CHILDREN (CARE AND JUSTICE) (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Children (Care and Justice) (Scotland) Bill (introduced in the Scottish Parliament on 13 December 2022) as amended at Stage 2. Text has been added or amended as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.

2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

THE BILL

Overview

4. The Bill, which broadly stated makes provision about the care of children (who are not involved in the criminal justice system) and the treatment of children within the criminal justice system, as well as with the interrelationship between the care system and the criminal justice system, consists of five Parts, four of which contain substantive provision, the fifth containing the usual final provisions.

5. Part 1 deals with aspects of the children's hearings system, with the main change being to the meaning of "child" in section 199 of the Children's Hearings (Scotland) Act 2011. This will mean all under 18s will be children for the purposes of the children's hearings system, without any distinction made between children over 16 who are subject to compulsory supervision orders ("CSO") and those who are not. Other changes to the 2011 Act made by Part 1 relate to the measures that may be included in CSOs, placing a duty on the Principal Reporter to inform people, who have a right to request information about the disposal of a child's case by the children's hearings system, that they have that right and, finally, providing for supervision and guidance for children after they turn 18 up to age 19.

6. Part 2 deals with children who are dealt with by the criminal justice system when suspected or accused of offences or as involved as victims or witnesses. Section 8 maintains the current link between the meaning of "child" in the Criminal Procedure (Scotland) Act 1995 and the definition in the 2011 Act so that, for almost all purposes, under 18s will be regarded as children. Most of the other provisions in this Part are consequential on this age change (like section 10) and amend provision for the treatment of children from the point of being arrested by the police through to detention after pleading, or being found, guilty. As part of that, section 12 will introduce restrictions on the reporting of criminal investigations involving children and section 13 will make changes to the current restrictions on the reporting of court proceedings. And section 17 will provide, among other things, that under 18s will no longer be detained in young offenders institutions. Where they are detained in secure accommodation, section 21 will make provision for how local authority duties in relation to "looked after" children will apply to children so detained.

7. Part 3 has links to both Part 1 and Part 2 as it is mainly aimed at reforming the legislative landscape around the provision of secure accommodation and the approval and regulation of those who provide it. That also includes changes around cross-border placements into accommodation in Scotland from other parts of the UK, as well as changes in relation to the recognition in Scotland of orders made in other UK jurisdictions.

8. Part 4 makes two changes. It changes the meaning of "child" in the Antisocial Behaviour etc. (Scotland) Act 2004 so that it covers under 18s (except in the case of parenting orders, where it will remain as under 16s). And it repeals Parts 4 and 5 of the Children and Young People (Scotland) Act 2014.

Crown application

9. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else. The Bill amends a number of existing enactments, some of which do, and some of which do not, apply to the Crown. The Bill makes no change to the application of those enactments to the Crown.

COMMENTARY ON PROVISIONS

Part 1 – children's hearings system

Section 1 – age of referral to children's hearing

10. This section will extend the age of referral to the children's hearings system to age 18 for all children.

11. Currently, if a child has had no prior involvement in the children's hearings system, then the child may be referred to the Principal Reporter only if they are under 16. Referral to the Principal Reporter is for the purposes of investigation into the child's circumstances, an assessment of whether the child is in need of protection, guidance, treatment or control, and whether it might be necessary for a compulsory supervision order (a "CSO") to be made in

relation to the child. The hearings system may still deal with some 16 year olds provided they have been referred to the system before turning 16. And the system can also deal with some 16 and 17 year olds if they are already subject to a CSO.

12. Section 1 will amend section 199 of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"), which defines "child" for the purposes of that Act, so that "child" means anyone under the age of 18. As a result, it will no longer be necessary for a child aged 16 or over to have been referred to the hearings system before they turn 16 in order for the hearings system to deal with them. Nor will the hearings system only apply to 16 and 17 year olds if they are already subject to a CSO.

Section 1A – child assessment and child protection measures: secure accommodation

13. Under the 2011 Act, a child may be taken to and kept in a place of safety in a number of circumstances. These include where a child assessment order[1] or a child protection order[2] is made, where a justice of the peace makes an order under section 55, and where a police officer considers, under section 56, that it is necessary to do so to protect the child from harm. In each case, the places to which the child can be taken include secure accommodation.

14. This section would amend the 2011 Act to insert a new section 57A into the 2011 Act, the effect of which would be to limit the circumstances in which a child could be placed in secure accommodation under any of these orders or by the police. Secure accommodation could be used as a place of safety only where it is necessary to do so and one or more of the following applies—

- the child has a history of absconding, would be likely to abscond again if not kept in secure accommodation, and, if the child were to abscond, the child's health safety or development would be at risk,
- the child is likely to self-harm if not kept in secure accommodation, or
- the child is likely to cause harm to another person if not kept in secure accommodation.

15. In addition, the section also inserts a new section 57B into the 2011 Act. This would confer a power on the Scottish Ministers to make further provision by regulations[3] about the placing and keeping of children in secure accommodation under any of these orders or by the police. For example, regulations under section 57B might make provision requiring that the person in charge of the residential establishment in which the secure accommodation is located be given the opportunity to consent to the placing and keeping of the child there. The regulations might also provide for the criteria and procedure in relation to the giving of such consent. This new section mirrors existing provisions[4] under which the use of secure accommodation can be regulated, as well as other provision being made by this Bill.[5] This will allow provision to be

[1] See section 35 of the 2011 Act.
[2] See section 37 of the 2011 Act.
[3] Subject to the affirmative procedure – see new section 58B(3).
[4] Such as sections 151 and 152 of the 2011 Act.
[5] See, e.g., section 17(6), new section 208A being inserted into the 1995 Act and, in particular, section 208A(4) to (6).

made, similar to that already contained in the Secure Accommodation (Scotland) Regulations 2013,[6] for the welfare of children detained in secure accommodation.

Section 2 – compulsory supervision orders: directions authorising restriction of liberty

16. A children's hearing may make a CSO in relation to a child if it is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child.[7] Section 83 of the 2011 Act explains what a CSO is. It is an order that may include any of the measures listed in section 83(2). One of those measures is a requirement that the child reside at a specified[8] place. If a CSO includes that type of requirement, it may also include a direction authorising the person in charge of the place where the child is to reside to restrict the child's liberty. That person may do so to the extent considered appropriate when taking account of the terms of the CSO.

17. Section 2 amends section 83 to make it explicit that any such direction does not include authorisation to deprive the child of their liberty. If a children's hearing considers it necessary to deprive the child of their liberty, it must instead include in the CSO a secure accommodation authorisation. That measure attracts special legal safeguards for the child's protection,[9] and is explained further in relation to section 5 at paragraphs 33 to 39.

Section 3 – compulsory supervision orders: prohibitions

18. Section 3 amends section 83(2) of the 2011 Act to extend the list of measures that may be included in a CSO. It adds two new prohibitions, giving children's hearings greater choice when deciding on which measure (or combination of measures) is best suited to a child's individual circumstances and is most likely to safeguard and promote the child's welfare.

19. The first prohibition is contained in new section 83(2)(ca). It prohibits the child from entering a specified[10] place or description of place. This might relate to a specific address or to a particular area. For instance, this measure could be used to protect someone who is considered to be at risk of harm or harassment from the child by, say, prohibiting the child from entering the person's home or place of work. Alternatively, it may be used to prohibit the child from entering an area or premises where the child is at risk of being exploited.

20. New section 83(2)(ca) provides a less restrictive and intrusive measure than the alternative of a movement restriction condition, which may be included in a CSO by virtue of section 83(2)(d) and is explained further in relation to section 4.[11] It is not subject to any preconditions or specific monitoring arrangements like a movement restriction condition. However, any breach of the prohibition would lead to a review of the CSO and could result in additional or more restrictive measures (like a movement restriction condition) being imposed.

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[6] SSI 2013/205 - available here.
[7] See section 91(3)(a) of the 2011 Act.
[8] See section 83(2)(a). "Specified" means specified in the order: section 83(8) of the 2011 Act.
[9] See sections 135 and 151 of the 2011 Act, the Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) and the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation (Scotland) Regulations 2013 (S.S.I. 2013/212).
[10] "Specified" means specified in the order: section 83(8) of the 2011 Act.
[11] See paragraphs 21 to 23 below.

21. The second prohibition is contained in new section 83(2)(cb). It prohibits the child from approaching, communicating with or attempting to approach or communicate with (whether directly or indirectly) a specified[12] person or class of person. This includes prohibiting the child from approaching or communicating with another person through someone else. Section 3 amends the interpretation provision in section 83(8) of the 2011 Act, to make it clear that "communicating with" another person includes communicating with that person by using social media (such as Facebook) or by any other electronic means.

22. Again, the prohibition in new section 83(2)(cb) may be used to protect someone where there is a risk of the child harassing or intimidating that person. It differs from the measure in section 83(2)(g), which is a direction regulating contact between the child and a specified person or class of person.[13] This generally involves regulating contact between the child and the people with whom the child has a relationship, such as family members.

Section 4 – compulsory supervision orders: movement restriction conditions

23. Section 4 changes the test to be applied when a children's hearing or sheriff[14] is considering including a movement restriction condition in a CSO by virtue of section 83(2)(d) of the 2011 Act. Section 84 of that Act explains what a movement restriction condition is. It consists of (a) a restriction on the child's movements in a way specified in the movement restriction condition, and (b) a requirement that the child comply with arrangements specified in the movement restriction condition for monitoring compliance with the restriction. This measure involves giving the child intensive support, and monitoring the child's compliance with the restriction by means of an electronic monitoring device[15] which uses radio frequency (rather than GPS) technology.

24. Currently, under section 83(4) of the 2011 Act, a CSO may include a movement restriction condition only if two requirements are met. The first is that at least one of the specified conditions must apply. The second is that the children's hearing or (as the case may be) the sheriff must be satisfied that it is necessary to include a movement restriction condition in the CSO.

25. Section 83(6) sets out the specified conditions. They 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, and (c) that the child is likely to cause injury to another person. The same conditions also apply for the purpose of including a secure accommodation authorisation (which is a more restrictive measure) in a CSO.[16]

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[12] "Specified" means specified in the order: section 83(8) of the 2011 Act.

[13] Section 29A of the 2011 Act requires a children's hearing to consider whether to include this measure when making, varying or continuing a CSO. It also requires a sheriff to do likewise when varying or continuing a CSO.

[14] When determining an appeal against a decision of a children's hearing, a sheriff may include a movement restriction condition in a CSO by virtue of 156(1)(b) or (2)(b) of the 2011 Act.

[15] See schedule 2 of the Restriction of Liberty Order etc. (Scotland) Regulations 2013 (S.S.I. 2013/6), which applies by virtue of regulation 8 of the Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 (S.S.I. 2013/210).

[16] By virtue of section 83(5)(b) of the 2011 Act.

26. Section 4 amends section 83 of the 2011 Act to apply a new set of conditions for the purpose of including a movement restriction condition in a CSO. There are two conditions. These are set out in new section 83(4A) and are: (a) that the child's health, safety or development is at risk, and (b) that the child is likely to cause physical or psychological harm to another person. As a result, a children's hearing or sheriff may impose a movement restriction condition only if one or both of the new conditions apply and it is considered necessary to do so.

27. The condition in new section 83(4A)(a) covers a broader range of circumstances than the current conditions. Like the conditions in section 83(6)(a) and (b), it would cover circumstances where the child's health, safety or development is at risk because of a likelihood of absconding and/or engaging in self-harming conduct. But it would also cover circumstances where, due to the child's vulnerability, the child is encouraged by others into situations where the child can be harmed or abused. So, a movement restriction condition (and the intensive support and monitoring arrangements that come with such a measure) could be used to prevent the child from visiting certain premises or areas that pose a risk to the child's health, safety or development. For example, it might specify an address where a known abuser lives, a place where there is a risk of sexual exploitation, or a locale where the child is known to buy drugs or to meet up with others to drink alcohol.

28. The condition in new section 83(4A)(b) makes it clear that a movement restriction condition may be included in a CSO where there is a likelihood of the child causing harm to another person, whether that be physical or psychological harm. Section 5 brings the condition in section 83(6)(c), now applicable only to secure accommodation authorisations, into line with this one. It also amends the interpretation provision in section 83(8) of the 2011 Act to define "psychological harm" as including (but not limited to) fear, alarm and distress.

29. Section 4 also amends section 150 of the 2011 Act, which confers a regulation-making power[17] on the Scottish Ministers to prescribe restrictions or monitoring arrangements that may be imposed as part of a movement restriction condition. It clarifies and extends the list of specific matters which they may prescribe.

30. First, it explicitly provides for the Scottish Ministers to prescribe methods of monitoring a child's movements or whereabouts (including whether a child is at, or not at, a particular place) for the purpose of monitoring compliance with a movement restriction condition. This means that they may prescribe[18] methods for both (a) checking a child's position or location at any particular time (say, for the purpose of monitoring compliance with a curfew condition), and (b) tracking a child's movement from place to place (say, for the purpose of monitoring compliance with some type of exclusion zone condition).

[17] This power has been used to make the Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 (S.S.I. 2013/210). By virtue of sections 150(3) and 195(2) of the 2011 Act, any regulations made using the power are subject to the affirmative procedure and may make different provision for different purposes.

[18] By virtue of section 150(2)(b) of the 2011 Act.

31. Secondly, it extends the Scottish Ministers' power[19] to specify devices that may be used for monitoring compliance with a movement restriction condition. As a result, they may also specify any apparatus to be linked to such monitoring devices.

32. Thirdly, and finally, it enables the Scottish Ministers to prescribe certain matters to make sure that specified monitoring devices are used appropriately and proportionately. This includes prescribing how or when a specified monitoring device may, or may not, be used. For example, they could set out in regulations how or when a particular device is to be worn by a child. It also includes prescribing how or when information obtained through the monitoring of a child by such devices may, or may not, be gathered, retained, used or shared for the purpose of monitoring a movement restriction condition. This is to expressly cover the additional data-collecting involved in using GPS technology should this be used as a method of monitoring a child's movements or whereabouts in the future. For example, the Scottish Ministers could set out in regulations the particular circumstances in which, or the times at which, the information may be gathered.

Section 5 – compulsory supervision orders: secure accommodation authorisations

33. Section 5(2) clarifies the test to be applied when a children's hearing or sheriff is considering including a secure accommodation authorisation in a CSO by virtue of section 83(2)(e) of the 2011 Act. Section 85 of the Act defines a "secure accommodation authorisation" as an authorisation enabling the child to be placed and kept in secure accommodation within a residential establishment.[20] This is the most restrictive measure that may be included in a CSO, involving the maximum level of intervention and support.

34. Accordingly, under section 83(5) of the 2011 Act, a CSO may include a secure accommodation authorisation only if three requirements are met. The first is that the CSO must contain a requirement that the child reside at either (a) a specified residential establishment which contains both secure and non-secure accommodation, or (b) two or more specified residential establishments, one of which contains non-secure accommodation.[21] The second is that at least one of the specified conditions must apply (those are the conditions which are listed in section 83(6) and set out at paragraph 25 above). The third is that the children's hearing or sheriff must be satisfied that it is necessary to include a secure accommodation authorisation in the CSO, having considered the other options available (including a movement restriction condition). Where a secure accommodation authorisation is included, special procedures apply in respect of its implementation and review.[22]

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[19] See section 150(2)(c) of the 2011 Act.

[20] See section 202(1) of the 2011 Act for definitions of "secure accommodation" and "residential establishment".

[21] While a children's hearing can authorise the placing of a child in secure accommodation, the chief social work officer is responsible for implementing a secure accommodation authorisation: see section 151 of the 2011 Act. That officer may implement the authorisation only so far as it is necessary to do so, and only with the consent of the person who is in charge of the residential establishment that comprises or contains the secure accommodation in which the child is to be placed. So, the first requirement is aimed at ensuring the CSO can still be given effect to, even if the chief social work officer does not implement the secure accommodation authorisation.

[22] See sections 135 and 151 of the 2011 Act, the Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) and the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013 (S.S.I. 2013/212).

35. Section 5(2) amends the conditions listed in section 83(6) in two respects.

36. First, it adjusts each condition so that it applies more clearly in relation to a decision to keep (rather than place) a child in secure accommodation. So, when a CSO containing a secure accommodation authorisation is reviewed, a condition will apply if the relevant risk would be likely to materialise unless the child is kept in secure accommodation. This recognises that a child already in secure accommodation is unlikely to abscond or cause harm to themselves or others while they are receiving the kind of intensive care and support on offer in a secure setting.

37. Secondly, as mentioned in paragraph 28 above, it adjusts the condition in section 83(6)(c) to align it with the condition in new section 83(4A)(b) which applies in relation to a movement restriction condition. This makes sure that a CSO may include a secure accommodation authorisation if there is a likelihood of the child causing harm to another person, whether it be physical or psychological harm. Section 5(2) also amends the interpretation provision in section 83(8) of the 2011 Act to define "psychological harm" as including (but not limited to) fear, alarm and distress.

38. Section 86 of the 2011 Act makes provision for an interim compulsory supervision order (an "ICSO"). To that end, it provides for various provisions of section 83 to apply to an ICSO in the same way as they apply to a CSO (including the list of measures contained in section 83(2)). Section 5(3) consequentially amends the cross-references to those provisions in section 86(4) to make sure that the changes made by this section, and sections 2 and 4, apply also in relation to ICSOs.

39. However, a secure accommodation authorisation is not a measure limited to CSOs or ICSOs. One can also be included in a medical examination order[23]or a warrant to secure attendance.[24] So, given that the same tests apply for secure accommodation authorisations attached to those orders and warrants, section 5(4) and (5) makes changes to the conditions listed in sections 87(4) and 88(3) which are equivalent to those made to section 83(6) by section 5(2).

Section 6 – provision of information to person affected by child's offence or behaviour

40. Under section 179A of the 2011 Act, certain persons are entitled to request information about the action taken by the Principal Reporter and the children's hearing in relation to a child who has committed an offence or, while under 12, acted or behaved in a way that was physically or sexually violent, sexually coercive, dangerous, threatening or abusive and which caused harm to another person.[25] Those persons are persons against whom the offence was committed, persons who were harmed by the child's actions or behaviour, where either of those persons is a child, a "relevant person" in relation to that child, and persons specified by the Scottish Ministers by regulations.[26]

[23] Defined in section 87 of the 2011 Act.
[24] Defined in section 88 of the 2011 Act.
[25] See section 179A(1) and (2). Section 179B sets out the information that may be requested.
[26] See section 179A(4). For the meaning of "relevant person" in relation to a child, see section 200 of the 2011 Act.

41. Section 6 amends section 179A(5) to place a duty on the Principal Reporter to inform the persons entitled to request information of their right to do so. The duty applies if it is reasonably practicable to do so. If, for instance, the Principal Reporter does not have and cannot find a person's contact details, then the person does not have to be informed. New subsection (5A), inserted into section 179A by section 6, will modify the duty to inform, where a person against whom the offence was committed, or who was harmed by the actions or behaviour, is themselves a child, so that the Principal Reporter can inform just the child, or a relevant person in relation to the child, or both.

42. New subsection (5B) disapplies the duty to inform in certain circumstances as set out in that subsection, including where the Reporter is satisfied that it would be detrimental to the best interests of any child involved for the Reporter to inform persons of their right to request information. This mirrors section 179C(1)(a), under which the Reporter can decline to comply with a request for information.[27]

43. Section 179B of the 2011 Act makes provision for the information that can be requested under section 179A. That information varies depending on whether the Principal Reporter has decided to arrange a children's hearing or not in relation to the child. Where no hearing has been arranged, the Reporter may[28] provide the information set out in section 179B(2)(a), that is, what determination the Reporter made under section 66(2) of the 2011 Act in respect of the child and any other action taken by the Reporter. Where a children's hearing was arranged, section 179B(2)(b) governs the information that may be provided, namely, information as to whether a CSO has been made in respect of the child or, where the child was already subject to a CSO, whether the CSO has been terminated, varied or continued, or, where a CSO was not made, terminated, varied or continued, information as to how the referral to the children's hearing was otherwise discharged.

44. Section 6(2A) amends section 179B so that, where a children's hearing is not arranged, the information to be provided is set out in a new version of section 179B(2). Where a hearing is arranged, the information to be provided is set out in new section 179B(3). The main change made is that information that can be provided where a children's hearing is arranged and a CSO is made in respect of the child includes information as to measures included in the CSO, namely, measures (such as those that might be included in a CSO as a result of section 83(2)(ca) or (cb), as inserted by section 3(2)(a) of this Bill), and whether a secure accommodation authorisation has been included.

45. Section 6(3)(a) amends section 179C(1)(a) of the 2011 Act to bring it into line with new subsection (5B)(b) of section 179A. Section 6(3)(b) amends section 179C to insert a new subsection (4). This provides that the limitation in section 179C(3), on the ability of the Principal Reporter to provide information which is not directly related to the action or behaviour which caused harm or which constituted an offence, does not stop the Reporter from providing information about the measures included in a CSO if they relate to the person who requested the information under section 179A.

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[27] Section 179C(2) also sets out the other factors to which the Reporter must have regard in deciding whether it is appropriate to comply with a request for information.

[28] Subject to section 179C of the 2011 Act.

Section 6A – support for victims in the children's hearings system

46. Section 6A amends the 2011 Act to insert a new section 179D. This provides the Scottish Ministers with a regulation-making[29] power to make provision for support services for the persons, mentioned in section 179D(2), who are entitled to request information under section 179A about the action taken by the Principal Reporter and the children's hearing in relation to a child who has committed an offence against them or otherwise acted or behaved in a physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive way and that has harmed the person. What is to constitute "support services" is to be set out in the regulations themselves.[30] Section 179D(3) contains an non-exhaustive list of the things that can be provided for in regulations. Before making regulations, subsection (4) requires the Scottish Ministers to consult a number of persons and bodies, including victim support organisations.[31]

Section 6B – duty to establish an information sharing system

47. Section 6B imposes a duty on the Scottish Ministers to make provision, by regulations,[32] establishing a system to provide information to persons affected by offences committed by children or by their behaviour, and for that system to include a single point of contact through which information will be provided.

48. Subsection (2) sets out mandatory provisions that the regulations must include, in particular that the system to provide information must take a tiered approach, with some information that must always be provided, other information that, depending on a risk assessment, must be provided, and further information about a child detained in, and transferred or released from, secure accommodation. In each case, the information is to be provided unless the person who would be provided with it opts out of receiving it.

49. In addition, information is to be provided in a way that accords with trauma-informed practice (as defined in subsection (7)) and in an accessible format. The regulations must also include provision for the sharing of information by a number of public bodies and persons, including Children's Hearings Scotland, the police and local authorities.[33]

50. Subsection (3) contains further detail on the information that must be provided in all cases, including general information on how the children's hearings system works, where to access victim support services, and the dates, and outcomes of, children's hearings (but only where necessary to enable safety planning by the recipient). Subsection (4) sets out more detail of the information that is to be provided following a risk assessment, including information about the making, and details of measures included in, CSOs.

Section 6C – publishing restrictions

51. Section 182 of the 2011 Act makes provision for reporting restrictions in relation to children's hearings and for offences where those restrictions are breached. Section 6C would

[29] Subjsect to the negative procedure – see section 179D(5).
[30] See section 179D(6).
[31] See, in particular, section 179D(4)(c).
[32] Subject to the affirmative procedure – see section 6B(6).
[33] See section 6B(2)(d).

amend section 182 to increase the penalties available to the court where a person is convicted of breaching those restrictions.

Section 7 – supervision or guidance post-18

52. Where, on reviewing a CSO, the children's hearing decides that the CSO should come to an end, the hearing must consider whether the child nevertheless has a continuing need for supervision or guidance and make a statement to that effect.[34] Under section 138(7) of the 2011 Act, the relevant local authority[35] has a duty, in such a case, to provide the child with that supervision or guidance, subject to the child accepting it.

53. Section 7 will amend section 138 in two ways. First, it will require the children's hearing to also consider whether the child might need supervision or guidance after the child turns 18. And, where the children's hearing makes a statement to the effect that the child does, the relevant local authority's duty under section 138(7) continues to have effect after the child turns 18. But the relevant local authority does not need to provide supervision and guidance after the child turns 19.

Part 2 – criminal justice and procedure

Involvement of children in criminal proceedings: general

Section 8 - meaning of "child"

54. The meaning of "child" for the purposes of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") is currently set out in section 307(1). At root, "child" is defined by reference to section 199 of the 2011 Act. So, as explained at paragraph 11 above in the context of the children's hearings system, while all under 16s will be children for the purposes of the 1995 Act, some 16 and 17 year olds will also be children if already involved with the children's hearing system. An exception to that is in section 46(3) and schedule 1 of the 1995, which, among other things, make special provision about certain offences that are committed against or in respect of children under 17.

55. Section 8 will amend the definition of "child" in section 307(1) of the 1995 Act both to reflect changes to the definition of "child" in the 2011 Act and to remove the references to section 46(3) and schedule 1 of the 1995 Act. Those references are no longer needed as a result of amendments made by section 9 (see paragraphs 57 to 59 below). But the definition of "child" will still be linked to the definition in the 2011 Act, meaning that "child" will generally mean the same in both the children's hearings system and in the criminal justice system, namely a person under 18.[36]

[34] See section 138(6) of the 2011 Act.
[35] Defined in section 201 of the 2011 Act.
[36] In some circumstances, however, different provision is still made: See, for instance, section 227J(1) (unpaid work or other activity requirement: further provision) and section 234B(1) (drug treatment and testing order).

56. Other provisions in the Bill make further changes to the 1995 Act to reflect that all persons under 18 will now be children for the purpose of that Act. Most notably, see section 10 which deals with the prosecution of children over the age of criminal responsibility.[37]

Section 9 – offences against children to which special provisions apply

57. Schedule 1 of the 1995 Act contains a list of offences against children under the age of 17 in relation to which special provisions apply. Those provisions are in section 46 of the 1995 Act and include presumptions about the age of a child involved in criminal proceedings (either as the victim or as the offender) relating to offences under the Children and Young Persons (Scotland) Act 1937, those listed in schedule 1 of the 1995 Act and certain offences under the Criminal Law (Consolidation) (Scotland) Act 1995.

58. As all persons under 18 will now be regarded as children for the purposes of the 1995 Act, section 9 amends schedule 1 to remove references to children aged under 17. As a result, schedule 1 and section 46 will apply in relation to offences committed against all children under 18.

59. Section 9(3)(a) will also repeal section 46(5)(b) as that paragraph is no longer needed, as whether a person was subject to a CSO is now irrelevant to the question of whether they are a child or not for the purposes of the 1995 Act.

Prosecution of children

Section 10 – prosecution of children over age of criminal responsibility

60. Section 42 of the 1995 Act currently provides that children aged 12[38] to 15 who commit an offence may be prosecuted only if the Lord Advocate authorises the prosecution. Children aged 16 or over can be prosecuted without this extra step, although a child of this age who offends while already subject to a compulsory supervision order may be referred back to a children's hearing.[39]

61. Section 10 will amend section 42 so that all children over the age of criminal responsibility (all those aged 12 or over but under 18) may be prosecuted only if the Lord Advocate authorises this.

Safeguards for children involved in criminal proceedings

Section 11 - custody of children before commencement of proceedings

62. The Criminal Justice (Scotland) Act 2016 ("the 2016 Act") makes provision for what happens if a child is arrested and taken into police custody. Under section 22 of that Act, a child (being a person a constable believes is under 16 or a person subject to a CSO) must be kept in a place of safety until that person can be brought to court. Under section 23 of that Act, a parent of the child (if one can be found) must be informed. Section 24 also requires the local authority to

[37] That age is 12 years old by virtue of section 41 of the 1995 Act.
[38] 12 years old being the age of criminal responsibility by virtue of section 41 of the 1995 Act.
[39] See section 49 of the 1995 Act, which is being amended by section 15 of the Bill. See paragraphs 76 to 85 below.

be informed. Sections 31 to 37 make provision for the police to interview children suspected of or charged with offences, including the right to have a solicitor present. In the case of a child under 16, the right to a solicitor cannot be waived (see section 33 of the 2016 Act). A distinction is currently made between children aged 16 and 17 who are subject to a CSO and those who are not. The latter can waive the right to a solicitor if not subject to a CSO, whereas 16 and 17 year olds who are subject to a CSO cannot waive this right.

63. Sections 38 to 41 of the 2016 Act contain more safeguards for children in police custody. Under section 38, intimation must be sent to a parent of a child under 16. Where the person is 16 or over, the intimation will be sent only on the person requesting it and only to an adult named by the person making the request. Where the person in custody is under 18, the person to whom intimation is sent under section 38 must be asked to attend the place where the person under 18 is in custody. But the constable does not need to ask the person to attend where the person in custody is 16 or 17 years old and requests that the person not be asked to attend. Section 40 makes provision about the circumstances in which a parent or other person can have access to the child in custody. As with other provisions in the 2016 Act, a distinction is made between those under 16 and those under 18. Under section 41, the constable must send intimation that a child subject to a CSO is in custody to the local authority. Intimation must also be sent to the authority where the person in custody is under 18 and the constable delays sending intimation under section 38 in the interests of safeguarding and promoting the wellbeing of the person. The local authority may arrange for someone to visit the child if the child is under 16 or subject to a CSO. Where they do so, sections 38 to 40 of the 2016 Act cease to apply, so that no intimation is sent under section 38 and only the local authority will have access to the child. A local authority, where they do not visit the person in custody, may give advice to the constable as to whether the person to be sent intimation under section 38 should not be sent that intimation and advice as to who intimation should be sent to instead. The constable must have regard to that advice.

64. As a result of treating all under 18s as children for the purposes of the 2011 Act and the 1995 Act, section 11 makes various changes to the 2016 Act aimed at removing, in most cases, the distinction between children under 16 and children aged 16 and 17, and between children subject to CSOs and children not so subject.

65. Section 11(2) amends section 22(1) of the 2016 Act so that all under 18s in police custody must be kept in a place of safety. Section 11(3) amends section 23 so that where an under 18 is in custody and is to be brought to court, a parent will be given notice. Section 24 of the 2016 Act is amended by section 11(4) so that where an under 18 is in custody and is to be brought to court, the local authority will also be informed.

66. Section 11(5) amends section 33 of the 2016 Act so that no under 18 can waive the right to have a solicitor present at a police interview. Section 38 of the 2016 Act is amended by section 11(6) so that a constable may delay sending intimation under that section so that the local authority can give advice as to whether that intimation should be sent and, if not sent, who intimation should be sent to instead.

67. Section 11(7) makes a number of amendments to section 41 of the 2016 Act. The main change is to provide that the local authority is to be given intimation that an under 18 is in custody regardless of whether the child is subject to a CSO. The repeal of subsections (7) and

(10) of section 41 is consequential on this change. In addition, new section 41(1A) provides for a number of other facts and events to be intimated to the local authority. Where such intimation is sent, the local authority will be able to consider whether to visit the child in custody as they can when intimation is sent under section 41(1). Section 11(7) also repeals section 41(8). The effect of this is that a local authority's ability under section 41(9), to advise the constable that the person due to be sent intimation under section 38 should not be sent it, will no longer depend on the local authority not visiting the child but instead can be exercised in response to intimation of any of the facts set out in new section 41(1A).

Section 12 – restriction on report of suspected offences involving children

68. Section 12 amends the 2016 Act by inserting a new Chapter 2A in Part 6 of that Act. The new Chapter 2A consists of new sections 106A to 106BD.

69. New section 106A places restrictions on the reporting of suspected criminal offences involving children. It makes it an offence to publish information that is likely to lead to the identification of a person suspected of committing an offence at a time when they were aged under 18. It also makes it an offence to publish information that is likely to lead to the identification of a person who is aged under 18 at the time of publication as being a victim or witness in relation to a suspected offence. The restrictions on publication apply regardless of whether the suspected offence was committed before or after section 12 comes into force. The restrictions imposed by this section only apply if there are no proceedings in a court in respect of the offence. If proceedings are raised in a court, the restrictions under this section cease to apply and the restrictions in section 47 of the 1995 Act become relevant.

70. New section 106B makes provision about applications to dispense with the restrictions imposed by section 106A. An application may be made to the sheriff by a constable, a prosecutor, the person whose information is protected by the restrictions or a media representative. The sheriff may dispense with the restrictions if satisfied that it is in the interests of justice to do so. Before deciding to dispense with the restrictions, the sheriff must have regard to the wellbeing of the person whose information is protected by the restrictions and must consider whether certain persons should be given the opportunity to make representations.

71. New section 106BA makes provision about applications to dispense with the restriction imposed by section 106A(2) (which relates to the identification of persons aged under 18 against whom an offence has been committed or is suspected to have been committed, or who are suspected to have been a witness to an offence), where the information to which the restriction would apply relates to a child. An application may be to the sheriff by a person who wishes to publish the information. The sheriff may dispense with the restriction if satisfied that the child to whom the information relates understands the nature and effect of the dispensation and consents to the publication, and that there is no good reason why the dispensation should not be made. Before deciding to dispense with the restriction, the sheriff must have regard to the best interests of the child to whom the information relates and give certain persons the opportunity to make representations.

72. New section 106BB creates an offence in relation to the publication of relevant information in contravention of section 106A, with a sentence on summary conviction of imprisonment for up to 12 months or a fine not exceeding the statutory minimum (or both), or on conviction on indictment to imprisonment for up to 2 years or a fine (or both). A person charged with the offence has a defence if the person to whom the relevant information which was published relates had given written consent to its publication, was aged over 18 when the consent was given, and had not withdrawn that consent. The person also has a defence if the information was already in the public domain and, if not published by the person to whom it relates, there was no reason to believe that that person had not given valid consent to the publication. A further defence is available if the person who published the information was not aware and did not have reason to suspect that the publication included relevant information.

73. New section 106BC makes provision about the culpability of individuals where an organisation commits an offence under section 106BB. New section 106BD makes provision about crown application of section 106BB.

Section 13 – restriction on report of proceedings involving children

74. Section 13 amends the 1995 Act.

75. Subsection (2) modifies section 47, which places restrictions on reports of criminal proceedings involving children. It is currently an offence under section 47 to include information in a newspaper report, or in a sound or television programme, if that is calculated to lead to the identification of a child as being an accused person or a victim or witness in criminal proceedings. Subsection (2) brings other forms of publication within section 47 so that it no longer applies just to newspaper reports and sound or television programmes but also to other forms of speech, writing or communication which are addressed to the public or a section of the public. It also modifies section 47 so that the threshold is whether the information is likely to lead to identification of the child rather than having to be calculated to lead to that.

76. Subsection (2) also modifies section 47 so that identifying information about an accused person must not be published if the person was aged under 18 at the alleged date of commission of the offence. It modifies section 47 so that identifying information about a victim or witness must not be published if the person is aged under 18 at the date of the commission of the offence. The restrictions apply until the date on which the person whose information is protected reaches the age of 18 or until the date of completion of the proceedings, whichever is the later, unless the person was the accused and the proceedings end with an acquittal or are otherwise discontinued against the person. In that case, the restrictions apply for the lifetime of the person. The restrictions do not prevent persons to whom information relates from publishing information which is likely to lead to their own identification, whether as an accused person (after the proceedings have completed) or as a victim or witness in relation to an alleged offence (whether during or after the proceedings have completed). There remains a power in the replacement subsection (3) of section 47, being substituted in, for the court to dispense with the restrictions on disposal if it is in the public interest to do so.

77. Subsection (2) inserts a new subsection (3A) in section 47, which provides that, in the case of an accused person, the court must not dispense with the restrictions unless the court has taken into account a report from the local authority regarding the person's circumstances. In the

case of an accused person, the restrictions may remain in place for longer if the court makes an order extending the period of the restrictions, in accordance with new section 47B, which is inserted by subsection (3).

78. Subsection (2) repeals subsections (4) and (5) of section 47, and inserts new subsections (5A) to (5C) in section 47. These are related to new sections 47A and 47C, which allow for appeals against decisions to dispense with the restrictions and against decisions not to extend the period of the restrictions. Subsection (5A) provides that if a court dispenses with the restrictions, the restrictions remain in place until after the point at which an appeal may be brought against that decision. If an appeal is brought, the restrictions remain in place until after the disposal of the appeal, provided the appeal is upheld. Similarly, subsections (5B) and (5C) provide that if a court decides not to make an order extending the period of restrictions, the restrictions remain in place until after the point at which an appeal may be brought against that decision. If an appeal is brought, the restrictions remain in place until after the disposal of the appeal, provided the appeal is upheld.

79. Subsection (3) inserts new sections 47ZA to 47F of the 1995 Act after section 47.

80. New section 47ZA makes provision about applications to dispense with restrictions imposed under section 47(1) after completion of the proceedings, while new section 47ZB makes provision about applications to dispense with restrictions imposed under section 47(1A) either during or after the completion of proceedings. In either case the information to which the restriction would apply must relate to a child and an application may be made to the sheriff by a person who wishes to publish the information. The sheriff may dispense with the applicable restriction if satisfied that the child to whom the information relates understands the nature and effect of the dispensation and consents to the publication, and that there is no good reason why the dispensation should not be made. Before deciding to dispense with the restriction, the sheriff must have regard to the best interests of the child to whom the information relates and give certain persons the opportunity to make representations.

81. New section 47A provides that an appeal may be brought against a decision to dispense with restrictions within 7 days beginning with the day on which the decision is made. In the case of a decision to dispense with restrictions relating to information about an accused person, an appeal may be brought by the accused person or the prosecutor. Where the information relates to a victim or witness, an appeal may be brought by a victim, witness or the prosecutor. The appeal court may either affirm the decision or quash the decision. If the decision is quashed, the appeal court may substitute its own decision or may remit the question back to the court of first instance with such instructions as the appeal court thinks appropriate.

82. New section 47B applies to restrictions relating to information about accused persons. It enables the court to make an order extending the period during which those restrictions are to apply. The court may make such an order unless the court considers that it would be contrary to the public interest to do so. The restrictions may be extended until the occurrence of a particular event or circumstances, until the person to whom the information relates reaches a particular age or for the lifetime of that person. Subsection (4) provides that if an order is made extending the

restrictions, a review may be brought by the person to whom the information relates or a media representative. On a review application, the court may vary or revoke the order.

83. New section 47C provides that an appeal may be brought against a decision not to extend the period during which restrictions are to apply, in accordance with section 47B. An appeal may be brought by the person to whom the information relates or the prosecutor. It must be brought within 7 days of the decision not to make an order. The appeal court may either affirm or quash the decision. If the decision is quashed, the appeal court may substitute its own decision or may remit the question back to the court of first instance with such instructions as the appeal court thinks appropriate.

84. New section 47D applies where it falls to a court to determine what is in the public interest when considering whether to dispense with restrictions or extend the period of restrictions. Section 47D provides that regard must be had to certain factors, in particular.

85. New section 47D(2) applies where the restrictions relate to information about an accused person. Paragraph (a) sets out the relevant factors. Paragraph (b)(i) provides that the best interests of the person is to be treated as a primary consideration if the person is aged under 18. Paragraph (b)(ii) provides that if the person is aged under 18, no regard is to be had to the length of time until they reach 18. For example, if the restrictions might only be in place for a short time because the person is close to reaching the age of 18, that is not to be treated as a relevant factor in determining whether it is in the public interest to dispense with the restrictions. New section 47D(3) sets out the relevant factors where the restrictions relate to information about a victim or witness.

86. New section 47D(4) provides that, in a case where a section of the public is already aware of the identity of the person to whom the information relates (whether that is an accused person, victim or witness), the fact that a section of the public already has this knowledge must not be considered to be a factor in favour of dispensing with the restrictions or against extending the period of the restriction.

87. New section 47E creates an offence in relation to the publication of relevant information in contravention of section 47, in place of subsection (5) of section 47, which is repealed. Sentence on summary conviction is imprisonment for up to 12 months or a fine not exceeding the statutory minimum (or both), and on conviction on indictment the sentence is imprisonment for up to 2 years or a fine (or both). A person charged with the offence has a defence if the person to whom the relevant information which was published relates had given written consent to its publication, was aged over 18 when the consent was given, and had not withdrawn that consent. The person also has a defence if the information was already in the public domain and, if not published by the person to whom it relates, there was no reason to believe that that person had not given valid consent to the publication. A further defence is available if the person who published the information was not aware and did not have reason to suspect that the publication included relevant information.

88. New section 47F makes provision about the culpability of individuals where an organisation commits an offence under section 47.

Section 14 – steps to safeguard welfare and safety of children in criminal proceedings

89. Section 50(6) of the 1995 Act requires every criminal court dealing with an offender who is a child to have regard to the welfare of the child. Section 14 adds a new subsection (7), which modifies this duty by requiring the court to consider what steps might be taken to facilitate the child's participation in the court proceedings while safeguarding the child's welfare. In addition, the court must take the steps it identifies unless it is not reasonably practicable to do so.

90. Section 14 also adds new section 70B to the 1995 Act. Section 70B will make, for solemn proceedings, equivalent provision to that already made for summary proceedings by section 142 of the 1995 Act. Section 142 requires the court, dealing with a child accused of an offence, to sit in a different building or room from that usually used or to sit on different days from other courts in the building and to take other steps to modify the court proceedings. Section 70B(1) gives the court power to do this in solemn cases but leaves it to the discretion of the court whether and how to do so. In addition, section 70B(2) gives the court power to direct that the court be cleared except for essential persons, including representatives of the press. But the general public will be excluded. Section 70B(4) also makes provision for court proceedings in which a child is accused along with an adult in the same proceedings, requiring the court to ensure that the adult accused can participate effectively in the proceedings.

91. Section 142 of the 1995 Act, which makes provision along the same lines as section 70B, but for summary proceedings, does not contain provision equivalent to section 70B(4). Section 14 will insert new section 142A into the 1995 Act which will make that equivalent provision. New section 142A will give power to the court, dealing with a child accused of an offence who is accused along with an adult in the same proceedings, to sit in a different building or room from that usually used or to sit on different days from other courts in the building. Section 142A(2) also gives the court power to direct that the court be cleared except for essential persons, including representatives of the press. But the general public will be excluded. In taking any of these steps or making any direction, the court must ensure that the adult accused along with the child can participate effectively in the proceedings.

Remit to children's hearing from criminal courts

Section 15 – referral or remit to Principal Reporter of children guilty of offences

92. Section 49 of the 1995 Act is one of a number of sections that govern what the courts may do when a child pleads, or is found, guilty of an offence.[40] Section 49 deals with the interrelationship between the children's hearings system and the criminal justice system and provides that the court may seek advice from a children's hearing as to the appropriate disposal to make in the child's case, may remit the child's case to a children's hearing for that hearing to dispose of the case under the 2011 Act, or can dispose of the case itself (either straightaway or after getting advice from a children's hearing). How this works depends on the age of the child, whether the child is subject to a CSO, whether the court is the Justice of the Peace court, the

[40] See also sections 44, 205, 207 and 208 of the 1995 Act, amended by sections 16 and 17 of this Bill.

sheriff court or the High Court, and whether the proceedings are solemn proceedings or summary proceedings. For instance, where a child is subject to a CSO, the sheriff court must seek advice from a children's hearing before it can dispose of the child's case.[41] It also depends on the offence involved.[42]

93. Section 15 makes a number of changes to section 49 of the 1995 Act, substituting new subsections (1) to (1F) for subsections (1) to (3) of section 49. The main change is that no distinction is made between a child subject to a CSO and a child not so subject. All under 18s will now be treated the same way. Summary cases and solemn cases are treated differently, and solemn cases in the sheriff court are treated differently from High Court cases.

94. In summary cases, the court has a duty to either request advice on the disposal of the child's case from a children's hearing or to remit the case to the hearing for disposal. See subsection (1A). The court can proceed straight to remitting the case to a children's hearing for disposal without first requesting advice. But it cannot generally dispose of the case itself without first requesting advice and considering that advice. See subsection (1E). The exception is where the child is within 6 months of turning 18. Where that is the case, and the court considers that it would not be practicable to either seek advice or remit the case for disposal by a children's hearing, the court may dispose of the case itself. See subsection (1C). As currently provided for by section 49(3), the court cannot remit the case to a children's hearing for disposal where the offence is one mentioned in new subsection (1F) (and for which there is a minimum sentence). And as currently provided for by section 49(5), where the offence is one for which the sentence is fixed by law, the court must dispose of the case itself.

95. In sheriff court solemn cases, the sheriff has a choice – to request advice from a children's hearing, to remit the case to a hearing for disposal, or to dispose of the case without a remit. See subsection (1A). But before the sheriff can dispose of the case without a remit, the sheriff must request advice from a children's hearing. The sheriff can proceed to dispose of the case without requesting advice in two circumstances. Either where the sheriff determines that it would not be in the interests of justice to do so. Or where the child is within 6 months of turning 18 and the sheriff considers that it would not be practicable to request advice before disposing of the case. See subsections (1B) and (1C). Subsections (1E), (1F) and (5) apply to the sheriff in a solemn case as they apply in summary cases.

96. In solemn cases in the High Court of Justiciary, the court has discretion as to how to proceed (subject to subsections (1F) and (5)), so may request advice before deciding how to dispose of the case, or remit the case to a children's hearing (with or without first requesting advice), or dispose of the case itself (again, with or without first requesting advice). See subsection (1D).

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[41] See section 49(3)(b).

[42] Where the offence is under section 51A of the Firearms Act 1968 or section 29 of the Violent Crime Reduction Act 2006 – offences for which a minimum sentence is specified – then the court cannot remit the child's case for disposal but must dispose of the case itself. See section 49(3). Where the offence is one for which the sentence is fixed by law – for instance, murder – then section 49 does not apply. See section 49(5). Instead, section 205(2) of the 1995 applies and stipulates that a child guilty of murder must be sentenced to be detained without limit of time.

97. Section 15(2)(c) makes another amendment of section 49. Currently, section 49(4) provides that where a court remits a case to a children's hearing for disposal, the jurisdiction of the court in respect of the child comes to an end. As was decided in the case of *McCulloch v. Murray*,[43] this means that a court cannot disqualify a child from driving while at the same time otherwise remitting the disposal of the child's case to a children's hearing. The court must either remit the whole case or keep the case for disposal itself.

98. New subsections (4A) to (4C) would modify section 49(4) in the case of three types of offence.

99. The first type is road traffic offences in relation to which a court can disqualify the person found guilty from driving or impose penalty points on the person's licence. As a result of subsection (4A), the court will be able to do so while otherwise remitting the disposal of the case to the children's hearing.

100. The second type is certain sexual offences in relation to which the notification requirements of Part 2 of the Sexual Offences Act 2003 apply.[44] Where the child pleads or is found guilty of one of these offences, subsection (4B) will make it clear that the notification requirements apply even though the child's case has been remitted to a children's hearing for disposal. However, in the case of some offences listed in schedule 3 of the 2003 Act, the notification requirements do not automatically apply but do so only where the court makes a finding of some sort. For instance, paragraph 60 of schedule 3, read with section 80 of the 2003 Act, provides that an offence in Scotland, other than an offence listed in paragraphs 36 to 59ZL of the schedule, triggers the notification requirements only if the court, in imposing sentence or otherwise disposing of the case, determines that there was a significant sexual aspect to the offender's behaviour in committing the offence. Where, however, the court remits the child's case to a children's hearing for disposal, the court will not impose sentence or otherwise dispose of the case and so no determination as to the sexual aspects of the offence will be made. Other offences listed in the schedule trigger the notification requirements only if the sentencing court determines that it is appropriate for the person convicted to be regarded for the purposes of Part 2 of the 2003 as a person who has committed the offence or that it is appropriate for Part 2 to apply to the person. Subsection (4B)(a), (b) and (c) therefore recognise this and makes clear that the notification requirements will not apply in such cases.

101. The third type is offences in relation to which the court is entitled (under section 234A of the 1995 Act) or obliged (under section 234AZA of that Act) to impose a non-harassment order on the offender.[45] New subsection (4C) makes it clear that, where the court remits the child's case to a children's hearing for disposal, the court may still impose a non-harassment order.

102. Finally, section 15 repeals section 49(6) and (7) as these subsections are no longer necessary, the matters they deal with now being incorporated into new subsections (1) to (1F).

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[43] 2005 SCCR 775.

[44] See section 80(1)(a) of the 2003 Act, which provides that a person becomes subject to the notification requirements if convicted of an offence listed in schedule 3. Colloquially, being subject to the notification requirements is known as being on the "sex offenders register".

[45] For the offences involved, see sections 234A and 234AZA of the 1995 Act.

Remand, committal and detention of children

Section 16 – remand and committal of children before trial or sentence

Section 17 – detention of children on conviction

103. Sections 16 and 17 make provision about the detention of children involved in criminal proceedings, either on remand before trial, or after conviction but before sentence, or on sentence. They do so by amending sections 51, 44, 205, 207 and 208 of the 1995 Act.

104. The amendments make two main changes. The first, in consequence of the change made by section 8 to the meaning of "child" for the purposes of the 1995 Act,[46] is to ensure that the provisions that apply to children apply to all persons under 18, with no distinction made between children subject to CSOs and other children. Currently, some provisions of the 1995 Act, such as section 51(1), refer to a person under 16 rather than to a child and distinguish between children aged 16 and above subject to CSOs and those not subject to CSOs. The other main change is to provide that a child cannot be held on remand or sentenced to detention in a young offenders institution (a "YOI"). Generally, as a result of these amendments, children will be held in secure accommodation.[47]

105. Section 51 of the 1995 Act deals with detention on remand of persons under 21. Section 16 will amend section 51(1)(a), (aa) and (b) so that all children (i.e. persons under 18) will be dealt with the same way and, as a result, will be committed to a local authority to be detained, while on remand, either in secure accommodation[48] or in a place of safety.

106. New subsections (6) to (8) will be inserted into section 51 so that the Scottish Ministers can, by regulations, make provision about the detention of such children in secure accommodation. This will allow provision to be made, similar to that already contained in the Secure Accommodation (Scotland) Regulations 2013,[49] for the welfare of children detained in secure accommodation, including the review of their cases. Currently, the 2013 Regulations deal with children detained in a place of safety under section 51(1)(a)(ii),[50] and make provision for such children to be moved to secure accommodation if necessary, but they do not apply to children detained in secure accommodation by virtue of section 51(1)(a)(i). As subsection (7) makes clear, the regulations may also make provision for children to stay in secure accommodation after they turn 18, provided the provision made by the regulations does not permit them to so remain after turning 19. Without this sort of provision, a child in secure accommodation who turns 18 would be transferred to a YOI. The power in subsections (6) and (7) will allow provision to be made to avoid this happening automatically, and allow the transfer to be tailored to the circumstances of the child and of the accommodation in which they are detained.

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[46] Which itself depends on the change made by section 1 to the meaning of "child" in the 2011 Act.

[47] For more on the meaning of secure accommodation, and the regulation of providers of "secure accommodation services", see Part 3 of the Bill and paragraphs 103 to 127 below.

[48] Defined in section 51(1)(a)(i) by reference to the definition in section 202(1) of the 2011 Act. Note that section 22 will amend the definition of "secure accommodation" in section 202(1).

[49] SSI 2013/205 - available here.

[50] See regulation 12.

107. Note also that section 51(2A), which relates to the use of remand centres, is repealed by paragraph 14(2) of the schedule.[51]

108. Section 44 of the 1995 Act deals with the detention of children who plead guilty or are found guilty in summary proceedings. Such children may be detained in "residential accommodation" provided by local authorities under Part 2 of the Children (Scotland) Act 1995 for up to one year. By virtue of the regulation-making power in section 44(5), the Scottish Ministers can provide for such children to be detained in secure accommodation. The Secure Accommodation (Scotland) Regulations 2013 were made under this power.[52]

109. The amendments of section 44 made by section 17(2) change references to "residential accommodation" to references to "residential establishments", as it is the latter that local authorities provide under Part 2 of the Children (Scotland) Act 1995, as well as inserting a definition of "residential establishment" into section 44(11). The amendments also insert new subsections (5A) and (5B) into section 44, mirroring the amendments made to section 51, and providing power for the regulations made under section 44(5) to make provision for 18 year olds to remain in secure accommodation rather than automatically being transferred to YOIs. The definition of "secure accommodation" in section 44(11) is also replaced with a definition that ties in to the definition in the 2011 Act.[53]

110. Section 17(6) inserts new section 208A into the 1995 Act. That section makes provision for the detention of children under section 205 (children guilty of murder) and to children convicted on indictment of other offences. Under those sections, the place of detention is determined by direction made by the Scottish Ministers.[54] Section 208A(2) modifies those direction-making powers so that children cannot be detained in YOIs or in prison. It also makes clear that secure accommodation can be used as the place of detention. Section 208A(4) to (6) make the same provision, for this section, as is made in sections 44(5) to (5B) and 51(6) to (8), for regulations about the use of secure accommodation.

111. Section 17(7) amends section 216 of the 1995 to insert a similar regulation-making power into that section. Section 216 makes provision for imprisonment and detention for non-payment of fines. Section 216(7) deals with cases where the person who has failed to pay a fine is a child, and provide for detention, rather than imprisonment, in a place chosen by a local authority. New subsections (8) to (10) will allow regulations to make provision for the use of secure accommodation in such cases.

112. Finally, section 17(5) amends section 208 of the 1995 to provide that, where a court orders that a child, convicted on indictment, be detained, the place of detention can be in any part of the United Kingdom.[55]

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[51] That repeal is linked to section 19 of the Bill. See paragraphs 97 and 98 below.
[52] They were also made under a number of other Acts.
[53] So the definition in section 44 now matches that in section 51.
[54] See section 205(2) and 208(1). See also section 117 of the Scotland Act 1998, under which references to the "Secretary of State" in sections 205 and 208 are read as references to the "Scottish Ministers".
[55] Section 44(1) already makes provision for this for summary proceedings.

Mental health disposals for convicted children

Section 17A – hospital directions

113. Under section 59A of the 1995 Act, the court can, in certain circumstances, make a hospital direction in relation to a person convicted on indictment who has a mental disorder. A hospital direction authorises the detention of the person in hospital (rather than in prison). Currently, hospital directions cannot be made in relation to children (as defined in section 307(1) of the 1995 Act). This means that they cannot be made in relation to persons under 16. In addition, where the person is under 18 and subject to a CSO, a hospital direction cannot be made. As a result, hospital directions can be made in relation to some 16 and 17 year olds – that is, those not subject to CSOs.

114. Following the amendments made by sections 1 and 8 of this Bill, "child" will be defined as meaning a person under 18.

115. Section 17A would amend section 59A so that the restriction on making hospital directions in relation to children would be removed. Hospital directions could then be made in relation to all under 18s.[56]

Places where children can no longer be detained

Section 18 – meanings of "young offenders institution" and "young offender"

116. Section 18 amends section 19 of the Prisons (Scotland) Act 1989. Under that section, the Scottish Ministers have a duty to provide young offenders institutions – places where offenders sentenced to detention in a young offenders institution, and those aged at least 14 but under 21 who are remanded in custody for trial or while awaiting sentence, can be held. As a result of amendments made to the 1995 Act by sections 16 and 17, no one under 18 will now be held in a young offenders institution. Section 18 amends section 19 of the 1989 Act so that young offenders institutions are defined as places for the detention of those aged 18 but under 21. Section 18 also amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011,[57] which defines "young offender" to mean a person aged at least 16 but under 21 so that that expression will now mean a person aged at least 18 but under 21.

Section 19 – abolition of remand centres

117. Section 19 also amends section 19 of the Prisons (Scotland) Act 1989. Under that section, the Scottish Ministers have a duty to provide remand centres – places where those aged at least 14 but under 21 and remanded in custody either for trial or while awaiting sentence can be held. There are no remand centres in Scotland and the amendments will remove the duty to provide them.

118. Part 4 of the schedule to the Bill contains a number of further repeals which remove redundant and unnecessary references to "remand centres" in legislation.

[56] Subject to the age of criminal responsibility, which means hospital directions cannot be made in relation to those under 12: see section 41 of the 1995 Act.
[57] SSI 2011/331.

Local authority duties in relation to detained children

Section 20 – duty of local authority to provide residential establishments for detained children

119. Sections 16 and 17 make changes to the places in which children can be detained, with the result that most children are likely to be detained in secure accommodation. As defined in the 2011 Act, as it will be amended by section 22, "secure accommodation" in Scotland is accommodation provided for the purposes of depriving children of their liberty which is provided in a residential establishment by a secure accommodation service. A "residential establishment", also defined in the 2011 Act, is an establishment provided by a local authority, a voluntary organisation or by another person which provides accommodation for the purposes of the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968.

120. Under section 59 of the 1968 Act, local authorities have a duty to provide and maintain residential establishments that are required for their functions under a number of enactments.[58] But the list of enactments does not currently include the 1995 Act. Section 20 will add the 1995 Act to that list, so that the duty to provide and maintain residential establishments includes providing and maintaining these establishments for the purposes of local authority functions conferred under or by virtue of the 1995 Act.

Section 21 – children detained in secure accommodation to be treated as "looked after" children

121. Section 21 will insert new section 17A into the Children (Scotland) Act 1995. It will provide that where a child is detained in secure accommodation under section 51, 205, 208 or 216[59] of the 1995 Act, the child will be treated as a child "looked after" by the local authority for the purposes of section 17 of the Children (Scotland) Act 1995. Section 17[60] puts various duties on local authorities, primarily to safeguard and promote the welfare of looked after children, which will now apply to children detained by order of the court in criminal proceedings.

122. Section 17A also provides that a child detained by order of the criminal court is treated as a looked after child for the purposes of sections 29, 30 and 31 of the Children (Scotland) Act 1995. These sections are about the provision of after-care for looked after children after they cease to be so looked after, including financial support for education or training, as well as about reviewing the cases of looked after children. These sections will now apply to detained children as they apply to former looked after children.

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[58] Local authorities may provide and maintain residential establishments themselves, jointly with other local authorities or by securing their provision by voluntary organisations or other person. See section 59(2) of the 1968 Act.

[59] These sections deal with detention on remand or committal before trial or sentence (section 51), detention without limit of time where the child is convicted of murder (section 205), detention when convicted on indictment (section 208) and detention for non-payment of fine (section 216). Although children can also be detained in secure accommodation by virtue of section 44 of the 1995 Act, section 17A does not need to apply to such children as section 44(3) provides that the local authority has the same powers and duties in relation to the child as if they were subject to a CSO. Section 17(6) of the Children (Scotland) Act 1995 provides that "looked after " child includes a child subject to a CSO. So a child detained under section 44 is already treated as a looked after child.

[60] Subject to the Looked After Children (Scotland) Regulations 2009 (SSI 2009/210) - here.

Part 2A – secure transportation

Section 21A – standards for provision of secure transportation

123. Section 21A inserts a new Part 16A, containing three new sections on secure transportation of children, into the 2014 Act.

124. Section 90A will require the Scottish Ministers to publish standards applicable to the secure transportation of children[61] who are liable to be taken to or placed in, or kept or detained in, secure accommodation. Those providing secure transportation services will, under new section 90B(1), be required to meet those standards in so far as they apply to the service that the person is providing. In addition, if local authorities or the Scottish Ministers make arrangements with a third party for the provision of secure transportation services, they must ensure that the service provided by the third party meets the standards applicabe to it.

125. The minimum content of the standards that must be prepared and published under section 90A is set out in section 90A(2). These mainly relate to the safety of children being transported, as well as the safety of others. Different standards may be provided for different kinds of secure transportation service. The first standards must be published no later than 1 year after section 21A of this Bill comes into force. The standards must be kept under review and the Scottish Ministers may revised standards when appropriate. Before publishing or revising the standards, the Scottish Ministers must consult those they consider appropriate. The first standards, and any revised standards, must be laid before the Scottish Parliament.

126. New section 90C deals with reporting requirements around secure transportation services. Where a local authority has provided such a service themselves, or arranged for a third party to provide such a service, they must prepare and publish a report on how the service was monitored to ensure that the standards applicable to it were met and on the extent to which the service met those standards. As well as being published, the report is to be sent to the Scottish Ministers. The Scottish Ministers must publish a consolidated report, combining the information provided by local authorities with information about secure transportation services provided by the Scottish Ministers themselves (or arranged by them). The reports must be prepared within the timescales set out in section 90C(8), that is, as soon as reasonably practicable after the end of the period of 3 years, beginning with the day section 21A of this Bill comes into force, and after the end of each subsequent period of 3 years. The Scottish Ministers can, by regulations, specify a date after which reports no longer need to be prepared. Section 90C(9) also gives the Scottish Ministers power to add other persons or bodies, in addition to or instead of local authorities, to whom the reporting requirements apply.

[61] As well as some under 19s. Although secure accommodation is generally only used for children – i.e. those under 18 – some under 19s can be kept in secure accommodation rather than transferred to, for instance, a young offenders institution. See, for instance, section 208A(5) of the 1995 Act, being inserted into that Act by section 17(6) of this Bill, which allows provision for this to be made by regulations.

Part 3 – residential and secure care

Section 22 – meaning of "secure accommodation"

127. Section 22(2)(a) amends the interpretation provision in section 202(1) of the 2011 Act to replace the definition of "secure accommodation" as it applies in relation to Scotland (its meaning in relation to England and Wales remains the same). This is to make the definition clearer in two respects.

128. First, it clarifies that secure accommodation is accommodation which is provided for the purpose of depriving children of their liberty (rather than for the purpose of restricting the liberty of children). This is to properly reflect that such accommodation is designed for, or has as its primary purpose, the deprivation of children's liberty. It provides a locked setting for children who are placed there for welfare reasons[62] as well as for children who are ordered to be detained there through the criminal justice system. The children are subject to a very high degree of supervision and control, albeit this is alongside provision of care and support to safeguard and promote their welfare whilst accommodated there. Existing secure accommodation settings are designed so that the children accommodated there cannot leave freely and can be subjected to continuous monitoring or surveillance. For instance, they may be subject to round-the-clock supervision by several members of staff, restrictions on their phone or internet use, or reasonable and proportionate measures of restraint. The system for placing and keeping children in secure accommodation therefore builds in the necessary procedural safeguards, including a clear legal basis and review process, to ensure that any such deprivation is compatible with Article 5 of the European Convention on Human Rights (which concerns the right to liberty).

129. Secondly, it clarifies that secure accommodation is accommodation which is provided in a residential establishment by a secure accommodation service. Section 202(1) of the 2011 Act already defines "residential establishment" as an establishment in Scotland (whether managed by a local authority, a voluntary organisation or any other person) which provides residential accommodation for children for the purposes of the 2011 Act, the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968. But section 22(2)(b) adds a new definition of "secure accommodation service" to section 202(1). It explains that a secure accommodation service is a service which meets two criteria: (a) it is approved by the Scottish Ministers under paragraph 6(c) of schedule 12 of the Public Services Reform (Scotland) Act 2010 ("the 2010 Act"), and in accordance with regulations made under section 78A of that Act, and (b) it is registered as a care service under Part 5 of that Act. This is to make sure that children may only be deprived of their liberty in secure accommodation that is run by a service which is approved by the Scottish Ministers and which is properly regulated and overseen by Social Care and Social Work Improvement Scotland (known as "the Care Inspectorate").[63]

Section 23 – secure accommodation services

130. Part 5 of the 2010 Act requires all care services to be registered with the Care Inspectorate. It is an offence under section 80 of the 2010 Act to provide a care service while not

[62] By virtue of a secure accommodation authorisation attached to a CSO, an ICSO, a medical examination order or a warrant to secure attendance, to reduce the risk of a child absconding or causing harm to themselves or others.
[63] Established under section 44 of the 2010 Act.

registered. A secure accommodation service is listed as a care service in paragraph 6 of schedule 12 of the 2010 Act.

131. Section 23(4) replaces the definition of a "secure accommodation service" in paragraph 6 of schedule 12 to give a fuller and clearer explanation of what it is. It defines such a service by reference to three characteristics.

132. The first characteristic is that it provides accommodation in a residential establishment for the purpose of depriving children of their liberty (rather than for the purpose of restricting the liberty of children). Section 23(4) adds a new paragraph 6A to schedule 12 to define "residential establishment". It mirrors paragraph (a) of the definition in section 202(1) of the 2011 Act (which is mentioned in paragraph 129 above). Except that it also specifies the Criminal Procedure (Scotland) Act 1995 as an enactment for the purposes of which such residential accommodation is provided. This sets out the legal basis for a service providing secure accommodation and the routes by which children are placed there.

133. The second characteristic is that it also provides, in such an establishment, appropriate care, education and support for the purposes of safeguarding and promoting the welfare of the children who are accommodated there as well as taking account of the effects of trauma which such children may have experienced. Section 23(4) likewise adds a new paragraph 6B to schedule 12 to define "appropriate care, education and support". This means the kind of care, education and support required to meet the health, educational and other needs of the children.

134. The third characteristic is that it is approved by the Scottish Ministers, in accordance with regulations made under new section 78A of the 2010 Act, for those purposes.

135. Accordingly, section 23(2) adds a new provision – section 78A – to Part 5 of the 2010 Act, which confers a new regulation-making power on the Scottish Ministers.[64] This power enables the Scottish Ministers to set out in regulations a process for approving secure accommodation services under paragraph 6(c) of schedule 12. New section 78A(2) provides a non-exhaustive list of the particular kinds of provision that the new power may be used to make. It includes provision about: the making of applications for approval; the procedure to be followed by the Scottish Ministers when deciding on applications; the duration of approvals; the attaching of conditions to approvals and the variation of such conditions; the review, renewal and withdrawal of approvals; and appeals against certain decisions of the Scottish Ministers in respect of approvals.

136. Section 23(3) amends section 104(2) of the 2010 Act so that any regulations made under new section 78A will be subject to the affirmative procedure.[65] By virtue of section 104(1)(b) and (c), any such regulations may also include ancillary provision[66] and make different provision for different purposes.

[64] Section 105(1) defines "regulations" as regulations made by the Scottish Ministers.
[65] See section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.
[66] Namely, consequential, supplemental, incidental, transitional, transitory or saving provision.

137. Section 23(5) and (6) revokes regulation 10(3) of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011.[67] This is because the changes made by this section supersede the requirement for ministerial approval of secure accommodation in that provision.

Section 24 – regulation of care services providing residential accommodation to children

138. Section 24 makes three main changes to Part 5 of the 2010 Act, which concerns the scrutiny and improvement of social care services.

139. The first main change is to section 50 of the 2010 Act, which requires the Scottish Ministers to prepare and publish standards and outcomes[68] applicable to care services (as well as social work services). The standards and outcomes are taken into account by the Care Inspectorate when making decisions under Part 5 of the 2010 Act.

140. Section 24(2) adds new subsections (1A) and (1B) to section 50 to confer a new function on the Scottish Ministers. So, in addition to their general duty under section 50(1), they will have the power under new section 50(1A) to prepare and publish specific standards and outcomes for specific types of care service which provide residential accommodation to children who are subject to a cross-border placement. Those care services are: (a) care home services[69] which are provided wholly or mainly to children, (b) school care accommodation services,[70] and (c) secure accommodation services.[71] Section 24(5)(b) amends the interpretation provision in section 105(1) of the 2010 Act to include a definition of "cross-border placement". This means the placement of a child in residential accommodation in Scotland where (a) the child was, immediately before the placement, resident in England, Wales or Northern Ireland, and (b) the placement is authorised by an order made by a court in England and Wales or, as the case may be, in Northern Ireland or by virtue of any enactment.[72]

141. Section 24(2) makes further changes to section 50 in consequence of adding the new subsection (1A) power. The changes mean that the existing provisions in section 50 will apply to both the standards and outcomes published under section 50(1) and any standards and outcomes published under new section 50(1A). They make provision for: the review and amendment of standards and outcomes; prepublication consultation with appropriate persons; the standards and outcomes to be taken into account for the purposes of certain decisions and proceedings; and the making of different provision for different care services. The Scottish Ministers will also be able to delegate their function under new section 50(1A) to the Care Inspectorate or anyone else they consider appropriate.[73]

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[67] S.S.I. 2011/210.
[68] See the Health and Social Care Standards: my support, my life (www.gov.scot), published on 9 June 2017.
[69] Defined in paragraph 2 of schedule 12 of the 2010 Act.
[70] Defined in paragraph 3 of schedule 12 of the 2010 Act.
[71] Defined in paragraph 6 of schedule 12 of the 2010 Act, but see proposed amendment in section 23(4) of the Bill.
[72] "Enactment" takes its meaning from the definition in section 126(1) of the Scotland Act 1998 (by virtue of article 6(3) of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379)).
[73] By virtue of section 50(8) of the 2010 Act.

142. The second main change is that section 24(3) adds a new section 59A to Part 5 of the 2010 Act, which makes further provision about the registration of care services under that Part. New section 59A(2) sets out two additional requirements that apply to the registration of certain care services for children.[74] Those care services are: (a) care home services which are provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services. As a result, a registration application for such a service must contain (a) any required information about cross-border placements, and (b) confirmation that notice of the application has been given to the persons mentioned in new section 59A(3).

143. The persons mentioned in new section 59A(3) are: (a) the local authority[75] for each area in which the service is to be provided, and (b) the relevant health board[76] for each such area. Under Part 3 of the Children and Young People (Scotland) Act 2014 ("the 2014 Act"), they have the responsibility of preparing (every 3 years) a children's services plan for the local authority area. This is a document setting out their plans for the provision over that 3-year period of all children's services and related services.[77] In preparing the plan, section 10(1), (2) and (6) of the 2014 Act requires the local authority and relevant health board to consult with certain persons, including organisations which provide a service for children in the area. However, the notice requirement impliedly imposed by new section 59A(2)(b) means that local authorities and relevant health boards will automatically be made aware of any prospective services for children in their respective areas for the purposes of children's services planning. To make sure that the notice requirement is complied with, new section 59A(4) precludes the Care Inspectorate from considering an application in respect of any of the listed care services unless and until the required confirmation is given. Knowingly giving a false confirmation in an application would be an offence under section 81 of the 2010 Act.[78]

144. New section 59A(2)(a) enables the Scottish Ministers to prescribe,[79] by order, such information about cross-border placements as they deem appropriate to be included in an application for registration as a care service. New section 59A(2)(b) also enables them to prescribe, by order, the form in which notice of the application is to be given to the persons mentioned in new section 59A(3). By virtue of section 104(1)(c) of the 2010 Act, those order-making powers include the power to make different provision for different purposes. Any order made under the new provisions[80] will be subject to the negative procedure[81] by virtue of section 104(3).

145. And, finally, the third main change relates to the regulation-making power in section 78(2) of the 2010 Act. This is a general power that enables the Scottish Ministers, by

[74] See section 59(2) of the 2010 Act for the standard requirements, along with the Social Care and Social Work Improvement Scotland (Applications) Order 2011 (S.S.I. 2011/29).
[75] See the definition of "local authority" in section 105(1) of the 2010 Act.
[76] As defined by section 7(1) of the Children and Young People (Scotland) Act 2014.
[77] See section 7(1) of the 2014 Act for the definitions of "children's service" and "related service".
[78] And, under section 64 of the 2010 Act, conviction of such an offence would be a ground for de-registering a care service whose registration was based on such a false confirmation.
[79] See the definition of "prescribed" in section 105(1) of the 2010 Act.
[80] As with an order made under section 59(2)(a) of the 2010 Act.
[81] See section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010.

regulations,[82] to impose on care services any requirements which they consider appropriate for the purposes of Part 5 of the 2010 Act.[83] Section 24(4) adds new subsections (2A) and (2B) to section 78 to expressly provide for the Scottish Ministers to impose specific requirements on specific types of care service which provide residential accommodation to children who are subject to cross-border placements. Those care services are: (a) care home services which are provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services. Any requirements imposed by virtue of new section 78(2A) would constitute "relevant requirements"[84] for the purposes of section 64(1)(b) of the 2010 Act. This means that a care service's failure to comply with any such requirement could result in it being de-registered.

146. Section 24(5)(a) amends the definition of "child" in section 105(1) of the 2010 Act for the purposes of the new provisions. As a result, references to "children" in new sections 50(1A) and (1B), 59A and 78(2A) and (2B) are to persons who are under the age of 18 (rather than under the age of 16).

Section 25 – cross-border placements: effect of orders made outwith Scotland

147. Section 25 amends section 190 of the 2011 Act, which confers a regulation-making power on the Scottish Ministers to make provision for specific non-Scottish orders to have effect in Scotland.[85] Those are orders made by a court in England and Wales, or in Northern Ireland, which appear to the Scottish Ministers to be an equivalent of a CSO. The power enables them to provide for the orders to have effect in Scotland as if they were a CSO. To that end, regulations made under section 190 may apply the Social Work (Scotland) Act 1968 or the 2011 Act to the specified orders with such modifications as are necessary or appropriate.

148. The amendments give the Scottish Ministers greater flexibility in specifying how each specified non-Scottish order is to have effect.

149. Section 25(2)(aa) broadens the application of the power. It amends section 190(1) so that the power is no longer limited to treating CSO-equivalent orders as if they were CSOs. Instead, it will cover giving such non-Scottish orders effect in Scotland either as if they were CSOs or in such other way as set out in the regulations.

[82] See the definition of "regulations" in section 105(1) of the 2010 Act. By virtue of section 104(2) of that Act, regulations made under section 78(2) are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

[83] Such requirements are set out in the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (S.S.I. 2011/210) and the Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 (S.S.I. 2013/227).

[84] Defined in section 64(3)(b) of the 2010 Act.

[85] By virtue of sections 190(2)(c) and 195(2) of the 2011 Act, regulations made using this power are subject to the affirmative procedure and may include incidental, supplementary, consequential, transitional, transitory or saving provision, and they may also make different provision for different purposes. The power has been used to make the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 (S.S.I. 2013/99) and the Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 (S.S.I. 2022/225).

150. Currently, under section 190(2)(a), the Scottish Ministers may specify the circumstances in which, and the purposes for which, non-Scottish orders are to have effect in Scotland. Section 25(2) substitutes for section 190(2) a new version which adds a new sub-paragraph (iii) to that subsection (2)(a) so that they can also specify the conditions on which such orders are to have effect.

151. Section 25(2) makes a number of other changes to section 190(2). It adds a new paragraph (b). This enables the Scottish Ministers to provide that a specified non-Scottish order is to have effect as if it were a CSO, or is to have whatever other effect they specify as being appropriate in the circumstances. It also inserts a new section 190(2A), replacing section 190(2)(b), conferring power to apply and modify enactments so that it covers any enactment, including the Children (Scotland) Act 1995 as well as the Social Work (Scotland) Act 1968 and the 2011 Act. It also adds a new paragraph (c) in section 190(2), enabling the Scottish Ministers to impose certain kinds of requirement in relation to specified non-Scottish orders. These relate to: the provision and sharing of information; the provision of services needed to support a child who is the subject of a non-Scottish order; and the payment of costs incurred in giving effect to a non-Scottish order. New section 190(2)(d) also includes the power to make provision as to the enforcement of any such requirements or any condition specified under new section 190(2)(a)(iii).

Section 25A – regulation of cross-border placements

152. Section 25A inserts a new section 33A into the Children (Scotland) Act 1995 conferring a regulation-making power on the Scottish Ministers to make provision about cross-border placements. A "cross border placement", as defined in section 33A(4), is one under which a court in England, Wales or Northern Ireland makes an order of any kind transferring the child, currently resident in England, Wales or, as the case may be, Northern Ireland, to a residential establishment in Scotland.

153. Mirroring section 190 of the 2011, as amended by section 25 of this Bill, regulations under new section 33A can cover the provision and sharing of information; the provision of services needed to support a child who is the subject of a cross-border placement; and the payment of costs incurred in giving effect to a cross-border placement. New section 33A(2) also includes the power to make provision as to the review of cross-border placements. Regulations under section 33A will be subject to the affirmative procedure.

Part 4 – antisocial behaviour orders, named person and child's plan

Section 26 – antisocial behaviour orders relating to children

154. Section 26 will amend the Antisocial Behaviour etc. (Scotland) Act 2004 so that, except in one respect, "child" in that Act will mean a person under 18. See the amendment of section 18.

155. The exception is in the case of parenting orders, which currently can be made by the sheriff under section 13 of the 2014 Act only in respect of children under 16. That exception will remain and this is achieved by the amendment of section 13 contained in subsection (2) of section 3.

Section 27 – named person and child's plan

156. Section 27 will repeal Parts 4 and 5, as well as schedules 2 and 3, of the Children and Young People (Scotland) Act 2014. Part 4 of the 2014 Act would make provision for every child and young person to have a named person. Part 5 would introduce the requirement for a child's plan when a child's wellbeing required the support of a targeted intervention. Schedules 2 and 3 relate, respectively, to Parts 4 and 5. These Parts, and those schedules, were not brought into force following the Supreme Court's judgment in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)*[87] and the withdrawal of the Children and Young People (Information Sharing) (Scotland) Bill.[88]

157. Part 2 of the schedule of the Bill contains a number of further repeals which are necessary in consequence of the repeal of Parts 4 and 5 of the 2014 Act.

Part 5 – final provisions

Section 28 – ancillary provision

158. Section 28 provides that the Scottish Ministers can make ancillary provision, by regulations, where appropriate. Regulations made under this section may modify any legislation, including this Act. Where they textually amend primary legislation they are subject to the affirmative procedure. Otherwise they are subject to the negative procedure.[89]

Section 30 – modification of enactments

159. Section 30 introduces the schedule of the Bill, which contains modifications of certain enactments.

Section 31 - commencement

160. Section 31 sets out when the provisions of the Act will come into force (i.e. begin to have an effect). For the most part, this will happen by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure.[90] However, some of the final sections of the Act, including this section, come into force automatically on the day after Royal Assent is granted.

161. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Section 32 - short title

162. This section provides that the short title of the Act is the Children (Care and Justice) (Scotland) Act 2023.

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[87] [2016] UK SC 51 – available here.
[88] Announced in the Scottish Parliament by the Deputy First Minister, John Swinney MSP, on 19 September 2019.
[89] For the negative procedure and the affirmative procedure, see sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010 ("ILRA").
[90] This is by virtue of section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Schedule – minor and consequential modifications

163. The schedule contains minor and consequential amendments and repeals and is organised in Parts that, while not corresponding exactly to the Parts of the Bill, follow the order in those Parts of the topics to which they relate.

164. Part A1 of the schedule relates to sections 4 and 5 and contain amendments consequential on changes made to sections 83 and 87 of the 2011 Act.

165. Part 1 of the schedule relates to section 9 and contains amendments consequential on the changes made by that section to schedule 1 of the 1995 Act.

166. Part 2 makes changes consequential on section 15 on remit from the criminal courts to the children's hearings system.

167. Part 3 makes miscellaneous changes relating to the criminal justice system, mainly in consequence of or related to sections 8, 16 and 17.

168. Part 4 contains amendments and repeals consequential on the abolition of remand centres by section 19.

169. Part 4A of the schedule amends the 1968 Act so that the Scottish Ministers can direct local authorities under section 5 of that Act as to how they exercise their functions in relation to children detained in secure accommodation in relation to criminal proceedings. It also removes a redundant reference from schedule 13 of the 2010 Act.

170. Part 5 contains amendments related to section 22 of the Bill and makes a number of changes to definitions of "secure accommodation" in a number of enactments to keep those in step with the amended definition in section 202 of the 2011 Act.

171. Part 6 modifies enactments in consequence of the repeal of Parts 4 and 5 of the Children and Young People (Scotland) Act 2014 by section 27.

CHILDREN (CARE AND JUSTICE) (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

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