



Greg Black
Clerk to the Delegated Powers and Law Reform
Committee
Scottish Parliament

6 March 2023

Dear Greg,

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

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

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

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

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

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

For some young people, this additional period of time in secure accommodation will enable them to complete a longer part, or the entirety, of their period of remand or sentence in the same environment, with the same supports and interventions that they have already been

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receiving. However, any decision on those over 18 remaining in a secure accommodation setting must be made on a case-by-case basis, to ensure this decision is in the young person's best interests and would not be contrary to the best interests of other children accommodated there. The factors likely to be set out in the regulations would inform this decision making. This is expanded upon below in response to Question 2 to aid the Committee's consideration.

The Scottish Government's consultation on the policy proposals around the Bill showed a significant majority of respondents (88%) felt children should be able to remain in secure care beyond their 18th birthday.

The approach taken in the Bill is consistent with the United Nations Convention on the Rights of the Child (UNCRC), which defines a child as up to age 18, and Article 37(c), which says that children are to be separated from adults unless it is otherwise than in their best interests. The UN Committee on the Rights of the Child General comment No. 24, amplifies that by saying that Article 37(c)

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

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

2. What circumstances it envisages setting out in regulations.

It is envisaged that the regulations will build on the Secure Accommodation (Scotland) Regulations 2013¹ (SSI 2013/205) to enable case-by-case assessment to be given to the basis on which a young person may remain in secure accommodation once they have turned 18 and whether the “best interests test” is met for all children/young people. The assessment will follow planning and input from those with relevant responsibilities around the young person, which is likely to include professionals from social work, secure accommodation (who will also be responsible for the care of the other children within their centre), and the Scottish Prison Service, as well as the young person and their family (as appropriate). While the factors to be included in the regulations will be for Ministerial agreement in due course, the assessment could include factors such as:

- Length of time the young person has already been in secure care and remaining period of remand or sentence;
- The relationship and engagement they have with the secure care provider and other children in the secure accommodation;
- The young person's ongoing needs (including their stage of development and any additional support needs), risks and vulnerabilities;

¹ [The Secure Accommodation \(Scotland\) Regulations 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ssi/2013/205)

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- Supports and interventions available to the young person within secure accommodation;
- Likely impact of the move to YOI, any additional support around transitions to the prison estate, and available services and interventions;
- Any on-going education or extra curricular attainments which cannot be continued in the prison estate;
- The needs of the other children in the secure care centre, including their safety, welfare, and best interests.

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

The decision-making process around planning and managing a child's transition from secure care to YOIs is currently subject to well established processes, which can be built upon. Presently, responsibility for leading the planning and management of a child's case when placed in secure care rests either with the Scottish Government or with the local authority, dependent on the child's legal status. The fulfilment of these responsibilities is supported by guidance, which includes the processes for a child's transition from secure care to a YOI under a Scottish Prison Service Standard Operating Procedure (which starts at least 6 months before a child's planned transition or sooner if closer to the child's 18th birthday) and Scottish Government guidance². This is supplemented by practice guidance³ to support the implementation of the Whole System Approach, within which transitions⁴, including from secure care to YOIs, is a core domain. Such existing regulations and guidance and practice experience will provide foundations for future development.

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

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

Yours sincerely,

Ian Donaldson
Deputy Director,
Children's Rights, Protection and Justice

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

³ [Children and young people in conflict with the law: policy, practice and legislation \(cycj.org.uk\)](http://cycj.org.uk)

⁴ [Reintegration and transitions for young offenders: guidance - gov.scot \(www.gov.scot\)](http://www.gov.scot)

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