Children's Care and Justice Bill
Consultation on Policy Proposals

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☐

Organisations – your role

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

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

> "...it produces information which is of use, and robust, for its audience; it offers boundary-spanning linkages to break down the silos between organisations, services, and kinds of practice; and it maintains a focus on seemingly intractable issues in the sector, providing a multi-pronged approach to untangling and unsettling the barriers to change" (Stocks-Rankin, 2020:2).

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

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

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

Uniquely we provide support to individual practitioners and, for service development, to develop the vision of youth justice in Scotland and across a resource level, relationship level, and system development level. It is recognised that it is "...the ability to work at the highest echelons on policy making and governance and into the depth and detail of day-to-day practice that makes CYCJ effective" (Stocks-Rankin, 2020:2).

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

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

Questions

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

Scotland's children's hearings system adopts an entirely different model of responding to children who have come into the conflict with the law than the court system. Whilst it considers the risk of harm to others, it is primarily an arena which prioritises the best interest of the child and seeks to respect and maintain their welfare and wellbeing. These concerns are not given such prominent or significant attention within the judicial arena. As such, the unavailability of some measures due to the differing legal mechanisms in place are not necessarily an indicator of deficit within one or other of the systems. Rather, the differing measures available within court in comparison with the hearing room (or vice versa) ought to be recognised as distinct features of two systems which serve distinct functions and purposes.

We are mindful that the person who has been harmed already receives information from SCRA, and that any change to this should only be taken with caution and a focus on the rights of those involved. We also note that the nature and volume of information provided when matters are dealt with within the formal court system vary depending upon disposal, and as such it is a simplistic and erroneous view to take that existing provision within the judicial process leads to adequate or complete disclosure of information. Therefore, if changes are made to existing provision within the children's hearings system, they must reflect an approach which achieves a rights-respecting solution for both the person who has been harmed, and the child who is believed to have caused that harm.

Should it be decided that additional information is made available then this ought to be on a limited basis. Any sharing of information needs to be proportionate and in accordance with existing legal protection in respect of children's & human rights, including privacy and data protection. Information should only be shared in those circumstances where there are protective measures directly involving the person harmed, for example where there is a condition for the child not to approach the harmed person's house. We are mindful of the need to maintain and respect the privacy of children, including in cases where they are accused of causing harm to others. The Beijing Rules, for example, point to the limits within which states must act when responding to episodes of harm, and the need for information relating to the child to be shared only when absolutely necessary. Clarity on the circumstances within which such a step would be taken, and mechanisms in place to prevent inappropriate sharing of information, would be required in this instance. CYCJ is also mindful of the implications of increased information sharing in light of GDPR, Data Protection legislation and existing protections relating to personal information.

Other information relating to the child such as their home circumstances, health or outcome of the hearing may not be appropriate to share. This is important in terms of upholding Article 19 of the United Nations Committee on the Rights of the Child (the right to protection from violence, abuse and neglect) and Article 39 (the right to recovery from trauma and reintegration) where the person harmed is a child.

The rights of both the child and victim must be upheld regardless of which system is employed to respond to the behaviour, and as such the information shared should remain limited. The frequency of this occurrence should be monitored, and any decision to release this information should be reported to the Scottish Government who must liaise with SCRA to publish data regarding the volume of such disclosures, nature of information shared and underlying patterns of these on an annual basis. It is important that this data is kept under review.

In order for people who have been harmed by a child to understand why certain information is not disclosable, and to aid their understanding of the children's hearings system, it would be advantageous for a general, illustrative account of difficulties and experiences children who cause harm have often experienced themselves, and what types of responses help them to recover from this and not harm others in the future. Moreover, increased and extensive use of Restorative Justice could help address questions over the incident in question, thus providing some context to the behaviour.

Question 2: Where a person has been harmed by a child who has been referred to a children's hearing, should SCRA be empowered to share further information with a person who has been harmed (and their parents if they are a child) if the child is subject to measures that relate to that person?
Yes

Whilst the caution we laid in within our response to question 1 remains, there may be room to improve the experiences of those who have been harmed by a child.

Although the ambition of such a change may be to instil greater confidence amongst the public over the efficacy of the children's hearings system, this could be achieved through alternative steps. These steps may include raising public awareness of the suite of supports and resources available through the children's hearings system, widening access to instruments such as MRCs and the wraparound supports that should sit alongside these, providing material and information to those who are believed to have been harmed by a child, drawing attention to the successes of the youth justice sector, or by continued work alongside victims' organisations. CYCJ believes that those who have been harmed must be made to feel that society acknowledges the harm, and that measures will be put in place to address the needs, risks and vulnerabilities of those who may have caused harm. Provision of additional information about the content or conclusion of a children's hearing is unlikely to achieve this in any meaningful sense. Furthermore, the progression of existing plans to implement the Restorative Justice action plan will go some way towards addressing concerns that some individuals may voice with regards risk of future harm.

When a decision relating to an individual who has caused harm has been made by a children's hearing (for example, that they must not approach the person who has been harmed) this should only be shared on the grounds of public protection and following a rigorous process alluded to previously. A high threshold must be imposed on this matter and it should not occur routinely. Practice in this area must be guided by international obligations, including Article 8 of the 1985 Beijing Rules which states that "the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling. In principle, no information that may lead to the identification of a juvenile offender shall be published".

It should not take place automatically and should only be used in those instances where the welfare and safety of another person is reasonably expected to be affected, and where labelling and unnecessary breach of privacy are minimised as far as possible. Other than such specific incidences, the rights of the child to maintain privacy and for their data to be protected must be honoured.

We note that the consultation is moot on whether such options would only relate to offence-based referrals or to other kinds of referrals too. We have in mind scenarios where a child may cause another person harm, but the grounds established relate to welfare concerns, rather than offence-based grounds, yet it is unclear whether the option to disclose information relating to the person who has been harmed would remain available under such circumstances. Clarity over this would be welcome.

CYCJ also wonders whether SCRA is best placed to undertake this role, and whether existing victim support agencies may be better suited to this task, while also preventing any potential conflict of interest.

Question 3: Where a person has been harmed by a child who has been referred to the Principal Reporter, should additional support be made available to the person who has been harmed?
No - unless required

Irrespective of the age of the person believed to have caused harm, the nature of the harm caused, or the statutory mechanism employed to respond to the behaviours, those who have experienced harm should have access to the necessary support to secure their recovery, which may not be additional to what is currently offered if not required.

The model of support required will vary from person to person but must be founded upon principles of being trauma-informed and responsive, and in line with the NES Trauma Informed and Responsive Justice Workforce for Witnesses Knowledge and Skills Framework currently under development. For children who have been harmed, support ought to be informed by the ongoing work being undertaken that will lead to the creation of principles and procedures for supporting children through the Bairns' Hoose model. The work undertaken through that project will provide insight into the sort of support that children require.

Providing additional support calls on a range of supports and resources to be made available, with the provision of a single point of contact who can coordinate a response. The supports and resources available should be designed according to the needs of those who have been harmed and what they have told us about what is required. The same level of care should also be available to children who have caused harm, where their own needs as victims have not been sufficiently addressed or supported in line with the United Nations Committee on the Rights of the Child Article 39 (the right to recovery from trauma and reintegration). Broadly, we would urge the Scottish Government to move away from policy and practices which seek to differentiate between the person who has been harmed, and those who have caused harm. It is well evidenced that these children are one and the same, and a failure to recognise this will merely serve to demonise and marginalise children, whilst failing to provide the level of care that they are entitled to and require.

It is not clear from the details provided within the consultation documents whether duties to provide this support will rest with the Prinicpal Reporter. It may be that such a role sits most appropriately with statutory bodies on a regional basis, and as such Children's Service Plans should have universal and specialist supports in place for this purpose. Not only should this mean the establishment of Bairns' Hoose for children who have been harmed, but for those who are believed to have caused harm of all ages. CYCJ believes that the exclusion of a cohort of children from the Bairns' Hoose services is unjust and will ultimately cause harm to the child and those they are believed to have hurt.

Restorative Justice should be considered on all occasions where a child has caused another person harm and should be built into Scotland's response to such behaviour. This provision may give the person harmed and those impacted by the behaviour an opportunity to have their voice heard; an issue that many victims stress as important. It is imperative that where this is embedded it is offered in instances of harm being caused, and not merely where a crime has been committed. This is an important distinction to make as any increase in age of criminal responsibility that may take place in the future could result in the harmful behaviour losing the label of 'criminal', yet they and the person who has been harmed may still benefit from restorative processes and practices. This should be offered as broadly as possible, and in parallel to any judicial proceedings that take place.

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

Whilst recognising that not every individual who has been harmed will require or take up the offer of this help, a single point of contact should be offered to everyone who has been harmed, with that individual taking responsibility to coordinate support when required. Provision of this nature was called for by those individuals who informed the NES Trauma Informed and Responsive Justice Workforce for Witnesses Knowledge and Skills Framework.

A single point of contact would allow for a consistent approach for those who have been harmed, possibly provided by a third sector organisation who could also offer other forms of support for the child and their family. This new role could also enhance confidence amongst professionals involved and members of the public, as well as those who have been harmed.

Given the existing volume of work undertaken by SCRA, it may prove apt for this task to be undertaken by an existing statutory body, or through agreement with voluntary organisations as is the custom within Police Scotland.

CYCJ is mindful of the implications that such a role may have upon the rights of those who have been harmed, and those who caused harm. In both instances it is imperative that those undertaking the role of single point of contact act in accordance with existing obligations, legislation and data protection provision. The right to a private life - regardless of what behaviours the child may have displayed - must be protected, and guidance around sharing of personal information must be robust and clear.

Question 5: Should existing measures available through the children's hearings system be amended or enhanced for the protection of people who have been harmed?
No

CYCJ does not believe that existing measures available within the children's hearings system require to be altered in any way, and hold a view that the existing suite of options are adequate in delivering the desired level of care and protection. For those children who are felt to pose a risk of serious harm to others, conditions to stay away from a particular person can be imposed. Panel members may also wish to consider the merits of utilising an MRC to ensure that a child stays away from a particular location. Moreover, FRAME provides good practice guidance with regards to risk practice and CARM offers those supporting the child with a framework for risk management oversight and scrutiny that could be put in place to reduce heightened risk of harm whilst promoting strengths and developmental opportunities.

It is imperative that the children's hearings system maintains its primary focus on responding to the needs of the child before them, with voluntary bodies or third sector partners tasked with delivering the help and support required to those who have been harmed.

Question 6: Should MRCs be made available to children who do not meet the current criteria for secure care?
Yes - in limited circumstances

In principle, we believe that MRCs should be made available to a small, distinct cohort of children who do not currently meet the secure care criteria but for whom significant concerns exist. These concerns must relate only to those children who have been assessed as posing a risk of serious harm to others through aspects of their behaviour.

CYCJ recognises that this is a difficult position to adopt and has implications for the restriction of a child's liberty and their rights. It is a position that is settled upon for three reasons, namely:

1) In light of the increased number of offence-based referrals that we hope the children's hearings system will deal with in lieu of matters appearing before court, solutions which manage risk of violence to others may be necessary.
2) In order to instil confidence amongst COPFS and sentencers, and thus increase referral to the Principal Reporter and use of remittal following conviction, robust and effective interventions which both address the child's needs and respond to risk within the children's hearings system are necessary. An MRC along with intensive supports may be such an option.
3) Whilst use of an MRC represents a restriction of liberty, it is hoped that doing so could avoid the deprivation of liberty that admission into secure care or custody causes.

Use of MRCs in conjunction with whole family support - such as that described within the promise's conclusions and within existing guidance relating to Intensive Support and Monitoring Services - may be the most appropriate response for some children whose behaviour may pose a risk of serious harm or are exposed to a high risk of harm, but do not meet the secure care criteria. In such instances, it is unfortunate that the added monitoring and support that can be provided by an MRC cannot be made available. This may leave the child exposed to risk for a further period of time.

An MRC must only be considered where there is a clear assessment and evidence as to how its intended use is proportionate to manage the level of potential harm, and interrupt or minimise the opportunity for the serious harm to occur. It may be beneficial to align MRC threshold to reflect circumstances where the child has engaged in acts of significant harm towards others and/or the child is at a significant risk of harm in the community and/or a risk formulation has been undertaken which indicates a significant risk to the child that can be reduced or managed through the use of an MRC with intensive support.

In all instances where an MRC is utilised it must be accompanied by robust wraparound and individualised support for the child and their family that scaffolds them whilst addressing risk of harm, building on strengths, creating capacity and providing developmental opportunities. Those supporting the child must undertake a robust and evidence based risk formulation which leads to clear and proportionate risk management plans with identified actions, which include mechanisms to be employed should the child not adhere to the MRC. This response must match the level of potential harm, the likelihood and impact should it occur. The potential use of an MRC with a child should only be where formal risk management processes, such as CARM, are in place. These should be approved by local Child Protection Committees, and only triggered when concerns regarding risk of significant harm are highlighted. This would provide appropriate review and scrutiny of proposed risk management plans through multi-agency decision making. Any restriction of liberty must always be proportionate to the circumstances of the child and their wider context, likelihood, seriousness and impact of any potential harm. As such, it would not be appropriate to restrict a child's liberty through an MRC when alternative responses would have secured the child's safety, and/or the safety of others, whilst responding to the underlying needs in question.

Research demonstrates that MRCs are not used in the variety of ways as they could be, and that too many children are placed in secure care following an extremely limited MRC assessment having been undertaken (Simpson & Dyer 2018). Practice with MRCs should be creative, flexible, responsive and reviewed at least every six weeks by both the children's hearings system and the responsible local authority in order to monitor the progress being made and gauge whether less restrictive measures were viable. The use of any restrictions applied should be considered through the prism of children's human rights.

CYCJ is eager to promote the creative use of MRCs, such as use of an MRC to support a child to stay *away* from a particular location where that would be felt to best meet the child's needs and address the risk of harm that has been identified. Likewise, CYCJ advocates the

consideration of the frequency upon which the restrictions must be imposed, such as only imposing the condition on those days and times at which the relevant risk was felt to be at its highest, rather than for 12 hours each night of the week. This flexibility may aid the child to access sport, recreation, educational and vocational opportunities and thus go some way towards adherence to Articles 3 and 37 of the United Nations Committee on the Rights of the Child.

Extending availability of MRC would require scrutiny and oversight applied appropriately and proportionality. Using this as a tool should be where it would meaningfully meet the needs and manage the risks identified, and always alongside meaningful robust wraparound support. Evidence demonstrates that the support package accompanying an MRC is the driver to addressing the underlying risk factors; merely restricting a child's liberty does not address the underlying drivers of the harmful behaviour over the longer term. Any changes through this Bill must therefore ensure that use of an MRC is always accompanied by a comprehensive assessment and suite of supports which address those reasons which lead aspects of the child's behaviour to pose risk of serious harm to others.

Changes to culture and attitude may be required should this proposal come into force. This may require additional expertise within the social work workforce, where practitioners are often unfamiliar with MRCs, particularly in those areas where dedicated youth justice teams have been dissolved. Similarly, understanding and knowledge amongst panel members may need to be enhanced through provision of training which highlights the risk associated with such a measure, and the benefits of the same.

Whilst CYCJ is in support of expanding the use of MRCs in very specific circumstances, significant caution must be given to any change in this practice and the risk of net-widening must be avoided through the provision of stringent criteria and monitoring that ensures that those children who do not fully cooperate with the expectations of the measure do not experience negative or punitive outcomes. It should not be the case that a child in this position should automatically enter secure care, nor should the continuation of the Compulsory Supervision Order be at risk. MRCs should not be utilised in those cases that do not meet the high threshold suggested above. With decades of research demonstrating the adverse effect that results from disproportionately intense interventions, this would be counterproductive, impinge on children's human rights and would lead to poor outcomes for the child.

Finally, this Bill could also take the opportunity to revise the material design of MRCs in Scotland by considering alternative models of electronic monitoring. Traditional use of a device fitted around a child's ankle can be stigmatising and add to the negative self-image held by the child. Advances in technology could lead to MRC aesthetics which are more in keeping with a child's lifestyle, and alternative designs of 'tag' should be considered.

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

CYCJ supports the maximum use of the children's hearings system for all children, including those who have been harmed, or where they have been accused of causing harm. There are a variety of reasons for this answer, many of which are interrelated and complement each another. These can be summarised as follows:

United Nations Committee on the Rights of the Child compliance

Adoption of this change would reflect Scotland's progress towards a rights-respecting nation, and in particular would honour Article 1 which defines a child as anyone under the age of 18. CYCJ notes reference within the promise to affording everyone under the age of 18 the rights associated with childhood. This change, therefore, is one way that Scotland could strive to meet its commitement to achieving the targets set out within the promise.

Justice, fairness and rights

The role of the children's hearings system for those aged 16 or 17 is well established, and each year large numbers of children have their Compulsory Supervision Order extended beyond their 16th birthday. Indeed, Henderson (2017) suggests that this occurs in the majority of cases where children approach their 16th birthday. It is therefore unfair that this support mechanism is currently only available to some children, and that their peers who encounter identical situations, scenarios and risks are left in a far more precarious situation which lacks the support that the children's hearings system can offer. Not only is the current scenario inequitable, unjust and unfair, but it fails to honour the rights of the child to be provided with equal treatment to their contemporaries. This divergent system, based purely on the child's date of birth, does not appear to respect the rights of the child.

In 2008, the United Nations Committee on the Rights of the Child underlined the importance of ensuring that all children in conflict with the law are always dealt with within the juvenile justice system and never prosecuted and tried as adults. As well as specific United Nations Committee on the Rights of the Child articles in relation to juvenile justice and children appearing in adult courts (Article 40), Scotland must ensure that we also meet its four 'general principles' of non-discrimination (Article 2), best interest (Article 3), survival and development (Article 6) and participation (Article 12). The UN Committee reinforced the requirement for all children under the age of 18 to be treated as children in its revised 'General Comment No 24 (2019) on children's rights in the child justice system.' This principle echoes the Council of Europe Guidelines on child friendly justice (2010), which sets out basic rules that Council of Europe members should follow when adapting justice systems to meet the specific needs of children. As well as applying to 16 and 17 year olds, consideration also needs to be given to the small number of children under the age of 16 who continue to be prosecuted in adult court. For example, in 2019-20 there were 18 children under the age of 16 proceeded against in court.

Direction of travel

Maximising access to the children's hearings system would reflect the general direction of travel that Scotland has taken in recent years, including the raising of the age of criminal responsibility and extension of continuing care qualification and aftercare entitlements. As Scotland has recognised the need to both lift children out of the criminal sphere and also to offer support into early adulthood, maximing use of the children's hearings system would appear to be a further step towards creating and providing increased support to children aged 16 or 17 - and beyond - who encounter adversity. It further reinforces the view of childhood being more than a distinct period of time that ends upon a certain date, but rather appreciating that childhood is subjective, unique to each individual and is more fluid than has been suggested previously.

Brain development

CYCJ believes that policy decisions relating to children and young people must bear in mind that brain development continues until the individual reaches their mid-20s (McEwan, 2017). Apportioning full culpability, responsibility and comprehension to someone prior to that would fail to take cognisance of this fact.

Enabling wider access to the children's hearings system would therefore acknowledge that adolescent children are not always fully equipped to make the best decisions, and indeed this may have contributed to the grounds which have brought them to the attention of the Principal Reporter in the first instance. Proposals which address this issue would therefore respond to our growing understanding of the adolescent brain.

Premature creation or terminations of Compulsory Supervision Orders

At present the inability for a child to be referred to the Principal Reporter after their 16th birthday could result in the temptation for practitioners and panel members to impose a Compulsory Supervision Order 'just in case' as a means of extending access to the children's hearings

system and the supports associated with it. This decision - whilst made under the best of intentions - is not in keeping with the minimum intervention principle and one could argue that it is an infringement upon the child's right to privacy. The current 'cut off' date of a child's 16th birthday creates a system that some professionals feel they ought to circumnavigate by adopting a cautious, risk averse approach that leads to children being made subject to a Compulsory Supervision Order in order to ensure protection and support remains available.

For those children who have been supported to address the factors in their lives which influenced the development of harmful behaviours, the termination of a Compulsory Supervision Order may lead to reduced support later if new or renewed concerns arise after they have turned 16. Practitioners, children and families may attempt to avoid this outcome by advocating for the continuation of a Compulsory Supervision Order when the level of risk and need for compulsion had dropped. This would be in contrary to the principle of minimum intervention, and ought to be discouraged by enabling a child to be referred to the Principal Reporter after their 16th birthday.

Likewise, the financial obligations and duties that are placed upon local authorities creates a perverse disincentive to terminate a Compulsory Supervision Order prior to the child's 16th birthday or de to outstanding court dates, and can result in the removal of support. Whilst Social Work Scotland have issued clear guidance that this should not take place without clear grounds to do so, and especialy not due to outstanding court apperances, the reality of an era of austerity, placement shortages and rationed provisions must have some bearing on the conscious and subconscious logic applied by practitioners and panel members.

A change in legislation that makes premature terminations unnecessary would therefore serve to address these issues, thus ensuring that a child can access the support and protection available through the Children's Hearings System.

Sixteen and 17 year olds in court

Whilst mindful that the implications of widening access to the children's hearings system extends well beyond the justice system, such a change could result in significant alterations to the way in which children who are in conflict with the law are responded to, resulting in far fewer children aged 16 or 17 appearing in court.

This would be advantageous for a number of reasons:

Firstly, it would provide a far swifter response to offending behaviour than would be available from court. The length of time between the commission of the offence, appearance at court, a period of bail, trial and then sentencing could stretch well over a year. During that time, the child may miss out on educational opportunities as a consequence of the pending matters and their situation may deteriorate, becoming more concerning. By comparison the delay from commission of the offence and social work becoming involved in the life of the child is far shorter - although not without its own delays - resulting in children and their families receiving support much quicker. This swifter response therefore increases its ultimate efficacy, as well as being more holistic and child-centred due to the nature of the children's hearings system.

This is not to say that all 16 and 17 year olds who come into conflict with the law ought to have their circumstances discussed formally at a children's hearing. Indeed, CYCJ hopes that Early and Effective Intervention (EEI) mechanisms across the country could be enhanced through this Bill, thus ensuring support is available to all children, of all ages regardless of their postcode. Similarly, the severity of the offence may not justify consideration of compulsory measures, so it should not be assumed that each case of a 16 or 17 year old in court would necessarily result in a Hearing being convened.

Secondly, removing the majority of children of this age from the court processes could have benefits for those who have been harmed, with a swifter resolution to matters being reached. Whilst the person who has been harmed may still require to provide evidence in a proof hearing

should the child deny any grounds that are put to them, this is likely to occur far less often than through court proceedings. Given that a large number of victims of the children in question are themselves children, this could have a beneficial impact on their own wellbeing. Likewise, they themselves could be referred to the Principal Reporter in some instances, thus adding to the support offered by existing victim services. This change could also see an increase in the use of Restorative Justice practices across the country, including for children who themselves have been harmed by a 16 or 17 year old. This would expedite access to a service that is known to provide satisfactory results, and which is in keeping with the Scottish Government's drive towards greater use of this model.

Thirdly, research has found that the outcomes realised for those children who appear in court are not particularly positive. CYCJ is aware that a large proportion of children who come into conflict with the law experience Speech, Language and Communication Needs (SCLN). The adversarial environment of the court system is not conducive to affording the child - particularly one who encounters SLCN - the opportunity to participate in the various processes and therefore fair justice, and thus impinges upon their human rights. The vulnerable nature of this cohort of children, who are often affected by significant adversities including mental ill-health and disrupted childhood, also makes the court process intimidating, daunting and traumatising. Maximising the use of the children's hearings system is therefore a step towards providing a more trauma-responsive approach to episodes of harmful behaviour.

Harmonisation

The legislative framework that defines childhood is complex and contradictory, and serves as a barrier to those seeking and providing support. Multiple pieces of Scottish legislation refer to childhood in terms of chronological age of either 16 or 18, whilst the Whole System Approach has been extended to the age of 21 in some local authorities (Lightowler & Nolan, 2017). This results in a confusing and contradictory landscape for this cohort of children, riddled with gaps and anomalies. In practice, this means that children can be left without recourse to the support which the children's hearings system may offer (Lightowler, 2020). They are often inappropriately and unnecessarily subjected to prosecution in court - thus running contrary to Kilbrandon's welfare ethos - or fall between (or are squeezed within) a range of other legislation not designed for the purpose of ensuring child welfare. Maximising the use of the children's hearings system would therefore go some way towards harmonising the legislative framework relating to children of this age. It would be in keeping not only with Article 1 on the United Nations Committee on the Rights of the Child, but would reflect the spirit and content of the 2014 Children and Young People (Scotland) Act, whilst providing greater consistency in the way the state responds to those who are in need. In doing so, it would move Scotland towards a position of defining childhood as the period of time until the 18th birthday.

Proposed options

All three proposed options outlined within the consultation have some merit and are worthy of further consideration.

Broadly, CYCJ believes that existing legislation should be amended to allow all children up to age 18 to be made subject to a Compulsory Supervision Order for up to one year. This would allow support to continue beyond their 18th birthday. Legislation could dictate that upon grounds being accepted or established, a Children's Hearing has powers to impose a Compulsory Supervision Order lasting for up to one year upon anyone under the age of 18. This would have the effect of providing the support and supervision of the Hearing System for a short period, thus circumventing the possibility of any support being formally concluded after a matters of days or weeks (such as when the individual was close to their 18th birthday).

CYCJ believes that children should be kept away from the formal court processes as far as possible. This position is taken in light of both academic research regarding the limited efficacy - and indeed criminogenic impact of - formal contact with justice systems, children's inability to

meaningfully participate as highlighted by *the promise* and the rights-respecting procedural justice ethos which CYCJ seeks to promote within the justice arena.

Option 1 is attractive in that it seeks to increase the use of remittal from court in those instances when a child has come into conflict with the law, including where that child is not subject to a CSO which tend to sit at around 2% of all cases (Henderson, 2017b). This could address the unnecessary use of Community Payback Orders or custody and poorer outcomes for these children as highlighted above in the section on 16 and 17 year olds. Providing legislative guidance which leads to those children aged 16 and 17 who were not already subject to a CSO being referred to the Principal Reporter could lift a considerable number of children out of the court system, providing them with the support and assistance available from the Children's Hearings System.

Lightowler (2020) highlights data from 2017/18, where 384 16 year olds and 1,381 17 year olds appeared in court. The nature of the offences in some cases were such that court may have been deemed the most viable option, however the vast majority of these matters were for offence types routinely dealt with by the Children's Hearings System, and indeed Lightowler queries whether the balance of cases being dealt with by COPFS rather than SCRA is in keeping with a rights-respecting agenda.

To achieve this, promotion of such a development amongst members of the judiciary is necessary, with their role in adjudicating such matters being fundamental to the success or failure of such a measure. Similarly, attempts to enhance awareness amongst social workers and legal agents are required given that they may otherwise be unfamiliar with this disposal. Fundamentally, however, the more preferable position would be the migration of all children out of the court process in this first instance.

The spirit of ***option 2*** is laudable and could lead to increased support to those children and young people who are not protected by a CSO. It is not clear how this would be delivered or enforced, and CYCJ fears that like other throughcare and continuing care policies, it could be implemented inconsistently across the country. It may therefore prove beneficial to strengthen the existing requirements outlined within leaving care and throughcare provision, with greater attention paid to the delivery of these policies by corporate parents. It may also prove worthwhile in offering specific and clear guidance as to the qualification for both 'Looked After' status and access to 'Leaving Care' support for those children who are accommodated within secure care, as these are often interpreted in many different ways across the 32 local authorities.

CYCJ supports ***option 3*** which would serve to provide a further period of support and supervision beyond the child's 18th birthday. This would reflect the fluid nature of childhood and adolescence, with the arbitrary age of 18 not necessarily imbibing each child with the full agency, maturity and responsibility that they will require through the fullness of time. It also takes cognisance of literature regarding brain development which has been highlighted previously in this response. Furthermore, it recognises that children who have encountered many years of adversity will often require support and assistance for a longer period of time, and thus extending a CSO up to a young person's 19th birthday will, occasionally, be the most suitable course of action. As McAra and McVie (2022) note, support should be provided at the time it is needed, not in a time limited manner. This provision would also prove useful in supporting children who have been sentenced to a period of detention, affording them opportunity to remain within the secure estate beyond their 18th birthday before transitioning to HMP&YOI Polmont or a community setting.

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

The current review of the children's hearings system being undertaken by the Children's Hearing Working Group, under the oversight of the promise, is expected to bring forth recommendations at the end of this year which are likely to frame the wider landscape touched on by this question.

Our existing justice systems fail to uphold or reflect the principles of the United Nations Committee on the Rights of the Child, Council of Europe Child Friendly Justice, General Comments CRC No. 24 and GIRFEC. The United Nations General Comment No 24, states that "every person under the age of 18 years at the time of the alleged commission of an offence has the right to be treated in accordance with the rules of juvenile justice, in a specific and specialized system, different from the criminal one applicable to adults" (2019, paragraph 37). A significant body of research, from a Scottish and international context, consistently demonstrates that in order for children and young adults to meaningfully participate, navigate and understand the justice system, a different approach is needed to that adopted for adults. With this in mind, we make the following comments which we believe ought to be borne in mind when considering how best to develop the interface between the children's hearings system and court.

- Creating a child friendly justice system in Scotland which enjoys public and judicial confidence, responds to the most harmful behaviours of a child in a developmentally and trauma-informed manner and which upholds children's human must be a priority. This is not an easy task and will require all professionals involved to undertake special and specific training as outlined in Child Friendly Justice.

- Consideration should be given to reserving the court arena for only the most serious or solemn cases, and the provision of supports that walk alongside every child and young adult from the point of initial contact with the justice system, rather than following conviction. Exlcuding the majority of summary matters ought to be a straightforward tasks; there is no reason why the majority of these could not be addressed through the children's hearings system.

- Ensuring that all under 18s are legally defined as a child in Scotland would also ensure all children have the same protections. Updating the Lord Advocate's Guidelines to reflect the context of charges where only those cases likely to be prosecuted under solemn matters are jointly reported would also reduce the impact on children of going through the court system. This could be achieved by making it the rebuttable presumption that all allegations of crime are responded to within the children's hearings system/by the Principal Reporter and that COPFS must justify any move of jurisdiction into the court arena.

- Enabling the children's hearings system to respond to matters which are likely to be prosecuted under summary procedures does not preclude an option of deprivation or restriction of liberty where serious harm has occurred. It may be more in alignment with existing legislation and direction of travel in the justice system given the presumption against short-term sentences of less than 12 months (the maximum available under summary matters) as secure care authorisation is subject to shorter timeframes for scrutiny and review.

- In addition, the children's hearings system has access to other measures which could be utilised rather than secure as discussed in this consultation. Of importance is that there should be no difference between the interventions implemented to respond to harmful behaviour whether through the children's hearings system or court, it should always be determined by the needs and cicrumstances of the child, and the systems and scaffolding required to build ability and capacity whilst managing and reducing risk of harm.

- A further barrier to removing children from the court system has included the manner in which road traffic offences are dealt with, with only court being able to impose driving bans. Often the age of the children involved mean that they would be unable to drive for some years in any case, and the sanctions imposed within the court setting may well fail to address the underlying factors which caused the offence in question. In these situations, this could be addressed through legislative amendments which permit the children's hearings system to address such matters. Should a driving ban be necessary due to the older age of the child, legislation could introduce a process through which this is imposed without the need for a child to enter the court arena.

- Further, that when a child has been convicted in court then an Advice Hearing should take place to ensure that action plans are appropriate developmentally and systemically for the child. These should reflect trauma-informed practice as well as being rights upholding and GIRFEC reflecting.

Changes to the Children's Hearings System

Whilst the hearing system presently responds to allegations and incidents of serious harm, the proposed changes will likely lead to an increased volume of offence based referrals for older children which may include more acts of serious harm being responded to. Amongst the 373 incidences of a child aged 16 or 17 being referred to the Principal Reporter on offence based grounds in 2020-21, several episodes relate to acts of violence and sexual harm. Thus, it is critical the workforce are competent and confident in their understanding of the needs of this group, of what developmentally informed interventions that reflect and encourage their increasing agency and self-efficacy look like, in accordance with the United Nations Committee on the Rights of the Child, within a risk management context. This may require additional support and training for panel members, social workers, education and wider partner agencies and corporate parents in line with all of our responsibilities to deliver GIRFEC.

Enabling a Compulsory Supervision Order to be imposed when a child is nearing their 18th birthday will provide appropriate and proportionate supports which may include risk management measures beyond the current date their 18th birthday provides and avoid the linear cut-off. This also provides for the scaffolding of support to be responsive as the child transitions into young adulthood to both the child's needs and wider risk management concerns, neither of which magically cease at the age of 18 years. This may require shifts in funding and resources - along with the above mentioned training - to ensure services fully meet the needs of these young adults.

The nature and definition of compulsion should be considered within this Bill. The current nature of a Compulsory Supervision Order principally relates to requirements placed on the child and the duties placed on the implementation authority to give effect to and supervise this. This may be too narrow an approach to meet the needs of all children referred to the children's hearings system in future. This Bill could seek to remedy this by re-examining the focus, breadth and parameters of a Compulsory Supervision Order. For example, the ability to place more explicit duties on public authorities to support or make provision for a child; an ability to place duties on other people to protect or cease contact or influence with a child. Implementation of this change should recognise the greater agency that older children enjoy, and as such the nature of compulsion may look different amongst those children who would otherwise have been dealt with by court. The need for support and supervision may well take greater prominence in the thinking of the Principal Reporter and other relevant actors.

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

CYCJ is fully supportive of option 4 and agree with the conclusion of the promise with regards to the need to create an environment which respects the rights of children in conflict with the law. As we have stated in the response to Question 8, the current set-up of the court system for children and young adults is not meaningful, effective, fair or rights-respecting in the spirit or ethos of the United Nations Committee on the Rights of the Child.

Scotland has the chance to develop a truly child friendly, evidence-based and rights-respecting justice system through this Bill. The current models of problem-solving courts and structured deferred sentencing courts do not create a child friendly justice system and such cases most likely to be dealt within these courts, under our proposals, would be dealt with through the children's hearings system.

In the previous answer, we have proposed that only those matters which would constitute solemn proceedings should be jointly reported and considered for prosecution. With this premise, there would be the presumption of all summary cases would go to the Principal Reporter, unless they assessed that the children's hearings system was not an option. The child's case could then be discussed with COPFS and a decision made.

With regard to our proposal of only solemn cases being considered for prosecution in court then most of the proposed changes should be incorporated, many of which have been repeatedly recommended within CYCJ's various reports on the matter. In order to create a truly rights-respecting, fair and internationally leading child justice system this would require significant exploration as to the structure, given that these would be sheriff or judge and jury cases. This would require significant collaboration across all stakeholders to develop potential models that meet the needs of all involved. Much learning can be taken from the problem solving and structured deferred sentencing courts however, and it is vital to understand what has been effective and meaningful in the delivery of 'fair' justice. Elements of human interaction, inclusion, connection, and support that walks alongside the child and young adult would appear to have contributed to the significant percentage of the children and young adults (some 84%) successfully completing their order.

CYCJ believes that the proposed adaptations to judicial proceedings and customs as outlined within ***option 3*** would serve as a minimum to improve the experience of children and young people who are prosecuted in court. These changes should include: court attire; the language used; adoption of sentencing guidelines; support to understand processes; physical layout of the court; separate and distinct buildings; shorter sessions; timely appearances; and adherence to Council of Europe and the United Nations Committee on the Rights of the Child guidelines.

Changes to wider policy
Presently the range of offences 16 and 17 year olds that can be referred to EEI is limited. They are equitable to those for which an adult can receive a recordable police warning. By increasing the age of referral to the children's hearings system and potential reconsideration of Lord Advocates Guidelines that only solemn cases are jointly reportable this should, by default, potentially mean all non-reportable offences must be eligible for EEI for all children, including 16/17years. EEI should be a needs led, rights upholding response to alleged offending behaviour implemented through a GIRFEC lens. This should be a matter of priority ensuring as many children as possible are diverted from entering any formal system either the children's hearings system or justice. In addition, there must be consideration of increasing the range of offences which could be referred to EEI for young adults and consideration of what this would look like and how this could be achieved consistently across the country.

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

Our overriding belief is that use of settings which deprive children of their liberty should be minimised, with alternative responses utilised in their place. This could include the expanded use of MRCs in certain situations, along with greater provision of community-based resources including intensive supports, adequately funded forensic mental health services and access to universal services including recreational activities and youth work services. To support children to remain within the community when they have caused the most significant levels of harm, Scotland must develop a sector within which risk is fully embraced, understood and addressed, as the promise has concluded. Enhancing practitioners' familiarity with procedures such as CARM and FRAME would contribute to this endeavour, whilst more widespread use of START-AV (as a means of creating a risk formulation concomitant with the needs of the child) would similarly enable practitioners to devise the best possible Child's Plan.

However, where it has been deemed necessary to deprive a child of their liberty - and where no alternative measure is likely to be successful in addressing the risk identified - CYCJ unequivocally believes that this must take place within the secure arena. We agree with the promise who concluded that "being placed in prison like settings is deeply inappropriate for children" (Independent Care Review, 2020: 82), and who called for all children to be removed from Young Offenders Institutions (YOIs) by 2024.

The reasons for this are many and varied.

Children who are deprived of their liberty within secure care have access to a range of supports within that setting which are not as freely available within the custodial estate. Education, for example, can be provided in smaller classes including 1:1 support. Whilst there may be grounds for secure care providers to consider the availability of additional, vocational qualifications alongside the curriculum for excellence, secure care does appear to be the most likely venue for children to achieve their academic potential. Provision of mental health support is similarly greater than in custodial settings, with the ability of community based mental health services to supplement and support the in-house provision that exists. Access to other community health services such as dentist, GP, hospital appointments and other similar services is also more reliable and available than when held in custody. Providing integrated residential care, secure care benefits from being able to synthesise any formulation undertaken by psychological services into the day to day routine of care. Owing to the larger population within custodial settings, and the lower level of interaction between prison officer and child, this is perhaps not as easily achieved there.

A further reason why secure should be used related to the scope for regular and meaningful visits from family members. These can take place within secure care on a more informal and private basis (upon the satisfaction of the staff responsible for providing care) and thus afforded the child and their family the opportunity to address any underlying relationship problems that they have experienced. Indeed, this may also be facilitated or supervised by a member of staff where necessary, including during transition and reintegration processes. Such opportunities to repair fractured family dynamics are essential to smooth the eventual transition of the child from the locked setting to the community. Given that the child will almost certainly return to the family home upon the end of the period of detention it is both pragmatic and morally right that both parties are afforded the greatest opportunity possible to amend any intra-familial conflict. Research indicates the benefits of ongoing family relationships and shows that transitions and reintegration can be more successful when children have meaningful contact with their family (Bullock, Litte and Millham, 1993; Carlson et al, 2019; Neil et al, 2020). Similarly, the increased involvement of family members permits greater scope for support and assistance to be offered to them; secure care staff can maintain regular contact with family members and thus assist the transition process. The Scottish Prison Survey demonstrates that significant levels of poverty and deprivation are found amongst the families of those in secure care, in addition to parental

adversities including mental ill-health, addiction and domestic violence. Secure care is better placed to provide assistance in this regard than a YOI.

It is evident from the work of Vaswani (2018, 2019) and the annual Scottish Prison Service survey that those placed within custodial settings have experienced myriad adversities and exposure to various traumatic episodes. Despite attempts by colleagues working within custodial settings to develop a trauma-informed environment, it remains the fact that secure care centres are far better equipped to respond to the needs of children in a trauma informed way. With greater staffing levels, specialist training on childhood development, a smaller cohort of children to care for, and a more naturalistic living environment, the secure care arena has the greatest range of tools at their disposal to support children who have experienced such challenges. It could be argued however, that the size of secure care houses also needs to be reduced if they are to meet the needs of the children that they care for (Whitelaw, 2022).

Provision of targeted interventions which seek to address criminogenic factors and other needs is often delayed within the custodial setting due to the practice of not delivering such supports during periods of remand, and due to the lengthy waiting lists for certain programmes. At times, this can lead to the child not receiving any intervention before their period of detention comes to an end. Such challenges are far less common within the secure care provision, where a range of assessments and interventions can be made available soon after the child's admission. This can lead to support being provided around needs including neurodiversity, trauma, learning disabilities or learning difficulties. Interventions can also address issues such as addiction, pro-criminal attitudes and other risk factors which precipitate episodes of criminal behaviour. Furthermore, a range of support can be provided which addresses wider welfare issues. Secure care therefore provides the best opportunity to affect change in areas of a child's life which may lead them to come into conflict with the law.

Adherence to children's rights is another factor that should be considered when legislating over the use of secure care. YOIs continue to use pain based restraint techniques, although are in the process of reviewing the suite of techniques and interventions that they utilise. Such measures are not employed within secure care, and as such the use of secure care rather than a YOI can help to protect children from episodes of harm.

The relatively small number of children currently held within HMP&YOI Polmont attests to the limited impact that migrating children over into the secure care sector would have on capacity there. Whilst numbers fluctuate, CYCJ is aware that the entire population of under 18s detained within Polmont has ranged between ten to 15 over recent months, with around 90% of these children held on remand at any one time. As Gibson (2020, 2021) shows, around one-third of children accommodated within secure care are placed by a local authority outwith Scotland, which has recently been as high as 50%. Should this Bill make provision to reduce the use of cross-border placements, then the additional capacity within secure care could be used in lieu of YOIs. Children's presence within a YOI is, of course, often due to the child not being subject to a Compulsory Supervision Order at that time and is yet a further reason to expand the window within which children can be referred to the Principal Reporter.

CYCJ is clear that secure care centres have the capacity to support all under 18s who have been detained due to conviction or remand. Indeed, they already accommodate many children who have been placed there for those very reasons, including those who have caused the most serious levels of harm and are convicted of the most serious of offences. The proportion of secure care residents who are 16 or 17 years old has gradually increased over the past decade, reflecting not only the impact of the Whole System Approach but the expertise within secure care of delivering care to this cohort of children (Gibson, 2021). Affording all children to access this resource when their liberty has been removed is therefore a sensible decision that will best address the causes of the harm caused, and more closely align Scotland to its commitment to the promise, the United Nations Committee on the Rights of the Child and other international treaties. Work is required in order to secure adequate capacity; on June 22, 2022 there were seven available beds within the four independent secure centres. Continued use of Scottish

secure provisions by English and Welsh local authorities plays a role in this, as highlighted elsewhere in this response.

Question 11: Should there be an explicit statutory prohibition on placing any child in a YOI, even in the gravest cases where a child faces a significant post-18 custodial sentence and/or where parts of a child's behaviour pose the greatest risk of serious harm?
Yes

It is important to note that YOIs are not merely used to remand or detain children who have engaged in the most harmful of behaviours, but may also relate to less harmful incidents. Children who have caused the most serious degrees of harm, and who face significant periods of detention remain, first and foremost, children and must receive the same level and nature of care as their contemporaries based on their own individual needs. This is also true of those children who have caused less serious degrees of harm who are often placed within custody despite posing a low risk of harm to others. Their deeds ought not to exclude them from the children's hearings system, nor the resources that are available to others. Such a position would not only be contradictory to the Kilbrandon principles but would be in breach of Scotland's international obligations.

Failing to include statutory prohibition of the placement of children within custodial settings speaks to the reactionary, punitive streak within societal attitudes towards children and to those who come into conflict with the law. As we have seen in other aspects of society, legislative provision is necessary in order to affect attitudinal change. Perhaps more importantly, it is necessary in this case in order to address the anomaly of children being detained in prison settings, devoid of many of the opportunities and supports that are available to their peers within the secure estate or within the community.

At present, children who are subjected to a period of detention following conviction and who are subject to a Compulsory Supervision Order could spend the first portion of their custodial sentence within secure care. This affords them the opportunity to access the support and interventions previously alluded to within this response, and which seem best placed to affect change upon the factors which precipitated the act which led to them being deprived of their liberty. Around the time of their 18th birthday and following dialogue with Scottish Ministers and the Scottish Prison Service, the child thereafter moves into the sentenced hall of HMP&YOI Polmont where the remainder of their sentence is served, or until they move on to the adult prison estate. CYCJ sees no reason why such practice ought not be extended to all children deprived of their liberty, including in instances where the child has caused significant harm. It would be unjust and inequitable to maintain any system which continues to differentiate between children on the basis of their conduct. All children must be treated as children, replete with a child orientated place of detention.

The nature of the offences which have resulted in a child subject to a Compulsory Supervision Order being detained include the gravest of matters and in recent years have included murder, rape and other acts of violence. The secure estate is familiar with such issues and is well placed to deliver a response to acts of significant harm. Indeed, the lives of those children who have caused significant degrees of harm often feature multiple adversities, victimisation and abuse. In light of their evident need themselves, CYCJ is of the view that should a child be deprived of their liberty, then the secure estate is best placed to promote long term desistance and supporting their eventual transition into the community.

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

Existing practice includes inconsistencies in the support available for children and young people leaving a secure or custody upon their return to the community. Whilst some are provided with looked after child status or eligibility for continuing care, thus affording them access to certain resources, this situation is not replicated universally, resulting in a cohort of children being disproportionately disadvantaged. It is crucial that all children and young people receive the best possible opportunities and support to reintegrate successfully back into society following a period of detention.

Existing provision through corporate parenting duties ought to address this inequality. Whilst strengthening the policy drivers relevant to this aspect of care would be welcome, it is the implementation gap of current policy that creates this precarious situation in the first place.

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

CYCJ agrees with all changes proposed within the consultation, but believes that the provisions outlined within the third proposal should be extended.

We agree that any exceptions to identifying a child accused by the judge should be based on protecting the public from serious harm, not based on public interest. When children in conflict with the law are responded to within the children's hearings system, their anonymity is protected through Section 44 of the Children's (Scotland) Act 1995. There are no exceptions to this. When children are responded to through the criminal justice system, there are exceptions under Section 47 (3) (b) of the Criminal Procedure (Scotland) Act when it is deemed to be in the public interest to remove this protection. Under the current legislation, children are not being given equity of access to their rights to privacy.

CYCJ is aware of two recent cases (involving three children) where the protection of anonymity was removed prior to the age of 18 as it was deemed to be in the public interest. In one case, the child's right to anonymity was lifted following an application from several media outlets. Amongst reasons cited for the request to lift the media ban was that the child's identity would be released anyway on their 18th birthday. Another reason given was that their name was already in the public domain through social media platforms (McInnes, 2019). In the second case, it appears that the decision was taken by the judge to remove the right to anonymity as he deemed it to be 'in the interests of justice'. We are not aware of any publicly available information as to the factors considered in the decision-making process in this case. There is also a more fundamental problem of a lack of a clear definition of what 'public interest' is in case law (Fitz-Gibbon & O'Brien, 2017). The decision to name these children resulted in information being made public in relation to their Adverse Childhood Experiences, their care experiences and other similar, personal information. This was detailed in the sentencing appeal decisions, which are available publicly on the internet. At present it is unclear what the process is for informing the child, their family, and the professional team working with them that an application has been made or that a decision to remove this protection is likely to be made. This could mean that the appropriate support and protections are not in place when required.

We agree that legislative change is required to enable a child's right to anonymity to apply from their first contact with the criminal justice system, including pre-charge. There are some cases in Scotland where children have been identified, and their photos published, whilst being investigated as a suspect pre-charge, and following arrest and charge, due to the interpretation of the wording of the legislation as applying to 'proceedings in a court' (see for example Frame v Aberdeen Journals). This can have significant implications in terms of Article 40 of the United Nations Committee on the Rights of the Child (the right to a fair trial).

We agree that the right to anonymity should be extended into adulthood unless there are exceptional circumstances involving the need to protect the public from the imminent risk of serious harm. However, we do not agree that this should only extend until the individual turns 26. We believe that children should be granted lifelong anonymity for offences that they have committed when under the age of 18. This would be in line with the United Nations General Comment No. 24 and would support the promotion of reintegration and assuming a constructive role in society as per Article 40 (1). To remove the right to anonymity upon reaching a certain age defeats the purpose of providing it in the first place. A quick internet search of newspaper headlines in Scotland identified at least eleven children since 2018 who were publicly named and shamed upon reaching their 18th birthday. The reporting in relation to these children often provides details about their own Adverse Childhood Experiences, care experiences, previous behaviours they have engaged in, exclusions from school and other sensitive matters. They do not report on their efforts to make amends for the harm they have caused or to address their behaviours. This will all have a negative impact on their ability to reintegrate into society.

There has been a recent case where details of the charges a child was facing, and their bail conditions, were revealed by media outlets following the child's death. This appears to be a further gap in the current legislative provision, and it is difficult to see how such disclosure could be in 'the public interest'. It is unclear where legislative protections sit in instances such as this and ought to be considered by the Bill.

Removal of a child's right to privacy can impact on various other rights within the United Nations Committee on the Rights of the Child. For example, children often face a risk of harm from others because of being named; they can be at increased risk of mental health issues due to the media reporting, as well as self-harm and suicide; and their opportunities for effective rehabilitation and reintegration into the community are reduced due to the negative impact on their access to education, work, and housing. There is the additional issue that even if there is no requirement to disclose offences, these details are still in the public domain. Maintaining privacy and thus enabling opportunities is likely to result in better outcomes and safer societies.

Reports provided to court often refer to the child's own children and/or family members and can result in the media contacting their families. The right to privacy is not only removed for the child but also for family (ECHR, Article 8). The impact of removing a child's right to privacy can be significant for the child's family members as well who have not committed an offence (Hart, 2014).

The guidance in the United Nations General Comment No 24 is clear that the protection of privacy should apply to all forms of social media, something which may also require legislative change, as it is not currently contained within Section 47. There does not appear to be any monitoring or data in relation to how often a child's right to privacy is removed or how many children are named on their 18th birthday when their protection expires.

The changes suggested above would be in line with the United Nations Committee on the Rights of the Child and recommendations from UNICEF that "The Scottish Government should commit to ensuring the anonymity of all children under 18 years of age who come into contact with the law and appear at Scottish courts - regardless of the offence they have committed. This anonymity should not cease at 18 years of age but instead should last a lifetime" (UNICEF, 2020:27). This component of the Bill therefore provides an opportunity for Scotland to meet the international standards that it aspires to attain.

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

The current regulatory landscape is extremely complex, resulting in both local authorities and secure care centres using resources such as CYCJ's 'routes into secure care' guidance to navigate the system. This needs to be simplified so that services can focus on meeting the needs of children and ensuring their rights are respected and upheld. At present the various routes are confusing to children, their family and to practitioners. This leads to unequal access to justice and inconsistent practice.

In addition to confusion over the routes that children can take into secure care there are complex mechanisms in place to inspect secure care and other forms of care which restrict a child's liberty. For example, services that are not registered as a secure accommodation service do not receive the same level of scrutiny from the Care Inspectorate as secure care centres. This results in a tiered approach to the upholding of children's rights, with children placed by authorities outwith Scotland into residential settings through Deprivation of Liberty orders, which restrict their freedoms and experiences of care within services that are not being inspected using the quality framework for secure accommodation services.

There can also be parallel processes operating within different residential or secure care services due to different routes, resulting in children's access to services, supports and provision being inconsistent. A clearer cohesive process that upholds the rights of all children is needed to ensure that all children who need support have access to it at the time when it is needed.

There are enormous barriers to progressing collaborative good practice due to the current funding mechanism that appear to pit services against each other. Gough (2016) highlights the need for a national strategy in relation to secure care as key decision makers differed in their views about both the purpose and the quality of secure care at the time of the Secure Care National Project. The marketised nature of secure care results in barriers to free and open knowledge exchange across settings and a national framework may help to remove barriers but legislative, cultural and practice barriers exist and need to be addressed, so that the focus can be on providing a service that meets the needs of the children who live within secure care. SAN Scotland highlights the number of vacant beds rather than the needs of children that secure care centres can meet. Needs not beds should be the focus in keeping with the promise which also states that "Scotland must fundamentally rethink the purpose, delivery and infrastructure of Secure Care, being absolutely clear that it is there to provide therapeutic, trauma informed support" (Independent Care Review, 2020:80). Spot purchase arrangements and viewing centres as a sector can impact on the perceived reality that four independent providers and a local authority service work in competition to meet the needs of children. The Scotland Excel contract marketing approach and a lack of support as an alternative to secure care needs to be considered here.

Educative work is needed so that systems work together in promoting rights-respecting and trauma-informed approaches to children, and work is also needed with services cutting across the children's hearings system and judiciary. The review of the children's hearings system is welcome, but should there be a parallel review of the justice system in relation to those under the age of 26?

Question 15: Do you feel that the current definition of "secure accommodation" meets Scotland's current and future needs?
No

The secure accommodation definition is not reflective of the language used in the promise and reference to its purpose as restricting liberty rather than safety, security, needs, strengths and risks, and trauma-informed care, is out of kilter with thinking in Scotland at this time. The

definition has not been updated since GIRFEC and it is not in keeping with children's rights, for instance Article 37 of the United Nations Committee on the Rights of the Child.

Data continues to reflect that children are likely to be placed within secure care on welfare grounds. Further research highlights that children within secure care are some of the most vulnerable children in Scotland (Gibson, 2021). The definition of secure accommodation and the purpose it serves should be reflective of this.

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

Children's access to secure care is another example of Scotland's multi-tiered approach to children due to conflicting definitions of 'a child'. The United Nations Committee on the Rights of the Child promotes that all children should have the same rights and access to resources, including secure care. This is particularly important when children have been assessed as being in a vulnerable situation/risk yet cannot access this resource due to how we define them under criminal justice or mental health legislation. This can result in many of these children ending up in a YOI or adult mental health resources, where their needs and rights as a child are not always upheld (Armstrong and McGhee, 2019).

Research has increasingly shown that children who are detained within secure care and prison settings are likely to have experienced a large volume of Adverse Childhood Experiences in addition to an increased likelihood of parental death (Gibson, 2021; Vaswani, 2014). With that in mind, it is right that the promise concluded that where children required to be deprived of their liberty, our approach must be relationship-based, trauma-informed and within therapeutic milieus. From a rights-based perspective this must take place within secure care instead of a YOI, which by their nature do not have therapeutic input as a primary goal.

While the Scottish Parliament Justice Committee has taken the position that children should be placed within secure care unless evidence suggests otherwise, CYCJ believes that there should be no exceptions to this. This Bill should seek to end the disparity of *some* children having access to secure care, whilst others are held within a YOI. Children should be treated in line with the United Nations Committee on the Rights of the Child and the promise, therefore under 18s who are deprived of their liberty should be accommodated within secure care. There should be a prohibition on placing children within a YOI - regardless of the crime they have committed - to ensure no exceptions. Behaviour can be managed by flexibility of use of buildings and staff time to respond to need and challenging levels and types of risk of harm - through robust risk management planning. This would also be the case for managing a mixture of ages, especially those over the age of 18.

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

Fundamentally, CYCJ believes that the use of remand is far higher than it ought to be across the entire custodial estate and that a range of alternative measures should be pursued in order to offer robust and supportive services that will give members of the judiciary the required level of confidence to use bail rather than remand. This is particularly important for children and young people, with over 90% of children detained in HMP&YOI Polmont being there by virtue of them being held on remand. This results in the vast majority of children and young people in custodial setting being held without any establishment of guilt, awaiting trial process which can often be delayed, and losing out on their opportunity to engage in the activities that often feature in the lives of people their age. This adversely impacts upon their development, their educational opportunities, their accommodation and a range of other factors.

On those occasions where court has decided to remand a child to secure care CYCJ believes that the cost of the placement should be borne by Scottish Ministers. This cost is currently met by the local authority and is considerably higher than the cost of a child being placed in a YOI, which is paid for by the Scottish Government. This creates a financial disincentive for local authorities where the termination of a child's Compulsory Supervision Order or failing to offer a secure care placement to court, may enable them to avoid the cost accrued through secure care. CYCJ would hope however that such considerations do not influence these decisions being made. Shifting financial responsibility on to Scottish Ministers would address this issue and encourage local authorities to offer the support and protection available through a CSO. This ought to be delivered in order to remove barriers to a rights-respecting approach, which is grounded in the needs of the child, not the financial circumstances of the local authority.

The cost of secure provision (sitting at over £6,000 per week) is a substantial financial outlay which could be invested in delivering community based, intensive supports as stated by the promise. Yet despite offering a range of community resources and support packages, the decision of a Sheriff or judge to remand a child often leads to local authorities spending tens of thousands of pounds - if not more - on funding a secure placement when they could likely have addressed the matter within the community by delivering intensive support.

Whilst this Bill must rightly address the financial limitations that remand imposes upon local authorities, CYCJ hopes that attention will be paid to the issue of remand itself. With the vast majority of people held on remand not ultimately receiving a custodial sentence it is imperative that community alternatives to the loss of liberty are promoted. Supporting and supervising a child within the community will have significant benefits on their mental health, family relationships, housing, economic circumstances and physical health amongst other issues. These in turn will support and promote desistance. This Bill should therefore seek to further improve and increase the use of alternatives to remand on the grounds of efficacy, human rights and financial benefits.

Question 18: Is a new national approach for considering the placement of children in secure care needed?
Yes - this should be explored further

Scotland has a secure care system consisting of one local authority and four independent providers. This means that the four independent secure care establishments are placed within a competitive, marketised environment, which results in an imperative to ensure a high degree of occupancy in order to provide the income required to sustain the establishment. Further to that, national approaches are evident in the Care Inspectorate framework for secure care accommodation, the NHS Education for Scotland (NES) trauma framework, the Secure Care Pathway and Standards, and the Scotland Excel framework, in addition to other national legal, guidance and regulatory processes and mechanisms. Funding mechanisms through the Scotland Excel process mean that three yearly negotiations around contracts promote competitiveness among services and hinders collaboration.

Whilst the autonomy afforded to the five secure care centres could be viewed positively as they can respond to needs in an individualised way, this is not without its difficulties and there is a view that a national approach to this care could make services more cohesive and consistent. Incorporation of secure care into a National Care Service could be one way of achieving this, whilst national funding mechanisms could also reduce the competitive nature of tendering and fears over the centres' future.

Post Covid-19 challenges include a limited supply of resources, including staffing, and a national care service could provide a structured process for this similar to the NHS where there is a clear framework for recruitment, training and development. This would not hamper innovation but

could lead to greater learning from different services and a national and holistic approach to meeting children's needs.

CYCJ is aware of the varied awareness and understanding of secure care by Chief Social Work Officers across Scotland (Moodie and Gough, 2017), whilst apparent 'thresholds' for admission into secure care differs from one authority to the next. This is perhaps understandable given the subjective nature of social work assessments, and all decisions should be taken within the context of the child's environment and social milieu. However, when the decision in question relates to something as acutely life changing as admission into secure care then a degree of standardisation is required. For this reason, CYCJ is supportive of further consideration of how best to achieve this ambition. The ongoing work of the Children's Hearings Working Group may well influence how Scotland goes about creating this mechanism.

Through working alongside colleagues in local authorities, CYCJ is aware that decision making processes over admission into secure care varies. In some areas a secure screening group has been established to deliberate over any instances where admission into secure care may be an option. In other areas such decisions are left to a small team of senior management. The efficacy of either approach, or indeed alternative models, are untested and as such CYCJ welcomes further exploration of any national approach. Were a national approach to be adopted, it ought to learn from existing models of practice and incorporate those features which are found to be most effective.

Yet consideration must always be given to the local dimension of any decisions such as this. Whilst consistency of practice across Scotland is to be strived for, it cannot be denied that life as a child on the islands of Scotland differs considerably from that within the inner city or schemes of an urban city. It is not possible to adopt a formulaic approach to assessing the needs of a child under such variances. Moreover, decisions such as adoption, permanence and guardianship remain located at a local level. For decisions regarding secure care admission to be undertaken by a national body would seem incongruous with similar decision-making fora noted above. Finally, knowledge of the local resources, services and relationships are essential when making a decision such as this. CYCJ fears that a lack of knowledge in this area would hinder the decision-making processes of any national group or body. This is particularly important given that most children will return to the family home - or have considerable contact with the family - upon their transition from secure. Knowledge of local factors is therefore important for gauging the need for secure care, and for planning for post secure provision.

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

When it is deemed necessary for the safety of the child or others then secure transport is an appropriate response. To guide and regulate the use of this a national specification has been developed to serve the needs of children who require secure transportation. This work has been developed in partnership with key stakeholders and in consultation with children who have experience of secure transport.

CYCJ believes that secure transport would best be undertaken by the secure care services themselves, rather than by a stranger who does not have any relationship with the child. This has been supported by a recent consultation where children stated that they would like to travel with someone known to them; preferably their social worker or a member of staff (May, 2022). This could be regulated and monitored as part of the existing framework with Scotland Excel. Children have also shared what needs to change about secure transportation if their needs are to be met and their experience to be rights-respecting. Currently, they may not know where they are going, they might not be provided with basic sustenance, and they may be confined within transport that is not designed for transportation purposes. This is despite the Secure Care Pathway and Standards outlining what children should expect from secure care

transportation. CYCJ believes that the best way to provide safe and secure transport is by having sufficient staff members from a secure care home within the vehicle, particularly where there has been a risk assessment pointing to a high risk of absconding, or where the child is distressed.

The developed national specification to transport children has applied the principles of the United Nations Committee on the Rights of the Child, the promise and the Secure Care Pathway and Standards. It sets out expectations of providers and their staff who currently also engage in other contracts. Meeting the needs of this specification is highly unlikely to be achievable from transport providers so it is clear that secure care centres would need to assume this additional role.

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

The Scottish Government currently operate a contract for adult secure transport provision, and it is likely that a similar arrangement for children will be necessary in order to meet the demand for this service. Preferably the provision of transport services could be undertaken by the secure children's centres themselves; this would need to be factored into future contract arrangements should the Scottish Government wish to pursue that option. Demand is such that it is not feasible for this service to operate on a spot purchase basis whilst retaining a rights-respecting approach, with current practice leading to lengthy delays due to the travelling time of the English secure transport providers, and it is unlikely that these providers would be able to meet the needs of specification developed as part of the secure care transport subgroup.

The Scottish Government may be aware that concerns have been raised at a recent meeting of the Scottish Physical Restraint Advisory Group regarding the transportation of children from mental health facilities, where transport providers have used restraint to return a child from a mental health provider in Scotland to England. Regulation over this form of transport is required in order to protect the rights of those children whom the service seeks to support, and thus creation of provision to deliver secure transport must take cognisance of the ethical and legal factors which are live in this discussion.

As part of the national transport specification development feedback was sought from children with experience of being transported and professionals responsible for organising this or who have accompanied a child. Feedback included a desire to create a system that ensured the safety of the child being transported, and the staff supporting them. Views also included the need for the service to be available in a timely fashion in order to minimise the distress caused by waiting extended periods of time. It is difficult to see how this is likely to be achieved unless the secure care centres provide this transport themselves.

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

For those children who are placed within secure care by virtue of them being sentenced to a period of detention, provision should be made to enable to stay there beyond their 18th birthday, and up to their 19th birthday if deemed appropriate. This will avoid circumstances where a child - approaching their 18th birthday - requires to transfer from a children's setting to a Young Offenders' Institution, only to stay there for a short period of times. CYCJ is aware of instances where this has been for as short a period as a few days. This is disruptive to the child, potentially traumatising and does little to support the process of desistance.

Exactly what length of time this consists of should be determined on a case by case basis and dependent upon the circumstances of the young person in question. Factors that should be considered include: the length of the remaining custodial sentence/remand, the maturity and personality of the young person, their educational needs, their wider best interests, and any vulnerabilities. It is not possible to simply designate an arbitrary age to serve as the threshold between two systems due to the fluid and complex nature of adolescence, the varying degrees of capacity amongst young people of this age, and myriad other factors that are entirely individualised.

Supportive of the principle alluded to within this proposal, CYCJ is clear that this should be an entirely subjective decision made within the context of Care Planning Meetings or similar arenas. A blanket decree regarding age criteria would not serve the young people in question well and is unlikely to respond to their particular needs. We acknowledge that a similar scenario may well arise upon the child's 19th birthday; however, we also believe that this would be less common, and could be less damaging given the added maturity of the person in question.

A similar stance is taken for those children who are placed in secure care on account of them being remanded by court. In this instance, CYCJ believes that they should remain in that setting until the conclusion of the remand period at which point a decision can be reviewed should the young person be sentenced to a period of detention.

With the larger number of 'older' children within secure care, consideration should be given to the mix of children within secure care. With some children aged as young as 12 placed within secure care, there may be occasions where adaptations and adjustments are required in order to best facilitate the accommodation of a 12 year old child beside a 18 year old. CYCJ is mindful of Article 37 of the UNCRC United Nations Committee on the Rights of the Child treaties which call for children not to be placed alongside adults. With that in mind it may be necessary to create separate provision within secure care in order that these international standards are not affected.

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

CYCJ is supportive of any measures which may lead to improved experiences for children within residential care, and for those who make the transition out of residential care. This includes the proposed pathways and standards for residential childcare.

Were this to come to fruition, it would be apt to create these pathways and standards in a similar manner to the creation of the Secure Care Pathway and Standards. Specifically, this should involve a period of co-production alongside children and young people who have experience of residential care, including those currently residing there. Their role must be meaningful and their views given due weight in the completion of such standards.

Mere creation of pathways and standards will do little to impact upon practice, and the months succeeding any publication must endeavour to communicate its contents as widely as possible. CYCJ has delivered roadshows relating to the Secure Care Standards for over two years and continues to meet and support practitioners who are unfamiliar with them. The task of rolling out residential pathways and standards is even greater than that faced by CYCJ, and thus forward planning on how each practitioner can become familiar with its content is necessary.

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

This Bill should ensure that mechanisms to monitor all sectors who provide care to children are created. There should also be a mechanism which requires the needs of an area to be considered prior to the establishment and approval of any new residential childcare provision within each local authority. Failure to do so would have significant impact upon the ability of local services such as police, health and education to perform their duties.

CYCJ agrees with the proposals outlined in the consultation document that approval of new residential childcare provision should only take place following meaningful dialogue between the potential provider and local authority in question, and the completion of a local strategic needs assessment. Provision which could result in additional demands being made upon nearby policing, health, education or other community resources must be taken into consideration in the course of community planning processes, in order to ensure that children within that jurisdiction are offered the level of service that they deserve and require.

The intention of this step would not be to prevent the creation of new provision, but to ensure that all residential childcare placements can deliver care in a manner which fully meets each child's rights and allow local partners to plan accordingly. In recent years some providers have not engaged in dialogue with the host local authority prior to the opening of the care provision. This has often meant that the local social work, police and other partners only learn of the new development at a point of crisis. This has led to the Care Inspectorate introducing a measure which requires them to be notified of cross-border placements in the hope that the notification will "give us assurance in relation to care planning and information for data analysis" (Care Inspectorate, 2022:6). However, this measure is not sufficient to proactively ensure that children are placed in a setting that both meets their needs, and aids in the community planning process.

Mandating the completion of a local needs assessment would support a planned approach to placements which provides relevant bodies with the information they require to deliver care. It could assist matching processes, ensuring that children are only placed within a service and community that can meet the child's needs and provide the environment that enables them to enjoy safety, security and the nurturing care called for within the promise.

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

The Children and Young People's Commissioner Scotland office recently gave evidence to the Scottish Parliament's Education, Children and Young People Committee, highlighting challenges relating to the inspection of residential childcare. Specific mention was made of childcare provision which are registered with the Care Inspectorate but who are not subject to inspection as a result of the Care Inspectorate's limited powers. The Care Inspectorate have themselves voiced concern over the measures available to them.

This Bill ought to address this situation through strengthening of the role of the Care Inspectorate and providing avenues through which they can address care provision which fails to meet the needs, and respect the rights, of those children who are placed within residential care.

CYCJ has specific and significant concerns over the continued use of Deprivation of Liberty orders within Scotland, with the extent of restrictions akin to those experienced within secure care. As the consultation document indicates, children are placed within residential care that deprives them of many of their human rights, but without the regulatory scrutiny and legal oversight that accompanies the use of secure care. This Bill must address this situation through mandating the inspection of any setting which delivers care of that nature, with a particular focus

on the rights of children in that setting and the provider's adherence to the "before" section of the Secure Care Pathways and Standards.

Cross-border placements can also lead to divergent standards within practice. For example, standards within England call for a planning meeting to be held within five days should a child be placed outwith their home local authority. This requirement is often not adhered to when a child is placed in Scotland. English social work practitioners do not produce assessments which align to the Scottish GIRFEC approach. This may lead to providers not being given the range of information that they do for other children, thus hindering their ability to provide care.

The regulatory and strategic functions of the Care Inspectorate provide a robust framework for the oversight of placements from outwith Scotland. While the aim of the promise is to end cross-border placements there is no indication that this will end imminently, and as such greater regulatory oversight should be brought forward by this Bill.

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

Children placed within Scottish residential or secure care must have the totality of their rights respected and protected. Provision of a local advocate is one step towards doing so and can assist children to have their views and opinions heard within decision-making fora. This is important due to the significant distance children find themselves from their family, their social worker and other support networks. Gibson (2021) found that almost one quarter of children placed by an English or Welsh local authorities were between 500 to 599 miles from their family home. A further 45% were between 300 to 499 miles away. Not only does this distance add to the isolation that these children must feel, but it prevents the delivery of effective oversight and care. Provision of advocacy is therefore important to achieve the safe care of children. Local advocacy, which understands the Scottish context and can assist the child to navigate unfamiliar territory, is particularly important in the case of children whose familiarity with the nuances of Scottish residential care may be limited.

However, local advocacy must be allied to access to legal representation in order to pursue any challenges that are required. Access to advocacy alone is not enough to ensure that children's rights are upheld, and advocacy services are not able to offer legal advice. Legal representatives, meanwhile, are not best placed to advocate on behalf of a child or to ensure that a child's voice is heard during the course of their care.

Children placed by local authorities or bodies outwith Scotland must also ensure that advocacy and legal representation pertaining to the home nation is available. The legal landscape across the four nations of the United Kingdom is complex, and thus advocacy and representation that is familiar with the various territories is required in order to achieve the best possible outcome with regards to children's rights and to participation.

The Care Inspectorate have indicated that they will undertake a study to gather views of children regarding cross-border placements; it may be that these insights will influence the Bill, and indeed CYCJ would recommend that these children - and all of those with experience of the various issues under consideration - are given the opportunity to shape the Bill as it progresses through Parliament. At present the Care Inspectorate have highlighted that there is a lack of information sharing, lack of planning for placement moves and a lack of legal protections. The provision of advocacy services for all children would go some way towards addressing these issues, although further work is required through widening routes to legal advice. All costs of advocacy and legal representation should be met by the placing authority as a condition of placing a child in Scotland.

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

Despite the promise concluding that Scotland must not restrain children, recent reports in the media have shown that children as young as five years old continue to be restrained within residential care (Goodwin, 2021). CYCJ is also aware that concerns have been raised over restraint of those children who have additional support needs, with restraint and safe holds used more frequently within certain environments.

Guidance relating to the collection of data should be provided as currently it is not possible to ascertain for certain exactly how often restraints are employed, upon whom, what approaches were attempted to avoid the use of restraint, and so on.

CYCJ would welcome the adoption of a consistent definition of restraint similar to that favoured by the Scottish Physical Restraint Action Group and adopted by the Care Inspectorate. The Care Inspectorate (2021) define physical restraint as “an intervention in which staff hold a child to restrict his or her movement and (which) should only be used to prevent harm”. A consistent use of this definition would aid in the recording of accurate data. This would assist in providing a clearer picture of the prevalence of restraint across Scotland, and thus the identification of measures which can reduce the unnecessary use of restraint. CYCJ would welcome legislation that prohibits pain based or prone restraint as a minimum for all children.

Should this Bill fail to provide guidance and legal clarity then steps should be made to respond to the ambiguity that lingers amongst practitioners over the role of restraint, and ensure that it is only used when a child is a danger to themselves or others. The scope and latitude to inappropriately carrying out restraint is too great at this moment; clarity is required. Restraint should be viewed within the wider context of restrictive practices which includes seclusion and restrictive physical intervention (SPRAG, 2021). These methods are used to modify a child’s behaviour through coercion or isolation and are not in keeping with a rights-respecting approach.

A cohesive approach to addressing restrictive practice is needed to ensure that the Care Inspectorate and Education Scotland, who will be assuming a monitoring role of restraint within schools, work closely with action groups with expertise in this practice, such as SPRAG and Restraint Reduction Scotland. We cannot have a system where conflicting definitions are used, where systems don’t talk to each other and where data is gathered in different measurements. This is not in keeping with the promise.

Question 27: Do you agree that the review of the 2019 Act should take place, as set out, with the 3-year statutory review period?
No

CYCJ believes that a review of the 2019 Act should be undertaken as soon as possible, and earlier than the planned three year review, in order examine the efficacy of the changes in practice.

Given the range of vulnerabilities, victimisation and difficulties faced by children who come into conflict with the law, combined with their stage of development and associated limited capacity to understand the law and make rational decisions, CYCJ believes that it is of fundamental importance that Scotland reviews the minimum age of criminal responsibility at the earliest opportunity. For too long we have been labelling some of our most vulnerable children as 'criminal', thus introducing further barriers for them to face, and preventing society from focusing on the wider issues contributing towards their actions.

The increase in the age of criminal responsibility to 12 was an important first step towards the ultimate, longer-term objective of moving to an age of criminal responsibility that takes into account capacity beyond this age. This move would recognise that children develop at different rates, and particularly acknowledges that some children are victimised and in vulnerable situations, and are thus more likely to come into conflict with the law.

CYCJ is also mindful of the conclusions of the promise, which calls on Scotland to "aim for the age of minimum criminal responsibility to be brought in line with the most progressive global Governments alongside efforts to prevent criminalisation of all children" (Independent Care Review, 2020:91). In order to achieve this, a review of the 2019 Act should be undertaken at the earliest opportunity, particularly given that the UN Convention on the Rights of the Child revised their guidance on this issue, setting a minimum recommended age of at least 14. Importantly, the UN Committee went on to stress the need for member states to take note of recent scientific findings and consider a minimum age of 15 or 16 years. By not taking every opportunity to review this situation, Scotland is falling behind the international standards that we seek to uphold, whilst hundreds of children each year are needlessly being responded to through a criminal justice mechanism. This can have negative outcomes for those children.

Delays in implementing the 2019 Act led to commencement of certain parts of that Act not being achieved until December 2021. Whilst this has resulted in a shortage of data regarding the operational elements of the Act, it may be the case that this can be captured in time for a review of the 2019 Act to take place sooner than the proposed date of December 2024. Scotland's children ought not suffer due to the slow progress of legislative change, nor should Scotland's commitment to achieving the conclusions outlined within the promise be allowed to waiver.

Scotland's progress towards implementation of the UN Convention on the Rights of the Child, and path towards becoming a rights-respecting nation, is obstructed by its low age of criminal responsibility. The age of 12 is not only below international standards but fails to respect children's human rights. Arguably there is much within the Beijing, Riyadh and Havana agreements which can be more closely endorsed by reviewing - and thereafter amending - the current position, and thus an earlier review is necessary.

In the absence of substantial data gathered since December 2021, CYCJ suggests that the wealth of evidence that was provided during the consultation and planning stages of the 2019 Act should be revisited. Furthermore, the fact that since December 2021 there have been no 'ACR interviews' undertaken for children under the age of 12 should be taken as evidence that the procedures introduced at that time have been successful in responding to the needs of children. As such, it ought to give Scotland greater confidence that any further increase could be undertaken without significant stress upon police and social work partners.

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

Proposals to share information regarding children who have caused harm with the person who has been harmed pose a degree of concern and must only be taken forward if strict adherence to human rights and data protection measures are followed and only where there is a legal justification to do so. Clear guidance will be required to ensure any changes to what information may be shared has appropriate oversight, review and recording mechanisms. This will ensure reasons for sharing justifiable, and only appropriate and proportionate, information. Even then, sharing of information must only take place if the high threshold outlined within this response has been satisfied. Upon the conclusion of matters the sharing of information should end, and the privacy of all parties respected.

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

This Bill has the potential to significantly change the manner in which children who come into conflict with the law are dealt with by the state and other corporate parents. Children do not currently enjoy the full spectrum of their human rights when they have come into conflict with the law, and there is a risk that this will continue to be the case should this Bill not take sufficient strides forward. The spirit and ethos of the consultation is promising; however the implementation of the Bill is essential in achieving the ambition of making Scotland the best place in the world for children who come into conflict with the law.

Within the consultation there are a number of areas that give a degree of concern over their impact on children's rights. These have been alluded to within the response, however in summary they include the following:

Potential ***MRC netwidening*** is of concern should the Bill seek to extend the circumstances within which a child can be made subject to an MRC without appropriate safeguards in place. Whilst there are several benefits of this measure there is a possibility of children being pulled into this intervention unnecessarily - and thus experience a restriction of liberty - when their circumstances do not merit it. As we have noted within this submission, strict adherence to guidance which only permits use of MRCs where there is a risk of significant harm would be one way of remedying this concern.

Within the body of this submission we have alluded to concerns over inappropriate ***data sharing*** that may take place in light of proposals to inform those who have been harmed of the outcomes of Children's Hearings. To do so would impinge upon a child's right to privacy, and we therefore suggest that this ought only to occur when there are significant public protection issues relating to the individual with whom the information is being shared. It should not be routine, it should be monitored and distinct limitations on the sharing of this information must be enforced.

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

Those considering the future provisions for children who come into conflict with the law ought to be mindful of the institutional inequalities which are woven into the justice system. This results in an over representation of individuals with particular needs and vulnerabilities requiring support from justice organisations, social work and secure care. For example, research shows that there are significant numbers of children and young people within custodial settings who have experienced substantial levels of bereavement (Vaswani, 2014), whilst Moodie and Nolan (2016) highlight the unnecessary criminalisation of children in residential care settings. Gibson (2021) demonstrates that children within the secure estate have experienced multiple layers of disadvantage, including mass exposure to Adverse Childhood Experiences and high rates of poverty. Finally, CYCJ (2021) notes the range of intrinsic barriers that prevent young people from marginalised groups from stepping away from conflict with the law.

With that in mind, this Bill should consider the nature and profile of those children who are more likely to come into conflict with the law and use this Bill and an opportunity to address the underlying factors which precipitate contact with the justice systems.