OFFICIAL REPORT
AITHISG OIFIGEIL

Education, Children and Young People Committee

Wednesday 22 March 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 22 March 2023

CONTENTS

EDUCATION, CHILDREN AND YOUNG PEOPLE COMMITTEE
10th Meeting 2023, Session 6

CONVENER

*Sue Webber (Lothian) (Con)

DEPUTY CONVENER

*Kaukab Stewart (Glasgow Kelvin) (SNP)

COMMITTEE MEMBERS

*Stephanie Callaghan (Uddingston and Bellshill) (SNP)
*Graeme Dey (Angus South) (SNP)
*Bob Doris (Glasgow Maryhill and Springburn) (SNP)
*Ross Greer (West Scotland) (Green)
*Stephen Kerr (Central Scotland) (Con)
*Ruth Maguire (Cunninghame South) (SNP)
*Michael Marra (North East Scotland) (Lab)
*Willie Rennie (North East Fife) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Superintendent Claire Dobson (Police Scotland)
Kenny Donnelly (Crown Office and Procurator Fiscal Service)
Fiona Dyer (Children and Young People's Centre for Justice)
Megan Farr (Children and Young People's Commissioner Scotland)
Alistair Hogg (Scottish Children's Reporter Administration)
Katy Nisbet (Clan Childlaw)

CLERK TO THE COMMITTEE

Pauline McIntyre

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Education, Children and Young People Committee

Wednesday 22 March 2023

[The Convener opened the meeting at 09:00]

Children (Care and Justice) (Scotland) Bill: Stage 1

The Convener (Sue Webber): Good morning, and welcome to the 10th meeting in 2023 of the Education, Children and Young People Committee. The first item on our agenda is evidence on the Children (Care and Justice) (Scotland) Bill. We have two panels of witnesses joining us today. I welcome our first panel. Alistair Hogg is head of practice and policy at the Scottish Children's Reporter Administration; Kenny Donnelly is procurator fiscal for policy and engagement at the Crown Office and Procurator Fiscal Service; and Superintendent Claire Dobson is from the partnerships, prevention and community wellbeing division of Police Scotland.

We have a lot of ground to cover today, so we will move straight to questions.

Stephen Kerr (Central Scotland) (Con): We will start with one of the principal issues in the bill, in the minds of many people, which is the definition of a "child". What are your thoughts about the change that is proposed? What is your experience that leads you to conclude one way or another about the age of 18?

Kenny Donnelly (Crown Office and Procurator Fiscal Service): It is a welcome change in that it standardises the definition of "child" for the criminal justice system. At the moment, there is a discrepancy. According to existing legislation, a child can be a person under 18 if they are a victim or witness, including a vulnerable witness, whereas a person can be 16 or 17 when charged with offences and when on supervision. It does not make sense that there are two different definitions, so, to the extent that the bill rationalises the age of a child for the criminal justice system, it is welcome.

Stephen Kerr: Based on your experience, why is that rationalisation or standardisation appropriate?

Kenny Donnelly: It is for Parliament to determine where the line should be drawn. Parliament recently passed the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill. I appreciate that the bill is still live, because of the Supreme Court's decision, but it defines a child as being a person under 18. By standardising the age at 18, which seems to be the universal norm in relation to criminal justice, the Children (Care and Justice) (Scotland) Bill is a logical follow-on from the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill.

Stephen Kerr: That is fair enough, but how about your own experience?

Kenny Donnelly: In my experience, one has to draw the line somewhere, Mr Kerr. We could be dealing with serious offending by people who are under 16 or serious offending by people who are aged 16 to 18, which makes you think that there has to be a criminal justice response. However, the bill and underlying policies allow that still to be the case. There has to be a standard age. The UNCRC tells us what that is; we then need in place processes that allow us appropriately and proportionately to respond to that, acknowledging that people under 18 are children and that we have to deal with them as such.

Stephen Kerr: I ask Alistair Hogg the same set of questions.

Alistair Hogg (Scottish Children's Reporter Administration): I agree with a lot of what Kenny Donnelly has just said. There is guidance in relation to the definition of a child under the UNCRC, and the age has been arrived at through consideration of lots of evidence, understanding and experience over many years and decades—centuries, in fact.

There are other policy documents, such as the sentencing guidelines that were recently introduced on the courts' approach to sentencing young people. The question is not so much whether a child should be defined as someone who is under 18 as whether the definition should go beyond 18. When we look at development, particularly brain development and the ability to make good decisions, the evidence is that a person can be 25 or 26 before their brain is fully mature and developed. In my view, we should move the age to 18.

You asked about experience, Mr Kerr. I have been a children's reporter for more than 22 years and, as I am sure you know, we already have 16 and 17-year-old children in the children's hearings system. In my view, that is entirely appropriate. To see young people of that age as children is an entirely appropriate response. They might not wish to be called children, of course; they might wish to be called young people or young adults. However, when it comes to how we, as a society, should approach them in a legal response, they should be viewed as children, because that aligns with the UNCRC.

Stephen Kerr: Thank you. Claire Dobson, do you want to comment?

Superintendent Claire Dobson (Police Scotland): Good morning. I have to agree with other panel members that there are differences across legislation at the moment, so changing the definition such that a child is a person under 18 will bring parity to the various systems. It will mean that young people aged 16 and 17 will be treated as children and that there will be parity of service in how the criminal justice system deals with them in relation not only to offences but to care and welfare. The approach supports the rights of the child and ensures that they are properly considered in the system.

Stephen Kerr: An aim of the bill is to improve the experience and outcomes when children come into the justice system, one way or another. What aspects of the bill will make a positive impact in relation to that objective?

Superintendent Dobson: It is positive that there will be parity for children or young persons who enter the criminal justice system. I am thinking about the rights of 16 and 17-year-olds who are not cared-for young people and currently come into the criminal justice system as adults. You will be aware that young people are dealt with differently at the moment. That change will be an improvement.

To ensure that that is the case, we need to make sure that the infrastructure is in place to support the change, and we need to put in place adequate provision for young people—for example, so that a place of safety is available for a young person when it is decided that they must appear before the court. That infrastructure must be in place.

We are considering a more whole-system approach. There will be more discussion between the various organisations, with more linking up. That is positive, too.

Stephen Kerr: Will those things improve a child's chances of not reoffending and of sorting their life out and getting themselves together again?

Superintendent Dobson: I think that the approach will mean that additional support will be in place for 16 and 17-year-olds who do not currently get it. There will be improved access to support for children who are currently, in essence, treated as adults when they turn 16. The approach will open up all sorts of avenues for support and intervention that are not currently available for older children.

Stephen Kerr: That is clear. Does Alistair Hogg want to comment?

Alistair Hogg: One of the most significant aspects of the bill is that it will raise the age at which a child can be referred to the children's reporter and might therefore be referred to a children's hearing. If we take the position that we recognise that anyone under 18 is a child, we have to consider that the best approach is the welfare-based approach, through the children's hearings system.

Committee members have information packs. There is lots of research evidence that the holistic welfare-based approach is the right one, and not just for the child but for society in general, because the approach is more likely to lead to positive outcomes. We know from research that formal interaction with the criminal justice system might have the opposite effect—it might increase the likelihood of reoffending.

Of course, the approach in the children's hearings system is to see children as children, irrespective of the matter that led to their referral to a hearing. Often, the referral is made on care and welfare grounds. We take the same approach in relation to children whose behaviour causes harm, because they are very often the same children. Often, they will have behaved in a particular way because of causal factors. We have numerous research documents.

We also have our own research team, which recently concluded that the research into offending by 12 to 15-year-olds is equally applicable to 16 and 17-year-olds. By looking at the circumstances in which young people have lived their childhoods, we can start to understand the causes of their behaviour and address those causes. That does not mean that we ignore their behaviour—of course, we address their behaviour as well. That is part of helping and supporting the child to reach a better outcome.

For us, that is a big part of the bill. There are numerous other provisions that relate to interaction with the children's hearings system. There is more in the bill that is incredibly helpful, positive and, in my view, progressive. As Kenny Donnelly mentioned, we must recognise that there will be situations in which a criminal justice response might be required. If and when such a response is required—which we hope will be only in exceptional circumstances—the bill requires from the criminal justice system a different response to how children and young people are dealt with.

We know that, at the moment, young people who go through the criminal justice system often face lots of challenges in interacting with that system, including challenges related to learning difficulties and to speech, language and communication issues, which mean that they do not understand what is going on. There is lots in

the bill to enhance their experience in that regard, as well as progressive policies including no longer putting children in young offenders institutions, in recognition that secure accommodation is a much better response than a prison or a young offenders institution, and providing the ability to keep young people in such accommodation beyond the age of 18. There are a lot of very positive and progressive policies in the bill.

Stephen Kerr: Colleagues will want to ask questions about a number of the issues that you have raised in relation to the bill. Kenny, do you have anything to add to what your colleagues have said?

Kenny Donnelly: I do not have a great deal to add to what Alistair—[*Interruption*.]

Stephen Kerr: I am sorry—I am a bit confused.

The Convener: It was a private comment. It is fine—carry on with your response, Kenny.

Stephen Kerr: I know that other colleagues will want to ask questions. I am sorry, Kenny.

Kenny Donnelly: Not at all.

I do not have a lot to add to what Alistair Hogg and Claire Dobson have said. I have already mentioned one of the benefits from a Crown Office perspective, which is consistency about age. That will mean that there will be consistency of opportunity for 16 and 17-year-olds, rather than just for young people who have been in contact with the reporter system at an earlier stage.

Prosecution policy is a matter for the Lord Advocate but, as we say in our written submission, there is already a presumption against putting 16 and 17-olds into the court environment. From our perspective, the option of referral to the reporter and discussion with the Children's Reporter Administration is a welcome step, because it provides an ability to give children a different opportunity to address their underlying issues, instead of consideration having to be given to doing that through the adult criminal justice system.

Stephen Kerr: That is in the hope that there will be a better outcome.

Kenny Donnelly: Indeed.

The Convener: We have heard a lot—from Claire Dobson, in particular—about the different ways in which young people are dealt with. Could you outline some of the inconsistencies that currently exist for 16 and 17-year-olds, depending on whether they go through the children's hearings system or the criminal justice system? I understand that you cannot talk about specifics, but it would be helpful if you could be as specific as possible, within the restrictions on what you can say about such matters. I invite Claire Dobson to respond first.

Superintendent Dobson: From a policing perspective, there are differences between how a child is dealt with and how a 16 or 17-year-old young person is dealt with as they come through the custody process, if they have been arrested. At the moment, a young person who is under the age of 16 will be treated as a child. When they are arrested, the local authority will be notified of that, to allow it to visit the child for welfare purposes and to make sure that they are okay and secure. In addition, at the moment, they are unable to waive their right to a solicitor and solicitor advice. If the young person is required to appear before the court the following day, we look for a place of safety for them, which might be secure overnight accommodation, because Police Scotland's view is that a young person should not remain in a police cell overnight.

09:15

The availability of secure accommodation causes us challenges at times. If it is not available, we would consider a child detention certificate, because there is no other place and the child would have to remain in a cell overnight, which would mean increased support and observations, as well as access for the local authority. The child's parent or guardian would also be notified and afforded access unless there was a specific reason, such as a safeguarding reason, for them not to be given that access.

When a young person who is 16 or 17 years old is the subject of a compulsory supervision order, they are treated in the same way as a child under the age of 16 would be treated. However, when a young person who is 16 or 17 is arrested, they are treated in the same way as an adult is treated. They can waive their right to a solicitor but, at the moment, they must do that via a reasonably named person, and there are no guidelines about who that reasonably named person should be. It can be any individual over the age of 18, and they can agree with the child that they can waive their right to solicitor access.

There is also no consideration of a place of safety. A 16 or 17-year-old remains in a cell overnight and is presented at court at the next opportunity. Those are the significant differences in how 16 and 17-year-old young people are treated and the discrepancies that we find are in the system just now.

The Convener: Alistair, would you like to add anything further?

Alistair Hogg: Could you remind me what your question was specifically about?

The Convener: It was about inconsistencies that exist for 16 and 17-year-olds, depending on whether they go through the children's hearings system or the criminal justice system.

Alistair Hogg: Thank you. Claire has understandably given you a response in relation to young people who might be arrested, but this impacts all young people.

The 16 and 17-year-olds for whom there is concern about their protection or their vulnerability will now have the opportunity to access the children's hearings system when that is appropriate, of course, and proportionate.

Claire outlined many of the differences in how the police and criminal justice system interact with 16 or 17-year-olds who are not on compulsory supervision orders or are not subject to referral to the reporter at the time. You can see that the differences are quite stark. The difference that the bill will make is that everyone under 18 will be viewed as a child who is to be afforded all the protections that a child would have. Anyone who is under 16, or who is 16 or 17 and is already involved with the children's hearings system will also get those protections. At the moment, people who are not within the children's hearings system at 16 or 17 do not get those protections, which are pretty significant when you consider what Claire just outlined about police processing, being taken into custody and the adult-orientated response that the law requires.

SCRA's submission to the committee outlines some scenarios and examples that I hope demonstrate some of the differences that exist and how they will be cured by the bill, thereby making the position for children much more equal.

The Convener: Mr Donnelly, do you want to add anything specific?

Kenny Donnelly: I have a couple of examples. Let us say that a 16-year-old is reported to the procurator fiscal for a relatively minor offence that might be a manifestation of an underlying issue. The issue for the procurator fiscal is that, if the child has previously been brought to the attention of the system and is on a supervision order from the children's hearings system, the case can be referred to the hearings system to continue the work that it is doing. If that is not the case, however, that option will not be available to the child and they will remain in the adult system, which seems to be inconsistent.

At that point, it is open to the fiscal to take alternative actions, one of which would be to address such issues through diversion from prosecution. However, the diversion from prosecution system that we operate is based on what is called a deferred prosecution model. It is a little bit of a carrot and stick approach: if the person does not complete the diversion programme, the alternative is to send the case to the adult court. In the SCRA and the children's hearings system, the matter would go back to a hearing and further steps could be considered. There are differences between the two approaches.

The other inconsistency relates to outcomes. I will not go into detail, but there was a recent case of a 16-year-old who had not previously been in trouble but who was presenting a significant danger to the public. They had to be remanded to Polmont, because, having not previously been in contact with the criminal justice system, they were not under a supervision order and, as a result, no alternatives were available.

The Convener: We will carry on this thread with questions from Mr Dey.

Graeme Dey (Angus South) (SNP): Before I move on to my questions, I want to go back to what Kenny Donnelly just said. What about a scenario in which two people of the same age commit the same offence but one is dealt with under the children's hearings system while the other is referred to the criminal justice system? It can take up to two years for the latter to be dealt with, because of court delays, by which time the other person will have been dealt with, will perhaps have been rehabilitated and will have a more positive outlook. Is that not the greatest inconsistency here?

Kenny Donnelly: That is a possibility, and it can arise as a result of a number of different circumstances. If we were talking about two 16 or 17-year-olds, one of whom was on a supervision order while the other was not, we would discuss the case with the reporter and decide who was best placed to deal with the one on supervision. That option would not exist for the other one, but we would look at other options—again, with a presumption against prosecution in the adult courts. We would look, for example, at diversion or other alternatives to prosecution. However, there is a possibility that the case would end up in court, and, as you have said, the courts are not operating as efficiently as they were before the pandemic, which could lead to significant delays and—I totally agree—to different outcomes in essentially the same circumstance.

Graeme Dey: Thank you. I just wanted to get that on the record.

Will the witnesses outline for us how a reporter currently decides whether a child or young person should be referred to the children's hearings system? Can you give us a feel for the thought process around that? Will that change in any way as a result of the bill? If so, how?

Alistair Hogg: I do not think that that will change with the bill, because the same principles will apply and the same approach will be taken. We will simply view any child or young person referred to us as a child, and we will therefore apply the same foundation principles that are contained in the Children's Hearings (Scotland) Act 2011.

As for how a reporter considers and investigates a case, it will take quite a while to answer that question, but I will try to be as succinct as I can. We receive referrals from all different sources. Most still come from our police colleagues, and often that is not because of the offending behaviour but because of care and welfare concerns for the child. Once we receive a referral, our thought process is to consider what is in the best interests of that child, which is not just the principal concern but the paramount concern, as defined in the 2011 act. That is an even higher test than is set out in the UNCRC, and it has to stay within our vision the whole way through the investigation process.

We will consider whether there is a justifiable reason to be concerned for the child, and, if we conclude that such a concern exists, we will consider the best approach to take in order to help and support the child in reaching a better outcome. Sometimes, that will be a referral to a children's hearing; often, it will not. Often, some kind of voluntary support or supervision can be provided. Sometimes, in fact, the child and the family have worked through matters already and there is no need for further action to be taken.

We take a robust approach to our investigation and decision making. We have a decision-making framework, which is available on our website for anybody to view freely. It is a structured and evidenced-based approach. We consider all of the child's circumstances—their living circumstances, their relationships and what is happening in education if they are of education age. We might obtain reports. We might investigate and obtain information from partners in social work, school and health or other partners who might be involved with the child. We will do all of that to identify what the child needs to protect them or to help and support them.

Our approach remains the same, and the same decision-making framework is applied irrespective of whether the child is referred because they are the subject of the harm or because they are a young person who has caused harm. Specific aspects of the framework allow us to assess such things as the nature and seriousness of any behaviour and its impact on others. That is part of the holistic view that we take in relation to the child. However, ultimately, if we refer a child to a children's hearing, our conclusion has to be that compulsory measures are, or supervision is, necessary and that it would be better for the child to be on a compulsory supervision order than it would be for them not to be on one. Unless we come to that conclusion, we will not refer the child to a children's hearing.

Graeme Dey: Even with that framework, I guess that there is always a degree of subjectivity in the decision making that takes place. It must leave you open to accusations of a lack of consistency on occasions—perhaps unfairly, given everything that you have to take account of.

Alistair Hogg: Obviously, there is a level of subjectivity to any decision that we take. Of course, we are open to that allegation, but we have the decision-making framework, which is backed up by three full days of training.

Any children's reporter who joins the service must go through the professional development award for children's reporter practice, which has seven modules. It has been assessed by the Scottish Qualifications Authority at masters level. People have two years within which to complete that award, otherwise they will not become children's reporters. Decision making is one of the modules in that professional development award.

We also have our own quality assurance. We constantly do our own case sampling. We interrogate and interpret whether the right decision was made on the basis of the information that we have. Our quality assurance case sampling exercises indicate that we believe that we have made the right decision in more than 90 per cent of cases. We have pretty robust procedures in that regard.

Graeme Dey: My final question will perhaps engage the other two witnesses in the discussion. Recently, the SCRA and the Procurator Fiscal Service did research into children aged 12 to 15 who were involved in offending and were referred to the children's reporter and the procurator fiscal. To what extent did that indicate a strong link between children who come into conflict with the law and the degrees of adversity, trauma, poverty and loss that they have experienced? We can also take account of your personal experience of dealing with such situations beyond the research.

Superintendent Dobson: There is a close correlation between children coming into conflict with the law and different—possibly multiple—aspects that affect an individual child, whether trauma, poverty or medical conditions. It could be a number of things. I can absolutely say that, in my experience, that is the case.

09:30

As Alistair Hogg said, we do not refer children to the reporter just in relation to criminal cases; more often than not, it is in relation to welfare. That is why the change is really important. It is about welfare, values and ensuring that we can provide continued support to a young person through their journey. You specifically asked about 12 to 15-year-olds, but it is important to offer additional support and put it in place for all young people.

Kenny Donnelly: I agree with what Claire Dobson has said. That is not something that I have been involved in researching, in particular, but all the research would point to that being the case.

I will pick up on a point that was made in response to the previous question, on subjectivity. I think that that is a strength. It might sound to some like a cliché, but every case is considered on its own facts and circumstances, including the circumstances of the offender. There is no formula. We consider the personal circumstances in reaching decisions between ourselves—as to whether the case is appropriate for reporters to deal with, or whether it should be a matter for the Crown—and thereafter in assessing the appropriate outcome of the case. Although everybody strives for consistency in decision making, there has to be an element of subjectivity.

Graeme Dey: Absolutely.

Alistair Hogg: Kenny Donnelly has made a really good point, and I thank him for making it.

On the research, the SCRA carried that out with the assistance of our colleagues at COPFS. The outcomes were really compelling. Would that still be consistent if we applied it to 16 and 17-year-olds? I have no doubt whatsoever that it would.

I manage the research team in the SCRA, so I had lots of lead-in and an idea of what was coming, but, when I first read the report, I found it utterly compelling—yet, sadly, not surprising, as it reflected everything that I have experienced as a children's reporter over many years.

There are some quite extraordinary figures contained in the research. They show social and economic deprivation in 63 per cent of the young people, which is a critical factor, and they show neglect among 48 per cent. That is just picking out a couple of indicators; there are many more that reveal the exposure to experiences in childhood that we would all hope not to experience, including trauma, abuse and other adverse childhood experiences. I was therefore not surprised to see what the report said, but it was really sad to see it.

The Convener: Stephanie Callaghan, do you have a brief supplementary question? I am double checking, as you are online.

Stephanie Callaghan (Uddingston and Bellshill) (SNP): Thank you, convener. Yes, I do.

I have been listening carefully to everything that has been said. There is a clear focus on welfare, values and providing continual support. I was looking through things earlier, and I note that

"where the accused and/or the victim or witness is a child, the best interests of the child are required to be treated as a primary consideration and to be given appropriate weight".

Are those interests given enough weight, noting other relevant considerations, or is the balance right?

Alistair Hogg: Is that in relation to the young person's views as referred to the system? I am sorry, but I did not quite pick up the premise of the question.

Stephanie Callaghan: Sorry. I am asking about the best interests of the child being

"treated as a primary consideration"—

you referred to that as being the paramount consideration—

"and ... given appropriate weight".

There are also other relevant considerations in assessing the public interest. Is that aspect right or does it need to be looked at? Is the point about those best interests being paramount strong enough?

The Convener: We will ask some questions about the balance later, Alistair, but perhaps you could answer the first point specifically.

Alistair Hogg: There is always a balance. However, as I have just outlined, our function as children's reporters is to consider the child who is referred to us, with their best interests throughout their childhood being the paramount consideration. The use of that word "paramount" is crucial here. The balance is weighted very much towards the interests of the child who is referred to us. That does not mean that we do not have consideration for others as well, but the best interests of the referred child are paramount.

There are some circumstances in which the paramount consideration can be reduced to the primary consideration, which are outlined in section 26 of the Children's Hearings (Scotland) Act 2011. In certain exceptional circumstances it can be reduced to the primary consideration if there is a need to protect members of the public from serious harm, whether or not that be physical harm. There is already a balance in the legislation, but I stress that it would be fairly unusual and exceptional for that reduction to be applied. For a children's reporter and the panel members at a children's hearing, the child who is before them would be their paramount consideration. That is

not to the exclusion of everything else, but what is in the child's best interests would outweigh most other factors.

The Convener: That is moving into territory on which Mr Rennie is looking to ask questions, so I will go to him now. Perhaps you could respond to him in that context.

Willie Rennie (North East Fife) (LD): The feedback that I get from victims and their families is that they often feel as though they are in the dark. They have low confidence in the system, because they just do not know what is happening. I understand all the information-sharing criteria and the other stuff that you have just mentioned. However, I am keen to understand the debate about that that goes on in the system, whether it is evolving or settled and, if it is evolving, where it might go. I am keen to build the confidence of victims and their families.

Perhaps Alistair Hogg could answer that question first.

Alistair Hogg: Of course. We, too, would like to build confidence. We would like there to be public confidence in the system, which, as the committee will know, has now been in place for more than 50 years. As I said earlier, we already have 16 and 17-year-olds in the system, but I understand that concern is heightened by the fact that the bill would enable any 16 or 17-year-old to be referred to a children's hearing. There has been a lot of discussion about that in partnership forums, and there are task forces on the go, such as the victims task force and the group that is considering the recommendations from Lady Dorrian's report on the management of sexual offending. A huge amount of activity and work is going on in that area.

Well in advance of the introduction of the bill, we put in place a cross-system group, consisting of partners who were involved in the children's hearings and criminal justice systems, to consider what might need to be put in place if the bill came to fruition and the proposal to raise the age of referral was agreed to. We looked at a number of aspects. A large part of our consideration was how we would deal with the situations of people who have been harmed by behaviour—that is, those who are victims. There are different elements to that. One issue is support. All victims should have access to the support that they need, which should be no different, no matter the system through which the matter will be dealt with. Support for victims should be consistent and universal.

The SCRA already writes to every identifiable victim of any child who is referred to us for an alleged offence. We offer victims the opportunity to receive the limited amount of information that we are allowed to provide by law. In such letters, we also signpost them to victim support groups, specifically Victim Support Scotland. Such signposting and arrangement of support starts at the beginning of a case. I am sure that Claire Dobson will say something about that in relation to the police's first interaction with a victim, when there is an opportunity to offer them support. That first point of contact is crucial for a number of different reasons. It is about offering support, but it is also about explaining carefully and managing expectations about what will happen next.

A lot of the time, we get people who are unhappy because a matter is being dealt with through the hearings system and not through the criminal justice system. A lot of the time, their frustration is because that has not been explained to them and they were not expecting it to happen. However, there also has to be a bit of understanding and awareness about why we would take that approach and why we are making the policy change. The reason is that it is based on evidence. We know that it leads to better outcomes.

Of course, if you were the person who has been harmed, you might have a different view about that, which would be understandable. Anyone who comes into contact with the victim or somebody who has been harmed needs to be informed about trauma. There has been a huge amount of work on raising awareness about trauma and informing the paid and volunteer workforce about how to interact with people in a trauma-informed way. There also needs to be, and should be, much wider provision of services such as restorative justice, which can often go a long way to helping the victim as much as to supporting the person who has caused the harm. Support is a key area. A huge amount of work already goes on, will go on and is developing.

You also touched on issues to do with information, Mr Rennie. As I said, we write to all victims. The bill makes that a responsibility of the principal reporter, but, in fact, we already do that anyway. We get some feedback that people are often unhappy at the decisions that we make because they are based on the best interests of the referred child and that might not necessarily accord with what the individuals think is the right outcome. However, we also get a lot of feedback welcoming the information and being grateful for the interaction that we have with them. Sometimes, we spend quite a lot of time talking to victims, meeting with them and explaining how the system works. We cannot, of course, explain the details or share any of the child's private information, but we can explain the ethos, approach and evidence base. People very much appreciate that when we do it.

Last year, we wrote more than 2,500 letters. Only 13 or 14 per cent of recipients of those offers to receive information wanted it. It is an opt-in service, so you have to ask for the information if you want it. There could be a variety of reasons why people did not respond to that letter, but the response rate is low. For some victims, receiving that information is very important and often part of their healing process. However, for a variety of reasons, many do not want the information.

Willie Rennie: Does it not cause you concern that it is such a low rate? Has research been done into why it is so low? It might be a reflection of people just giving up on the system.

Alistair Hogg: We have not done research, but we should definitely consider doing that. I cannot answer the question. There could be a number of reasons why people do not want the information.

The third area—I am sorry to take up so much time—

The Convener: I am sorry to interrupt, but Mr Donnelly was interested in responding to the previous question as well. I am also looking at the time and I need to ask for more concise responses.

Kenny Donnelly: I will quickly pick up a point relating to the previous question. I do not want to get bogged down in legal definitions, but the requirement that the interests of the child be the paramount consideration is unique to the children's hearings system and the Children's Hearings (Scotland) Act 2011 in relation to children who have been referred to the system.

From a prosecutor's point of view, the child's best interests are a primary consideration, but they are not the only one when we consider the public interest. This may be dancing on the head of a pin, but the child's best interests are primary, rather than paramount. From a prosecution point of view, and in assessing the public interest, we must consider other, wider interests, including the interests of victims, the impact on communities and suchlike. We are not coming at it purely from the point of view of the welfare of the child; we are coming at it from a broader public interest point of view. I just wanted to clear up that point.

09:45

I am not sure where your question was focused, Mr Rennie. When you referred to "the system", were you referring purely to the children's hearings system?

Willie Rennie: Yes.

Kenny Donnelly: In that case, I do not think that I can add anything to what Alistair Hogg has said.

Willie Rennie: Claire Dobson, do you have anything to add?

Superintendent Dobson: Ultimately, I would say that we encourage and want to encourage victims, and we signpost at an early stage. We work really closely with Victim Support Scotland, and we are involved in a lot of the work across the agencies.

I understand that there is a balance to be struck, and we work hard to strike that balance and to support children who harm and those who are harmed.

I welcome the reparations that are made by the bill and the ability to go further than we can go now. We would look for a strong communications strategy to help communities to understand what the changes in the bill mean and why they are being made. The changes—if and when they are enacted—should be coupled with support and education for communities to help them understand what work is on-going and what we are trying to do to create parity across the system and promote better outcomes for young people. That would mean accessing systems and putting things in a different light. It would also mean that we would need to put the right support into the community, with the right resource in and around that.

Ruth Maguire (Cunninghame South) (SNP): Good morning. I want to ask about compulsory supervision orders. The bill makes several changes to movement restriction conditions, including broadening the criteria for MRCs to include

"consideration of 'harm' rather than 'injury'",

and the use of MRCs

"where it is necessary to help the child to avoid causing physical or psychological harm to others."

We have received written evidence from the SCRA on the use of "fear, alarm and distress" as a subjective test. I would be keen to hear the panel members' views on those proposed changes. We have heard about the positive side of using subjective approaches, but there is also risk in there. I am particularly interested in the point that has been raised that

"there is a risk that children could be placed on MRCs, and have their liberty and behaviour restricted for a far wider range of behaviour"

than might be intended in the bill. It is your evidence that I am referring to, Alistair, so I will come to you first. We can then hear from the other panel members.

Alistair Hogg: There is quite a lot in the changes around MRCs. Movement restriction conditions are available within the hearings

system, but they are not used very often at all. The test for placing a young person under a movement restriction condition is the same test as for authorising secure accommodation, so it is quite a high test. The bill decouples the test: it creates a different test for movement restriction conditions.

I will explain my understanding of the reasons for that. In preparation for today's committee meeting, I looked over the report from the cross-system working group that I referred to earlier. One of the group's recommendations was to decouple the MRC test from the secure accommodation test. Part of that was about recognising the opportunity that such conditions can provide, although they have to be viewed through the lens of what they provide for the young person. They must be seen as something that would support the young person and their own welfare. If we look at them through that lens, we can see that opportunities might be expanded.

I understand—I think that we have referred to this in our submission, and I have seen it referred to in other submissions—that there are concerns about making the criteria much wider and thereby perhaps increasing the number of movement restriction conditions. As we and, I think, others have said, what is much more important than the actual restriction—which currently involves an electronic tag and a monitoring box; technology might develop in that respect—is the intensive support that is put in place. You can put that intensive support in place without a movement restriction condition, and that is what makes the big difference, rather than the actual restriction of movement itself.

You have to be very careful in applying movement restriction conditions. The bill undoubtedly widens the opportunity to use them by making the test itself wider. As a result, there will have to be proportionality in the way that they are used, and as one might imagine, significant thought will have to be given to guidance in that respect, certainly for those making the decisions—that is, the panel members. It is a question that you might well wish to ask our Children's Hearings Scotland colleagues, who recruit, train and support panel members, but consideration will have to be given to having robust guidance on the matter to get around the subjectivity that you have referred to.

Ruth Maguire: That was helpful. Claire, do you have any comments on the matter?

Superintendent Dobson: To be honest, I do not have any comments on the broadening out of the criteria. I have to say that we have very limited experience of MRCs, and any consideration for us would relate to the latter part of Alistair Hogg's answer with regard to intensive support. For the method to be effective and allow young people to remain in their community, there would require to be intensive and effective support in the community, which would be significantly resource intensive for local authorities.

Kenny Donnelly: Obviously, this falls exclusively within the remit of the SCRA and the children's hearings system. There are parallels in the criminal justice system with regard to, for example, the imposition of bail conditions such as curfews or electronic monitoring, but that approach comes at the issue from the perspective of public protection and alternatives to custody and remand, so I am not really qualified to add much to what Alistair Hogg has said.

Ruth Maguire: I know that all panel members are concerned with the rights of children, so, as a follow-up on the same topic, I would be interested to hear whether the bill's provisions go far enough in offering support and rights to the children and young people with MRCs. You have all said that intensive support is needed, but are there any protections that children with an MRC need but do not have?

Alistair Hogg: When you talk about extending protections for children, is that in relation to the application of an MRC? I know that some submissions have considered whether, at the point at which an MRC is being considered, the young person should have legal representation, and that is one area that you might look at.

Any young person who comes to a children's hearing has the opportunity to access legal support and representation. I know that there is a means and merits test, but I would be really surprised if a child were ever refused legal aid on that basis. Of course, they have not always engaged a lawyer before coming to a hearing, but the hearing itself can consider whether they need legal representation and can recommend that they obtain it. However, some submissions might well be suggesting that, as for a hearing that is considering secure accommodation authorisation, legal aid and representation should be provided automatically. The committee might wish to consider that, too.

There is also the right to advocacy support in the hearings system. Every child or young person aged five or over is offered an advocacy worker for their hearing. At the hearing itself, the chair must ensure that the child is aware of that right, and the child will be given the opportunity to get a worker if they so wish.

Is that the kind of thing that you were asking about?

Ruth Maguire: Yes. Does anyone else have anything to add?

Kenny Donnelly: Perhaps the representative from Child Clanlaw on the next panel will be better placed to answer that from the child's point of view.

Kaukab Stewart (Glasgow Kelvin) (SNP): I want to ask about children in the criminal justice system. Having read through the evidence, I understand that the Scottish Courts and Tribunals Service has taken steps to improve the experience of children in court proceedings through the use of evidence suites and so on. However, we know that traditional court settings are not settings in which children's rights can be upheld or where children can be heard. Do you agree with that statement? If so, how will the provisions in the bill ensure that those rights will be upheld in appropriate settings for every child, whether they are the victim or the accused?

I ask Kenny Donnelly to answer that one.

Kenny Donnelly: As a bald statement, that is correct. The maturity of children who enter the criminal justice system, whether as the accused or as victims or witnesses, differs—the range is from 17 to, in the case of some witnesses, the very young. The court will always take steps to mitigate the experience and make it less impactful than would otherwise be the case. That is set out in the SCTS's evidence.

We are constrained in that a court is a court, so the provisions in the bill that allow the court to perhaps sit somewhere else are helpful. However, we already take steps, particularly for victims and witnesses. The child accused has to be part of the proceedings, and so they have to be there, although we try our best to keep children out of the court by using pre-recorded evidence or by taking evidence using other measures, such as closed-circuit television links. During my years as a prosecutor, I have seen that all of that has helped to improve the experience. The steps that have to be taken for the child accused are set out in the SCTS's evidence, and the ability to sit somewhere other than in a formal court setting helps in that regard.

Kaukab Stewart: Does the bill go far enough? Could it go further?

Kenny Donnelly: I noticed that one of the submissions—Clan Childlaw's, I think—refers to a youth justice court set-up, although I am not sure that that was the phrase that was used. I am not hugely familiar with that and not sure how it would operate beyond the children's hearings system or the adult system. Perhaps it might be for further consideration by the Government, but everything that we can do to make the experience as child friendly as possible has to be explored. We should not have to be required to do that. The UNCRC requires us to have the best interests of the child at heart and for the child to be a primary consideration in everything that we do, and that should include the environment. I would have no difficulty with exploring that further.

Kaukab Stewart: How do you know that the measures that you are putting in are effective? Do you ask the witnesses?

Kenny Donnelly: I cannot really answer that question. My understanding is that research shows that the wigs and gowns and the formality of the setting are off-putting and that that is why steps are taken. However, such steps tend to be taken by the court on a case-by-case basis depending on the age and maturity of the child. The extent of the steps that are taken and the introduction of 16 and 17-year-olds into the definition of a child for that purpose will need further consideration by the court.

Kaukab Stewart: My next question is for Claire Dobson. It is about the proposed changes to the definition of a child and what effect the relevant provisions in the bill will have on Police Scotland's approach to dealing with children in custody. It also leads on from what Kenny Donnelly said.

What would your approach be to dealing with a child who is 13, for instance, compared with one who is 17? What would be the difference in your approach?

Superintendent Dobson: Are you asking about how we care for them while they are in custody?

Kaukab Stewart: Yes.

10:00

Superintendent Dobson: Obviously, each case needs to be looked at individually. When anyone comes through a custody system, questions are asked, risk assessments are undertaken and we review the case on an individual, case-by-case basis. The last thing that we want to do is put a child in a cell, because of the kind of environment that that is. Police Scotland has a dedicated child custody facility on London Road. It is a new facility that has a separate charge bar and separately decorated cells. The facility is under evaluation at the moment.

We will consider the age of the child and the circumstances. If they are 13 years old, the likelihood is that, for the period that they are in custody, as we go through the process, we will have them in a separate room, with two officers to ensure that they are looked after. The current provisions mean that we will request that the local authority carry out a welfare check for the child. For a 13-year-old, we will also request access for a parent or guardian. That will not happen for a 16 or 17-year-old. However, the bill's provisions

would ensure that that support was opened up for older children, too.

As Kenny Donnelly said, we have to view each case individually. Circumstances can be very different for each child—the reasons why they are there can be very different—so we need to ensure that our response is tailored to the individual.

Kaukab Stewart: Police Scotland points out in its evidence that it has a responsibility to children who harm and those who have been harmed. As we have alluded in earlier questions, that is a very difficult balance. From Police Scotland's perspective, how is that balance currently achieved? How could it be enhanced?

Superintendent Dobson: We have responsibility in both circumstances. It is about supporting and managing the individual who has harmed and ensuring that they have access to the right services. It is also about supporting the victim or those who have been harmed. That can take many guises, whether it involves support from Victim Support Scotland or referral to various support agencies.

We have to balance both aspects, which might involve a specific, tailored, individual policing response. How we do that is quite bespoke. We review cases on a case-by-case basis. It will really depend on the nature and severity of the case, and on communication.

As I said, one of the most important aspects of the changes and improvements in the bill will be a really strong communication strategy to help our communities to understand the children's hearings system, why people are referred and how a child's rights are considered. It is about ensuring that we uphold our values and support children while they are in the community.

The Convener: Claire, you spoke about a strategy for communication with communities, but what sort of culture change will be required in Police Scotland, given that officers are used to treating 16 and 17-year-olds as adults?

Superintendent Dobson: We are pushing forward. We are a values-based organisation and, ultimately, we want to promote the rights of the child. We have a lot of work going on internally. We would look at training and at supporting a communication strategy. Supporting the child will always be at the centre of what we do, regardless of the situation in which we come across them. We would build on our existing approaches. We are already working towards the provisions under the UNCRC, so we are already considering how we can enhance our engagement with young people. We will include that for our officers and staff and build on the work that we already carry out.

The Convener: Kenny, do you want to comment?

Kenny Donnelly: May I return to a previous question?

The Convener: Of course you can.

Kenny Donnelly: I have been thinking about the answer that I gave. About 10 years ago, there was a pilot of a youth court at Hamilton sheriff court. It never evolved into anything being rolled out, although I think that a youth court might also have been set up at Glasgow sheriff court. I am not fully sighted on that, but I will find out more information and write to the committee about it, if that is okay.

The Convener: Thank you. We will move on to questions from Michael Marra.

Michael Marra (North East Scotland) (Lab): My questions are on cross-border placements, which the bill seeks to regulate. Perhaps the representative from each organisation could speak to the complexities and challenges that it faces in managing the processes for such placements. By that I mean those that cover, for example, young people whose cases are disposed of in England or Wales but who end up living in secure or supported accommodation in Scotland.

Kenny Donnelly: They do not present any particular issues for the COPFS. Cases come to us based on where a crime is committed rather than where the offender's residence is. That issue is more likely to have an impact on the organisations that are represented by Alistair Hogg and Claire Dobson.

Alistair Hogg: It potentially has an impact on our service. However, looking at the issue more widely, there is concern about the welfare of young people who are placed in Scotland but are some considerable distance away from their homes. What has been put in place represents an effort to manage such situations.

As for how that issue might interact with our practice and why the principal reporter might be concerned, my answer is similar to Kenny Donnelly's. If a young person is within our community, they are within our jurisdiction. If there are concerns about the welfare of that child, which might be related to their behaviour, they might still be referred to the children's reporter even though they might be on an order from an English or Welsh court. The children's reporter will need to consider such a referral in the same way that we consider other referrals. Ultimately, it is likely that we would conclude that a protective order is already in place and that introduction of the case to the children's hearings system might make it even more complex. However, there are

circumstances in which a different decision might be made.

There are probably even wider concerns about the issue, which I am sure the committee's next panel of witnesses will pick up on. However, the approach should be all about regulating the circumstances and conditions in which young people are placed and where their accommodation is; ensuring that it is properly monitored and regulated; and ensuring that they have access to proper advice, support and representation, which are crucial and have been a concern until now.

Superintendent Dobson: Police Scotland welcomes the changes that the bill proposes. We often find that young people can be placed across borders, extremely far from their home addresses. We also find that, at times, not enough information is supplied to private care providers with which young people are placed. If a young person then becomes a missing person, limited information is available to us that would help to establish where they are, find them and care for them when they could be in danger. We therefore welcome any increase in our ability to gain information.

Young people who are placed far away from their homes often have no relationships, family support or infrastructure around them. We often find that they put themselves at increased risk by travelling hundreds of miles back to their home addresses or to where their parents, families and relationships are.

Michael Marra: As bodies that are involved in the dispensation and use of secure accommodation services, are you concerned that capacity in secure accommodation and residential care might be impacted by cross-border placements in that the number of available bed spaces might be reduced? Your organisations are involved in sending young people into such places. Does the capacity issue concern you?

Kenny Donnelly: Yes. When young people are presented to the criminal justice system and there is a need to have them in secure accommodation, the facility must be available. I am not sighted on what the current issues are or whether cross-border placements are having an impact, but that is one of the challenges that we face.

It is similar to dealing with people who present with mental health issues: we can find ourselves on the back foot trying to find a place where the person can safely be put. The bill is helpful from that point of view, because the fall-back is often that, in the absence of a secure place, the young offenders institution becomes the place where the young person will go.

Given the increase that will occur with 17 and 18-year-olds falling within the definition of children, irrespective of a supervision order, there will have to be sufficient capacity for the court to be able to use its ability to place someone in secure accommodation.

Alistair Hogg: The bill's impact on capacity needs to be considered as a whole. It is not just about cross-border placements; it is also about some of the other provisions in the bill, particularly the provisions to ensure that no child is kept in a young offenders institution and that a young person may be kept in secure accommodation rather than being transferred to a young offenders institution at the age of 18—that is, that they may be kept for longer. Those provisions will all create capacity pressures for the secure accommodation providers.

I do not know how many cross-border placements are using up secure accommodation capacity in Scotland. My understanding is that, to date, the bigger concern has been about the other accommodation that has been provided for them. It is not secure accommodation and has not been approved as such, but it has some restrictions that might cause it to be seen as something approaching secure accommodation, or as something that involves deprivation of liberty. That is where many of the concerns have arisen. However, I do not know how many cross-border placements have used up secure accommodation beds.

Michael Marra: Are there concerns in your organisations that some of the institutions may be becoming reliant on cross-border placements for their financing? The committee has heard in other evidence that many people are concerned about and critical of the situation in the regime south of the border. We have heard that, frankly, it is right for Scotland to offer safe havens for some of the young people concerned but that there may be an issue to do with the finances of some of the institutions. Have your organisations reflected on that? Do you have any concerns about it?

Alistair Hogg: That is probably not something that I can fully comment on, but it is commented on in the Promise. There is concern about the purposes for which some facilities are arranged. I think that the Promise says that we should not be making any profit out of our young people in that regard. I believe that some of the accommodation that has been created to house young people from across the border will be quite reliant on those young people filling that accommodation.

Michael Marra: In recent years, the Scottish Government has had a policy to fund a last-bed provision in secure accommodation. Kenny, you mentioned an issue to do with finding capacity. However, I am told that there is some dubiety as to whether that policy will be continued. Would it concern your organisations if that last-bed

provision to find a place for a person was not continued?

Kenny Donnelly: I am not entirely familiar with the policy to which you refer. Ultimately, as Alistair Hogg said, the availability of capacity will have to be reviewed and ensured to enable the bill to be properly implemented and to take effect. Where someone requires to be in secure accommodation, the bill removes the possibility of a young offenders institution being the alternative. The Government, local authorities and other providers will therefore have to find the capacity to enable us to properly look after our young people who need to be remanded.

Michael Marra: Convener, I think that, if witnesses are able to share any information on that last-bed issue, it would be useful.

The Convener: My recollection is that we heard something quite different from what you presented to the witnesses in your question today, Michael. However, we can look back at the evidence that we have been presented with previously.

Michael Marra: Certainly.

The Convener: We will then be able to decide how we want to follow up on that line of questioning.

Mr Doris, do you want to comment on that?

Bob Doris (Glasgow Maryhill and Springburn) (SNP): No, not on that.

The Convener: Okay. We will move on to questions from Ross Greer.

Ross Greer (West Scotland) (Green): Do any of the witnesses' organisations have engagement and contact with transportation providers in relation to secure accommodation? If so, I have some specific follow-up questions; if not, there is no need for them.

Alistair Hogg: We certainly have contact with those who provide transport from prison establishments, but I am not quite sure about who provides the transport from secure accommodation.

Ross Greer: I will elaborate on that a bit. You might have seen the evidence that has been submitted by the hope instead of handcuffs campaign, which raises specific concerns about private transport providers. In essence, the concerns relate to the lack of regulation and reporting on transportation.

In relation to secure accommodation, the broad direction of travel has been towards raising standards, with more reporting and less use of inappropriate restraint, for example. However, the campaign has evidence of what it believes to be inappropriate use of handcuffs, specifically, and restraint in general by private transportation providers when young people are being moved between secure accommodation locations or between somewhere else and secure accommodation. The campaign has proposed to the committee and Parliament that there should be greater regulation and greater reporting specifically in relation to transport.

If private transportation providers were required to report every instance in which restraint was used, whether that was handcuffs or something else, which would be the appropriate body to which such reports should be submitted? Would it be the SCRA, the Care Inspectorate or local authorities? Would it depend on the individual circumstance, such as where the young person was being transported to and from?

Alistair Hogg: I do not think that it should be us. We have interaction with secure accommodation providers but only in so far as children are accommodated through the children's hearings system, and they are only a proportion of those who are in secure accommodation. As to who it should be, there is an argument for it being the other organisations to which you just referred. The Care Inspectorate and local authorities might have a particular interest in the matter.

On the wider issue, transportation requires focus and a bespoke application. We need to consider the needs of the young person in relation to the transportation and the best approach to it. Regulation is a matter for legislators.

Superintendent Dobson: In our experience, transportation is often unavailable and we have to transport young people. We would welcome a service that was not only safe and secure but able to provide transport nationwide and out of hours. Our general experience at the moment is that transport is unavailable.

I will consider your question about who should regulate transportation and come back to the convener. I will not give an opinion just now.

Ross Greer: That would be useful. I will follow up your point about the lack of capacity and the fact that, often, your officers have to provide the transportation. That should not be the case, but, given that it is at the moment, what reporting would you carry out if, for example, you ended up in a situation in which a young person who was being transported needed to be restrained in some way? What would the Police Scotland reporting mechanism for that be? Would you inform any partner organisations that you work with that that had taken place during transportation?

Superintendent Dobson: Ultimately, each case would need to be considered on its own merits. Similarly, when an adult or young person is going from our care into that of another organisation or

establishment, there will be full discussions, considerations and handover. I can get you more detail on that, but I will have to come back to you on it.

Ross Greer: That would be useful, thanks. It is primarily of interest in relation to private providers but, as you said, sometimes they are not available. I would be interested in understanding what your process would be in those circumstances.

The Convener: Thank you. We move to questions from Bob Doris.

Bob Doris: I have just a couple of questions to finish what has been quite a lengthy evidence session. Our briefing papers suggest that the bill's provisions might have an impact on Police Scotland's reporting jointly to the procurator fiscal and the principal reporter offences committed by children. I am keen to understand how that process operates currently and how it might have to be adapted in the light of the changes to the definition of "child" that the bill proposes.

Perhaps Claire Dobson is best placed to answer that question in relation to Police Scotland's reporting requirements.

Superintendent Dobson: There will not be a change of process as such; there will simply be an increase in the volume of work. At the moment, we report either to the procurator fiscal alone or jointly to the reporter and the procurator fiscal. When officers prepare joint reports, they take roughly an additional 30 minutes per report per officer, so, although the processes themselves are already in place, we will see an increase in demand on our officers' time.

Bob Doris: Okay. Do the other witnesses want to reflect on that aspect? As Claire Dobson mentioned earlier, we need to ensure that the bill's provisions do not have wider resource implications. Has Police Scotland done work on additional officer time? You have given us a per case example, but have you done any modelling work on that, which you could share with us either today or at a later date?

Superintendent Dobson: I could share information at a later date. We have information on the number of children who come through the custody suites, which we have broken down according to age and outcome. I could certainly provide the committee with that at a later date.

The resourcing impacts for Police Scotland are wider than those for the reporting aspect. As Alistair Hogg said earlier, we refer many children to the reporter not on criminal matters but on child protection issues. We anticipate that there will be increased resource implications for us in the interagency referral discussion—IRD—process, as significantly more 16 and 17-year-olds will be subject to public and child protection procedures. That is already a busy landscape, and we anticipate that there will be resourcing implications for us there, too.

Bob Doris: I knew what IRD stood for, but my colleagues possibly did not, so thank you for explaining that, Claire.

I have one final question but, first, would Mr Hogg or Mr Donnelly like to add anything on that point?

Kenny Donnelly: All crimes detected by the police that are to be reported would ordinarily be reported to the procurator fiscal. However, the Children's Hearings (Scotland) Act 2011 specifies that, when a child is being reported to the procurator fiscal, a report must also be sent to the Scottish Children's Reporter Administration.

The Lord Advocate has issued to the police guidelines on the types of cases that should be jointly reported. That results in many cases involving children—currently, those aged under 16—not being reported jointly but instead simply being referred to the reporter. Certain categories of offence specified in the guidelines, a copy of which I think has been sent to the committee, require to be jointly reported. At present, for 16 and 17-year-olds, any case involving a child who is on a compulsory supervision order also requires to be jointly reported.

The bill's provisions will mean that the case of every 16 or 17-year-old that is not currently jointly reported will need to be considered for that. We will need to consider the Lord Advocate's guidelines—and we have started doing so—to reflect the changes that the bill will bring about and to update the guidelines so that they are fit for purpose for the proper implementation of the bill.

It will not be a case of just replicating them, because there will be some nuances around crime type and volume. For example, a child is legitimately able to drive a vehicle at 17, and they could have a licence, so we have to give some thought to what we would do with a 17-year-old who was caught speeding or had committed some other road traffic offence that would ordinarily result in penalty points on a licence and a fixed penalty. Strictly speaking, according to the legislation, that child would have to be reported to the procurator fiscal and the children's reporter.

Bob Doris: Can I check whether the Lord Advocate's guidance will be updated?

Kenny Donnelly: The Lord Advocate's guidance will be updated to reflect the bill. There is also a joint agreement between the COPFS and the SCRA as to how we will deal with certain cases. Essentially, that will introduce business rules to say that certain cases will ordinarily go to

the reporter and others will be subject to discussion. At the moment, there is a presumption that cases involving children aged 16 and 17 should go to the reporter unless there are reasons why they should not. Our staff are given guidance on that. That guidance will have to be updated, and we have started discussions about how it might look in the post-bill climate.

Bob Doris: I am not sure whether Mr Hogg wants to come in, but that point leads nicely into my final question, so I will ask it now, and Mr Hogg can reflect on both issues.

When the committee initially spoke about this in private, one of the things that we grappled with was that 16 and 17-year-olds who are not currently on supervision orders can theoretically still be referred to the children's reporter. Although there is no presumption that they will be referred, in theory, they can be. Can witnesses confirm whether that is the case?

I checked again on the Scottish Government's website before asking that question, and it says that they can still be referred to the children's reporter. That might happen only in specific circumstances, but they can still be referred. They do not have the protection of not being kept in a cell or being unable to waive the legal right to a lawyer, and safeguarding protections might not exist, but my understanding is that they can still be referred to the children's reporter. Does that happen or am I wrong?

Kenny Donnelly: You are not entirely wrong, but that can happen only following a conviction. Criminal proceedings would have to take place first, and the court could then remit the case to the children's reporter. That applies to those who are aged 16 up to 17 and a half—I think that I am correct in saying that.

Alistair Hogg: You are.

Kenny Donnelly: Thanks, Alistair.

It is technically possible, but it means going through the criminal justice process first.

Bob Doris: That is very helpful. Maybe I was a daft laddie during the briefing session, but I do not think that that was made clear to us. Mr Hogg, do you want to add anything?

Alistair Hogg: Yes, I just want to clarify that, if a person is currently aged 16 or 17, they could be referred to the reporter only if they were either on a compulsory supervision order or if an outstanding referral was still open with the reporter. Under the current act, if someone is referred before their 16th birthday, the reporter can make a decision after they turn 16 that is still valid.

Bob Doris: Just to push you on that, are you both saying that a referral can still happen but that a person has to have had direct interaction with the court system before they are sent back to the reporter? Otherwise, I am reading something very different on the Scottish Government's website.

Alistair Hogg: Unless they are on a CSO or they have an open referral, the only way that a person aged 16 or 17 can be referred to the children's hearings system is via the criminal court, which would happen following a conviction. That is under section 49 of the Criminal Procedure (Scotland) Act 1995.

The Convener: We have a very brief supplementary from Graeme Dey on an issue that was raised earlier.

Graeme Dey: Mr Hogg, in response to Willie Rennie's question on the subject of victims, you talked about early signposting to victim support. However, it not practical to assume that police officers, who are dealing with very troubled and traumatic situations in which people are very upset, as well as doing so much else, can be a conduit for information and, at the end of the interaction, say, "By the way, you can go to victim support. Here is a card." How do you ensure that, at a very early stage, beyond the first police interaction, victims are signposted to their opportunity to contact victim support?

Alistair Hogg: My agency does not have any involvement until a referral is made to us, at which point our responsibilities kick in. Our responsibilities relate to the provision of information but not to the provision of support. We take on board our responsibility to alert victims to the fact that they can access support. However, I cannot answer your question about police officers' capacity to signpost people. I understand the premise of your question, but it is important that, right at the very beginning, victims are provided with support, and, if signposting does not come from the police officer, it needs to come from somebody else.

10:30

Graeme Dey: It does, and, unless Superintendent Dobson corrects me, it is unrealistic to guarantee that police officers—considering everything else they deal with—will provide that information at the outset.

Superintendent Dobson: We do our level best to provide support and signposting, which can take many different forms depending on the individual need in the case. However, you are right that, in certain circumstances when we are dealing with a raw situation at a fraught time—it is fair to say that front-line police officers often interact with individuals at a moment of extreme crisis in their

life—signposting may not be the priority at that time.

Graeme Dey: Thank you.

The Convener: I thank the panel for their time this morning. I suspend the meeting until 10:40 to allow a change of witnesses.

10:31

Meeting suspended.

10:40

On resuming—

The Convener: Welcome back. We will now take evidence from our second panel of witnesses on the Children (Care and Justice) (Scotland) Bill.

I welcome to the meeting Megan Farr, policy officer at the Children and Young People's Commissioner Scotland; Fiona Dyer, director of the Children and Young People's Centre for Justice; and Katy Nisbet, head of legal policy at Clan Childlaw.

We will move directly to questions from members. Again, the first set of questions is from Stephen Kerr.

Stephen Kerr: Good morning—yes, it is still morning. Thank you for being here, panel.

One of the fundamental aspects of the bill is the change in the age in the definition of a "child". It would be useful for the committee to hear your views on that change in definition, what it does to advance better outcomes and your experience of the significance of the affected demographic.

Fiona Dyer (Children and Young People's Centre for Justice): The Children and Young People's Centre for Justice welcomes bringing the age up to 18 and the proposal that all children will be defined as being under 18, as is recommended by the United Nations Convention on the Rights of the Child.

In Scotland, we have a two-tier system at the moment whereby, as you heard, some children are defined as children when they are 16 and 17 and some are not, purely because they are in an open referral with the Scottish Children's Reporter Administration. However, we know that all children under 18 have the same needs, risks and developmental issues. Therefore, bringing the age into line with the UNCRC will create a fairer justice system in Scotland.

We have two legal systems that have been developed and built upon over the years and that are not quite aligned with each other, which results in some children being treated unfairly and their rights as children not being upheld in a criminal justice system that does not really take account of their age and stage of development. If they have full access to a children's hearings system that is welfare based and can take account of their age and stage of development, it will be fairer and there will be a true sense of justice.

Stephen Kerr: Will you expand on "welfare based" and "child based"? Will you explain what that approach does?

Fiona Dyer: With the Kilbrandon report, the ethos of the children's hearings system was that we would look at the child's needs, not their deeds. That goes back to evidence that we still have today on the reasons why children are involved in conflict with the law.

Obviously, the system is not just for children who are involved in conflict with the law. The majority of children are referred on welfare grounds, so they are referred for other reasons in their lives, over which they have no control. It might be to do with their parents or circumstances and vulnerabilities that they have been placed in that contribute to their need for support in a welfare-based system. It is about looking at children as a whole and, as adults, taking responsibility for them and helping to support them.

Stephen Kerr: What is the evidence for the difference that that makes to outcomes?

Fiona Dyer: We have a plethora of evidence on that. The Edinburgh study of youth transitions and crime gives us a Scottish example of positive outcomes. We have outcomes from children and young offenders who have gone through an adult criminal justice system that can be more detrimental in the cycle of offending. However, in a welfare-based system, where the child's needs and underlying issues are addressed, there are more positive outcomes for the child and society through the child's stopping offending. That means that there are fewer victims and it contributes to the desistance process.

Stephen Kerr: You mentioned the University of Edinburgh study. Are you content that 18 is the right age?

Fiona Dyer: We now have a lot of evidence about brain development, and our sentencing guidelines for young people go up to 25, when the brain is still not fully developed. I think that 18 is a good start. Although some children, especially those who have been subject to a lot of vulnerabilities, need additional support past 18, it is probably the right age.

Stephen Kerr: It is a general age. There are obviously individual circumstances, as you mentioned.

I put the same question to Megan Farr.

Megan Farr (Children and Young People's Commissioner Scotland): From our point of view, it is a matter of compliance with the UNCRC, which defines a child clearly as a person under the age of 18. However, as Fiona Dyer said, 18 is probably the minimum acceptable age rather than the maximum age in this instance. There is nothing in the UNCRC that prevents us from doing more. I came across the following Dr Seuss quote yesterday:

"A person's a person, no matter how small."

You could equally say that a child is a child, no matter how big.

10:45

In terms of the UNCRC—and Scots law, when the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill becomes law—a 16 or 17-year-old is a child and they deserve the protections that being a child gives them. Fiona Dyer has covered the evidence base really well, and I do not really have anything to add to that. The UN Convention on the Rights of the Child and the UN Committee on the Rights of the Child are really clear that we need to increase the age to 18.

Stephen Kerr: Thank you. Does Katy Nisbet wish to respond?

Katy Nisbet (Clan Childlaw): I do not have much to add to that. As Megan Farr says, Fiona Dyer has covered the evidence base really well.

It is a really positive step that the age is now 18, compliance with the UNCRC being one of the main reasons for that. However, although the age is being increased, it provides only the possibility of a referral into the children's hearings system—the joint referral guidelines will still be in use and not all children will go into the children's hearings system. We have continuing concerns about not only how those decisions are made but how children will still be subject to the adult criminal justice system—which, despite the changes in the bill, is still not an appropriate place for them to be.

Stephen Kerr: Do you want to expand a little on those concerns?

Katy Nisbet: Absolutely. At present, there are 16 and 17-year-olds in the children's hearings system who have been referred on offence grounds. That means that they have gone through the joint referral process and the decision has been made to keep them in the children's hearings system. However, that relates only to children who are currently on a compulsory supervision order. All those children who were not on a CSO had no option—they would go into the adult justice system.

This change is important because it allows all children—no matter what their involvement with the children's hearings system was prior to the conflict with the law—the opportunity to go into the children's hearings system. However, there is no suggestion that anything around the joint referral system is going to change and, ultimately, the procurators fiscal or the Crown Office will decide whether it is in the public interest to prosecute a child. If that is the case, the child is then in the adult justice system, which is not suitable for them.

We have concerns about the joint referral process itself, because, although it refers to the UNCRC and taking the child's views in relation to the decision making, no procedure is outlined as to how that will happen. The guidelines state simply that, where possible, the child's views are to be taken into account, and there is no procedure in place as far as we can see. Also, when we have had cases in which a child has been going through this process, it has been very difficult to know how to represent their views in it. Transparency around that still requires to be looked at.

No children should be in the adult justice system, and the bill does not address that, despite the increase in the age in the definition. Concerns about the transparency of the joint referral process compound that. Once children are in the adult process, there is no automatic review of that decision. The sheriff does not have an opportunity to see how the decision was made, and nor does the child. Improvements could be made there.

The Convener: I know that there will be more questions on that area later and that you will be able to go into more detail. Have you got anything else to ask on the original thread, Stephen?

Stephen Kerr: No, I think that the answers on the legal definition are complete.

The Convener: Thank you. We will move to questions from Ross Greer.

Ross Greer: I would like to follow up on what Fiona Dyer said about the evidence around the impact on young people under the age of 18 who have gone through the criminal justice system. Would Fiona or anybody else on the panel be able to expand a little on what the effect often is on the young person and on the rest of their life when they go through a criminal justice approach while they are still a child?

Fiona Dyer: One of the main issues is that children do not understand the process, which means that something is being done to them. We know from the Promise that children need to have ways to participate meaningfully in the justice system. Even for a professional, going into court can be really confusing. It can be hard to know what is happening and to understand the language

that is being used. For a child who is traumatised by their experience, especially if they are coming from custody and have been in a loud cell with adults, going into court can be a traumatic experience. They are not able to understand what is happening, and even explaining it to them afterwards is quite difficult. I have gone to see children in cells who had been remanded and were not even aware of that. That can have a massive impact on a child.

There can be a cycle. If someone has been in court before, the chances are that they will go back to court. It is unlikely that anyone who has been to court will go into the children's hearings system, because they are already in the adult justice system. The evidence from the Edinburgh study shows us that being in that system can be detrimental because people can remain in it for longer. It can be more positive to do nothing with the child. If we bring them into the system, they stay in that system for longer and there can be a revolving door of reoffending. The child comes back to court again and sentences increase because there is a tariff system: the more someone appears in court, the harsher the outcome is.

Children tell us that that perpetuates and that it affects their life circumstances. The evidence is that it impacts their home life, their relationships and their prospects of a job, education or training. It impacts their whole future. The evidence from various studies shows that that is especially true for children who come from areas of high deprivation who have experienced trauma or who have been looked after and accommodated. Those children are more likely to be criminalised in that system. They can be very vulnerable, and that is perpetuated by putting them into an adult justice system that they do not understand and cannot meaningfully participate in.

Ross Greer: I am keen to pick up on the Promise, which you mentioned. Before I do so, would Megan Farr or Katy Nisbet like to add anything?

Megan Farr: I draw members' attention to general comment 24 from the UN Committee on the Rights of the Child, which came out in 2019, and to the Council of Europe guidelines on child-friendly justice, both of which advocate children under the age of 18 being dealt with through a child-friendly justice system. The children's hearings system is a fairly good example of that internationally.

Ross Greer: The bill is relevant only to part of what is in the Promise, which goes far wider. In so far as it is relevant, does the bill go far enough to fulfil what is in the Promise?

Fiona Dyer: It does not go far enough in relation to courts. As other witnesses have said, the bill still includes the option for children to be prosecuted in the courts. The independent care review, which became the Promise, said that children's rights cannot be upheld if children cannot be heard. We know that. The bill improves that to some extent by trying to extend the children's hearings system to more 16 and 17-year-olds, but, if children are still going to court, their rights are not being upheld. That is not a juvenile justice process under the terms of UNCRC; it is an adult justice process.

We are looking at that in Scotland, where there are two youth courts—one in Lanarkshire and one in Glasgow. We, at CYCJ, are looking to support other local authorities, with the agreement of sheriff principals, in developing youth courts within Scotland, but children are still going to adult courts at the moment and the bill does not go quite as far as it could.

Ross Greer: Does anyone else want to contribute?

Katy Nisbet: I agree with Fiona.

Ross Greer: That is ideal. That is all from me for now, convener.

The Convener: It is helpful to hear about the youth courts, because the witnesses on the earlier panel were not quite able to put their finger on that area. It is helpful to have more specificity about that.

We will move to questions from Willie Rennie.

Willie Rennie: I am concerned about how information is shared with victims and about how we can build the confidence of victims and their families. Do we have the balance right? I understand the landscape, but I am interested in how the debate within what we might call "the system" is developing and whether improvements could be made. If so, what should those improvements be?

Fiona Dyer: One advantage for victims of going through the children's hearings system is that it is a speedier process. When children have offended and there are victims, we hear that the court system can sometimes take two years or more. That means victims not knowing what is happening during that time.

I know that there are issues, which were discussed in the earlier session, about the information that is given to victims. I appreciate that, and it is about getting the right balance between upholding the rights of children who have caused harm and upholding the rights of others who might have been harmed. I think that the bill goes some way to achieving that balance.

It is also about recognising that the majority of children who are in conflict with the law are victims themselves—and they are victims first and foremost. Most are known to services because of what has happened to them as children. Therefore, it is also about getting that balance right. It is a tricky balance, but I think that it is one that the bill goes some way to achieving.

Megan Farr: There are some steps in the bill that we particularly welcome, including those around improving anonymity for victims as well as for children in the system. We said something in our written submission about when that protection starts, because there is not a lot of clarity on that, although I appreciate that the deadline was Friday, so you might not have had a chance to read the submission yet.

One of the disappointments of the bill is that, in the consultation, there were a number of proposals around support for victims, including having a single point of contact and other measures, which I think would help victims—particularly child victims—significantly. They might be brought forward in policy, but they are not in the legislation. That is disappointing because some of those could have made a big difference.

When we spoke to young people about it, the one thing that we heard is that victims sometimes feel that they are getting no support at all. That is a big issue. Therefore, we would very much welcome more being done to ensure that victims—particularly child victims, given our remit—have easy access to support.

Willie Rennie: Does that come down to resource, or is that about aspects of the bill? Will you talk a bit more about what that means?

Megan Farr: The proposal in the consultation was about the children's hearings system having a single point of contact for victims, where they could go to for signposting. I think that that would be a good support for child victims and their families, who are often left having to try to access support themselves, particularly if it is geared to supporting children when there has been significant trauma. That proposal would be a positive step, and it would be great to see it introduced.

Willie Rennie: Do you know why that could not be included?

Megan Farr: I am not aware of that. It might be that it is intended to take the proposal forward through policy and that it does not require legislation. I will be generous enough to give that as a possibility.

Willie Rennie: We can inquire.

Katy, do you want to come in?

Katy Nisbet: I do not have anything to add to what Megan said. There is a difficult balance to strike when it comes to information sharing, particularly when both parties are children, because both have rights that need to be protected. The bill goes some way towards supporting that, but improvements could clearly be made.

Michael Marra: There is a fair amount of commentary there about communication and the right to information. In this area, I am particularly concerned about child victims of child crime.

Will you give us your reflections on the management of relationships? Many of the victims will be living in the same communities as children who are the perpetrators of crimes, who might end up going to the same school or living in the same street as the victims of what are sometimes very serious crimes. How are those processes managed, and can more be done to achieve better outcomes? I ask Katy to start.

Katy Nisbet: I will have to pass on that question. I do not have any information about the practicalities of how that works from our experience at Clan Childlaw, I am afraid. My colleagues might be able to comment.

Fiona Dyer: Those situations are currently managed very well by skilled social workers on a day-to-day basis throughout Scotland. Children tend to offend against other children, and that tends to be against children whom they know. There are children in the same class, and sometimes in the same family, who offend against, and cause quite significant harm to, each other. That is managed through skilled risk assessment. We have care and risk management processes in Scotland that social workers follow. That can result in different outcomes. In a family situation, it can result in a child having to be removed from the family to manage the risk. Management is very individualised to each circumstance and each child, and it is currently done through social work on a day-to-day basis.

11:00

Megan Farr: Children's hearings are well placed to deal with some of those instances, particularly when they involve serious harm.

On the point about providing information to victims, one of the reasons why there needs to be some caution is that, with today's social media, there is a risk that victims will inadvertently and unintentionally criminalise themselves by sharing information. That has to be part of the risk assessment when a decision is being made about whether to share information with a victim, particularly when they live in the same community.

It needs to be ensured that they are aware of the risks of sharing that information further.

As Fiona Dyer has said, things are already managed on a day-to-day basis by a very skilled workforce with good experience of doing that.

Michael Marra: I would contend that things are not managed well in every circumstance. I suppose that nothing can be—mistakes will be made, and there will be problems. I have dealt with constituency casework that has involved very difficult situations in which those things have not been managed. Essentially, there were voluntary dispensations that fell between the cracks, with local authorities not having the resource to carry things through. Is there nothing that we could do in the bill to further strengthen the support for managing the arrangements between victims and perpetrators who are in the same community?

Fiona Dyer: Work is under way on things such as restorative justice. The Scottish Government's restorative justice action plan is currently being piloted, and previous work has looked at restorative justice with high-risk cases in such situations and at family group conferencing and mediation in relation to that.

As Megan Farr and I have said, it is about having a skilled workforce. It is about having appropriate resources so that we have a fully resourced skilled workforce. It takes money to ensure that local authorities are fully resourced so that they can have that and are able to support children in their communities. Really looking at the resource attached to the bill would go some way to helping.

If people think that children are falling through the cracks and situations are not being managed well, Scotland has new child protection procedures that are being followed. A lot of professionals from a lot of different disciplines are involved around children. That goes some way to supporting that management. Again, it is about the resources that are available across local authorities. Unfortunately, provision will be patchy across them. There is a bit of a postcode lottery when it comes to who has the resources to specialise in areas such as harmful sexual behaviour or violence. Provision is different across Scotland.

Michael Marra: That is useful.

The Convener: Graeme Dey wants to ask a supplementary question on that thread.

Graeme Dey: I fully recognise that a balance has to be struck in these circumstances. Megan Farr is right when she talks about the risk of imparting information that is then shared on social media. However, do you not recognise that, in some of these cases, there is a sense that a package of measures is being put around the alleged perpetrator, but the victim is left wondering how they can be confident that their needs are being met? When MSPs who pick up those cases for their constituents try to get information, they are told, "We can't give you that, because it is about measures that we have taken in relation to the alleged perpetrator." Do you not accept that it sometimes appears that the victims and their families are forgotten in all of this?

Megan Farr: We definitely hear—we have been saying this for quite a while—that there is a gap around support services for victims, especially child victims, and that there are aspects of the criminal justice system in particular that act as a barrier to providing that support; I think that that is less of an issue with the children's hearings system. However, that is not a reason not to provide support to children who are accused of causing harm. As Fiona Dyer said, most of them, if not the vast majority of them, are also victims of crime—that is part of their background.

In addition, if we fail to provide such interventions and support to those children when they are children, there is a very real risk that, if they become further criminalised, they will go on to offend. With children, there is an opportunity to change that behaviour. In our view, there is absolutely a need for more resource for victim support, but not at the expense of support for children who are in conflict with the law.

Graeme Dey: I do not disagree with that. Perhaps I did not make myself clear. We often find that victims and their families are looking for reassurance and want to know what measures have been taken to protect them, but it is impossible to get information on that. The ground for that is that that information cannot be shared, because those matters pertain to the alleged perpetrator. That exacerbates the sense of concern of victims and their families. That is what I am getting at.

I do not have the answer; I simply wanted to get a sense that you recognise that that is an issue.

Megan Farr: There is potentially an exception. Generally speaking, we would say that information around outcomes—I am talking about convictions—should remain private for life. However, there is scope for the sharing of information in relation to measures to keep other children safe and to allow adequate safety planning to be done. That is permissible within the current legal framework.

It is an incredibly difficult balance to strike. To an extent, that is not something that we can legislate for. We have to take case-by-case decisions on safety planning for individual children in communities. As Fiona Dyer said, that is where

the work that is done by social workers comes into play.

The Convener: Sticking with the same thread, I will bring in Stephanie Callaghan, who is online, as she has a follow-up question.

Stephanie Callaghan: We should keep in mind the fact that children who cause harm are often children who have been harmed—they are often the same children. Given what Megan Farr said, I wonder whether part of the problem is the fact that people are either on one side or the other side, and that there is not enough cross-working. For example, on one side, we have things such as the bairns' hoose, which will be coming through to support children who have been harmed. On the other side, there is the reporter, who looks at the causes of harm.

I have an additional question. What part do accountability and responsibility play in the developing wellbeing of those children who are causing harm? How important is that as part of their wellbeing and development?

The Convener: Are you able to take that, Megan?

Megan Farr: Yes—I was just frantically thinking.

When it comes to children, accountability need not result in a criminal conviction. A child's understanding that they have caused harm to another person and that that has had consequences does not need to have a lifelong criminal conviction attached to it. That is where the support package for the child who is in conflict with the law, which Mr Dey mentioned, comes in.

Too often, systems still treat the children we are talking about as two different groups of children rather than as overlapping groups of children. There are victims out there who are not in conflict with the law, but there are very few children who are in conflict with the law who are not victims, in some form, themselves. It would help us in addressing the issue if that was more widely understood. That needs to be understood at a political and a cultural level, rather than at the level of an individual child, whether they be the child who is in conflict with the law or the child who is a victim.

Fiona Dyer: I think that you are right. Sometimes, the issue is the way that our systems are set up; they could be joined up better. Again, we are probably some way off doing this, but the Promise looked at supporting the whole family in addressing that issue, and I think that local authorities will be mindful of that. However, as Megan Farr said, the way that we do that could be better joined up.

We work in areas of work, if you like. If you are working with a child because they have come to your attention as a result of their behaviour, that is what you are focusing on. However, taking a whole-family approach would go some way towards ensuring better joined-up working and improving those links.

Megan Farr: To go back to the bill, it will give us the opportunity to do that with some of those children who are 16 and 17. They will now be able to go into the children's hearings system, which is probably more capable of taking that approach than the criminal justice system, which can often result in a false dichotomy between different groups of children.

Stephanie Callaghan: Megan Farr has just picked up my further question, convener. Thank you.

The Convener: That is super. We will move to questions from Kaukab Stewart.

Kaukab Stewart: Existing regulations allow for cross-border placements in secure accommodation—we have heard evidence on that this morning. The Scottish Government has also committed to implementing the Promise, which has highlighted the concerns for children's human rights as a result of being removed from their families and support mechanisms. In light of that, do the provisions in the bill go far enough to address those concerns?

Katy Nisbet: Cross-border placements cover a wide variety of orders that come from England. You are referring to children who have been placed on a secure care order in England and have been placed in secure care accommodation in Scotland. That is fairly highly regulated, because secure care orders in general have a lot of safeguards. When children are placed in Scotland under those regulations, there is far more oversight than there is in some of the other examples. Notwithstanding that, the very fact that children are placed so far away from their support networks and families is hugely detrimental to their wellbeing and contrary to their rights under article 8 of the European convention on human rights.

With regard to residential placements of children coming into Scotland—it is possibly less the case with secure placements—there is legislation in place for long-term placements. However, that is predicated on the basis that the Scottish local authority will accept the child and take responsibility and that they will then go into the children's hearings system. If that were happening, a lot of oversight in terms of protections and safeguards for those children would be available, and that would happen in Scotland. However, as far as we are aware, that is not happening because, surprisingly—or not surprisingly—local authorities in England do not know that the placement is going to become a

long-term one, and it then becomes long term and it drifts. Getting acceptance from all the local authorities that that is where the responsibility should lie is also difficult, particularly when budgets are so stretched.

There are situations when children leave care. They have already been separated from their support network. If they are up here for the long term, when they leave care, there are real issues about who takes responsibility for their transition into adult life, if you like. In Scotland, we have relatively good provision for aftercare and continuing care, but, if someone is here on an English order that has never been accepted by a Scottish local authority, the English local authority is still the relevant local authority, and it can be very difficult to work out who has responsibility. There is a whole host of children who, having been taken away from their support networks in England, have perhaps been placed in Scotland on a long-term basis, have built relationships and want to stay here, and they are being let down again when they leave care. That is a big issue.

11:15

There are also the children from England who are placed in Scotland on deprivation of liberty orders, which are being used with increasing frequency in England, because there is not enough secure care accommodation. Those are children on whom the High Court has to rule that, ultimately, it is in their best interests for them to be deprived of their liberty but not to be put into a secure placement, where there are a lot of—or, at least, more—safeguards and protections in place through legislation.

Last year, the Scottish Government introduced regulations on the matter. Previously, if a child was placed in Scotland on a DOL order, you had to go to the Court of Session to have the order recognised, which was quite a laborious and expensive process. Under the regulations that are now in place, the orders can be recognised in Scotland. I am sure that the commissioner's office will have a lot to say about that, and we fully support its criticisms of that particular bill and now the regulations, because the children in question are being placed in Scotland in what is quite often wholly unsuitable accommodation. The regulations do not provide for oversight here and, indeed, they do not do enough to protect the children's human rights.

In each of the categories, there is the real prospect of having a two-tier rights system for children who are in the care of bodies in Scotland. That raises huge human rights issues. Initially, then, there is the issue of children being broken away from family supports and, in relation to the deprivation of liberty orders, in particular, there are issues with regard to article 5 rights and so on.

When the regulations that I have mentioned were introduced, we were told that the final position, the final range of safeguarding measures et cetera would all be outlined in the bill, but that has not happened. Instead, we are looking at framework provisions for regulations to be made at a later date. Although we welcome in principle increased regulation from the Care Inspectorate, not enough has been outlined in the bill for us to know whether those children's rights are actually going to be safeguarded in any real way. In fact, if you read the policy documentation along with the bill, you will see that the types of regulation provisions that it is suggested will arise—for example, notification requirements—sound very similar to what is in the current cross-border regulations that came out in 2022 and which are wholly inadequate. If that is deemed to be what will be put in place for future cross-border placements, it is simply not adequate, and it will not address the root problem of the huge underprovision of secure accommodation in England.

Kaukab Stewart: I can see that you are very passionate about this subject, Katy, and I thank you for outlining the very complex issues surrounding it. I note, too, from your written evidence that you were disappointed with the Scottish Government's response.

Perhaps I can bring in Fiona Dyer and Megan Farr. We have touched on the issue of safeguarding, but is there anything further that you wish to add on the matter? In particular, we need views on safeguarding to ensure the welfare and protection of vulnerable children in the context of cross-border placements.

Megan Farr: We have stepped back slightly from our initial view, which is that this sort of thing should not be happening and is not in the children's best interests. I think that the Promise said as much, and it should be the starting point. Indeed, in its policy memorandum, the Scottish Government has said that such placements should be rare and should happen only if there is a clear best-interests case for the child to be placed in Scotland. That would be our view, too.

An example of that could be something like a child having a parent or another close family member in Scotland and their being placed here because that would provide them with a support link. However, what is happening is that children are being taken away from any of the support or strengths that they can draw from their families or their communities, as Katy Nisbet said.

In terms of welfare, our first step would be to try to prevent that from happening. We should be

trying to reduce instances of that to the absolute minimum. That is difficult, because the problem is rooted in the shortage of secure places in England, as Katy Nisbet said. The other way to ensure that there is safeguarding and that those children's rights are respected is to ensure that they have the same rights as children who are placed in secure care or who are deprived of their liberties elsewhere. Children can be deprived of their liberty—even when they are not on an order that says that—if they are subject to restrictions to such a degree that they cannot, at will, leave where they are being held.

We cannot see anything in the bill that will rectify that. All the concerns that my colleague expressed to the committee when the regulations were passed last year still exist. The bill just replicates the system. We were told that it would be a permanent solution, yet it is not. The permanent solution would be to make those instances as rare as the Scottish Government has said that they should be.

Kaukab Stewart: Is that an indication that there will always be exceptional circumstances to allow for that scenario?

Megan Farr: From our point of view, we felt that there could be circumstances but that those would be exceptionally rare and would apply to a child only very occasionally. However, we are not seeing that. Fiona Dyer will probably have better detail on the numbers, but we are seeing that a significant proportion of the children who are in secure care in Scotland are not from Scotland. That is a problem, because they are being moved away from their family support into a different education system and a different culture, into a situation that is very different from what they have grown up in, which is not something that we should be encouraging.

Kaukab Stewart: That is great. Can I bring in Fiona?

Megan Farr: She is probably better placed to answer that than I am.

Fiona Dyer: If the intention of the bill was to make those instances rare and exceptional, that would go some way to addressing the issue and to meeting the Promise. However, they are not rare and exceptional. We have conducted two secure care censuses. At one point, more than 50 per cent of the secure care beds in Scotland had children from outside Scotland. At one point, that reduced to 30 per cent, but the percentage of children who are in secure care and who are not from Scotland is still high.

Kaukab Stewart: That is interesting.

Michael Marra: The analysis of the harm and of the benefits for young people of being located close to their community or in their community makes sense. It is reasonable and sound, and I will draw on your expertise on that. However, I worry about some of the language and the talk of a forced reduction, which it feels to me is the case with some of the numbers. If those young people have nowhere else to go, should we not welcome them here? Is it your contention that, by being less welcoming in a legislative framework, we can force the United Kingdom Government to do better? I wish that it would do better, but is that the contention? It feels to me that, if we make the process more difficult, we could put more children at risk, whether they are from south of the border or not. Megan, I was particularly concerned about your language.

Megan Farr: The other side of that is that we have had instances where children have ended up in HM Prison and Young Offenders Institution Polmont because there has been a lack of spaces in secure care in Scotland. It is not a one-way risk.

Michael Marra: I accept that we do not want that to happen, but can you address my point about the cross-border placements?

Megan Farr: I agree that it is difficult. The ideal situation would be that the UK Government would do more. By making it harder for local authorities to place children in Scotland, our hope would be that that would somewhat force the issue of providing more appropriate places in England. However, it is not something that Scotland can fix for England's sake. Sending children to Scotland should not be an easy route out of the problem in England when it is not in those children's best interests. That potentially damages their links with their support networks and their families, which will be a positive part of their lives, and they will end up being hundreds of miles away from them. It is difficult, but we cannot fix the problem in England from Scotland. That is where the point about rare and exceptional comes in, but, as Fiona Dyer's evidence shows, those instances are not rare and exceptional.

The Convener: It is clear that there is a topic of discussion for us there.

Ross Greer: The witnesses are probably familiar with the evidence that the hope instead of handcuffs campaign submitted, specifically in relation to transportation providers for young people who are moving between secure accommodation, from elsewhere into secure accommodation or from secure accommodation to elsewhere. The campaign's contention is that, although we are broadly on a path towards higher standards and better regulation of secure accommodation providers, there is a gap in relation to the transportation providers. It has provided evidence of inappropriate use of restraint, specifically handcuffs—hence the name

of the campaign. There is the question of whether we need to wait for the bill to deal with that; there are other ways in which we can deal with it.

I am interested in your thoughts on the campaign's proposals that relate to reporting mechanisms in particular. It proposes the mandatory reporting of incidents in which a transportation provider has had to restrain a child or young person. I would be interested in your thoughts on that campaign more generally and what it is asking for, and specifically on whom those reports should go to. Should they be submitted to the Care Inspectorate, for example, or directly to Government? Where would be the appropriate place for those reports to be collated?

Megan Farr: There are two parts to that. Transportation was consulted on, but it is not in the bill. I do not remember off the top of my head exactly what we said in our consultation response, but I would be happy to provide a summary of that in writing to the committee before the end of the week, if the committee wishes.

You touched on restraint. That is one of our biggest concerns, and we have been campaigning on the issue for a long time. We conducted our first-ever investigation into restraint and seclusion in schools almost five years ago. Since then, we have heard that restraint and seclusion and the use of restrictive practices are an issue across the whole range of settings in which children find themselves. They are an issue in special schools and mainstream schools, secure care, residential care homes, mental health settings and, as you have said, in transport.

For a long time, we have called for a consistent statutory framework that covers the use of restraint and seclusion with children and young people—I think that our colleagues in the Scottish Commission for People with Learning Disabilities would say the same for adults—to ensure that, when restraint or seclusion is used, it is safe, it is used by someone who is adequately trained, and it is recorded and properly monitored. Our call, which is in line with Beth Morrison's campaign on Calum's law, is that that should be done consistently across all settings. The bill was a good opportunity to introduce that statutory guidance, and we are disappointed that that has not been done.

On the broader issue of transport, as I said, I would be happy to provide a written update based on what we said in our consultation response. I did not include that issue in my notes, as it is not in the bill.

Fiona Dyer: We have been doing work on secure care transport for several years. That issue has continued, as we know that what is happening is not adequate. There is a group that includes several partners, including the Convention of Scottish Local Authorities and the Scottish Government, to look at how we can improve the situation in Scotland. The last update that I got from it was that we are getting there. All options are being looked at. Would the secure care providers do that, or the private companies that are being used through the Scottish Government? We are looking at all options and exploring that issue. It is on our agenda.

It is really traumatising for children to be restrained anywhere. That needs to be addressed and passed on, and children need to be supported. Their social worker needs to know about that, and an agency such as the Care Inspectorate needs to govern that. We are talking about children who are in our care and who are being transported from court to secure accommodation or from secure accommodation to other secure accommodation, for example. It is really important that that is addressed. I would hate to think that children are being subjected to that and that it is not being addressed.

Ross Greer: My understanding is that there is new guidance or rules. Something new is being produced, primarily by COSLA. I presume that that is coming from the group that you referred to.

Fiona Dyer: Yes.

Ross Greer: The question for the committee and for the Parliament is whether we can deal with that issue specifically through a non-legislative approach or whether it should be covered in the bill. I am interested in hearing your thoughts on whether what is coming will do the job that I think we all want it to do. Alternatively, should we consider a legislative approach, whether in the bill or elsewhere?

11:30

Fiona Dyer: I hope that it can be done through policy. I presume that that is why that aspect has not made it into the bill following the consultation. I hope that it will not need to be legislated for and that we can achieve the creation of guidance, improve it and ensure that we are upholding children's rights when they are being transported, as a minimum.

Ross Greer: The advantage of that is that we could just go ahead and do it now.

Fiona Dyer: Yes—exactly.

Ross Greer: The bill will take some time, whereas we could produce policy in a matter of months.

Megan Farr: With apologies to Fiona Dyer, I disagree with her. Guidance for individual settings could be done through policy, but our problem will

be achieving consistency across care and healthcare settings. That is partly why our position is that guidance needs to be made statutory at this point. Although we welcome the work that has been done, particularly on transport, through COSLA, and other work that is happening on education, to ensure consistency, there is a need for the guidance to be put on a statutory basis. That is because of the breadth of settings in which we hear about children being inappropriately restrained or about the use of seclusion and restrictive practices.

As for why we think that that is so important, if unsafe practices are used, there is a risk of harm and potentially a risk of fatal injury. In the examples that we have heard of, many of which involve disabled children, it potentially amounts to cruel, inhuman or degrading treatment within the definition in article 3 of the European convention on human rights, which is on the prevention of torture. It is a very serious issue, which is why our view is that the guidance needs to be made statutory and to apply across all settings.

Ross Greer: Do I have time to ask Megan Farr a brief follow-up question, convener?

The Convener: Yes—if it is very brief. Just for clarity, I advise members that, if they wish to look at the CYPCS's evidence on seclusion and restrictive practices, it is on pages 2 and 3 of its submission.

Ross Greer: Just on that point, Megan, if your position is that the guidance should be in legislation, do you believe that it should be in primary legislation such as the bill, or is there a way to do it through secondary legislation? Do you have a view on which legislative vehicle should be used?

Megan Farr: When we responded to the consultation last year, we called for it to be in the bill that we are discussing, so we are disappointed that it is not. Now that the bill has been introduced and it is the Parliament's bill, I would not want to tell the Parliament how it should address that as regards how it can be put into the bill at this point. Our position remains that the guidance needs to be made statutory. The bill is a potential vehicle for that.

The Convener: Thank you for that, Megan. We move to questions from Graeme Dey.

Graeme Dey: I was struck by the idea that witnesses do not tell Parliament and committees what should be added to a bill by way of amendment.

The Convener: That is why we are here.

Graeme Dey: That is what we are here for—exactly.

I want to explore another aspect. If our witnesses watched our earlier evidence session, they will have heard that we considered inconsistencies in the experiences of 16 and 17-year-olds under the current arrangements, depending on whether they go through the children's hearings system or the criminal justice system.

We explored an example in which two individuals of a similar age commit the same offences but one is dealt with through one process and the other person goes through the other. The first one, who goes through the children's hearings system, could have been dealt with and have moved on to a much more positive outlook before the one who is going through the criminal justice system has even attended court, because of the delays. That is an obvious example, but are there other inconsistencies in the current situation that you want to make us aware of?

Fiona Dyer: As we discussed earlier, children who are referred on welfare grounds cannot currently access the children's hearings system unless they are already the subject of an open case or on compulsory supervision prior to their 16th birthday. That is true not only for children who are in conflict with the law; children who might need care and support cannot currently access a system that could give them those within a child development context in the way that the children's hearings system does. That is one discrepancy that exists at the moment.

As you mentioned, as well as delays, there is the general problem that some 16 and 17-year-olds have to go through an adult justice system that they cannot understand, participate in or engage in, and in which their views are not necessarily heard, in comparison with those who go through the children's hearings system. As well as timeliness, the issue is about responding in a way that supports child development.

Graeme Dey: Are there any other comments, or does that cover it? If not, that is excellent—we will move on.

The bill provides that, where a child should be deprived of their liberty, no one under the age of 18 can be committed to a prison or a young offenders institution. They would instead enter secure accommodation or similar residential establishments. I think that we would all welcome that move, but do you have any concerns about moving to that set-up—perhaps around capacity? Are all of the existing facilities that would accommodate those young people of a suitable standard? I am not trying to put words into your mouth; I am just planting those ideas. Is there anything there that makes you think, "This is great, but—"?

Fiona Dyer: There is a review at the moment. The CYCJ has been commissioned by the Government to look at the potential for children to move out of our young offenders institutions and at the capacity, resources and current availability. The review is looking at not just our secure care providers but alternatives. It is looking at the options and at smaller trauma-informed environments, as mentioned in the Promise, for children who, as a last resort, if we are looking at it under the UNCRC, need to be deprived of their liberty.

We are currently undertaking that review but, capacity-wise, it is touch and go. I checked yesterday and there are currently eight children in our young offenders institutions and there are 10 spaces in secure care. However, the week before, there were not enough beds in secure care to cope with the number of children in Polmont, so it is really touch and go. The Government is looking at capacity and the last-bed policy, and it is considering buying some resource to make sure that a bed is always available. Therefore, there are things in place to look at capacity.

In secure care, our providers—I am sure that you will hear from them at some point—meet the care and protection needs of children, as well as the educational and health needs. They meet the whole plethora of needs of the children, who are the most traumatised in society.

Graeme Dey: Do you accept that there is a balance to be struck between the need to provide environments that will help to rehabilitate and assist those young people and giving the public the confidence that, depending on the offences that they have committed, they are in genuinely secure accommodation?

Fiona Dyer: Yes. The secure care centres are secure. I think that, if the public realised what they are actually like, with the children locked in rooms, they would have that confidence. It can be as traumatising for children to go there as it is for them to go to a young offenders institution—well, perhaps it is not as traumatising as those, but it is a harsh reality; it is very secure.

Graeme Dey: I do not need to be convinced—I have visited one—but, when there are changes to the law such as this, there will be an element of the public that will want that reassurance.

Megan Farr: On that last point, there is something about how the change is being communicated by the Scottish Government and a need for awareness raising about that.

The numbers in Polmont have decreased significantly over the past couple of years. Certainly, it has been in single figures for the past six months. Eight is actually quite a significant uptick, as it has been under five for most of this year, so there should be space in the secure estate for those children.

The bill will prevent children from being sent to Polmont, but it will not require an immediate move for the children who are currently there. That said, for a long time, most of the children in Polmont have been untried; they have not been convicted. We continue to hear of cases where a child has been sent to Polmont other than as a last resort. We had a case last year of a child who had failed to appear as a witness, and we have also heard of cases in which a child having no fixed abode has resulted in their being sent to Polmont rather than another setting.

That is why we feel that it absolutely needs to be in primary legislation that children cannot be sent to prison, and Polmont is a prison. We are confident that the secure care homes are able to safely manage those children. As Fiona Dyer says, they are absolutely secure and there needs to be communication around that.

The Convener: Ruth Maguire has some questions.

Ruth Maguire: My question is about movement restriction conditions. A number of submissions have raised concerns about changes to them. The evidence from Clan Childlaw specifically mentions the uncoupling of MRCs from secure care orders and the lowering of the threshold for use of MRCs. Why do you have those concerns?

Katy Nisbet: We are concerned for a number of reasons. It is our view that MRCs amount to a deprivation of liberty and that there should be a threshold test to ensure that, when an MRC is imposed, that is done as a necessary and proportionate response to the risks that are displayed.

Previously, MRCs had to be considered when a secure care order was going to be made. MRCs have traditionally been coupled with secure care and have been considered using the same criteria. As far as we are aware—and I think other witnesses will be able to confirm this—MRCs are used very rarely. We have not come across them very often. Generally, once a child is being considered for secure care, they go straight to secure care.

The bill seems to suggest that MRCs could be used fwillmore often, as a slightly lesser restriction that might avoid the need for children to go into secure care. The bill approaches that by lowering the threshold for using MRCs, which I think is dangerous.

The provision on psychological harm is particularly concerning. The bill suggests that a child who may have caused psychological harm to another could be considered for an MRC and also

makes that change to the secure care regulations. That is particularly concerning because the definition of "fear, alarm and distress" is entirely subjective. There is no objective test, which is out of step with how that term is used in other legislation, such as on breach of the peace—fear and alarm are part of that. I would have to check, but that is, in effect, about how something would be perceived by the general population. There is an objective test: a reasonable person would have to consider that fear and alarm could be caused.

It is the same in the Protection from Harassment Act 1997. Such acts always have an objective qualifier somewhere within the definition. Technically, what is in the bill means that one witness could say that they were scared of a child or a group of children, and that would pass the threshold test. That is not acceptable, given the restrictions that could then be put in place.

The bill is trying very hard to say that deprivation of liberty can occur only under a secure order or by using secure care, but that is not how human rights law interprets deprivation of liberty. It cannot be judged only by how it is defined in legislation; we must look at all the circumstances. The bill will put more children into the children's hearings system but will increase the range of orders that can go on to compulsory supervision orders. Some of those are fairly extreme, especially in combination. We are concerned that that could amount to deprivation of liberty. A child can be detained in a house for 12 hours. If you add that to not having contact with various individuals and being kept away from certain environments, that is a serious restriction of liberty. For that to be granted because of a subjective test is not adequate.

11:45

Ruth Maguire: Your evidence also mentions the potential absence of legal representation.

Katy Nisbet: At the moment, if the children's hearing is likely to consider a secure order, legal aid is automatic. The applicant does not have to go through a means and merits test; they can be awarded advice and representation. In addition, the child is informed of that and, if they do not have a solicitor at a hearing, that is queried and there is a duty solicitors list available. It is all very much set up for a solicitor to be there, because the consequences of deprivation of liberty are so serious.

That is not the case for an MRC. If MRCs can now be considered when a children's hearing is not likely to make a secure order, there is no automatic entitlement to that. Although there is information about accessing a lawyer and legal aid can be applied for, it will need a means and merits test. That will not happen as standard.

Ruth Maguire: We heard from the first panel that it would be highly unlikely for a child in need not to meet the means and merits test. If there is a difficulty with pressures on legal aid solicitors in that, if legal aid is not automatic, it might be problematic for children—

Katy Nisbet: That might be an issue, but our concern is that the child will not readily know that they can have a solicitor. The children's hearings system is meant to be informal and solicitors are not there as a matter of course, so children might well not know that they are entitled to a solicitor. As I said, the children's hearings system gives information to children, but it assumes that they understand what might happen at the hearing and the restrictions that might be put in place, as well as that they have read all the information so that they know that they can contact a lawyer and know how to do so when there is not a duty solicitor. There are all those barriers—that is the real concern.

As Ruth Maguire said, if a solicitor is contacted, the likelihood is that legal aid would be granted, but that initial step is the barrier.

Megan Farr: I endorse what Katy Nisbet has said. We share the view that MRCs have the potential to be an unlawful deprivation of liberty under article 5 of the ECHR. The need for automatic legal representation is really important, particularly in children's hearings, because people are not typically legally represented in those situations. There should be no situation in which a child could be deprived of their liberty without competent and qualified legal advice.

We also have an issue with section 2 of the bill, which we think attempts to define removal, by the manager of an establishment, of the liberty of a child in an emergency, as a restriction and not a deprivation. That could, and in fact would, result in a deprivation of liberty.

I draw the committee's attention to page 3 of our evidence, which mentions general comment 24 on the UNCRC on what a deprivation of liberty is, particularly that the person

"is not permitted to leave at will".

We see that there can be situations in which not permitting a child to leave a place of residence for safety reasons might be necessary, but that needs to be subject to review and to be time limited or it will be disproportionate. We have a concern about that.

This comes down to the fact that one of the issues that we have with quite a lot of the bill is about delineation of what is and is not a deprivation of liberty, which depends on the

context and the degree of restriction. An MRC can be a deprivation of liberty depending on the degree of restriction. Not permitting a child to leave their home at night might be necessary for their safety, but such a restriction also needs to be proportionate, necessary, time limited and subject to some kind of oversight, otherwise it does not meet the criteria in article 5 of the ECHR.

Ruth Maguire: Fiona, do you have anything to add to that?

Fiona Dyer: I agree with my colleagues, and I think that having legal representation would be important. However, I can see a benefit with MRCs—they can be really positive because of the intensive support that is part of the package. It is not just about restricting somebody or depriving them of liberty and making them stay in their house; it is also about there being an intensive package of support around a child.

MRCs are not used often. I do not know whether that is because of the criteria; maybe the bill is trying to address that. For the majority of children who are currently in secure care, an MRC would not be appropriate. I imagine that that is why they are not being used and why children are not subject to MRCs prior to secure care. They might have gone straight to secure care because they have specific needs that an MRC would not address.

MRCs could be used much more creatively. My view is that the bill is trying to achieve that by looking at the secure care criteria, because they are not being used but could be used so that children would have access as an alternative. It is about striking that balance—

Ruth Maguire: I am sorry to interrupt, Fiona. Can I just make sure that I am picking you up right? Are you saying that most of the children who are in secure care would not meet the criteria?

Fiona Dyer: I do not think that an MRC would be appropriate for them.

Ruth Maguire: Is that because their behaviour is harmful or because of their welfare needs?

Fiona Dyer: There will be a mixture of things. For many children who are in vulnerable situations, an MRC would not be appropriate. A lot of things will have been tried prior to a child meeting secure care criteria—that decision does not suddenly come out of nowhere. A lot could have gone into supporting the child at home and in the community before that decision.

Ruth Maguire: I am sorry to cut in again, but I just want to make sure that I am getting this right. Are you saying that, for an MRC to work and for someone to be kept at home, their home has to be safe and stable, which is perhaps why MRCs are not used?

Fiona Dyer: Yes, potentially. It is also about behaviour. An MRC might be used to restrict a child from going out at certain times in the evenings or at weekends, because those times are when they might be offending, for instance. However, if a child has issues that are not specific to a certain time, an MRC will not necessarily be appropriate. There is a bank of evidence about contextual safeguarding, which is about looking at the areas where children might be involved in offending. It can also be about hotspots—for example, Friday and Saturday evenings. MRCs could be used creatively in such situations.

However, such children might not be at the point at which we need to lock them in, or at which they need to be secured for their safety or the safety of others. That is where the question of a threshold comes in. An MRC is a restriction or a deprivation, so a robust risk assessment is needed as part of that, and certain criteria need to be met. A robust support package is needed, and that needs to be resourced because a support package will be very time intensive for social work, the third sector and other partners. That all needs to be considered for MRCs to be effective.

Ruth Maguire: As a panel, do you all agree that the automatic right to a solicitor is crucial for that level of intervention?

Witnesses *indicated agreement.*

Ruth Maguire: You all agree. Thank you.

The Convener: We are a little bit ahead of time. However, you do not get in front of the committee often when we are discussing legislation that holds such importance for our young people, so I will give you a couple of minutes each to share with us something that you really want us to hear in relation to the bill.

Katy Nisbet: My point probably follows on from the automatic entitlement to a solicitor. I think that there has been a missed opportunity. With more children coming into the children's hearings system, we need to look again at automatic entitlement to a solicitor. Where a child has been referred to a children's hearing on offence grounds, there is no automatic entitlement, so there is no list of duty solicitors and no automatic referral, as happens with secure care.

The Rehabilitation of Offenders Act 1974 applies in relation to offence grounds. I do not know whether members have seen those offence grounds, which the person might admit to or which might be proven in the sheriff court. Those are libelled as a criminal charge would be libelled, so they are noted as offences. If they are admitted to or are proven at the sheriff court, having not initially been admitted to, they can be declared on checks later in life, thereby preventing or impacting on employment opportunities and so on.

That is a severe impact on the person's future. The child concerned might not technically have been convicted of an offence, but such offences are recorded for later and there is no automatic entitlement to advice from a solicitor at that point. There might be reasons why the offence grounds should not be accepted. Initially, however, the person is just presented with a set of offence grounds and is asked whether or not they accept them. There could be a defence, and there could be various other things—the offences might not be factually correct, for example.

The children's hearings system is meant to be about need, not deed, so many of the grounds could be put through as welfare grounds with consideration of what the child needs at that point. There is a real lack in that respect.

There is also concern surrounding access to lawyers. As I have said previously, information about accessing a lawyer is available; people can apply for legal aid and have a merits and means assessment. It is a matter of their knowing that it is possible to do that.

It is at the really early stage of considering the offence grounds when people can say that they either agree with them or do not agree with them. No evidence is led. That is a really critical point for consideration, at which there is no automatic entitlement, and it is something that we would look to address in the bill.

The Convener: Megan, this can be your last gasp.

Megan Farr: I whole-heartedly agree with Katy Nisbet on legal representation when there are offence grounds. We have come across young people who have contacted us who had not realised that they had, in effect, pleaded guilty when they were asked whether they accepted offence grounds.

That leads nicely on to the issue that I was going to raise, which might come as no surprise to anyone: the age of criminal responsibility. We still have an age of criminal responsibility in Scotland that is below the internationally acceptable legal minimum of 14. That was made clear by the UN Committee on the Rights of the Child in May 2019, in the same week that our act was passed, and it was made clear in 2010 by the Parliamentary Assembly of the Council of Europe that the European acceptable minimum was 14, but we failed to pass legislation that complied with that minimum.

The implementation of that age was delayed by two and a half years, which has had the effect that the three-year review that was added under the Age of Criminal Responsibility (Scotland) Act 2019 has become a five-and-a-half-year review. In our consultation response, we called for the bill to be used as a vehicle to raise the age to 14 as a matter of urgency, in order to bring Scots law properly into line with the UN Convention on the Rights of the Child. That has not happened, so we are obviously disappointed. That would give the opportunity for the review—which I hope is now under way—to concentrate on raising the age to 16 or, potentially, beyond that. We are really disappointed that that change did not happen.

In our consultation response, we have highlighted several bits of the bill that we would like to come into force immediately on royal assent, particularly those concerning deprivation of liberty orders. The other provision that I wish to mention is the one that will prevent children being placed in Polmont.

The Convener: Thank you, Megan. Received.

Fiona Dyer: We are really supportive of the Children (Care and Justice) (Scotland) Bill. We think it has the potential to significantly change the way in which we deal with children in Scotland by recognising that all children are children up to the age of 18, by providing them with open access to the children's hearings system and by removing children from our young offenders institution. As Megan Farr said, that needs to happen as soon as is practically possible.

The Convener: That is great. Thank you very much for that, and thanks for your time this morning. The public part of today's meeting is now at an end. We will consider our final agenda item in private.

12:00

Meeting continued in private until 12:28.

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