

# **Children's Care and Justice Bill**

## **Consultation on Policy Proposals**

**March 2022**

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## Ministerial Foreword



I want Scotland to be the best place in the world to grow up. The Scottish Government is rightly unapologetic in our level of ambition. To achieve this, we are adopting a progressive, and continually improving, approach to supporting our children and young people to achieve the best outcomes possible for them. In doing so, we are committed to promoting and enhancing the rights of every child.

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 contact or conflict with the law, providing the best support to address the causes of their behaviours will help children to reintegrate, rehabilitate and desist. In turn, this approach can prevent the causing of further harm and minimise the number of people experiencing such harm. The benefits of this are felt by everyone – the individual child thought to be responsible for causing harm, their family, the wider community, the person harmed and ultimately broader society.

We are committed to enhancing the rights of people who have been harmed to ensure appropriate protection, support and information, irrespective of the age of the person who has caused harm or how this harm is responded to. It is often other children who are harmed by children's behaviours. Children who cause harm have often been harmed at earlier stages in their childhood. It is imperative that we get it right for every child and any person who has been harmed.

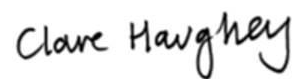
In February 2020, Scotland's Independent Care Review published a series of reports with The Promise narrating a vision for Scotland. The Promise told Scotland what it must do to make sure that all children and young people, are loved, safe and resected so that they can reach their full potential. The Scottish Government is committed to Keeping The Promise by 2030 and our Promise Implementation Plan sets out the actions and commitments we are taking to do so.

Last year we published a new Vision for Youth Justice, which 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 to preventing offending by young people focused on early intervention, diversion from prosecution, and alternatives.

Our current Programme for Government commits to: "...safeguard young people within the youth justice system, supporting a presumption against under 18s in the Criminal Justice System, keeping them out of young offenders' institutions where possible and appropriate, while ensuring that victims receive the support they need. We will bring forward a Children's Care and Justice Bill to support this transformation".

Therefore I am very pleased to be publishing this consultation, seeking views of people and organisations across civic Scotland, to inform the development of legislation ahead of introduction to the Scottish Parliament.

Of course, legislation alone cannot deliver these overarching aims. The proposed Children's Care and Justice Bill is one strand of body of work being taken forward on policy, legislative, structural and resourcing matters to Keep The Promise. We must continue to strive across all fronts in order to do all we can to improve the outcomes for Scotland's children and young people and I welcome the continued commitment and dedication of partners to help achieve that aim.

A handwritten signature in black ink that reads "Clare Haughey". The signature is written in a cursive, flowing style.

**Clare Haughey MSP**  
Minister for Children and Young People

## 1. Consultation Process

### 1.1 Responding to this consultation

The consultation will run for 12 weeks and we are inviting responses to this consultation by 22<sup>nd</sup> June 2022.

In order to respond to this consultation, please use the Scottish Government's consultation hub Citizen Space, which you can access online [here](#).

You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date above. You do not need to respond to every question.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and send your responses to consultation questions to [CC&JBill@gov.scot](mailto:CC&JBill@gov.scot).

In addition, an Easy Read version of the consultation and questions will be made available imminently. Further supporting materials including a conversation guide for professionals working with children and young people and associated materials have been produced, following feedback from young people themselves, and will also be available are available [here](#). We are also happy to engage with children and young people directly-please contact [CC&JBill@gov.scot](mailto:CC&JBill@gov.scot).

This formal public consultation is not the only means by which the Scottish Government will seek views on the proposals and related issues. Many of these matters are subject to ongoing and in-depth engagement with partners and stakeholders, whilst others have already been subject to primary legislation or other public consultation in preceding years. Throughout the period of this consultation, engagement work with key partners and stakeholders will continue. We will be providing input to existing groups and forums. If it would be helpful to engage with you or your organisation in a specific arrangement, please get in touch at [CC&JBill@gov.scot](mailto:CC&JBill@gov.scot).

### 1.2 Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document. To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy>

### 1.3 Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence. Responses will be published where we have been given permission to do so. An analysis report will also be made available in summer 2022.

### 1.4 Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to <http://consult.gov.scot>.

### 1.5 Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot> Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## 2. About this Consultation

The Scottish Government's Programme for Government<sup>1</sup> 2021/22, commits to: "...safeguard young people within the youth justice system, supporting a presumption against under 18s in the Criminal Justice System, keeping them out of young offenders' institutions where possible and appropriate, while ensuring that victims receive the support they need. We will bring forward a Children's Care and Justice Bill to support this transformation".

In this consultation, the Scottish Government is seeking views and feedback on policy proposals to inform the development of the Children's Care and Justice Bill, intended to be introduced to the Scottish Parliament. The Government's future legislative programme will be set out in the Programme for Government. This consultation covers potential legislative reforms to promote and advance the rights of all children and people who have been harmed. In particular, the objectives of these proposals are to safeguard and support Scotland's children towards positive outcomes and destinations, especially those who may need legal measures to secure their wellbeing and safety. The proposals have a particular focus on children coming into contact with care and justice services or who come into conflict with the law.

Evidence, from children and young people with experience of the care and justice systems, from practitioners, stakeholders and academics and from the Promise<sup>2</sup>, has been fundamental to the development of these proposals. Additionally, system reviews and subsequent articulated ambitions of the outcomes that Scotland should seek to pursue for its children and young people<sup>3</sup>, offer important context. The Lord Advocate's independent role as head of the system of criminal prosecutions in Scotland also needs to be recognised and respected in reference to issues explored in this consultation.

The Scottish Government is committed to co-designing solutions, and this consultation is therefore also aimed at eliciting views on how we collectively achieve our aims for children and young people. In respect of certain elements of these proposals, prior consultation has already been undertaken and specific proposals have been developed. In respect of other matters, the document outlines issues and objectives and then sets out options as to potential solutions.

The Promise<sup>4</sup> articulated how to take forward the findings of Scotland's Independent Care Review in order to improve outcomes for Scotland's most vulnerable children, particularly those who come into contact with the care system. The Scottish Government is committed to keeping the Promise in full by 2030. Certain elements of the Promise require to be kept by 2024 in line with change programme ONE<sup>5</sup> published in 2021. The proposals in this consultation are part of this commitment.

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<sup>1</sup> [A Fairer, Greener Scotland: Programme for Government 2021-22 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/programme-for-government-2021-22/pages/introduction.aspx)

<sup>2</sup> As detailed further in the forthcoming Scottish Government Promise Implementation Plan

<sup>3</sup> For example, through the [Independent Care Review – The root and branch review of Scotland's care system](#).

<sup>4</sup> [The-Promise.pdf \(carereview.scot\)](#)

<sup>5</sup> [Change Programme ONE - The Promise](#)

The Scottish Government published a Promise Implementation Plan on 30 March, which references the Children's Care and Justice Bill as part of the package.

Successful implementation of legislation must be supported by enhanced interventions and services; support for a skilled, confident and empowered workforce; culture and practice change; partnership working; and efforts to promote public understanding and to command broad confidence in Scotland's communities. Therefore the Bill is one pillar of a number of such efforts being taken forward to Keep The Promise by 2030. That wider context makes it necessary to acknowledge the implications of some proposals, and to indicate where wider potential measures will be required to support successful practical implementation.

Getting it Right for Every Child (GIRFEC)<sup>6</sup> 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)<sup>7</sup>. The term 'child' or 'children' in this consultation document therefore refers to that age-group, unless otherwise stated. 'Young people' is typically used to refer to those aged 18-25 years in keeping with wider legislation and policy developments<sup>8</sup>.

Children's care and justice are complex and emotive areas, and many of the issues explored in this document are challenging. However, addressing difficult issues is necessary to achieve our goals in relation to children, young people, people who have been harmed and justice<sup>9</sup>. While many of the considerations relate to children in conflict with the law, these will impact on all children who are in need of care and protection, as well as those who may be harmed by parts of a child's behaviour. That integrated philosophy is central to GIRFEC. The proposed changes will also affect children who are placed or who may be placed in care settings in Scotland from other jurisdictions. The policy aims that the proposed legislation seeks to support are:

- To ensure children receive the right help and support they require, at the right time, as far as possible and appropriate without statutory intervention.
- Where any child requires the support and intervention of formal systems, to ensure this is available through the age-appropriate children's hearings system by raising the maximum age of referral to the Principal Reporter.
- To ensure children are treated in a way that is trauma-informed and accounts for their age and stage of development, recognising that this approach is constrained by current structures and systems.
- To maximise the use of measures to support children in the community, and with their family wherever possible. Where a child requires to be deprived of their liberty, to ensure that this only happens in age-appropriate care facilities where possible and appropriate by enabling more children to access secure care or other residential or community-based alternatives.

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<sup>6</sup> [Getting it right for every child \(GIRFEC\) - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>7</sup> [The United Nations Convention on the Rights of the Child](http://www.unhcr.org/refugees/article/43c47dad/the-united-nations-convention-on-the-rights-of-the-child)

<sup>8</sup> For example, [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](http://legislation.gov.uk) and [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](http://scottishsentencingcouncil.org.uk)

<sup>9</sup> Including [The-Promise.pdf \(carereview.scot\)](http://carereview.scot), [Bail and release from custody arrangements in Scotland - Scottish Government - Citizen Space \(consult.gov.scot\)](http://consult.gov.scot) and [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](http://scottishsentencingcouncil.org.uk)



- That cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child, with the introduction of additional safeguards and regulation.
- To enhance the rights to appropriate protection, support and information for people who have been harmed irrespective of the age of the person who has caused the harm or the system dealing with their case.
- To make other technical and procedural alterations to existing legislation in such areas where deemed necessary and appropriate.

### 3. Introduction

The Scottish Government wants all of Scotland's 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<sup>10</sup>. This requires that children are treated respectfully, have their voices heard and their rights respected. Central to achieving this aim is GIRFEC which articulates the national policy and practice model for improved outcomes for children. GIRFEC supports families by making sure children and young people can receive the right help, at the right time, from the right people. This requires a continuum of preventative and protective work, alongside effective interdisciplinary working. GIRFEC is a practical expression of Scotland's commitment to implementation of the United Nations Convention on Rights of the Child (UNCRC). Work is currently ongoing to incorporate UNCRC into domestic legislation<sup>11</sup>.

All children in Scotland have the right to be protected from abuse or neglect. The Scottish approach to child protection is based on respect for children's rights and sits within the wider context of GIRFEC. Legislation, guidance, procedures and assessment frameworks exist to support and inform child protection processes and practices<sup>12</sup>. Child protection is particularly crucial where children come into conflict with the law. People harmed by children's offending are often other children. There is extensive evidence demonstrating that children involved in a pattern of offending, or who are involved in more serious offences, are usually Scotland's most vulnerable, victimised and traumatised children<sup>13</sup>.

Low level offending behaviour is a common feature of childhood as children grow and test boundaries. It is usually responded to appropriately by families and communities, largely with the incidence of such behaviours reducing as children mature<sup>14</sup>. For a small percentage of children, the frequency and severity of their harmful or offending behaviour causes more significant concern, and brings more serious consequences. The Scottish Government and partner agencies across sectors and professions have worked hard to prevent children coming into conflict with the law, and to promote effective policies encouraging prevention and diversion since the introduction of the Whole System Approach (WSA)<sup>15</sup>. Over the last 12 years, there has been a 75% reduction in children referred to the Principal Reporter on offence grounds, an 85% reduction in the number of children and young people

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<sup>10</sup> [National Performance Framework](#)

<sup>11</sup> The [United Nations Convention on the Rights of the Child \(Incorporation\) \(Scotland\) Bill](#) passed its final stage in the Scottish Parliament in 16 March 2021. However, the UK Government law officers referred the UNCRC (Incorporation) (Scotland) Bill to the Supreme Court on the basis that some aspects exceeded the legislative powers of the Scottish Parliament. The Supreme Court ruled that some provisions in the bill did exceed the legislative competence of the Scottish Parliament. The Scottish Government is currently considering the implications of this.

<sup>12</sup> For further information see [national-guidance-child-protection-scotland-2021 \(4\).pdf](#)

<sup>13</sup> [Key messages from the Centre for Youth & Criminal Justice](#) and [Scotland's approach to children in conflict with the law \(cycj.org.uk\)](#)

<sup>14</sup> Although there is a growing body of evidence that even for the same behaviours some children are more likely to receive a formal system response. For example poorer children, children with an autism spectrum disorder, a learning difficulty and/or children who experience the care system see [rights-respecting-approach-justice-children-young-people-scotlands-vision-priorities \(4\).pdf](#) and [Independent Care Review – The root and branch review of Scotland's care system.](#)

<sup>15</sup> [Youth justice: Whole system approach to young offending - gov.scot \(www.gov.scot\)](#)

prosecuted in Scotland's courts and a 93% reduction in 16 and 17-year-olds being sentenced to custody<sup>16</sup>.

The WSA is the Scottish Government's approach for addressing the needs of children in, or on the cusp of coming into, conflict with the law. Based on the principles of GIRFEC, the WSA seeks to deliver better outcomes for children, young people, people who have been harmed and communities. Many of the core components of the WSA are not enshrined in legislation to allow much needed flexibility of delivery across the country to fit with local need. Instead, the core elements are outlined in, and practice informed by, guidance<sup>17</sup>, Standards for those working with children in conflict with the law<sup>18</sup> and the Rights-Respecting Approach to Justice for Children and Young People: Scotland's Vision and Priorities<sup>19</sup>. Part of this Vision is to extend the WSA to those beyond the age of 18 providing access to support up to age 26 where possible and appropriate. Care leavers are given particular focus within this extension in some areas of Scotland, in recognition of care leavers overrepresentation in the criminal justice system. The WSA is not set out in legislation. The delivery of WSA needs to be more comprehensive and consistent across Scotland. However, committed efforts mean that positive results are still being seen. The Scottish Government continues to explore how to support and implement the essential elements of the WSA, in order to preserve Scotland-wide integrity in its implementation.

The findings from the Edinburgh Study of Youth Transitions and Crime<sup>20</sup> have been influential in shaping the WSA. The study highlighted the need to ensure that responses to children in conflict with the law are holistic, developmentally appropriate and proportionate, and based on identified need. Early adverse contact with justice agencies is in itself a factor likely to heighten the risk of further offending behaviour. Tiered approaches that divert children from formal systems at every stage are cornerstones of the WSA, including Early and Effective Intervention and diversion from prosecution<sup>21</sup>.

Limiting the imposition of statutory intervention and compulsion only to those children where this is required remains a fundamental principle of Scotland's children's hearings system. The system's creation dates back to the landmark Kilbrandon Report<sup>22</sup> of 1964, furthering Scotland's welfare-based approach to children's care and youth justice. This 'social education' approach proceeds from an acceptance 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 themselves offend, or are offended against.

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<sup>16</sup> [rights-respecting-approach-justice-children-young-people-scotlands-vision-priorities \(4\).pdf](#)

<sup>17</sup> [Youth justice: Whole system approach to young offending - gov.scot \(www.gov.scot\)](#)

<sup>18</sup> [Working with children in conflict with the law 2021: standards - gov.scot \(www.gov.scot\)](#)

<sup>19</sup> [rights-respecting-approach-justice-children-young-people-scotlands-vision-priorities \(4\).pdf](#)

<sup>20</sup> [Youth crime and justice](#)

<sup>21</sup> [Youth justice - early and effective intervention: core elements - framework - gov.scot \(www.gov.scot\)](#)

[Diversion-from-Prosecution-Guidance-Version-4.0-FINAL-VERSION-April-2020.pdf \(communityjustice.scot\)](#)

<sup>22</sup> [The KILBRANDON Report - gov.scot \(www.gov.scot\)](#)

Currently, there are limited routes to ensuring all children – including 16 and 17-year-olds who are not already subject to a Compulsory Supervision Order (CSO) or an open referral to the Principal Reporter – who require support through the children’s hearings system can access this<sup>23</sup>. This can leave children unable to benefit from the support and protection of that system because of their statutory status rather than an individualised assessment of their needs and circumstances.

In light of this concern, the 2019 Programme for Government gave a commitment to consult on enabling joint reporting to the Crown Office and Procurator Fiscal Service (COPFS) and the Principal Reporter of all 16 and 17 year olds in offence cases. Ministers subsequently agreed to widen the consultation to seek views on increasing the age at which children can be referred to the Principal Reporter for care and protection grounds as well as offence grounds. This is covered in detail in Section 4.

In Scotland, children from the age of 12 can be dealt with through the criminal justice system. The circumstances in which children aged 12-17 can be prosecuted are specified in legislation and guidance<sup>24</sup>, in practice resulting in joint reporting to the COPFS and the Principal Reporter in appropriate circumstances.

However, the current legislative framework only permits children aged 16 and 17, who are not subject to a CSO or to an open referral to the Principal Reporter, to be dealt with by the Procurator Fiscal (not the Principal Reporter). These cases are therefore not jointly reported. For these children there is a rebuttable presumption that an alternative to prosecution in court will be in the public interest, and in such 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. Domestic and international evidence highlights concerns about the appropriateness of children’s position in the criminal justice system and traditional courts. This is detailed in Section 5.

Under the WSA and UNCRC, wherever possible and appropriate, most children in conflict with the law should be supported in their families and communities via appropriate community-based supports<sup>25</sup>. In practice, these interventions are often provided in partnership across a range of universal and targeted, statutory and voluntary sector services. The specific supports for each child should be holistic and trauma informed, taking account of that child’s age and stage of development and the broader systems surrounding them (including their family and/or care placement, school, community and wider environment). Support planning and delivery should be based on multi-agency assessment of the child’s strengths, needs, risks and vulnerabilities underpinned by holistic formulation. Supports must be rights respecting and are most effective when provided in the context of relationships and through non-stigmatising approaches, services and systems. Intervention should

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<sup>23</sup> [Children - raising the age of referral: consultation analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>24</sup> [JOINT GUIDANCE IN RELATION TO THE CASES OF CHILDREN JOINTLY REPORTED TO THE PROCURATOR FISCAL AND CHILDREN'S REPORTER \(copfs.gov.uk\)](http://copfs.gov.uk) and [Lord Advocates Guidelines to the Chief Constable on the reporting to Procurators Fiscal of Offences alleged to have been committed by children.pdf \(copfs.gov.uk\)](http://copfs.gov.uk)

<sup>25</sup> [A Guide to Youth Justice in Scotland: policy, practice and legislation \(cycj.org.uk\)](http://cycj.org.uk)

focus on those factors that are most clearly linked to offending and should be tailored to the needs of the individual, including in terms of intensity, while based on evidence and research. There are various examples of best practice, including for offence-specific interventions, across Scotland<sup>26</sup>. Work is underway locally and nationally to ensure that the full range of interventions and supports that may be required are available to Scotland's children in conflict with the law.

For the few children whose behaviour may present a risk of serious harm to others, it may be appropriate to address identified needs and risks under child protection procedures. In addition, established risk management measures exist across Scotland underpinned by the Framework for Risk Assessment Management and Evaluation with children aged 12 to 17-years-old<sup>27</sup>. Care and Risk Management is a best practice example of a formal risk management process. Risk management strategies of monitoring, supervision, intervention and victim-safety planning can be agreed and provided through such processes. In addition, in certain circumstances, depending on the nature of a child's offence and / or presenting risk of harm, children can be subject to Multi-Agency Public Protection Arrangements (MAPPA)<sup>28</sup>.

There will be occasions where, due to the level of concern about the risks or significant harm that a child's behaviours pose to themselves or others, it will be necessary to deprive them of their liberty. Under the WSA, where this is owing to the child being in conflict with the law, the child should be placed in secure care as opposed to a Young Offenders' Institution (YOI). However, not all children can access secure care in these circumstances. For these children not subject to measures through the children's hearings system, YOI is the only available option at present, as detailed in Section 6. Relatedly, barriers to ensuring secure care for every child who requires it, including funding arrangements and capacity<sup>29</sup>, are being explored with partners ahead of any legislative changes in the area of secure care.

The Scottish Government's Justice Vision<sup>30</sup> calls for justice services to transform to meet the needs of Scotland's people, including to ensure the delivery of person-centred services and embed trauma-informed practices across the system. The overarching aims for the criminal justice system in Scotland are to improve public safety by building safer communities; to protect and support people who have been harmed; ensure access to fair justice; and to reduce rates of victimisation by reducing crime and reoffending. Realising these aims will require the balancing of public protection with the provision of real, and repeated, opportunities to support and rehabilitate children who come into conflict with the law. Those rehabilitative concerns particularly apply to children, where the scope and time available to promote lasting positive changes in outlooks and behaviours are self-evident. Children's development can also result in significant changes over shorter time frames than adults as their brains are still developing<sup>31</sup>. All future reform in respect of

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<sup>26</sup> See for example [Practitioner Case Studies - Children's and Young People's Centre for Justice \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>27</sup> [Framework for Risk Assessment Management and Evaluation \(FRAME\) with children aged 12-17](#)

<sup>28</sup> [Management of Offenders etc. \(Scotland\) Act 2005 \(legislation.gov.uk\)](#)

<sup>29</sup> [Secure care and prison places for children and young people in Scotland \(azureedge.net\)](#)

<sup>30</sup> [Justice in Scotland: vision and priorities - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>31</sup> [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk)

Scottish justice is about ensuring smart, compassionate justice, encouraging a shift towards prevention and early intervention and away from custody for those who don't pose a risk of serious harm.

All people are rights holders - the rights of those children who have caused harm and the rights of others sometimes come into conflict.<sup>32</sup> This means striking a balance when upholding the rights of all involved. Support, care and compassion for all those involved, in an attempt to promote healing and to address underlying issues holds out the best prospect of preventing future harm and restoring relationships wherever this is possible<sup>33</sup>.

Restorative justice seeks to ensure the needs of persons harmed and their voices are central, and supports a reduction in harmful behaviour across our communities. The Scottish Government published the Restorative Justice Action Plan<sup>34</sup> in 2019 which commits to having restorative justice services widely available across Scotland by 2023. This should increase access to those services. Involvement in restorative justice in Scotland should always be voluntary for the individual or community harmed or those who have caused harm.

In Scotland, we are moving towards a more nuanced approach to children and young people's age and stage of development. The current law means that a child's trajectory and which parts of the system they can be supported within are determined by their chronological age alone<sup>35</sup>. The proposed changes are rooted in ensuring approaches are consistent with our understanding of child and adolescent social, emotional, cognitive and psychological development and maturation<sup>36</sup>. Typical development and journeys to maturity can be impacted by vulnerabilities and experiences of adversity and trauma, as is frequently the experience of children in conflict with the law.

This evidence also highlights the distinct needs of young people aged 18 onwards, moving into early adulthood. Scotland should work to move away from 'cliff edges' of supports and systems determined only by chronological age. More needs to be done to ensure the development and availability of graduated, needs-led, transitions based more on developmental ability and capacity. While the reforms proposed in this consultation predominantly relate to under 18s, some of these extend to and have relevance for young people and young adults, especially those aged under 26.

### 3.1 The Promise

The proposals in this consultation aim to align with the findings of the Independent Care Review. Their implementation would support Scotland to Keep The Promise. Published in 2020, the Promise states that a fundamental shift is required in how

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<sup>32</sup> [Justice in Scotland: vision and priorities - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>33</sup> [Scotland's approach to children in conflict with the law \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>34</sup> [Restorative Justice Action Plan](#)

<sup>35</sup> For example under the [Age of Criminal Responsibility \(Scotland\) Act 2019 \(legislation.gov.uk\)](#); [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](#); [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](#)

<sup>36</sup> [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts \(scottishsentencingcouncil.org.uk\)](#)



decisions are made with children and families, with particular recommendations related to care and justice highlighted throughout this document. All political parties currently represented in the Scottish Parliament are committed to implementing these conclusions in their entirety by 2030. Meeting the imperatives of the Promise requires a fundamental shift in focus, time, commitment, resourcing and underlying structures. Significant work is already underway towards the requirements articulated in The Promise Scotland Plan 21-24<sup>37</sup>. By working cohesively across Government, with The Promise Scotland and together with partners in local government, health boards, the third sector and the care community we aim to ensure that improvements are felt day to day in the lives of care experienced children and families. A number of the Promise findings are of particular relevance for this consultation:

- The disproportionate criminalisation of care experienced children and young people will end.
- 16 and 17-year-olds will no longer be placed in YOIs on remand or having been sentenced.
- There will be sufficient community-based alternatives so that detention is a last resort.
- Children who do need to have their liberty restricted will be cared for in small, secure, safe, trauma-informed environments that uphold their rights.

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<sup>37</sup> [Plan 21-24 - The Promise and as detailed in change-programme-one-pdf.pdf \(thepromise.scot\)](#)

## 4. Raising the Maximum Age of Referral to the Principal Reporter

### 4.1 Background

The Promise is clear that more should be done to ensure children can stay within the welfare-based children's hearings system.

Children are usually referred to the Principal Reporter<sup>38</sup> by police, social work or schools, but can be referred by anyone, such as a concerned relative<sup>39</sup>. The Principal Reporter will then consider whether to convene a children's hearing<sup>40</sup>, that will determine whether compulsory legal measures of supervision are required for the child. The various grounds on which a child can be referred to the Principal Reporter are legislatively defined<sup>41</sup>.

The recommendation to increase the maximum age of referral to include all children under 18 received unanimous support among responses to the consultation on raising the age of referral to the Principal Reporter<sup>42</sup>, as detailed in the analysis report of December 2020<sup>43</sup>. Whether on care and protection grounds or offence grounds, the Scottish Government's intention is to enable this important structural shift.

#### 4.1.1 Referral on offence grounds

Where children are alleged to have committed an offence, the police must jointly report certain offences to the Procurator Fiscal and to the Principal Reporter. These offences are set out in the Lord Advocate's guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children ("the Lord Advocate's Guidelines")<sup>44</sup>.

Where an alleged offence is jointly reported, there is a binding agreement between Scottish Children's Reporter Administration (SCRA) and COPFS – 'Decision Making in Cases of Children Jointly Reported'<sup>45</sup>, which details the presumption that the child will be referred to the Principal Reporter in relation to an offence and factors for consideration in overriding this presumption. Although the decision regarding the jointly reported case is for the Procurator Fiscal, such a decision shall not be taken until the case has been discussed with the Principal Reporter. The Lord Advocate retains constitutional authority over the processes on such matters.

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<sup>39</sup> Under the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10) criteria for referral to the Reporter are: a) The child is in need of protection, guidance, treatment or control; and b) It might be necessary for a CSO to be made in relation to the child.

<sup>40</sup> Under Section 66 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10), the test to be applied by the Reporter is (a) the Reporter considers that a section 67 ground applies in relation to the child, and (b) it is necessary for a compulsory supervision order to be made in respect of the child

<sup>41</sup> Under Section 67(2) of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10)

<sup>42</sup> [Raising the age of referral: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/Information/Consultations/2020/Raising-the-age-of-referral-consultation)

<sup>43</sup> [Children - raising the age of referral: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/Information/Consultations/2020/Children-raising-the-age-of-referral-consultation-analysis)

<sup>44</sup> [Lord Advocate's Guidelines](https://www.gov.scot/Information/Consultations/2020/Lord-Advocate-s-Guidelines)

<sup>45</sup> [Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter](https://www.gov.scot/Information/Consultations/2020/Decision-making-in-cases-of-children-jointly-reported-to-the-Procurator-Fiscal-and-Children-s-Reporter)



In the welfare-based children's hearings system it is not the role of a children's hearing to sentence a child or impose a retributive penalty in respect of an offence committed, no matter how serious. In coming to a decision, the hearing must respect the general principles<sup>46</sup>, namely:

- that the welfare of the child is the paramount (or when absolutely necessary to protect members of the public from serious harm a primary) consideration<sup>47</sup>;
- that the views of the child must be taken into account; and
- that the hearing may only make or continue an order only if it is better for the child for the order to be in force than not (sometimes referred to as the "minimum intervention principle").

Children can remain subject to a CSO only if the hearing considers that it is necessary for the protection, guidance, treatment or control of the child. A child can only be subject to an order issued by the children's hearing up to age 18 (at which point the order ceases to have effect).

The Promise is clear that: "Despite the principles of Kilbrandon that aimed to ensure a welfare-based approach to offending, a significant number of children involved in offending behaviour are dealt with in Criminal Courts rather than through The Children's Hearing[s] 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[s] system."

It is key that this approach be made applicable to under 18s whether being referred on either care or justice grounds – often this can be a combination of both. This will also support the upholding of the Scottish Government's Youth Justice Vision which commits to raising the age of referral to 18, alongside a presumption against under 18s in the criminal justice system, insofar as that is consistent with the extant Lord Advocate's prosecution policy.

#### 4.1.2 Referral on care and protection grounds

All children and young people must be able to benefit from the Kilbrandon approach, especially those who need care and protection because of the actions or omissions of others in their lives.

In the previous consultation on raising the age of referral to the Principal Reporter, roughly two thirds (68%) of respondents agreed that, if the age of referral was increased, the existing grounds for referral to the Principal Reporter were sufficient. We are not proposing the addition of any new grounds for referral.

In 2020-21<sup>48</sup>:

- 9,665 children in Scotland were referred to the Principal Reporter, 2,207 on offence grounds and 8,013 on non-offence grounds. 555 children were referred on non-offence and offence grounds.

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<sup>46</sup> Sections 25 to 29 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>47</sup> Section 26 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>48</sup> [Children referred to the Reporter \(scra.gov.uk\)](https://scra.gov.uk)

- Some children referred for offending are referred on multiple occasions and referrals can contain multiple charges - the 2,207 children referred on offence grounds were referred for 9,142 alleged offences on 5,282 referrals<sup>49</sup>.
- Over half of these offences were classed as miscellaneous (4,600) or other crimes (1,075); 1,339 for fire-raising, vandalism etc.; and 1,260 crimes of dishonesty.
- 381 were sexual crimes; 320 motor offences; and 167 non-sexual crimes of violence.
- Of the 2,207 children referred on offence grounds, only 79 had a hearing arranged on new grounds. The most common reason for not arranging a hearing was that a CSO was not necessary or that the current order / measures were sufficient.

The 2020 consultation responses and the activity of the cross system working group established under the Youth Justice Improvement Board<sup>50</sup> which reported in September 2021, set out a range of operational and practical implications of any future legislative change around raising the age of referral.

Many of these factors relate to policy, practice, staffing, training, availability of services and resource across services and may impact on the roles and remits of those discharging the children's hearings system. Managing these impacts is under discussion with the responsible partners. This will continue alongside the preparatory work to develop the Children's Care and Justice Bill to ensure the system as a whole is ready to maximise the benefits of any increase to the maximum age of referral to the Principal Reporter.

The Promise identified significant support for, and commitment to, the underlying principles of Kilbrandon, alongside issues with the operation of the children's hearings system, some of which echo the experiences highlighted by children with experience of secure care<sup>51</sup> and in conflict with the law<sup>52</sup>.

The Promise Plan 2021-24 requires that by 2024 the children's hearings system will have gone through a redesign process, to rethink the underpinning structures, processes and legislation. In addition to the ongoing improvement activity by the Children's Hearings Improvement Partnership<sup>53</sup> focused on the current system, the Hearings System Working Group has been established, chaired by Sheriff Mackie, to take forward transformational redesign work on the system and to report in early 2023. That Working Group is a partnership between Children's Hearings Scotland, Scottish Children's Reporter Administration and The Promise Scotland, with the Scottish Government playing an observer role.

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<sup>49</sup> NB the 9,142 alleged offences is a slight undercount due to recording issues around offences in the early days of SCRA's new system

<sup>50</sup> The focus of this groups work thus far has been on children in conflict with the law. Further work is required to understand the needs of children who are vulnerable and may be referred to the children's hearings system with the increased age of referral on other grounds.

<sup>51</sup> [Secure Care in Scotland: Young People's Voices \(cycj.org.uk\)](https://cycj.org.uk)

<sup>52</sup> See [Scotland's approach to children in conflict with the law \(cycj.org.uk\)](https://cycj.org.uk) for further information

<sup>53</sup> [Children's Hearings Improvement Partnership | \(chip-partnership.co.uk\)](https://chip-partnership.co.uk)

The group will engage with stakeholders to produce collective proposals for redesign and define the required legislative changes. Accordingly, the proposals and questions within this consultation are specific to those which require consideration to support the increase in age of referral to the Principal Reporter, and do not extend to include proposals generated by the Hearings System Working Group.

#### 4.1.3 People who have been harmed by a child

It is often other children who are harmed by children. Regardless of which system is used to address a child's behaviour, it will be imperative to keep communities safe and maintain public confidence in a rounded rights-respecting manner that also meets the legitimate concerns of people who have been harmed and their families and demonstrates a commitment to real and inclusive justice.

In a paper to the Victims Taskforce<sup>54</sup>, victim support organisations identified four key themes raised in feedback from people affected by crime, regarding how their experience of the criminal justice system could have been improved. These were:

- being heard;
- accessing information;
- feeling safe; and
- experiencing compassion.

The proposals in this section of the consultation seek to ensure that people who have been harmed have access to consistent, appropriate and timely information and support, and are treated with fairness, compassion and in a trauma informed manner, where their safety and well-being is a priority. It is recognised that children who cause harm have often been harmed themselves at earlier stages in their childhood.

Work is ongoing under the Victims Taskforce to co-ordinate and drive action to improve the experiences of people who have been harmed and witnesses within the criminal justice system, whilst ensuring a fair justice system for those accused of crime. The taskforce has two key work streams on a Victim-Centred Approach and a Trauma Informed Workforce. In addition, work is underway to improve support to children who have been harmed and witnesses, including to uphold the Programme for Government commitment to ensure that all eligible children have access to a 'Bairns' Hoose' by 2025<sup>55</sup>. The 'Bairns' Hoose' will ensure all children in Scotland who are alleged to have been harmed by, or witnesses to, abuse or violence, however that is dealt with, as well as children under 12 whose behaviour has allegedly caused significant harm, have access to trauma informed recovery, support and justice. Key elements of the 'Bairns' Hoose' include the provision services from the whole team around the child in one child friendly setting, with a key aim being to reduce the number of times children have to recount their experiences through a coordinated, needs-led approach.

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<sup>54</sup> [Themes from 'Victims Voices' feedback pre.sented at the Victims Taskforce](#)

<sup>55</sup> [Bairns' Hoose - Scottish Barnabus: vision, values and approach - gov.scot \(www.gov.scot\)](#)

For cases dealt with through the criminal justice system, the Victims Code for Scotland<sup>56</sup> clearly and simply sets out the rights of people who have been harmed and what should be expected from criminal justice agencies. This includes the right to information, including case specific information, participation (where appropriate), protection and support. The statutory basis for the Victims Code is established in the Victims and Witnesses (Scotland) Act 2014, which also sets out a range of general principles and rights. There is not a comparable code for victims where children's offences have been dealt with outwith the criminal justice system.

In considering particular offences, the independent review led by Lady Dorrian on improving the management of sexual offence cases<sup>57</sup> found that people who have been harmed continue to feel frustrated and under-informed. Recommendations were made in respect of both the children's hearings and criminal justice systems, including:

- The provision of further information to people who have been harmed on how the children's hearings system works, including the restrictions on the provision of information and the reasons for that, and reviewing how this information is provided;
- The role of police and where appropriate COPFS, in providing timely information - where there is a possibility that an allegation will be managed through the hearings system - on the different procedures and how restrictions on the provision of information will apply; and
- People who have been harmed having a single point of contact and access to advocacy support.

The Scottish Government has established a Governance Group to further consider the recommendations and will consult later in 2022 on recommendations which require legislation to be implemented.

#### 4.1.4 Implications of raising the maximum age of referral to the Principal Reporter

The ability to refer all 16 and 17 year olds to the Principal Reporter would lead to an increase in the number and range of cases being dealt with by the children's hearings system, including offence cases, and therefore an increase in people who have been harmed and their families coming into contact with this system. As further discussed in Section 5, some cases will still require the criminal justice system to play the main role in dealing with a child's offending behaviour. The decision of whether or not to prosecute would be one for the Procurator Fiscal taking account of the factors as detailed in the prosecution code<sup>58</sup>. These include considerations related to the law, evidence and public interest - such as the nature and gravity of the offence, the impact of the offence on the person harmed, circumstances related to the offence and the child who caused harm.

In responses to the 2020 consultation raising the age of referral to the Principal Reporter, the vast majority of respondents (77%) advised that amendments would be required to ensure sufficient access to information and support for people who have

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<sup>56</sup> [Victims' Code for Scotland \(mygov.scot\)](https://www.mygov.scot/victims-code-for-scotland)

<sup>57</sup> [Improving the management of Sexual Offence Cases.pdf \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/improving-the-management-of-sexual-offence-cases.pdf)

<sup>58</sup> [COPFS Prosecution Code - August 2021.pdf](https://www.copfs.gov.uk/copfs-prosecution-code-august-2021.pdf)

been harmed by children if the age of referral were to be increased. We therefore need to consider whether legislative change can be made to promote greater access to information, support and protection to people who have been harmed where cases are dealt with through the children's hearings system. It will remain crucial to ensure the overarching welfare approach and principles of the system are not eroded; that a rights-based approach is maintained; and that the risk of harm to any child is not increased.

All people who have been harmed who come into contact with the police should receive a Victim Care Card, which provides information such as the investigating officer's name, contact details and how to access support from Victim Support Scotland. However, beyond this the information and support provided to people who have been harmed varies dependent on whether the case is dealt with by the children's hearings system or criminal justice system.

## 4.2 Information

### 4.2.1 Information where a person has been harmed by a child who has been referred to the Principal Reporter

SCRA offers a Victim Information Service for people who have been harmed, their parents or other relevant persons, where a child is thought to be responsible and has been referred to the Principal Reporter. The level and type of information which can be shared is:

- About the children's hearings system;
- The outcome of the referral (i.e. whether or not a hearing was arranged and the outcome of the hearing)<sup>59</sup>; and
- About how Scotland treats children who do things which are against the law.

Information about the measures (conditions) on a CSO or Interim CSO (ICSO) is not shared with the person who has been harmed. This means that if for example, there is a measure on such an order that a child's movement or contact with a person who has been harmed is restricted, that person will not be aware of such conditions. This means that the person who has been harmed would not know if such measures were not being complied with, nor be able to alert the implementation authority to concerns.

Victim Information Co-ordinators write to people who have been harmed when identified in a police report at the initial stage of their investigation. People who have been harmed can then opt in to receive the above information. Safeguards are in place to ensure that the provision of such information would not be detrimental to the child who has caused harm, or to any other child, taking account of factors including the age of the child referred, seriousness and circumstances of the offence, the effect on those harmed, and other factors the Principal Reporter considers appropriate. The information provided must be proportionate and not include more information than is necessary. Victim Information Co-ordinators also provide the

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<sup>59</sup>Under Section 178-180 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2011/10) as amended by section 27 [Age of Criminal Responsibility \(Scotland\) Act 2019 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2019/10)

point of contact for requests for information from the Criminal Injuries Compensation Authority and insurance companies.

#### 4.2.2 Information where a person has been harmed by a child who went to the criminal justice system

If a case is dealt with through the criminal justice system, people who have been harmed have the right to request information about their case from agencies<sup>60</sup> such as Police Scotland, COPFS and the Scottish Courts and Tribunals Service. This will be dependent on what stage of the process that the information is sought and may include, for example, information about a decision not to prosecute and to request a review of that decision. When a case proceeds to court, people who have been harmed have a right to request information on the dates of any court hearings, the final decision of a court in a trial or any appeal arising from a trial, and any reasons for it.

Where protective measures are made prior to conviction, for example bail conditions, or as part of the outcome/disposal of a case, for example, where a non-harassment order is imposed by the court, the person who these measures relate to would be informed.

#### 4.2.3 Proposals

Respondents to the raising the age of referral to the Principal Reporter consultation cited various types of information seen as important for people who have been harmed. This included information relating to the children's hearings system and case-specific information such as the outcome of the hearing, the risk management plans put in place, the effectiveness of support and acknowledgment of harm. In responses from children and young people, there was a range of views on whether change was needed. These varied between perspectives that more information for people who have been harmed was definitely needed, to more cautious views that the provision of further information should be conditional and determined on a case-by-case basis, including consideration of why the information was being requested and whether this may place the referred child at risk, and that details of interventions or personal information should not be included.

The provision of further information to people who have been harmed on how the children's hearings system works and the different procedures and restrictions on the provision of information that apply has already been recommended by the Lady Dorrian review<sup>61</sup>. The Scottish Government are considering whether more case-specific information should be provided through the children's hearings system. We are particularly keen to identify if measures within an order relating directly to a person who has been harmed, for example through restricting a child's movement or contact with others, whether that person, or their parents in the case of a child who has been harmed, should be informed. Any changes would need to ensure the sharing of information remains proportionate and in accordance with existing legal protections in respect of children's and human rights, including to privacy, and data

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<sup>60</sup> [Victims and Witnesses \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>61</sup> [Improving-the-management-of-Sexual-Offence-Cases.pdf \(scotcourts.gov.uk\)](https://scotcourts.gov.uk)



protection. The ethos and core principles of the Children's hearings system must also be respected.

#### 4.2.4 Questions

**Question 1:** Where a person has been harmed by a child whose case is likely to proceed to the children's hearings system, should further information be made available to a person who has been harmed (and their parents if they are a child) beyond what is currently available?

Yes / No

- If yes: what further information should be made available?
- If yes: are there specific circumstances when further information should be provided and what would those circumstances be?

Please give reasons for your answer

**Question 2:** Where a person has been harmed by a child who has been referred to a children's hearing, should SCRA 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?

Yes / No

Please give reasons for your answer

#### 4.3 Access to support

All people who are harmed should have consistent and universal access to support throughout their journey, no matter which system deals with the offence(s) affecting them. All people who have been harmed who come into contact with the Police Should receive a Victim Care Card with details on how to access support from Victim Support Scotland.

##### 4.3.1 Support where a person has been harmed by a child who has been referred to the Principal Reporter

Where a case goes on to be dealt with through the hearings system, the SCRA Victim Information Service can help people who have been harmed to access support organisations offering practical and emotional support. Individuals can also independently access these support services. However, people who have been harmed and their families have reported that the support available can be insufficient and access arrangements disjointed. In particular, children who have been harmed appear to face difficulties in accessing support and protection within services such as social work and education, potentially because a child protection response to the harm has been more focussed on risk within the referred child's home environment. This should improve through consistent application of the new national child protection guidance. At time of writing, these concerns appear particularly acute when a child who has been harmed remains in the same community and educational setting as the child who has caused the harm. Those who have been harmed and their families often make unfavourable comparisons between the holistic approach applied to supporting the child who has caused the harm through the children's hearings system; and the support available to them.

### 4.3.2 Proposals

The Scottish Government is keen to explore how a more comprehensive, joined-up, trauma-informed approach to support can be developed for people who have been harmed, particularly following the referral of a case to the Principal Reporter. For children who have been harmed, in particular, this may need to be a multi-disciplinary approach, requiring professionals from, for example, health, education, social work and the third sector to work together to provide a suitable package of support. In doing so we are interested both in whether additional support should be provided, as well as what this should be, and if a single point of contact for each individual who has been harmed is appropriate. This role could be to provide a single conduit of information and to provide, arrange and coordinate access to support. This would require the gathering and collation of information from different agencies as appropriate. This would seek to reduce people who have been harmed needing to contact various different agencies for information and address gaps and delays in safe and appropriate information provision.

Further consideration would need to be given to the feasibility of such a role, who would be responsible for delivery, and how this would interface with existing measures including the SCRA Victim Information Service and developments related to the 'Bairns' Hoose' It would be important that the single point of contact was available throughout the person's journey from the harm being caused, through decisions being made on if how to proceed with the case, through to its conclusion and any subsequent support.

### 4.3.3 Questions

**Question 3:** Where a person has been harmed by a child who has been referred to the Principal Reporter, should additional support be made available to the person who has been harmed?

Yes / No

- If yes, what additional supports do you feel are necessary?
- If yes, should this apply to all people who have been harmed or only in certain circumstances? (Please specify)

**Question 4:** Should a single point of contact to offer such support be introduced for a person who has been harmed?

Yes / No

- If yes, should this be available to all people who have been harmed or only in certain circumstances? (Please specify)
- If yes, who should be responsible for providing the single point of contact?

Please give reasons for your answers

## 4.4 Protection for people who have been harmed and preventative measures

Scotland needs to support the confidence of the public, professions and people who have been harmed in the measures that are available through the children's hearings system. Where a child has caused harm, the person who has been harmed must be protected. In preventing future victimisation, children should be able to access the services, supports and interventions they require as part of any statutory order.



#### 4.4.1 Current children's hearings system measures

The Children's Hearings (Scotland) Act 2011<sup>62</sup> allows for children placed on a CSO or ICSO to be made subject to specific measures. These can include:

- Specifying where the child is to reside;
- Allowing a person the child is living with to restrict their liberty as appropriate;
- A Movement Restriction Condition (MRC) using electronic monitoring alongside intensive supports;
- Secure accommodation authorisation;
- Regulating contact between the child and a specified person or class of person;
- Requiring that the child comply with any other specified condition. This might include measures like treatment in respect of substance misuse or mental health concerns; undertaking interventions or specific activities; or avoiding specific behaviours;
- Making a condition can also be made that the implementation authority carry out specified duties in relation to the child.

Through these existing measures that can be attached to an order, current mechanisms exist that could be used to protect people who have been harmed. For example, a condition of 'no contact' with a person could be used, or a condition 'not to harass or cause further harm' to any person who has previously been harmed. In addition, a MRC could be used to specify that a child's movement is restricted away from a particular place, for example a victim's home address, places they frequent or where an offence took place.

Any decision to include these measures needs to take full account of the general principles set out in sections 25 to 29 of the Children's Hearings (Scotland) Act 2011, and must comply with the relevant statutory criteria for making an order or including a measure. The welfare of the child referred can become a primary, as opposed to the paramount consideration where necessary for the purpose of protecting members of the public from serious harm<sup>63</sup>. A child could not however be made subject to an order or particular measures attached to that order solely for the best interests or protection of others.

When a hearing is considering a MRC, the referred child must currently meet the criteria for a secure accommodation authorisation<sup>64</sup>, which includes that the child is likely to cause injury to another person. However, it may be that a person who has been harmed would benefit from a MRC being in place where the potential for harm is broader than being physically injured - for example through emotional or psychological harm from coming into contact with a child who has caused harm, or from being harassed or intimidated by this child.

Because the children's hearings system is not a criminal process, there is no applicable concept of "breaching" an ICSO / CSO and the attached measures. In the

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<sup>62</sup> Section 83 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10/section/83)

<sup>63</sup> Section 26 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10/section/26)

<sup>64</sup> Section 83(6) of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/10/section/83)

event that a child does not comply with an order, the implementation authority would have a duty to request a review by a children's hearing of a CSO<sup>65</sup>. The children's hearing considering the CSO or ICSO could include more restrictive measures on the order, as a result of the lack of compliance.

There is also no current ability to share information with a person who has been harmed about the existence of measures in a ICSO / CSO to restrict a child's movement or contact with a person who has been harmed. This means that they would not necessarily know if those measures were not being complied with, or be able to alert the implementation authority.

#### 4.4.2 Current criminal justice system measures

Through the criminal justice system a number of protective measures are available, at various stages of that process, that are not accessible via the children's hearings system. They include bail conditions, notification requirements for sexual offenders, disqualification from driving and non-harassment orders. Even where there are comparable measures available, there are key differences as to enforceability.

For example, in respect of bail, the court may admit a person to bail on the standard conditions (including a condition of appearing at court diets on time, not committing an offence while on bail, and not to interfere with or cause alarm or distress to witnesses). Further conditions that the court, or as the case may be the Lord Advocate, considers necessary to secure that the standard conditions of bail are observed can be included. It is an offence to breach bail which can result in arrest, prosecution and punishment, with possible penalties including a fine or imprisonment<sup>66</sup>.

#### 4.4.3 Measures outwith the children's hearings system or criminal justice system

Support to manage and address parts of a child's behaviour that may pose a risk of harm can be provided outwith either system. For example, where a child is subject to formal risk management measures (for example under Care and Risk Management procedures), victim safety planning will be considered as part of a multi-agency risk management plan. In those cases, information could be shared with a person who has been harmed as deemed necessary.

#### 4.4.4 Proposals

In maximising the use of age-appropriate systems and creating a context where more children's cases are likely to be dealt with through the children's hearings system, it is necessary to consider whether additional protections may be required for people who have been harmed. This could include considering whether existing measures should be amended or enhanced. In doing so, we must ensure that the fundamental welfare-based and non-punitive principles of the children's hearings system would be retained and that existing rights to privacy for referred children, would be upheld. As a result, certain measures currently available through the

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<sup>65</sup> ICSOs only last for a short period and a children's hearing to consider a further ICSO could be made aware of the lack of compliance.

<sup>66</sup> Section 27 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1995/27)

criminal justice system have already been considered. The current Scottish Government assessment is that these could not appropriately be replicated in the children's hearings system - certainly not without fundamentally distorting the ethos of the system.

As detailed above, a range of measures exist that can be attached to any order through the children's hearings system could be adapted to offer better protection to people who have been harmed. It may be that awareness of these measures could be enhanced or they could be utilised more frequently or appropriately, for example through the provision of guidance to decision-makers.

It may be that amending or enhancing existing measures is deemed necessary, and we would welcome respondents' suggestions on how this could be achieved. By way of possible examples, one potential change would be to require a children's hearing to consider the necessity of attaching measures to an order for the protection of any person(s) who has been harmed where there is a risk of further serious harm (whether physical or otherwise). This echoes and extends the already statutorily defined ability for a children's hearing or court to safeguard and promote the welfare of the child as a primary consideration rather than the paramount consideration for the purpose of protecting members of the public from serious harm (whether physical or not)<sup>67</sup>.

A further example would be to revisit the stipulation that a Movement Restriction Condition (MRC) is only available when a child meets the current criteria for secure care<sup>68</sup>. There are different apparent options for revising the criteria for the use of MRCs. For example, the condition related to the child is likely to cause injury to another person, this could be changed to likely to cause serious harm (whether physical or not) to another person<sup>69</sup>.

Alternatively, the criteria for an MRC could be linked to the commission or alleged commission of particular offences or harms.

A further option would be for the criteria to be broadened to relate to the particular vulnerabilities of the person who could be harmed.

Any of these changes to MRC criteria could lead to the wider use of such measures in cases where there are concerns about the safety of members of the public, particular people who could be harmed and the protection of children or others. Clear parameters on when these measures could appropriately be used, and review mechanisms, would be required.

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<sup>67</sup> As per section 26 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>68</sup> As per Section 83(6) of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk) these conditions are—

- (a) that 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,
- (b) that the child is likely to engage in self-harming conduct,
- (c) that the child is likely to cause injury to another person.

<sup>69</sup> This is definition of serious harm is enshrined under section 26 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk)

Respondents will also wish to consider if any expansions of this nature would remain consistent with the welfare-based approach of the children's hearings system.

#### 4.4.5 Questions

**Question 5:** Should existing measures available through the children's hearings system be amended or enhanced for the protection of people who have been harmed?

Yes / No

Please give reasons for your answer

- If yes, please provide details of how they should be amended or enhanced

**Question 6:** Should MRCs be made available to children who do not meet the current criteria for secure care?

Yes / No

Please give reasons for your answer

- If yes, what should the new criteria for MRCs be?

#### 4.5 Maximising the use of the children's hearings system and supports to children beyond the age of 18

The children's hearings system and criminal justice and courts system interact in respect of certain limited circumstances including in the ability of the court to remit<sup>70</sup> a child's case to the hearings system for advice and/or disposal. In respect of jointly reported cases<sup>71</sup> where it has been determined that the child will be referred to the Principal Reporter, that decision cannot be reconsidered. In other words, the Procurator Fiscal cannot decide subsequently to prosecute the child in relation to that particular offence. Conversely, where it has been decided that the Procurator Fiscal will deal with the offence, they can reconsider that decision at a later date and could refer the child to the Principal Reporter as an alternative to proceeding with prosecution. If a child went on to commit further offences, these could be jointly reported and further discussion between the Principal Reporter and the Procurator Fiscal would take place in determining how to proceed with those further offences.

There are various sentencing disposals that can be made through the courts that are not available through the children's hearings system. These include detention in custody, disqualification from driving, and notification requirements for sexual offenders. These measures cannot easily be replicated in the hearings system without jeopardising its ethos. Limits on disposals available through the children's hearings system may become a reason for the decision for a child's case to be retained by the Procurator Fiscal and the justice system.

Current disposals through the children's hearings system cannot extend beyond a child's 18<sup>th</sup> birthday. This does not mean to say that services, supports and interventions do not continue beyond a child's 18<sup>th</sup> birthday, but not as part of compulsory measures through the children's hearings system. The children's

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<sup>70</sup>Section 49 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>71</sup>[Decision making in cases of children jointly reported to the Procurator Fiscal and Children's Reporter](#)

hearings system can place a duty on the local authority to give such supervision or guidance as the child will accept, on termination of a CSO<sup>72</sup>. Any child who was a looked after child<sup>73</sup> and ceased to be looked after on or after their 16<sup>th</sup> birthday, yet who is less than 26 years of age, may be eligible for such support in the form of aftercare<sup>74</sup>. Services can also be accessed through adult and criminal justice social work services. The eligibility criteria are guided by relevant legislation and local prioritisation frameworks. There are concerns, as detailed elsewhere, that turning 18 can become a cliff-edge for support for some young people.

#### 4.5.1 Proposals

In order to maximise the use of the children's hearings system and to ensure supports to those children on turning 18, an initial exploration of the interfaces between the children's hearings system and criminal justice system, and the powers across each system, has been undertaken. The differences between the children's hearings system and the criminal justice system including their distinct purposes, must be respected. Certain measures can only realistically be made available via one system or the other. Scotland's future approach must be mindful of the challenges children can face in understanding the different systems they are involved in, and in complying with multiple orders often with different purposes, requirements and measures<sup>75</sup>. Therefore, the Scottish Government is keen to gather views on the following illustrative options, as well as for respondents to put forward any suggested alternatives.

Possible options:

1. Enabling all children under the age of 18 to be remitted to the Principal Reporter for advice and disposal in their case even where they had initially been prosecuted and have pled, or been found, guilty<sup>76</sup>. This would extend the existing legislative provision to cover all children charged under summary and solemn proceedings and not be dependent on a child being subject to measures through the children's hearings system. The exception would remain in respect of an offence where the sentence is fixed by law. This option would support the reinforcement of the position in respect of remittal as detailed in the Scottish Sentencing Council Sentencing Young People Guideline<sup>77</sup>.
2. Promoting wider use of the existing ability for the children's hearings system to require support to be offered to a young person on a voluntary basis following the termination of any CSO by virtue of that individual turning 18. This could be strengthened to include the need for the children's hearing to provide a closure report at the end of a child's CSO where this is being discharged or ceasing only by virtue of the child turning 18. This report could detail any identified needs or risks that

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<sup>72</sup> Section 138(6), (7) of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>73</sup> Section 17(6) of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk) defines the term "looked after child"

<sup>74</sup> Part 10 of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>75</sup> See for example [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](https://www.cycj.org.uk) and ["Just a wee boy not cut out for prison" : Policy and reality in children and young people's journeys through justice in Scotland - Strathprints](https://www.strathprints.ac.uk)

<sup>76</sup> Section 49 [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

<sup>77</sup> [sentencing-young-people-guideline-for-publication.pdf \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk)

remain. It could be shared with the implementation authority who would be responsible for assessing the support needed, including on a multi-agency basis, to address these needs or risks. This assessment and any subsequent provision of support could be provided under existing aftercare duties, where applicable.

3. Increasing the age to which children can remain subject to measures through the children's hearings system for a period beyond the child's 18<sup>th</sup> birthday. Consideration would require to be given as to what age this could continue to, and whether this would only available for children who had already been referred to the Principal Reporter prior to turning 18. An extension of this nature may also support the optimisation of benefits of raising the age of referral to the Principal Reporter. If measures cannot extend beyond a child's 18<sup>th</sup> birthday, there will be limits to the range of support that can be provided to those who are referred close to this upper age range. Further considerations, not least in respect of the differential rights of young people as adults, the ethos of the hearings system, and the implications for services of any such change would need to be taken into account.

#### 4.5.2 Questions

**Question 7:** Should any of the above options be considered further?

Yes / No

- If yes, which option(s)?

Please give reasons for your answer, including any positive or negative implications of any of the proposals.

**Question 8:** Please give details of any other ways in which the use of the children's hearings system could be maximised, including how the interface between the children's hearings system and court could change



## 5. Children and the Criminal Justice System

### 5.1 Background

The children's hearings system is a cornerstone of Scotland's approach to children who are in conflict with the law, with various presumptions already in existence to support children outwith the system of criminal prosecutions. These include the rebuttable presumption that the Principal Reporter will deal with jointly reported cases; the use of non-court disposals; and of diversion from prosecution. Currently the definition of a child varies across Scots law and is not universally defined as under 18 years. Many provisions in criminal justice legislation apply the definition of a child for 16-17 year olds based on their current involvement with the children's hearings system. If children do not meet this narrow definition, it can mean they are unable to access age-appropriate systems like the children's hearings system or age-appropriate facilities like secure care. The Scottish Government is looking at legislative definitions of children in conflict with the law, and considering whether these can be amended to ensure consistency along with the raising of the maximum age of referral to the Principal Reporter. A significant number of children continue to have their cases dealt with by the Procurator Fiscal and through prosecution at court.

In terms of jointly reported cases, in 2020-21<sup>78</sup>:

- 1,090 children were the subject of 2,412 joint reports. Of these, 55.3% (1,333) were for children aged 16 or over while 44.7% (1,079) were for children aged under 16.
- The majority of joint reports were made while the child was not in police custody - 1,078 children with 2,327 reports. The Procurator Fiscal retained 28.3% of these cases for those that were decided during the period covered by these statistics.
- 85 joint reports were made for 56 children in custody. The Procurator Fiscal retained 77.6% of these cases for those that were decided during the period covered by these statistics.

Those children who cannot be jointly reported and cannot be effectively managed through alternative measures, where it is in the public interest to do so, are prosecuted in court and may be subject to disposals in the same way as adults.

Information on Criminal Proceedings in Scotland is published on an annual basis and includes additional tables on 12 to 17 year olds<sup>79</sup>. In 2019-20:

- 7,225 children received non-court disposals most commonly EEI (4,245) followed by Recorded Police Warning (1,822).
- 1,208 children were proceeded against in court.
- The most common crime types which were the subject of court proceedings were miscellaneous offences (including common assault, breach of the peace, and drunkenness and other disorderly conduct) (391). This was followed by other offences (including crimes against public justice,

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<sup>78</sup> [Children referred to the Reporter \(scra.gov.uk\)](https://www.scra.gov.uk)

<sup>79</sup> [Criminal Proceedings in Scotland, 2019-20 - gov.scot \(www.gov.scot\) additional table for youth convictions.](https://www.gov.scot/publications/criminal-proceedings-in-scotland-2019-20/additional-table-for-youth-convictions/)

handling offensive weapons, and drugs) (317); and motor vehicle offences (148). The remainder were crimes of dishonesty (142); non-sexual crimes of violence (104); fire-raising, vandalism etc. (77); and sexual crimes (29).

- The most frequent outcome in these cases were community sentences (such as community payback orders) (392) and other sentences (which includes admonishment and absolute discharge) (286). This is followed by financial penalty (185); remit to children's hearings system (89); and custody (57).
- In 199 cases, the child was found not guilty.

## 5.2 Children at court

It has been suggested that the criminal justice system has not been designed specifically with children in mind<sup>80</sup>, with criminal trials being adversarial processes designed to determine guilt and to impose appropriate disposals. Concerns have been raised regarding the fulfilment of child-friendly justice<sup>81</sup>. Evidence<sup>82</sup> highlights the challenges faced by children in understanding and participating in court proceedings, the traumatising and re-traumatising impact of proceedings and that children's presentation in such settings can be wrongly interpreted as an indication of guilt. These issues are even more concerning given the high prevalence of additional support needs including speech, language and communication needs; learning disabilities; and autism spectrum disorder, experienced by children who come into contact with the justice system. These experiences have important implications for children's perceptions of procedural fairness<sup>83</sup>. Key components of that include the individual child's ability to understand the process, have a voice, feel treated with respect, and trust the neutrality of the process. This matters because evidence indicates 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. Some observers hold to 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<sup>84</sup>.

The UN Committee on the Rights of the Child (CRC), in General Comments No. 24<sup>85</sup> states: "Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualised approach".

Whilst this consultation concerns the proposal that all 16/17 year olds could be jointly reported, the Lord Advocate and Procurator Fiscal will retain the discretion to begin criminal proceedings and to prosecute children in court, where appropriate. These

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<sup>80</sup> [Use and impact of bail and remand in Scotland with children - Children's and Young People's Centre for Justice \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>81</sup> The [Council of Europe: Guidelines on Child-Friendly Justice | CRIN](https://www.coe.int/en/web/council-of-europe/guidelines-on-child-friendly-justice) apply to all circumstances where children (under 18) are likely to be in contact with criminal, civil or administrative justice systems. The guidelines are underpinned by 5 fundamental principles – participation, best interests of the child, dignity, protection from discrimination and rule of law.

<sup>82</sup> See [Scotland's approach to children in conflict with the law \(cycj.org.uk\)](https://www.cycj.org.uk) for summary

<sup>83</sup> For more detail see [problem-solving-courts-an-evidence-review.pdf \(justiceinnovation.org\)](https://www.justiceinnovation.org)

<sup>84</sup> For UK criticism see the [Committee on the Rights of the Child Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland](https://www.unhcr.org/refugees/journal/2016/11/58311111)

<sup>85</sup> [General Comment No. 24 \(201x\), replacing General Comment No. 10 \(2007\) Children's rights in juvenile justice](https://www.unhcr.org/refugees/journal/2016/11/58311111)



decisions will take into account the factors detailed in the prosecution code<sup>86</sup>. These include considerations related to the law, evidence and public interest such as the nature and gravity of the offence, impact of the offence on the person harmed, and circumstances related to the offence and the child who caused harm.

In respect of children and young people, the then Scottish Executive introduced a youth court pilot in Hamilton in 2003 and a second in Airdrie in 2004. The policy priorities at this time were very different, being focused on children who were classed as 'persistent offenders', and the requirement of the youth court was to prosecute these children, regardless of the type or seriousness of offences committed. While the evaluation of the pilots found they had met their objectives, there were concerns about 'up-tariffing' these children through the encouragement of prosecution where an alternative would have been possible<sup>87</sup>. The pilots did not continue.

Around that time, Structured Deferred Sentence (SDS) courts were piloted in some areas, which have been extended over recent years, with children and young people often a priority group for such courts. In Lanarkshire, for example, the purpose of a pilot SDS court was to improve sentencing outcomes for children and young people aged between the ages of 16-21 years old, through a combination of deferring sentencing and regular engagement with an intensive social work support package focusing on the child or young person's needs. The pilot involved dedicated courts and sheriffs, with the latter taking a welfare-based approach, speaking directly to the child or young person and engaging differently with them, alongside social work being in attendance, with closed courts being held at set times. The sentencing outcomes, re-offending rates and social improvements for children and young people were found to be overwhelmingly positive<sup>88</sup>. A Sentencing Youth Court is also currently being piloted in Glasgow. There is also instructive national and international evidence in respect of youth courts, including in respect of problem-solving courts and practice<sup>89</sup>.

These initiatives are in addition to the existing legislative requirements<sup>90</sup> that in summary proceedings where a child is the accused, that the sheriff must sit either in a different building or room from that in which he or she usually sits, or on different days from those on which other courts in the building are engaged in criminal proceedings. The people who can attend court are also limited, often referred to as a "closed" court. These provisions do not apply to children aged 16-17 who are not subject to measures through the children's hearings system.

Children appearing at court can also apply for the use of special measures<sup>91</sup> including the use of television link and/or a supporter. In addition, under the WSA and the Standards for those working with children in conflict with the law all children must have access to support when going through the judicial processes. It is

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<sup>86</sup> [COPFS Prosecution Code - August 2021.pdf](#)

<sup>87</sup> [Evaluation of the Airdrie and Hamilton Youth Court Pilots \(sccjr.ac.uk\)](#)

<sup>88</sup> [Evaluation of South Lanarkshire structured deferred sentencing for young people](#)

<sup>89</sup> [Time-to-get-it-right-Enhancing-problem-solving-practice-in-the-Youth-Court-Main-Report.pdf \(nuffieldfoundation.org\)](#)

<sup>90</sup> Section 142 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

<sup>91</sup> Sections 271 to 271M of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#),

however recognised that practice in respect of such measures and support varies across Scotland.

The Scottish Sentencing Council Sentencing Young People Sentencing Guideline recently came into effect. The guideline applies to the sentencing of those who are under the age of 25 at the date they plead or are found guilty. The guideline reflects evidence<sup>92</sup> that children and young people, by virtue of brain development, have a lower level of maturity, and therefore a greater capacity for change and rehabilitation, than an older person. Rehabilitation should be a primary consideration when sentencing a young person. The maturity of the young person at the time that the offence was committed should also be considered. In determining the sentence, the court should ensure account is taken of the young person's particular and individual circumstances and that some sentences could have more of an adverse effect on a young person than on an older person because of their age, maturity, or circumstances.

A number of factors based on research<sup>93</sup> and international human rights instruments offer underpinnings to any approach to children at court, namely:

- Adopting an individualised approach, that recognises and takes full account of the age and stage of development of the child, level of maturity, intellectual and emotional capacities and their experiences, focusing on the needs, rights and best interests of child, protecting children from discrimination and further pain or hardship.
- Treating children with dignity, respect, care, sensitivity and fairness, paying particular attention to their personal situation, well-being and specific needs, and with full respect for their physical and psychological integrity.
- Operating in a manner and using language that is accessible, understandable and relatable, listening to children taking their views seriously and upholds their rights to participation.
- Delivering access to justice that is accessible, age-appropriate, speedy, diligent, procedurally fair, adapted to and focused on the needs and rights of the child.
- Separately considering and assessing the best interests of all children involved in the same procedure or case and seeking to balance these with a view to reconciling possible conflicting interests.
- Is appropriate; proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances of the child and the various and particularly long term needs of society; and is trauma informed and responsive.
- Ensuring that professionals are sufficiently trained and experienced to ensure the needs, experiences, maturity and development of the child are considered; and that all age-appropriate disposals and supports are discussed and available, to encourage desistance, rehabilitation and the child's reintegration to society.

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<sup>92</sup> [The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts \(scottishsentencingcouncil.org.uk\)](https://www.scottishsentencingcouncil.org.uk)

<sup>93</sup> [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](https://www.cycj.org.uk)

### 5.2.1 Proposals

The Scottish Government's Youth Justice Action Plan<sup>94</sup> 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. Any changes would be for cases where it had been determined that a child should be prosecuted and therefore could not have their case dealt with through the children's hearings system. Given the changes proposed elsewhere in this consultation, we would therefore anticipate a reducing number of cases.

Should any changes be considered to current approaches, it will be necessary to accommodate the legitimate societal interest in accountability where serious harm has been caused, to uphold the rights of people harmed and to account for any risks to public safety. It will also be essential that this builds on our understanding of children and young people's needs and experiences; the learning from existing and previous pilots and initiatives; and is clear about who this would apply to (i.e. children or children and young people)<sup>95</sup>.

Any changes and identified resource requirements should also be considered in light of wider related initiatives within the overall justice system. These include the extension of the provisions within the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 around pre-recorded evidence for child complainers and witness aged under 16 in sheriff and jury cases; the three-year rollout of the new Scottish Child Interview Model for Joint Investigative Interviews which is designed to improve the quality of interviews so that they can be more routinely used as evidence in chief, again increasing the use of pre-recorded evidence; and, as previously referenced the commitment around access to holistic services within a 'Bairns' Hoose' by 2025. These are three significant and resource intensive developments, which will deliver significant benefits to eligible children and improve their experience of our justice and child protection systems.

The Scottish Government recognises that the independence of the Lord President is protected in legislation<sup>96</sup>. It is for the Lord President, as head of the Scottish Judiciary, to make and maintain arrangements for securing the efficient disposal of business in the Scottish courts. This role must continue to be respected.

Change would also require the involvement of a range of stakeholders, including children with experience of the justice system and people who have been harmed. At this stage, four suggestions for change present themselves, on which we are keen to gather views:

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, as outlined currently in Section 4 above.

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<sup>94</sup> [Justice for children and young people - a rights-respecting approach: vision and priorities - action plan - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/youth-justice-action-plan-2019-2022/pages/1-1-introduction.aspx)

<sup>95</sup> [Evaluation of the Airdrie and Hamilton Youth Court Pilots \(sccjr.ac.uk\)](https://www.sccjr.ac.uk/evaluation-of-the-airdrie-and-hamilton-youth-court-pilots/)

<sup>96</sup> [Judiciary and Courts \(Scotland\) Act 2008 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2008/18/section-1)

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. There may also be learning from previous and current innovations in different areas of Scotland as detailed above, and wider developments in terms of justice that can continue to be shared<sup>97</sup>.
3. Making changes to practice, conduct in court and support for all children, whilst retaining children in court settings. Evidence would suggest such changes could include<sup>98</sup>:
  - Holding dedicated, separate courts for children.
  - Ensuring children are kept separate from adults attending court/other settings, for example through separate entrances or waiting areas.
  - Cases being held in a more child-friendly environment, not traditional court rooms, which could either be specifically designed for children, in a different building or different room within existing court premises (such as a jury room).
  - The prioritisation of children's cases, set for a specific time to reduce waiting times, with the court closed to the public<sup>99</sup>.
  - Dedicated personnel for such courts, all of whom adopt a welfare-based and trauma-informed approach. All personnel should be sufficiently and, as necessary, additionally trained in matters including child development; trauma; speech, language and communication needs; and communicating with children additional needs to promote their ability to communicate and deliver process of justice in a manner that is effective and child centred.
  - The child sits round a table with a sheriff/judge (not in traditional court dress), their solicitor (not in traditional court dress), social worker and parent/carer where appropriate, to allow all parties, but particularly the child's, full participation.
  - That the language used is modified to ensure that the child understands the process, with all procedures fully explained to them in a way they understand.
  - The child is spoken to directly by the sheriff/judge and not through their solicitor or social worker.
  - Adaptation of proceedings including adopting a slower pace, for example through regular breaks or shortened court day.
  - The provision of enhanced needs and developmentally led, trauma informed support to children throughout the court process and in respect of any disposal from court, with multi-disciplinary support available as required.
  - Access to independent advocacy as well as legal representation.

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<sup>97</sup> Noting that in some areas of the country, specialist Domestic Abuse Courts have been established by local Sheriffs Principal. In relation to the prosecution and management of serious sexual offences. Lady Dorrian's multi justice sector Review Group, reported in 2021 and recommended that a national specialist sexual offence court be established, with bespoke jurisdiction and sentencing powers. The Scottish Government has established a Governance Group to further consider the recommendations and will consult later in 2022 on recommendations which require legislation to be implemented.

<sup>98</sup> See for example [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](https://www.cycj.org.uk) and [Microsoft Word - Older children in conflict with the law \(cypcs.org.uk\)](https://www.cypcs.org.uk)

<sup>99</sup> Section 142 and section 92(3) [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk) Current provisions relating to who can be present in court vary dependent on whether the procedures are summary or solemn and the child's age and legal status

- These facilities and supports being available to children throughout their journey through the justice system (i.e. from the decision being made that the child's case cannot be progressed through the children's hearings system, to conclusion of any disposal, as opposed to just after sentencing).
  - Timescales for cases being dealt with should be shorter than for adults, whilst still allowing legal safeguards to be fully respected.
  - Where cases involve older co-accused, the same processes should apply.
  - All age-appropriate disposals and supports are discussed and available. In particular maximising the use of structured deferred sentences, during which period children are intensively supported and are provided with the opportunity to engage with services and to evidence behavioural change.
  - Supportive, regular reviews by the sheriff/judge throughout, not just following sentence, which the child can fully participate in and has the chance to provide an update on their life and progress overall, as in respect of any disposals.
4. The Promise stated that: "...Scotland must consider how to ensure that children have the totality of their cases dealt with in an environment that upholds their rights and allows them to effectively participate in proceedings. Traditional criminal courts are not settings in which children's rights can be upheld and where they can be heard". In light of this we would welcome views on any other proposals beyond options 1-3 that should be considered.

### 5.2.2 Question

**Question 9:** Should any of the above options be considered further?

Yes / No

- If yes, which option(s)?

Please give reasons for your answer, including any positive or negative implications of any of the options. We are particularly interested in implications for people who have been harmed

### 5.3 Children in custody

For children in conflict with the law, their rights, including their right to liberty must all be respected in line with the international standards of child-friendly juvenile justice and legislation<sup>100</sup>. The deprivation of liberty of a child should be a last resort, to be used only for the shortest possible period of time. In Scotland, individuals accused of any criminal offence can be allowed to remain in the community pending trial including by ordaining them to appear or granting of bail. The presumption of liberty can be overridden in certain circumstances<sup>101</sup>. Research has highlighted complexities related to remanding children<sup>102</sup> including 16-17 year olds subject to measures through the hearings system and thus legally defined as a child; financial imperatives in that local authorities are responsible for funding remand places in secure care but not YOIs; and the various factors considered in decision-making.

<sup>100</sup> Including under [Council of Europe: Guidelines on Child-Friendly Justice | CRIN](#) and [The United Nations Convention on the Rights of the Child](#)

<sup>101</sup> Section 23 and 24 [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

<sup>102</sup> [Use and impact of bail and remand in Scotland with children - Children's and Young People's Centre for Justice \(cycj.org.uk\)](#)



In the Scottish Government Programme for Government 2021-22 and via the consultation on bail and release from custody arrangements<sup>103</sup>, changes are being considered to prevent individuals being remanded in custody wherever possible, unless a risk of serious harm is posed and sufficient public safety concerns exist.

The proposed changes will apply to all those being considered by criminal justice system processes including under 18s. Alongside this, efforts are being made to expand the availability of intensive community-based supports to augment youth and community justice services supporting diversion from prosecution, alternatives to remand and community sentencing. The bail and release consultation specifically invited views on whether the legislation should require courts to take an individual's age into account when deciding whether to grant them bail.

In 2019-20<sup>104</sup>:

- 124 16-17 year olds were in prison / YOI, 119 of whom were male.
- Three children aged 16-17 years made up the full-year population of the analytical period, while 121 made up the part-year population.
- Those aged 16-17 years spent an average of 59.8 days in custody. This is important in the context of the presumption against short prison sentences of 12 months or less.

During 2021, on average 16-21 children aged under 18 were in YOIs/prisons each month, 76-94% of whom were on remand (i.e. had not been found guilty of an offence)<sup>105</sup>. The proportion of children held on remand has increased as the total number of children held in custody has decreased and as a proportion is much higher than for adults<sup>106</sup>.

Nationally and internationally<sup>107</sup>, there is increased recognition of the significant detrimental impact on children being deprived of their liberty, even for short periods particularly within custodial institutions.

Where children require to be deprived of their liberty, our responses must be rights-based, relationship-based, psychologically and trauma informed, in therapeutic environments<sup>108</sup>. According to international human rights instruments<sup>109</sup>, this should take place in correctional or educational facilities which are more akin to secure care in Scotland rather than YOIs / prisons, in a manner that takes account of children's needs and age. The priority must always be ensuring the child's effective reintegration into their community as soon as possible.

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<sup>103</sup> [Use and impact of bail and remand with children in Scotland \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>104</sup> [Scottish prison population: statistics 2019 to 2020 - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>105</sup> [Children and young people on remand in Scotland - Children's and Young People's Centre for Justice \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>106</sup> [Microsoft Word - Older children in conflict with the law \(cypcs.org.uk\)](https://www.cypcs.org.uk)

<sup>107</sup> [Report on Expert Review of Provision of Mental Health Services at HMP YOI Polmont | HMIPS \(prisonsscotland.gov.uk\)](https://www.prisonsscotland.gov.uk); [Rights Respecting? Scotland's approach to children in conflict with the law - Children's and Young People's Centre for Justice \(cycj.org.uk\)](https://www.cycj.org.uk); [UN GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY \(2019\) - Omnibook](https://www.un.org)

<sup>108</sup> [The-Promise.pdf \(carereview.scot\)](https://www.carereview.scot)

<sup>109</sup> Including [The United Nations Convention on the Rights of the Child](https://www.un.org) and [General Comment No. 24 \(201x\), replacing General Comment No. 10 \(2007\) Children's rights in juvenile justice](https://www.un.org)

Secure care is usually referenced - and often equated with - custody. Whilst this is inevitable due to the comparable deprivations of liberty, there are unintended consequences which impact on perceptions, expectations and children's experiences of secure care<sup>110</sup>.

There are increasing calls in Scotland for children not to be placed in YOIs or prison-like settings, echoing calls from other jurisdictions<sup>111</sup>. YOIs are not primarily designed to be therapeutic environments. They cannot offer the same level of trauma and attachment informed support as secure care, nor the high staff to child ratio sometimes necessary to meet the needs of these children.

The previous HMIPS inspection of HMP YOI Polmont, although identifying a number of positive factors, concluded that the setting is inappropriate for children, with staffing and an architectural structure more appropriate for an adult prison<sup>112</sup>. Particular concerns have also been raised about the upholding of children's rights in such institutions<sup>113</sup>.

The above concerns have been exacerbated by COVID-19, with the restrictions, treatment and conditions experienced by children akin to those of adults, in contrast to those experienced by children in secure care<sup>114</sup>. The HMIPS Year of Childhood Pre-Inspection Survey<sup>115</sup> raised particular concerns about meeting children's psychological, educational, social or cultural rights and needs. Children on remand are treated differently to those who are sentenced in YOIs, but this can impact on the supports and opportunities that are available for these children<sup>116</sup>.

The Expert Review Of The Provision Of Mental Health Services For Young People Entering And In Custody At HMP & YOI Polmont<sup>117</sup> made 80 findings, highlighting seven key recommendations and two high level strategic issues which have or are being addressed through a multi-agency action group.

As a result, a Scottish Parliament Justice Committee<sup>118</sup> inquiry into secure care and prison places for children in Scotland recommended that "...unless there is strong evidence to the contrary, no young person under the age of 18 should be placed in HMP & YOI Polmont when a place in a secure care unit would be more suitable". Similarly, the Promise stated that in line with the UNCRC, 16 and 17 year olds who are remanded or sentenced must be accommodated within secure care rather than a

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<sup>110</sup> [Secure Care in Scotland: Young People's Voices](#)

<sup>111</sup> For example [End Child Imprisonment – Article 39](#)

<sup>112</sup> [Report on Full Inspection of HMP YOI Polmont - 29 October to 2 November 2018 | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#)

<sup>113</sup> See [Rights Respecting? Scotland's approach to children in conflict with the law - Children's and Young People's Centre for Justice \(cycj.org.uk\)](#) for further details

<sup>114</sup> [independent-cria.pdf \(cypcs.org.uk\)](#)

<sup>115</sup> [HMIPS - Year of Childhood Pre-inspection Survey 2021 | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#)

<sup>116</sup> [Report on Full Inspection of HMP YOI Polmont - 29 October to 2 November 2018 | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#)

<sup>117</sup> [Report on Expert Review of Provision of Mental Health Services at HMP YOI Polmont | HMIPS \(prisonsinspectoratescotland.gov.uk\)](#)

<sup>118</sup> [Secure care and prison places for children and young people in Scotland \(azureedge.net\)](#)

YOI. They concluded “Young Offenders Institutions are not appropriate places for children and only serve to perpetuate the pain that many of them have experienced”. This has been committed to within the Scottish Government’s Youth Justice Vision that as far as possible, “no under-18s are detained in young offenders’ institutions, including those on remand, with secure care and intensive residential and community-based alternatives being used, where trauma-informed approaches are required for the safety of the child or those around them” and also within the Programme for Government 2021-22.

### 5.3.1 Proposals

To address the above concerns and to support Scotland to Keep The Promise, we propose to make specific provisions related to children. Where it is determined that parts of a child’s behaviour would pose significant risk to public safety, and that no other options for mitigating this risk are available or proportionate, deprivation of liberty may be necessary but should be an option of last resort. Where it is required, children should be remanded or sentenced to secure care, not to a YOI or prison. Through keeping The Promise, we are committed to ending the placement of 16 and 17 year olds in YOI without delay.

We are interested in views on whether there should be a statutory prohibition on placing children in a YOI. This would include in the gravest cases where a child faces a significant post-18 custodial sentence. Currently, the needs, welfare and best interests of all children in secure care require to be considered in making any placement decision, as do the rights of all children including to be protected and kept safe.

Where any child is deprived of their liberty, be this having been remanded or sentenced, this should be taken as an indicator of wellbeing needs and that the child may require support – either in parallel or on release - to promote positive outcomes. There are existing duties on local authorities to assess the needs and wellbeing of children where there are concerns and to provide support (including coordinated support) as necessary. There is also a duty to make a referral to the Principal Reporter where the existing criteria are met. These duties are set out in policy and legislation relating to all children, which are extended in relation to children in conflict with the law, for example under the WSA. In addition, children in YOIs and secure care may be looked after children or care leavers who have additional entitlements to support, including aftercare potentially up to the age of 26. For care leavers, deprivation of liberty should warrant a re-assessment of that young person’s needs and welfare, along with the provision of aftercare support where necessary taking account of existing legislative entitlements. The desire is to ensure all children and care leavers who are sentenced or remanded have access to support that they require at the point of sentence or remand, during any period in secure care or custody, and following their return to the community.

### 5.3.2 Questions

**Question 10:** Where a child requires to be deprived of their liberty, should this be secure care rather than a YOI in all cases?

Yes / No



Please give reasons for your answer

**Question 11:** Should there be an explicit statutory prohibition on placing any child in a YOI, 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?

Yes / No

- If no, in what exceptional circumstances should use of a YOI be considered?

Please give reasons for your answer

**Question 12:** Should existing duties on local authorities to assess and support children and care leavers who are remanded or sentenced be strengthened?

Yes / No

Please give reasons for your answer

- If yes, please provide details of how could this be achieved

## 5.4 Anonymity

A child's general right to privacy is given additional attention in cases where a child is in conflict with the law<sup>119</sup>. In Scotland the identification of a child as either accused or acting as a witness in a criminal case is prevented, although the judge has discretion to make an exception when the court is satisfied this is in the public interest<sup>120</sup>. These provisions do not apply pre-charge when a child is a suspect or after the age of 18. In the children's hearings system, protected information must not be published if this is intended, or is likely, to identify a child, their address or school<sup>121</sup>. Any other child connected with the case – including a child who has been harmed – has similar rights to anonymity.

Whilst the public may have an interest in knowing the identity of a child, particular in cases of serious offending, it has been argued that doing so is not justified, given the need to keep these children safe, support their rehabilitation and reintegration, and uphold their rights. There are also impacts for children's families. In England, it has been recommended that children should have lifelong anonymity through the review of youth justice<sup>122</sup>, with this position supported by the UK's four Children's Commissioners<sup>123</sup>. As such it has been recommended in Scotland that: "... all persons who are under 18 at the time of the offence must be granted lifelong anonymity, with any exceptions to this extremely limited and clearly stated in law"<sup>124</sup>.

### 5.4.1 Proposals

Three interlinked proposals are being made:

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<sup>119</sup> Article 16 and Article 40(2)(b)(vii) of the [UN Convention on the Rights of the Child \(UNCRC\)](#) - [UNICEF UK](#) and [Rule 8\(1\) United Nations Standard Minimum Rules for the Administration of Juvenile Justice](#)

<sup>120</sup> Section 47 [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

<sup>121</sup> Section 81 of the [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](#)

<sup>122</sup> [Review of the youth justice system - GOV.UK \(www.gov.uk\)](#)

<sup>123</sup> [Review of the youth justice system - GOV.UK \(www.gov.uk\)](#) and [Report-of-the-UK-CCs-UNCRC-Examination-of-the-Fifth-Periodic-Report.pdf \(childcomwales.org.uk\)](#)

<sup>124</sup> [Microsoft Word - Older children in conflict with the law \(cypcs.org.uk\)](#)

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<sup>125</sup> and/or in the interests of justice<sup>126</sup>.

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 automatic 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.

#### 5.4.2 Question

**Question 13:** Do you agree that the three above changes related to anonymity should be made?

- Yes to all changes
- Yes but only to some changes (please identify which ones)
- No

Please give reasons for your answer

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<sup>125</sup> This is consistent with the existing measures for example the statutory definition for a children's hearing or a court to override the primary consideration of the welfare of the child under section 26 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](http://legislation.gov.uk) and in respect of decisions about bail under the proposal that any decision to refuse bail must be justified on public safety grounds in [Bail and release from custody arrangements: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

<sup>126</sup> [General Comment No. 24 \(201x\), replacing General Comment No. 10 \(2007\) Children's rights in juvenile justice](#)

## 6. Secure Care

### 6.1 Background

Secure care - provided by a secure accommodation service, as defined in statute<sup>127</sup> - 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. This can occur through involvement of the children's hearings system or the criminal justice system and arises due to the level of concern about the risks, or actual significant harm, which parts of a child's behaviour pose to themselves and/or others.

In exceptional circumstances, the use of secure care is necessary and proportionate as the only means by which a child and / or others can be kept safe, having the potential to save a child's life, or change it for the better<sup>128</sup>. Taking a child's liberty away is one of the most serious restrictions a state can impose on a child's rights. As such, children have the right to be protected from unlawful deprivation of liberty under a number of international human rights treaties<sup>129</sup>.

Children in secure care should experience nurturing, relationship-based, high quality care where their needs and rights are understood and met. Support should be therapeutic and trauma-informed, with effective interventions available to keep children safe, meet their needs, promote healing, and achieve the best possible outcomes<sup>130</sup>. Children's rights must be upheld in secure care, ensuring children have access to all they need for health, including mental health, education, participation and relationships.

At the time of this consultation publishing, there were 84 secure places available in five secure care centres in Scotland excluding 7 additional emergency beds (only normally used if required and for the short-term)<sup>131</sup>. Four of these centres - Rossie Secure Accommodation Services; Good Shepherd Centre; Kibble Education and Care Centre; and St. Mary's Kenmure - are provided by independent charitable organisations. Edinburgh Secure Service is run by Edinburgh City Council. All of Scotland's secure care centres offer an integrated model of delivery, caring for children who have been placed in secure care for their own protection or that of others.

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<sup>127</sup> See paragraph 6 of schedule 12 of the [Public Services Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](#). A "secure accommodation service" is a service which - (a) provides accommodation for the purpose of restricting the liberty of children in residential premises where care services are provided; and

(b) is approved by the Scottish Ministers for that purpose.

<sup>128</sup> [Secure Care in Scotland: Looking Ahead - Children's and Young People's Centre for Justice \(cycj.org.uk\)](#) and [The-Promise.pdf \(carereview.scot\)](#)

<sup>129</sup> 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](#)

<sup>130</sup> [The-Promise.pdf \(carereview.scot\)](#)

<sup>131</sup> [Children's Social Work Statistics Scotland, 2019-20; Protocol and procedures for secure accommodation services on the use of registered emergency beds.pdf \(careinspectorate.com\)](#)

In domestic legislation, for children in Scotland, there are various legal routes to secure care<sup>132</sup>:

- An order made by the children’s hearings system or a sheriff: A relevant order or warrant (CSO, ICSO, medical examination order, or a warrant to secure attendance) may include a secure accommodation authorisation<sup>133</sup>.
- Where a child is subject to a relevant order which does not include a secure accommodation authorisation; is being provided with accommodation by a local authority<sup>134</sup>; or is subject to a [permanence order](#) they can be placed in secure accommodation in specific circumstances<sup>135</sup>. These are sometimes referred to as “emergency placements” made by the Chief Social Work Officer (CSWO).
- Police Powers: Where a constable believes a person is under 16, or where a child is aged 16-17 and is subject to a CSO or ICSO, and requires to be kept in a place of safety until they can be brought to court<sup>136</sup>, the child can be placed in secure accommodation in certain, limited circumstances<sup>137</sup>.
- Court-Remand<sup>138</sup>: Where a court remands a child under 16, it shall commit the child to the local authority care. The court can require this to either be in secure accommodation or a suitable place of safety chosen by the authority (which can include secure accommodation in certain circumstances<sup>139</sup>). The same applies for children aged 16/17 and subject to a CSO or ICSO, who can also be remanded to a YOI. If the child is aged 16/17 and not subject to a CSO or ICSO, the court must commit them to a ‘remand centre’ where an appropriate facility is available or to YOI. As there are no remand centres in Scotland the only option is for the court to commit the child to a YOI.
- Sentence: Where a child in summary proceedings pleads guilty, or is found guilty of an offence to which section 44 of the Criminal Procedure (Scotland) Act 1995 applies, the court may order the child be detained in residential accommodation (including secure accommodation) which the local authority considers appropriate, for a period not exceeding one year, subject to conditions<sup>140</sup>.

For children under 16, or aged 16/17 and subject to a CSO, sentenced to detention having been convicted on indictment<sup>141</sup> and all children under 18 who have been convicted of murder<sup>142</sup>, the place of detention shall be

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<sup>132</sup> For more detail on legislation, roles and responsibilities see [Info-Sheet-85-Sept-21.pdf \(cycj.org.uk\)](#)

<sup>133</sup> 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

<sup>134</sup> Section 25 of the [Children \(Scotland\) Act 1995](#)

<sup>135</sup> See [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

<sup>136</sup> Section 22 of the [Criminal Justice \(Scotland\) Act 2016](#)

<sup>137</sup> Regulation 12 of [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#) if the chief social work officer of the relevant local authority is satisfied that the requirements under regulation 11(3)(a) and (b) are met.

<sup>138</sup> Section 51 [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

<sup>139</sup> See regulation 12 of [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

<sup>140</sup> See section 44 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#) and regulation 11 of [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

<sup>141</sup> Section 208 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

<sup>142</sup> Section 205(2) of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

determined by Scottish Ministers. Where practicable and appropriate, the place of detention will be secure accommodation.

If a child is aged 16/17 and not subject to a CSO, if they are convicted of an offence which would carry a period of imprisonment for an adult, and if the court considers that no method of dealing with the child other than imposing detention is appropriate, it must commit the child to a YOI<sup>143</sup>.

Responsibilities for providing (either delivering or purchasing) secure care, managing and funding children's placement in secure care and associated costs vary depending on the route for placing a child. For Scottish children, local authorities are responsible in all cases, except for sentenced children (as detailed above) where Scottish Ministers are responsible. Local authorities are also currently responsible for funding the placement of children on remand in secure care, whereas there is no cost to the local authority if the child is placed in a YOI. This allocation of responsibility, and the current spot purchase model, could serve as barriers to achieving the aim of children not being remanded to YOIs.

The data tells us<sup>144</sup>:

- In 2020, there were 194 admissions to secure care.
- In 2020 the average number of children in secure care was 82 - 53 from Scotland and 28 from out with Scotland.
- In 2020 the most common lengths of stay were 3 months to 6 months (22%), less than a month (21%) and 6 months to 1 year (20%).
- Almost half of children in secure care on 31 July 2020 were aged 16 years or older.
- 73 and 69 children respectively had secure accommodation authorisations as part of their ICSO or CSO in 2020-21<sup>145</sup>.
- In 2019-20 the legal reason for admission to secure care for 22 children was transfer in urgent necessity through the children's hearings system<sup>146</sup>, 17 as condition of CSO, 18 as ICSO, and 44 pending a decision by the Reporter<sup>147</sup>.
- In 2019-20 32 children were in secure care as a place of safety or having been remanded, with Police Scotland data highlighting that in 2020, 5 children were released to the care of social work to be placed in secure accommodation having been arrested, compared to 135 who were arrested and held on a child detention certificate in police custody<sup>148</sup>.
- In 2019-20 No children were placed in secure care having been sentenced on summary proceedings, and less than five under solemn proceedings<sup>149</sup>. A further 57 placements were made on other legal orders.

### 6.1.1 Proposals

The regulatory landscape around secure care is complex. We consider it would be desirable to take the opportunity simplify and clarify this and to make procedures for

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<sup>143</sup> Section 2017 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/1995/59/section/2017)

<sup>144</sup> [Children's Social Work Statistics Scotland, 2019-20](https://www.gov.scot/publications/statistics/2019-20/children-social-work-statistics-scotland-2019-20)

<sup>145</sup> [Children referred to the Reporter \(scra.gov.uk\)](https://www.scra.gov.uk/children-referred-to-the-reporter)

<sup>146</sup> Section 143 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2011/17/section/143)

<sup>147</sup> Additional tables [Children's social work statistics: 2019 to 2020 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/statistics/2019-20/children-social-work-statistics-scotland-2019-20/item-4-police-scotland-custody-update.pdf)

<sup>148</sup> [item-4-police-scotland-custody-update.pdf \(spa.police.uk\)](https://www.spa.police.uk/item-4-police-scotland-custody-update.pdf)

<sup>149</sup> Additional tables [Children's social work statistics: 2019 to 2020 - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/statistics/2019-20/children-social-work-statistics-scotland-2019-20/item-4-police-scotland-custody-update.pdf)

approval and registration of secure accommodation services more transparent. We are also considering whether the current legislative definition of “secure accommodation”<sup>150</sup> offers the required precision.

Current routes to secure care are complex. Whether a child can access secure care depends on their age and legally defined status. This has significant implications for the ability of all children, particularly those aged 16/17 years, to access these age-appropriate facilities. This position requires to be amended if Scotland is to Keep the Promise. The Scottish Government wants to ensure that all children aged under 18 have a legislative route to secure care when this is deemed necessary and appropriate.

Through increasing the maximum age of referral to the Principal Reporter, more children should be able to access secure care as part of relevant order or warrant with a secure accommodation authorisation. Moreover, while we want to move away from the use of secure care as an emergency placement, we want to ensure any child can be placed in secure care where this is necessary, proportionate and in their best interest. For children accessing secure care via police powers or through the criminal justice system who have been sentenced or remanded, we want to make legislative provision to enable all children aged under 18 to be placed in secure care.

It is important to ensure decisions as to where a child is placed are driven by the needs of the child as opposed to financial considerations and who is responsible for payment. To reduce any disincentives to the use of secure care as opposed to YOI when a child is being remanded, we are considering whether these costs should be covered by Scottish Ministers.

#### 6.1.2 Questions

**Question 14:** Do you agree that the regulatory landscape relating to secure care needs to be simplified and clarified?

Yes / No

Please give reasons for your answers

- If yes, please provide details of how this could be achieved

**Question 15:** Do you feel that the current definition of “secure accommodation” meets Scotland’s current and future needs?

Yes / No

Please give reasons for your answers

- If no, please provide details of how this could be changed

**Question 16:** Do you agree that all children under the age of 18 should be able to be placed in secure care where this has been deemed necessary, proportionate and in their best interest?

- Yes through all routes
- Yes but only through certain routes
- No

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<sup>150</sup> See paragraph 6 of schedule 12 of the [Public Services Reform \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk).



Please give reasons for your answer, including any positive or negative implications

**Question 17:** Should the costs of secure care placements for children placed on remand be met by Scottish Ministers?

Yes / No

Please give reasons for your answer

## 6.2 Current funding and placement arrangements

The Promise requires a fundamental rethink of the purpose, delivery and infrastructure of secure care. This echoes the previous findings of the Secure Care National Project<sup>151</sup>, which resulted in the development of the Secure Care Pathway and Standards for Scotland<sup>152</sup> and the establishment of the Vision for Secure Care<sup>153</sup>, and by the previous Justice Committee. Significant work is currently underway across Scotland to address these findings and to drive forward the transformational change to improve the experiences and outcomes for children who are experiencing extreme vulnerabilities across the continuum of supports including secure care.

Secure care currently operates on a national contractual arrangement. The contract operates on a cost recovery basis for the independent centres, and is based on a break-even rate of 90% occupancy. This means that where a centre is below 90% occupied, it is not financially viable.

The demand and supply of secure care has consistently been recognised as a complex and shifting landscape. A spot purchase model operates, whereby local authorities and the Scottish Government directly approach individual centres in order to access secure care placements. Individual local authorities have generally been content with this approach given their limited or unpredictable usage of secure care<sup>154</sup>. While the placement of children from outside Scotland into Scottish secure care centres is not new, the placement of children from outwith Scotland into vacancies within secure care (often called “cross-border” placements) to sustain Scottish secure care centres has become more significant in recent years as Scottish usage of secure care has fallen<sup>155</sup>. This could however result in demand for placements outstripping supply, meaning Scottish children may not be able to access secure care where it has been assessed as being required immediately and all alternative measures have been attempted. A further issue is lack of choice, with placements often being driven by whichever centre has a vacancy, regardless of the child’s individual needs and the particular ‘offer’ a centre can provide, as well as the geographical location of the centre<sup>156</sup>.

The Scottish Parliament’s previous Justice Committee, concluded that the current funding model for secure care is not sustainable and called on the Scottish

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<sup>151</sup> [Secure Care in Scotland: Looking Ahead - Children's and Young People's Centre for Justice \(cycj.org.uk\)](https://www.cycj.org.uk)

<sup>152</sup> [Secure care: pathway and standards - gov.scot \(www.gov.scot\)](https://www.gov.scot)

<sup>153</sup> [Secure+Care+Strategic+Board+-+Report+to+Ministers+-+February+2019.pdf \(www.gov.scot\)](https://www.gov.scot)

<sup>154</sup> [Chief Social Work Officers and secure care](#)

<sup>155</sup> [Secure care and prison places for children and young people in Scotland \(azureedge.net\)](https://www.azureedge.net)

<sup>156</sup> [Chief Social Work Officers and secure care](#)

Government and COSLA to look at alternative models, such as national commissioning or the use of block funding of places. The Promise identified a lack of clarity about pathways through secure care and decision making driven by overly complex funding and procurement arrangements, as well as the detrimental impact of the current competitive contractual framework. Both stressed that planning and provision must reflect the needs of Scotland's children to ensure there are sufficient places for children who require to be placed in secure care: "It should never be the case that a child or young person is sent to HMP YOI Polmont when a secure care unit would be more appropriate to their needs".

### 6.2.1 Proposals

Discussions are underway with Social Work Scotland, COSLA, Scottish Government and secure care centres to explore different funding approaches to ensure that every child living in Scotland, who requires to be cared for in secure care, can be.

With a very small number of children needing secure care on an ongoing basis, but with unplanned emergency admissions sometimes required, and the occupancy position in secure units often very tight, the current arrangements do not work well for either providers or purchasers. There is no moderation between local authorities where more than one child may meet the secure criteria, but only one secure place is available.

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. Local approaches to decision making can vary<sup>157</sup>, often utilising either formal local secure care screening groups or the CSWO bringing together the relevant professionals and the team around the child, to meet prior to making decisions. Research has highlighted the competing pressures and complex professional and ethical judgements facing those responsible for such decisions<sup>158</sup>. These decisions are fundamentally linked to the availability of other local supports for children in the community or other parts of the system. At times, there have been reports of children being placed in secure care because there are no other appropriate local supports available. Efforts are underway across Scotland to address this<sup>159</sup>. The recent investigation by the Children and Young People's Commissioner Scotland<sup>160</sup> examined the powers and performance of statutory duties by CSWOs when children were placed in secure care on an emergency placement or through implementation of children's hearings system orders. The study identified in some cases a lack of evidence of compliance with legal duties and made various recommendations for change<sup>161</sup>. Many local authorities have reported taking action to address these findings.

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<sup>157</sup> [Chief Social Work Officers and secure care](#)

<sup>158</sup> [Chief Social Work Officers and secure care](#)

<sup>159</sup> [The-Promise.pdf \(carereview.scot\)](#)

<sup>160</sup> [Secure-Investigation.pdf \(cypcs.org.uk\)](#)

<sup>161</sup> Including that the Scottish Government work with partners to consider whether existing laws are compatible with the UNCRC; to make any amendments necessary to strengthen legal protections for children's human rights; and to address any scrutiny gap in relation to compliance with these legal duties.

The secure care “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<sup>162</sup>. In agreeing to a child’s placement in secure care through any legislative route, the head of unit has similar duties to the CSWO<sup>163</sup>. This includes considering the needs of the child, the suitability of the placement having regard to the establishment’s statement of functions and objectives, and the needs of the other children residing in that unit. They will also consider available guidance and criteria for example as provided by the Care Inspectorate in respect of admissions and matching<sup>164</sup>. Where a child is in secure accommodation it is the responsibility of the managers of the unit in consultation with the head of unit, to ensure, safeguard and promote the child’s welfare<sup>165</sup>.

This means there is no placement commissioning mechanism or national oversight of placement decisions, demand for secure care or the needs of the children for whom secure care places are being sought. As a result, it is difficult to know whether the children currently placed in secure care are those who most require this service across Scotland. There are concerns around consistency of thresholds for decision making. There is also no cohesive and holistic overview of the impact, experiences and outcomes for children who are being considered for, are in, or are leaving secure care. The Promise calls for planning and provision to be based on understanding of need and data and the previous Justice Committee noted the lack of a centralised monitoring system for the number of places or referrals to secure care. Within current approaches, such monitoring and data provision is impossible.

In other jurisdictions there are different approaches to considering and securing a child’s placement in secure care, albeit that the legal frameworks for, and routes to, secure accommodation vary, which can provide valuable learning. Different models include the Secure Welfare Coordination Unit in England and Wales<sup>166</sup> and the national, independently chaired multi-agency admissions panel in Northern Ireland<sup>167</sup>.

Drawing on national and international evidence, the Scottish Government considers a national approach to considering the needs and circumstances of any child who might need to be placed in secure care should be explored.

## 6.2.2 Question

**Question 18:** Is a new national approach for considering the placement of children in secure care needed?

Yes / No

Please give reasons for your answer

- If yes, please provide details of what this approach should look like

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<sup>162</sup> Section 151(3) of the [Children’s Hearings \(Scotland\) Act 2011](#)

<sup>163</sup> [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

<sup>164</sup> [Admissions Guidance for Residential Services Oct 2019.pdf \(careinspectorate.com\)](#)

<sup>165</sup> [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](#)

<sup>166</sup> [Referrals \(securechildrenshomes.org.uk\)](#)

<sup>167</sup> [Microsoft Word - review-of-regional-facilities-for-children-young-people \(health-ni.gov.uk\); Deprivation of liberty in Northern Ireland - Children's and Young People's Centre for Justice \(cycj.org.uk\)](#)

## 6.3 Secure Transport

When a child is being transported either to secure care or transported to critical appointments while living in secure care (for example to a children's hearing, medical appointment, or court appearance), this is often done through the use of secure transport. Responsibility for the organisation and funding of secure transport varies. Scottish Ministers are responsible for children under the age of 16, or those between 16 and 18 who are subject to a CSO, and who have been convicted on indictment by the courts and sentenced to detention<sup>168</sup>. Scottish Ministers are also responsible for children under 18 who are convicted of murder<sup>169</sup>. Scottish Ministers have a contract in place with an organisation to provide secure transport. Local authorities are responsible for the transport of all other children placed in secure care through any route.

Where this responsibility lies with local authorities, the decision as to who will transport a child is made on a case-by-case basis, taking into account a range of factors including those specific to the child, the type of journey, risk assessment and the availability of transport. Transport can be provided by local authority staff, social care staff, by commissioning secure transport from private organisations or, in exceptional circumstances, by the police.

There are a range of challenges for local authorities associated with ensuring children who require secure transport can be provided with child-appropriate, timely, rights-based, trauma-informed services. These include the limited availability of Scottish based secure transport providers; the combination of planned and unplanned journeys; limited regulation; and the lack of standards, principles and for expectation of services. Secure transport is mentioned in other Standards<sup>170</sup> and activity is underway via the Secure Care Group<sup>171</sup> to support the identification of how these Standards can be achieved in practice and what requires to change. In legislation there is limited reference to secure transport, either for children who are being placed in secure care through the children's hearings system or the criminal justice system<sup>172</sup>.

### 6.3.1 Proposals

We propose to enable secure transport to be utilised when necessary and justifiable for the safety of the child or others. The decision on the type and level of security of the transport should continue to be made by those who are responsible for the child's placement (i.e. the local authority or Scottish Government). This decision should be based on an assessment of the child's needs, strengths, circumstances and risks, with the level of restriction proportionate to this assessment.

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<sup>168</sup> Section 208 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>169</sup> Section 205 of the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk)

<sup>170</sup> [standards-those-working-children-conflict-law-2021.pdf](#); [Secure care: pathway and standards - gov.scot \(www.gov.scot\)](#)

<sup>171</sup> [Secure Care Group - gov.scot \(www.gov.scot\)](#)

<sup>172</sup> For example, a person detained under the [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](https://legislation.gov.uk) is treated as being in legal custody ([section 295](#) of the Act) and transport should not be less secure than the accommodation

### 6.3.2 Questions

**Question 19:** Is provision needed to enable secure transport to be utilised when necessary and justifiable for the safety of the child or others?

Yes / No

Please give reasons for your answer

**Question 20:** Are there any other factors that you think need to be taken into account in making this provision for secure transport?

Yes / No

Please give reasons for your answer

- If yes, please provide details of these factors

### 6.4 Age thresholds

As things stand, the legal definition of “secure accommodation” means that children cannot currently remain in secure accommodation beyond their 18<sup>th</sup> birthday, regardless of the needs, vulnerabilities or the best interests of the young person, or remaining sentence for young people turning 18 who were placed in secure care when they were sentenced<sup>173</sup>. At present, the only option is for children under 16, or aged 16/17 who are subject to CSO, convicted on indictment and sentenced to detention<sup>174</sup> to be released on licence on the recommendation of the Parole Board at any time<sup>175</sup>. In other jurisdictions, for example England, albeit the provision of services differs, children can remain in secure children’s houses or secure training centres (and YOIs) beyond their 18<sup>th</sup> birthday if for example a child’s sentence end is imminent or they are engaged in a programme or intervention that it would be detrimental to disrupt.

For children who are placed in secure care via the criminal justice system, at the age of 18 these children must automatically transfer to a YOI. Both the Promise and the previous Justice Committee have recommended that this stop: “...the Committee does not believe that current system, which sees the automatic transfer of a young person from care to HMP YOI Polmont, should be based solely on age... Any system of transition must be based on vulnerability assessments and not purely based on reaching a specific age”.

International human rights instruments<sup>176</sup> recognise that where a child is deprived of their liberty, they should not automatically transfer to an “adult facility” on reaching 18, if this is not in their best interests and also the child remaining is not contrary to the best interests of the other children in the facility. Moreover, the current approach is inconsistent with the current Youth Justice Vision’s emphasis on moving away from age-related ‘cliff edges’; the individualised approach encouraged by GIRFEC; and the ability to adopt a needs and developmentally led approach, to ensure that

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<sup>173</sup> As defined under section 202 to be read with section 199 [Children's Hearings \(Scotland\) Act 2011 \(legislation.gov.uk\)](#) and highlighted by [Secure care and prison places for children and young people in Scotland \(azureedge.net\)](#)

<sup>174</sup> under section 208 [Criminal Procedure \(Scotland\) Act 1995](#)

<sup>175</sup> Section 7(2) of the [Prisoners and Criminal Proceedings \(Scotland\) Act 1993](#)

<sup>176</sup> [General Comment No. 24 \(201x\), replacing General Comment No. 10 \(2007\) Children's rights in juvenile justice](#)



children are cared for in the best possible facilities that meet their needs. Transitions at 18 are also inconsistent with our understanding of brain development and maturation<sup>177</sup> and of emerging adulthood.

In Scotland, children in secure care who are defined as a looked after child<sup>178</sup> and who cease to be looked after on or after their 16<sup>th</sup> birthday but are less than 26 years of age may be eligible for aftercare<sup>179</sup>. A child who is looked after in foster, kinship or residential care on or after they turn 16 is eligible to remain in their current care placement until they turn 21 under continuing care<sup>180</sup>.

One exception to the duty on local authorities to provide continuing care is if the child was accommodated in secure care immediately before ceasing to be looked after, owing to secure care being a childcare facility<sup>181</sup>. The philosophy underpinning continuing care is to enable continuity of care and consistent relationships, to provide young people with the support they need to develop the necessary skills to move on from their last placement when they are ready to do so with the option to return as necessary to secure a positive and sustained transition into adulthood<sup>182</sup>. The Promise made various recommendations regarding transitions support including that “Any young person who is ‘looked after’ and is in Secure Care and turns 18, must retain social work support and be able to access throughcare and continuing care provisions upon leaving Secure Care”.

#### 6.4.1 Proposals

We propose to enable those young people who turn 18 to remain in secure care for a time limited period. The use of any such extension would be determined on a case by case basis, involving the full team around the young person, and only where this has been assessed as in their best interests based on their needs, strengths, risks and vulnerabilities. Any decision would also need to respect the young person’s right under Article 5 ECHR not to be deprived of their liberty except where this is necessary, proportionate and prescribed by law. As such, we believe this change would need to be limited to children who are remanded or sentenced and whose liberty requires to be deprived on an ongoing basis. As matters stand, young people cannot remain subject to measures through the children’s hearings system beyond their 18<sup>th</sup> birthday. Given that deprivation of liberty must be for the shortest time possible, we do not consider that it would usually be appropriate to extend these measures to provide a legal basis for young people to remain in secure care on welfare grounds beyond their 18<sup>th</sup> birthday. However, in-keeping with the wider move away from chronological ages being determinative of children’s and young people’s rights, we would welcome respondents’ views on this issue.

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<sup>177</sup> [Sentencing of young people guideline \(scottishsentencingcouncil.org.uk\)](http://scottishsentencingcouncil.org.uk)

<sup>178</sup> Section 17(6) of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](http://legislation.gov.uk) defines the term “looked after child”

<sup>179</sup> Part 10 of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>180</sup> Section 67 of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](http://legislation.gov.uk) amended Section 26A of the [Children \(Scotland\) Act 1995 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>181</sup> See section 67(5)(a) of the [Children and Young People \(Scotland\) Act 2014 \(legislation.gov.uk\)](http://legislation.gov.uk)

<sup>182</sup> [Staying Put Scotland - Providing Care Leavers With Connectedness and Belonging \(www.gov.scot\)](http://www.gov.scot)



Consideration of the child's relationships; supports in secure care; the needs of the other children in secure care; length of time the child/young person is likely to be deprived of their liberty; their views and those supporting them should all inform an assessment of the child's best interests. The roles of secure care staff and the Head of Unit are critical. Consideration would need to be made to children's rights to be separated from adults unless it is considered in a child's best interest not to do so<sup>183</sup>. Consideration and preparation would also be required to ensure secure care can resource the necessary supports to ensure the wellbeing of all children that any over 18s remaining in secure care may affect.

In determining how long any such extension could last, this could be based on needs or development; based on the child's length of remand or sentence; or could apply in relation to a specified age range. We would welcome views on this. We are proposing that the ability of a young person to remain in secure care would be subject to early, and regular review.

#### 6.4.2 Question

**Question 21:** Do you agree children should be able to remain in secure care beyond their 18<sup>th</sup> birthday, where necessary and in their best interests?

- Yes / No

If yes, for all children or only those who are remanded or sentenced?

If yes, how long for?

- For as long as the child's needs require it
- To a maximum length of remand or sentence (and if so what should this be?)
- To a maximum age (and if so what should this be?)
- For another period (please specify)

Please give reasons for your answers

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<sup>183</sup> Under [The United Nations Convention on the Rights of the Child](#)

## 7. Residential Care and Cross-Border Placements

### 7.1 Cross-border placements

Children and young people should be provided with a nurturing and loving environment, ideally in the family home. However, where this is not possible, then alternative provision must be available for children living in Scotland.

Children and young people can be placed in residential care settings in Scotland from other UK jurisdictions. These placements are known as cross-border placements. In Scotland we have 334 residential services, which at any one time can accommodate over 100 children on a cross-border placement. 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<sup>184</sup>, orders made under section 25 of that Act authorising a placement into secure care and Deprivation of Liberty (DOL) orders.

Some residential care services with resources in Scotland are receiving cross-border placements of children and young people subject to DOL orders. These are granted by courts in England and Wales to allow a child to be deprived of their liberty in a residential care setting, rather than a secure care setting, in Scotland. As of February 2022 there are 15 DOL order placements into residential care settings in Scotland. The total number since 2019 is 35. Of these, 34, have been from England and 1 child has been placed from Wales.

#### 7.1.1 The Promise and cross-border placements

The Promise was clear that the commercial practice regarding cross-border care placements must end. It is established that 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.

Therefore cross-border placements should only occur in exceptional circumstances where the placement is in the best interests of an individual child. Until the lack of provision for secure and residential care, particularly in England, is addressed, the practice of cross-border placements into Scotland will continue. The Scottish Government continues to seek assurance from the UK Government that prompt and effective action is being taken to find a solution to capacity issues.

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 and that it is desirable to improve notification and scrutiny arrangements for cross-border childcare placements in Scotland.

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<sup>184</sup> [Children Act 1989 \(legislation.gov.uk\)](https://legislation.gov.uk)

Views are sought on a potential national approach to considering the placement of children in secure care in Scotland and to reduce reliance on cross-border placements, except in exceptional circumstances where it is in the best interests of the child.

#### 7.1.2 Cross-border placements under deprivation of liberty orders

The Scottish Government believes that in all circumstances where it is considered to be in the child's best interest to move cross-border into a Scottish residential or secure care establishment, the child should receive the highest possible standard of care, with appropriate safeguards in place.

Cross-border placements of children into secure accommodation in Scotland are governed by section 25 of the Children Act 1989, as amended in 2017. It is not proposed to make changes to this provision. There are currently safeguards in place for these placements which are covered by the secure care standards and pathways<sup>185</sup> which must be followed by all secure care providers in Scotland. There are also conditions in place within an agreed Memorandum of Understanding (MoU) between the Scottish and UK Governments. This is a signed agreement from both parties 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.

It is established that some residential care services with resources in Scotland are receiving cross-border placements of children and young people subject to DOL orders. The experiences of these children are of particular and immediate concern. They are often the children and young people with the most complex needs, in the most vulnerable of situations, who require specialist care and support.

DOL orders for children and young people are authorised by the High Court in England and Wales under its "inherent jurisdiction". This practice is due to there being no statutory provision which authorises deprivation of liberty in residential care settings. In January 2022 the Scottish Government sought views on draft regulations<sup>186</sup> to be laid in Parliament in Spring 2022 under section 190 of the Children's Hearings (Scotland) Act 2011 as a temporary measure to legally recognise DOL orders in Scotland.

It is clear from the responses received that there are concerns around DOL order placements continuing in residential settings. It is suggested that provisions are needed to support a future reduction of such placements, whilst also reducing any unintended consequences, such as ensuring that as residential placements

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<sup>185</sup> [Home - Secure Care Pathway and Standards Scotland \(securecarestandards.com\)](https://www.securecarestandards.com/)

<sup>186</sup> [Cross-border placements of children and young people into residential care in Scotland: policy position paper - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/position-papers/pages/1.aspx)

decrease, we do not see a parallel increase in the number of cross-border placements into secure care.

Many of the young people from other UK jurisdictions are being placed in residential homes under DOL orders and are being deprived of their liberty under circumstances which would be akin to those living in secure accommodation. It is useful to consider restrictions imposed upon a person's activities as a spectrum ranging from no interference with liberty, escalating to measures of restriction and ultimately to deprivation of liberty.

The question of whether or not a child is being deprived of their liberty relates to the "degree or intensity" of measures they are subject to. Factors to be considered include the physical environment of the setting and the extant regime, the extent to which the child is prevented from leaving the placement and efforts to return them if they leave; the nature and level of supervision and monitoring of the child; the degree of restriction of mobile phones and other methods of communication; and the degree of access to the local community (and how this is supervised).

### 7.1.3 Proposals

As noted above, it is clear from our targeted stakeholder engagement in January 2022 in response to the proposals for interim measures to regulate cross-border DOL placements, that concerns extend to all other cross-border placements continuing in residential settings, as well as DOL order placements.

Currently, the Care Inspectorate plays a role in ensuring that children and young people experiencing care in Scotland get the best quality of care that meets their needs, respects their choices and protects their rights. This is through registration, assessment and inspection processes. We anticipate a future increased role for the Care Inspectorate which ensures that through the registration criteria, notifications systems and inspection processes that there are explicit references to cross-border placements.

We recognise that numbers of residential accommodation settings in Scotland over recent years have increased and that in some circumstances, this has led to increased capacity to provide care for children and young people from outside of Scotland. We consider that, going forward, it may be appropriate that approval of any new residential childcare provision should be considered in the context of local need as identified through the joint strategic needs assessment undertaken to inform each area's Children's Services Plan. We propose that as a prerequisite to applying for registration with the Care Inspectorate, providers should demonstrate that robust discussion has taken place with their local Children's Services Planning Partnership and that any proposed provision meets identified service provision needs. Where provision is proposed which relates to restricting or depriving children of their liberty it is proposed that oversight and scrutiny is more stringent as the restriction increases.

It is unlikely that cross-border placements will cease completely in the future - as some young people may require such a placement as it will be in their best interest.

Therefore it is felt that provision is required to ensure that such placements are better regulated.

The Scottish Government's view is that deprivation of liberty for children should be as a last resort, and should ordinarily only occur in secure care. We recognise that for some children and young people being placed across the border, this will not be in their best interest and that a non-secure, enhanced setting may be more appropriate. To ensure that in these circumstances, the complexity of children's needs is appropriately matched to the care environment and provision they live in, we propose to introduce pathways and standards for residential care for children and to explore linking these to registration with the Care Inspectorate. This could potentially include a requirement that settings hosting children and young people subject to DOL orders must obtain special approval and/or registration.

We firmly believe that children and young people should be cared for within their local community where this is safe and appropriate to do so. Where a move cross-border is considered to be in the child's best interest, we must ensure that their rights are upheld in the community they are resident in. Independent advocacy can support affected children to provide their views about how their experience aligns with their care plan; and how their welfare is being protected. We propose to introduce measures to ensure that those children and young people from outside of Scotland who are subject to DOL orders will be offered an advocate locally. We further propose that this should extend to all children and young people living in cross-border residential and secure care placements, where they do not already have access to Scottish advocacy provision.

#### 7.1.4 Questions

**Question 22:** Do you agree with the introduction of pathways and standards for residential care for children and young people in Scotland?

Yes / No

Please give reasons for your answer

- If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

**Question 23:** Do you agree that local strategic needs assessment should be required prior to approval of any new residential childcare provision?

Yes / No

Please give reasons for your answer

- If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

**Question 24:** Do you agree that there should be an increased role for the Care Inspectorate?

Yes / No

Please give reasons for your answer

- If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

**Question 25:** Do you agree that all children and young people living in cross-border residential and secure care placements should be offered an advocate locally?

Yes / No

- If yes, please provide details of how you think this should operate in practice

## 7.2 Use of restraint in care settings for children

Legislation specifies that a care provider must ensure that no service user (in this case no child) is subject to restraint, unless it is the only practicable means of securing the welfare and safety of that or any other service user and there are exceptional circumstances<sup>187</sup>.

In practice, the use of restraint is often complex, difficult and emotive for everyone involved. Each secure care and residential setting will have their own techniques, methodologies and training for staff on approaches to physical restraint and their own policy and procedures based on legislative requirements, contractual obligations and the national Holding Safely<sup>188</sup> guidance published in 2005 and updated in 2013.

Holding Safely gives guidance in relation to physically restraining a child and defines physical restraint of a child as “an intervention in which staff hold a child to restrict his or her movement” and it stresses that “restraining a child should only be used to prevent harm”. A child should only be restrained when this is necessary and justified and there must be exceptional circumstances.

The restraint must be reasonable and proportionate in the circumstances, using the minimum force, in the least restrictive manner for the shortest time needed to prevent harm. At all times, children’s rights must be upheld.

Where restraint is carried out in circumstances other than this:

- It may amount to the offence of assault. This could lead to prosecution of the person who carried out the restraint.
- It could also amount to a breach of the child’s rights under the Human Rights Act 1998<sup>189</sup> or the UNCRC.

Holding Safely specifies that any approach to restraint must be approved by the employer and the staff member appropriately trained in the approach used. Appropriate monitoring and recording documentation should be completed after each physical restraint<sup>190</sup>. The guidance also states that after any incident of restraint, the child should be supported and given the opportunity to discuss the restraint, all staff should be de-briefed and managers should monitor the use of restraint.

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<sup>187</sup> [The Social Care and Social Work Improvement Scotland \(Requirements for Care Services\) Regulations 2011 \(legislation.gov.uk\)](#)

<sup>188</sup> [Holding Safely CD-ROM.indd \(celcis.org\)](#)

<sup>189</sup> [Human Rights Act 1998 \(legislation.gov.uk\)](#)

<sup>190</sup> [The Regulation of Care \(Requirements as to Care Services\) \(Scotland\) Regulations 2002 \(legislation.gov.uk\)](#), regulation 19(3). A care provider must keep a record of any occasion on which restraint or control has been applied to a user, with details of the form of restraint or control, the reason why it was necessary and the name of the person authorising it.



The Scotland Excel contract for secure care highlights the above standards and also states that secure care providers must ensure staff are fully trained in de-escalation techniques and alternatives to restraint and should use trauma-informed management of children's behaviours.

Currently data on the use of restraint in secure care is not publically available but during inspections by the Care Inspectorate, policies and procedures, information on all incidents, and reviews of selected cases provide information on restraint. All services are required to keep a record of all restraint incidences and these should contain details of the form of restraint, reasons, risk and benefit assessment, name of the person authorising it, discussions with key partners, family and friends and arrangements for monitoring and ongoing assessment.

The Promise heard about children's experiences of restraint and the complexity surrounding this. It concluded "Scotland must strive to become a nation that does not restrain its children". To achieve this, the Promise recognised that various factors needed to be addressed including the supporting and nurturing of Scotland's workforce; ensuring caring, relational and trauma-informed responses to difficult situations; staff are equipped with preventative and de-escalation interventions; environmental and cultural change; and leadership. The Promise Scotland Plan 21-24 states that by 2024 "Restraint will always be pain free, will be used rarely, and only when required to keep a child safe. There will be well communicated and understood guidance in place that upholds children's rights and reflects equal protection legislation. The workforce will feel supported to respond to behaviour in a trauma informed way that reflects a deep understanding of the children in their care". Significant work has already been carried out by secure care providers to reduce the use of restraint, through working groups along with the introduction in some centres of restraint reduction plans which are co-produced with young people and which follow the Restraint Reduction Network Standards (2019)<sup>191</sup>. The standards encourage an increased focus on restraint reduction across the UK. There is a growing recognition that whilst the use of restraint may on rare occasions be necessary to keep people safe, it is also traumatic and must be minimised in therapeutic settings.

Work is also underway across secure care and residential child care to respond to the findings of the Promise in respect of restraint. This includes the work of the Scottish Physical Restraint Action Group. This multi-agency group is committed to "Working towards making coercive forms of holding less or even unnecessary, and when children are restrained, it is carried out relationally and with care". Activity has included working with the Care Inspectorate in updating notification of restraint guidance; piloting a self-evaluation tool for care services in respect of restraint as part of continuous improvement; and completing research including with children and young people.

In addition, the Secure Care Pathway and Standards Scotland were published in 2020. The standards reiterate that restraint should only be used when absolutely necessary to prevent harm, should be undertaken in the least restrictive way possible for the shortest time, during which time the child must be treated with

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<sup>191</sup> [Training Standards 2019 - Restraint Reduction Network](#)

respect, dignity and compassion. The standards also stress that following any incidence of restraint, the child should always be well supported afterwards. As detailed elsewhere consideration of similar standards for residential childcare, which would likely include standards in respect of restraint, are currently being consulted on.

### 7.2.1 Proposals

As noted above, there are standards and guidance to be followed around the use of restraint in care settings. It should be recognised that there has been lots of positive work carried out across the residential and secure care sector over the years to ensure that the position as outlined above (that restraint is only ever used in exceptional circumstances and to prevent serious harm), is followed. We are however keen to gain views on whether any change is needed to existing law and guidance on the use of restraint in residential and secure care settings.

### 7.2.2 Question

**Question 26:** Whilst there are standards and procedures to follow to ensure restraint of children in care settings is carried out appropriately, do you think guidance and the law should be made clearer around this matter?

Yes / No

- If yes, please provide details of how this could be achieved

## 8. Age of Criminal Responsibility

### 8.1 Background

The age of criminal responsibility (ACR) in Scotland was increased from 8 to 12 in December 2021, when the Age of Criminal Responsibility (Scotland) Act 2019<sup>192</sup> (“the Act”) was fully commenced.

The policy intention of the Act focused on protecting children, reducing stigma and ensuring better life chances. Additionally, to align ACR with the current minimum age of criminal prosecution, and reflect Scotland’s commitment to international human rights standards so that:

- Children under 12 are not criminalised at a young age and stigmatised due to being labelled an “offender”.
- Children under 12 are not disadvantaged by having convictions.
- The age of criminal responsibility (of 12) aligns with longstanding presumptions around maturity, rights, and participation.
- The position of care-experienced children is improved (particularly children looked after away from home, whose behaviours are more likely to have been reported to police – and therefore attract a criminalising state response – than Scotland’s child population in general).

The Act sets out a number of measures that provide safeguards, enabling the police and other authorities to take action when children under 12 are involved in serious incidents of harmful behaviour, whilst ensuring that the rights and best interests of the child whose behaviour caused the harm are protected, as are the rights and interests of anyone harmed by that behaviour.

These measures include specific investigatory powers for the police, provision for a person who has been seriously harmed to receive information, and for a child under 12 thought to be responsible for seriously harmful behaviour to have the right to be supported by a child interview rights practitioner during an investigative interview.

The Act made changes to the disclosure system, removing the automatic disclosure of convictions or other relevant behaviour of under-12s. It established the role of the independent reviewer, who will review information to be included in a response to a disclosure check when that check may disclose relevant information dating back to when the applicant was under the age of criminal responsibility.

Increasing the age of criminal responsibility makes it explicit to children that while any behaviour under the age of 12 will be fully investigated, they will not be involved in a process that re-creates the adversarial criminal process. Increasing the age of criminal responsibility to 12 has the potential of bringing about a positive cultural shift in how society views the harmful behaviour of young children, and to better understand the issues that led to it.

### 8.2 A future age of criminal responsibility

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<sup>192</sup> [Age of Criminal Responsibility \(Scotland\) Act 2019 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2019/12/section-1)

At Stage 3 of the ACR Bill, a Government amendment inserted a new Part, which placed a duty on Scottish Ministers to review operation of the Act in general, and with a view to considering the future age of criminal responsibility. This was agreed to by the Scottish Parliament (and forms Part 6 of the Act).

This review is required to look at the operation of the measures in the Act, some of which are novel to the care and justice system. This includes the role of the independent reviewer, the investigative powers provided to police, the role of child interview rights practitioners and the use of interview orders and interview by consent.

The review period began in December 2021 and will last for a period of 3 years. Scottish Ministers will also be required to consult such persons as they consider to be appropriate, when carrying out the review. At the conclusion of the review period, Scottish Ministers will then be required, within 12 months, to prepare and publish a report on the review and lay that review before the Scottish Parliament.

An Advisory Group was established in summer 2019. Whilst that Group has been able to consider what might be required to support a higher age of criminal responsibility, until it is able to determine operation of the Act in general, it will not be able to provide fully-considered recommendations for a future age, or what would be required by way of systems-change to support that future age. Given that the review period of the Act has only recently commenced, it does not seem appropriate for provisions in the Children's Care & Justice Bill to seek to amend the age of criminal responsibility in Scotland at this time.

#### 8.2.1 The Promise and the age of criminal responsibility in Scotland

To ensure that all children are diverted from the criminal justice system, The Promise requires Scotland to aim for the age of minimum criminal responsibility to be brought in line with the most progressive global Governments alongside efforts to prevent criminalisation of all children.

Globally, the age of criminal responsibility ranges between 7 and 18 years of age. Most European countries have an age of criminal responsibility of 14, although in a handful the age is 15 or 16. Luxembourg has an age of criminal responsibility of 18.

#### 8.2.2 Question

**Question 27:** Do you agree that the review of the 2019 Act should take place, as set out, with the 3-year statutory review period?

Yes / No

- If no, what period do you think is appropriate?
- If a shorter review period, how should the Scottish Government to address the lack of review findings or data to inform such a change?

## 9. Assessing Impact

### 9.1 Background

We propose to carry out impact assessments alongside the development of any new legislation which would be required to implement the changes proposed in this consultation.

These include a Data Protection Impact Assessment, Child Rights and Wellbeing Impact Assessment, Equality Impact Assessment (related to the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation). We would be interested in your views on these areas to help us in developing these and any other necessary assessments.

#### 9.1.1 Questions

**Question 28:** What, if any, do you see as the data protection related issues that you feel could arise from the proposals set out in this consultation?

**Question 29:** What, if any, do you see as the children's rights and wellbeing issues that you feel could arise from the proposals set out in this consultation?

**Question 30:** What, if any, do you see as the main equality related issues that you feel could arise from the proposals set out in this consultation?

## RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email Address

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name  
 Publish response only (without name)  
 Do not publish response

### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes  
 No



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Any enquiries regarding this publication should be sent to us at

The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-80435-248-9 (web only)

Published by The Scottish Government, March 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS1046430 (03/22)

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