be contacted by them in relation to the children's hearing. In such cases, the Scottish Government considers it paramount that the victim's wishes be respected. Accordingly it is appropriate for the duty to be subject to an exception that it need not be carried out where SCRA are aware that a victim does not wish to be contacted by them.

90. As stated above, SCRA will write to a relevant person rather than a victim where the victim is a child under 16 (to be amended to 18). While considered unlikely, it is possible that a relevant person in relation to a victim may in fact be the person who has harmed the victim. SCRA might be aware of this because, for example, there could be a referral to a children's hearing of the victim on child protection grounds. In those cases the Scottish Government considers that it would not be appropriate to contact that relevant person and so there should be an exception for such a scenario.

Alternative approaches

No change

91. The Scottish Government considered whether making no provision in this Bill in relation to information-sharing would be appropriate.

92. As stated above, the Children's Reporter already writes to victims to advise of their right to request information where they have the information necessary to enable them to do so. An option would have been to leave this practice on an administrative basis. The Scottish Government considers that this would not have been aligned to its general victim-centred approach and therefore it is appropriate to reframe what is currently done. The new provisions provide certainty to victims in relation to how they can expect to be treated. Furthermore, the creation of exceptions to the new obligation will create certainty for SCRA from an operational perspective in terms of the situations where the new duty will not apply.

Consultation

93. In response to the previous 2020 consultation on raising the age of referral to the Children's Reporter, the majority of respondents (77%) felt that more information and support should be given to people who have been harmed. In this year's consultation, various respondents again supported this. However, this was often caveated, with a view that the sharing of any further information should be balanced and proportionate: respecting both the need for a person harmed to receive further information, whilst also respecting the wellbeing of the child who has caused the harm (particularly as regards their right to privacy and data protection).

94. There was widespread agreement amongst victim centred organisations that SCRA should be empowered to share further information with a person who has been harmed (and their parents, if they are a child) if the child is subject to measures that relate to that person. Respondents expressed that sharing further information in these instances can provide a person harmed with a sense of safety, reassuring them that the harm had been acknowledged and action was being taken to ensure it did not occur again. Victim organisations stressed that this was particularly important for high-level harms, including sexual and domestic abuse which might be dealt with more frequently by the children's hearings system should the maximum age of referral to the Principal Reporter be increased.

95. It is the case however, that particular attention was also afforded to the importance of implementing a case-by-case approach to the sharing of any further information, as well as the need for robust safeguards to be applied relating to the scope and nature of any further information to be divulged - to ensure no infringement on the rights of the person causing harm. This was particularly stressed by Children's Rights organisations, children's hearings systems-related organisations and some Local Government/Social Work respondents. The importance of further information being shared with the child victim (and their parents if they are a child) in an accessible and easily understood format was also highlighted within certain responses.

96. Nine young people agreed that further information should be shared where a measure is in place that relates to the person who has been harmed, and one disagreed. The reasons given for this reflect many of the adult responses, in emphasising that this should be in place for the

protection of the person who has been harmed and allow them to report any cases of non-compliance to these measures. Respondents balanced this with an acknowledgement of privacy and confidentiality issues for the person who caused harm, and the need for any information to be shared carefully and avoid sharing information re. measures that relate to private or sensitive aspects of the child's life, i.e., their home circumstances, irrelevant background information, any substance misuse or mental health orders.

Extension of duty to provide support beyond 18

Key background and policy context

97. Children's hearings can only make compulsory measures on a child up to age 18. A fundamental principle is that the hearing will consider the individual circumstances of each child, and only make a compulsory order if strictly in their best interests. In terminating a child's order, a hearing must consider whether further voluntary supervision or guidance is needed and, if so, make a statement to that effect. In this circumstance the local authority must provide such supervision and guidance as the child will accept. This complements after care provisions and recognises the ongoing responsibilities of local authorities to children who have required supervision up to age 18 and may require ongoing help.

Policy measures and objectives

98. It is desirable to smooth the transition for supports available to children as they move into adulthood, avoiding the 'cliff-edge' which may otherwise occur at age 18. The intent is to ensure the local authority has a duty to provide support should the hearing decide that ongoing supervision and guidance is likely to be helpful to the young person whose order will be terminated. If the young person is in agreement, the local authority will continue the relationship without compulsion on the young person to do so, up to age 19. This will ensure the young person does not 'fall through the cracks' as they will already be known to the local authority. This is consistent with the approach to providing aftercare to looked after children in the Children and Young People (Scotland) Act 2014.⁴⁵

Alternatives

No change

99. The alternative is to make no provision for children whose orders are terminated purely by virtue of turning 18. This would not meet the policy aim to support transition between childhood and adulthood for those who need it. Whilst the young adult could make an application for after care it would not be automatic and could cause delay in them accessing the appropriate support.

Extending the children's hearings system beyond 18

100. Consideration has been given to whether to extend compulsory measures beyond 18 using the children's hearings system. The system itself is completely designed around making decisions about compulsory orders on children, with relevant persons also having rights in relation to the child. The test currently to be applied is that compulsory orders can be made only if necessary to

⁴⁵ Under Part 10 of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

safeguard or promote welfare throughout a child's childhood. Current disposals include measures of residence with relevant persons, kinship or foster carers, named residential places or secure accommodation. Any extension beyond age 18 would require an entirely new framework for the system, and the tests needed to justify compulsion beyond childhood would require to be restated to accommodate the rights of the evolving young-adult, with limited options for non-compliance. Further, this could cause capacity issues in the system and volunteer panel members would require to be trained and supported in decision-making in relation to young people as opposed to children. This option has therefore not been taken forward.

Consultation

101. In consultation responses, the key reason given in support for this was that the proposal would improve transitions for children and young people and offer a continuity of support for those whose CSOs are being terminated by virtue of them turning 18. This was particularly emphasised by Local Government/Social Work respondents. It was expressed that a closure report would facilitate multi-agency working, informing aftercare support of the needs and risks of the young person.

102. Relatedly, several respondents highlighted that this option would help alleviate the 'cliff edges' that young people can face, where they are no longer eligible for the support they need by virtue of turning 18. It was expressed that this proposal would allow for a young person's needs, risks and developmental stage to be taken into consideration when determining whether further support is required, rather than simply their age. Conversely, several respondents raised key concerns related to this proposal, including that the proposal could complicate an already complex landscape, given that there are already aftercare requirements and duties that cover children whose CSOs have been terminated on or after age 16. However, several respondents also expressed concerns that this support was not being consistently provided.

PART 2: CRIMINAL JUSTICE AND PROCEDURE

103. This part of the Bill is made up of provisions in seven distinct but interrelated areas:

- Involvement of children in criminal proceedings: general;
- Prosecution of children (as discussed under Part 1 in this document);
- Safeguards for children involved in criminal proceedings (including for children in police custody);
- Remit to children's hearing from criminal courts;
- Remand, committal and detention of children;
- Places where children can no longer be detained;
- Local authority duties in relation to detained children.

104. It is anticipated that as a result of raising the age of referral a reduced number of children will have their cases dealt with via criminal proceedings and prosecution at court, but the provisions in the Bill will not remove this option nor the discretion of the Lord Advocate and Procurator Fiscal. This will build upon the over 85% reduction in the last 12 years in the number

of children and young people prosecuted in Scotland's courts and a 93% reduction in 16 and 17-year-olds being sentenced to custody.⁴⁶

Children in police custody

Key background and policy context

105. Where a child aged 12 or over is suspected of committing an offence, they can be brought into police custody. Efforts are made to avoid bringing children into a police station but where this is unavoidable, children have a range of rights.⁴⁷ There is variation in how these rights are upheld dependent on whether the child is a "younger child" (aged under 16 or aged 16/17 and subject to measures through the hearing system) or "older child" (16/17 year old not subject to any children's hearings system measures). These include:

- Keeping children in a place of safety prior to attendance at court;
- Notice to a parent and local authority that a child is to be brought before court;
- Consent to interview without a solicitor;
- Right to have intimation sent to another person to advise that the child is in custody and right of access to that person;
- Social work involvement.

106. With the amended definition of a child that comes with changes in Part 1 to define child as those under 18, as well as this being in keeping with UNCRC, such a distinction between "younger" and "older" children is arguably inconsistent with the broader provisions in this Bill and approach to children in Scotland. It is necessary to ensure that whilst respecting the evolving capabilities for children aged 16/17, that these children are also protected.⁴⁸ Moreover, whilst some parental rights and responsibilities cease at 16, the responsibility to provide a child with direction and guidance appropriate to the child's developmental stage continues to 18, with parental involvement when a child is involved in justice systems given additional attention in international human rights standards.⁴⁹

Policy measures and objectives

107. It is the Scottish Government's policy to ensure that there is a more consistent approach to the upholding of children's rights when in police custody for all children. All people under age 18 are children and should have enhanced rights when in police custody, with provision made under section 11 of the Bill.

108. Research confirms that police stations and cells can be frightening, distressing and traumatising places for children, with by their very nature their ability to be child-centred limited.⁵⁰

⁴⁶ [Justice for children and young people - a rights-respecting approach: vision and priorities - gov.scot \(www.gov.scot\)](https://www.gov.scot)

⁴⁷ [Criminal Justice \(Scotland\) Act 2016 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁴⁸ In accordance with international human rights standards such as [Refworld | General comment No. 20 \(2016\) on the implementation of the rights of the child during adolescence](#)

⁴⁹ For example [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \("The Beijing Rules"\)](#)

⁵⁰ CYCJ research on children in police custody is forthcoming.

Children report that it can be difficult to understand what is happening to them, what their rights are and how these can be upheld.⁵¹ Therefore, it is important that children are only kept in police custody when this is necessary and proportionate.

109. The Criminal Justice (Scotland) Act 2016⁵² provides that every precaution should be taken to ensure that a person is not unreasonably or unnecessarily held in police custody, and in taking a decision as to whether to hold a child in police custody, the wellbeing of the child is a primary consideration. Guidelines issued by the Lord Advocate sets out a presumption of liberty, unless factors such as the serious nature of the offence, a significant risk to victims or witnesses and the nature and timescale of further enquiries, justifies police custody.

110. If a child who is being prosecuted for an offence is in police custody, and is not being liberated by the police, the place of safety must not be a police station unless it would be impracticable, unsafe or inadvisable for reasons of the child's health to be kept anywhere else. The provisions mean that this will now extend to all under 18s so that an alternative place of safety⁵³ is considered for all children and except in limited circumstances, children should not be kept in police stations.

111. A key change is that the local authority will now be informed when any child under 18 is in police custody. This ensures that the local authority can visit a child if they believe this would best safeguard and promote the child's wellbeing. Social work have a key role in assessing and responding to the needs of children and arguably a child's placement in police custody is indicative of wider wellbeing needs and that the child requires support. The child will undoubtedly be in difficult circumstances and potentially vulnerable, rendering it likely the child may benefit from such involvement. The local authority can also provide information to the police that they would not otherwise have for example about who would or would not be an appropriate person to be informed of the child being in police custody or in respect of the child's care status. Therefore an enhanced role for social work for all children is justified.

112. For a child under 16 in police custody, their parents will always be informed and asked to attend reflecting parental responsibilities and international human right instruments, unless the local authority advises this would be detrimental to the wellbeing of the child.

113. From age 16, respecting the evolving capabilities of child, the child will have the choice to nominate that another adult other than a parent is notified of their being in custody (subject to the local authority being able to give information that intimation should not be sent because that may be detrimental to the wellbeing of the child). The child can also request that no intimation is sent, the adult is not asked to attend the police station, does not have access to them, or for attempts to make contact to cease. In such instances the local authority should be notified. Likewise, in any

⁵¹ Efforts have been made to address this, for example through the coproduction of materials like [CYCJ-Know-Your-Rights-Guide-WEB.pdf](#).

⁵² [Criminal Justice \(Scotland\) Act 2016 \(legislation.gov.uk\)](#)

⁵³ A place of safety is as defined under section 202 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](#). This can only include secure accommodation if regulation 12 of [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#) is met

case, should parental or another adult access to the child be refused or restricted,⁵⁴ the local authority should be notified.

114. The aim is to ensure every child has an appropriate person notified and no child is left in police custody without being visited by either a parent, another adult or the local authority.

115. Similarly, amendments to notifications to parents/local authority to inform that a child is to be brought before court should enable the child to be supported. In terms of local authority notification, this should provide an additional and earlier means of identifying children who will be appearing at court and potentially afford more time to ensure appropriate support can be put in place for the child as required, in keeping with the WSA.

116. In respect of solicitor access, the Scottish Government deem this is an important right and safeguard for children. The Scottish Government therefore do not deem the ability of any person under 18 to waive access to a solicitor to be appropriate, with provisions made in section 11 that no one under 18 can consent to being interviewed without having a solicitor present.

Alternative approaches

No or limited changes

117. In light of the direction of Scotland's approaches to all children under 18, it was not deemed to be consistent with policy aims to make no change in this area. Making only limited changes would further increase inconsistency and complexity of approach, which is not desirable. It is necessary for all children under 18 to be treated as children and be given appropriate safeguards if they are detained by the police.

Consultation

118. No questions specifically in respect of children in police custody were asked in the consultation. This was because these changes are linked only in a fairly limited way to the changes of the definition of a child. In the consultation there was general support for all children under 18 having a route to secure accommodation where this was necessary, which could in limited circumstances include children in police custody.

Safeguards for children involved in criminal proceedings

119. Provisions in sections 12 to 14 of the Bill relate to the framework for reporting suspected offences or proceedings involving children and taking of steps to safeguard welfare and safety of children in criminal proceedings.

⁵⁴ As per section 40(4) of the [Criminal Justice \(Scotland\) Act 2016 \(legislation.gov.uk\)](https://legislation.gov.uk)

Framework for the reporting of suspected offences or proceedings involving children

Key background and policy context

120. Under the UNCRC and international human rights standards, a child's general right to privacy is given additional attention in cases where a child is in conflict with the law⁵⁵ and/or is appearing as a witness. In respect of the former Article 40(2)(vii) of the UNCRC is clear on the child's right: "To have his or her privacy fully respected at all stages of the proceedings". The Beijing Rules⁵⁶ further that this is to "avoid harm being caused to her or him by undue publicity or by the process of labelling... In principle, no information that may lead to the identification of a juvenile offender shall be published". In Scotland the identification of a child as either accused or acting as a witness (see below) is relatively rare.

121. At present, section 47 of the Criminal Proceedings (Scotland) Act 1995 governs reporting restrictions where proceedings involve children where a child (under 18) is the person against whom court proceedings are taken (sometimes known as the accused⁵⁷), there is an automatic prohibition on a newspaper report revealing the identity of the child or any other child involved in the court proceedings.⁵⁸ These reporting 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 the court so directs.

122. Whether the child is appearing in court is the accused or is a witness, the court has the power to dispense with reporting restrictions (at any stage of proceedings) and the Scottish Ministers has the same power (but after proceedings have concluded).⁵⁹ In either case, reporting restrictions can be waived to the extent considered necessary where that is in the public interest.

123. Where the child is the accused, the decision to identify them by dispensing with reporting restrictions is a matter of judgement, involving the balance of competing factors. Currently, on turning 18, a child involved in criminal proceedings or who pled or was found guilty of an offence in childhood can be publicly identified.

124. Arguments to support the public identification of children who commit offences in childhood often relate to the principles of open and transparent justice, which are important in ensuring the integrity and accountability of the justice system and upholding public confidence.⁶⁰ The rights to freedom of expression, to fair and public trials of the public at large and the rights of people who have been harmed by parts of the child's behaviour are also cited.

125. Some key commentators have argued that the identification of children who have committed offences in childhood is not consistent with children's rights or justified, arguing that

⁵⁵ Article 16 and Article 40(2)(b)(vii) of the [UN Convention on the Rights of the Child \(UNCRC\) - UNICEF UK](#) and [Rule 8 United Nations Standard Minimum Rules for the Administration of Juvenile Justice](#)

⁵⁶ [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \("The Beijing Rules"\)](#)

⁵⁷ For the purpose of this document, "the accused" is used to refer to a child suspected or accused of committing an offence and/or who has pled or been found guilty of an offence during court proceedings

⁵⁸ Section 47 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

⁵⁹ As above

⁶⁰ For more details see [The naming of child homicide offenders in England and Wales: The need for a change in law and practice — Monash University](#)

this should never be permitted, and also that such anonymity should be lifelong.⁶¹ UNICEF UK,⁶² the UK's four Children's Commissioners, and CYPSC in the most recent consultation⁶³ are amongst those who have called for such change in Scotland.

126. Central to these arguments is the need to keep people safe and to uphold their rights, which can be jeopardised through public identification. For children this includes their rights to survival, development, protection, privacy and recovery, as enshrined in human rights legislation and international standards. The rights of family members, including to privacy can also be detrimentally affected, including any siblings or children of their own they may have.⁶⁴ The resulting shame and stigma can cause the breakdown of family relationships and contact with the individual, which has implications for reintegration and rehabilitation.

127. A further argument relates to the unique developmental position of children and young people that requires a distinct approach. As detailed in the Sentencing Council Guideline and accompanying research, children and young people have not fully physically and psychologically developed or achieved maturity, resulting generally in poorer decision-making and consequential thinking, with greater vulnerability to negative influences and propensity to take risks. Children and young people are also particularly susceptible to stigmatisation, with the detrimental and long-term impacts of labelling having been well established in literature and research.⁶⁵ The stigmatisation and shaming of a child and young person where a child is identified can therefore be felt more acutely than by an adult. This can be further compounded by the notoriety, particularly where a serious offence has been committed, that again is likely to be experienced even more acutely for children than adults.⁶⁶ Children and young people are also less likely to be able to deal effectively with such public identification, notoriety and the resulting attention this brings, by virtue of their age and stage of development and more limited life experiences. Such exposure can also exacerbate pre-existing vulnerabilities and result in poorer outcomes, further evidencing the need for a distinct approach to both those who committed offences in childhood whilst they are children and for such protections not ceasing on turning 18.

128. Moreover, for children and young people their culpability is generally lower than that of an older person but as detailed in the Sentencing Young People's guideline⁶⁷ it is also pointed out: "*rehabilitation is a primary consideration when sentencing a young person... The character of a young person is not as fixed as the character of an older person, and a young person who has committed a crime may have greater potential to change*". Promoting rehabilitation and reintegration should, in accordance with international human rights legislation and Scottish policy, be a core aim of approaches to children and young people in conflict with the law, and arguably serves the interests and safety of the public. However as Hart⁶⁸ has concluded "*There seems little doubt that being publicly named puts rehabilitation at risk*". This is because the identification of children and young people reduces the ability to access the identified core components that support

⁶¹ This is consistent with the Committee on the Rights of the Child in [General comment No. 24 \(2019\) on children's rights in the child justice system](#)

⁶² [A Rights-Based Analysis of Youth Justice in the United Kingdom - DocsLib](#)

⁶³ [Report-of-the-UK-CCs-UNCRC-Examination-of-the-Fifth-Periodic-Report.pdf \(childcomwales.org.uk\)](#)

⁶⁴ [What's in a name? The identification of children in trouble with the law — AYJ, Alliance for Youth Justice](#)

⁶⁵ [A Rights-Based Analysis of Youth Justice in the United Kingdom - DocsLib](#)

⁶⁶ [The naming of child homicide offenders in England and Wales: The need for a change in law and practice — Monash University](#)

⁶⁷ [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](#)

⁶⁸ [What's in a name? The identification of children in trouble with the law — AYJ, Alliance for Youth Justice](#)

rehabilitation, reintegration and desistance such as safety, healthy and positive relationships, education and employment opportunities, connectedness and sense of self-worth.⁶⁹ Moreover, where a child is not named but is subsequently named after turning 18 this can make the progress made in terms of rehabilitation and reintegration more challenging to sustain, which further supports the extension of childhood anonymity.

129. The identification of children and young people can also be deemed an additional, disproportionate punishment to any sentence imposed by the courts and one that is often lifelong and inescapable: this information is in the public domain forevermore regardless of how much the child or young person has changed or matured.⁷⁰

130. Moreover, Scotland has recognised that childhood offending should be treated differently to that of adults, as illustrated in the unique disclosure considerations, meaning a child might have committed an offence that no longer requires to be disclosed. The current position on the removal of reporting restrictions at age 18 is inconsistent with this, as well as the approach advocated in international human rights standards. For example, the Committee on the Rights of the Child in general comment 24⁷¹ states “*there should be lifelong protection from publication regarding crimes committed by children....pertaining to all types of media, including social media*”. If the child is publicly named their offence could be known and information publicly available anyway, meaning the benefits and protections the disclosure system affords to those who commit offences in childhood may become meaningless. The above arguments therefore support a change of approach in Scotland to childhood offending, both before and after the child concerned turns 18.

Policy measures and objectives of the Bill

Child accused

131. The current legal provisions that reporting restrictions are automatically applied to a child under 18 in court proceedings are retained, with the courts having power to lift restrictions in the public interest. The Bill however under sections 12 and 13 extends the restriction, applying to a child suspected of an offence up to the completion of proceedings-at which point the court may dispense with restrictions or alternatively leave the restrictions in place until the child attains the age of 18. The sentencing court may also direct that the restrictions remain in place beyond age 18. If the proceedings against a child suspect are not continued, or the child is found not guilty the restriction applies lifelong unless the court determines otherwise.

132. Before court proceedings, where a suspected offence involves children, either as the person suspected of committing the offence or a witness, a court will only be able to dispense with reporting restrictions if this is in the interests of justice (as per section 12). This extended protection is important as the implications of a child being identified are similar and significant at whatever stage this is, and if identified during an investigation, this undermines the protection offered by the presumption of anonymity during court proceedings. The interests of justice test is slightly narrower in this context than public interest and fits more naturally with what is required for the

⁶⁹ For a summary see as above

⁷⁰ [What's in a name? The identification of children in trouble with the law — AYJ, Alliance for Youth Justice](#)

⁷¹ [OHCHR | General comment No. 24 \(2019\) on children's rights in the child justice system](#)

proper and fair investigation of crime, this being the main circumstance for dispensing with restrictions at this stage of proceedings.

133. In respect of court proceedings, as per section 13, reporting restrictions would apply when the child was aged under 18 at the alleged date of commission of the offence and until the child turned 18 or the conclusion of proceedings, whichever came later. This is in recognition that court proceedings relating to childhood offences may take place or conclude when the child is aged over 18 but still relate to childhood offences. Reporting restrictions will only be able to be removed by the court on the disposal of the proceedings, as opposed to at any stage as is currently the case. This means guilt will have been established and the full facts of the case and circumstances will have been made available before a decision is made to consider lifting restrictions. A report will also have to be completed by the local authority to inform such considerations, supporting the decision to be made on as full information as possible. This will also ensure that the child is aware of any consideration that they might be publicly identified, supporting the upholding of the child's rights, including to have their views taken into account, and appropriate support and safety planning to be made for the child and family members as required. The Scottish Ministers will continue to have discretion to dispense with restrictions after completion of proceedings.

134. The provisions in section 13 enable court discretion to extend reporting restrictions beyond the child turning 18 or the disposal of proceedings, recognising the need for a distinct approach to offences committed in childhood. If the court did not extend anonymity beyond 18, as is currently the case reporting restrictions would cease once the proceedings had concluded, if the person was now over 18 or once the child turns 18. This approach enables judicial discretion in such cases and stops short of providing automatic anonymity for all children who commit offences in childhood.

135. Public interest will remain the test for dispensing with reporting restrictions (or extending these beyond 18) and in determining what would amount to public interest, and to help to promote consistency, clarity, understanding and transparency of the considerations in such decisions, a non-exhaustive list of factors that the court or Scottish Ministers must consider are specified.

136. If the child is aged under 18 at the time of consideration:

- The child's wellbeing must be a primary consideration;
- Have no regard to the length of time until the child reaches age 18. This is because publishing restrictions may be extended beyond age 18, and even if not, it is inconsistent with what is known about the maturity, culpability and rehabilitation of children to dispense with reporting restrictions even earlier than age 18, simply because it is possible that reporting restrictions might be lifted at age 18.

137. That a person's identity is already known to some people is not a factor in favour of allowing publication (as publication necessarily means that a very large number of other people would or could also know the person's identity).

138. The factors are based on analysis of case law, existing guidance/legislation, and available evidence.

139. The Bill provides new rights of appeal in relation to a decision to dispense with reporting restrictions, and/or not to extend restrictions. Provision is also made to enable a review of an order to extend publishing restrictions by the court either at the request of a media representative, or the person to whom the information relates.

Child witnesses

140. To ensure child witnesses (which may include a child who is the victim of an offence) benefit from automatic application of publishing restrictions, the Bill amends the existing provisions governing reporting restrictions in relation to children in section 47 of the Criminal Procedure (Scotland) Act 1995 so that these restrictions automatically apply to a witness under age 18 irrespective of the age of the accused unless the court lifts the restriction in the public interest. In line with the approach taken to a child accused, the Bill provides that a witness is also to be protected by reporting restrictions that will apply from the point in time that the offence is allegedly committed. The Scottish Government considers that such changes are required to ensure protection for a witness against their identity being disclosed, as well as ensuring equity of protection in the context of reporting restrictions for children who are accused of committing an offence (as explained above), and child witnesses.

141. Similar to the court's power to lift restriction for accused children, the Bill sets out factors for the court to consider in relation to an application for reporting restrictions to be waived (either wholly or in part) in relation to a child witness. The purpose behind the introduction of these factors is to provide certainty and clarity in a person-centred way about how such decisions might be approached, with minimal interference in practice on the ability of the court or Scottish Ministers to exercise their discretion when considering whether to lift reporting restrictions. The factors are:

- The age and maturity of the person to whom the information relations.
- The effect that dispensing with the requirement may have on that person's wellbeing.
- The views of that person so far as they are reasonably ascertainable.

142. The Bill also makes provisions so that, where there is a section of the public which is already aware of the identity of a witness, this is not to be a factor in favour of dispensing with the reporting restrictions. This reflects the reality of 21st century communications and the need to uphold a witness's treatment as a child where they are under 18 years old.

143. However, the provisions in this Bill which govern reporting restrictions for child witnesses should be understood in the context of the Scottish Government's commitment in its 2022 Programme for Government to introduce a Bill (the Criminal Justice Reform (Scotland) Bill) which will make provision granting a statutory right of automatic lifelong anonymity to complainers in sexual offence cases.

144. It is the Scottish Government's policy – notwithstanding the general approach to reporting restrictions in this Bill – that child victims of sexual offences should benefit from the planned provisions on automatic anonymity in the forthcoming Criminal Justice Reform (Scotland) Bill. The particular traumatic nature of these offences and their impact on a victim, especially where that victim is a child, means that a bespoke approach is appropriate and as such it is planned that

the provisions in the Criminal Justice Reform (Scotland) Bill will take precedence in this area. Therefore, it should be noted that the provisions governing restrictions on publication of identifying information insofar as they extend to child victims of sexual offence cases in this Bill are subject to change in the future given the planned provisions on automatic anonymity for complainers in sexual assault cases in the Criminal Justice Reform (Scotland) Bill.

145. The Bill also makes provision to enable an appeal by a victim or witness against the direction of a court to lift reporting restrictions, in the same way that it does for appeals by a child accused. The Scottish Government considers it necessary to create this bespoke appeal pathway for witnesses and victims to ensure that any concerns they have about a decision on the lifting of restrictions can be considered.

Reporting Restrictions covered by provisions

146. The Bill makes provision to extend the reporting restrictions beyond newspaper, sound and television to cover any publication in whatever form, which is addressed to the public at large or any section of the public and is likely to identify the individual.⁷² The Scottish Government considered that current provisions did not adequately reflect the reality of 21st century media, digital platforms in particular. The change will therefore help ensure that children appearing at court (whether as witnesses or accused) benefit from a more robust suite of protections against disclosure of their identity across a variety of publications (particularly in the context of the internet and social media). This is also in keeping with international human rights standards.

Alternative approaches

Child accused

No change

147. Consideration was given to making no change in this area, recognising in practice the public identification of children who commit offences in childhood is relatively rare and the complex and emotive manner of such decisions. However, given the significant implications of doing so, Scotland's progressive agenda in respect of children's rights, and issues identified above, as well as the strength of support in consultation responses, this position was deemed untenable. The public identification of such children is one of polarised views between those who would advocate that no child should ever be identified and protections should be lifelong and those who maintain this should be possible in limited exceptions when there are valid grounds for doing so, for a time limited period. It was deemed the above provisions achieve the right balance.

Varying the public interest test

148. Consideration was given to varying the test in court proceedings to protecting the public from serious harm and/or in the interests of justice. The evidence base that public protection is enhanced by dispensing with publication restrictions to enable the public identification of children who committed offences in childhood is lacking.⁷³ Public protection measures are distinct from public identification. Where a child has committed a particularly serious offence there will be a

⁷² This brings consistency with section 2 of the [Contempt of Court Act 1981 \(legislation.gov.uk\)](http://legislation.gov.uk)

⁷³ [What's in a name? The identification of children in trouble with the law — AYJ, Alliance for Youth Justice](#)

raft of risk management and public protection measures in place which may include Care and Risk Management procedures, MAPPA, deprivation of liberty, extended sentences and licence conditions on release (including life licence), none of which require the public identification of the child. In addition, in many of these instances, victims will be provided with information about an individual's identity or whereabouts as part of court processes, victim safety planning or existing provisions for sharing information with victims, for example under the Victim Notification Scheme. Moreover, public protection arguments start from a defeatist position whereby a child's behaviour cannot change which is neither supported by evidence or consistent with Scotland's approach to justice. A test related to serious harm would also be narrower than the current public interest test, thereby limiting circumstances in which a child could be identified. As a result this approach was not pursued.

149. The rationale for the interests of justice test being used in considerations related to suspected offences involving children is as detailed above.

Reporting restrictions into adulthood

150. The Scottish Government did consider if a reporting restriction was made as regards offending under 18, if this would continue lifelong. However, it was deemed important to consider reporting restrictions in relation to under 18 offending and over 18 as separate policy aims. The Scottish Government believes childhood offences require distinct attention and therefore deem it is essential to change the current arrangements whereby children can be automatically identified on turning 18. The provisions therefore allow court discretion to continue publishing restrictions beyond 18 either lifelong or for a specified period (i.e. to the occurrence of a particular event or set of circumstances or age), enabling consideration on a case-by-case basis. Along with the ability for a media representative or individual who is the subject of the restriction to request a review of reporting restrictions when extended beyond 18, which could result in variation or revocation of restrictions, allows for a more individualised approach to be adopted that should allow for the greatest opportunity to achieve the policy aims. This approach aims to strike the balance between the current approach of all individuals who commit childhood offences being able to be identified post-18, with those who would advocate for lifelong anonymity in all such cases.

Child witnesses

No change

151. The Scottish Government understands that protection against publication currently requires the courts to issue a direction that publication restrictions be in place in relation to a witness under 18. In practice this has resulted in directions not being made or made only where the accused themselves is under 18. Therefore, generally speaking witnesses under 18 may not always benefit from publishing restrictions

152. In addition, the current legislation does not provide the person-centred, trauma-informed approach which Government wishes to deliver for criminal justice, with reframing to better focus on the needs of the witness. By making the application of reporting restrictions automatic for under 18 victims or witnesses, this removes the need to make directions thus creating efficiencies within court processes. The Scottish Government has also had regard to the changes being introduced in relation to anonymity of a child under 18 against whom proceedings have been brought.

New approach to child complainers in sexual assault cases

153. The Scottish Government consulted in May 2022 on improving victim experiences of the justice system, including seeking views on anonymity of complainers in sexual assault cases,⁷⁴ seeking views on whether there was a gap in the law, when an automatic right to anonymity should take effect, and anonymity in respect of children.

154. The provisions in the current legislation which govern witness anonymity apply in relation to all types of crime, not solely to sexual assault cases. Further, they govern witnesses in general, not complainers in relation to particular categories of offence. The consultation on improving victim experiences of the justice system sought views in relation to anonymity for a limited type of complainer, and the Scottish Government concluded that responses to this consultation could not reasonably be construed as a robust body of evidence in terms of extending the measures under discussion in the consultation to witnesses generally.

155. The Scottish Government will monitor any provisions introduced in relation to anonymity for complainers in sexual offence cases in the usual way. As part of that, it can consider if these provisions, or aspects of the same, should be extended to other areas of the justice system.

Consultation

156. In the consultation, views were sought on three interlinked proposals:

- 1) That the judge's discretion to make an exception to identify a child accused should be further limited. Instead of this being permissible when in the public interest, instead this should only apply when the court is satisfied this is necessary for the purpose of protecting the public from serious harm and/or in the interests of justice.
- 2) That legislative change is made to enable a child's right to anonymity to apply from their first contact with the criminal justice system, including pre-charge.
- 3) That the post-18 identification of children who have come into conflict with the law aged under 18 ceases. Where a child has been convicted of an offence aged under 18, their right to anonymity should be maintained into adulthood, unless it is determined subsequent to the child turning 18 that, for reasons of protecting the public from serious harm and/ or the interests of justice, such identification is necessary. That anonymity should persist until that young person turns 26.

157. Almost all consultation respondents who answered this question agreed that there needed to be at least some change to anonymity for children. The reasons for such support often related to children's rights, including the safety of the child and their family, and the impact for future rehabilitation. There were various views and points of clarity sought regarding the most appropriate future test for dispensing with reporting restrictions. Likewise, in respect of option 3 there were different views expressed concerning how a child's age factored into anonymity, including calls for lifelong anonymity.

⁷⁴ [anonymity of complainants in sexual assault cases](#)

158. Five young people supported all changes, four supported some and only one supported none of the proposals in this question. The key reasons given in support of the changes were that extending anonymity for children and young people will protect themselves and their families from violence, harassment and being ostracised in their communities, whilst simultaneously supporting their rehabilitation and enhancing their job and educational opportunities. There were differing views across young people regarding whether proposals should be caveated with concerns for public safety. The minority felt that committal of a serious offence such as murder should mean that publication is permitted.

159. Changes in respect of child witnesses were not consulted on. However, in order to develop the policy underpinning the Bill, the Scottish Government has considered where relevant responses to the questions in the consultation. These include the benefits to a child of anonymity, privacy concerns, and a future test for dispensing with restrictions.

Taking of steps to safeguard the welfare and safety of children in criminal proceedings

Key background and policy context

160. Provisions in section 14 relate to children at court, seeking to enhance the welfare and safety of these children. Support to children at court has been a long-standing core domain of the WSA. The necessity for such support is based on the recognition that failure to support children through the totality of the criminal justice process or address their wider needs and risks, can lock them into a cycle of reoffending, which is in no-one's best interests.⁷⁵

161. Amendments to court conduct, practices and processes in respect of children can already be made, informed by a combination of existing legislation, Practice Notes, and court rules and procedure.⁷⁶ These considerations and amendments for children at court by virtue of their age, are in addition to other supports that may be provided owing to a child's other vulnerabilities. These changes build upon existing and previous pilots and initiatives seeking to improve approaches to and the experiences of children at court, with various related initiatives within the overall justice system underway as detailed in the consultation.

162. The Scottish Government however recognises the domestic and international evidence highlighting concerns about the appropriateness of children's position in the criminal justice system and traditional courts. These include the fulfilment of child-friendly justice⁷⁷ and children's experiences of proceedings, particularly the challenges faced by children in understanding and participating in court proceedings and the traumatising and re-traumatising impact.⁷⁸ There is extensive evidence on the difficulties faced by child defendants in criminal courts, rendering children significantly less likely to understand and effectively participate in court proceedings, which may mean the child is unable to exercise their rights under the UNCRC.⁷⁹ The approach to addressing these concerns has therefore been by building upon national and international research,

⁷⁵ [Assisting young people aged 16 and 17 in court](#)

⁷⁶ For example as outlined in the consultation response by [Response 622342867 to Children's Care and Justice Bill - consultation on policy proposals - Scottish Government - Citizen Space](#)

⁷⁷ [Council of Europe: Guidelines on Child-Friendly Justice | CRIN](#)

⁷⁸ As detailed in [Evaluation of South Lanarkshire structured deferred sentencing for young people](#) and [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](#)

⁷⁹ See [Scotland's approach to children in conflict with the law \(cycj.org.uk\)](#) for summary

and international human rights instruments law, which offer best practice that should underpin any approach to children at court.

163. Improving the experiences of children in the criminal justice system benefits not just the individual child involved but wider society. The evidence indicates that if people feel they have been treated fairly, they are more likely to believe that the courts have a right to make decisions, and are more likely to comply with these decisions. This reduces the likelihood of the individual coming into further conflict with the law and, in turn, future people being affected by offending.⁸⁰ Change is also necessary to progress Scotland's ambition to further the rights of children up to age 18.

Policy measures and objectives

164. In advancing the Scottish Government's commitment to Keep The Promise, to uphold the rights of all children, and to transformational and smart justice, the policy objectives are to improve the experience of children appearing at court by safeguarding their welfare and safety to ensure rights-respecting, age and stage appropriate and trauma-informed treatment.

165. The relevant provisions extend existing duties or introduce new powers on courts where a child has been accused of, or has pled or been found guilty of, an offence. These measures include for the court to:

- Prevent children (up to 18) in being conveyed to or from any criminal court, or waiting before or after attendance in such court, from associating with an adult who is charged with an offence (unless a relative or is jointly charged with the child).⁸¹
- Have regard to the welfare of the child and to take steps to remove the child from undesirable surroundings for all children under 18,⁸² and in doing so consider what steps might be taken to facilitate the participation of the child in the proceedings while safeguarding the child's welfare and where reasonably practical take those steps. This will build upon existing legislative and non-legislative amendments that can be made to court practice, process and conduct by placing on a statutory footing the requirement of the court to consider, and as appropriate, take these steps. Such provision preserves the discretion of the court to determine on a case-by-case basis what amendments may be required to best meet the needs of each individual child, without interfering with judicial independence. These provisions should support the child's full understanding of and participation in proceedings which is essential in upholding children's rights, including to a fair trial.
- Extending the closed court requirements in relation to summary proceedings against children⁸³ so that such measures are also an option in solemn proceedings, as well

⁸⁰ For more detail see [problem-solving-courts-an-evidence-review.pdf \(justiceinnovation.org\)](#)

⁸¹ As is currently provided for some children under section 42(9) [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

⁸² As is currently provided for some children under section 50(6) [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

⁸³ Currently section 142(1) [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) directs that where summary proceedings are brought in respect of an offence alleged to have been committed by a child, no person shall be present at any sitting for the purposes of such proceedings except: (a) members and officers of the court; (b) parties to the

as in summary and solemn proceedings where a child is co-accused with an adult. The court must, in considering whether to put closed court measures in place in summary or solemn proceedings where a child has been co-accused with an adult, have regard to the rights of the adult to effectively participate in proceedings. In recognition of the practical considerations that may be required in solemn proceedings (as detailed in consultation responses) and, where an adult co-accused is involved in summary or solemn proceedings, these provisions to put in place closed court measures are powers rather than duties. They enable the court to make such a decision based on the individual considerations in a particular case, providing all children with the opportunity to benefit from such safeguards and protections while also recognising the rights of the adult co-accused.

166. In particular, section 14 of the Bill, seeks to improve the experience of children at court and enhance the rights of children by recognising the additional rights and vulnerabilities all children experience by virtue of their age. In requiring the court to consider what steps might be taken to facilitate the participation of the child in proceedings and, where reasonably practicable, taking those steps, it is recognised that participation is a fundamental principle of child-friendly justice. The ability for the child to understand proceedings is at the core of participation and the exercising of a child's rights to be heard.

167. The provisions also support the achievement of the Youth Justice priorities that:

- For those who go through the criminal justice system their experience should be meaningful and participative; one which educates, improves, understands and upholds the rights of children and young people.
- Improved participation and engagement of children and young people, ensuring that they have developmentally appropriate participation opportunities to help shape the decisions, services and supports that affect them.

168. They also support the achievement of Standard 5.3 of Standards for those working with children in conflict with the law:⁸⁴ *“The support provided to children in the court or judicial processes should be holistic and individualised”*. The provisions align with the Scottish Sentencing Council Sentencing Young People Sentencing Guideline,⁸⁵ which recognise in sentencing the need to take account of the young person's particular and individual circumstances and that the best interests of the child must be a primary consideration.

Alternative approaches

No change

169. Owing to the concerns detailed above regarding children's experiences at court and based on consultation responses, as well as the need to advance children's rights and Scotland's

case before the court, their solicitors and counsel, and witnesses and other persons directly concerned in that case; (c) bona fide representatives of news gathering or reporting organisations present for the purpose of the preparation of contemporaneous reports of the proceedings; and (d) such other persons as the court may specially authorise to be present

⁸⁴ [Standards for those working with children in conflict with the law](#)

⁸⁵ [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](http://scottishsentencingcouncil.org.uk)

commitment to Keep the Promise, this option was not deemed to be appropriate. However, whilst the Bill does propose extensions to existing and additional considerations in respect of court processes and safeguards for children at court, the ability for local innovation will continue.

Removal of children from traditional courts to some alternative model

170. Respondents frequently acknowledged that this would require more detailed consideration and the involvement of a range of stakeholders, including people who have been harmed by parts of a child's behaviour and children with experience of the justice system, as well as adequate resource to support implementation. The Scottish Government has recognised that some observers hold a view that the criminal court context, even where adapted, is not an optimal forum for considering the needs and developmental and cognitive stage of children.⁸⁶ The Youth Justice Action Plan⁸⁷ committed to scoping out options for a future approach where no under 18s are in an "adult court" setting, through the development of a child-friendly approach; including gathering data, views from key partners and evidence of good practice from other countries. This work is underway but not as yet concluded to be able to inform developments under the Bill. It is expected that this work will be concluded in 2024.

Consultation

171. In the Consultation, four potential options for change were outlined:

- Option 1: A re-examination of the decision-making framework between which system should deal with a child's case and the consequent interfaces between the children's hearings system and the courts.
- Option 2: The continued use of traditional court settings, recognising the local innovations that are already underway across different areas of Scotland to improve children's experiences.
- Option 3: Making changes to practice, conduct in court and support for all children, whilst retaining children in court settings
- Option 4: Any other options.

172. A high level of support was yielded for further exploration of the options outlined in the consultation as detailed above. Option 1 attracted the highest level of support, followed by option 3, then 4 and lastly option 2. Option 1 was often seen as a necessary step with the greatest potential for lasting, radical change provided the decision-making framework was reviewed to allow all (or the vast majority) children to be removed from the criminal justice system and dealt with via the children's hearings system. Whilst options 1 and 4 were often identified as more long-term goals, option 3 was frequently supported as a means to make immediate improvements to the experiences of children and young people being dealt with in court and making these more child friendly. Local innovations under option 2 were seen to provide important learning but concerns were raised about the retention of traditional courts by some respondents and that provision varied based on where a child was attending court. Children and young people expressed mixed views, with some feeling

⁸⁶ [Committee on the Rights of the Child Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland](#)

⁸⁷ [Justice for children and young people - a rights-respecting approach: vision and priorities - action plan - gov.scot \(www.gov.scot\)](#)

that traditional court settings should never be used for children and others feeling that these are appropriate in some cases.

173. A small number of respondents did raise concerns about the examples of change proposed under option 3. From the Scottish Courts and Tribunals Service, these related to the changes already being made to improve children's experiences of court and the practicalities of implementing some of the further changes proposed in the consultation. The Sheriffs' and Summary Sheriffs' Association observed that courts are the place where children's rights are heard and upheld and highlighted practical and legal challenges in implementing some of these proposals; measures already in use which may address many of the concerns underpinning the changes suggested; and existing judicial training. These views have been taken into account in drafting the provisions of the Bill.

Remit to children's hearing from criminal courts

Key background and policy context

174. The children's hearings system and criminal justice system interact in respect of certain limited circumstances, including in 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 of an offence.⁸⁸ 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 children's 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 afforded to meet the child's needs.

Policy measures and objectives

175. The provisions under section 15 bring consistency for children by removing the differential arrangements for children dependent on whether they are subject to a CSO/ICSO or not, as well as allowing the court to remit for disposal without the need for advice, where considered appropriate.

176. The provisions retain distinction between different types of court proceedings:

- Where a child is being dealt with in the High Court, the court *may* refer for advice and then thereafter may remit for disposal (with the ability to remit for disposal straight away if considered appropriate).
- Where a child is being dealt with in solemn proceedings in the sheriff court, the court *may* seek advice and then thereafter may remit for disposal (with the ability to remit for disposal straight away if considered appropriate). However, before disposing of the case itself, the court must, unless it determines that it is not in the interests of justice to do so, remit for advice.

⁸⁸ Section 49 [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk)

- Where a child is being dealt with in summary proceedings, the court *must* seek advice as to disposal and then thereafter it may remit for disposal (with the ability to remit for disposal straight away if considered appropriate).

177. This echoes and extends current provisions in respect of children who are subject to ICSSO or CSOs but seeks to clarify the distinction between solemn proceedings held in different courts. Further, this recognises the vulnerability of children who appear at court and that disposals through the children’s hearings may, in some cases, be more suitable than disposals at court for a particular child. This approach is supported by research⁸⁹ which looked at the cases of all children who were remitted for advice in 2015-16, all of whom had childhoods characterised by trauma and involvement in the Hearings System and almost all (98%) had some previous involvement in the Hearings System.

178. Given the limitations on a children’s hearing powers to deal with a child who is 18 or above as explained in para 97 and 98 above, there is an exception on the requirements for courts to seek advice in summary proceedings or solemn proceedings in the sheriff court where the child is within 6 months of attaining the age of 18 years, and the court is of the view that it would not be practicable to do so. This is to enable sufficient time for an advice/disposal hearing to be convened and actions in terms of any order or measures to be implemented.

179. Where section 51A of the Firearms Act 1968⁹⁰ or section 29 of the Violent Crime Reduction Act 2006⁹¹ applies the court must itself dispose of the case as per existing provisions.

180. The provisions in respect of road traffic offences⁹² enable courts to disqualify or issue penalty points, whilst also remitting to the children’s hearing for advice or disposal. Currently, a court cannot both make measures for public protection under the 1988 Act by way of disqualification or penalty points and remit to the children’s hearing for disposal (such measures for public protection are not available through the children’s hearings system and cannot be replicated within that system). However, in these cases, the court will now be able to remit to the children’s hearing for advice and/or disposal if it is considered that compulsory measures of care are necessary and the most appropriate disposal for the child. Provision is also made to enable the court to retain their ability to review a disqualification after it has been imposed. Similar provision is made to clarify that, in respect of certain sexual offences,⁹³ where a case is remitted to the children’s hearings system after a Sexual Offence Notification Requirement (SONR)⁹⁴ has been imposed, the SONR continues to apply despite the case being remitted for disposal. These changes to the legislation should promote individual and collective understanding of remittal with a view to maximising its use. This option supports the Scottish Sentencing Council Sentencing Young People Guideline that remittal should be considered as an option where competent to do so, and Social Work Scotland’s Position Statement⁹⁵ that: “We would wish courts requesting the advice

⁸⁹ [Criminal Advice and Remittals to the Children’s Hearings System \(scra.gov.uk\)](https://www.scra.gov.uk)

⁹⁰ [Firearms Act 1968 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁹¹ [Violent Crime Reduction Act 2006 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁹² The relevant provision seeks to make remittal possible in respect of offences to which sections 26, 34 and 44 of the [Road Traffic Offenders Act 1988 \(legislation.gov.uk\)](https://legislation.gov.uk) applies

⁹³ For example under schedule 3 of the [Sexual Offences Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁹⁴ As per section 80 of the [Sexual Offences Act 2003 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁹⁵ [Social-Work-Scotland-WSA-Guidance.pdf \(chip-partnership.co.uk\)](https://www.chip-partnership.co.uk)

of a hearing prior to disposing of the case and considering the option of remittal back to the children's hearings system for disposal in all cases".

Alternative approaches

No change

181. Making no change would not support the policy intention or address the issues identified above in respect of remittal. This would also not support consistency in Scotland's approach to all children.

Requiring remittal in every case

182. The provisions stop short of requiring all courts to seek advice in every case. This is given the limited statutory requirements placed on the High Court at present and the nature of cases likely to be dealt with at that court. This approach is also mindful that requiring advice in cases where it is unlikely the court would remit for disposal could result in detrimental delays in the child's case being disposed of.⁹⁶

Consultation

183. The majority of respondents supported further exploration of the proposal to enable all children under the age of 18 to be remitted from a court to the Children's Reporter as a means of maximising the use of the children's hearings system. Several respondents argued this would lead to improved outcomes, with more children and young people able to be supported via this system. Respondents deemed this as particularly important given that many children in conflict with the law have experienced trauma, abuse and other adversities in childhood. Relatedly, many respondents who supported this proposal argued that it would resolve the current discrepancy for 16- and 17-year-olds, bringing about equity for this age group, treating all under 18s as children and allowing the rehabilitative potential of the children's hearings system to be maximised.

184. Where concerns were raised in respect of these proposals, these related to the impact on resources and capacity as emphasised by Delivery Organisations. A small number of responses expressed that this proposal might not be in the best interests of the child, citing that 16- and 17-year-olds could become targets for child exploitation and trafficking; that the child could benefit from structure through access to (unpaid) work as part of a court imposed Community Payback Order (CPO); and that this could be problematic for victims who have been harmed by 16- and 17-year-olds, particularly where serious or sexual harm had occurred.

Remand, committal and detention of children

Key background and policy context

185. In Scotland significant progress has been made in reducing the number of children who require to be deprived of their liberty, including being held in custody. Building upon the WSA, under the Youth Justice vision, "to the extent possible, no under-18s should be detained in YOI,

⁹⁶ For example see [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](https://www.cycj.org.uk), with the right of the child "To have the matter determined without delay" enshrined under Article 40 of the UNCRC

including those on remand”. Secure accommodation and intensive residential and community-based alternatives should instead be used where therapeutic trauma-informed approaches are required for the safety of the child or those around them.

186. As summarised in the consultation, national and international evidence⁹⁷ has highlighted the significant detrimental impact on children being deprived of their liberty, even for short periods particularly within custodial institutions. Accordingly international human rights instruments,⁹⁸ specify that where children do require to be deprived of their liberty, this should take place in correctional or educational facilities, in a manner that takes account of children’s needs and age and prioritises ensuring the child’s effective reintegration into their community as soon as possible. In Scotland, secure accommodation provides such facilities.

187. However, the decision to remand or sentence a child to be deprived of their liberty is a matter for the judiciary, informed by relevant legislation. The decision as to where the child should be placed depends on the legal basis for the child being remanded or sentenced, but would either be a decision for the judiciary, local authority or Scottish Ministers. At present, many of these children go to YOIs as they do not have a legal route to secure accommodation.

188. There has been criticism about the automatic transfer to a YOI when a child turns 18, having been placed in secure accommodation via the criminal justice system, whether following remand or sentence.⁹⁹ The disruptive and potentially damaging impact of transitions for children have been well established,¹⁰⁰ with transitions to and from secure accommodation or custody being major, often traumatic, life events for children, which can exacerbate existing vulnerabilities and render children susceptible to a range of (further) negative outcomes on return to the community.¹⁰¹

189. Under the UNCRC where a child is deprived of their liberty they have the right to be separated from adults unless this would not be in the child’s best interests. International human rights instruments¹⁰² support the position that a child who is in a facility for children does not need to move to adult provision immediately on turning 18 and continuation of their placement should be possible. However, this should only be permitted if this is in the young person’s best interests and is not contrary to the best interests of other children within the facility.

Policy measures and objectives of the Bill

190. The provisions of the Bill seek to ensure that all children who require to be deprived of their liberty receive rights-based, relationship-based, psychologically and trauma informed responses, in age appropriate, therapeutic environments, normally secure accommodation. The Bill

⁹⁷[Report on Expert Review of Provision of Mental Health Services at HMP YOI Polmont | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#); [Rights Respecting? Scotland’s approach to children in conflict with the law - Children’s and Young People’s Centre for Justice \(cycj.org.uk\)](#); and [UN GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY \(2019\) · Omnibook](#)

⁹⁸ Including [The United Nations Convention on the Rights of the Child](#) and [General Comment No. 24 \(201x\), replacing General Comment No. 10 \(2007\) Children’s rights in juvenile justice](#)

⁹⁹ [The-Promise.pdf \(carereview.scot\)](#); [Secure accommodation and prison places for children and young people in Scotland \(azureedge.net\)](#)

¹⁰⁰ [Children and young people in conflict with the law: policy, practice and legislation \(cycj.org.uk\)](#)

¹⁰¹ As above

¹⁰² See for example [OHCHR | General comment No. 24 \(2019\) on children’s rights in the child justice system](#)

ends the use of YOIs (and prisons) for all children aged under 18, supporting Scotland's commitment to Keep the Promise and the achievement of the current Youth Justice Vision.

191. A number of interrelated provisions have been made in the Bill to:

- Enable children who are remanded or committed for trial or sentence to be detained in secure accommodation (where the court requires) or a place of safety chosen by the appropriate local authority, whether or not the child has already been subject to compulsory measures via the children's hearings system. It is also clarified that once a person has attained 18 the court may commit the person to a YOI (section 16);
- Provide 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 (sections 16 and 17);
- Bring greater consistency to where children convicted of an offence may be detained, in particular a new section 208A is inserted into the Criminal Procedure (Scotland) Act 1995 to provide that for those children convicted on indictment (including for murder) they may not be detained in a prison or a YOI. It is provided instead that the Scottish Ministers may direct that the child be detained in secure accommodation. It is expressly provided that the age limit at which someone can be sentenced to detention in a YOI is 18-21 (section 17 (with the resulting definition changes at section 18));
- Remove legislative references to remand centres as there are no such facilities in Scotland and no intention to re-introduce them (section 19);
- Clarify the duty on local authorities to provide residential establishments for children who are deprived of their liberty through the criminal justice system (section 20);
- Provide that children detained in secure accommodation are to be treated as looked after children for certain purposes (section 21).

192. These provisions do not interfere with the court's ability to deprive children of their liberty where this is deemed necessary; rather they change where a child may be detained. In cases where a child is remanded, the place of detention would either be secure accommodation if the court requires this or a place of safety as determined by the local authority, which could include secure accommodation in certain circumstances.¹⁰³ Children under 18 can no longer be committed to a prison or YOI. Likewise where a child is sentenced to detention under summary proceedings, this will be in a residential establishment chosen by the local authority, which could include secure accommodation in certain circumstances. Where a child is sentenced under solemn proceedings, Scottish Ministers will direct where the child is to be placed - this may not be a YOI or prison but may be secure accommodation. This change enables all under 18s to benefit from the same treatment and removes potential discrimination against 16/17 year olds in the context of UNCRC.

¹⁰³ As per the [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk), with the Bill containing further regulation-making powers

193. For a child to be considered for placement in secure accommodation either through the children's hearings system or criminal justice system, there requires to be a significant level of concern about the risk parts of that child's behaviour may present either to themselves or other people and all other alternative options to meet the child's needs must have been explored. Secure accommodation centres currently care for children even in the gravest cases where a child faces a significant post-18 custodial sentence and/or where parts of a child's behaviour pose the greatest risk of serious harm. In doing so, public protection and safety is maintained and indeed promoted- in the short-term the child is still cared for in a locked facility where they are unable to leave and in the longer-term the child is provided with support to aid their rehabilitation, reintegration and desistance.

194. All Scotland's secure accommodation centres offer an integrated model of delivery, caring for children together regardless of the route they have been placed in secure accommodation. In addition, although the routes a child is placed in secure accommodation will vary, the evidence illustrates similar and shared high levels of need and vulnerability.¹⁰⁴ Children who are placed in secure accommodation through the children's hearings system will often have had past or outstanding criminal convictions. Children placed in secure accommodation through the criminal justice system will often have been involved with the children hearings system for welfare concerns. This illustrates that whether placed via a welfare or justice route, there is often overlap between the experiences and needs of these children, indicating how difficult it is to separate victimization and offending. Secure accommodation centres already utilise a range of interventions, supports and strategies to meet the needs of all children, ensure their safety is maintained and risk is managed. Indeed, often the decision as to where a child is placed is not driven by the child's needs, risks or vulnerabilities but by their legal status which the provisions in this Bill will rightfully amend.

195. In developing these provisions, it is recognised that there have been rare situations whereby children have moved from secure accommodation to YOI on an unplanned basis and/or where it has been challenging to identify a suitable placement in secure accommodation. There are also some under 18s who are currently in YOI who require specialist supports and protections, which will need to be factored in to consideration around future secure accommodation provisions. Recognition is also given to the issues raised in the consultation about the considerations and resources that will be required to enable more children being placed in secure accommodation through a justice route and consideration is required around options and models of secure accommodation which can meet the needs and protect the safety of all under 18s in their care. This may require additional staffing, training, availability of skills towards employability and adaptations to the physical environment of the existing facilities.

196. To support the practical implementation of such legislative change and in recognition of the issues raised in consultation responses, work is underway to establish how secure accommodation needs to be reconfigured and augmented in the future to meet the needs of all children who require this type of care. This includes understanding the current profile of young people in secure accommodation and YOI, how current or alternative services/provision can meet that need and where there are the gaps. This work is expected to conclude in 2024.

¹⁰⁴ [ACEs, Distance and Sources of Resilience \(cycj.org.uk\)](https://www.cycj.org.uk)

197. To support stability; continuity of care, support and relationships; and gradual and improved transitions for children who have been remanded or sentenced and placed in secure accommodation under the age of 18, the Bill enables Scottish Ministers to make regulations to enable children to remain in secure accommodation beyond their 18th birthday (to a maximum age of 19). This will remove the requirement for children to leave secure accommodation when they turn 18, enabling any decision to be made on a case-by case basis to ensure that the decision is in their best interests and not contrary to the best interests of other children in the facility. This is consistent with UNCRC defining a child as up to 18 and Article 37(c) which says that children are to be separated from adults unless it is otherwise than in their best interests. The UN Committee on the Rights of the Child General comment No. 24, amplifies that by saying that Article 37(c) “does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.” So maximum age of 19 seems to strike a balance to avoid arbitrary cliff edges. Although the young person might subsequently transfer to a YOI, the period spent in secure accommodation should enable them to benefit from the supports and services that can be afforded to help prepare the child for adulthood and future transitions and the transfer to the YOI. Work with independent service providers, sector leaders and key stakeholders on funding and capacity proposals to ensure any changes that might be required to meet the needs of those young people is underway and will continue in parallel to the Bill’s progression.

Alternative approaches

No change

198. Without making the amendments, the use of YOIs would continue and a child’s ability to access secure accommodation would remain inconsistent. This would not address the concerns outlined regarding the use of YOIs. Therefore change is necessary to end the use of YOIs for children. Any steps that fall short of this will not uphold Scotland’s commitment to Keep the Promise.

Extension of secure accommodation placements beyond 18

199. Consideration was given to whether the ability for secure accommodation extending beyond 18 should not only apply to children who are sentenced or remanded; but to all children placed in secure accommodation. Under Article 5 European Convention on Human Rights¹⁰⁵ people have the right not to be deprived of their liberty except where this is necessary, proportionate and prescribed by law. However, as detailed above it is concluded that the children’s hearings system cannot extend beyond 18-therefore for children placed through this route would not be a lawful basis for the child’s placement in secure accommodation. Moreover, given that any deprivation of liberty must be for the shortest time possible, it is not considered generally appropriate for young people to remain in secure accommodation on welfare grounds beyond their 18th birthday.

200. To ensure the best interests test is met for all children, consideration was also given to whether alternative secure accommodation facilities for children aged 18 was required, thereby separating those aged over and under 18. However, that would run contrary to the policy objective

¹⁰⁵ [European Convention on Human Rights - Official texts, Convention and Protocols \(coe.int\)](https://www.coe.int/en/e/treaties/Convention-on-human-rights)

of ensuring stability and continuity of care and support. It could also result in situations where the young person was being cared for in isolation if they were the only young person in this age range.

Consultation

201. Consultation respondents were largely supportive that where a child requires to be deprived of their liberty, this should be in secure accommodation rather than a YOI in all cases. Many respondents emphasised that YOIs were fundamentally inappropriate settings for children. This was particularly emphasised by Local Government/Social Work, Third Sector and Children's Rights organisations. Respondents cited the detrimental impact on children and the ability to uphold international rights standards, alongside the benefits in secure accommodation of a superior trauma-informed and therapeutic setting, where children and young people's needs can be responded to on an individual basis. It was also suggested that secure accommodation affords better access and opportunities for education, whilst allowing for family visits to be more regular, private and meaningful. It was stressed that this type of environment offered greater scope for effecting rehabilitative change. Children's Rights organisations also emphasised that secure accommodation is not immune to its own challenges, and several responses stressed the need for community alternatives to be fully resourced to avoid children being held in either YOIs or secure accommodation. Many also cited the need to Keep the Promise.

202. A small proportion of responses argued that use of YOIs should be maintained in certain circumstances, namely where the gravest of offences had been committed or where it has been assessed that secure would be unable to manage the risk posed to others. Several respondents stressed the corresponding resource implications of such change, both in respect of secure accommodation but also in ensuring adequate community-based services and supports were available to ensure deprivation of liberty was an option of last resort. In the consultation document, the challenges with existing funding and commissioning approaches for secure accommodation were outlined in detail. Currently where a child is placed in a YOI this is at no cost to the local authority, and as cited in the consultation the Scottish Government understands this has previously provided a financial disincentive to the use of secure accommodation in such cases. The requirement for secure accommodation to be used where it is deemed necessary for a child to be deprived of their liberty on remand will have financial implications for local authorities. Further funding options around secure accommodation are under consideration.

203. Six young people agreed that all children who need to be deprived of their liberty should be held in secure accommodation rather than YOIs - and five disagreed, with similar reasons given as detailed above. A key concern raised by young people who disagreed with this proposal was the risks posed by mixing children who are being held for welfare and offence grounds. There was concern that if secure accommodation is to be used for all children and young people, including for those who have committed the gravest of crimes, then the safety and mental health of those held for lower-level offending or on welfare grounds would be threatened. For these reasons, and despite acknowledging benefits of secure, some young people felt YOIs should remain for the most serious offences, as they are better placed to keep the child and others safe. Responses from other young people, however, felt that secure accommodation could still be used in these instances so long as the centre split children held on offence and welfare grounds into different areas.

204. Views regarding whether there should be a statutory prohibition on the use of YOIs were more polarised. Arguments often echoed those detailed above, with particular emphasis placed on

the adaptations, resources and training that would be required, with a few responses suggesting that a separate secure-like estate might be advantageous. The extent of challenge was often clear from respondents whether supportive or not of this proposal, with some arguing that these issues should not impede implementing an explicit statutory prohibition, whilst others stressed that relevant resourcing and planning considerations should be addressed first. Young people expressed similarly polarised views, although most did not support a statutory prohibition (six compared with three).

205. Most respondents supported children remaining in secure accommodation beyond their 18th birthday, citing the need for robust planning and risk assessment, along with an individualised approach that took into account factors like the child's stage of development. Responses were more mixed on whether this should be for all children or only those who were sentenced or remanded, although most stated for all children. Most respondents believed that a child should be able to stay in secure accommodation beyond their 18th birthday up until age 21 years old, with most stating this should be for as long as the child needs it. Implementation considerations were highlighted by a number of respondents, including in respect of children's rights and how secure accommodation would cater for younger children, when placed alongside young people over 18 years old.

Treating children in secure accommodation through the criminal justice system as “looked after” children

Key Background and policy context

206. Local authorities already have duties to assess the wellbeing needs of children where there are concerns; and to work in partnership with other service providers to assess needs holistically 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. Currently most children in secure accommodation are looked after children and on leaving secure accommodation could be care leavers- if they are not however, they do not benefit from such entitlements.

207. In enabling any child who is detained in secure accommodation (whether on remand or following sentence), more children are likely to be placed in secure accommodation who are not looked after children and therefore will not have corporate parenting or aftercare entitlements.

208. These children are likely to be some of Scotland's most vulnerable, victimised and traumatised children, who will require support at the point of sentence or remand, during any period in secure accommodation, and following their return to the community. Moreover secure accommodation is the most intensive and restrictive form of care in Scotland, where a child is deprived of their liberty alongside the provision of care, support and education, making it distinct from other care settings.

Policy measures and objectives of the Bill

209. The Bill affords 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

in accordance with the provisions of certain sections of the Children (Scotland) Act 1995 (section 21 of the Bill). This means the local authority where the child predominantly resides or the local authority with whose area the child has the closest connection has the same responsibilities to the child as if they were a looked after child in respect of those sections of the 1995 Act.¹⁰⁶

210. In addition, by doing so should the child leave secure accommodation on or after their 16th birthday they will be treated and have access to the same entitlements to other care leavers.¹⁰⁷ This should ensure any child who is deprived of their liberty in secure accommodation, having been remanded or sentenced, regardless of their legal status, have their needs assessed and are provided with the best possible care and support they may require during and after their stay in secure accommodation.

Alternatives

Extending existing guidance

211. Consideration was given to extending existing guidance to specify the above. However in promoting equalities of entitlements and a duty to treat children in such a way, as well as affording children the opportunity to legally challenge entitlements not being fulfilled, legislative provision was deemed necessary.

Consultation

212. There was wide spread support for existing duties on local authorities to assess and support children and care leavers who are remanded or sentenced being strengthened. Reasons for support often related to the high level of need of children who are remanded and sentenced, that these children often missed out on throughcare support and inconsistencies in practice. However, views varied on how best these issues could be addressed and whether this could be achieved through greater support to implement existing legislation, more explicit guidance, or new duties. However these did not meet the policy intention to treat any child subject to detention in a similar way. Young people drew particular attention to the importance of earlier intervention and mental health support before and during any placement in secure accommodation or YOI.

PART 3: RESIDENTIAL AND SECURE CARE

213. Provisions in this part of the Bill relate to secure accommodation and cross-border placements. Routes to secure accommodation are covered at various different points in the Bill but are covered in this section of the policy memorandum for consistency with other provisions related to secure accommodation.

Secure Accommodation

214. Secure accommodation - provided by a secure accommodation service - is among the most intensive and restrictive form of child care available in Scotland, whereby children up to age 18 are placed in a locked care setting. Whilst depriving a child of their liberty is one of the most

¹⁰⁶ As per section 17 and 31 of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

¹⁰⁷ As per section 29 and 30 of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

serious restrictions a state can impose on them, it can be necessary, proportionate, in the child's best interests and the only option in exceptional circumstances to keep a child and/or others safe.

Meaning and Approval of secure accommodation and secure accommodation services

Key background and policy context

215. A “secure accommodation service”¹⁰⁸ is a service which currently provides accommodation for the purpose of restricting the liberty of children in residential premises where care services are provided; and is approved by the Scottish Ministers for that purpose. Secure accommodation centres in Scotland must also be registered with the Care Inspectorate to provide both residential care and education services.

216. The Care Inspectorate will carry out unannounced statutory inspections of secure accommodation services at least once every 12 months. These inspections review and evaluate the effectiveness of the provision and check whether the provider is delivering care which meets the requirements of legislation, statutory regulations and the Quality framework for secure accommodation services.¹⁰⁹

217. Education is ordinarily provided by an independent school on the same site as the secure accommodation service. Independent Schools must be registered by Scottish Ministers and are inspected as part of Her Majesty's Inspectorate of Education's (HMIE's) sampling process for residential special schools. As a result, they are generally inspected every 3-6 years.

218. Children in secure accommodation should also benefit from nurturing, relationship-based, high quality care where their needs and rights are understood and met as set out in the Secure accommodation Pathway and Standards.¹¹⁰ As detailed in the Promise, therapeutic and trauma-informed support should be provided, with effective interventions to keep children safe, meet their needs, promote healing, and achieve the best possible outcomes. Children's rights must be upheld in secure accommodation, including in respect of health, including mental health, education, participation and relationships. Significant work is underway across secure accommodation centres to continue to develop the supports and services currently provided and to consider what future provision Scotland requires. Changes to the funding of secure accommodation places is being considered as a key aspect of this activity and is due to conclude in 2024.

Policy measures and objectives of the Bill

219. To ensure that the definition of secure accommodation is fit for the future and adequately reflects the purpose, role and function of secure accommodation services, the current definition of secure accommodation as being for the purpose of restricting a child's liberty requires to be amended as achieved by section 22 and 23. Whilst any child accommodated within a secure accommodation service should be subject to only the level of restriction which is necessary and proportionate in the circumstances, the overarching purpose of secure accommodation is a deprivation of a child's liberty. This will reinforce that the purpose of secure accommodation is to

¹⁰⁸ Schedule 12 of the Public Services Reform (Scotland) Act 2010

¹⁰⁹ [Quality framework for secure accommodation services](#)

¹¹⁰ [Secure accommodation Pathway and Standards](#)

deprive a child of their liberty, as compared with a child’s placement in other residential settings or a child who is subject to other measures, where the purpose is to restrict but not deprive the child of their liberty (as also clarified in section 2 of the Bill).

220. However whilst the purpose of secure accommodation is to deprive a child of their liberty, what is provided to the child in secure accommodation extends far beyond this. The Scottish Government has therefore sought to provide legislative clarity under section 23 to reinforce that support, care and education must be provided to children accommodated there for the purposes of safeguarding and promoting their welfare and meeting their needs. The provisions also clarify the definition of a residential establishment in the context of a secure accommodation service.

221. Secure accommodation services continue to require to be approved by Scottish Ministers as a pre-requisite to their registration as a care service with the Care Inspectorate. The Bill enables regulations (subject to affirmative procedure) to be made regarding the approvals process under section 23.¹¹¹ This seeks to make the framework for approval of secure accommodation services by the Scottish Ministers clearer, simpler and more transparent.

Alternative approaches

No change

222. By making no change the current challenges with the definition and approval of secure accommodation services would persist which is not supportive of the policy aims of ensuring this definition is fit for the future and the approval process is clear. No alternative definitions were considered as these would not reflect the primary purpose of secure accommodation.

Consultation

223. In the consultation, almost all respondents who answered the question related to the regulatory landscape for secure accommodation agreed this needed to be simplified and clarified. Responses generally focused their response on routes to secure accommodation as detailed above. Three young people agreed that the regulatory landscape needs to be simplified and clarified, and one disagreed, although limited detail was given.

224. Opinion was more split on whether the current definition of “secure accommodation” meets Scotland’s current and future needs. Of those respondents who felt this did not, rationale included that this did not align with what The Promise articulated, namely that secure accommodation should provide-therapeutic, trauma-informed, rights focused support and that the current definition could be stigmatising. Three young people agreed that the current definition of secure accommodation is adequate, and two disagreed. A key concern expressed in three responses was that secure accommodation should not be used for children who abscond.

¹¹¹ Children and Young Persons Act 1969

Routes to Secure accommodation

Key Background and policy context

225. A child can be placed in secure accommodation through a variety of legal routes,¹¹² namely:

- An order made by the children’s hearings system or a sheriff¹¹³ and implemented by the local authority.
- Where a child is subject to a relevant order which does not include a secure accommodation authorisation; but is being provided with accommodation by a local authority;¹¹⁴ or is subject to a permanence order in specific circumstances.¹¹⁵ These are sometimes referred to as “emergency placements” made by the Chief Social Work Officer (CSWO).
- As a place of safety ahead of appearing at court (as detailed in Part 2).
- Having been remanded or sentenced by a court (as detailed in Part 2).

226. Children have the right to be protected from an unlawful deprivation of their liberty under a number of international human rights treaties.¹¹⁶ The conditions for a secure accommodation authorisation as part of a children’s hearings order (often referred to as the secure accommodation criteria) are important in making such an order and considering the continuation of a child’s placement, as well as in respect of other routes as these criteria are referred to in the secure accommodation regulations.¹¹⁷ As detailed above these have until now been the same as the MRC criteria, namely:¹¹⁸

- 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.

227. A secure accommodation authorisation can only be made if one or more of these conditions are met, and having considered the other options available (including a MRC) the children’s hearing or, as the case may be, the sheriff is satisfied that it is necessary to include a secure accommodation authorisation in the order.

¹¹² As detailed in the Consultation

¹¹³ Sections 83(5) and (6), 87(3) and (4) or 88(2) and (3) of the [Children’s Hearings \(Scotland\) Act 2011](#) respectively provide the conditions that require to be met before a secure accommodation authorisation can be imposed in a CSO, ICSO, medical examination order or warrant to secure attendance

¹¹⁴ Section 25 of the [Children \(Scotland\) Act 1995](#)

¹¹⁵ See [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

¹¹⁶ Including under Article 5 of the [European Convention on Human Rights \(coe.int\)](#) which was incorporated into UK law through the [Human Rights Act 1998 \(legislation.gov.uk\)](#); and Article 37 of the [UN Convention on the Rights of the Child \(UNCRC\) - UNICEF UK](#)

¹¹⁷ [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

¹¹⁸ Section 85 [Children’s Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](#)

228. Legal routes to secure accommodation are complex, making them difficult to understand for all involved, and even in cases of serious concern for the child, access to secure accommodation is currently constrained depending on the child's age or legally defined status. This does not support Scotland's approach to needs-led individualised decision making and meeting the needs and upholding the rights of all children. It is necessary to address this to ensure that all children aged under 18 have a clear legislative route to secure accommodation when this is necessary and appropriate.

229. For children placed on an emergency basis, through the children's hearings system and in some cases through the criminal justice system, the CSWO has a significant decision making power and responsibility. The secure accommodation "head of unit" is defined as the person in charge of the residential establishment containing the secure accommodation in which the child is to be placed. In agreeing to a child's placement in secure accommodation through any legislative route, the head of unit has similar duties to the CSWO. Moreover, in conjunction with the managers of the unit, they must ensure, safeguard and promote the child's welfare during the placement.

Policy measures and objectives of the Bill

230. The Scottish Government wants to ensure that all children under 18 have a route to secure accommodation when this is required. This will ensure that they are able to access these age and stage appropriate facilities where they can benefit from the intensive care and support required at the correct point in time. Although not specifically covered in Part 3 of the Bill, various changes made elsewhere that relate to secure accommodation are collated in this part of the policy memorandum.

231. Through the changes detailed in Part 1, children under 18 who may require secure accommodation as part of relevant order or warrant will have the opportunity for a secure accommodation authorisation to be made by the children's hearings system or a sheriff as required. Measures under Part 2 also enable secure accommodation to be used as an alternative to a police station, or where a child has been sentenced or remanded by a court in certain circumstances. In each case, existing legislative safeguards to inform decision making will be retained.

232. Section 5 of the Bill revises the criteria for secure accommodation authorisation and at the same time makes it distinguishable from other measures such as an MRC. A decision to place a child in secure accommodation should be subject to the highest possible threshold, given this involves a deprivation of liberty. Such a decision must be in accordance with a procedure prescribed by law and subject to appropriate procedural safeguards.

233. The current criteria regarding absconding and self-harming conduct remain appropriate, particularly given that if a child absconded, it must also be likely that their physical, mental or moral welfare would be at risk and a secure accommodation authorisation arguably most directly prevents a child from absconding by depriving the child of their liberty.

234. New provision is made to amend the criteria that the child is likely to cause injury to another person, to being likely to cause physical or psychological harm (which may cause fear, alarm and distress), which is consistent with the updated MRC criteria as indicated above. Appropriate safeguards remain in place to ensure that depriving a child of their liberty will still be an option of

last resort, for those situations where this is necessary, proportionate and in the child's best interests (or in limited circumstances to protect the public from serious harm), where all suitable alternatives including an MRC have been considered.

235. Currently where a child is placed in secure accommodation, this should only be when necessary and their case should be reviewed on an ongoing basis to ensure that the child continues to meet the secure accommodation criteria. However, given the intensive care and support provided in a secure accommodation setting, it becomes much less likely that a child will abscond or cause injury/harm to themselves or others, which can make it difficult for any of these conditions to continue to be met and can result in premature transitions from secure accommodation. The Bill therefore varies the test to reflect that unless the child is kept in secure accommodation such harm is likely to occur. This updated criteria will apply to all orders that could include a secure accommodation authorisation (CSO, ICSO, medical examination order, and warrant to secure attendance as per section 5 of the Bill).

236. These changes will enable any child who meets or continues to meet the secure criteria test and needs to be deprived of their liberty, to be placed in secure accommodation and therefore supported in a trauma-informed, therapeutic, care-based, age and stage appropriate environment.

Alternative approaches

No change to routes to secure accommodation

237. Without the above changes, some children for whom secure accommodation is necessary to maintain their own safety or that of others would not have a legal route to secure accommodation. This could result in the child or other people being placed at risk, which does not meet the policy aims

Secure accommodation criteria

238. Consideration was given to not amending the secure accommodation criteria. This was discounted due to the need to ensure that secure authorisation is clearly seen as a deprivation of liberty and at a higher threshold than the MRC criteria. The Scottish Government also considered varying the absconding and self-harming conduct criteria in line with that for MRCs. However, retaining the existing criteria about the risk of absconding and of harm to oneself is essential given the severity of a child being deprived of their liberty. Also, that it would not be appropriate to deprive a child of their liberty owing to circumstances that might result from the behaviour of others.

239. Therefore, reflecting that the criteria could be deemed to be met even if a child was not placed in secure accommodation, no change would mean the challenges and difficulties that have been highlighted in practice would continue. This is not deemed appropriate and therefore the change is felt to be proportionate.

National approach for considering the placement of children

240. A national approach to decision making about the placement of children in secure accommodation, such as a national panel model, to address challenges relating to secure

accommodation placement commissioning and lack of national oversight of placement decisions and thresholds, has been considered. Whilst there was high support in the consultation for such an approach, this was often caveated with the unavoidable localised dimension to decision making and that further scoping and consideration would be needed. As a result, no change is being made at this point in time and existing decision making forums and roles and responsibilities for a child's placement in secure accommodation will therefore continue.

241. This reflects that those working with the child will best understand the child's needs and reasons for the consideration of secure accommodation, and the inherent link between a child's placement in secure accommodation and what services are available locally, alongside the need to often make decisions in short timeframes.

242. There are also wider uncertainties around the future provision of secure accommodation needed in Scotland and given future considerations related to the proposed National Care Service (NCS) and the potential implications of this on the delivery of children's services. The Scottish Government and Children's Services Planning partners will look to gain increased data and understanding of need and trends in respect of children being placed in secure accommodation, to provide greater understanding and inform future planning at a national and local level. The creation of a NCS would bring change to children's health, social work and social care services, including secure accommodation, across Scotland. This is the case whether those services are included in the NCS or not. To ensure the decision made on the future delivery of children's services is one which best meets needs, the Scottish Government is undertaking work to understand whether transferring children's services into the NCS is an improvement on existing models, or whether needs are best met by children's services which remain outside the NCS.

Consultation

243. Most respondents agreed that secure accommodation should be available to all children under 18 through all routes or through certain routes. Although it was noted this should only be when all other alternatives had been explored and was in the best interests of the child, following robust assessment and safeguards. This was particularly stressed by Local Government/Social Work respondents and Children's Rights organisations, where it was emphasised that, in line with the UNCRC, detention should only be used as a last resort. The implications of such change in terms of capacity, resource and workforce skills was also highlighted. This was raised as a concern by almost all organisational respondents.

244. Local Government/Social Work and Third Sector respondents in particular noted that the legal complexities surrounding whether a child is able to access secure accommodation (especially where they are 16 or 17 and not already on measures through the children's hearings system) has led to differing interpretations across agencies and unequal access for children and young people, as well as complex decision making routes. Funding of secure accommodation was highlighted as exacerbating complexities, and creating perverse incentives for decisions about where a child is to be placed based on resource demands rather than what is in the child's best interests. As a result most respondents supported remand costs being met by Scottish Ministers rather than local authorities, although some respondents, including children and young people believed this should remain with local authorities. The current routes to secure accommodation made it difficult for practitioners to explain these arrangements to children, their families and people who have been harmed.

245. Eight young people who responded to this question supported it, with five agreeing this should only be for certain routes, three agreeing it should be for all routes, and none disagreeing. Several respondents emphasised that secure accommodation deprived children of their liberty, and thus should only be used as a last resort when all other community alternatives have been exhausted. In this instance, where the child was at high risk to themselves or others, several young people highlighted that secure should be available to all, as a more child-friendly space suited to their age and stage. One young person however stressed the placement should be time bound and another that this should be for as long as the child needed this.

246. As detailed in para 72 above, the consultation asked whether MRCs be made available to children who do not meet the current criteria for secure accommodation but did not specifically ask if any change be made to the secure accommodation criteria.

Cross-Border Placements

247. Children and young people can 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 number of residential accommodation settings in Scotland over recent years has increased. In some circumstances, this has led to increased capacity to provide care for children and young people from outside of Scotland. Some care settings gain financially by accepting cross border children.

248. The Scottish Ministers cannot regulate what happens in a decision-making process by a court in another jurisdiction, including any assessment of what the welfare of the child requires.

249. 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 transported to an unknown place with no connections or relationships. Such placements can result in children and young people being separated and distanced from their families, peers, community support networks and services. This impacts on planning for the child and on their ability to maintain meaningful relationships. There are also concerns that this may impact on their human rights.

250. The Promise is also clear that current commercial practices regarding cross-border placements, whereby they are purchased by a local authority in another UK jurisdiction, must end.

251. To manage the issues of increasing capacity for cross border placements, the Bill provisions direct new care service providers to tailor proposed provision to Scotland's particular needs – in the first instance by increasing scrutiny and communication around proposed new services. Also extending 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 and how best to recognise and regulate (with appropriate safeguards) under Scots law a range of different types of care orders in the other UK jurisdictions (mainly from England) giving rise to cross-border placements.

252. It is the Scottish Government's position that cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child. Since, however, these placements are being driven by a lack of adequate provision for children elsewhere

in the UK, courts in other jurisdictions often determine that the best option for a child is to be accommodated in a Scottish setting.

Notification of Registration and Increased role of the Care Inspectorate

Background and key policy context

253. As things stand, prospective care service providers who wish to register with the Care Inspectorate do not need to provide any information on whether or not they propose to host children on cross-border placements. Accordingly, those who do intend to play host to such placements do not require to provide any evidence in relation to their ability to cater to the specific needs of children who are placed in Scotland from another jurisdiction.

254. It is clear that cross-border placements impact on Scottish services, having consequential resource implications. The Promise recognises there are challenges in the management of places in care and the sustainability of settings of care. It is clear that strategic planning must reflect only the needs of children in Scotland's local authorities.

Policy objectives and measures

255. The creation and development of residential child care provision in Scotland should primarily be planned for and responsive to the needs of children in Scotland. The Scottish Government wants to ensure that greater responsibility rests with those applying to be new service providers. The provider should be held accountable in demonstrating they have informed the bodies with statutory responsibility for preparing a children's services plan of their intention to make an application for registration with the Care Inspectorate, as per provision under section 24 (which inserts a new 59A into the Public Services Reform (Scotland) Act 2010) of the Bill.

256. The purpose of this is to ensure that oversight can be maintained of what service provision is proposed for children across Scotland, ensuring this can be factored into decision-making around resourcing and allocation of services. Making local authorities and health boards aware of proposed new service provision will also allow them to identify which new services propose to accept cross-border placements of children and ensure that, where appropriate, providers which are ultimately registered with the Care Inspectorate are brought into the preparation of children's services plans.

257. In developing this provision, options were considered relating to engagement with strategic needs planning. It is the Scottish Government's intention to explore options in the longer term that may permit regulators to refuse registration of a proposed new care service for children where it is considered to be surplus to local or national requirements, as assessed through children's services planning processes. This could include further changes to the existing regulatory regime for residential placements in Scotland as set out in the Public Services Reform (Scotland) Act 2010.

258. The Scottish Government believes that enhancing the level of regulatory scrutiny as part of the registration of relevant care services with the Care Inspectorate has the potential to disincentivise the hosting of cross border placements in Scotland. Importantly, this would have the additional benefit of ensuring that the children being hosted here are subject as far as possible to

equity and the highest possible standards as applicable to children already in placements in Scotland.

259. It is considered important that, in future, the Care Inspectorate is able to identify from the outset of the establishment of a new residential care service if it may host children from other UK jurisdictions.

260. The Bill seeks to provide Ministers with powers to impose additional requirements on those services hosting cross border placements. This could extend to placing a duty on prospective providers of residential care services to provide appropriate information to the bodies with statutory responsibility for preparing a children's services plan of any application to be registered with the Care Inspectorate. The provisions that have been made in this Bill represent a first step towards ensuring that local authorities and services are kept informed of proposed new provision and the Scottish Government is exploring further options for the longer term which engage the broader strategic and policy context of residential care. This could include further duties to be placed on providers, for example, satisfying a range of criteria with regards to their provision or the children and young people in their care. It could also include asking providers to fulfil certain requirements that demonstrate that they are meeting local needs and/or strategic priorities at a local or national level. Whatever the Scottish Government do, it needs to ensure that there are no unintended consequences for the wider residential care sector.

261. Scottish Ministers will have the power to prepare and publish specific standards and outcomes applicable to providers of relevant residential care services hosting cross border placements, and to impose specific requirements in relation to those care services, thus strengthening the regulatory and scrutiny role of the Care Inspectorate in relation to such placements. It will be necessary to develop any associated regulations with the assistance of all parties who would be impacted by such a development.

262. The provisions aim to protect vulnerable children whilst providing the flexibility for the system of regulation and scrutiny to respond appropriately and proportionately in the short and longer term in ways that cohere with the wider Scottish policy context.

263. Work to develop proposals to address the issue of cross border placements has highlighted a situation of considerable complexity where quick fixes are extremely challenging to implement and, ultimately, may be detrimental to vulnerable young people. The provisions in the Bill reflect the fact that this issue will not be solved through legislation alone, but rather act as one layer in a multifaceted approach which includes working with regulators, providers and other UK administrations.

264. Measures to address an issue not arising in the Scottish context must be sensitive and proportionate to the wider developing policy, and legislative landscape of this country and the needs of its communities and people. The Scottish Government is carefully considering what further legislative steps could be taken in the future as the broader context develops.

265. Overall, the various provisions in Part 3 of the Bill seek to ensure 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. They also seek to

protect the vulnerable young people at the centre of these circumstances and ensure that their needs and rights are met and that they are fully visible to services.

Alternatives

No Change

266. The Promise is clear that the practice of cross border placements must end. This cannot be addressed through legislation alone but the Scottish Government must do all that it can to disincentivise such placements and protect vulnerable children, and have a more tailored child-centred regulatory approach. To make no change would mean new private care settings could be set up specifically to meet the needs of UK cross border placements, and continue to meet the demand. This would not ensure that such placements only take place in exceptional circumstances.

A National Strategic Needs Assessment

267. It is evident that some residential provision responds to a national need as well as providing care in a local context. Consideration was given to options which would require new service providers to demonstrate that they were responding to identified national need but this could have significant implications for the wider residential care sector and was considered to be outwith the scope of this Bill.

Ministerial veto or approval of placements

268. In determining these provisions, options have been discounted that would result in a disproportionate impact on the registration of care services more generally, as the Scottish Government's specific focus in this Bill has been on the practice of cross border placements. The Scottish Government have also sought to avoid creating circumstances where regulators or Ministers would effectively be (re-)approving the placement of individual children as the Scottish Government does not wish to introduce processes which could unintentionally endorse the practice in any way or create delays which put children at risk.

Consultation

269. A significant number of respondents did not answer the question on local strategic needs assessment. Of those that did, 90% supported local strategic needs assessments. Three individuals, one children's hearing related organisation and one third sector organisation, did not support this.

270. Most respondents believed that a local strategic needs assessment should be required prior to approval of any new residential childcare provision, and that decisions should be based upon localised need, rather than financial incentives or motivations (particularly as regards to attracting cross-border placements). This was especially stressed by local government respondents, who sought greater involvement and oversight of decisions to open new residential centres, with two respondents highlighting that in the past provisions have been opened without local practitioners being notified. Additionally, it was emphasised that this could also allow for careful planning in respect of the availability of local universal resources to be accessed by children located in these settings.

271. On the question relating to the Care Inspectorate, 88% of those who responded agreed that there should be an increased role for the Care Inspectorate. However, a small number of local government respondents and one secure accommodation respondent expressed concerns around whether the proposal would result in increased levels of bureaucracy and paperwork, aimed at measuring outcomes that may not appropriately encapsulate the level of care being provided. Several responses felt that the Care Inspectorate already had sufficient or very high degrees of regulatory authority, whilst a number of other responses felt that further detail was required concerning the proposal and what an augmented role for the Care Inspectorate would involve.

272. Large numbers of respondents to the consultation did not complete the questions relating to cross-border placements and residential care. However, this does not diminish the value and contribution of the responses received, particularly as many were from important organisations within this context.

Recognise and regulate care orders from other jurisdictions

Key background and policy context

273. There are various legal orders which may apply to children who are placed across borders, including care orders made under section 31(1)(a) of the Children Act 1989,¹¹⁹ orders made under section 25 of that Act, authorising a placement into secure accommodation and Deprivation of Liberty (DOL) orders.¹²⁰

274. In Scotland, there are approximately 336 residential care settings. In a residential setting, cross border placements are contracted on a spot purchase basis involving placing Local Authorities directly securing the placement with an individual residential service provider. Residential services in Scotland which are fully commissioned by Scottish Local Authorities do not provide spot purchase placement; private services can.

275. In addition, as at 31 March 2022, there were 35 residential special schools in Scotland, 20 (57.1%) provided by private sector and 15 (42.9%) provided by the voluntary/not for profit sector. All residential care provision for children and young people in Scotland must be registered with the Care Inspectorate. Over the last ten years, the number of private residential care settings for children and young people increased from 47 in 2012 to 152 in 2022 - a threefold increase. The number of voluntary sector care settings has also increased, showing a significantly slower growth rate from 47 in 2012 to 68 in 2022. The number of local authority run care settings has remained largely the same, increasing by only 1 from 114 in 2012 to 115 in 2022.

276. Some UK residential care providers who operate residential accommodation in Scotland are receiving cross-border placements of children and young people due to a lack of resources elsewhere. Some children who have come to the attention of the Scottish authorities are those subject secure orders and those subject to DOL orders. The numbers of these children are small.

¹¹⁹ [Children Act 1989 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1989/31)

¹²⁰ [The Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk/uksi/2022/120)

The majority of children in residential placements are placed under care orders under section 31(1)(a) of the Children Act 1989 and may be in Scotland without the authorities being aware.

277. Cross-border placements of children into secure accommodation in Scotland are governed by section 25 of the Children Act 1989, as amended in 2017. There are currently safeguards in place for these placements which are covered by the Secure Accommodation Pathways and Standards,¹²¹ which must be followed by all secure accommodation providers in Scotland. There are also conditions in place within an agreed MoU between the Scottish and UK Governments, to support appropriate use of cross-border placements into secure accommodation from England into Scotland and vice versa. The MoU ensures that all other suitable placements in the child's own country have been explored before a child is placed in Scotland. Information must also be provided to the Scottish secure accommodation provider by the placing authority in advance of a placement being made, to ensure that the provider can meet the child's needs. This includes information such as the dates of regular reviews, anticipated length of stay in the placement and that notification has been given to appropriate authorities in both jurisdictions.

278. DOL orders are granted by courts in other parts of the UK to allow a child to be deprived of their liberty in a residential care setting other than secure accommodation, in Scotland. The UK Supreme Court ruled that the use of the High Court's inherent jurisdiction to authorise deprivations of liberty in "non-secure" accommodation in certain circumstances is lawful.¹²²

279. Until recently, DOL orders could only be recognised in Scots law by the Court of Session in exercise of its *nobile officium/parens patriae* jurisdiction. Further to the outcome of the Supreme Court case, the Scottish Government made a commitment to the Court of Session to bring forward a mechanism for legislative recognition of DOL orders as a matter of Scots law. This was achieved through the DOL Order Regulations¹²³ which, following Parliamentary approval, came into force on 24 June 2022. These regulations are considered an interim measure with further longer term measures being brought through this Bill and associated administrative measures.

280. The effect of these regulations is to put in place extra protections to ensure these children are made known to the Scottish authorities, to recognise those orders for a period of 3 months at a time (subject to their review); and that children are offered support through advocacy, and can be subject to enforcement action being available where the arrangements for the child are breached.

281. The Regulations apply, with certain modifications, provisions of the 2011 Children's Hearings (Scotland) Act to ensure that the non-Scottish authority which has placed the child in Scotland is designated as the "implementation authority" for the order and, therefore, has full responsibility to provide or secure all services to support the child placed in Scotland under the recognised DOL order. The Regulations also modify relevant enforcement provisions of the 2011 Act to provide the Scottish Ministers with the power to apply to the sheriff court for an enforcement order if a placing authority does not comply with its obligations.

¹²¹ [Secure care: pathway and standards - gov.scot \(www.gov.scot\)](https://www.gov.scot)

¹²² [T \(A Child\), Re \[2021\] UKSC 35 \(30 July 2021\) \(bailii.org\)](https://www.bailii.org)

¹²³ [The Cross-border Placements \(Effect of Deprivation of Liberty Orders\) \(Scotland\) Regulations 2022 \(legislation.gov.uk\)](https://legislation.gov.uk)

282. Since the regulations came into force, Scottish Ministers have received 14 notifications, relating to the placements of 10 children and young people.

283. The most appropriate permanent solution for orders resulting in temporary placement of children cross border is to address this lack of provision. This is not in the Scottish Government's gift.

Policy objectives and measures

284. Addressing this complex and sensitive matter requires a multi-faceted and considered response that puts the welfare of vulnerable children first, but also ensures that Scottish resources are utilised appropriately, and that the Scottish policy context and the Scottish Government's related strategic ambitions are not unduly influenced by challenges arising in other jurisdictions.

285. Scottish Ministers wish to ensure that any children that are placed temporarily in residential care in Scotland from elsewhere in the UK have all of their needs and circumstances properly communicated in advance to Scottish authorities and relevant services. They also wish to ensure that those authorities should be assured that all of the child's needs will be met, or provided for, by the non-Scottish placing authority and that their care order will be recognised in Scotland when appropriate.

286. The legislative steps taken here reflect the complexity of the situation and demonstrate the need to undertake actions in the short and longer term in order to progress adequate solutions. There is no quick or straightforward fix. A comprehensive response to this issue means that not all elements are reflected within the Bill as ongoing dialogue with the other UK administrations remains critical. It is also important that the time is taken to learn from the experience of the recent DOL Order Regulations, and to continue working closely with counterparts in other UK administrations to ensure that relevant orders can be appropriately recognised and placing authorities held appropriately accountable for the welfare of the children they place and the costs associated with their care.

287. The Bill (section 25) will, therefore, confer regulation making powers to enable the recognition in Scots law of different types of court orders from other UK jurisdictions, subject to appropriate conditions and safeguards, such as provision of support including advocacy as may be necessary, and to place appropriate duties on placing authorities. This seeks to ensure that the children who are placed in Scotland should receive the highest possible standard of care and have their rights safeguarded at all times. This is also intended to delineate clear lines of responsibility between authorities which place children here and those authorities/services which operate within the area where the child is being hosted in Scotland. The greater the restrictions on their liberty that are required to keep the child and others safe, the more extensive those safeguards should be.

Alternatives

No Change

288. The DOL order regulations were intended to be a temporary measure and the Scottish Government must learn from their operation to build more comprehensive solutions. The DOL order regulations also only relate to some of the orders that bring young people into residential

care in Scotland and so taking no further action at this stage means that the totality of the situation has not been addressed.

Outright Ban or Ministerial Veto

289. An outright ban, Ministerial veto or power of intervention in relation to cross border placements could have very significant impacts on very vulnerable children for whom a placement into Scottish residential care may be in their best interests. It would directly conflict with the decisions of courts in other parts of the UK and, in the absence of suitable alternative provision, place those children at risk of significant harm.

290. The process of considering and implementing any Ministerial veto could also lead to significant delays and further judicial challenge, leaving children and their families facing extended uncertainty when stability and safety should be the priority. It would also be at odds with the Scottish Government's desire to ensure that cross border placements are considered within the context of local strategic needs as well as the need to protect the rights of children. An outright ban or Ministerial veto has, therefore, been ruled out as an option.

Consultation

291. Almost all respondents agreed that all children and young people living in cross-border residential and secure accommodation placements should be offered an advocate locally. Some respondents cautioned that even when accounting for the introduction of a local advocate, there would still be a need for children to have access to appropriate legal assistance and supports.

292. Several responses also highlighted cost implications associated with a local advocate, with a number believing that the cost should lie with the placing authority. A small number of respondents did believe that further consideration was needed prior to the taking forward of this proposal.

293. We note from the consultation response that there is some conflation of advocacy and legal support (advocate), which are separate and distinct though complementary forms of support for children and young people.

PART 4: ANTI-SOCIAL BEHAVIOUR ORDERS, CHILD'S NAMED PERSON AND CHILD'S PLAN

294. Part 4 makes two changes. It changes the meaning of "child" in the Antisocial Behaviour etc. (Scotland) Act 2004 so that it covers under 18s (except in the case of parenting orders, where it will remain as under 16s). This is consistent with the approach discussed further in Part 1 and 2 above.

Child's named person and child's plans

Key background and policy context

295. The Children and Young People (Scotland) Act 2014 (the 2014 Act) supported implementation of the GIRFEC approach. The GIRFEC approach is a shared framework for all

those working with children and young people to provide initial advice and support, to consider wellbeing holistically, and to plan and co-ordinate support across services.

296. Some provisions of the 2014 Act relating to the named person service and information sharing were successfully challenged in the Supreme Court.¹²⁴ In July 2016 the Supreme Court ruled that information sharing provisions included in the named person scheme in the 2014 Act may result in a disproportionate interference with the rights of children, young people and their parents under Article 8 of the ECHR. The Court was very clear, however, that the policy intention behind the 2014 Act was ‘unquestionably legitimate and benign’ and did not in and of itself breach human rights.

297. In September 2016 the Deputy First Minister confirmed that the Scottish Government would undertake a three month period of engagement on how information sharing in relation to the named person service should operate.

298. The Children and Young People (Information Sharing) (Scotland) Bill¹²⁵ was published in June 2017. The Bill proposed changes to the information sharing provisions in Parts 4 and 5 of the 2014 Act to include new provisions on when and how information can be shared by and with the named person service, in order to address the Supreme Court’s judgment and to ensure that the information sharing provisions align across the Parts. In addition, the Bill required that a Code of Practice be produced to provide appropriate safeguards in relation to these information sharing provisions, as well as clarification of the interaction between the 2014 Act and other relevant areas of law.

299. In February 2018 the Deputy First Minister established the independent GIRFEC Practice Development Panel and appointed Professor Ian Welsh OBE, Chief Executive of the Health and Social Care Alliance Scotland, as its independent Chair. The GIRFEC Practice Development Panel was asked to develop an authoritative and accessible information sharing Code of Practice for children, families and the people who work with and support them. The Panel provided their report to Ministers, containing a number of recommendations which the Scottish Government accepted in full.

300. The report concluded that Ministers should not pursue a statutory Code of Practice on Information Sharing and should instead provide a summary of information on the rights, principles and values that govern information sharing for children and young people and parents and refreshed practice guidance to support practitioners and organisations deliver GIRFEC including guidance on information sharing.¹²⁶ The final conclusions were also based on updated EU General Data Protections Regulations (GDPR) and Data Protection Act 2018.

301. This is because the Panel felt that it would be challenging to produce an authoritative draft Code of Practice for Information Sharing that properly reflects the relevant legal requirements, is

¹²⁴ [The Christian Institute and others \(Appellants\) v The Lord Advocate \(Respondent\) \(Scotland\) - The Supreme Court](#)

¹²⁵ [Children and Young People \(Information Sharing\) \(Scotland\) Bill](#)

¹²⁶ [Getting it right for every child – Practice Guidance 4 – Information Sharing – 2022](#)

workable, comprehensive and user-friendly for children and young people, parents and practitioners.

302. On 19 September 2019, Deputy First Minister announced to Parliament his decision to withdraw the Children and Young People (Information Sharing) Bill and his intention to seek to repeal Parts 4 and 5 of the 2014 Act. Parts 4 and 5 are not yet in force.

303. The Deputy First Minister tasked officials to work with stakeholders to develop a suite of resources to support and promote proportionate and appropriate information sharing practice.¹²⁷

Policy measures and objectives

304. For the above reasons Part 4 (Provision of named persons) and Part 5 (Child's Plan) of the Children and Young People (Scotland) Act 2014 are repealed.

305. Under Part 5, child's plans were intended to relate to the named person provisions in Part 4, as the responsible authority was required to consult the child's named person in deciding whether a child requires a child's plan, as well as in preparing and reviewing a child's plan. Part 5 specifies that the "child's named person" means the individual who is the child's named person by virtue of Part 4.

306. As Parts 4 and 5 have never been in force, the repeal does not affect the existing named person or child's plan practice. Child's plan and named person practice continue to be important elements of Getting it right for every child best practice and are supported and promoted by the publication of the GIRFEC practice and policy refresh.

307. GIRFEC continues to be about enhancing the wellbeing of all children and young people as well as building a flexible scaffold of support where it is needed, for as long as it is needed. This is delivered through the core components of:

- a named person who is a clear point of contact for children, young people and families to go to for support and advice. A named person can also connect families to a wider network of support and services so that they get the right help, at the right time, from the right people;
- a shared and holistic understanding of wellbeing and a single model of how this can be considered and supported; and, a single, shared and rights-based approach to planning for children and young people's wellbeing where support across services is needed, co-ordinated by a lead professional.

308. This is supported by use of the GIRFEC National Practice Model, which sets out a shared framework and approach to identification, assessment and analysis of wellbeing needs. It provides a consistent way for practitioners to work with children, young people and their families to understand the child or young person's individual growth and development in the context of their

¹²⁷ The full suite of guidance is available at [GIRFEC resources - Getting it right for every child \(GIRFEC\) - gov.scot \(www.gov.scot\)](http://www.gov.scot)

rights, unique family circumstances and wider world, exploring strengths, resilience, adversities and vulnerabilities.

309. Wellbeing is considered and assessed across the aspects of children and young people being Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included. These are the wellbeing indicators as referred to within the Children and Young People (Scotland) Act 2014,¹²⁸ commonly known as SHANARRI. A consistent approach to safeguarding, supporting and promoting wellbeing is embedded within statutory Children's Services Planning approaches across Scotland, as well as in the development of Wellbeing Outcomes for the Children, Young People and Families Outcomes Framework.

Alternative approaches

No change

310. This would result in Parts 4 and 5 of Children and Young People (Scotland) Act 2014 remaining on the statute book. This option would allow for ambiguity in relation to the Scottish Government's intentions to take account of the Supreme Court judgment in 2016, and is therefore not appropriate.

311. There was extensive work, in particular by the Practice Development Panel, to address the issues highlighted in the Supreme Court judgment. That work led to the decision to seek to repeal Parts 4 and 5.

Consultation

312. There was a three month period of engagement on how information sharing in relation to the named person service should operate prior to the introduction of the Children and Young People (Information Sharing) (Scotland) Bill.

313. Since the Deputy First Minister's announcement in 2019 of the intention to repeal Parts 4 and 5, there has been extensive engagement with stakeholders on developing policy and practice guidance, which has recently been published. As a result these provisions were not included in the consultation for this Bill.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

314. An Equality Impact Assessment (EQIA) has been carried out on the policies in the Bill. The Scottish Government recognises the established intersecting vulnerability, disadvantage and multiple adversity often experienced by children and young people in many of the core groups the

¹²⁸ Section 96(2) of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

Bill will particularly affect.¹²⁹ Moreover, it is acknowledged that system responses can be influenced by and exacerbate pre-existing vulnerabilities and compound inequality, stigma and disadvantage.¹³⁰ As a result of the EQIA, it has been concluded that the provisions in the Bill are likely to have an overall positive impact on people with protected characteristics in eliminating discrimination, promoting equality of opportunity and fostering good relations. The EQIA has reinforced the necessity for various provisions contained within the Bill, particular those that address the inconsistencies in the way in which 16 and 17 year olds are treated, and therefore address the resulting disadvantage experienced by this age group. Measures in the Bill that aim to promote equality of opportunity for all children for example in extending legal protections and safeguards that currently only some children can benefit from, such as in respect of police custody, court arrangements, and looked after children status for those children remanded or sentenced in secure accommodation this should promote parity. Where provisions extend to young people, the benefits are also likely to be favourable to this older age range. The EQIA has also identified the positive impacts that the Bill is likely to have for disabled children, girls and boys, transgender children, and children from black and minority ethnic backgrounds.

315. Where potential negative implications have been identified, efforts have been made to minimise or mitigate these as far as possible. For example, particular implications for people (and especially children) who have been harmed have been identified. The provisions in respect of information sharing by the Children’s Reporter; bolstering the ability for measures to be placed on a child through compulsory orders where necessary for the protection of the child and others; reporting restrictions; and closed courts have sought to mitigate potential impacts. Moreover, for individuals who have been harmed with a protected characteristic or those adversely affected by aggravated offences, the child will still be supported to address their offending behaviour and as required can be deprived of their liberty but this would be within age-appropriate systems and services. This should help prevent the causing of further harm and future victims, benefitting everyone.

Human rights

316. As noted below, there are a number of areas covered by the Bill that potentially engage rights under the European Convention on Human Rights (ECHR). However, the Scottish Government considers that the provisions of the Bill are ECHR compliant.

Section 1 and 8: Meaning of child

317. In relation to sections 1 and 8 of the Bill, re-defining “child” as all persons under 18 does not raise any issue of ECHR compatibility.

318. These provisions do engage UNCRC, by in effect allowing the children’s hearings system to be recognised as an appropriate forum for children up to age 18, within the limits of the Lord Advocate’s Guidelines and the independence of prosecutorial decision-making.

¹²⁹ Various national and international research has evidenced this as summarised in [Key messages from the Centre for Youth & Criminal Justice](#); [Scotland’s approach to children in conflict with the law \(cycj.org.uk\)](#); [Children and young people in conflict with the law: policy, practice and legislation](#); [The-Promise.pdf \(carereview.scot\)](#)

¹³⁰ For example in agency responses to children from [different socio-economic backgrounds](#), [the disproportionate criminalisation of looked after children](#), and [in depriving children of their liberty in YOIs](#).

319. This ensures there is no differential treatment of a child due to age alone, instead promoting equality of access to this system, and allows decisions to be made with the child's welfare as a paramount, if not primary consideration in all cases. This recognises the need to be able to treat children differently from adults as envisaged by article 40 UNCRC.

Compulsory supervision orders: movement restriction conditions (“MRCs”)

320. Where a hearing decides to include an MRC in a child's order, this engages Articles 6 (right to fair trial) and 8 (right to respect for family and private life), and potentially Article 5 (right to liberty and security) ECHR (though in the vast majority of cases, the extent of restrictions on a child are unlikely to constitute a deprivation of liberty).

321. A children's hearing is a public authority which must act compatibly with the ECHR in accordance with section 6 of the Human Rights Act 1998.

322. The provisions in the Bill regarding MRCs as a whole, with clear, precise criteria,¹³¹ and which will be further supported in guidance are capable of being operated in a manner which is proportionate, and thus compatible with Articles 5 and 8 ECHR. Children's hearings are used to operating in a manner which supports fair and effective participation of the child and those with a right to attend the hearing, with the availability of legal representation where appropriate. This, together with rights of appeal, supports compliance with Article 6 ECHR.

Secure authorisation

323. Section 5(2) of the Bill amends the criteria for secure accommodation authorisations.¹³² However, those still reflect the high threshold for any decisions to deprive a child of their liberty through their placement or keeping in secure accommodation, in accordance with Article 5 ECHR. The current process for granting these measures continues to satisfy the requirements of Article 5 and 6 ECHR which the provisions in section 5 of this Bill do not adversely affect.

Restriction on report of proceedings involving children

324. Section 13 engages Article 6 and 10 (freedom of expression) ECHR. On the other hand, publishing identifying information in relation to children accused of offences can, in some circumstances, lead to threats or the risk of actual harm (engaging Articles 2 (right to life) or 3 (prohibition of torture) ECHR). In respect of Article 8 ECHR, being publicly identified as a person who is accused or convicted of offending in childhood can bring additional and lifelong notoriety.

325. The policy aim here is to enhance rehabilitation, to promote the welfare of children, to promote greater compliance with the UNCRC and in light of recent developments in understanding adolescent brain development, as is reflected in Scottish sentencing guidelines,¹³³ to acknowledge that offending in childhood is and ought to be treated differently to offending as an adult. This

¹³¹ *Khlaifia and Others v. Italy*, Application No. 16483/12, 15 December 2016

¹³² In section 83(6) of the 2011 Act in relation to CSOs, as well as making similar changes in relation to the criteria for ICSOs (section 5(3), which amends section 86 of the 2011 Act), medical examination orders (section 5(4), which amends section 87 of the 2011 Act) and warrants to secure attendance (section 5(5), which amends section 88 of the 2011 Act).

¹³³ [Scottish Sentencing Council, guidelines](#)

means that children require to be given additional protection whether involved in court proceedings as an accused or a witness. Proceedings can still be contemporaneously publicly reported on, but without publishing identifying information. Any interference with Article 6 or 10 ECHR rights must pursue a legitimate aim, and there must be a relationship of proportionality between the aim and the means to achieve this. The legitimate aim pursued by these provisions falls within “the protection of the rights of others”, and the relevant and sufficient reason for this policy is supported by the policy aims set out above. In the Scottish Government’s view the measures included in the Bill can be justified as proportionate to those aims.

Closed courts

326. Section 14(3) of the Bill inserts a new section 70B into the 1995 Act allowing the sheriff in solemn proceedings in respect of an offence alleged to have been committed by a child and adult co-accused, to conduct proceedings in a closed hearing setting. So far as engaging the right to a fair and public hearing under Article 6(1) ECHR, the latter entails two aspects: the holding of public hearings and the public delivery of judgments. The European Court of Human Rights has found that the entitlement to a “public hearing” in Article 6(1) ECHR necessarily implies a right to an “oral hearing”¹³⁴, and the Court has not felt bound to adopt a literal interpretation of the words “pronounced publicly”¹³⁵. As such, a trial in closed court settings exclusively for the child, the co-accused adult, their representatives, media, and any other persons the court deems appropriate, is not of itself incompatible with Article 6 ECHR.

327. In any event, the new sections 142A(5) and 70B(4) of the 1995 Act specify that, in considering whether to put in place closed court measures for a child and adult who are co-accused, the court must have regard to the rights of the person with whom the child is jointly charged to effectively participate in the proceedings. The relevant provisions do not constitute a blanket requirement on the court to put in place closed court measures. Rather, they provide the courts in summary and solemn proceedings with an opportunity to carefully consider on a case-by-case basis whether closed court settings for a child and adult co-accused are appropriate, with special consideration to be given to the rights of the co-accused to effectively participate in proceedings. The courts’ duty to act in accordance with the ECHR under section 6 of the Human Rights Act 1998 will also inform that decision-making process.

Remittal

328. The Scottish Government does not consider that increasing the scope for remittal raises any substantive issues of compatibility with convention rights. However, it is worth noting that, in relation to Article 6 ECHR, the section 49 powers can only be used where the child has pled guilty to, or been found guilty of, an offence, which would be via a criminal court process which complies with Article 6 ECHR.

Remand, committal and detention of children

329. The Scottish Government assess that in exceptional circumstances detaining certain children in secure accommodation with other children could engage Article 2 and Article 3 ECHR, but that robust risk management procedures that may ultimately lead to a child being held

¹³⁴ *Dory v Sweden* (28394/95)

¹³⁵ *Sutter v Switzerland* 8209/78

separately and the requirement for Scottish Ministers to act compatibly with ECHR, will enable compatibility with those Articles.

330. The Scottish Government has also considered the child's own Article 3 rights where, in extreme cases, a child is held separately. The Scottish Government does not think that holding a child by themselves in secure accommodation for a proper purpose for short periods, with procedural safeguards including review, would violate Article 3.

331. The Scottish Government considers that to the extent that Articles 5 and 6 ECHR are engaged by sections 16 and 17, those sections operate compatibly. Furthermore, the regulation making powers in those sections will enable provision to be made to support the child during the placement, which will be underpinned by appropriate assessments of the child and a child's plan.

332. In the extreme cases where it is determined that a child should be held separately in secure accommodation the Scottish Government assess that it is possible that the decision to hold the child separately could engage Article 6 ECHR, but that the provisions can operate compatibly.

333. The Scottish Government notes that sections 16 and 17 (and section 18) may engage rights under Article 8 ECHR in so far as they prescribe the place of detention for all children under the age of 18. However, the new provisions seek to enhance the conditions of detention for children by providing that children under 18 may not be detained at the point of remand or sentence in a YOI or prison. Sections 16 and 17 also include regulation making powers, which will allow for reviews of aspects of the detention such as visiting/contact arrangements with family members. The Scottish Government therefore considers that any interference under Article 8 ECHR is proportionate and for a legitimate aim.

334. The Scottish Government considers that Article 14 ECHR could be engaged (in tandem with another convention right) given that regulations made under sections 16 and 17 may provide that those who are remanded or sentenced under 18 to detention in secure accommodation may remain in secure accommodation until a maximum age of 19; whereas an 18 year old who is remanded or sentenced at that age will be detained in a YOI. However, the Scottish Government considers that to avoid arbitrary cliff edges there is objective justification for a difference in treatment as between 18 year olds on remand/serving a sentence who were in secure accommodation before turning 18 and those who have been remanded/sentenced after that point. A Children's Rights and Wellbeing impact assessment has been completed for the Bill. This assesses the positive impacts on the main policy areas in the Bill in relation to reducing the discrimination of children aged 16 and 17 in particular and highlights the many positives of ensuring that all ages of children are treated appropriately in the justice system in recognition of their differing needs from adults. The potential for giving better effect to UNCRC is also set out.

Island communities

335. The provisions in this Bill are intended to benefit all communities across Scotland. While there are specific considerations for island communities in relation to some of the provisions, such as MRCs and local authority responsibilities when a child is in police custody these are likely to be able to be addressed at a local level. As a result a full island communities impact assessment has not been completed.

Local government

336. A significant number of the provisions in this Bill are likely to have an impact on local government. For example, local authorities have responsibility for the provision of information and support where children have their cases addressed through the children's hearings system or criminal justice system, including in the implementation of any order. They are also responsible for the provision providing (either delivering or purchasing) secure accommodation and managing and funding children's placements in certain circumstances the funding of a child's placement. The financial implications for local authorities are set out in the Financial Memorandum accompanying the Bill.

337. Moreover, the Bill's provisions around police custody extends functions in a range of areas in respect of 16 and 17 year olds, to ensure they apply to all those under 18, not just those who are subject to measures through the children's hearings system (as is currently the case). This includes extending notification to local authority social work that any child up to 18 is in custody, and may require local authority attendance to support the child. This reflects the increase in the definition of a child to 18.

338. In addition, the Bill enables a hearing to make a statement that a child needs supervision or guidance, after a compulsory order is terminated, and places a duty on the local authority to be under a duty to provide it up to age 19, where it is accepted by the child. These duties will align with existing duties on local authorities to provide care leaver and after care entitlements to a child.

339. In enabling any child who requires to be deprived of their liberty to be remanded or sentenced to secure accommodation, more children are likely to be placed in secure accommodation who are not already looked after children and therefore will not have existing corporate parenting or aftercare entitlements. The Bill looks to afford parity by including provisions to enable any child who is sentenced or remanded to secure accommodation to also be treated as a looked after child.

Sustainable development

340. The Bill is expected to have a positive social impact by contributing to improved outcomes for children. Where children come into conflict with the law, addressing the causes of their behaviours can help them reintegrate, rehabilitate and desist. In turn, this approach can prevent the causing of further harm and minimise the number of future victims. In doing so, overall societal outcomes are improved for everyone.

341. The legislation will build on Scotland's overall approach to children's rights and welfare, in-line with UNCRC, our Youth Justice Vision and GIRFEC principles. It also aims to improve experiences and outcomes for all children who are accommodated in care and justice settings in Scotland, as well as those who are placed here across borders in exceptional circumstances.

342. In addition, the Bill is intended to have a positive economic impact over time. Scotland has already seen dramatic positive changes in the youth justice sector which the provisions aim to build upon. Between 2008-09 and 2019-20, there was an 85% reduction in the number of children

and young people prosecuted in Scotland's courts and a 93% reduction in 16- and 17-year-olds being sentenced to custody.

343. As set out in the Financial Memorandum, the Bill should be seen within this wider backdrop of the benefits change programmes are engendering and potential savings to public expenditure. The negative costs to society, both economic and social, of offending and crime are well documented. For instance, The Promise *Follow the Money*¹³⁶ report estimates the cumulative private costs, physical and emotional (psychological) harm, lost output and public service costs (at 2016 population level) to be £3.9bn. By helping address the underlying causes of a child's conduct and looking more holistically at the circumstances surrounding any offending behaviour – in-line with the Kilbrandon ethos on which the children's hearings system was founded – Scotland can help them on to more positive futures.

344. Regarding financial sustainability of the organisations discharging the new legislative duties, the Bill creates no new public bodies. Therefore existing delivery bodies will, already be subject to existing value-for-money and financial prudence obligations. Therefore the Bill is not assessed as making any impact here.

345. The potential environmental impact of the Bill has been considered, with a pre-screening report completed. No significant environmental effects are expected.

¹³⁶ The Promise *Follow the Money* <https://www.carereview.scot/wp-content/uploads/2020/02/Follow-the-money.pdf>

APPENDIX 1 GLOSSARY

346. Care leaver - a child who ceases to be a looked after child on or after their 16th birthday.¹³⁷
347. Child or children - a person or people aged under 18 years.
348. Child or children in conflict with the law - a child or children who are suspected of, alleged to, and have been found guilty of breaking the law. These children may have their cases addressed through the children's hearings system or criminal justice system.
349. Children's hearing - the legal meeting (often just called a Hearing), that children and young people can be asked to attend if there are concerns about the child or young person, or their behaviour.
350. Children's hearings system - Scotland's approach to care and justice for children.
351. Compulsory Supervision Order - a legal order the children's hearings system can make that can make a child subject to a range of conditions.¹³⁸
352. Cross border placement - a child placed into a residential care setting in Scotland by a local authority from England, Wales or Northern Ireland. Although this relates to the placement itself, this term relates to individual children.
353. Deprivation of liberty - An order (including an interim order) made under the inherent jurisdiction of the High Court of England and Wales or, as the case may be, made by the High Court of Justice in Northern Ireland, which authorises the deprivation of liberty of a child in a residential care setting.
354. Deprivation of liberty order - An order (including an interim order) made under the inherent jurisdiction of the High Court of England and Wales or, as the case may be, made by the High Court of Justice in Northern Ireland, which authorises the deprivation of liberty of a child in a residential care setting.
355. Kilbrandon ethos - referring to the 1964 Kilbrandon Report,¹³⁹ which promotes a holistic approach to the needs and welfare of the child, and emphasises that the underlying causes of children's offending behaviour should be met with care and protection.
356. Looked after child - a child who is under the care of the local authority.¹⁴⁰
357. MAPPA – Multi-agency public protection arrangements.

¹³⁷ As per section 29 [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹³⁸ As per section 83 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹³⁹ [The KILBRANDON Report - gov.scot \(www.gov.scot\)](https://www.gov.scot)

¹⁴⁰ As per section 17(6) [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk)

358. Place of safety - an appropriately safe place for a child to be held, in a range of formal or informal settings.¹⁴¹

359. Principal Reporter - an independent official within the children's hearings system with powers to delegate functions to other officers, in particular Children's Reporters, with these terms used interchangeably in this document.

360. Relevant Person - this is generally this is a person with parental rights or responsibilities for a child.¹⁴²

361. Secure accommodation authorisation - an authorisation on an order through the children's hearings system allowing a child to be placed in secure accommodation.¹⁴³

362. Secure accommodation service - a service which provides accommodation for the purpose of restricting the liberty of children in residential premises where care services are provided; and is approved by the Scottish Ministers for that purpose.

363. The Promise - the commitment the Scottish Government made to ensure that all children and young people are loved, safe and respected so that they can reach their full potential.

364. Whole System Approach - The Scottish Government's programme for addressing the needs of young people involved in offending.

365. Young offenders' institutions - these currently provide custodial facilities for 16-21 year olds (or older in exceptional circumstances). HMP & YOI Polmont is the main establishment for boys, girls and young people.

366. Young person or people - a person or people aged 18-25 years.

¹⁴¹ As per section 202 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁴² As per section 200 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

¹⁴³ As per section 85 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

This document relates to the Children (Care and Justice) (Scotland) Bill (SP Bill 22) as introduced in the Scottish Parliament on 13 December 2022

CHILDREN (CARE AND JUSTICE) (SCOTLAND) BILL

POLICY MEMORANDUM

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