CHILDREN’S HEARINGS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Children’s Hearings (Scotland) Bill introduced in the Scottish Parliament on 23 February 2010. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 41–EN.

2. This Policy Memorandum is structured in four parts. The first provides the introduction, the policy context and the need for and objectives of reform. The second outlines the proposed new structural framework for the Children’s Hearings system. The third sets out the arrangements that will work within that new structural framework. The fourth relates to effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

PART ONE – POLICY CONTEXT, POLICY OBJECTIVES AND CONSULTATION

3. The Scottish Government is committed to improving outcomes for children and young people. We want our children to have the best start in life and to be ready to succeed. We want our young people to be successful learners, confident individuals, effective contributors and responsible citizens. We are committed to improving the life chances for children, young people and families at risk. We want to see strong, resilient communities where people take responsibility for their own actions and how they affect others. Delivering on these key national outcomes for children and young people will play an important role in delivering on the Government’s overarching purpose of creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth.

4. The Children’s Hearings (Scotland) Bill will underpin reform of the Children’s Hearings system – reform that provides the opportunity to improve the way we support our most vulnerable children and their families.

5. This reform of the Children’s Hearings system is one part of the Scottish Government’s work in relation to children and young people aimed at breaking Scotland’s historic cycles of poverty, under achievement and inequalities in health, income and outcomes. The Scottish Government has worked with partners to develop three inter-connecting and complementary
frameworks to tackle these challenges - *Achieving Our Potential*¹, *Equally Well*² and the *Early Years Framework*³. No matter where they live or whatever their needs, children, young people and their families should know where they can find help, what support might be available and whether it is the right support for them.

6. We are working in a range of ways to ensure that local professionals work together to meet the needs of children and young people at the earliest possible stage – so that only those who need compulsory measures of supervision to safeguard and promote their welfare come before a children’s hearing.

7. Through the *Early Years Framework*⁴, we have established a vision for a 10 year programme of transformational change in Scotland to give all our children the best start in life and to tackle, at the earliest possible point, the disadvantage and adversity that some children face. We are supporting this through the national roll-out of *Getting it Right for Every Child*⁵ which promotes business, practice and culture change so that agencies and professionals can work effectively together. This promotes a child centred approach at every stage of a child and young person’s development. It threads through all services and seeks to establish a shared understanding and common language so that everyone is clear what needs to be done and who will do it and that children and young people will be involved at every stage in the decisions that affect them. Integral to this approach is an understanding and promotion of the rights of each individual child and young person, including their right to take part in any decisions affecting them.

8. *Getting it Right for Every Child* embeds a consistent, personalised, holistic, timely and effective approach to meeting children’s needs with a focus on early intervention. For the majority of children this will be enough to meet their needs and should ensure that only those whose needs are greater and require extra support through compulsory measures of supervision are referred to the Hearings system. This will enable the Children’s Hearings system to concentrate its resources and expertise to best effect.

**The Children’s Hearings system and the need for reform**

9. The Children’s Hearings system is well regarded both within Scotland and further afield. For example, whenever there are debates in the Scottish Parliament on the Hearings system or related issues MSPs, almost without exception, highlight their support for the system and the principles that underpin it. Guernsey has recently put in place the Child Youth & Community Tribunal, based on the Children’s Hearings system, for dealing with children and young people in need.

10. We must have a Children’s Hearings system that is capable of dealing with the challenges presented today and in the future – challenges such as the large growth in the number of children

⁵ [http://www.scotland.gov.uk/Publications/2008/09/22091734/5](http://www.scotland.gov.uk/Publications/2008/09/22091734/5)
needing care and protection as well as the need to deal with offending behaviour by young people; itself a symptom of the social fragmentation bred by disadvantage and deprivation.

11. We need a Hearings system that has children and young people at its centre and which promotes and supports their welfare and their rights. The Scottish Government is committed to the United Nations Convention on the Rights of the Child (UNCRC) and to promoting and supporting the rights of children in Scotland. To that end, we want a Hearings system that:

- has the child’s best interests as its paramount consideration;
- allows and encourages effective participation by the child;
- lets children have their say on issues which affect them and have their views heard by panel members trained to the highest standards;
- gives children the right to see relevant papers;
- gives children, in particular situations of risk, a limited right of privacy in their discussion with panel members when that is needed and appropriate; and
- gives children a fair hearing, including when it appears that they have committed an offence.

12. The philosophy and principles of the Children’s Hearings system were established over 40 years ago in the Kilbrandon Report of 1964. That philosophy and those principles remain as true today as they did when the Report was published:

- the welfare principle;
- the consideration of needs alongside deeds;
- the appropriate forum of the hearing as the best place to make decisions on compulsory measures of supervision intended to support children through difficult times; and,
- the imperative of the involvement of the child in discussions.

13. It is these principles that make the system unique, such as the way the system considers all those who come within it, either on welfare or offending grounds, as being children in need and facing risks either from their own behaviour or the behaviour of others. The changes to the Hearings system proposed in the Bill are designed to protect those principles at the same time as modernising and strengthening the system to enable it to continue to work well both now and in the future.

14. Kilbrandon provided a visionary and influential approach. Set in the context of Scottish society in 1964, the Report was many years ahead of its time in proposing a system that takes a holistic approach to meeting the needs of vulnerable children. Times have changed. The principle of a welfare-based approach is now well established and there have been considerable changes in society, in political structures and in the ways that agencies work with each other including the extension of the principles to all children under the Getting it Right for Every Child approach. It is right that the Children’s Hearings system evolves to adapt to these changes without losing the vision and philosophy of Kilbrandon.
15. There has also been recognition for a number of years now, including among the Hearings system’s strongest supporters that it is not working as effectively as it might or should. Key concerns include: inconsistency within the Hearings system; the high volume of referrals to the Principal Reporter in recent years; limited opportunity for the child to participate effectively; the lack of adequate monitoring of the implementation of hearing decisions and their outcomes; and the potential for challenges to the system under the European Convention on Human Rights (ECHR).

16. Moving forward, children and young people in Scotland need a system which:
   - meets their needs;
   - builds on the key principles of Kilbrandon;
   - retains the welfare based approach at its heart;
   - reflects Scotland’s commitment to the UNCRC; and,
   - is robust against future legal challenge.

Policy objectives of the Bill

17. So in bringing forward a Bill and wider reforms to strengthen and modernise the Hearings system and secure better outcomes for children we are looking to put in place a system which provides:
   - children’s rights at the heart of the system – by giving them the right to see relevant papers and information about their case and ensuring they have the support they need to participate effectively in the Hearings system and have a voice during hearings;
   - more modern grounds for referral – that will ensure that only those children who need compulsory measures of supervision will be referred to a hearing;
   - improved consistency – by introducing a single national Children’s Panel with national recruitment and training, better support for panel members and a clearer statutory framework around the work of the Principal Reporter;
   - a stronger system – by supporting the independence of panel members, ensuring they have the training, support and advice they need to take decisions in the best interests of the child and giving panel members reassurance that their decisions will be acted upon;
   - improved efficiency and protection – through the introduction of procedural changes such as interim compulsory supervision orders.

18. The Bill proposes a system which retains the key fundamental principles of Kilbrandon and which will help ensure we improve the life chances of Scotland’s most vulnerable children and families. The Bill provides for a dedicated national body, Children’s Hearings Scotland. Children’s Hearings Scotland will: undertake functions associated with the recruitment, selection, training, retention and support of panel members; quality assure hearings and processes; provide independent advice to children’s hearings; monitor panel members; and act as advocate for the Children’s Panel. This will result in panel members being better equipped to
determine the best possible outcomes for children in hearings no matter where the child lives in Scotland.

19. The Bill and related secondary legislation, guidance and practice change will strengthen the Children’s Hearings system by:
   - increasing the capacity of the Children’s Panel, through improved and consistent recruitment, selection, training and continuing support of panel members;
   - re-asserting the independence of panel members as key decision makers;
   - retaining a strong local element to the system within a consistent national framework; and
   - clarifying the role of the Principal Reporter by ensuring the necessary separation of functions is both real and perceived to be real.

20. The Bill will allow for the establishment of area support teams, under the direction of the National Convener, that will support the Hearings system at local level and help ensure consistency of practice across the country. The current statutory requirement for there to be 32 separately-constituted children’s panels and for the establishment of Children’s Panel Advisory Committees (CPACs) will be removed. To help ensure that consistency, national criteria will be used for the recruitment and selection of panel members and in the re-appointment and monitoring of panel members. Standardised access to training will be provided to panel members across Scotland. Both CPAC members and panel members have expressed concern at the difference in practice, especially in respect to training and have expressed a wish for a more consistent approach.

21. The existing children’s panels will be replaced by a single national Children’s Panel, comprising volunteers from local communities who will continue to be recruited and sit as panel members for hearings in their local communities. Children’s Hearings Scotland will, through the area support teams, work closely with local authorities to provide support to ensure that all children’s hearings make nationally consistent and high quality decisions in relation to children and young people.

22. As well as the policy on reforms, the Bill:
   - substantially re-states current primary legislation that is applicable to the Children’s Hearings system and brings this together within one cohesive Act for the first time, thus providing a clear legislative framework under which the Children’s Hearings system will operate;
   - sets out the functions of the Scottish Children’s Reporter Administration (SCRA) and the Principal Reporter;
   - replaces the “interim” legal representation scheme, with a permanent scheme that will see legal representation for children and relevant persons available through the normal civil legal aid system as administered by the Scottish Legal Aid Board;
   - introduces a Ministerial power to prescribe the procedure which the Chief Social Worker/Head of Unit have to follow in applying their discretion to place a young
person in secure care and to provide for the right of appeal against their decisions; and

- delivers improvements to the Vulnerable Witnesses (Scotland) Act 2004 relating to children’s hearings court processes.

Consultation

Previous consultations

23. Reform of the Children’s Hearings system was the subject of three consultations prior to May 2007: Getting it Right for Every Child: Review of the Children’s Hearings system in 2004⁶; Getting it Right for Every Child: proposals for action in June 2005⁷; and the draft Children’s Services Bill published in December 2006⁸, though not introduced to Parliament.

24. In January 2008, Scottish Ministers announced plans to meet a manifesto commitment to reform and strengthen the Children’s Hearings system. At that time, it was intended to establish one national body to undertake functions currently delivered by SCRA, the children’s panels located in 32 local authorities and CPACs. The proposals were contained within a fourth consultation, Strengthening for the Future⁹, which ran from 31 July to 24 October 2008.

Draft Children’s Hearings (Scotland) Bill¹⁰

25. The proposals in Strengthening for the Future were revised following consultation responses which indicated a strong resistance to the establishment of one national body. These revised proposals formed the draft Bill which was published for consultation in June 2009¹¹. The draft Bill proposed that SCRA should continue to deliver the children’s reporter service; and a new body, the Scottish Children’s Hearings Tribunal (SCHT) would be responsible for the functions associated with the children’s panel, including recruitment, selection and training of panel members. The draft Bill sought to clarify the roles and functions of all players in the system and to illustrate clear separation and independence of decision-making processes between the two national bodies.

26. From June 2009 to January 2010, Ministers and officials engaged with a wide range of stakeholders across the country on this draft Bill, by:

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⁶ http://www.scotland.gov.uk/Publications/2004/04/19283/36191
http://www.scotland.gov.uk/Publications/2004/10/20021/44103
http://www.scotland.gov.uk/Publications/2004/10/20020/44101
⁷ http://www.scotland.gov.uk/Publications/2005/06/20135608/56098
http://www.scotland.gov.uk/Publications/2006/03/13105254/0
http://www.scotland.gov.uk/Publications/2006/03/13105643/0
http://www.scotland.gov.uk/Publications/2006/03/13104913/0
⁸ http://www.scotland.gov.uk/Publications/2006/12/18140606/6
http://www.scotland.gov.uk/Publications/2007/10/01140120/0
http://www.scotland.gov.uk/Publications/2007/10/01140205/0
⁹ http://www.scotland.gov.uk/Publications/2008/08/01110537/0
¹⁰ http://www.scotland.gov.uk/Publications/2009/06/29113351/0
¹¹ http://sh45inta/Topics/People/Young-People/c-h-bill/Consultation/ResponseOverview#top
http://sh45inta/Topics/People/Young-People/c-h-bill/Consultation/ResponseTable-1#top
holding around 100 separate engagements across the country. These included working group meetings, briefing sessions at panel member training and attending seminars and workshops;

holding a series of one-to-one meetings to ensure that each of our key stakeholder groups had the opportunity to discuss their areas of particular interest;

engaging with the Scottish Parliament by holding a briefing session with the Education, Lifelong Learning and Culture Committee, participating in a variety of Parliamentary receptions, speaking about the Bill at the Cross-Party Group on Children and Young People and inviting MSPs to seek the views of their constituents on the Government’s proposals;

Ministers participating in a number of conferences and lectures in order to engage with as wide an audience as possible. These included the Holyrood conference on reform of the Children’s Hearings system (October 2009), the 9th Kilbrandon Biennial Lecture hosted by Glasgow University and other partners (November 2009) and Action for Children’s Where’s Kilbrandon Now seminar (November 2009); and

holding a series of briefing events in January 2010 to help those involved in the Children’s Hearings system to better understand the proposals in the Bill.

All of this work helped shape the Bill as introduced to the Parliament.

Short life working groups

In order to involve as many stakeholders as possible in the shaping of the Bill to be introduced in the Parliament, the Children’s Hearings Reform Strategic Project Board, chaired by the Minister for Children and Early Years, set up a number of working groups to develop detailed proposals on a number of key issues for the Bill, as well as on wider implementation issues. Membership of the Strategic Project Board comprises the Scottish Children’s Reporter Administration (SCRA), the Convention of Scottish Local Authorities (CoSLA), the Association of Directors of Education in Scotland (ADES), the Scottish Administrative Justice & Tribunals Council (AJTC), the Association of Directors of Social Work (ADSW), the Association of Chief Police Officers in Scotland (ACPOS), the Children’s Panel Chairmen’s Group (CPCG), the Children’s Panel Advisory Group (CPAG) and the Scottish Association of Children’s Panels (SACP).

The five working groups12 (Bill, this was a ‘virtual’ group, Child at the Centre, Implementation, Organisational Support and Training) made a series of recommendations, and identified areas for ongoing discussion for Scottish Ministers, which have either been taken into consideration for the drafting of this Bill or, where appropriate, will be considered as secondary legislation, guidance and/or practice change are developed. Some of the main discussion and recommendations from these working groups included matters such as advocacy for children in hearings (Child at the Centre), how support to hearings should be provided (Organisational Support) and the training provision, materials and timescales required to implement the new system (Training), for example.

http://sh45inta/Topics/People/Young-People/c-h-bill/WrkGrps
Outcome of consultation

30. The Government’s thinking has progressed significantly as a result of this engagement process and the Bill on introduction is quite different to the draft Bill published in June 2009. Further details relating to the outcomes of consultation, and to alternative approaches considered, are given in relation to each specific topic in the next two parts of this document. Unless information on the outcome of that consultation is noted, there were no significant comments received.

31. Following stakeholder consensus on a number of key issues, some of the main changes made to the Bill include:

- a continuing presence of the children’s reporter in hearings and a role for the reporter to arrange hearings, issue papers and conduct appeals before the sheriff;
- the inclusion of a role for local authorities in supporting the system to maintain local links;
- re-ordered and modernised grounds for referral; and
- the introduction of a feedback mechanism in order to promote accountability and to better understand the outcomes of disposals reached by hearings.

PART TWO – REVISED STRUCTURE OF THE CHILDREN’S HEARINGS SYSTEM

32. This part of the Policy Memorandum sets out how the Bill and wider reforms will strengthen the place of the child at the centre of the Children’s Hearings system. It also sets out the structural framework for the Children’s Hearings system and the key players who will work within the system and/or support it.

The child at the centre

Policy objective

33. Improving outcomes for children is the key driver for the Bill and wider reforms. The new arrangements must have the child and their rights and welfare at the centre. The Scottish Government has made clear its commitment to the UNCRC and to promoting and supporting the rights of children in Scotland. The UNCRC does not have the same status in domestic law as ECHR and is not therefore legally binding domestically. There is however already a legislative basis for the underlying principles of the UNCRC in individual pieces of legislation, for example in parts of the Children (Scotland) Act 1995 (“the 1995 Act”).

Key information

34. A short life working group was established to put forward proposals for strengthening the place of the child at the centre of the Hearings system. The group produced a number of recommendations that have informed the Bill and wider reforms.

35. Part 3 of the Bill sets out “General considerations” with regard to the welfare, interests and views of children that hearings and courts must take into account in reaching decisions about
children. Taken together they will help ensure the child’s best interests are central to the ethos and day-to-day operation of the Children’s Hearings system.

Welfare principle

36. The welfare principle underpins everything that a children’s hearing does. Section 24 provides that in taking decisions in relation to a child, children’s hearings and courts must have the welfare of the child as their paramount consideration. This restates provisions from the 1995 Act. The only exception to the welfare principle is section 25 which provides for when a hearing or court considers that public protection must also be taken into account in reaching a decision about a child. Again this is a restatement from the 1995 Act. In addition, the Bill reflects Article 3 of UNCRC by providing that when reaching a decision under section 25 the child’s welfare must be “a primary consideration”.

Voice of the child

37. In keeping with Article 12 of UNCRC, the Bill provides for the voice of the child to be heard in the Children’s Hearings system. Decisions reached by children’s hearings and sheriffs have a significant impact on the life of the children involved and it is only right that in these circumstances, children of all ages have the opportunity to express his or her views prior to any decisions being reached. Section 26 provides for this to happen wherever practicable taking account of the age and maturity of the child. This section is largely a restatement from the 1995 Act, and includes a presumption that all children over 12 are sufficiently mature to form a view.

38. While the Bill provides a framework for hearing their views, experience has shown that children do not always feel comfortable speaking at a hearing. Current legislation provides for children to bring a representative of their choice with them to a hearing or to court and the Bill will continue this provision to the new arrangements. There is no reason why this person could not be someone to help or support them to have their say or to advocate on their behalf. There is at present no consensus on how that support could best be provided and the Scottish Government will continue to explore possible solutions to ensure that any child who wants it can get the help and support he or she needs to participate in the hearings process and to have their voices heard. Advocacy support is distinct from the state-funded legal representation that is available to children and young people in the Hearings system, in certain circumstances.

No-order principle

39. Another fundamental principle of the Children’s Hearings system is the “no-order” principle – that measures should only be put in place if that is better for the child than taking no action. Sections 27 and 28 provide for the no-order principle to apply when children’s hearings and sheriffs are making decisions about whether a child should be subject to compulsory measures.

Safeguarders

40. Current legislation provides that in order to ensure a child’s best interests are properly protected during its considerations, children’s hearings may appoint a safeguarder for the child. Section 29 of the Bill restates that provision. Safeguarders will continue to play an important role in the Hearings system – not withstanding any subsequent arrangements for advocacy
support. Protecting the interests of children can be very different to helping them to have their say.

**Alternative approaches**

41. None. Putting the child at the centre of the Hearings system and promoting and supporting their rights and welfare are fundamental to the reforms and the proposed new arrangements.

**Consultation**

42. There has been overwhelming support from stakeholders throughout the consultation process for the welfare principle and for putting the child at the centre of the Hearings system.

**Access to papers for children**

**Policy objective**

43. To strengthen children’s rights by providing a framework for a statutory right of access to papers for children.

**Key information**

44. Section 26 of the Bill provides that a children’s hearing must take account of the child’s view. Children should be encouraged and supported to participate fully in their hearing but they may not be able to participate as effectively as they might if they do not have access to the same information provided to others at the hearing.

45. Following the ‘S’ v Miller case in 2002, SCRA introduced a non-statutory scheme which provided that children over the age of 12 automatically receive the same reports as panel members and relevant persons, subject to certain exceptions, for example where releasing the information to the child would put the child’s welfare at risk. Children between 8 and 12 may receive reports: a) where the child or his/her adult representative requests the papers, subject to exceptions; or b) if report writers express the view that it is in the child’s interests to receive them. However, children have no statutory right of access to the reports – unlike relevant persons e.g. their parents.

46. Section 170 of the Bill provides sufficient enabling powers for the Scottish Ministers to legislate for this in secondary legislation following the Bill’s passage. This secondary legislation can cover the procedure of children’s hearings, taking account of new parties and roles, and providing children with a statutory right of access to relevant papers that will operate broadly in the same way as the administrative scheme currently operated by SCRA. More detail regarding the section 170 enabling power can be found in the Delegated Powers Memorandum to the Bill.

47. As with current SCRA guidance and practice, the new secondary legislation will strike a balance between the rights of the child to information about themselves and their own welfare – for example, non-disclosure where releasing information to the child would place the child’s welfare at risk.
48. Information for children and young people should be presented in an accessible and appropriate way – and that can mean different things for each child and young person. The role of presenting information to the child can be performed by a variety of suitable people; for example a parent, social worker or safeguarder.

**Alternative approaches**

49. Consideration was given to including the right for children to receive papers on the face of the Bill. The draft Bill proposed to transfer responsibility for notification of children’s hearings and the provision of documents to the then “president” of the new body and it made sense to provide for a statutory right of access to papers for children as part of those new provisions. Following the decision that the Principal Reporter should retain responsibility for the notification of children’s hearings, the Government considered that the policy objective did not require primary legislation and could be more appropriately achieved by secondary legislation on the provision of documents to panel members, relevant persons and children.

**Consultation**

50. We sought views in *Strengthening for the Future* on whether to give children a statutory right of access to papers – 96% of respondents expressed support for the proposal. Comments included a strong consensus that children should have a statutory right of access to papers (because children can only participate effectively in hearings if they have access to appropriate information) and an equally strong consensus that this right should be fettered according to the child’s maturity.

51. Responses to the June 2009 draft Bill also showed strong support for a statutory right of access to papers for children, with the caveat that papers should be fettered according to the maturity and welfare of the child.

**New structural framework: introduction**

52. Parts 1, 2 and 4 and schedules 1 to 3 of the Bill set out the new structural framework for the Children’s Hearings system, in particular Part 1 contains legislative provision to implement a number of the structural changes needed for reform. The Bill provides for and sets out the functions of:

- the National Convener;
- Children’s Hearings Scotland;
- area support teams;
- the Principal Reporter;
- the Scottish Children’s Reporter Administration;
- the Children’s Panel;
- panel members;
- safeguarders;
- Scottish Ministers; and
local government.

The commentary below sets out the rationale and policy objectives for each of these provisions, other options considered and relevant consultation.

The National Convener

Section 1 provides for the creation of a principal officer of Children’s Hearings Scotland, the National Convener, who will operate independently to ensure that statutory functions around the work of the Children’s Hearings system are carried out to a high standard.

Policy objective

To provide independent and consistent national leadership and ensure that children and young people who attend children’s hearings receive consistently high quality decisions which deliver improved outcomes for them.

Key information

Currently, the management of and support for panel members is spread across local authorities who have responsibility for the establishment of a children’s panel for their area. Under the 1995 Act, Scottish Ministers have responsibility for the formal appointment of panel members, but the processes and criteria used at local level to recruit panel members vary across the country, as do the monitoring and re-appointment approaches. It can also be the case that procedures followed within a hearing can vary. It is clear from what panel members say that they currently receive a variable standard of support from local authorities and that this impacts directly on their sense of the value they are adding.

Section 1 of the Bill provides for the establishment of the post of National Convener of Children’s Hearings Scotland. The first National Convener will be appointed by Ministers. Subsequent appointments will be made by the Board of Children’s Hearings Scotland with the approval of Scottish Ministers. The Bill will provide for appointments of five years. The National Convener will be a figurehead for the Children’s Hearings system and will need to have appropriate skills, understanding and experience to carry out that role effectively. Schedule 1, paragraph 8(5) of the Bill gives Ministers the power to prescribe the qualifications that the National Convener must hold.

The National Convener will have responsibility for the support, selection and training of panel members using nationally agreed standards. They will also take responsibility for the development and implementation of a framework of practice for panel members and quality assurance of panel member performance. It is expected that the National Convener will make decisions on standards in consultation with stakeholders involved in the Children’s Hearings system, taking account of and building on current best practice. Children and families appearing before a children’s hearing need to have confidence that panel members are recruited, trained and supported to the very highest standard and are able to take the very highest quality decisions.
59. The National Convener will provide leadership and direction for the Children’s Panel and will work with partners in the system and agree with them how best to continuously improve the Children’s Panel to achieve best outcomes for children.

60. An example of this is in the National Convener’s work with local authorities with whom he/she will be expected to build positive and robust relationships. Section 173 of the Bill places a duty on local authorities to report on their response to decisions made by children’s hearings, and that the National Convener should convey this information to panel members. At present, panel members rarely know what happens after they make a supervision requirement. Having this information will allow them to better understand what types of supervision have proved effective and which in turn could help inform future decision-making and thus achieve better outcomes for children. This feedback loop will also allow the National Convener to identify areas of good practice around the country which can be shared more widely.

61. The National Convener will also assume the current functions of Scottish Government in the appointment of members to the national panel and in running a national training programme. The quality of training is crucial in moving forward with this reform agenda. It is vital that all panel members across Scotland have access to the same level and quality of training, that the training is fit for purpose and is responsive to emerging needs. Current training is generally of a high quality but there is still room for improvement. Training opportunities can also vary across the country, and while localised training will remain an important part of a panel member’s training programme, all panel members will have equitable access to training which will be consistently delivered across Scotland to agreed standards, will be evaluated, and will have its effect on practice understood.

62. To help ensure both the actual and perceived appearance of independence, section 9 of the Bill provides for the National Convener to be responsible for the provision of independent advice to the hearing, in particular: legal advice; procedural advice; advice about the consequences of decisions of the children’s hearings; and advice about how decisions of children’s hearings are implemented. This ensures that the hearing does not rely on the Principal Reporter, or indeed, any legal representative that appears before it for advice. This support also ensures a fair hearing for all parties by ensuring that the hearing is properly equipped to consider submissions made by all parties.

63. The National Convener will have responsibility for ensuring that independent and reliable advice is available to every hearing when it is required. It is not anticipated that such advice will be required at every hearing. Advice could be provided in a number of ways: by the development of easily referenced written guidance based on case studies and situational scenarios; on-line advice; by telephone discussion; or in person by a legal adviser. We expect the need for such advice to diminish as improvements in the training of panel members take effect.

64. The National Convener will advocate for the Children’s Panel. Currently, panel members have no right of recourse if they are dissatisfied with any aspect of the Hearings system. The Bill enables the National Convener to put in place arrangements for the accountability of panel members and area support teams. This will help allow objective analysis of the effectiveness of
the system in improving outcomes for children, and help ensure that all children, no matter where they live, receive the same standard of service from the system.

65. The Bill confirms the independent status of the National Convener in carrying out his/her functions. This is necessary to ensure that independence of decision-making across the system is both real and perceived, and also ensures that the National Convener can provide independent national leadership and forge clear lines of accountability, for example, through the area support teams which will support panel members at local level.

66. The Bill provides Scottish Ministers with the power to remove or transfer functions of the National Convener and to specify the manner or period within which a function has to be performed. This power will not be used to influence individual decision-making by the National Convener. The power gives the Parliament the opportunity to consider proposals for organisational changes and respond quickly to issues such as duplication, bureaucracy and overlap without having to wait for a slot in the primary legislative programme. It will allow Parliament to make adjustments to the role of the National Convener subject to Parliamentary scrutiny and Parliamentary approval, through the affirmative procedure.

Alternative approaches

67. The 2004 consultation *Getting it Right for Every Child: Review of the Children’s Hearings system*, identified a need to improve the support arrangements for children’s panel members. *Getting it Right for Every Child: proposals for action* (June 2005) therefore contained two options for improving support within the Children’s Hearings system: a single national body; and a local authority regional structure which would possibly be co-terminus with the Community Justice Authorities. The supporting bodies would work to national standards for recruitment, monitoring and training. The standards would be statutory in nature and developed by the Scottish Government.

68. Having considered the responses to the consultation, Ministers decided to pursue the option of a single national body with a principal officer to act as a national figurehead for the Children’s Hearings system. Other options for leading the national body were considered, such as collective leadership arrangements, but these did not fully meet the policy objective of having a national advocate for the Children’s Panel and a figurehead for the system as a whole.

69. As indicated in paragraph 25 above, the idea of a single national body was ultimately rejected in favour of the current proposals following the *Strengthening for the Future* consultation. Ministers concluded that the different decision-making functions of the Hearings system should be independent from one another.

Consultation

70. Building on *Strengthening for the Future* and the responses to it, the Scottish Government published a draft Bill in June 2009 which announced the intention to bring forward proposals for two national bodies.

71. As outlined at paragraph 26, the Scottish Government then undertook an additional intensive period of engagement with stakeholders which identified some key important areas of
difference with partners, most notably around a large new role for the National Convener of Children’s Hearings Scotland and the proposed reduction in the role of the Principal Reporter. Ministers carefully considered the comments received on the draft Bill and decided to make a number of revisions, which make fewer changes to the role of the Principal Reporter, ie they will still arrange and attend hearings, and result in a consequential reduction in the functions of Children’s Hearings Scotland and the National Convener.

Children’s Hearings Scotland

Policy objective

72. To ensure services continue to be delivered locally but to national standards, thereby improving consistency, standards and effectiveness of hearings.

Key information

73. Section 2 of and schedule 1 to the Bill make provision to establish a new national body, Children’s Hearings Scotland, to support the national Children’s Panel.

74. The Bill provides for Children’s Hearings Scotland to be established as a non-departmental public body (NDPB) to ensure that the governance structure in place is publicly accountable for achieving improvements in the Children’s Hearings system. Children’s Hearings Scotland will be overseen by a management board of between 5 and 8 members, similar to the arrangements for SCRA, including a chairing member. Board members will be appointed by the Scottish Ministers through the public appointments process. There will be a principal officer, the National Convener. The Bill provides flexibility for the National Convener to also operate as chief executive officer of Children’s Hearing Scotland.

75. The key function of Children’s Hearings Scotland is to support the National Convener to carry out his/her statutory independent functions without influencing his/her professional judgements on the standards that are applicable in hearings and how these should be implemented and monitored. Children’s Hearings Scotland will have responsibility for ensuring that the business of the National Convener is managed effectively and efficiently.

76. Children’s Hearings Scotland will take responsibility for the functions currently undertaken by local authorities in respect of the 32 local children’s panels and 30 Children’s Panel Advisory Committees. It will be responsible for facilitating, in keeping with national standards set by the National Convener, the recruitment, training and quality assurance of the single, national Children’s Panel, through the work of the National Convener. The Bill enables close working with local authorities in taking forward those responsibilities.

77. Children’s Hearings Scotland may not interfere with the functions of the Children’s Panel. This is similar to the relationship between the Principal Reporter and SCRA and is necessary to ensure that the appropriate independence is observed.

78. Schedule 1 provides for the Board of Children’s Hearings Scotland to employ staff, including the office-holders, on terms and conditions to be approved by the Scottish Ministers. Children’s Hearings Scotland will also require back-office functions such as Human Resources,
Finance, IT, procurement etc. In the interests of efficient government, it is expected that these functions will form a platform of shared services with SCRA where no conflict of interest arises. The governance arrangements for Children’s Hearings Scotland mirror the governance framework for SCRA. They will have similar sponsorship arrangements. In the exercise of its statutory powers and functions Children’s Hearings Scotland will be required to co-operate with SCRA, the National Convener and the Principal Reporter where there is no conflict of interest (section 175).

Alternative approaches

Do nothing

79. The status quo will not deliver the policy objectives of the Bill, and previous attempts to standardise practice, standards and processes (through, for example, the Standardisation Working Group) have proved ineffective.

80. It has been widely acknowledged that the system currently suffers from a lack of accountability and also of understanding that the Children’s Hearings system is a national system of support for vulnerable children and young people that is delivered locally. This lack of clear accountability, particularly among those who manage key processes, is a significant hurdle to achieving the necessary consistency.

81. Schedule 1, paragraph 11 of the 1995 Act enables the payment of expenses to panel members and gives Ministers the power to determine the amounts payable. Currently, panel member expenses are set in the context of wider directions about local government expenses for councillors which set a maximum level of expenses for panel members. This in turn enables local authorities to vary the rates payable and has led to an unacceptable variety of practice, which can lead volunteers to be inadequately recompensed for expenses incurred in carrying out their voluntary role.

A single national body

82. In Strengthening for the Future, the Scottish Government proposed that a single national body should be established, and that this new body would facilitate the functions currently carried out by SCRA, local authorities, the Scottish Ministers, and safeguarders with appropriate firewalls to ensure clear independence of decision-making within the new organisation. Consultation responses strongly opposed this model with concern expressed about the weakening of the various independent decision making functions.

83. The Children’s Hearings system needs to be compliant with evolving human rights legislation. The European Convention on Human Rights very clearly sets out the requirements of due process which would protect human rights in any decision being made for/about an individual. These requirements include a need to ensure the clear independence, both real and perceived, of decision makers during judicial and quasi-judicial decision making processes. This perception is vital to children and families to ensure they have confidence that their circumstances are being fairly and objectively considered when a hearing is making a decision on the appropriate support that may be necessary.
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

A regional structure

84. Having considered responses to the 2005 Getting it Right for Every Child consultation, and following a detailed process of analysis and discussion with stakeholders, it was concluded that a regional structure would not necessarily achieve the improvements needed to uphold and strengthen the system. A regional approach would have required Scottish Ministers to determine which local authorities should be grouped together in order to provide consistent support to panel members. In the regional model, local authorities would need to enter into a mutual co-operation agreement in order to achieve the desired outcomes.

85. Scottish Ministers concluded that the delivery of support to volunteers should be local and flexible in nature, and provided by a national body which would also be responsible for ensuring high and consistent standards. It was on this basis that the consultation paper Strengthening for the Future was developed.

Consultation

86. Alongside discussion on the overall structure, a great deal of time has been spent discussing with key partners and stakeholders how Children’s Hearings Scotland can best deliver support to panel members. The Scottish Government is committed to retaining, and where possible, improving local links through the provision in the Bill for area support teams in Schedule 1.

Area support teams

Policy objective

87. To provide standardised local support for panel members and maintain a link with local authorities.

Key information

88. Under current arrangements local authorities have a local children’s panel and a Children’s Panel Advisory Committee (CPAC).

89. Schedule 1 provides for the functions currently carried out by CPACs and local panel chairs to be carried out by the National Convener. Schedule 1, paragraph 13 provides for the National Convener to delegate functions to area support teams to maintain links with local communities and provide local support for panel members. Schedule 1, paragraphs 12-13 provide for the establishment, membership and functions of area support teams.

90. The Bill enables close interaction between the National Convener and local authorities and for local authorities to continue to provide local support for the Hearings system such as office space, clerical support and involvement in local recruitment.

91. The Bill gives the National Convener a statutory duty to consult with local authorities on the establishment of area support teams in relation to their location and functions. Local authorities will also be able to nominate people as members of area support teams. This will
help facilitate continuous engagement between the National Convener, local authorities, panel members and SCRA and to help determine and achieve standards.

92. The Bill enables area support teams to be staffed by a combination of paid staff and volunteers which mirrors current arrangements whereby volunteers (currently CPACs) are supported by local authority clerks. It is clear that there are advantages to the Children’s Hearings system in retaining the experience, knowledge and commitment of volunteers within a more structured system of standardisation.

93. It is envisaged that the selection of members to form individual hearings will be delegated by the National Convener to the appropriate area support team. This will help ensure against any risk that the National Convener may seek to influence the performance of members through rota management of panel members for hearings.

Alternative approaches

94. Ministers considered a different model for local support put forward by Cosla following publication of the draft Bill. This model similarly proposed a national body and a national children’s panel but with local authorities having responsibility for the delivery of local support.

95. The Cosla model proposed local support for the Hearings system coming from Committees based within local authorities but established separately to services such as education and social work to ensure independence of decision making. Committees would comprise a majority of lay volunteers and some elected members and would have responsibility for structuring children’s hearings within the local authority, the appointment of panel members to the national panel and the training and management of panel members locally.

96. There would be no barriers to local authorities sharing committees and the number and location of Committees would be decided by local authorities. Guidance would be used to promote the shared service approach and encourage local authorities to do whatever is necessary to ensure effective and cost efficient practice.

97. Performance of these local committees would be monitored by local authority senior management. Children’s Hearings Scotland would have an oversight role but would not have a role in the monitoring or enforcement of standards. Monitoring could be based initially on self-assessment with Children’s Hearings Scotland taking a supportive and enabling role, rather than an enforcement one.

98. Having considered this model and discussed it with Cosla representatives, Ministers decided not to adopt it primarily because of concerns about a lack of accountability, governance and quality assurance at the local level. The model does not provide for direct accountability between the local authority and the National Convener, therefore it is difficult to gauge how the National Convener could ensure that his/her standards are being enforced and how concerns about consistency could be addressed. There is also a possible conflict of interest; the Cosla model would mean committees appointed by local authorities, involving elected members and therefore accountable to local authorities, having a direct role in the appointment and re-
appointment of panel members who then make decisions about children. Local authorities must then pay for and implement those decisions.

99. However, as a result of these discussions with Cosla, the Scottish Government has made a number of changes to the Bill to address Cosla concerns and to enable local authorities to play a direct role in the composition, location and work of area support teams.

Consultation

100. Responses to the draft Bill raised concerns that moving to an area support team model would weaken the link between panel members and local authorities. The flexibility the Bill provides to involve local authorities will ensure this is not the case.

101. A number of comments were also received on how local support might be provided in practice and seeking further information on the day to day operation of area support teams. This level of operational detail does not need to be set out in primary legislation which provides for the legal duties and functions concerning the provision of local support. The detailed operation of the new arrangements will be developed in consultation with partners as part of the ongoing development of the reforms. An Implementation Group of stakeholders will consider this and other issues.

The Principal Reporter

Policy objective

102. To provide a statutory framework for reporter practice; and to support the provision of a consistent, high quality reporter service for Scotland which is able to adapt to emerging needs.

Key information

103. The Bill re-affirms the role of the Principal Reporter as professional gatekeeper to the Children’s Hearings system and makes provision for the Scottish Children’s Reporter Administration (SCRA) to continue as a dedicated national body to support the work of the children’s reporter service. The Principal Reporter will continue to exercise professional functions in respect of the reporter service, matters relating to the referral of children to the hearing, organising hearings and responding to appeals before the sheriff. Section 77 gives the Principal Reporter a statutory right to attend children’s hearings.

104. The powers, both in current legislation and in the Bill, are vested in the person of the Principal Reporter. The functions of the Principal Reporter can be delegated to authorised employees of SCRA, and it is this that allows reporters to act in the name of the Principal Reporter at hearings across Scotland. A scheme of delegation is in place to regulate this.

105. The Principal Reporter must ensure that consistently high standards are achieved and maintained by all reporters at all times. This is key to securing the positive change to the Hearings system that is required – strengthening the independence of panel members, specifying the role of the reporter and ensuring the system is well placed to meet future ECHR challenges. Reporters are under a statutory duty to follow guidance from the Principal Reporter.
106. The Bill sets out the functions of the Principal Reporter. These can be grouped into five broad categories: receiver of referrals, investigator, decision-maker and, administrator.

Receiver of referrals

107. The Principal Reporter receives referrals from local authorities, the police, other agencies, or individuals when the referrer considers that the child may be in need of compulsory measures of supervision. Local authorities have a statutory duty to refer in these circumstances as do the police whose referrals will include reports of offences a child is alleged to have committed. Courts may also refer children. Certain emergency measures (e.g. the granting of a child protection order) also trigger referrals to the Principal Reporter.

108. The Principal Reporter receives this information for the purpose of determining whether a child needs compulsory measures of care through a children’s hearing.

Investigator

109. Once a referral has been received, the Principal Reporter carries out initial investigations to assess whether a children’s hearing needs to be arranged in respect of the child.

110. The Principal Reporter has a specific right to obtain information for the purposes of initial investigation from a local authority. The approach under *Getting it Right for Every Child* is designed to ensure that key information can be readily brought together from all appropriate agencies to enable early, informed and accurate decision making.

Decision maker

111. Having considered the information available to them, the Principal Reporter will decide whether there are grounds for referring the child to a children’s hearing (the grounds for referral are set out in section 65 of the Bill) and whether compulsory measures of supervision are required.

112. As set out in section 67, if the Principal Reporter considers that compulsory measures of supervision may be necessary, and that a ground for referral exists, they must refer the child to a children’s hearing. If the Principal Reporter decides that compulsory measures are not required (section 66) they will not call a children’s hearing but can refer the child for voluntary measures if they consider that appropriate.

Administrator

113. The Principal Reporter is responsible for a range of tasks in connection with the administration and operation of a children’s hearing and related proceedings. The Principal Reporter will:

- request a report from the local authority if not already in receipt of one, or may request additional information;
- secure the attendance of the child at the hearing and may apply to the hearing for a warrant for this purpose;
initially consider who is a relevant person and arrange a pre-hearing in certain circumstances to determine this, as well as other procedural matters;

- arrange for review of any compulsory supervision order at the request of any of the parties, when an emergency review is triggered or when the order is nearing expiry; and

- arrange any continued hearing.

114. The Principal Reporter may also be required to arrange a children’s hearing in certain circumstances, e.g. to provide advice to a criminal court or to consider the case of a child referred by a sheriff on making an antisocial behaviour order.

115. The Principal Reporter is responsible (section 150(2)) for providing papers to the sheriff in any appeal against the decision of a hearing.

Other roles

116. Local authorities are required to consult and involve the Principal Reporter when preparing and reviewing a variety of local plans, including the children’s services plan, and the strategy for dealing with antisocial behaviour. The Principal Reporter also has a role in relation to parenting orders and antisocial behaviour orders for children. The Bill does not interfere with these roles.

117. As with the National Convener (paragraph 65 above), the Bill gives Ministers the power to change the functions of the Principal Reporter through secondary legislation – subject to the approval of Parliament through the affirmative procedure.

Alternative approaches

118. Following the changes to reporter practice introduced in September 2009 which instructed that reporters should not have private discussions with panel members, even in relation to points of law or procedure, the Bill provides a further opportunity to protect the independence of decision making in children’s hearings. To that end the draft Bill proposed transferring some of the Principal Reporter’s duties to the head of the new national body. For example, it proposed that reporters would not attend hearings and that the “president” would provide support to the hearing, offer it advice and write up the note of its decision making.

119. In response to comments received on the draft Bill, Ministers decided not to proceed with this model. Stakeholders raised concerns about the potential impact that such an approach would have on children and young people as it would remove the continuity that reporters have with the child and their family as the individual case progresses. There was also concern that the hearings adviser would be another adult in the process which would add to the confusion often felt by children in the Hearings system.

120. A further option that was considered but not adopted was the recruitment of legally qualified hearing chairs to provide advice to the hearing. Whilst this would solve the issue of providing independent advice to hearings (because a hearing with a legally qualified chair would advise itself) it would conflict with the ethos of a “lay tribunal”, offer less flexibility in rota
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management; and raise issues around the recruitment and retention of existing panel members due to a feeling of “inequity” within the hearing.

Consultation

121. Following Ministers’ decision to proceed on the basis set out in the Bill, the Scottish Government has discussed the proposed role of the Principal Reporter with the Children’s Hearings Reform Strategic Project Board and in discussions with stakeholders including the Principal Reporter, the SCRA Board, reporters and other SCRA staff.

Scottish Children’s Reporter Administration (SCRA)

Policy objectives

122. To provide for the continuity of the Scottish Children’s Reporter Administration as part of the reform of the Children’s Hearings system and update corporate governance arrangements.

Key information

123. SCRA was created as a result of local government reorganisation in 1996. At that time, Scottish Office Ministers took the view that in order to provide a coherent and consistent service, Scotland’s children’s reporters, who were then based within the old regional councils, should be brigaded together under a “Principal Reporter” with an associated administration to support their work.

124. The Bill makes clear that the existing statutory role of SCRA to facilitate the work of the Principal Reporter through the employment of children’s reporters and staff remains.

125. SCRA is a non-departmental public body and the Bill updates some of the governance arrangements to reflect current best practice. The Bill removes the Principal Reporter from the SCRA Board and provides for the possibility of the Principal Reporter and the Chief Executive Officer roles being carried out by separate individuals. This allows SCRA flexibility in delegating these functions to more than one official. If it adopts this approach, SCRA will need to fund any additional posts from within its grant-in-aid.

126. The Bill removes the requirement for a Deputy Chairperson of the SCRA Board, in line with practice in other national bodies.

127. The Bill allows for some staff transfer from SCRA to Children’s Hearings Scotland, and from local authorities should this prove to be necessary. This allows for the possibility of staff transfer should the sharing of expertise and experience during the time of transition be required on a more permanent basis to that which could be achieved through secondments etc.

Alternative approaches

128. The role of SCRA and its staff would have been affected by the proposed change to the role of the Principal Reporter discussed in paragraphs 118 to 119 above.
Consultation

129. As above, the role of SCRA was very much part of the consultation on the role and functions of the Principal Reporter.

The Children’s Panel

Policy objectives

130. To establish a single national Children’s Panel for Scotland to help ensure that processes and systems are operated to a consistently high standard in every children’s hearing in Scotland, while allowing for local delivery of services.

Key information

131. A children’s hearing is a lay tribunal of three panel members recruited from within the local community in which the hearing sits. It must not be wholly male or female and aims to have a balance of age and life experience. The hearing considers the circumstances which have led to a child being referred to it and makes decisions on how vulnerable children and young people can be supported. Decisions by children’s hearings must be taken in the best interests of the child.

132. The Bill does not make significant changes to the key objectives and business of hearings themselves. Scottish Ministers remain committed to the key Kilbrandon principles outlined at the start of this Memorandum, and the welfare of the child remains paramount.

133. The Bill provides for the National Convener to appoint panel members to a single national Children’s Panel and to ensure that hearings continue to operate locally, comprising 3 members of the local community wherever that is practicable, and that they maintain a gender balance.

134. One national panel will result in the removal of unnecessary geographical boundaries on panel service. Currently, panel members are appointed to serve within a local authority panel and are unable to move across that boundary. The Bill provides greater flexibility while still allowing panel members to sit on hearings in the communities in which they work or live. This will assist in the smooth and efficient organisation of hearings allowing greater flexibility to deal with unexpected difficulties such as illness or a lack of gender balance, and will promote greater use of shared local training resources. A consistent national approach will also ensure that panel members serving outwith their local area are comfortable and familiar with the support they receive, the processes involved etc.

135. The Bill provides for greater flexibility in certain circumstances where it is in the child’s best interest for a hearing to take place outside of the child’s local community, for example, where that child has been placed in secure accommodation. However, the policy of the children’s hearing taking place in the child’s community, served by members of the local community, remains at the heart of the reforms.
136. The Bill provides for the appointment and re-appointment of panel members to be carried out by the National Convener for a period of three years.

137. The National Convener will re-appoint members to the national panel, on the basis of them having met conditions of re-appointment set out by the National Convener. This will achieve nationwide consistency in expectations of panel members in view of the major role they play in supporting vulnerable children and young people.

138. Under the terms of the Tribunals and Inquiries Act 1992, panel members may not be dismissed without the agreement of Scottish Ministers and the Lord President of the Court of Session. The Bill provides for the continuity of the role of the Lord President in this respect. The power to remove panel members is now vested in the National Convener subject to the consent of the Lord President, and is restricted to conduct and capability grounds, including failure to comply with training requirements. In practice to date, no member has been removed other than for a refusal to take part in training.

139. The Bill transfers responsibility for the payment of panel members’ expenses from Scottish Ministers and local authorities to the National Convener. Expense rates currently vary across the country. The National Convener will put in place a single national scheme which will ensure standardised amounts and ensure timely payments.

Alternative approaches

140. In developing proposals for reform, Ministers considered the possibility of retaining the current 32 children’s panels. This would not however address concerns about consistency of practice across Scotland – a child’s experience of the Hearings system should be the same no matter where they live. The establishment of a single national Children’s Panel will help ensure consistently high standards across Scotland.

Consultation

141. The establishment of a single Children’s Panel has received support from stakeholders as a means of raising the profile and public standing of panel members and the Hearings System more generally. The Bill provides for strong links between panel members and their local community which addresses concerns that these links might be lost with the setting up of a national panel.

Panel members

Policy objective

142. To improve the consistency and quality of support for panel members across Scotland and to strengthen their ability to take independent decisions in the best interests of the child.

Key information

143. Across Scotland there are 2,422 children’s panel members who sit on children’s hearings. All panel members are volunteers. Currently they are appointed to 32 children’s panels, one in each local authority area. Under the proposed new arrangements, the National Convener will
appoint panel members to the national Children’s Panel (section 4), for a period of 3 years, with automatic re-appointment for 3 years unless the panel member does not wish to continue or the National Convener has grounds to seek the removal of the panel member. The National Convener will also have a duty to ensure that children’s hearings continue to have 3 panel members drawn from the local community wherever practicable, and a gender balance (sections 5 and 6).

144. Maintaining local links will be crucial once the national panel is established. The provisions for area support teams will enable local authorities to play a key role in supporting panel members locally. The recruitment of panel members may also take place locally, in keeping with the national standards and framework set by the National Convener. The new feedback loop will ensure that panel members have access to local information to help improve the decision-making process. It will provide a more accurate picture of how hearings decisions are being implemented locally and which types of compulsory supervision have proved successful and effective and might therefore be useful for other children.

Alternative approaches

145. Keeping the current arrangements would not provide the consistency of approach that is required. For example the retention of 32 panels would mean that panel members across the country would continue to be recruited based on different skills sets, with differing expectations and levels of ability.

Consultation

146. As set out above, the role of the Children’s Panel and panel members has been a key element of consultation. Regular meetings to discuss the Bill and wider reforms have been held with panel chairs and panel members across Scotland.

Safeguarders

Policy objective

147. To continue to safeguard the best interests of the child in the Children’s Hearings system by providing independent assessment and recommendations to children’s hearings and sheriffs.

Key information

148. Consideration by a children’s hearing as to whether to appoint a safeguarder at every hearing was introduced in response to a recommendation of Lord Clyde’s Report of the Inquiry into the Removal of Children from Orkney in February 1991.

149. The role of the safeguarder is to provide children’s hearings and courts with an independent assessment of what is in the child’s best interests. Safeguarders are independent of all agencies and are selected from various backgrounds – lawyers, social workers and ex-panel members or people who have had some experience of working with children in other capacities. It is often valuable for the child for a third party to set out recommendations taking on board the child’s view’s and removing conflicts of interest, for example between the child and the parents.
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The management, provision and payment of safeguarders is the responsibility of local authorities, and the Bill does not change this.

150. Under the 1995 Act a children’s hearing or a sheriff (in hearings-related court cases) is required to consider whether it is necessary to appoint a person to safeguard the interests of the child in the proceedings. If the hearing consider it necessary they must appoint a safeguarder, and state reasons for doing so. A safeguarder will then be appointed to the hearing by the local authority from its panel of safeguarders – there are around 300 safeguarders on local authority panels at present. Safeguarders are paid a fixed fee for each appointment and receive expenses from the local authority.

151. Scottish Ministers have exercised their discretionary power to make regulations providing for the establishment of a panel of persons from whom safeguarders may be appointed in legal proceedings concerning children. These regulations give each local authority a duty to maintain a list of safeguarders in consultation with the local Sheriff Principal and panel chair. The regulations also give local authorities discretion to determine, in consultation with the Sheriff Principal, the experience and standard of any qualifications to be possessed by the safeguarders. Training is available for safeguarders, however no provision currently exists to agree remuneration and best practice nationally, to deal with complaints or to monitor performance.

152. Safeguarders produce an independent written report for the children’s hearing. He or she may interview the child, members of the family and any other person who may provide information and they may have access to records held by professionals. The contents of a safeguarder’s report are not defined in law but there is an expectation that it will: reflect interviews with the child, family and any other significant people; put forward the views of the child; identify relevant issues; and make a recommendation based on the interests of the child. If appointed by a court a safeguarder may become a party to the proceedings.

153. Safeguarders are expected to attend children’s hearings, not to speak for the child, although they may present the child’s views, but to represent the child’s best interests. This may sometimes mean making a recommendation to the hearing with which the child does not agree. Once the hearing has made its final disposal, and the appeal period is over, the safeguarder has no further contact with the child.

154. Safeguarders have the right to:

- receive copies of the papers which were considered by the hearing which made the appointment and any subsequent hearings during the period of appointment;
- receive copies of the reasons for the decision to appoint a safeguarder;
- be present at all stages of the hearing;
- be informed of the decision and reasons of the final hearing and to be given a copy of those reasons in writing;
- appeal against the decision of the hearing on behalf of the child; and

have their views considered in advice and warrant hearings.

155. The Bill provides (section 30) for local authorities to establish for their area a panel of safeguarders from which appointments of safeguarders under the Bill are to be made and provides Scottish Ministers with a regulation making power to make arrangements for the recruitment and training of safeguarders, qualifications to be held, payment of expenses and functions of safeguarders.

156. The functions of a safeguarder once appointed by a children’s hearing will be substantially the same as at present under the new arrangements. The most significant change, in response to a request from the Scottish Safeguards Association, is the inclusion at section 148 of an independent right of appeal for safeguarders against the decision of a children’s hearing. Currently, only a child or relevant person can appeal against a decision of a children’s hearing; this new power will enable a safeguarder to appeal in their own right, for example where they believe that a hearing has got a disposal wrong or that the wrong procedure has been followed, and it is in the best interests of the child to lodge an appeal. The safeguarder would then carry on safeguarding the child’s interests through the appeal process. Section 157 of the Bill enables an independent right of appeal against the decision of a sheriff.

157. The detail of the functions and powers of safeguarders appointed by the sheriff will be dealt with by secondary legislation. It may be that a sheriff appointed safeguarder may be a party to the proceedings or may simply act as a court appointed report provider.

Alternative approaches

158. The original proposal was to place responsibility for the management and appointment of safeguarders with the new national body. This was not however considered appropriate by Scottish Ministers given that the need to protect the independent nature of safeguarders made it inappropriate to place them within Children’s Hearings Scotland given its role in supporting panel members who make decisions on whether to appoint safeguarders. Similarly, safeguarders cannot be placed within SCRA given the role of reporters in the hearings process. It is also important that the perception of independence is maintained and this cannot be achieved if safeguarders are placed within an NDPB which supports another part of the Children’s Hearings system.

159. The only other alternative which would protect the independence, both real and perceived, of safeguarders was to place them within a bespoke national body. This was not considered to be a cost effective solution and therefore the decision was made to continue to place responsibility for safeguarders with local authorities.

Consultation

160. Strengthening for the Future proposed creating a single panel of safeguarders to be employed by the Board of the new body and under the discrete management of an employee appointed for that purpose. Sheriffs and children’s hearings would have remained free to choose whether to appoint a safeguarder, as at present. There was no support for this proposal and concern that the independence of safeguarders would be threatened by their placing within the
national body. Therefore the intention is that the current arrangements for the maintenance and management of safeguarders should be substantially the same as at present.

161. The role of the safeguarder was set out in the draft Bill published in June 2009. The provisions in the Bill have not significantly changed from those in the June draft and have been discussed with the Scottish Safeguarders Association.

**Scottish Ministers**

**Policy objective**

162. To set in place a structure which supports the independence of decision-makers in the Children’s Hearings system and enabling Scottish Ministers to set broad strategic objectives.

**Key information**

163. The Bill makes changes to the functions of the Scottish Ministers. Currently, the Scottish Ministers manage the national recruitment campaign and appoint and re-appoint panel members on the basis of advice from CPACs. The Scottish Ministers are also responsible for the national training of panel members.

164. The Bill transfers these functions currently carried out by Scottish Ministers to Children’s Hearings Scotland. The Scottish Ministers will take a sponsorship role in relation to Children’s Hearings Scotland and will retain its existing sponsorship role with SCRA. The Bill sets out these sponsorship responsibilities.

**Alternative approaches**

165. No other approaches would have met the policy objective.

**Consultation**

166. The role of Scottish Ministers in the new arrangements have formed part of the various consultations undertaken.

**Local government**

**Policy objective**

167. To achieve productive and professional partnership working between the Children’s Panel and local authorities and maintain the link between panel members and the communities in which they live and work.

**Key information**

168. The Bill makes changes to the current functions of local authorities. Currently, local authorities have responsibility for the establishment of CPACs which support the work of panel members in a local authority area. The functions currently carried out by CPACs will transfer to the National Convener.
169. The Bill enables the continued involvement of local authorities in children’s hearings. While the Bill gives responsibility for maintaining and managing the Children’s Panel to Children’s Hearings Scotland, it continues to place responsibilities on local authorities for supporting the work of hearings, implementing and funding decisions made by them and for providing practical local support to panel members through involvement with area support teams.

Alternative approaches

170. As discussed in paragraphs 94-99 above Ministers considered a different role for local authorities put forward by Cosla. The model in the Bill is considered the most effective way of meeting the overarching policy objectives of reform.

Consultation

171. There has been ongoing discussion with Cosla and the Association of Directors of Social Work during the development of the Bill for introduction. There is agreement on the need for change and on many of the measures in the Bill, but Cosla do not support the arrangements for local support proposed in the Bill (see paragraphs 94-99).

PART THREE – OPERATION OF THE CHILDREN’S HEARINGS SYSTEM

172. This part sets out the arrangements that will work within the new legislative framework and follows the structure of the Bill from Part 5, cross-referencing to other parts of this document where appropriate. There are a number of new provisions outlined here, along with issues on which the Bill is simply restating and consolidating existing legislation.

Part 5 – Child assessment and child protection orders

Child assessment orders

Policy objective

173. A child assessment order is an emergency order designed to provide local authorities with the opportunity to undertake a full assessment of a child’s health and wellbeing in those instances where such an assessment cannot be undertaken on a voluntary basis due to specific consent issues. The orders are used as a tool to identify whether further measures are required to ensure a child’s safety and wider wellbeing. The orders are based on existing practice which is known to be generally sound and so no significant changes are being made. Instead, sections 33 and 34 of the Bill clarify the law in relation to child assessment orders, reducing the risk for error or confusion.

Existing law

174. Child assessment orders were first introduced in response to a recommendation of Lord Clyde’s Report of the Inquiry into the Removal of Children from Orkney in February 1991, published in October 1992. Lord Clyde recommended that the sheriff should be empowered to authorise a child to be removed for the purposes of medical examination by way of an interim protection order. This recommendation was based on evidence obtained in the course of the
Inquiry which identified, on occasion, difficulties with obtaining consent by or on behalf of a child to be medically examined.

175. Interim protection orders were re-named child assessment orders for the purposes of the 1995 Act. A child assessment order may be applied for by a local authority and made by the sheriff. Such an order extends beyond medical examinations and instead allows for a wider assessment of a child’s health and wellbeing and the way in which they have been treated to take place without the consent of parents on behalf of their children.

176. Section 55 of the 1995 Act identifies those directions which can form a child assessment order. Such an order can last for a period of up to seven days and can place a number of directions on those in a position to produce the child in order that an assessment may take place. It is important to note that, in line with section 2(4) of the Age of Legal Capacity (Scotland) Act 1991, a child may refuse any medical examination directed as part of such an order. Section 55(2) of the 1995 Act also allows for the sheriff to make a child protection order in response to an application for a child assessment order where the sheriff is satisfied that the grounds for making such an order are met.

177. Whilst infrequently used, child assessment orders are viewed by social work and child protection practitioners as a necessary tool, required to identify whether further action is required in order to ensure a child’s safety or wider well-being.

Proposals for change

178. The provisions which form sections 33 and 34 of the Bill have only minor implications for the practical operation of child assessment orders. The changes are designed primarily to simplify and clarify the statute relating to such orders. Section 33 identifies that only local authorities may apply for a child assessment order and outlines those directions which may be included in any such order. Section 34 outlines those conditions which must be satisfied in order for a sheriff to make a child assessment order. Section 34(3) replicates section 55(2) of the 1995 Act by allowing for the sheriff to make a child protection order upon receipt of an application for a child assessment order where he is satisfied that the grounds for making such an order are met.

179. The only significant change to statute in this area relates to the duration of child assessment orders. Under the 1995 Act, a child assessment order can last for a period up to 7 days. Section 33(5)(b) reduces this timeframe to 3 days. As mentioned previously, child assessment orders are often used by practitioners to identify whether any specific further action is required to ensure a child’s safety and well-being and can, on occasion, lead to an application being made for a child protection order. Where there are concerns that a child may be suffering harm or neglect it is crucial that an assessment of their needs be undertaken as quickly as possible. The revised timescales are designed to assist practitioners in achieving this. We have been advised by practitioners that the identified timescales are sufficient for these purposes. The requirement that any such order be implemented no more than 24 hours after it is granted has been included for a similar reason.
Alternative approaches

180. No alternative approaches have been identified. Policy in respect of child assessment orders is embedded into consistent general practice amongst the child protection practitioner community, with the orders considered to be a valuable tool when assessing the risks and needs of young people who are believed to be at significant risk of harm or neglect.

Consultation

181. The provisions relating to child assessment orders were the subject of a short informal consultation with the 30 Child Protection Committees which operate in Scotland through their Chairs. No substantive comments were received. Consultation has also taken place with the Multi-Agency Resource Service, based in Stirling University, who were content with the revised timescales proposed in respect of the orders.

Child protection orders

Policy objective

182. Child protection orders are emergency orders granted by the sheriff which make directions for specific action to be taken for the purposes of ensuring a child’s immediate safety. These orders can provide immediate safety where other legal measures are not in place and most often lead on to a children’s hearing which can consider or amend compulsory measures of supervision. Like child assessment orders, the operation of child protection orders is an element of practice that is generally viewed to be sound. The provisions therefore make only minor changes to the way in which the orders will operate.

Key information

183. Like child assessment orders, child protection orders were first established as a response to the findings of Lord Clyde’s Report of the Inquiry into the Removal of Children from Orkney in February 1991. In the Report of the Inquiry, Lord Clyde called for section 37(2) of the Social Work (Scotland) Act 1968 to be revised. Section 37(2) of that Act provided for any person authorised by any court or justice of the peace to take a child to a place of safety (or to detain that child in a place of safety where they had already sought refuge) in those instances where certain specified offences had been committed. Lord Clyde identified the need to replace these measures with the introduction of a new “child protection order” which expressly empowered the sheriff to remove a child to a place of safety where it was believed that they were at risk of significant harm, irrespective of whether an offence was known to have been committed.

184. The change recommended by Lord Clyde was implemented through the introduction of child protection orders under sections 57 to 61 of the 1995 Act.

185. These provisions allow for the sheriff, or in certain instances the justice of the peace, to make an order which can: direct that a child be removed to a place of safety; direct that a child may not be removed where they are currently in a place of safety; and prevent the disclosure of the location of any place of safety. Section 57(1) and 57(2) of the 1995 Act identify the criteria that must be satisfied in order for a child protection order to be made. In keeping with Lord Clyde’s recommendation, the 1995 Act identifies that in order for a child protection order to be
made, the child that is the subject of the application must be either suffering significant harm or be likely to suffer significant harm if such an order is not made.

186. At the same time as considering any application for a child protection order, the sheriff will also consider contact directions between specified individuals (usually including parents) and the child that is the subject of the application. Consideration will also be given to the fulfilment of specific parental rights and responsibilities in respect of the child. The exercising of these rights will usually be used for the purposes of consenting to medical examination and treatment as well as any other assessment deemed necessary. Each of these directions can be included in any child protection order.

187. An applicant must attempt to implement a child protection order within 24 hours of it having been made, otherwise the order will cease. In almost all cases, the applicant for an order of this nature tends to be the relevant local authority. However, the 1995 Act does allow for any person to apply for a child protection order.

188. An application for variation or termination of a child protection order can be made to the sheriff by certain specified individuals, including the child that is the subject of the order, their parent, or the initial applicant in respect of the order. The Principal Reporter may also choose to terminate a child protection order where they believe that the grounds on which the order were made are no longer satisfied.

189. Where a child protection order has been made, the Act requires that the Principal Reporter convene a children’s hearing to consider the order on the second working day after implementation. It is the role of this hearing to identify whether the order should be continued, varied or ceased. The “second working day” hearing will not take place only in those instances where an application for variation or termination has already been made to the sheriff.

190. In those instances where a child protection order has been either continued or varied by the “second working day” children’s hearing, the Principal Reporter is required to consider arranging a further hearing, to take place on the eighth working day after initial implementation of the order. It is the responsibility of this hearing to identify any compulsory measures of supervision in respect of the child. The child protection order made by the sheriff will cease at the point at which a decision has been made by this hearing. It is important to note that an “eighth working day” hearing will not proceed in those instances where the reporter considers that there is insufficient evidence to substantiate grounds for referral at this point, or considers that compulsory measures are not necessary. In those instances where the hearing does not proceed, the order will again cease.

191. Child protection orders continue to be used regularly, predominantly by local authorities, for the purposes of securing the safety of those children who are believed to be at immediate risk of significant harm. 661 children with child protection orders were referred to SCRA in 2008-09. Proportionately, more of these orders are granted for very young children, with approximately 40% of all child protection order referrals received by SCRA relating to children aged under two years. Practice in this area is viewed to be generally sound amongst child protection practitioners, with no need for significant change having been identified.
Revised legislation

192. The provisions in the Bill relating to child protection orders are broadly based on sections 57 to 61 of the 1995 Act and implement only minor policy changes. The majority of the changes being introduced are of a drafting nature and are designed to offer greater clarity in respect of the law in this area and are not anticipated to have an impact on practice. However, minor changes have been made to strengthen the way in which child protection orders will operate.

193. Section 38(3) of the Bill extends the scope of information relating to a child’s whereabouts that can be withheld for the purposes of ensuring their safety as part of a child protection order. This change has been made following concerns raised by practitioners that parents have been known to seek out contact with their children through a trace of a carer’s details. Such information could not be withheld as part of a child protection order under existing arrangements. The changes being implemented allow for the sheriff to direct that information such as this be withheld in future where appropriate.

Alternative approaches

194. There are none which meet the policy objective.

Consultation

195. The provisions focusing on child protection orders were the subject of a short informal consultation with each of the 30 Child Protection Committees operating across Scotland through their Chairs. Consideration has been given to those comments received as part of this process, with the additional safeguard developed at section 38(3) having been included as a direct response to the consultation. A number of further suggestions were made, most of which were designed to retain consistency with existing practice in respect of child protection orders. Where possible, these have also been taken into account. The Multi-Agency Resource Service, based at Stirling University, has also been consulted on the provisions and is content with what is proposed.

Part 6 – Investigation and referral to children’s hearing

196. Much of this Part is a re-statement of existing legislative powers and policy objectives which are working well in practice. Key changes that this Part will introduce are set out below.

Grounds for referral

Policy objective

197. To modernise the grounds for referral and ensure that all children in need of compulsory measures of supervision can be referred to a hearing.

Key information

198. The “grounds for referral” are the grounds by which a child can be referred to a children’s hearing. The grounds for referral usually relate to a specific incident or evidence of risk to the child that indicate that compulsory measures of supervision may be required. The
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

reporter drafts the grounds for referral, often based on information received about the child from sources such as councils, schools, welfare agencies, the courts and the police.

199. Our intention is to modernise the grounds for referral, to simplify the language and ensure they provide for vulnerable children and young people who can benefit from referral to a children’s hearing. Most children’s hearings address care and protection grounds and we intend that this provision will help maintain and strengthen the welfare-based nature of the Hearings system.

200. The current grounds listed in section 52(2) of the 1995 Act cover a range of situations and events. Despite the range of these conditions, some situations that suggest that a child is in need of compulsory measures are not clearly covered and there can be uncertainty about whether the reporter, and the sheriff, will consider a ground to be satisfied. Examples of these potential gaps are circumstances such as self-harm by a child, exposure to domestic abuse, and anti-social behaviour by a child that does not involve the commission of an offence. The current grounds can therefore sometimes fail to cover vulnerable children and young people who would benefit from attending a children’s hearing.

201. At the same time, the current provision lists some situations which are no longer as relevant as they were when originally enacted, for example solvent abuse, or no longer need their own ground, for example incest.

202. The wording of the current grounds can result in the placing of unfair burdens (for example, where the mother of a child is asked to accept ‘lack of parental care’ grounds when her child has been exposed to domestic abuse) and contains moralistic elements that are both unhelpful in terms of protecting children and which fail to reflect the realities of 21st century Scotland.

203. The Bill seeks to remedy these problems. It updates the grounds to reflect changes in society, and the consequent shift in the concerns that arise in relation to children’s welfare. For example, more is understood now about the impact of domestic abuse on the lives of children, and there appears to be a greater incidence of self harm amongst young people, whereas existing grounds on incest or solvent abuse have been rendered obsolete by legal and societal changes. The Bill provides separate grounds for a child’s misuse of drugs and alcohol, partly to aid collection of data on both issues but more fundamentally as important recognition of how drugs and alcohol can impact adversely on Scotland’s children and young people.

204. By wording the grounds in a more up-to-date and less technical way, we intend to make them more easily understood by panel members and other key players in the Hearings system, and also more easily explained to children and relevant persons.

205. The intention is to make the grounds wide enough to accommodate any vulnerable child or young person who could benefit from compulsory measures of supervision. We do not intend however that the new grounds would result in a significant increase in referrals to the Reporter. The Getting it Right for Every Child approach should mean that early intervention meets the needs of most children, nor is it the Scottish Government’s intention that all children who meet a ground for referral should be referred to the reporter. We wish to ensure that referrals to the
reporter are appropriate and that only children who meet the dual test of being in need of protection, guidance, treatment or control and needing compulsory intervention attend a children’s hearing. Section 66(5) of the Bill specifically provides that the Principal Reporter may refer a child for voluntary measures when they consider that compulsory measures are not required.

Alternative approaches
206. There are none that meet the policy objective.

Consultation
207. We did not consult directly on the proposed changes to the grounds for referral in Strengthening for the Future and only 9 responses made explicit recommendations on the grounds for referral.

208. However, those responses did call for the modernisation of the grounds for referral, and some of the changes in the Bill directly address the issues raised by stakeholders e.g. removal of “glue-sniffing” grounds and the inclusion of “domestic abuse” grounds.

209. A draft of the grounds for referral was included as section 59 of the draft Bill published in June 2009. The provision was revised following feedback to the draft Bill, and further consulted on via the short-life working group on the Bill. Group members responded with broadly strong support for the revised grounds.

Child arrested and kept in place of safety: Principal Reporter’s function

Policy objective
210. Section 63 of the Bill provides for the Principal Reporter to be able to liberate a child from detention in a place of safety while continuing to investigate and decide at a later date whether to arrange a hearing. This ensures that a child is only kept in a place of safety for the protection and control of the child.

Existing law
211. Section 43 of the Criminal Procedure (Scotland) Act 1995 deals with the situation where a child is apprehended and cannot be brought immediately before a sheriff. Children should only be detained for offences for which they are liable to prosecution. The police may liberate the child or may detain him or her in a place of safety, depending on the circumstances. If the child is not liberated, the police should keep the child in a place of safety other than a police station, unless certain criteria are met.

212. Section 63 of the Children (Scotland) Act 1995 (“the 1995 Act”) addresses the action open to the reporter and any children’s hearing following a child’s detention in a place of safety by the police under section 43 of the Criminal Procedure Act and where it has been decided that criminal proceedings are not going to be taken. The reporter must arrange a children’s hearing unless he or she considers that compulsory measures of supervision are not required, in which case the reporter must liberate the child from the place of safety. As the reporter has made the
decision that compulsory measures of supervision are not required, no further investigation nor a
decision to refer to a hearing on the basis of the offence(s) for which the child was apprehended
is possible.

213. The children’s hearing must begin no later than the third day after the reporter is notified
that the child is detained and there are to be no criminal proceedings. In practice, the hearing
usually takes place on the first day.

214. If a children’s hearing is arranged, the hearing may grant a warrant to detain the child in a
place of safety and may direct the reporter to arrange a hearing. The hearing will generally not
have the background report from the local authority necessary to making a dispositive decision
and will consider whether to issue a warrant under section 66 or under section 63(5) of the 1995
Act. If such a warrant is granted the reporter may liberate the child from the place of safety either
because the conditions for granting the warrant are no longer satisfied or because the child is not
in need of compulsory measures of supervision. If liberated for the former reason, the reporter
will continue to investigate and decide whether to refer the child’s case to a hearing.

215. Consideration of whether compulsory measures of supervision are needed for a child
detained under section 43(5) of the Criminal Procedure Act is difficult for the reporter because of
the necessarily limited information available following the child’s detention by the police. There
is no separate test that the child’s detention in a place of safety is necessary. Most children
detained by the police are therefore referred to a hearing not because the reporter is satisfied that
the child requires compulsory measures of supervision, nor because any conditions justifying
detention in a place of safety are met, but because the reporter cannot be satisfied in the time
available that compulsory measures of supervision are not required. The child may remain
detained pending the hearing taking place.

216. It is currently not possible for the reporter to be able to liberate a child from a warrant
granted by a hearing under section 63(5) of the 1995 Act and continue to investigate whether
compulsory measures of supervision are required. In addition, it is understood that the
procurator fiscal could liberate the child yet still take criminal proceedings.

217. Section 63(5) of the 1995 Act does not make it clear whether grounds for referral should
be presented at the first hearing following the child’s detention. The implication is, given the
power of the hearing to direct the reporter to arrange a hearing for the purposes of section 65(1),
that grounds are not presented.

Proposals for change

218. Section 63 of the Bill provides for a child to either be released from the place of safety or
continue to be kept there until the reporter makes a determination as to whether to refer the child
to the hearing or not. Under section 67(5) of the Bill if the reporter decides to refer the child to
the hearing, and the child is being kept in the place of safety, the reporter must ensure that the
hearing is arranged to take place no later than the third working day after the reporter receives
information from the police that the child has been detained by them. Section 71 provides that
where the reporter has decided to refer the child to the hearing and the child was at the time of
that determination still being kept in the place of safety the reporter may release the child or continue to keep the child in the place of safety until the hearing.

219. Grounds for referral must be presented at the initial hearing.

Alternative approaches

220. There are none which meet the policy objective.

Consultation

221. The Principal Reporter requested that consideration be given to amending section 63 of the 1995 Act. This is in order to provide the reporter with greater flexibility in decision-making where the procurator fiscal has decided not to proceed with the charge(s) against a child who has been detained in a place of safety by the police. This policy formed part of the draft Children’s Services Bill which was subject to full consultation in early 2007.

Part 7 – Attendance at children’s hearings

222. Much of this Part is a re-statement of existing legislative powers and policy objectives which are working well in practice. Key changes that this Part will introduce are set out below.

Persons with a right to attend a hearing

223. The Bill (section 77(3)) makes a new provision for the child or relevant persons to have the power to object to the presence of observers who have been granted permission to attend by the chairing member of the children’s hearing.

224. While in practice the child and relevant person are consulted on the attendance of observers in a children’s hearing, the Bill makes provision for a right of refusal by a child and relevant person, putting current practice on a legislative footing.

Alternative approaches

225. There are none which meet the policy objective.

Consultation

226. Putting the rights of the child at the centre of the process and ensuring their view is heard was the main, and overwhelming, message communicated to us during the consultation we undertook following publication of the draft Bill.

Part 8 – Pre-hearing panel

227. This Part sets out the procedure for pre-hearings (currently called “business meetings”). It puts in place new provision for the procedures that can be raised in a pre-hearing and provision will be made in secondary legislation to allow for the child, relevant person and safeguarder to attend.
Policy objective

228. To make provision for the consideration of preliminary matters relevant to a forthcoming hearing, and to ensure that discussion is held in an inclusive and open way. This represents a change to current practice in section 64 of the 1995 Act which provides that the business meeting may be convened by the reporter at which the reporter would be present but neither the child nor relevant person could attend. Instead, any expressed views would be presented to the business meeting by the reporter.

Key information

229. Current legislation allows for a business meeting to be arranged by the reporter to seek guidance on procedural matters such as:
   - recognising someone as a relevant person;
   - removing the obligation on a child to attend a hearing; and
   - removing the obligation on a relevant person to attend a hearing.

230. Business meetings are held between the reporter and panel members. A child or relevant person can provide their views to the reporter in advance who must then relate these views to the business meeting.

231. The purpose of the business meeting is not to make final decisions on any matter, but to provide guidance to the reporter on procedural matters ahead of a hearing. A hearing is not bound by the decision of a business meeting and can also consider the same issues during a hearing.

232. Almost 90% of business meetings are convened for the single purpose of releasing a child from their obligation to attend a children’s hearing. Less than 1% are convened to ascertain relevant persons status. 9% are convened for “other reasons” - most likely for consideration of whether state funded legal representation is required.

233. The Bill (section 78) makes provision for certain matters to be referred to a pre-hearing panel for consideration prior to the full hearing of the child’s case. These matters are:
   - removing the obligation on a child to attend a hearing;
   - removing the obligation on a relevant person to attend a hearing;
   - considering a case for conferring relevant status on a person who does not meet the criteria in section 185; and
   - considering whether the Scottish Legal Aid Board should be notified that it is necessary for the child to be legally represented as it is likely that the children’s hearing will make a compulsory supervision order which includes a secure accommodation authorisation.

234. The Bill provides clear criteria for establishing whether someone is a relevant person and it is not thought it will be necessary to consider this for those who clearly meet the criteria. However, there will be individuals who do not meet that criteria but who consider themselves to
be involved in the child’s life, such as a father with a contact order and relationship with a child but who does not have other parental rights or responsibilities vested in him. The Bill makes provision for those persons to seek relevant person status at a pre-hearing panel. The Bill also makes provision for an appeal to be made against such a decision, either the individual in question, a relevant person, a safeguarder or the child.

235. The Bill requires the Principal Reporter to give notice of a pre-hearing panel to the child, relevant persons and safeguarder who will (under secondary legislation) have a right to attend the meeting and to make their views known to the Principal Reporter.

236. This provision aligns with changes to reporter practice introduced in September 2009 which instructed that reporters should not have private discussions with panel members, even in relation to points of law or procedure.

Alternative approaches

237. This is necessary to ensure attendance and participation by all appropriate parties throughout the children’s hearings process. No alternative approaches meet the policy objective.

Consultation

238. No consultation was undertaken on this issue, because the proposed changes are necessary to facilitate open and transparent decision making.

Part 9 – Children’s hearing

Compulsory supervision orders

Policy objective

239. To provide that children who require compulsory measures can continue to receive the help and support they require.

Existing law

240. Under the 1995 Act, a children’s hearing or sheriff (in appeal proceedings) has a discretionary power to make a compulsory supervision requirement where they consider that the child is in need of compulsory measures of supervision.

241. Children are referred to children’s hearings if there are concerns about their care, protection or behaviour or if they are alleged to have committed an offence and the reporter is of the opinion that compulsory measures of care may be needed to protect the child and/or address their behaviour. 13,523 children were subject to supervision requirements as at 31 March 2009 with 80% of children subject to review proceedings extending supervision beyond the one year period.

242. The relevant local authority for the child normally provides a background report for the children’s hearing at the request of the reporter. This report may be a general report on the social background and circumstances of the child and in particular the reporter may request a report on
any particular matter relating to the child. In line with the *Getting it Right for Every Child* approach, a single child’s plan agreed at multi-agency level may be provided as a background report to the children’s hearing.

Proposals for change

243. Section 97 of the Bill provides for compulsory supervision requirements to continue and to be known as compulsory supervision orders. The term “order” replaces “requirement” because compulsory supervision order is a more accurate description of what actually happens and it links into the test of compulsory measures of supervision being necessary to support the child. It is also considered a more user friendly term.

244. A child must comply with any conditions specified in the compulsory supervision order and the relevant local authority must perform specified duties, for example to supervise the child. Section 138 of the Bill gives local authorities a duty to implement compulsory supervision orders.

245. The welfare principle underpins the decision of a children’s hearing or sheriff whether or not to impose compulsory measures of supervision. Section 24 provides that in taking decisions in relation to a child, children’s hearings and courts must have the welfare of the child as their paramount consideration.

246. In reaching a decision that compulsory measures of supervision are necessary for a child, the hearing should focus on what this will actually mean in practice and what it is intended to achieve. A children’s hearing or sheriff should not make an order relating to a child unless the hearing or court considers that to do so would be better for the child than making no order at all – this is the “no-order principle” set out in sections 27 and 28 of the Bill.

247. A compulsory supervision order may require a child to reside at a specified place or places. When this occurs, information about places where the child is to reside may be withheld at the discretion of the hearing from any person. Compulsory supervision orders may also have conditions attached; for example in relation to contact, or medical or other examination or treatment in relation to the child.

248. Hearings may specify in a compulsory supervision order that a child shall be liable to be placed and kept in secure accommodation, subject to the agreement of the chief social work officer of the local authority and the head of unit. A hearing may also impose a Movement Restriction Condition, as part of a compulsory supervision order, which places restrictions on a child’s liberty.

249. A hearing is obliged to consider whether to attach a condition regulating contact between the child with another person or persons whenever a compulsory supervision order is made. A hearing must consider whether to attach conditions to regulate any contact that the child may have with any other named person. For example, the child may be required to live away from home as part of the compulsory supervision order but it may be desirable to maintain contact with family members. Alternatively, the children’s hearing may regulate contact if the child remains at home and it appears to the children’s hearing that the child may benefit from contact
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

with an absent father or a previous foster carer. Contact may also be regulated so the child is prohibited from any contact with a person.

Alternative approaches

250. No alternative approaches meet the policy objective.

Consultation

251. This was included in the draft Bill published in June 2009.

Warrants

Policy objective

252. To streamline and rationalise warrant provisions to remove complexity around the current decision-making process.

253. Sections 100 to 101 of the Bill relate to interim compulsory supervision orders and medical examination orders respectively. These sections consolidate the existing provisions in sections 66 and 69 of the 1995 Act for a children’s hearing to grant a warrant in relation to finding and keeping a child in a place of safety, including a clinic, hospital or other establishment for the purposes of medical examination, and bringing a child to a children’s hearing. The current warrant provisions are complex and difficult to manage and the Bill seeks to reduce the technicalities surrounding the conditions of issuing and renewal of warrants to the minimum necessary.

254. In addition, the introduction of interim compulsory supervision orders in the Bill combines the current place of safety warrants and the need for interim measures of supervision. Interim compulsory supervision orders may allow interim plans to be put in place if a hearing is unable to dispose of a case pending further information or investigation.

255. Rationalising existing warrant provisions and providing for interim compulsory supervision orders provides a more robust and transparent process from initial consideration and making of orders, through to any subsequent appeal process.

256. Warrants to secure attendance of a child at a hearing under section 45 of the 1995 Act do not form part of interim compulsory supervision orders and continue as standalone warrant provisions under section 102 of the Bill.

Key information

257. Where a hearing is unable to dispose of a case there are a number of provisions in the 1995 Act which enable a hearing to grant or issue a warrant. A warrant can permit a child to be kept in a place of safety if the hearing or sheriff considers that it is necessary in order to safeguard or promote the welfare of the child.
258. Where there is an outstanding application for proof, any warrant granted by a hearing is subject to a maximum 22 day period and a total maximum period of detention of 66 days. Detention beyond that must be authorised by the sheriff on application by the reporter.

259. Where the child attends a hearing under section 63 of the 1995 Act (detention by police following alleged offending), the hearing may, if they consider it necessary, issue a warrant to keep the child in a place of safety and bring them to a hearing – section 63(5).

260. Where grounds for referral are accepted or established or the hearing is reviewing a supervision requirement, and the hearing is satisfied that further investigation is necessary, it may grant a warrant requiring the child to be taken to and kept in a place of safety – section 69(7).

261. Where a child fails to fulfil a requirement made under section 69(3) of the 1995 Act to attend, or reside at, any clinic, hospital or other establishment for the purpose of further investigation for the children’s hearing, the hearing may grant a warrant to find the child and take them to a place of safety or to the establishment specified in the warrant – section 69(4).

262. In all other situations where the hearing is unable to dispose of a case, a warrant may be granted under section 66. The warrant is also authority to find, keep and bring the child to a hearing. A section 66 warrant may be continued in force by a hearing for a maximum total period of 66 days under section 67.

263. Warrants may be issued by the sheriff under section 68. The sheriff may issue warrants to continue a child’s detention in excess of a total period of 66 days.

264. The process for the granting of further warrants depends on which provision the existing warrant was granted under and so the choice of warrant affects subsequent action. This is of significance given the need to apply to the sheriff for further detention of the child in certain circumstances and to give notice of the application.

Alternative approaches
265. No alternative approaches meet the policy objective.

Consultation
266. This was included in the draft Bill published in June 2009.

Interim compulsory supervision orders

Policy objective
267. There is currently one primary disposal available to a children’s hearing to effect supervision under the 1995 Act: this is to make a compulsory supervision requirement. The policy objective is to increase the options available to the hearing at an early stage, and to ensure decisions regarding compulsory measures are timely and appropriate. In cases where there are risks to a child or risks to others from the child that require action that falls short of emergency
measures, an interim decision may be needed. This should mandate action for the child where action is considered necessary whenever a hearing is unable to dispose of a case.

268. Interim compulsory supervision orders may only be used by the children’s hearing or sheriff when a child’s circumstances are such that for the protection, guidance, treatment or control of the child it is necessary as a matter of urgency to take action. This is a deliberately high test and helps to ensure that any interference with the rights of the child or relevant person is proportionate and that only the least intrusive measures possible apply.

Key information

269. There is a deficiency in existing law in relation to cases where the hearing is unable to dispose of the case but the child’s needs are such that the imposition of interim compulsory measures would be in the child’s interests. The only option currently available to a children’s hearing is to grant a warrant for the child’s detention in a place of safety. Where the child’s needs are not such that detention in a place of safety is necessary, there is no provision for the hearing to impose any other type of interim measure.

270. None of the current warrant provisions has the flexibility required to meet the policy objective of enabling a children’s hearing to impose a range of interim measures to meet the immediate needs of the child. The hearing may include conditions in a place of safety warrant but conditions cannot be imposed on the child as an interim measure independently of a place of safety warrant.

271. A child protection order is a limited response for particular circumstances, initially through the sheriff, to take emergency action to protect a child. It creates a speedy route into a children’s hearing but does not create additional flexibility in the hearing’s decision-making options and therefore does not meet the policy objective of the hearing being able to impose a range of interim measures.

272. Detention of a child under section 43 of the Criminal Procedure (Scotland) Act 1995 also provides for a speedy route into a children’s hearing in particular and narrowly specified circumstances, but again does not create additional flexibility in decision-making and therefore does not meet the policy objective of the hearing being able to impose a range of appropriate interim measures.

273. At present, if a referral to the reporter is made, investigations are carried out and a referral to a children’s hearing may be made. This process may take some time – the time interval standard from referral to decision on whether to convene a hearing is 60% of decisions to be made within 50 working days (current performance is 70%) with 71% of hearings to take place 20 working days later (current performance is 74%). This is a considerable time in a child’s life.

274. Any decision to issue an interim compulsory supervision order must be a proportionate response to the child’s circumstances. Necessity and proportionality involve consideration of the same kind of factors and the current approach of hearings is well suited to what is required.
The Bill provides that a children’s hearing may make an interim compulsory supervision order to ensure action can be taken and authorised by a hearing when such help or action is required in advance of the hearing disposing of the case through the means of a compulsory supervision order. An interim compulsory supervision order reflects the terms of a compulsory supervision order except that the order is limited to 22 days.

Before making an interim compulsory supervision order, the hearing will need to be satisfied that the child’s circumstances are so urgent that it is necessary to make the order for the protection, guidance, treatment or control of the child. Interim compulsory supervision orders will only be available when the hearing cannot dispose of a case. The power to make an interim compulsory supervision order applies at any hearing where the hearing cannot, for whatever reason, make a compulsory supervision order. This applies therefore to all hearings other than those arranged under sections 43 and 44 (initial hearing of case of child subject to child protection order).

An interim compulsory supervision order could be made at various points in the hearing process. It could be made on making a referral to the sheriff to have grounds established. It could be made after grounds have been accepted or established but where the hearing is not in a position to make a compulsory supervision order because, for example, further information is needed, the presence of a person who is not present is needed or more time is needed to consider a report or information.

Where there is an outstanding application for proof, any interim compulsory supervision order will be subject to a maximum 22 day period and a total maximum period of detention of 66 days. Detention beyond that must be authorised by the sheriff on application by the reporter (section 103). This reflects the current position in relation to warrants granted under section 66 of the 1995 Act.

The provisions will ensure that where there is no outstanding application for proof and the hearing is therefore proceeding on the basis of accepted or established grounds for referral or on review, then any interim compulsory supervision order will be subject to a maximum period of 22 days but with no total maximum period of detention. This reflects the current position in relation to warrants granted under section 69(7) of the 1995 Act. Where grounds have been accepted or established and the hearing is exploring the appropriate disposal of the referral but is not, for whatever reason, able to make a compulsory supervision order the hearing in deferring that decision may make an interim compulsory supervision order. There is no limit to the number of times a hearing may defer making a decision on a compulsory supervision order or number of times the hearing may make an interim compulsory supervision order in those circumstances.

Worked examples

Below are two worked examples, which serve to illustrate the deficiencies in the current system and how the proposals outlined would improve the system.
Example 1

**Circumstances**

1. Ellie, aged 4, is referred to a hearing on grounds of lack of parental care. The grounds are not accepted by Ellie’s mother and Ellie is unable to understand them. The hearing directs the reporter to make an application to the sheriff for a finding as to whether the grounds are established.

2. There are identified concerns in the social worker’s report about ongoing contact by Ellie with her maternal grandfather, who has committed schedule 1 offences against other children, and Ellie’s failure to attend nursery regularly.

**Current situation**

3. The hearing considers whether a warrant is necessary and decides that it is not. The local authority continues to try to work with the mother on these concerns while the proof hearing is pending but the mother is reluctant to participate. The case returns to the hearing if and when grounds are established.

**Situation with option of interim compulsory supervision orders**

4. The hearing considers that the circumstances in relation to the contact with the maternal grandfather are urgent and serious and that Ellie may need interim measures of compulsory supervision to protect her. The hearing decides that a place of safety is not required but that an interim compulsory supervision order including conditions that the child is to have no contact with the maternal grandfather and that she is to attend nursery every morning.

5. The sheriff establishes grounds for referral and may continue the interim compulsory supervision order for 22 days or until the date of the subsequent children’s hearings. A hearing is arranged within the 22 day period to consider the case further.

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Example 2

**Circumstances**

1. Ross, aged 14, is referred to a hearing on grounds of 3 offences. He has received two police restorative warnings for offences in the past year. He accepts one of the offences but not the other two, which are more serious. His parents’ response to the grounds is the same as his. The hearing decides to direct the reporter to make an application to the sheriff for a finding as to whether the non-accepted offences are established.

2. There are identified concerns in the action plan about Ross staying out late most nights and not attending school on occasion. A placement on a programme to address offending is recommended in the action plan. Ross is not willing to discuss the offences, which he denies.
Current situation

3. The hearing does not consider that a warrant is necessary. The case returns to the hearing once the sheriff has determined the application.

Situation with option of interim compulsory supervision orders.

4. The hearing does not consider that a place of safety is necessary. However, it makes an interim compulsory supervision order with a condition that Ross is to be in his mother’s house between midnight and 7 am every day.

5. The sheriff establishes grounds for referral and may continue the interim compulsory supervision order for 22 days or until the date of the subsequent children’s hearing. A hearing is arranged within the 22 day period to consider the case further.

281. The child or recognised carer may apply to the sheriff to appeal against an interim Compulsory Supervision Order under section 148 and any appeal must be concluded within 3 days of making the application; see section 152.

Alternative approaches.

282. The introduction of interim supervision requirements without consolidation of the warrant proposals was put forward in section 17 of the draft Children’s Services Bill. The original policy objective has been retained with the added value of adding powers to remove the child to a place of safety and other interim orders into interim compulsory supervision orders.

Consultation

283. The earlier consultation response to the proposal contained in the draft Children’s Services Bill was positive, with 77.8% of respondents giving either a clear or qualified yes to the principles of interim supervision orders.

Medical examination orders

Policy objective

284. To continue to provide for the children’s hearing to make a medical examination order to require a child to attend or reside at a specified clinic, hospital or establishment for the purposes of medical (including psychological) assessment for the purposes of gaining further information to identify the child’s needs when a children’s hearing is deferred.

Key information

285. A children’s hearing may continue a case under section 69(2) of the 1995 Act and, for the purpose of further investigation, grant a warrant to require the child to attend or reside at a clinic, hospital or other establishment during a period of not more than 22 days. Section 69(4) provides for the children’s hearing to grant a warrant to find the child and remove the child to the specified clinic, hospital or establishment where a child has failed to comply with the conditions of a medical order.
286. This warrant may be granted on application by the reporter or by the hearing independently. This warrant may not last more than 22 days and may contain conditions including that the child submit to any medical or other examination (subject to the Age of Legal Capacity (Scotland) Act 1991). A children’s hearing or sheriff may include a secure accommodation authorisation where the order requires the child to reside at a residential establishment and certain criteria contained in section 70(10) of the 1995 Act are met.

287. Section 101 of the Bill reflects section 69 of the 1995 Act in so far as it provides distinct provision for medical orders. Medical orders cannot be streamlined with interim compulsory supervision orders since it is not appropriate for medical orders to be issued before grounds of referral are established.

Alternative approaches

288. None. There is no change to current policy

Consultation

289. None. There is no change to current policy.

Part 10 – Proceedings before sheriff

290. Much of this Part is a re-statement of existing legislative powers and policy objectives which are working well in practice. Key changes that this Part will introduce are set out below.

Expediting the establishment of grounds for referral

Policy objective

291. To expedite the process for the establishment of grounds for referral where the child is too young, not sufficiently mature or not able to understand the grounds for referral and the relevant person accepts them.

Key information

292. At present when a child is too young, not sufficiently mature or does not understand the grounds for referral, but the parents accept them, it is necessary for a proof hearing to be arranged at the Sheriff Court.

293. The current process can cause delay and frustration for all concerned and can also mean heightened risk for the child. It can take more than 7 weeks from the initial children’s hearing until the sheriff establishes the grounds for referral – 7 calendar days after the children’s hearing for the reporter to lodge the application, 28 calendar days for the sheriff to hold the proof hearing with the relevant persons and/or child present, followed by notification of the second hearing once the sheriff’s decision is made.

294. The Bill will remedy this problem by allowing the sheriff to dispense with the formal proof hearing where the application shows that the grounds are accepted by the relevant persons but the child would not understand or has not understood the grounds.
295. In 2008-09 the Principal Reporter made 581 applications to the sheriff court where the relevant persons accepted the grounds but the child either did not understand or was incapable of understanding the grounds. The Bill will facilitate a quicker addressing of the needs of the child in such circumstances by allowing the sheriff to determine grounds on a paper basis where this is appropriate, which will cover the vast majority of such cases. Section 110 of the Bill requires the sheriff to reach a paper-based decision on whether to find the grounds established in 7 calendar days from the making of the application, thereby reducing the time period taken to establish the grounds by three weeks.

296. This reform will improve outcomes for children and their families by reducing unnecessary bureaucracy. There is no intention to compromise the rights of the child or relevant person, but to safeguard against this, the sheriff will have the discretion to hold a formal hearing if they consider it appropriate. Similarly, the sheriff will not be able to carry out the expedited process if the Principal Reporter, the child, a safeguarder or a relevant person requests a hearing.

**Alternative approaches**

297. There are none that meet the policy objective.

**Consultation**

298. We sought views on this proposal in *Strengthening for the Future*. Of the 207 respondents who indicated a yes or no response, 187 (89%) expressed support for the proposal, and 15 (7%) expressed qualified support. Key views were that the proposal would improve the efficiency of the system and would reduce distress for children and their families, along with concerns that the new system be robust and efficient without compromising the best interests of the child.

299. The provision formed part of the draft Bill published in June 2009 (section 79). No significant comments were received from stakeholders.

**Part 11 – Subsequent children’s hearings**

300. This Part deals largely with procedural matters relating to subsequent hearings that take place after a children’s hearing has deferred making a substantive decision. Much of this Part is a re-statement of existing legislative powers and policy objectives which are working well in practice. The key change that this Part will introduce is to facilitate the use of interim compulsory supervision orders, the policy objectives for which are discussed at paragraphs 267-283 above.

301. As a consequence of this Part being a restatement of existing law no alternative approaches were considered and no significant comments have been received.

**Part 12 – Children’s hearings: general**

302. This Part re-states current legislative powers and policy objectives which are working well in practice. As a consequence of this Part being a restatement of existing law no alternative approaches were considered and no significant comments have been received.
**Part 13 – Review of compulsory supervision order**

303. This Part re-states existing legislative powers and policy objectives which are working well in practice. As a consequence of this Part being a restatement of existing law no alternative approaches were considered and no significant comments have been received.

**Part 14 – Implementation of orders**

304. Much of this Part of the Bill is a re-statement of existing legislative powers and policy objectives which are working well in practice. Key changes that this Part will introduce are set out below.

** Enforcement of local authority duties in case of breach**

*Policy objective*

305. The Bill seeks to strengthen the independent decision-making of the children’s hearing by removing the discretion currently afforded to the Principal Reporter on whether to apply for an order where it appears to the hearing that the relevant local authority is not fulfilling the obligations contained in a compulsory supervision order.

*Existing legislation*

306. A children's hearing may impose duties on a local authority to enable a child to comply with a supervision requirement and this may include the provision of services even where these are not provided by the relevant local authority. Where on any review by a children’s hearing it appears that a local authority are in breach of their duties under section 71 of the 1995 Act (to give effect to the supervision requirement etc.), the hearing may direct the reporter to give the local authority notice of their intention to authorise the reporter to apply for an order from the Sheriff Principal requiring the local authority to perform their duties. Where after a further review the local authority is still found to be in breach of their duties the hearing may direct the reporter to apply for such an order. But discretion lies with the reporter, who may decide not to make such an application.

307. SCRA are aware of 10 cases where the hearing has directed the Principal Reporter to serve notice on the local authority. Where notice has been imposed, the duty has been complied with so there have been no cases where the Principal Reporter has been authorised to apply to the Sheriff Principal.

308. Given the wider policy drive to strengthen the independent decision-making of the children’s hearing, the Bill provides for the shifting of responsibilities that sit with the Principal Reporter to the National Convener but also removes the discretion to take enforcement action. In future, when a children’s hearing directs the National Convener to apply for an order, the National Convener will, after satisfying the conditions in the Bill, be required to do so.

*Alternative approaches*

309. An alternative would have been for the National Convener to be given the discretion that the Principal Reporter currently has. This would have fitted with the National Convener’s role in
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

promoting partnership between panel members and local authorities, however it is at odds with the independence of the children’s hearing and would undermine the policy of strengthening the hearing’s decision-making if they could not require the order to be carried out.

Consultation

310. We received a range of views on this issue following publication of the draft Bill in June 2009, including concerns that restating the existing power risked creating an authoritarian relationship between the head of the new body and local authorities and that this was not the best way to resolve issues between local authorities and children’s hearings. It was also argued that the Bill should provide a strengthening of the power to hold local authorities to account, and that the final decision-making power should be with the hearing, and not the head of the new body.

Movement restriction conditions

Policy objective

311. To provide a robust, community-based alternative to secure accommodation.

312. Ministers believe that for a very small number of young people, a movement restriction condition (MRC) can be an effective intervention, provided it is just one part of an intensive programme of supervision and support, including educational provision. An MRC cannot therefore, be imposed without a child or young person’s plan that covers the range of elements in such a programme and how it will be delivered.

313. The restriction of liberty that an MRC can impose is such that the use of such measures should be subject to strict criteria and the restrictions must be clearly specified in the compulsory supervision order. This reflects the current position.

314. Children’s hearings must satisfy themselves that it is necessary to make an MRC. This requires that the hearing should have considered all other available options before determining that an MRC is appropriate. This is to ensure that young people receive a proportionate and appropriate response to their needs and deeds and that other, perhaps more suitable options for intervention have not been overlooked.

Key information

315. Sections 97 and 98 of the Bill are based on sections 70(11), (12), (13), (14), (15) and (16) of the 1995 Act and defines an MRC as part of a compulsory supervision order. Section 144 of the Bill gives Scottish Ministers the power to prescribe by regulation the parameters of the restrictions that can be placed upon a child and also the monitoring arrangements that may be imposed as part of an MRC. This power enables Ministers to prescribe methods of monitoring, the devices that may be used to do this and the people or persons who will carry out the monitoring.

316. Movement restriction conditions were introduced as part of the Antisocial Behaviour etc. (Scotland) Act 2004 which amended the 1995 Act. Initially introduced in seven phase 1 areas, the opportunity to use Intensive Support and Monitoring Services was extended nationally in
April 2008. MRCs can apply to young people as part of a supervision requirement i.e. mainly those under 16, but can also include those aged 16 and 17 who are subject to a supervision requirement.

317. There is universal agreement that the criteria for application of an MRC must be the same as that used for secure care. An MRC may be used as an alternative to placing a young person in secure accommodation. A child is placed in “secure accommodation” by a supervision requirement formerly under section 70(9) of the 1995 Act and now primarily as part of a compulsory supervision order under section 97(5) of the Bill. The hearing must be satisfied that a child or young person for whom an MRC is to be imposed meets the criteria for secure accommodation set out in section 97(6) of the Bill. An MRC may also be used to enable a child or young person to “phase” their re-entry to the community from secure care, allowing an earlier transition from secure conditions.

Regulation making power (section 144)

318. Given the nature of the MRC, the potential vulnerability and risk to self or others presented by the young people who may be subject to an MRC, and the potential consequences of non-compliance, Ministers have been clear that there is a need for the monitoring arrangements to be robust and well managed. They will therefore set out in regulations how these arrangements should be made and the devices and persons suitable to perform the monitoring.

319. The regulations will also make specific provision regarding the need to share information with the agreed service provider to allow robust and efficient monitoring, supporting the safety of young people and the public.

320. These regulations will replace the Intensive Support and Monitoring (Scotland) Regulations 2008 SI 2008/75 which set out the support required for young people, along with the other procedural issues. We do not intend to vary the substantive content of these regulations at the present time but they will need to be replaced during implementation of the new arrangements as their current enabling powers will be revoked by repeal of the 1995 Act provision.

Alternative approaches

321. None. This is a restatement of previous legislation which remains a viable policy option for this Government.

Consultation

322. A full consultation process was undertaken as part of the Antisocial Behaviour etc. (Scotland) Act 2004. As part of the introduction of the current regulations a limited, stakeholder, consultation was undertaken in January 2006 and a follow-up consultation to include the practice learning of the first phase was undertaken from January 2008.
Secure accommodation

323. Section 99 provides that a secure accommodation authorisation enables a child to be placed and kept in secure accommodation within a specified residential establishment. The secure accommodation authorisation is made by the children’s hearing (or sheriff on appeal) and may only be made in conjunction with a compulsory supervision order, an interim compulsory supervision order, a warrant to secure attendance or a medical examination order. Certain conditions must be met before the authorisation may be granted (the risk of absconding and the risk to the child’s welfare; that the child is likely to self-harm; or that the child is likely to cause injury to another person).

Policy objective

324. The underpinning policy intention of the approach to secure care reflects the existing content of the 1995 Act. This has been reinforced by the work undertaken by the Securing Our Future Initiative (SOFI) which reached its conclusion in February 2009 and to which Scottish Ministers responded in April 2009.

325. The Scottish Government’s ultimate vision is that no children should be in secure care. We know that the needs of the vast majority of high-risk young people can be met safely and cost-effectively in their communities. Where that is possible, we believe that it is in the interests of the child and their community, and we want to see those opportunities maximised. However, there is no doubt that now and for the foreseeable future, there is a small number of children whose needs and risks, for a particular period in their lives, can only be managed in the controlled setting of secure care. We recognise the important role that secure care has to play in providing the intensive support and safe boundaries that enable these highly vulnerable young people to re-engage and move forward positively in their communities.

Key information

326. Secure care currently provides for two broad populations, those requiring care for their own safety and those who present a risk to others, with substantial overlap between these two groups. A combination of care and control is needed to provide support and challenge and getting this balance right is critical. The Scottish Government publishes statistics on secure care.\(^{14}\)

327. The nature of secure accommodation in Scotland is strongly influenced by its being firmly located within services for looked after children and the welfare-based Children’s Hearings system. It is a founding principle of the Hearings system that children in need of care and protection and those who offend should be treated within the same system and we want to preserve this. Young people in secure care must receive a welfare-based service offered within a child-centred setting.

328. Section 97(5)(a) is specifically designed to prevent a young person from being admitted to secure accommodation where such measures are not considered appropriate. It will allow the conditions of the underlying compulsory supervision order, or interim compulsory supervision

order, to be met without the secure accommodation authorisation having to be implemented in every case. The implementation of secure accommodation authorisations is discussed below. The compulsory supervision order (and interim order) must specify the residential establishment at which the child is to reside. Currently if a secure accommodation establishment is named on an authorisation and as part of the underlying supervision requirement, but that establishment only provides secure accommodation, in order to comply with the supervision requirement, the child must be admitted to secure accommodation in order to comply with the underlying supervision requirement.

329. The Bill now provides that a compulsory supervision order (or interim compulsory supervision order) can only include a secure authorisation if: i) the residential establishment where a child is to reside provides both secure and non-secure accommodation; or ii) where the establishment named within the secure authorisation provides only secure accommodation, that two or more residential establishments are specified, one of which must include non-secure accommodation. This will allow a child to be placed in non-secure accommodation where it is considered appropriate not to implement the secure accommodation authorisation whilst ensuring that the terms of the underlying compulsory supervision order are met.

330. An additional safeguard which has been added to support the principles outlined above is that the children’s hearing must be satisfied that the other options available, including a movement restriction condition, have been considered (section 97(5)(c)).

331. Given the effect of the secure accommodation authorisation, it is considered appropriate to set out on the face of the Bill the conditions under which a secure authorisation can apply.

332. The Secure Accommodation (Scotland) Regulations 1996 (S.I. 1996/3255) regulate the provision of secure accommodation. The provision and use of secure accommodation in a residential establishment requires the approval of the Scottish Ministers (regulation 3). The managers of the establishment are under a duty, in consultation with the person in charge of that establishment, to ensure that the welfare of each child looked after is safeguarded and promoted and that the child receives provision for his or her education, development and control as is conducive to their best interests (regulation 4). There are also duties on the managers, in consultation with the person in charge of the establishment, to keep a record of the child’s placement (regulation 16).

Alternative approaches

333. None. This is largely a restatement of previous legislation which remains the preferred policy option for this Government.

Consultation

334. As part of the SOFI process, substantial thought was given by stakeholders to the role of secure care and joint views and recommendations were agreed.15

Implementation of secure accommodation authorisations

Policy objective

335. Section 145 of the Bill makes provision for the implementation of secure accommodation authorisations. This section applies where a children’s hearing (or the sheriff) makes a secure accommodation authorisation in conjunction with a compulsory supervision order, an interim compulsory supervision order, a medical examination order or a warrant to secure attendance.

336. Section 70(9A)(a) of the 1995 Act provides the principal route under which children can be placed in secure accommodation, by empowering the children’s hearing to specify in a supervision requirement “that the child shall be liable to be placed and kept in secure accommodation in a residential establishment specified…. during such period as the person in charge of that establishment, with the agreement of the chief social work officer of the relevant local authority, considers necessary”.

337. The 1995 Act allows a level of local flexibility and discretion, so that professionals can respond quickly to young people’s changing levels of need and risk. In practice this means that professionals may decide to place or not to place children and young people in secure care based on a dynamic risk assessment i.e. children are reassessed when circumstances change.

338. However, from a policy and practice perspective, there is a concern that this discretion, while valuable, is not applied consistently, and not always based on the best interests of the child. For example, there is a perception among some stakeholders that local authorities may give agreement to decisions by the head of unit based on the finance available to fund placements rather than what provision is optimal to meet the needs and risks of children. In exploring these concerns it has become clear that the process of decision-making is insufficiently transparent.

339. Going forward the objective is to preserve legitimate flexibility (i.e. where it is based on the best interests of the child) while resolving the issues around inconsistent/poor practice.

340. There were a number of key principles which were considered when developing the policy position:

• our ultimate ambition, as set out in our response to the report of the Securing Our Future Initiative, is to have no child in Scotland in secure care and we must actively work to reduce the need for secure care;

• where it is possible to meet the needs of high-risk young people safely and cost effectively without recourse to secure care, then these opportunities should be maximised; and

• legislation and practice must support the achievement of optimum outcomes for children, young people and their communities by providing appropriate, proportionate and timely responses based on the interests of the child.
341. The intention is to provide a process which protects the flexibility of the current system while ensuring any decision made regarding the placement of a child in secure accommodation is fair, transparent and in the best interests of the child.

Key information

342. In order to understand the impact of making any changes to the process and practice surrounding the placement of young people in secure care it has been necessary to analyse data from several sources.

343. We know that where a children’s hearing authorises secure care for a young person, it is not always the case that the young person is admitted to secure care. From the information available we estimate that the average conversion rate of secure care authorisations is around 60-70%. This estimated conversion average should be treated with some caution, however, as a number of assumptions have been necessary due to the number of variables that can impact on this process.

344. Based on 2007-08 figures, had the current arrangements been substituted with a system in which no discretion existed around the implementation of a secure authorisation, then an additional 75-103 young people could have been accommodated in secure care. This would therefore have substantially increased the number of young people being admitted to secure care, contradicting the principles we have used to develop this policy position as outlined above.

345. While we are clear that decisions about placing young people in secure care should be based on need and risk, if these additional young people had been accommodated, the potential additional revenue costs to support the costs of accommodation could be substantial. If for example 75 young people were accommodated for a period of 21 days, the cost could be in the region of £1.18m. If 103 young people were accommodated for 12 weeks, the costs could be in the region of £6m.

Bill proposals

346. To retain legitimate flexibility we propose that the chief social work officer of the relevant local authority for the child may implement the authorisation only with the consent of the person in charge of the residential unit containing the secure accommodation in which the child is to be placed. This differs from the previous legislation and places the chief social worker in the primary decision-making role, as per current practice. However, it retains the requirement for the head of unit to agree to the implementation of the authorisation as they must have the opportunity to confirm whether placement within their unit would be appropriate and in the best interests of that child and the other children resident.

347. This will apply where a relevant order or warrant made in relation to a child includes a secure accommodation authorisation. A relevant order or warrant is:

- a compulsory supervision order,
- an interim compulsory supervision order,
- a medical examination order, or
• a warrant to secure attendance.

348. The chief social worker must remove the child from secure accommodation if he/she considers it unnecessary for the child to be kept there, or is otherwise required to do so by regulations made under this Bill. Once a child is removed from secure care, a secure accommodation authorisation ceases to have effect.

349. To ensure that this flexibility is applied in an open and transparent way, ensuring consistency and embedding good practice, section 145(6) gives Scottish Ministers the power to make regulations in relation to decisions by the chief social worker about whether to implement a secure accommodation authorisation and whether to remove a child from secure accommodation and, in addition, provision relating to decisions by the head of unit whether to consent.

350. In particular, to ensure transparency, good communication, and the effective participation of the child, the relevant person(s) and other parties, it is proposed that the regulations will make provisions about the time within which a decision must be made, the procedure to be followed, the criteria to be applied, matters to be taken into account or disregarded, persons who must be consulted and persons who must consent before a decision has effect. The power also allows provision to be made as to the notification of decisions, the giving of reasons for decisions and the review of decisions.

351. Regulations under section 145(6) are subject to the affirmative procedure.

Alternative approaches

352. We have attempted to assess the robustness of the various options (including the status quo) in the context of the desired criteria outlined above.

No action

353. Preserving the status quo is not an attractive option as stakeholders have collectively agreed that current practice is opaque and does not support the principles of transparency and openness.

Strengthen existing practice, without supporting legislation to ensure that secure care is used only when necessary

354. In our discussions with practitioners, we heard that most local authorities are planning for secure care placements properly. We also heard that children’s Hearings are already considering other measures for children and do not take lightly the decision to authorise secure care.

355. We were, however, advised by practitioners that some local authorities do not keep an audit trail detailing the decision-making process in full and panel members do not automatically hear why authorisations are not implemented.

356. As no requirement would be placed upon decision makers to provide reasons, and to record and communicate their decisions, this solution is unlikely to be robust enough to ensure
that discretion can be considered legitimate. From a policy perspective this solution does not adequately support the key principles by which we have assessed against the desired criteria and does not support transparency and openness in a way that would ensure the effective participation of young people and their carers.

Remove the chief social work officer and head of unit from the decision making process altogether

357. This would ensure that all secure authorisations made by the children’s hearing would be implemented without further reference to any third party.

358. This approach was proposed in the draft Children’s Services Bill. There are however significant risks of taking this approach without safeguards:

- any potential increase in the use of secure care is not consistent with the ultimate vision to have no child in secure care and a mutually agreed desire to reduce the need for secure care, supported by all partners and accepted by Cosla and Ministers. A partnership approach has been developed that envisages a reduction in the need for secure care through the effective use of proven community-based alternatives such as Intensive Support and Monitoring Services (including the use of a movement restriction condition) which would in turn support the objectives of early intervention (including the shifting of resource from acute into earlier interventions);

- the expertise of the chief social work officer and head of unit is important in ensuring that the placement is in the best interests of the child in light of a dynamic risk assessment. Circumstances can change very quickly in the lives of young people and practitioners feel strongly that they need to retain flexibility in order to capitalise on any positive elements and protective factors they can; and

- there is likely to be an increase in placements to secure care should the role of the chief social work officer and head of unit be removed as the figures reveal that their discretion not to place a child is used, on average, in around 30 per cent of cases. While we are clear that decisions about placing young people in secure care should be based on need and risk, an initial estimate of the financial impact would suggest the need for 30 more secure care places at a capital cost of around £40m as well as an annual revenue cost to local authorities of up to £6m per year.

359. This solution was therefore rejected as not supporting the best interests of children, lacking flexibility and potentially being very costly.

Consultation

360. Possible changes to the system were considered following the draft Children’s Services Bill and the consultation Strengthening for the Future.

361. The solution proposed in the draft Children’s Services Bill was to amend section 70(9A)(a) of the 1995 Act to remove the conjoined decision-making power of the head of unit and the chief social work officer. This did not find favour during consultation on the Children’s Services Bill.
362. During the development of the provisions for the Children’s Hearings Bill, policy officials have engaged with stakeholders from the Cosla, SCRA, the Association of Directors of Social Work (ADSW), secure care providers and panel members to explore the key issues, to gain an understanding of national practice and to assess the impact of various options on both professionals and on children and young people.

363. It is clear that the current discretion is valued in principle by stakeholders as supporting the interests of the child through minimising the use of secure accommodation. It is felt that removal of this discretion would be very likely to result in increased use of secure accommodation with associated significant costs.

364. It is, however, apparent that a wide variation in practice under current legislation has grown up, and policy and stakeholders have collectively agreed that there is merit in bringing more certainty and transparency to the procedure and practice that surrounds the discretion of the chief social work officer and head of unit. By setting out a robust decision making process in secondary legislation with additional safeguards we will ensure the system recognises both relevant legal and welfare requirements.

Secure accommodation: placement in other circumstances

365. Section 146 allows the Scottish Ministers to make regulations which will specify the circumstances in which a child who is subject to a compulsory supervision order, but not a secure accommodation authorisation, may be placed in secure accommodation. This provision replicates section 75(1)(a) of the 1995 Act. The power extends to making provisions about the procedure to be followed in deciding whether to place a child in secure accommodation, the notification of decisions and the giving of reasons for decisions when a child is placed in secure accommodation in those circumstances.

366. Section 146 allows the Scottish Ministers to make regulations about the review of decisions and the review of placements by a children’s hearing.

367. The aim of this provision is to ensure that children and young people who are placed in secure accommodation in the absence of a secure accommodation authorisation are entitled to the same level of transparency and robust procedures. The Secure Accommodation (Scotland) Regulations 1996 currently make provision for interim placements in secure accommodation for children who are subject to supervision requirements but not a secure accommodation condition imposed under section 70(9) of the 1995 Act (regulation 6).

Alternative approaches

368. None. This is largely a restatement of previous legislation which remains the preferred policy option for this Government.

Consultation

369. As part of the SOFI process, substantial thought was given by stakeholders to the role of secure care and joint views and recommendations were agreed.
Secure accommodation: regulations about procedure etc.

370. Section 147 allows the Scottish Ministers to make regulations which will impose requirements on the Principal Reporter and relevant local authorities in relation to children placed in secure accommodation. There will also be requirements about who will be notified of the placement of the child in secure accommodation and what that notification will contain.

371. Section 147(2)(c) allows the Scottish Ministers to make regulations in connection with the protection of the welfare of children placed in secure accommodation.

372. These regulations will set out clear roles and responsibilities of agencies and will set out a robust procedural framework in secondary legislation to ensure the system recognises both relevant legal and welfare requirements.

Alternative approaches

373. None. This is largely a restatement of previous legislation which remains the preferred policy option for this Government.

Consultation

374. As part of the SOFI process, substantial thought was given by stakeholders to the role of secure care and joint views and recommendations were agreed.

Appeal to sheriff against decision to implement secure accommodation authorisation

375. Section 156 provides a right of appeal against a decision made by the chief social work officer to implement a secure accommodation authorisation, not to implement the authorisation or to remove the child from secure accommodation. This appeal right will be available to the child and the child’s relevant person and may be made jointly by: (a) the child and one or more relevant persons in relation to the child; or (b) two or more relevant persons in relation to the child. The appeal lies to the sheriff. The appeal may be made on fact and law to ensure that full consideration can be given to the facts of the case.

376. These provisions are directly linked to the policy reasons for introducing sections 145, 146 and 147 of this Bill. These will bring transparency to the process and will support and enable a process which protects the flexibility of the current system while ensuring any decision made regarding the placement of a child in secure accommodation is fair, transparent and in the best interests of the child. Adding the appeal provision to this will ensure that fairness and transparency, can, where necessary, be tested, supporting the best interests of children and the principles of good decision making.

377. Section 156(7) also allows the Scottish Ministers to make, by regulations, further provision about appeals under this section, including the period within which an appeal may be made. This is important to ensure that appeals are dealt with in a speedy and effective manner and children and young people are not held in secure accommodation for longer than necessary. Subsection (6) provides that the appeal must not be held in open court.
**Alternative approaches**

378. These provisions are directly linked to the new framework and are therefore subject to the same policy considerations and consultation processes set out at paragraphs 334-363 above.

**Part 15 – Appeals**

379. This Part of the Bill makes provision for appeals against decisions made by a children’s hearing, and provides that the child, relevant person and safeguarder may apply to the sheriff for a review of certain decisions made by a children’s hearing. These are the decision to make, vary or continue a compulsory supervision order, to make an interim compulsory supervision order, to make a medical examination order, grant a warrant to secure attendance, discharge a referral by the reporter or to terminate a compulsory supervision order. The Bill extends appeal rights to safeguarders. An application for appeal must be made within 3 weeks beginning on the day on which the decision to be appealed is made. There is no power to allow the sheriff to waive the time limit, which is a re-statement of current provision in the 1995 Act.

**Policy objective**

380. To continue the ability to appeal a decision of a children’s hearing. The Bill makes provision for an appeal of a hearing’s decision to be made to the sheriff. There is no policy change in continuing this right. However, the Bill does clarify the scope of appeal and review that is available to the sheriff in considering any appeal, and makes it clear that the sheriff has available to him the power to conduct a wide review of the issues that a hearing considered. We anticipate that the sheriff would use the full range of these powers infrequently.

**Key information**

381. Appeals against children’s hearings decisions are rare (around 600 per annum) and many sheriffs will only ever deal with a handful.

382. Current legislation provides that appeals to the sheriff can be wide in scope (such as that it can be effectively a re-hearing of the matter, if the sheriff considers this appropriate). The scope of appeal was deliberately broadened by the 1995 Act as compared with the appeal process outlined in the Social Work (Scotland) Act 1968. This is clear from a number of statements made at Westminster by Government Ministers during the parliamentary passage of the 1995 Act. A wide scope of appeal (albeit to be used infrequently) was the deliberate legislative intention of the 1995 Act.

383. Providing the sheriff with a wide potential scope of appeal is in line with the stated intention of Kilbrandon that there was a significant role for the sheriff in the Children’s Hearings system, such as deciding upon the grounds for referral if they are not accepted by the child or relevant person.

384. Under section 51 of the 1995 Act the sheriff has various options as to disposal of a section 51 appeal and these include the power to substitute his own decision for that of the children’s hearing. The sheriff is not limited to remitting back to the hearing for a decision, and this suggests that the sheriff can address the merits.
385. In all appeals the sheriff will have a copy of all reports etc. and may ask for further reports or cite witnesses. Most appeals however consist of the solicitor for the appellant making his case, which is then answered by the reporter who was present at the children’s hearing (in around 70% of appeals it is the same reporter who appears). In most cases the sheriff then makes a finding without having heard evidence. However, it is for the sheriff to decide this.

386. Therefore the intention of the 1995 Act was to widen the scope of the appeal to the sheriff, as compared with the 1968 Act and in legislative terms this widening was achieved. Some case law has however reflected this widening.

387. An Inner House judgement in the SK v Paterson case in October 2009 gives some support to there currently being a wide potential scope of appeal and a relevant extract from the opinion is below:

“The provisions of section 51 require that the Sheriff have placed before him all the reports and statements that were before the children’s hearing, together with all reports of the children’s hearing itself and the reasons for its decision. The Sheriff is also entitled to hear evidence from, or on behalf of, the appellant and the respondent and to examine the authors or compilers of any reports or statements and call for any further reports he deems to be necessary. The Sheriff’s power under section 51 entitles him to investigate the issue...”

388. The Bill therefore reflects the appeal provisions in the 1995 Act and also clarifies that a wide potential scope of appeal is available to the sheriff should they consider this necessary in the circumstances of the case before the court. The Bill seeks to remedy the ambiguity of current powers and allow for consistent application of the power for a wide review, if the sheriff considers it justifiable in all the circumstances.

Part 16 – Enforcement of orders

389. This Part is a re-statement of existing legislative powers and policy objectives which are working well in practice.

Part 17 – Proceedings under Part 10: evidence

390. Sections 166 to 169 deal with child and adult vulnerable witnesses giving evidence in proceedings in the sheriff court arising from children’s hearings. The Bill replaces and widens the application of sections 68A and 68B of the 1995 Act which place restrictions on evidence or questioning about character and sexual behaviour in relation to these proceedings.

Cases involving behaviour: evidence

391. The restrictions on the admissibility of evidence contained in section 68A of the 1995 Act do not apply where a child is referred because it is alleged he or she has committed a sexual offence. These cases form a significant proportion of those which proceed to proof and feature some of the most concerning children and the most vulnerable witnesses. Section 166 extends the evidence restrictions so that they apply where the ground of referral involves the sexual behaviour of any person.
392. Section 166 also restates the type of character or sexual behaviour about which the sheriff will not allow evidence or questioning. The only difference is that the introduction to section 68A(2) of the 1995 Act currently states that these special rules apply to witnesses giving evidence at the hearing. This is no longer appropriate given the change made by this section.

393. The restrictions on the cross-examination of witnesses contained in section 68A(2) of the 1995 Act only apply in respect of “the child who is the subject of the application or any other witness giving evidence at the hearing”. These restrictions do not apply where evidence is given in the form of hearsay by another witness. This means that the character or reliability of the child who is the subject of the application could be attacked indirectly through questioning of a witness who gives evidence in place of the child e.g. a police officer or social worker. Similarly, the character or reliability of an adult vulnerable witness whose statements to the police may have given rise to the grounds of referral or concern could also be attacked. Section 166 extends the evidence restrictions so that they apply regardless of whether the child or any other person to whom the evidence or questioning relates has actually given evidence directly at the hearing.

Cases involving sexual behaviour: taking of evidence by a commissioner

394. The protections in section 68A(2) of the 1995 Act only apply during an actual hearing by the sheriff of an application under sections 65(7), 65(9) or 85 of that Act. They do not apply where evidence is taken by a commissioner. This means that a vulnerable witness could be subjected to inappropriate questioning when giving evidence in this way. Section 167 extends the restrictions to ensure that a vulnerable witness whose evidence is taken by a commissioner is not treated differently to a witness using other special measures in these proceedings. It also ensures parity with the protections afforded in criminal proceedings.

Sections 166 and 167: application to sheriff for order as to evidence

395. Section 68B of the 1995 Act sets out the circumstances in which a sheriff may make exceptions to the restrictions about allowing evidence or questioning in these cases.

396. Section 168 redrafts these provisions and sets out the circumstances where a sheriff may make an order to allow the evidence or questioning prohibited by sections 166 and 167. It brings together more clearly what the sheriff can do, who can benefit from the protections, which matters the evidence or questioning can relate to, and defines “sexual behaviour” and “proper administration of justice”.

Amendments to Vulnerable Witnesses (Scotland) Act 2004

397. Section 169 also makes consequential amendments to the Vulnerable Witnesses (Scotland) Act 2004 (“the 2004 Act”):

- to make clear that “civil proceedings” include proceedings before the sheriff in relation to children’s hearings;
- so that, in proceedings in the sheriff court arising from children’s hearings, the Principal Reporter is able to lodge a child witness notice or vulnerable witness application, and any application for a review of current arrangements. The Principal Reporter may exercise this power where he or she is citing the witness who is also a
party to the proceedings. The witness may still lodge the notices or applications him or herself; and

- allowing for evidence in chief to be given by prior statement as a special measure in a hearing by a sheriff of an application to establish or review grounds for the compulsory supervision of a child where the ground is that the child has committed an offence.

398. The use of a prior statement as evidence in chief was introduced by Part 1 of the 2004 Act as a special measure in criminal cases. It enables a witness’s evidence to be recorded without interruption before the trial and alleviates the need for the witness to adopt or otherwise speak to the statement when giving evidence in court. It also avoids the need for the witness to be led through potentially distressing material in court. This special measure was not included in Part 2 of the 2004 Act (civil proceedings) because the use of hearsay evidence in civil cases and sheriff court proceedings to determine non-offence based grounds of referral to the Children’s Hearings system is common practice.

399. The non-availability of this special measure in children’s hearing proceedings based on offence by the child grounds can make it extremely difficult to prove the ground for referral to the required (criminal) standard. It relies on the strength of the evidence given by young and often intimidated witnesses during the proceedings in court. For these reasons, and to ensure parity with criminal proceedings, we intend the use of this special measure to be available to child and adult vulnerable witnesses in these proceedings.

400. A prior statement will only be admissible if it has been authenticated. The method of authentication is to be provided for by the Scottish Ministers in secondary legislation.

Alternative approaches

401. There are none that meet the policy objective.

Consultation

402. These provisions have been prompted by operational experience. SCRA has been involved in their development throughout (and was involved in the consultations which led to the Vulnerable Witness (Scotland) Act 2004).

Part 18 – Miscellaneous

Withholding information

Policy objective

403. To enable children’s hearings to withhold information about the child to whom the hearing relates or about the child’s case when its release may place the child’s welfare at risk. This may be information provided to the hearing by the child or another person.
Key information

404. Currently section 16 of the 1995 Act (as section 26 of this Bill does) requires the hearing in most circumstances, and taking account of the age and maturity of the child, to give the child an opportunity to express his/her views if the child wishes to do so and to have regard to any views expressed.

405. In order to ensure the child’s rights and welfare are not compromised or placed at risk, it is important that the child should feel safe and comfortable in expressing any views, and feel confident that, so far as possible, these will not be shared in a way that places them at risk.

406. Section 46 of the 1995 Act currently empowers a hearing where necessary to exclude a relevant person from any part or parts of the hearing in order to obtain the views of the child or where the presence of the person or persons in question is causing or is likely to cause significant distress to the child.

407. Section 46 of the 1995 Act also requires the chairman of the hearing to explain to a person who has been excluded the substance of what has taken place in their absence. In the majority of cases there is no reason why any information shared by the child with the hearing should not be passed on to the relevant persons. However, we know that in certain circumstances this deters children from informing the hearing about events in their life (e.g. emotional abuse), or from giving the hearing the true reason for their behaviour.

408. The Bill will remedy this problem by enabling the hearing to withhold information provided by the child when its release may place the child’s welfare at risk.

409. The provision is not intended to offer a permanent restriction on the sharing of the information. Rather, it is intended to secure a child’s immediate safety and ensure children at risk are protected to enable new information provided by the child is investigated and/or its impact on the action proposed in relation to the child is assessed.

410. The power to withhold information applies throughout the hearing but where the information, is material to the hearing’s consideration of the case, it may require to be disclosed as part of the reasons for making a particular decision to ensure parties are able to effectively exercise appeal rights.

Alternative approaches

411. There are none that meet the policy objective.

Consultation

412. We sought views on the proposal to enable the reporter and hearing to withhold information in Strengthening for the Future. Of the 223 respondents who indicated a yes or no response to this proposal, 137 (68%) of the respondents expressed clear support for the proposal, with a further 36 (18%) expressed qualified support. Key comments included views that the provision would help to protect children, encourage them to express their views, and that the rights and safety of the child should be paramount.
413. Key concerns qualifying respondents’ support for the proposal were that withholding information could raise ECHR issues relating to ‘equality of arms’ and a fair hearing, and that the proposal would reduce the ‘open’ nature of the Children’s Hearings system.

414. The provision for withholding information did not form part of the draft Bill published in June 2009. Children’s organisations raised concerns that the provision had not been included, and called again for such provision to be made.

**Information flow from SCRA to Crown Office**

*Policy objective*

415. To enable better and quicker sharing of specific information from SCRA to the Crown Office and Procurator Fiscal Service (COPFS). Section 172 of the Bill gives the Principal Reporter a statutory duty to allow the flow of materially relevant information from SCRA to COPFS. By providing a specific duty, the provision is designed to enable a quicker and smoother information flow from SCRA to COPFS. The information sought will assist with the preparation of criminal trials and inform the decision making of the prosecutor.

*Key information*

416. There is no explicit power in the 1995 Act or the Local Government etc. (Scotland) Act 1994 allowing the Principal Reporter to share information such as expert reports and transcripts of care and protection proceedings with COPFS.

417. The information-sharing power is mandatory, rather than permissive, but restricted to specific circumstances where there are both criminal proceedings and care and protection proceedings and COPFS request specific information (for example expert reports and transcripts of care and protection proceedings) from the Principal Reporter.

418. There is not widespread practice of COPFS seeking information from the Principal Reporter and it is thought that this duty will only be used in a small number of exceptional cases, and where COPFS have been unsuccessful in obtaining this information from other sources.

*Alternative approaches*

419. There are none that meet the policy objective.

*Consultation*

420. The need for the provision emerged from a request from COPFS in their response to the *Strengthening for the Future* consultation.

421. A draft section was not included in the draft Bill published in June 2009. However, the Scottish Government has shared the draft provision with SCRA and COPFS and hosted a meeting with them to discuss it and to determine the wording of the Bill.
Feedback from local authorities on the implementation of compulsory supervision orders

Policy objective

422. To provide information to panel members of the impact of decisions made by a children’s hearing to improve understanding of local authority action in response to decisions.

Key information

423. During the development of the Bill, many panel members raised the issue that once they have made a supervision requirement, they rarely know what happens next, either about that supervision requirement itself or indeed about how the relevant local authority implements supervision requirements in general. If the supervision requirement is reviewed, then it is likely to be a differently constituted hearing that considers the child’s case on review.

424. What was not clear from consultation is whether this is an issue across Scotland or just in certain local authorities; Ministers heard clearly from reporters and panel members in some areas that non-implementation of supervision requirements was not an issue locally. In determining the scale and range of this issue it is therefore important to have an accurate picture of the position in all areas.

425. The Bill enables the National Convener to work closely with local authorities to promote a robust partnership between them, panel members and local authority professionals. To help provide a more accurate picture on how local authorities are implementing decisions, and to improve panel member decision-making, the Bill provides a duty on local authorities to report on their response to hearing decisions when requested to do so by the National Convener.

426. We believe it inappropriate and overly bureaucratic for each panel member to receive feedback about the implementation of every compulsory supervision order that that panel member was involved in making. Instead, section 173 of the Bill provides the National Convener with a power to collect information from the relevant local authority about how it implements compulsory supervision orders and to give generalised feedback to panel members.

427. This information might include:

- policy statements by the authority and details of types of residential establishments that the council owns/has use of;
- statistics on types of compulsory supervision orders (e.g. how many secure accommodation authorisations made by hearings were implemented by the chief social worker and head of unit); and
- general information on how the authority goes about implementing compulsory supervision orders, any challenges or difficulties they have faced, or any types of compulsory supervision orders that have proved particularly successful in assisting/protecting the child.

428. This information will help improve panel members’ decision-making process in terms of providing a more accurate picture of how hearing decisions are being implemented, knowing...
which types of compulsory supervision orders have proved to be successful interventions in children’s lives before, and therefore might be useful for other children. It can also be used to inform planning of local training programmes and development needs.

Alternative approaches

429. None that meet the policy objective.

Consultation

430. This aspect of the Bill was discussed with key partners and wider stakeholders including Cosla and local authority partners during the consultation period following publication of the draft Bill. We have received significant support for the inclusion of this provision as stakeholders agree on the objectives of awareness raising, transparency and promoting partnership working.

Mutual assistance

Policy objective

431. To ensure co-operative working between Children’s Hearings Scotland, the National Convener, SCRA, the Principal Reporter and between local authorities.

Key information

432. The Bill makes provision for the national bodies to comply with a request by another of those persons for assistance in the carrying out of functions conferred by the Bill. It is intended that this will promote co-operative working with each other where it is not incompatible with their statutory and other functions. In relation to local authorities it replicates provision made at section 21 of the 1995 Act (which will require amendment following the commencement of the Bill).

Alternative approaches

433. There are none that meet the policy objective.

Consultation

434. This was consulted on during the period following publication of the draft Bill. Although some responses suggested partners already work well with one another, many others appreciated having this on the face of the Bill in order to strengthen existing arrangements, given the lack of consistency throughout the system.

Part 19 – Legal aid and advice

Policy objective

435. To put in place a permanent, sustainable national scheme for the provision of state-funded legal representation in children’s hearings and associated court proceedings.
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

Current position

436. Until 2002 there was no state-funded legal representation available to children or relevant persons appearing before children’s hearings. This reflected a policy approach that legal representation was not necessary during hearings given their informal, child-centred nature. In particular, there are no complicated procedural rules; the panel consists of lay people rather than judges; the hearing does not determine the grounds for referral, including any finding that an offence may have been committed; and there is provision for a safeguarder to be appointed where appropriate to protect the child’s interests.

437. In 2002, an interim scheme was put into effect to provide state-funded legal representation for children at a hearing following the decision in the case *S v Miller*. In that case, the Court of Session held that, in certain circumstances, the European Convention on Human Rights requires that legal representation be made available to children appearing before hearings.

438. The scheme provides that a legal representative can be appointed to any child if it appears that legal representation is necessary to allow the child to effectively participate in the hearing, or it may be necessary to make a supervision requirement involving secure accommodation. The local authority is responsible for finding a legal representative from practising solicitors on the relevant panels of persons who may be appointed as safeguarders or curators ad litem.

439. In 2009, in response to a further legal challenge (*SK v Paterson* [2009] CSIH 76) the scheme was extended to enable state-funded representation to be made available to relevant persons in limited circumstances – essentially where legal representation is required to allow the relevant person to effectively participate, and a supervision requirement may be made affecting the relevant person’s contact with the child, or parental rights, or resulting in the child no longer residing with the relevant person.

440. Although this provides for compliance with ECHR requirements, the scheme has significant limitations. The fact that the local authority, who have an interest in the case, are responsible for finding legal representation for another party is not ideal in terms of demonstrable fairness and independence. Local authorities have no particular expertise in identifying appropriate lawyers, or in funding solicitors to represent third parties, and are not well placed to ensure good quality representation. By contrast, the Scottish Legal Aid Board (“SLAB”) is the statutory body whose primary function is the funding of legal representation to secure access to justice.

441. In addition to the above provisions regarding representation at the hearing itself, state-funded legal advice is already available (under the advice and assistance scheme) to the child and any relevant person, if they are financially eligible, both before and after a hearing.

Furthermore, legal aid may be available for any proceedings in the sheriff court or Court of Session arising out of a hearing (e.g. an appeal against a decision by the hearing, now provided for in Part 15 of the Bill, or an application to the sheriff to determine the grounds of referral, now provided for in Part 10). Although SLAB meet the cost of legal aid in those cases, it is currently left to sheriffs to apply the statutory criteria which determine who is eligible to receive it (except in the case of appeals to the sheriff principal or the Court of Session where the decision is taken by SLAB).

The new framework for children’s legal assistance

The new arrangements for state-funded legal representation in connection with children’s hearings will include the following aid types. In this document, they all come under the heading ‘children’s legal assistance.’ Some of the provision described below will be put in place through regulations made under the general legal aid legislation (that is, the Legal Aid (Scotland) Act 1986) rather than through provision in the Bill. Provision under all aid types is discussed here to provide a comprehensive overview of the Government’s intended approach.

Advice and assistance

Advice and assistance will continue to be available to a child or relevant person, before or after a hearing, subject to a test of financial eligibility.

Assistance by way of representation (“ABWOR”)

ABWOR is a way in which solicitors are funded to provide representation as well as advice under the advice and assistance scheme, rather than the more complex and formal legal aid scheme.

The Government has concluded that for practical reasons, legal representation for children and relevant persons who have appointed a solicitor to represent them in a children’s hearing will best be provided under ABWOR rather than children’s legal aid. This allows acting solicitors to assess their client’s eligibility and authorise themselves to act immediately, subject to later confirmation by SLAB, rather than requiring a full legal aid application. This extension of ABWOR does not require primary legislation: regulations extending ABWOR to children’s hearings will be made under the existing enabling power in section 9 of the Legal Aid (Scotland) Act 1986.

Automatic children’s legal aid

It is envisaged that children or relevant persons may obtain their own legal representative ahead of a children’s hearing. As set out above, this will be funded, where appropriate, through ABWOR.

However, if this has not happened, the Bill provides for automatic children’s legal aid to be made available to the child in prescribed circumstances. This is intended to ensure that representation can be made available in urgent cases where a child appears without having secured representation and the issues are such that it would be inappropriate for the hearing to proceed without the child being represented.
449. Children’s legal aid will also be automatically made available in non-urgent cases where a deprivation of the child’s liberty is in prospect but the child has not secured representation ahead of the hearing. In those situations, SLAB will appoint a solicitor to the child.

450. The automatic grant of children’s legal aid will only be available for the purpose of the immediate hearing.

Children’s legal aid

451. Children’s legal aid will still be the aid type for court proceedings, for both the child and relevant persons. So, for example, children’s legal aid will still be available for an appeal to the sheriff against a decision of a children’s hearing or a grounds of referral proof before the sheriff. It will also continue to be the aid type for onwards appeals to the sheriff principal and the Court of Session.

452. In deciding whether legal aid should be available, SLAB will required to be satisfied that it is reasonable in the circumstances of the case, and that the expenses of the case could not be met without causing undue financial hardship to the applicant or their dependents. Where the applicant is a child, SLAB must also be satisfied that the grant of legal aid is in the child’s best interests. In addition, in appeal cases SLAB must be satisfied that the child or relevant person has substantial grounds for taking, or responding to, the appeal.

Quality assurance

453. The Scottish Government recognises that it is vital to ensure that legal representatives who operate within the Children’s Hearings system should be familiar with its procedures, sympathetic to its unique ethos and able to adapt their professional style to the special nature of the proceedings.

454. SLAB will take responsibility for ensuring that there are sufficient numbers of legal representatives available across the country, that those legal representatives are appropriately experienced and that the quality of their work is appropriately monitored. Solicitors registered with SLAB to provide children’s legal assistance will be subject to quality assurance.

455. The Bill makes provision for a register and code of practice to ensure that those state-funded solicitors, appearing before a children’s hearing demonstrate the appropriate skills and characteristics. SLAB will monitor compliance with the code and ultimately may remove from the Register a solicitor or firm for failing to comply with it.

456. Children and relevant persons will be free to choose their own solicitor from amongst those registered to provide children’s legal assistance. The level of choice will therefore be dependent on the availability and number of solicitors registered with SLAB to provide children’s legal assistance.

457. In emergency hearings, or where there is limited time for a legal representative to be sought, (that is in the cases where children’s legal aid is being provided automatically) SLAB will appoint a registered solicitor to the child, or as the case may be, the relevant person.
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

458. The Bill does not provide for a similar quality assurance regime in relation to advocates. The Scottish Government does not consider it necessary or appropriate for advocates to appear before children’s hearings and therefore state-funding will not be made available for them to do so.

Transferring responsibility for assessing applications

459. Sheriffs currently have to decide if an applicant meets the statutory criteria for children’s legal aid, in a case before the sheriff court (other than an appeal to the sheriff principal). This responsibility will transfer to SLAB, on the basis that this task is a core function which they perform across various types of court proceedings, that they have wide experience in applying such tests, and it sits well with their statutory duties of securing that legal assistance is available and administering the Scottish Legal Aid Fund.

A consistent contributions regime

460. Depending on the financial circumstances of the applicant, a contribution may be payable for persons in receipt of children’s legal aid. The Scottish Government believe that those who can afford to pay towards their own legal advice and representation should do so. The alternative would be to provide children’s legal aid without requiring contributions. This would be inconsistent with the general approach across nearly all civil proceedings, that those who can afford to contribute to the costs of the action should do so.

461. Those who do have to contribute can make payments over an extended period to minimise the impact.

Alternative approaches

462. An alternative approach would have been to require local authorities, SCRA or Children’s Hearings Scotland to secure legal representation for children and relevant persons where required. This was rejected as it would be administratively burdensome for these bodies, would not secure any efficiencies or improved access, and would have led to two different regimes for representation in hearings themselves and in court cases arising out of hearings.

Consultation

463. The Scottish Government commissioned the Scottish Centre for Social Research\(^\text{18}\) to conduct research into the effectiveness of legal representation for children in hearings. It found significant local variations in many aspects of the scheme, including how solicitors were recruited to the local pool and selected for individual cases, their background and qualifications, and how the decision to appoint a solicitor in an individual case was taken. Concerns were expressed that the role of such solicitors in hearings was unclear. Suggestions for improvement included a wider or national ‘pool’, training and monitoring of legal representatives, and allowing young people some say in who their legal representative should be.

\(^{18}\) Research of the Children’s Legal Representation Grant Scheme: Research Report, Rachel Ormston & Louise Marryat, Scottish Centre for Social Research (ScotCen), Scottish Government Social Research, 2009
464. The consultation paper *Strengthening for the Future*, proposed putting in place a permanent scheme of legal representation to replace the current “interim” scheme – which has been in place since 2002. Responses to the consultation said that legal representatives should be specialists in child law, be experts in the Hearings system, and understand the difference between a panel hearing and a court.

465. In the light of this evidence, the Bill seeks to modify the current arrangements by:

- establishing a proper basis within the legal aid and assistance scheme for legal representation to be provided at children’s hearings and associated court proceedings, under the label “children’s legal assistance”;
- transferring responsibility for assessing entitlement to children’s legal aid in the sheriff court from sheriffs to SLAB;
- establishing a contributions regime for those who can afford to contribute to the costs of children’s legal aid; and
- establishing a scheme for quality assurance for solicitors who are paid for under the children’s legal assistance scheme.

**Part 20 – General**

466. This Part includes general and ancillary provisions relating to matters such as parliamentary procedures for statutory instruments, definitions of terms used in the Bill, and ancillary and transitional order making powers.

**Interpretation**

467. Section 184 of the Bill continues to provide for the age of a child in the Children’s Hearings system. A compulsory supervision order may be imposed by the children’s hearing or sheriff (in appeal proceedings) in respect of a child who is under the age of 16. Those children who are subject to a compulsory supervision order when they are 16 may continue to be subject to the jurisdiction of the hearing until they are 18.

468. A compulsory supervision order may not, subject to it being continued or reviewed, last more than a year will terminate on the child’s 18th birthday.

**Definition of relevant person**

**Policy objective**

469. To clarify the criteria for those who should automatically receive relevant person status. In addition, section 78 of the Bill creates a right for any person to argue before a pre-hearing panel that they should be treated as a relevant person (even though they do not meet the definition in section 185 of the Bill).

**Key information**

470. Every person who is a relevant person has a duty to attend all stages of any child’s hearing; a right to accept or deny grounds for referral; a right to appeal a decision made by a
hearing and a right to request a review of any supervision requirement made by a hearing. Under current legislation (section 93(2)(b) of the 1995 Act) a relevant person is anyone who comes within one or more of the following categories:

- any parent enjoying parental responsibilities or parental rights under Part 1 of the 1995 Act;
- any person in whom parental responsibilities or rights are vested by virtue of the 1995 Act; and
- any person who appears to be a person who ordinarily (other than by reasons only of employment) has charge of, or control over, the child.

471. The third category above is a question of fact rather than a legal test. In order to determine whether a person meets this test, all the facts and circumstances need to be considered. It is currently the reporter who initially determines whether a person meets this test (and any of the categories in the definition of “relevant person”) in fulfilling his or her function of giving notice to the relevant person. The reporter may refer the case to a business meeting to decide whether notice is to be given where there is doubt as to the person’s relevant person status. In making this decision a business meeting could determine whether the test was met. There is, however, no automatic right for a person, who claims to be a relevant person, to have their case considered by a panel nor any right to attend a business meeting.

472. The first category, parents who enjoy parental responsibilities or parental rights (“PRR”), has also given rise to different interpretations in practice. For example, in the case of a father who has been granted a contact order from the sheriff court (under section 11(2)(d) of the 1995 Act) but, otherwise, does not have PRR, there is a divergence of opinion on whether this would meet the required criteria for achieving relevant persons status. The Inner House has recently commented on this (Principal Reporter v JPK and JR (2010) CSIH 5, paragraph 61 and seq).

473. The intention, therefore, is to amend the definition of “relevant person” and remove potential ambiguities but also to safeguard the rights of persons who may be significantly involved in the child’s upbringing.

474. As to the new criteria for relevant person status, the intention is that they will be clearer and that evidence of a person’s status will be a matter of legal certainty. A person will now receive automatic relevant person status where they have PRR in respect of the child. This will be a question of law, not a factual test. This is achieved by removing the third category (a person ordinarily with charge of, or control over, the child) in the current definition of “relevant person” and by making it clear that an order granted under section 11(2)(d) (contact order) or (e) (specific issue order) of the 1995 Act alone will not suffice to award relevant person status.

475. For example, a person who is not a parent could qualify if they receive PRR by virtue of an order made under section 11(2)(b) of the 1995 Act or by virtue of a permanence order under section 82 of the Adoption and Children (Scotland) Act 2007. Adoptive parents would, also fall within the category of those who would automatically receive relevant person status as, on the making of an adoption order, PRR are vested in the adopters.
476. In addition the definition will now include those who have PRR vested in them by virtue of a court order made in England and Wales so that in cases where children move to Scotland there is a recognition of their carers’ rights. Further, an order making power has been taken allowing the Scottish Ministers to specify any other person as having parental responsibilities or rights under the law of a country or territory outwith Great Britain analogous to those held by or vested in a person falling within the definition at section 185(1)(a) to (e) of the Bill.

477. Although the new criteria make clear that a parent who only has a contact order granted under section 11(2)(d) or a specific issue order under section 11(2)(e) of the 1995 Act does not receive automatic relevant person status, such a parent and others claiming to have a significant involvement in the upbringing of a child will now be afforded the opportunity to make a case before a pre-hearing panel that they should have the right nevertheless to be treated as the child’s relevant person.

478. The test for determining whether a person should be treated as the child’s relevant person is whether they have a significant involvement in the child’s upbringing (section 80(3) of the Bill). This will be a matter for the pre-hearing panel or children’s hearing to determine. The test is designed to take in persons who provide a significant amount of care for the child and who are significantly involved in decision making on the child’s upbringing. The intention is that persons who have such an interest should be able to make a decision on whether or not to become involved in the child’s progression through the Hearing system. This will allow them to contribute to the hearing so that the hearing has all the facts before it. It is also intended to afford such persons greater protection of their relationship with the child through their involvement in the hearing.

479. The determination of whether the person meets the test will be made by a pre-hearing panel. Notification requirements will be prescribed in subordinate legislation. The intention is that all parents (regardless of whether they have PRR or not) will be notified of an upcoming hearing along with any person the reporter recognises as having a significant involvement in the child’s life. The right to request a pre-hearing determination of whether they should be treated as the child’s relevant person will, however, extend to any person who claims such an interest regardless of whether they have received formal notification.

480. The decision as to whether the person meets the test, and should be treated as the child’s relevant person, can only be made by the pre-hearing panel regardless of whether or not there is any dispute between the individual, the child and a person who automatically assumes relevant person status by qualifying under section 185 of the Bill. There is also a right of appeal against the panel’s decision, as outlined in section 155. When a determination is made that a person is to be treated as the child’s relevant person they will be treated as such for the purposes of Parts 7 to 18 of the Bill and Parts 5A and 5B of the Legal Aid (Scotland) Act 1986 – for the purposes of that hearing (including any continuation or review), any appeal arising therefrom or subsequent court proceedings and for the purposes of implementing any order granted during that process.

481. Persons who are unsuccessful in claiming that they should be treated as the child’s relevant person (or other persons who have an interest in the child’s upbringing but who choose not to claim relevant person status) may still have the opportunity to attend the hearing as the current discretion allowing such persons to attend will be preserved. Section 77(2) permits a
person’s attendance where the chair considers it necessary for the proper consideration of the matter before the hearing or where they are otherwise granted permission to attend.

482. Clarifying the position of relevant persons will also help promote the best interests of the child. Being able to hear directly from all those with a significant involvement in a child’s life will help ensure that a children’s Hearings has all the information that it needs to take decisions in the best interests of the child.

Alternative approaches

483. An alternative option would have been to create a new category of person who would automatically qualify as the child’s relevant person to include persons who would not otherwise qualify under the present definition in the 1995 Act but who have a significant interest in the child’s upbringing which should be safeguarded by their inclusion in the hearing process. The difficulty with this approach is that it creates an unnecessary overlap with the third category discussed at paragraph 471 above (the person who ordinarily has care of or control over the child) leading to further interpretative problems. This would also have had an effect on the numbers of adults who received relevant person status, perhaps adding significantly to the number of adults present in a hearing which could conflict with the duty to keep the number of persons present to a minimum.

484. It is also considered more appropriate for decisions on questions of fact to be determined by panel members who may hear from all the parties on the circumstances of the case. By conferring the right to request a pre-hearing determination of whether a person should be treated as the child’s relevant person, this will provide an opportunity for those persons who may have a significant involvement in the child’s upbringing, but who may not have otherwise qualified as a relevant person under the current definition, to carry over that role in the context of the hearing system.

Consultation

485. This issue was not included in earlier consultations such as Strengthening for the Future. It is an issue that has emerged more recently.

PART FOUR – EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

486. The Bill is designed to improve outcomes for every child who is referred to the Principal Reporter, and the provisions will not discriminate negatively on the basis of gender, race, age, religion, disability or sexual orientation. In terms of equality, the Bill is designed to strengthen and protect a system that already places the child at the centre – and so looks already to address each child’s individual needs and circumstances. The Bill and wider reforms will provide for positive differential impacts on children and young people in the Hearings system, particularly relating to the child’s age and maturity.
487. Given the significant and complex equality issues relating to children’s hearings, an Equality Impact Assessment (EQIA)\textsuperscript{19}, a full analysis of the equality impact of the Bill and associated reforms, has been published on the Scottish Government website to coincide with the Bill’s introduction to the Scottish Parliament.

488. The EQIA focuses on the most important policy driver i.e. improving outcomes for children and young people. The EQIA acknowledges that children and young people are not a homogeneous group: their identities are made up of many factors including their age, gender, disability, faith and family circumstances. They have individual needs and aspirations and it is important that their potential is not compromised by barriers to services or assumptions made by service providers that may or may not be correct. The EQIA identifies gaps in the current evidence base relating to the needs and experiences of children and young people in the Hearings system and details what the Scottish Government will do to fill those gaps, including working with key delivery partners to improve their own data collection and research.

489. The legal aid provisions will help to ensure that children or relevant persons who are unable to participate effectively as a result of, for example a disability or mental health problem, are provided with appropriate assistance.

**Human rights**

490. The Scottish Government considers that the provisions of the Bill are compatible with those provisions in the European Convention on Human Rights (ECHR) which constitute “the Convention rights” within the meaning of the Scotland Act 1998 and the Human Rights Act 1998. In the view of the Government, the main Articles of the ECHR by reference to which issues arise under the Bill are Article 5 (right to liberty and security), Article 6 (right to a fair hearing by an independent and impartial tribunal in the determination of civil rights) and Article 8 (right to respect for private and family life).

491. Article 6 provides, in respect of the determination of civil rights and obligations or of any criminal charge, that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This Bill complies with Article 6. The Children’s Hearings system is a fair and impartial tribunal system designed to ensure the best outcomes for children; it promotes the child’s welfare and respects the rights of children as an intrinsic component of child welfare. The Children’s Hearings system imposes compulsory measures of supervision on children only after a full quasi-judicial process has been conducted.

492. Children and relevant persons who enter the Children’s Hearings system are informed of the reasons for, and circumstances of, the referral and are involved throughout the subsequent determination process before the children’s hearing or the sheriff. There are also extensive appeal rights for children and their parents from the disposals of children’s hearings. Given the independent decision-making of the children’s hearings, which has access, as necessary, to independent and expert legal and procedural advice from the National Convener, combined with the rights of appeal provided, it is considered that the requirements of Article 6 are satisfied in respect of any determination of an individual’s civil rights.

\textsuperscript{19} [www.scotland.gov.uk/childrens-hearings-bill](http://www.scotland.gov.uk/childrens-hearings-bill)
This document relates to Children’s Hearings (Scotland) Bill (SP Bill 41) as introduced in the Scottish Parliament on 23 February 2010

493. ECHR Article 8, paragraph 1 states that: “Everyone has the right to respect for his private and family life, his home and his correspondence”. Any interference by a public authority with the exercise of this right must, under paragraph 2, be “in accordance with the law and necessary in a democratic society”. In addition, any interference must satisfy a further test that it is “in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

494. In this context, the Bill engages the Article 8 rights of children and their parents on a number of levels. The Bill makes provision for compulsory measures of supervision to be imposed upon children which may regulate their residence and contact with others. Such compulsory measures obviously impinge on the private and family life of the child and parents. However such interferences are in accordance with the law and are potentially necessary for several of the reasons outlined in Article 8(2): public safety; prevention of disorder or crime; protection of health or morals; or for protection of the rights and freedoms of others. The compulsory measures which might be contained within a Compulsory Supervision Order made by a children’s hearing meet the requirements of necessity and proportionality inherent in Article 8(2) and pursues the legitimate aim of protecting the welfare of children. The Bill confers powers upon the various bodies and personnel within the Children’s Hearings system which are capable of being exercised in a manner that is compatible with the Convention rights and the Scottish Government consider that they do not, in themselves, cause an unjustified interference with Article 8. Insofar as Article 8 is engaged, the Scottish Government consider that any interference would be justified.

495. Article 5 ECHR provides that everyone has the right to liberty and security of person and no one shall be deprived of his liberty save in specified circumstances and in accordance with procedures prescribed by law. One of these circumstances (Article 5(1)(d)) is “the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.” The Bill engages Article 5 in the context of placing a child in secure accommodation. This is a deprivation of the child’s liberty. However this deprivation can be justified because it is pursuant to a lawful order made by an independent and impartial tribunal and is for the broad purpose of the educational supervision of the child or in order to arraign the child before a children’s hearing or the court (in the case of warrants to secure attendance). The Scottish Government consider that, insofar as Article 5 is engaged, any deprivation of liberty is justified.

496. The Bill is also cognisant of numerous provisions of the UN Convention on the Rights of the Child. For instance, it reflects Article 3 by ensuring the paramountcy of the best interests of the child including when the child is separated from his parents, as regulated by Article 9; and it respects the rights of parents generally as required by Article 5. Article 12(1) provides that: “State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”. The Bill reflects this stipulation across its provisions. The Children’s Hearings system is also an embodiment of the positive obligation on States to protect children from all forms of abuse and maltreatment, as required by Article 19. Article 40 sets standards for when children infringe the penal law. The Children’s Hearings system, by encompassing those children who commit criminal offences within it, and keeping them out of the adult criminal justice system, ensures that children are, in
the words of Article 40 “treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”

497. The legal aid provisions will provide for a more consistent and organised scheme to ensure compliance with the human rights of children or relevant persons to legal representation in certain circumstances.

**Island communities**

498. The provisions in the Bill will help the Hearings system respond to the varied needs and circumstances of island and remote rural communities in a more coordinated way.

499. The Bill provides for the establishing of Children’s Hearings Scotland which will support the principle of community involvement in the Hearings system and support local decision making and delivery.

**Local government**

500. The Convention of Scottish Local Authorities (Cosla) and local authorities have been engaged during development of the provisions of the Bill that directly impact on them. Cosla is represented on the Children’s Hearings Reform Strategic Project Board, which provides strategic guidance and advice on matters relating to reform of the Children’s Hearings system.

501. The implementation of the measures contained in the Bill will not increase the financial or regulatory burden on local government. Local authorities will continue to have a role in supporting the Hearings system locally, for example in the recruitment and selection of panel members. Area support teams based in local authority areas or groups of local authorities will operate under the direction of the National Convener, providing support and monitoring local performance in keeping with a national framework and standards laid down by the new body. The Bill will place a duty on the National Convener to consult with local authorities on aspects of area support teams: their location, membership and remit.

502. The transfer of responsibility for securing legal representation to SLAB will relieve local government of an administrative burden.

503. The policy objectives lying behind these measures are set out in detail throughout this Memorandum and the financial implications in the Financial Memorandum.

**Sustainable development**

504. The Bill will have no negative impact on sustainable development.
CHILDREN’S HEARINGS (SCOTLAND) BILL

POLICY MEMORANDUM


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