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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers provisions in the Children (Care and Justice) (Scotland) Bill at Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Paul Sweeney
Scottish Labour



Jeremy Balfour
Scottish Conservative
and Unionist Party



Oliver Mundell
Scottish Conservative
and Unionist Party

Introduction

1. At its meetings on 21 February and 14 March 2023, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Children (Care and Justice) (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. On 21 February, the Committee accepted in principle the delegation of powers and parliamentary procedures proposed in Sections 4(3), 12(2), 23, 24(2), 24(3), 24(4), 25, 28, and 31.
3. The Committee, however, agreed to ask questions of the Scottish Government in relation to the following powers:
 - Section 16(2)(e) – Remand and committal of children before trial or sentence,
 - Section 17(2)(b) and (c) – Detention of children on conviction (summary proceedings),
 - Section 17(6) – Detention of children on conviction (solemn proceedings),
 - Section 17(7) – Detention of children on conviction (fine default).
4. The [Committee’s letter](#) and the [Scottish Government’s response](#) are available online and at Annexes A and B, and further discussed at paragraphs 20 - 27 of this report.
5. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#)

Overview of the Bill

6. This Scottish Government Bill was introduced by the Cabinet Secretary for Education and Skills, Shirley-Anne Somerville MSP on 13 December 2022. The lead committee is the Education, Children and Young People Committee.
7. The Bill amends several pieces of legislation in respect of the care system and the justice system with regards to children. One of the main purposes of the Bill is to amend the definition of “child” for the purpose of eligibility for referral to the Children’s Hearing System. Previously, restrictions applied in terms of the referral of those aged 16 and 17. This Bill enables all of those under the age of 18 to be referred to the Principal Reporter.

Delegated Powers

8. The Bill contains 32 sections and a schedule. The Bill confers thirteen powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reason for taking the delegated powers in the Bill and the parliamentary scrutiny procedures that has been chosen.

Provisions of the Bill

Section 4(3) – Compulsory supervision orders: movement restriction conditions

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

9. Section 4(3) of the Bill amends the regulation making power in section 150 of the Children’s Hearings (Scotland) Act 2011. Section 150 currently provides that the Scottish Ministers may make regulations prescribing restrictions or monitoring arrangements that may be imposed as part of a movement restriction condition.
10. Movement restriction conditions can be imposed by the Children’s Hearing System or a sheriff and may require that a child’s movement is restricted in a specified way and monitored through the use of electronic monitoring technology.
11. The provision amends the existing powers in three ways. Firstly, it provides that regulations may prescribe methods of monitoring a child’s movements or whereabouts (including whether a child is at, or is not at, a particular place) for the purpose of monitoring compliance with a movement restriction order. Further, it extends the Scottish Ministers’ power to specify devices that may be used for monitoring compliance with a movement restriction condition, and they may also specify any apparatus to be linked. Finally, it enables the Scottish Ministers to specify the conditions in which specified monitoring devices are to be used. This would include prescribing how or when information obtained through the monitoring of a child by such device may or may not be gathered or shared and how or when a specified monitoring device may or may not be used.
12. Regulations made under this provision would be subject to the affirmative procedure.

Committee Consideration

13. The Scottish Government addresses this power at paragraphs 8 to 12 of its DPM. It explains that the extension of the regulation making power will provide greater flexibility in respect of movement restriction conditions to keep up with emerging technology. For example, technological advancements may provide for the ability to monitor a child’s movement other than at a fixed address where a box is installed.

The Scottish Government explains in its DPM that there is uncertainty at the pace of future technological developments, and therefore the delegated power provides scope to react quickly and flexibly when such technology becomes available.

14. The Committee finds the power acceptable. It considers that there is sufficient detail in section 4(3) and in the DPM as to how this power is likely to be exercised. It also agrees that the affirmative procedure is appropriate, given the sensitivity of the issue of monitoring arrangements for children subject to a movement restriction condition.
15. **The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 12(2) – Restriction on report of suspected offences involving children

Power conferred on: High Court of Justiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: Laid, no procedure

Provision

16. Section 12 inserts a new section 106(A) and 106(B) in the Criminal Justice (Scotland) Act 2016. New section 106(A) provides that the publication of information regarding suspected offences involving children is to be restricted to the extent that information is likely to lead to the identification of the person suspected of an offence, if they were under the age of 18 at the date of commission of the suspected offence. It makes it an offence to publish such information. Publication of information which may lead to the identification of a victim of a suspected offence or a witness to a suspected offence if that person is themselves under the age of 18 is also restricted. This extends the restrictions on reporting that are currently in place with regards to court proceedings involving children under the Criminal Procedure (Scotland) Act 1995, and therefore once there are proceedings in a court in respect of the offence, the provisions of this Bill will cease to apply and those under the 1995 Act will begin to have effect. New section 106(B) provides that a sheriff may by order dispense with the restrictions imposed by the provisions of this Bill if it is in the interests to do so, having received an application from a constable, prosecutor, a person to whom the relevant information relates or a media representative. Section 106(B)(3) provides the High Court of Judiciary with a power to make an Act of Adjournal to prescribe the form of application, when made in writing as opposed to orally, which should be used when requesting such a disposal order.
17. Such an Act of Adjournal would be laid before the Parliament but would not be subject to any further procedure.

Committee consideration

18. The Scottish Government addresses this power at paragraphs 13 to 15 of its DPM. It states that the court will require to provide procedure to support the provision made in the Bill that an application may be made to a sheriff for disposal of the restrictions on reporting. It states that such matters which relate to the

administrative and procedural work of the court are most appropriately dealt with by the court itself, and that the usual laying procedure for court rules made by Act of Adjournment is laid only. The Committee agrees with this assessment, and finds the power and procedure acceptable.

19. **The Committee accepts the power in principle, and that such an Act of Adjournment would be laid before the Parliament but would not be subject to any further procedure.**

Section 16(2)(e) – Remand and committal of children before trial or sentence

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Section 17(2)(b) and (c) – Detention of children on conviction (summary proceedings)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Section 17(6) – Detention of children on conviction (solemn proceedings)

Section 17(7) – Detention of children on conviction (fine default)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provisions

20. Section 16(2)(e) confers a power on Scottish Ministers to make regulations concerning the detention of children on remand in secure accommodation, including the circumstances in which such children may remain in secure accommodation after the age of 18 (provided that no person remain in such accommodation after attaining the age of 19).
21. Section 17(2)(b) and (c) make amendments to section 44 of the Criminal Procedure (Scotland) Act 1995 which currently provides a regulation making power to enable the making of any provision about the detention of children in secure accommodation following conviction for an offence for which it would be competent to impose imprisonment on a person of the age of 21 years or more. Similar to the power described above, provision is also made that regulations may prescribe the situations in which such children may remain in secure accommodation despite attaining the age of 18 years (provided that no person remain in such accommodation after attaining the age of 19 years).

22. Section 17(6) and 17(7) insert new regulation making powers to the Criminal Procedure (Scotland) Act 1995 in order that provision may be made about children detained in secure accommodation following conviction under solemn proceedings for fine default respectively. Both powers will enable the Scottish Ministers to make provision for the welfare of children detained in secure accommodation in such circumstances, including making provision that such children may remain in secure accommodation after turning 18.
23. All such regulation making powers described above are subject to the affirmative procedure.

Committee consideration

24. The Committee asked why the Scottish Government considers that different provision will be required to be made in respect of some children who reach the age of 18 whilst in a secure accommodation in order that they may remain there and not others, and what circumstances it envisages setting out in regulations.
25. The full response is included in Annex B to this paper. In summary, the Scottish Government has explained that it is following the approach set out in the United Nations Convention on the Rights of the Child, which states that children are to be separated from adults unless it is otherwise than in their best interests. The Scottish Government also quotes the UN Committee on the Rights of the Child General comment No. 24 which states that that principle “does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interest and not contrary to the best interest of the children in the facility”. The Scottish Government states that regulations made under this power will build on the Secure Accommodation (Scotland) Regulations 2013 which currently make provision for circumstances where the chief social work officer and head of unit may determine that a child should be placed and kept in secure accommodation. The Scottish Government has provided examples of the factors which may be included in the resulting regulations, namely:
 - Length of time the young person has already been in secure care and remaining period of remand or service,
 - The relationship and engagement they have with the secure care provider and other children in the secure accommodation,
 - The young person’s ongoing needs (including their stage of development and any additional support needs), risks and vulnerabilities,
 - Supports and interventions available to the young person within secure accommodation,
 - Likely impact of the move to YOI, any additional support around transitions to the prison estate, and available services and interventions,
 - Any on-going education or extra curricular attainments which cannot be continued in the prison estate,
 - The needs of the other children in the secure care centre, including their safety,

welfare, and best interests.

26. The exercise of this power could have a significant impact on those it effects. Resulting regulations will guide the chief social work officer and unit heads as to how to determine whether a person over the age of 18 should serve the remainder of their sentence or time on remand in a secure accommodation unit rather than being transferred to a young offenders institution. The Committee is content that such resulting regulations will come before the Parliament subject to the affirmative procedure, allowing for a high level of scrutiny. The Committee accepts that in the circumstances, it is appropriate that such matters are prescribed in regulations in order that the Parliament can consider in detail the matters that may be prescribed, and that there is flexibility to make any modifications following the monitoring of implementation. Therefore, the Committee accepts the Scottish Government's justification for the inclusion of this power in the Bill.

- 27. The Committee accepts the powers in principle, and that the exercise of each power is subject to the affirmative procedure.**

Section 23 – Secure accommodation services

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

28. Section 23(2) of the Bill inserts a new section 78A to the Public Services Reform (Scotland) Act 2010 and provides the Scottish Ministers with a regulation making power in order that they can make provision about the approval of secure accommodation services under paragraph 6(c) of schedule 12. Under that provision, a secure accommodation service must be approved by the Scottish Ministers in order to operate as such a service. Regulations made under this power will set out a process for approving secure accommodation services.
29. New section 78A includes a non-exhaustive list outlining matters which may be included in such regulations. For example, regulations made under the power may make provision about the categories of applicant who cannot competently make an application, the form and content of applications, information to be provided in connection with applications as well as matters such as the duration of approvals and the attaching of conditions to approvals.
30. Regulations made under this power will be subject to the affirmative procedure.

Committee consideration

31. The Scottish Government addresses this power at paragraphs 33-36 of the DPM. It states that the regulation making power will make the framework for approval of secure accommodation services by the Scottish Ministers clearer and more transparent, given the process for approval is currently not specified in legislation. It

states that it believes the power strikes the right balance between the importance of the issue and providing flexibility to respond to changing circumstances.

32. The Committee agrees with this reasoning and accepts the power in principle. It is content that such a process will be specified in regulations which can be updated more easily than primary legislation, should this be required. The Committee also agrees that the affirmative procedure will provide the appropriate level of scrutiny.

- 33. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.**

Section 24(2) – Regulation of care services providing residential accommodation to children (standards and outcomes)

Power conferred on: The Scottish Ministers

Power exercisable by: Publishing standards and outcomes

Parliamentary procedure: None

Provision

34. Section 24(2) inserts new subsections (1A) and (1B) to section 50 of the Public Services Reform (Scotland) Act 2010. It provides that Scottish Ministers may prepare and publish specific standards and outcomes applicable to care home services which are provided wholly or mainly to children, school care accommodation services and secure accommodation services so far as they consist of or include providing residential accommodation to children in accordance with arrangements made for cross-border placements. Currently, Scottish Ministers have a duty to prepare and publish standards and outcomes applicable to care services and social work services generally. This power means that Scottish Ministers may also publish specific standards and outcomes relevant to services which provide residential accommodation to children who are subject to a cross-border placement.
35. The existing provisions in section 50 of the 2010 Act are extended in order to allow for, with regards to such specific standards and outcomes, the review and amendment of such 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 services.
36. Standards and outcomes will be published by the Scottish Ministers but will not be subject to any parliamentary procedure, as is the current position in relation to publishing standards and outcomes in relation to care services and social work services generally.

Committee consideration

37. The Scottish Government addresses this power at paragraphs 37 to 40 of the DPM. It states that it is appropriate to include such a power to publish standards and outcomes specific to services providing cross border placements in order that it can

ensure that children being hosted in Scotland from other parts of the United Kingdom are subject to the highest possible standard of care.

38. In the Policy Memorandum, the Scottish Government explains that cross-border placements often occur in Scotland without the Scottish authorities' knowledge as services may be procured on a commercial basis from a service operating in Scotland from an authority elsewhere in the United Kingdom. The Committee therefore agrees that it is appropriate that the Scottish Government has a power to publish standards and outcomes specifically aimed at such services in order that a consistent standard of care is maintained in respect of such placements.
39. The Scottish Government explains in its DPM that the power will be exercised administratively and therefore it is appropriate that it is not subject to any parliamentary procedure. The Committee agrees with this assessment.

40. **The Committee accepts the power in principle, and that it will be exercised administratively by the Scottish Ministers and therefore not subject to any further parliamentary procedure.**

Section 24(3) – Regulation of care services providing residential accommodation to children (registration of care services)

Power conferred on: The Scottish Ministers

Power exercisable by: Order made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

41. Section 24(3) adds a new section 59A to the Public Service Reform (Scotland) Act 2010. It delegates two order making powers to the Scottish Ministers. The first power will allow Scottish Ministers to prescribe, by order, such information about cross-border placements that they deem appropriate to be included in an application for registration of any care home service which is to be provided wholly or mainly to children, school care accommodation service or secure accommodation service. The second power will enable the Scottish Ministers to prescribe the form in which notice of the application is to be given to the local authority for each area in which the service is to be provided and the relevant health board for each such area.
42. Orders made under these powers will be subject to the negative procedure.

Committee consideration

43. The Scottish Government addresses this power at paragraphs 41 to 43 of the DPM. It explains that currently prospective care service providers who wish to register with the Care Inspectorate do not need to provide any information on whether or not they propose to host children on cross-border placements. It states that the order making power will be used to ensure that the Care Inspectorate can identify from the outset whether or not a new care service may host children from other UK jurisdictions and facilitate better information sharing between local authorities,

health boards and the Care Inspectorate at the point of registration of new services. It states that such matters are appropriately dealt with by order making powers to allow for flexibility in responding to changing practices regarding applications from establishments propose to host cross-border placements. It states that the negative procedure provides an appropriate level of scrutiny given the procedural nature of the matter, and is consistent with the current procedure in relation to the prescribing of information to be included in applications for registration of care services under section 59 of the 2010 Act.

44. The Committee agrees that such matters are appropriately dealt with by order subject to the negative procedure.

- 45. The Committee finds the power acceptable in principle and is content that it is subject to the negative procedure.**

Section 24(4) – Regulation of care services providing residential accommodation to children (care service requirements)

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

46. Section 24(4) adds new subsections (2A) and (2B) to section 78 of the Public Services (Reform) Scotland Act 2010. Section 78(2) currently provides that the Scottish Ministers may by regulations impose any requirements which they consider appropriate for the purposes of scrutiny and improvement relating to social care and social work. New (2A) and (2B) extends the power to expressly enable the Scottish Ministers to use the power to impose specific requirements on care home services which are provided wholly or mainly to children, school care accommodation services and secure accommodation services which provide residential accommodation to children, where those services may be provided to children who are subject to cross-border placements.

Committee consideration

47. The Scottish Government addresses this power at paragraphs 44 to 46 of the DPM. It states that the power affords the Scottish Ministers the necessary flexibility to impose further, more tailored requirements on care services which accept or propose to accept cross-border placements, and enable the Care Inspectorate to take action where such requirements are not adhered to. Such regulations will be subject to the affirmative procedure, which is consistent with the approach currently set out in the 2010 Act.
48. The Committee agrees that it is appropriate that the Scottish Ministers have a power to impose specific requirements on services which accept cross-border placements. As the power will be used to impose requirements on services, the Committee also agrees that the affirmative procedure provides the appropriate level of scrutiny.

49. The Committee finds the power acceptable in principle and is content that it is subject to the affirmative procedure.

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

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

50. Section 25 amends section 190 of the Children’s Hearing (Scotland) Act 2011 which confers a regulation power on the Scottish Ministers to make provision for specific non-Scottish orders to have effect in Scotland. 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 Compulsory Supervision Order. The amendments mean that Scottish Ministers will have greater flexibility in specifying which kinds of non-Scottish order are to have effect in Scotland and how such orders are to have effect.
51. Regulations made under this power would be subject to the affirmative procedure.

Committee consideration

52. The Scottish Government addresses the power at paragraphs 47 to 51 of the DPM. It states that there are various types of order that a child may be subject to elsewhere in the United Kingdom before being placed in a care establishment in Scotland and therefore it is necessary that the Scottish Ministers have a power to enable them to make provision to recognise such orders in Scots law. It also states that further policy work will be undertaken with other United Kingdom administrations as to how such orders are recognised and the conditions which should attach to the recognition. It states that the regulation making power will allow the Scottish Ministers the flexibility to make different provision in respect of different orders following that policy work.
53. The Committee agrees that it will be necessary for the Scottish Ministers to make further provision in relation to the recognition of non Scottish orders. The Committee considers it appropriate that this can be done flexibly through the use of secondary legislation. It also agrees that it is appropriate that such secondary legislation will be subject to the affirmative procedure, given the sensitivity of the subject.

54. The Committee is content with the power in principle, and that it is subject to the affirmative procedure.

Section 28 - Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by:Regulations

Parliamentary procedure: Affirmative if modifying primary legislation, otherwise negative.

Provision

55. Section 28 makes standard ancillary provision, giving the Scottish Ministers the power to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Act flowing from the Bill.
56. By virtue of section (2), regulations made under section 28 may modify any enactment, including the Act flowing from this Bill.
57. Section 28(3) provides that the affirmative procedure will apply where regulations made under section 28 amend primary legislation, and that otherwise the negative procedure will apply.

Committee consideration

58. The power is considered at paragraphs 54 to 58 of the DPM.
59. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it.
60. The power allows issues of an ancillary nature which may arise to be dealt with effectively by the Scottish Ministers. Without such a power, any changes would require to be made by primary legislation, which would not be an effective use of either the Parliament's or the Scottish Government's resources.

61. **In light of the above, the Committee is content with the power to make ancillary provision in regulations under section 28 of the Bill. The Committee also is content that the affirmative procedure applies to any provision made which modifies primary legislation and that otherwise the negative procedure applies.**

Section 31 - Commencement**Power conferred on: The Scottish Ministers****Power exercisable by: Regulations made by Scottish statutory instrument****Parliamentary procedure: Laid, no procedure**

Provision

62. Section 31 makes commencement provision. The following provisions of the Bill come into force the day after Royal Assent: section 28, 29, 31 and 32.
63. The delegated power is contained in section 31(2), which provides that the Scottish Ministers can, by regulations, appoint when the other provisions of the Bill are to come into force.

64. Such regulations are to be laid before the Parliament but are not subject to any parliamentary procedure.

Committee consideration

65. It is standard to take a power at the end of a Bill to commence those section of the bill where provision has not been made in the Bill for commencement. This allows the Scottish Ministers to appoint the day on which those sections are to be commenced. The Committee is therefore content with the power in principle.
66. It is also standard that commencement regulations are laid before the Parliament but not subject to further parliamentary procedure.

- 67. In light of the above, the Committee is content with the power to make such commencement regulations in section 31(2).**

Annex A – Letter from Committee to the Scottish Government

Letter from the Clerk to the Delegated Powers and Law Reform Committee, to the Scottish Government, 23 February 2023

Children (Care and Justice) (Scotland) Bill

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on Tuesday, 21 February and agreed to write to you in relation to the following delegated powers:

- Section 16(2)(e) – Remand and committal of children before trial or sentence;
- Section 17(2)(b) and (c) – Detention of children on conviction (summary proceedings);
- Section 17(6) – Detention of children on conviction (solemn proceedings); and
- Section 17(7) – Detention of children on conviction (fine default).

The Committee noted that these regulations will enable Scottish Ministers to make provision for children detained in secure accommodation, including the circumstances in which such children may remain there after turning 18.

The Committee considered that further explanation is required as to the circumstances envisioned on a case-by-case basis in which children can or cannot remain in secure accommodation after age 18. It would therefore be grateful for an explanation as to:

- why the Scottish Government considers that different provision will be required to be made in respect of some children who reach the age of 18 whilst in a secure accommodation in order that they may remain there and not others; and
- what circumstances it envisages setting out in regulations.

It would be appreciated if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by Monday, 6 March.

Annex B – Response to Committee from Scottish Government

Letter from the Scottish Government, to the Clerk to the Delegated Powers and Law Reform Committee, 6 March 2023

Thank you for your letter dated 23 February to Alison Irvine, Head of the Scottish Government’s Cabinet, Parliament and Governance Division regarding the Children (Care and Justice) (Scotland) Bill (‘the Bill’ for the purposes of this letter). As Deputy Director with remit overseeing the Bill, I am responding regarding the Delegated Powers and Law Reform Committee’s request for further explanation of certain delegated powers in the Bill.

The relevant delegated powers that were identified by the Committee are set out in the following sections of the Bill:]

- Section 16(2)(e) – Remand and committal of children before trial or sentence;
- Section 17(2)(b) and (c) – Detention of children on conviction (summary proceedings);
- Section 17(6) – Detention of children on conviction (solemn proceedings); and
- Section 17(7) – Detention of children on conviction (fine default).

The Scottish Government’s responses to the Committee’s questions are set out below.

1. Why the Scottish Government considers that different provision will be required to be made in respect of some children who reach the age of 18 whilst in a secure accommodation in order that they may remain there and not others;

To support stability; continuity of care, support and relationships; and gradual and improved transitions for children who have been remanded or sentenced and placed in secure accommodation under the age of 18, the Bill enables Scottish Ministers to make regulations to enable children to remain in secure accommodation beyond their 18th birthday (to a maximum age of 19).

For some young people, this additional period of time in secure accommodation will enable them to complete a longer part, or the entirety, of their period of remand or sentence in the same environment, with the same supports and interventions that they have already been receiving. However, any decision on those over 18 remaining in a secure accommodation setting must be made on a case-by-case basis, to ensure this decision is in the young person’s best interests and would not be contrary to the best interests of other children accommodated there. The factors likely to be set out in the regulations would inform this decision making. This is expanded upon below in response to Question 2 to aid the Committee’s consideration.

The Scottish Government’s consultation on the policy proposals around the Bill showed a significant majority of respondents (88%) felt children should be able to remain in secure care beyond their 18th birthday. The approach taken in the Bill is consistent with the United Nations Convention on the Rights of the Child (UNCRC), which defines a child as up to age 18, and Article 37(c), which says that children are to be separated from adults

unless it is otherwise than in their best interests. The UN Committee on the Rights of the Child General comment No. 24, amplifies that by saying that Article 37(c)

“does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.”

Therefore it may not be appropriate for all remanded or sentenced children to remain in secure accommodation beyond the age of 18. Should the “best interests test” not be met, the young person would require to transition from secure care to a Young Offenders’ Institution (YOI) when they turn 18.

2. What circumstances it envisages setting out in regulations.

It is envisaged that the regulations will build on the Secure Accommodation (Scotland) Regulations 2013ⁱⁱ (SSI 2013/205) to enable case-by-case assessment to be given to the basis on which a young person may remain in secure accommodation once they have turned 18 and whether the “best interests test” is met for all children/young people. The assessment will follow planning and input from those with relevant responsibilities around the young person, which is likely to include professionals from social work, secure accommodation (who will also be responsible for the care of the other children within their centre), and the Scottish Prison Service, as well as the young person and their family (as appropriate). While the factors to be included in the regulations will be for Ministerial agreement in due course, the assessment could include factors such as:

- Length of time the young person has already been in secure care and remaining period of remand or sentence;
- The relationship and engagement they have with the secure care provider and other children in the secure accommodation;
- The young person’s ongoing needs (including their stage of development and any additional support needs), risks and vulnerabilities;
- Supports and interventions available to the young person within secure accommodation;
- Likely impact of the move to YOI, any additional support around transitions to the prison estate, and available services and interventions;
- Any on-going education or extra curricular attainments which cannot be continued in the prison estate;
- The needs of the other children in the secure care centre, including their safety, welfare, and best interests.

The regulations may be supplemented by guidance and practice requirements to assist those undertaking assessments.

The decision-making process around planning and managing a child’s transition from secure care to YOIs is currently subject to well established processes, which can be built

ii [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

upon. Presently, responsibility for leading the planning and management of a child's case when placed in secure care rests either with the Scottish Government or with the local authority, dependent on the child's legal status. The fulfilment of these responsibilities is supported by guidance, which includes the processes for a child's transition from secure care to a YOI under a Scottish Prison Service Standard Operating Procedure (which starts at least 6 months before a child's planned transition or sooner if closer to the child's 18th birthday) and Scottish Government guidanceⁱⁱⁱ. This is supplemented by practice guidance^{iv} to support the implementation of the Whole System Approach, within which transitions^v, including from secure care to YOIs, is a core domain. Such existing regulations and guidance and practice experience will provide foundations for future development.

Given that it has not previously been possible to accommodate over 18s in secure care, the use of regulations provides flexibility to allow for the monitoring of implementation and the framework around it; and for any future modifications that may be required without the need for primary legislation. However, as the Committee will be aware, these will be subject to affirmative procedure and the scrutiny that brings.

I hope these responses are helpful for the Committee in its Stage 1 scrutiny of the Bill.

iii [Practice Guidance: Custody of Children and Young People Convicted on Indictment Under Section 205\(2\) or Section 208 of the Criminal Procedure \(Scotland\) Act 1995](http://www.gov.scot)
(www.gov.scot)

iv [Children and young people in conflict with the law: policy, practice and legislation](http://cycj.org.uk)
(cycj.org.uk)

v [Reintegration and transitions for young offenders: guidance - gov.scot](http://www.gov.scot) (www.gov.scot)

