

Children (Care and Justice) (Scotland) Bill Stage 3 briefing

April 2024

Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

The Commissioner is fully independent of the Scottish Government.

We support the Children (Care and Justice) (Scotland) Bill, which represents significant progress of the realisation of children's rights in Scotland.

Measures within this Bill will further protect the rights of some of the most vulnerable children in Scotland – those who are referred to a Children's Hearing and the very small number of children who are placed in secure care.

The Bill also ends the imprisonment of children in Scotland.

Whilst much of the debate on this Bill has focussed on children in conflict with the law, we would like to highlight that the Bill also provides for children aged 16 and 17 to be referred to a Children's Hearing on care and protection grounds. Indeed, in their evidence to Committee, Children's Hearings Scotland stated that they expect the majority of new referrals for 16 and 17 year olds to be on care and protection grounds¹. Likewise, the majority of children in secure care are placed there either because they are at risk of harming themselves or at risk of harm in the community².

We ask MSPs to support this Bill.

We previously provided the Education, Children and Young People Committee with Stage 1 evidence and produced briefings ahead of Stage 1 and Stage 2 consideration.

Group 1: Rights and welfare of children

Support	Oppose	No position
45, 63-67	47	40, 43, 84

We welcome amendment **45** which requires the government to commence section 3 of the Children (Scotland) Act 2020 within 6 months of this Bill being given royal assent. Section 3 of the 2020 Act strengthens children's rights to participate in children's hearings. We should not be in a position where additional legislation is required to bring this into force.

¹ Children's Hearings Scotland, 2023. *Response to Call for Views, Children (Care and Justice) (Scotland) Bill*
https://yourviews.parliament.scot/ecyp/Ofd30086/consultation/view_respondent?uuld=870836825

² Care Inspectorate, 2023. *Secure care pathway review*. p46.
https://www.careinspectorate.com/images/documents/Secure_care_pathway_review_2023.pdf

Amendments **63 to 67** require the court to consider the rights and welfare of the child before they are removed from the court. It also ensures consideration of the child's views if there is a need to do so.

We recognise and share the concerns that give rise to amendment **47**, which deals with children who do not meet the threshold for a Compulsory Supervision Order. However, the amendment as drafted duplicates the existing role of public authorities under GIRFEC and it may disproportionately interfere with the rights of the child.

Group 2: Meaning of “child”

Support	Oppose	No position
	41, 50-53, 59-62, 69-79, 83, 90-97	

We oppose **all** amendments in this group.

These amendments are contrary to the general principles of the Bill as agreed by Parliament at Stage 1 and are incompatible with the UNCRC.

In their Stage 1 report on this Bill, the Education Children and Young People Committee noted that the Scottish Government had stated that the main objective of this Bill is to:

“Improve experiences and promote and advance outcomes for children, particularly those who come into contact with care and justice services. Building on Scotland’s progressive approach to children’s rights in line with the UNCRC, the Bill’s provisions aim to increase safeguards and support, especially to those who may need legal measures to secure their wellbeing and safety.”

In addition, in their conclusion, this Committee stated that it:

“acknowledges that, in order to be compliant with UNCRC, any young person up to the age of 18, who is accused of an offence, should have access to age-appropriate justice.”

And that

“The Committee requests that the Scottish Government urgently addresses these concerns to ensure that all under 18s in Scotland have access to age-appropriate justice.”

These amendments are therefore incompatible with the recommendations of the Committee at Stage 1.

Group 3: Children’s hearings system: ways of working and training

Support	Oppose	No position
		42, 44, 46, 57

We recognise and share the concerns that give rise to amendments **42, 44, 46** and **57**, but we acknowledge they are arguably already covered by existing frameworks, including GIRFEC, or those which will be required by UNCRC incorporation.

Group 4: Compulsory supervision orders

Support	Oppose	No position
	2	

We oppose amendment **2**. This amendment is contrary to the welfare-based approach at the heart of the Kilbrandon Principles. It would result in increased criminalisation of already vulnerable children, despite the significant evidence that doing so only increases the chances of re-offending and thus of further harm.

Group 5: Children's hearings system: victim information

Support	Oppose	No position
3 – 7		

See comments below.

Group 6: Children's hearings system: victim support

Support	Oppose	No position
8 – 23	24	48

We support Willie Rennie's amendments **3 to 18** and **21 to 23** and the associated amendments **19** and **20**. These amendments represent an improvement to the Bill as passed at Stage 2, in particular by removing provisions which would have significantly interfered with the rights of children in conflict with the law. We welcome the clarification in amendment 5 making it clear that information necessary to assist with safety planning may be shared.

We remain concerned that there may be the potential for information to be shared without meeting the human rights tests of proportionality and necessity and that it may not be clear that this information must always be shared confidentially. We ask that this be further clarified in guidance.

We oppose amendment **24**. Notwithstanding the unrealistic timetable of the review, subsection 3 is excessively restrictive and does not reflect either current or best practice within Children's Hearings.

We note the Principal Reporter has already commissioned research into the experiences of victims within the Children's Hearings system.

Group 7: Publishing and reporting restrictions

Support	Oppose	No position
	25, 26, 27, 38, 49	

Although we cannot support amendment **25, 26, 27** and **38**, which remove important human rights protections for children involved in Children's Hearings (including for victims and witnesses), we understand why this was felt necessary in the absence of a s104 order from the UK Government.

Removal of these sections does not impact our support for the Bill as a whole.

We oppose amendment **49**. Our view is that Scottish Ministers should not have the power to dispense with reporting restrictions in any circumstances and we supported the remove of this power in the Bill as originally published.

Group 8: Children's hearings system: victims' views

Support	Oppose	No position
	58, 68	

We oppose both amendments **58** and **68**, which would require Children Hearings to consider the views of a "victim".

Our view is that these amendments have the potential to undermine the paramountcy of the best interests of the child who is the subject of a hearing. This is a fundamental principle within Children's Hearings.

These amendments also risk creating an expectation from victims that such a statement would influence the decision of the panel. This cannot be delivered within the Kilbrandon Principles.

Scope already exists for the impact of the child's behaviour on others to form part of professional reports.

Group 9: Legal aid

Support	Oppose	No position
54 – 56		

We support amendments **54 to 56** from Pam Duncan-Glancy, which extend availability of Legal Aid to children within the Children's Hearings system.

We have consistently called for extension of legal aid to children in all circumstances and the UN Committee on the Rights of the Child has made a number of recommendations to this effect, most recently in their 2023 Concluding Observations. We have come across situations where a child has not understood that accepting s67(2)(j) grounds results in them effectively having a conviction on their PVG record.

Group 10: Reporting requirements and information collection

Support	Oppose	No position
		80, 81, 85, 86

Group 11: Residential accommodation for children

Support	Oppose	No position
	29	1, 82

We oppose amendment **29**. This presumes that children who offend and children with welfare needs are different. The reality is that they are often the same group of children at different points of their journey and the interaction between offence and welfare grounds for many children is complex.

In fact, almost all children referred on offence grounds have been victims of crimes themselves. Many have experienced abuse, neglect or significant trauma. Conversely, children who have engaged in offending behaviour may ultimately be placed in secure care on welfare grounds, for example because of an insufficiency of evidence to establish offence grounds.

We assume that the purpose of amendment **82** is to ensure that children have access to the services listed, rather than placing a duty on secure accommodation services to provide them. These are duties which already lie with other public bodies and this amendment has the potential to create confusion. We therefore cannot support it.

Group 12: Minor and technical

Support	Oppose	No position
		28, 30, 31, 32, 37

Group 13: Cross-border placements

Support	Oppose	No position
33		

We support amendment **33**, which would require a review of cross-border placements. This has been an ongoing area of concern for our office and we are particularly concerned about children on Deprivation of Liberty Orders from the English High Court who have been placed outwith secure accommodation. We remain unconvinced that their human rights are being met in these placements.

Group 14: Decisions to prosecute children: UNCRC compatibility issues

Support	Oppose	No position
	34, 36, 39	

There has been limited consultation or opportunity for scrutiny of the purpose of these amendments. We are concerned that the UNCRC (Incorporation)(Scotland) Act is being amended before it is even in force.

While we oppose these amendments, the Bill as a whole still contains a number of important provisions for the advancement of children's rights.

Group 15: Resources for implementation of Act

Support	Oppose	No position
	88, 89	35, 87

We oppose amendments **88** and **89**. These would prevent any part of this Bill from being brought into force prior to a report on resourcing being laid in Parliament. This would prevent the immediate implementation of important measures to protect children's rights and further realise the UNCRC. In particular, our view is that the sections preventing any future imprisonment of children should be brought into force immediately following royal assent.

For further information, please contact Gina Wilson, Head of Strategy at gina.wilson@cypcs.org.uk