

EXPLANATORY NOTES

Children (Care and Justice) (Scotland) Act 2024 (asp 5)

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CHILDREN (CARE AND JUSTICE) (SCOTLAND) ACT 2024

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Children (Care and Justice) (Scotland) Act 2024. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

Overview

3. The Act makes provision about the care of children (who are not involved in the criminal justice system) and the treatment of children within the criminal justice system, as well as about the interrelationship between the care system and the criminal justice system. It consists of eight Parts, seven of which contain substantive provision and the eighth contains the usual final provisions.

4. Part 1 deals with aspects of the children's hearings system, with the main change being to the meaning of "child" in section 199 of the Children's Hearings (Scotland) Act 2011. This will mean all under 18s will be children for the purposes of the children's hearings system, without any distinction made between children over 16 who are subject to compulsory supervision orders and those who are not. Other changes to the 2011 Act made by Part 1 relate to: placing a duty on children's hearings to have due regard to the effects of trauma on children; the measures that may be included in compulsory supervision orders; placing a duty on the Principal Reporter to inform people, who have a right to request information about the disposal of a child's case by the children's hearings system, that they have that right; providing support to such persons in the children's hearings system; and, finally, providing for supervision and guidance for children after they turn 18 up to age 19.

5. Part 2 deals with children who are involved with the criminal justice system when suspected or accused of offences or when involved as victims or witnesses. Section 12 maintains the current link between the meaning of "child" in the Criminal Procedure (Scotland) Act 1995 and the definition in the Children's Hearings (Scotland) Act 2011 so that, for almost all purposes, under 18s will be regarded as children. Most of the other provisions in this Part are consequential on this age change (like section 14) and amend provision for the treatment of children from the point of being arrested by the police through to detention after pleading, or being found, guilty. And section 19 will provide, among other

things, that under 18s will no longer be detained in young offenders institutions. Where they are detained in secure accommodation, section 24 will make provision for how local authority duties in relation to "looked after" children will apply to children so detained.

6. Part 3 deals with the regulation of secure transportation used to transport children and young people to and from secure accommodation. It places a duty on the Scottish Ministers to prepare and publish standards for secure transporation services and a corresponding duty on those providing, or arranging the provision of, those services to ensure the standards are met.

7. Part 4 has links to both Part 1 and Part 2 as it is mainly aimed at reforming the legislative landscape around the provision of secure accommodation and the approval and regulation of those who provide it. Part 4 also reforms and extends ministerial powers to regulate cross-border placements of children into residential accommodation in Scotland from other parts of the UK.

8. Part 5 makes two changes. It changes the meaning of "child" in the Antisocial Behaviour etc. (Scotland) Act 2004 so that it covers under 18s (except in the case of parenting orders, where it will remain as under 16s). And it repeals Parts 4 and 5 of the Children and Young People (Scotland) Act 2014.

9. Part 6 includes new provision in the Criminal Procedure (Scotland) Act 1995 that restricts the judicial remedies available where a court finds that a prosecutor, in deciding to prosecute a child, has acted unlawfully under section 6(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

10. Part 7 makes provision for the operation of the Act, including the sufficiency of resources in place for its effective implementation, to be reviewed and reported on annually.

Crown application

11. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010[1] provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. So, technically, this Act applies to the Crown in the same way as it applies to everyone else. But the Act's substantive provisions mainly amend a number of existing enactments, some of which do, and some of which do not, apply to the Crown. The Act makes no change to the application of those enactments to the Crown.

Interpretation

12. In these Notes, the following abbreviations are used—

- "the 1995 Act", which refers to the Criminal Procedure (Scotland) Act 1995,[2]
- "the 2010 Act", which refers to the Public Services Reform (Scotland) Act 2010,[3]

[1] Interpretation and Legislative Reform (Scotland) Act 2010 (legislation.gov.uk).
[2] Criminal Procedure (Scotland) Act 1995 (legislation.gov.uk).
[3] Public Services Reform (Scotland) Act 2010 (legislation.gov.uk).

- "the 2011 Act", which refers to the Children's Hearings (Scotland) Act 2011,[4]
- "CSO", which refers to a compulsory supervision order,
- "ICSO", which refers to an interim compulsory supervision order.

13. The Act's freestanding text (that is, any provision which is not a textual amendment of another piece of legislation) is to be interpreted in accordance with section 36 of the Act and the Interpretation and Legislative Reform (Scotland) Act 2010. Among other things, the latter provides default definitions for certain expressions and sets out default rules for common situations.

14. Text that the Act inserts into other enactments is to be interpreted in accordance with the interpretation legislation that applies to that enactment. For example—

- text inserted into the 1995 Act, or the Children (Scotland) Act 1995, is to be interpreted in accordance with the Interpretation Act 1978,[5]
- text inserted into the 2010 Act is to be interpreted in accordance with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999,[6]
- text inserted into the 2011 Act, or the Children and Young People (Scotland) Act 2014, is to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.

COMMENTARY ON PROVISIONS

Part 1 – children's hearings system

Section 1 – age of referral to children's hearing

15. This section extends the age of referral to the children's hearings system to age 18 for all children.

16. Under the 2011 Act, if a child has had no prior involvement in the children's hearings system, then the child may be referred to the Principal Reporter only if they are under 16. Referral to the Principal Reporter is for the purposes of investigation into the child's circumstances, an assessment of whether the child is in need of protection, guidance, treatment or control, and whether it might be necessary for a CSO to be made in relation to the child. The hearings system may still deal with some 16 year olds provided they have been referred to the system before turning 16. And the system can also deal with some 16 and 17 year olds if they are already subject to a CSO.

[4] Children's Hearings (Scotland) Act 2011 (legislation.gov.uk).
[5] Interpretation Act 1978 (legislation.gov.uk).
[6] The Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (S.I. 1999/1379) (legislation.gov.uk).

17. Section 1 amends section 199 of the 2011 Act, which defines "child" for the purposes of that Act, so that "child" means anyone under the age of 18. As a result, it will no longer be necessary for a child aged 16 or over to have been referred to the hearings system before they turn 16 in order for the hearings system to deal with them. Nor will the hearings system only apply to 16 and 17 year olds if they are already subject to a CSO.

Section 2 – children's hearing: duty to have due regard to effects of trauma on child

18. Section 2(2) inserts new section 7A into the 2011 Act. It places a duty on a children's hearing, when carrying out its functions, to have due regard to the need to treat the child to whom the hearing relates in a trauma-informed way. The duty applies also to a pre-hearing panel.[7] Section 7A further requires the National Convener, so far as practicable, to ensure that children's hearings and pre-hearing panels comply with this duty.

19. Section 2(4) supplements the National Convener's new duty by extending its training-related functions as set out in paragraph 3(3) of schedule 2 of the 2011 Act. As a result, when training (or making arrangements for the training of) panel members, the National Convener must have regard to the need to provide training on how panel members may treat the child to whom a children's hearing relates in a trauma-informed way.

20. In addition, section 2(3) extends the Scottish Ministers' power under section 177(1) of the 2011 Act to make procedural rules for children's hearings.[8] It enables them to make rules about treating the child to whom a children's hearing relates in a trauma-informed way.

Section 3 – child assessment and child protection measures: secure accommodation

21. Under the 2011 Act, a child may be taken to and kept in a place of safety in a number of circumstances. These include where a child assessment order[9] or a child protection order[10] is made, where a justice of the peace makes an order under section 55, and where a police officer considers, under section 56, that it is necessary to do so to protect the child from harm. In each case, the places to which the child can be taken include secure accommodation.

22. This section inserts new section 57A into the 2011 Act, the effect of which is to limit the circumstances in which a child may be placed in secure accommodation under any of these orders or by the police. Secure accommodation may be used as a place of safety only where it is necessary to do so and one or more of the following applies—

- the child has a history of absconding, would be likely to abscond again if not kept in secure accommodation, and, if the child were to abscond, the child's health, safety or development would be at risk,
- the child is likely to self-harm if not kept in secure accommodation, or
- the child is likely to cause physical or psychological harm to another person if not kept in secure accommodation.

[7] Defined by section 79(2)(a) of the 2011 Act as three members of the Children's Panel selected by the National Convener to determine certain matters in advance of a children's hearing.
[8] See the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 (S.S.I. 2013/194) (legislation.gov.uk), as amended.
[9] See section 35 of the 2011 Act.
[10] See section 37 of the 2011 Act.

23. In addition, the section also inserts new section 57B into the 2011 Act. This confers a power on the Scottish Ministers to make further provision by regulations[11] about the placing and keeping of children in secure accommodation under any of these orders or by the police. For example, regulations under section 57B might make provision requiring the person who is in charge of the residential establishment in which the secure accommodation is located to consent to the placing and keeping of the child there, or requiring the agreement of the chief social work officer of the relevant local authority. The regulations might also set out the criteria and procedure for the giving of such consent or agreement. This new section mirrors existing provisions[12] under which the use of secure accommodation can be regulated, as well as other provision being made by this Act.[13] This will allow provision to be made, similar to that already contained in the Secure Accommodation (Scotland) Regulations 2013,[14] for the welfare of children detained in secure accommodation.

Section 4 – compulsory supervision orders: directions authorising restriction of liberty

24. A children's hearing may make a CSO in relation to a child if it is satisfied that it is necessary to do so for the protection, guidance, treatment or control of the child.[15] Section 83 of the 2011 Act explains what a CSO is. It is an order that may include any of the measures listed in section 83(2). One of those measures is a requirement that the child reside at a specified place.[16] If a CSO includes that type of requirement, it may also include a direction authorising the person in charge of the place where the child is to reside to restrict the child's liberty. That person may do so to the extent considered appropriate when taking account of the terms of the CSO.

25. Section 4 amends section 83 to make it explicit that any such direction does not include authorisation to deprive the child of their liberty. If a children's hearing considers it necessary to deprive the child of their liberty, it must instead include in the CSO a secure accommodation authorisation. That measure attracts special legal safeguards for the child's protection,[17] and is explained further in relation to section 7 (see paragraphs 41 to 47 of these Notes).

Section 5 – compulsory supervision orders: prohibitions

26. Section 5 amends section 83(2) of the 2011 Act to extend the list of measures that may be included in a CSO. It adds two new prohibitions, giving children's hearings greater choice when deciding on which measure (or combination of measures) is best suited to a child's individual circumstances and is most likely to safeguard and promote the child's welfare.

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[11] Subject to the affirmative procedure – see new section 57B(3) of the 2011 Act.
[12] Such as sections 151 and 152 of the 2011 Act.
[13] See, for example, section 19(6), new section 208A being inserted into the 1995 Act and, in particular, section 208A(4) to (6).
[14] The Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) (legislation.gov.uk).
[15] See section 91(3)(a) of the 2011 Act.
[16] See section 83(2)(a). "Specified" means specified in the order: section 83(8) of the 2011 Act.
[17] See sections 135 and 151 of the 2011 Act, the Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) and the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013 (S.S.I. 2013/212) (legislation.gov.uk).

27. The first prohibition is contained in new section 83(2)(ca). It prohibits the child from entering a specified[18] place or description of place. This might relate to a specific address or to a particular area. For instance, this measure could be used to protect someone who is considered to be at risk of harm or harassment from the child by, say, prohibiting the child from entering the person's home or place of work. Alternatively, it may be used to prohibit the child from entering an area or premises where the child is at risk of being exploited.

28. Section 83(2)(ca) provides a less restrictive and intrusive measure than the alternative of a movement restriction condition, which may be included in a CSO by virtue of section 83(2)(d) and is explained further in relation to section 6 (see paragraphs 31 to 40 of these Notes). It is not subject to any preconditions or specific monitoring arrangements like a movement restriction condition. However, any breach of the prohibition would lead to a review of the CSO and could result in additional or more restrictive measures (like a movement restriction condition) being imposed.

29. The second prohibition is contained in new section 83(2)(cb). It prohibits the child from approaching, communicating with or attempting to approach or communicate with (whether directly or indirectly) a specified[19] person or class of person. This includes prohibiting the child from approaching or communicating with another person through someone else. Section 5 amends the interpretation provision in section 83(8) of the 2011 Act, to make it clear that "communicating with" another person includes communicating with that person by using social media (such as Facebook) or by any other electronic means.

30. Again, the prohibition in section 83(2)(cb) may be used to protect someone where there is a risk of the child harassing or intimidating that person. It differs from the measure in section 83(2)(g), which is a direction regulating contact between the child and a specified person or class of person.[20] This generally involves regulating contact between the child and the people with whom the child has a relationship, such as family members.

Section 6 – compulsory supervision orders: movement restriction conditions

31. Section 6 changes the test to be applied when a children's hearing or sheriff[21] is considering including a movement restriction condition in a CSO by virtue of section 83(2)(d) of the 2011 Act. Section 84 of that Act explains what a movement restriction condition is. It consists of (a) a restriction on the child's movements in a way specified in the movement restriction condition, and (b) a requirement that the child comply with arrangements specified in the movement restriction condition for monitoring compliance with the restriction. This measure involves giving the child intensive support, and monitoring the child's compliance with the restriction by means of an electronic monitoring device[22] which uses radio frequency (rather than GPS) technology.

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[18] "Specified" means specified in the order: section 83(8) of the 2011 Act.

[19] "Specified" means specified in the order: section 83(8) of the 2011 Act.

[20] Section 29A of the 2011 Act requires a children's hearing to consider whether to include this measure when making, varying or continuing a CSO. It also requires a sheriff to do likewise when varying or continuing a CSO.

[21] When determining an appeal against a decision of a children's hearing, a sheriff may include a movement restriction condition in a CSO by virtue of 156(1)(b) or (2)(b) of the 2011 Act.

[22] See schedule 2 of the Restriction of Liberty Order etc. (Scotland) Regulations 2013 (S.S.I. 2013/6) (legislation.gov.uk), which applies by virtue of regulation 8 of the Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 (S.S.I. 2013/210) (legislation.gov.uk).

32. Under section 83(4) of the 2011 Act, a CSO may include a movement restriction condition only if two requirements are met. The first is that at least one of the specified conditions must apply. The second is that the children's hearing or (as the case may be) the sheriff must be satisfied that it is necessary to include a movement restriction condition in the CSO.

33. Section 83(6) sets out the specified conditions. They are: (a) that the child has previously absconded and is likely to abscond again and, if the child were to abscond, it is likely that the child's physical, mental or moral welfare would be at risk, (b) that the child is likely to engage in self-harming conduct, or (c) that the child is likely to cause injury to another person. The same conditions also apply for the purpose of including a secure accommodation authorisation (which is a more restrictive measure) in a CSO.[23]

34. Section 6 amends section 83 of the 2011 Act to apply a new set of conditions for the purpose of including a movement restriction condition in a CSO. There are two conditions. These are set out in new section 83(4A) and are: (a) that the child's health, safety or development is at risk, or (b) that the child is likely to cause physical or psychological harm to another person. As a result, a children's hearing or sheriff may impose a movement restriction condition only if one or both of the new conditions apply and it is considered necessary to do so.

35. The condition in section 83(4A)(a) covers a broader range of circumstances than the original conditions. Like the original conditions in section 83(6)(a) and (b), it would cover circumstances where the child's health, safety or development is at risk because of a likelihood of absconding and/or engaging in self-harming conduct. But it would also cover circumstances where, due to the child's vulnerability, the child is encouraged by others into situations where the child can be harmed or abused. So, a movement restriction condition (and the intensive support and monitoring arrangements that come with such a measure) could be used to prevent the child from visiting certain premises or areas that pose a risk to the child's health, safety or development. For example, it might specify an address where a known abuser lives, a place where there is a risk of sexual exploitation, or a locale where the child is known to buy drugs or to meet up with others to drink alcohol.

36. The condition in section 83(4A)(b) makes it clear that a movement restriction condition may be included in a CSO where there is a likelihood of the child causing harm to another person, whether that be physical or psychological harm. Section 7 brings the condition in section 83(6)(c), now applicable only to secure accommodation authorisations, into line with this one. It also amends the interpretation provision in section 83(8) of the 2011 Act to define "psychological harm" as including (but not limited to) fear, alarm and distress.

37. Section 6 also amends section 150 of the 2011 Act, which confers a regulation-making power[24] on the Scottish Ministers to prescribe restrictions or monitoring arrangements that may be imposed as part of a movement restriction condition. It clarifies and extends the list of specific matters which they may prescribe.

[23] By virtue of section 83(5)(b) of the 2011 Act.

[24] This power has been used to make the Children's Hearings (Scotland) Act 2011 (Movement Restriction Conditions) Regulations 2013 (S.S.I. 2013/210). By virtue of sections 150(3) and 195(2) of the 2011 Act, any regulations made using the power are subject to the affirmative procedure and may make different provision for different purposes.

38. First, it explicitly provides for the Scottish Ministers to prescribe methods of monitoring a child's movements or whereabouts (including whether a child is at, or not at, a particular place) for the purpose of monitoring compliance with a movement restriction condition. This means that they may prescribe[25] methods for both (a) checking a child's position or location at any particular time (say, for the purpose of monitoring compliance with a curfew condition), and (b) tracking a child's movement from place to place (say, for the purpose of monitoring compliance with some type of exclusion zone condition).

39. Secondly, it extends the Scottish Ministers' power[26] to specify devices that may be used for monitoring compliance with a movement restriction condition. As a result, they may also specify any apparatus to be linked to such monitoring devices.

40. Thirdly, and finally, it enables the Scottish Ministers to prescribe certain matters to make sure that specified monitoring devices are used appropriately and proportionately. This includes prescribing how or when a specified monitoring device may, or may not, be used. For example, they could set out in regulations how or when a particular device is to be worn by a child. It also includes prescribing how or when information obtained through the monitoring of a child by such devices may, or may not, be gathered, retained, used or shared for the purpose of monitoring a movement restriction condition. This is to expressly cover the additional data-collecting involved in using GPS technology should this be used as a method of monitoring a child's movements or whereabouts in the future. For example, the Scottish Ministers could set out in regulations the particular circumstances in which, or the times at which, the information may be gathered.

Section 7 – compulsory supervision orders: secure accommodation authorisations

41. Section 7(2) clarifies the test to be applied when a children's hearing or sheriff is considering including a secure accommodation authorisation in a CSO by virtue of section 83(2)(e) of the 2011 Act. Section 85 of the Act defines a "secure accommodation authorisation" as an authorisation enabling the child to be placed and kept in secure accommodation within a residential establishment.[27] This is the most restrictive measure that may be included in a CSO, involving the maximum level of intervention and support.

42. Accordingly, under section 83(5) of the 2011 Act, a CSO may include a secure accommodation authorisation only if three requirements are met. The first is that the CSO must contain a requirement that the child reside at either (a) a specified residential establishment which contains both secure and non-secure accommodation, or (b) two or more specified residential establishments, one of which contains non-secure accommodation.[28] The second is that at least one of the specified conditions must apply (those are the conditions which are listed in section 83(6) and set out in paragraph 33 of these Notes). The third is that

[25] By virtue of section 150(2)(b) of the 2011 Act.
[26] See section 150(2)(c) of the 2011 Act.
[27] See section 202(1) of the 2011 Act for definitions of "secure accommodation" and "residential establishment". The former is amended by section 26(2)(a) of this Act.
[28] While a children's hearing can authorise the placing of a child in secure accommodation, the chief social work officer is responsible for implementing a secure accommodation authorisation: see section 151 of the 2011 Act. That officer may implement the authorisation only so far as it is necessary to do so, and only with the consent of the person who is in charge of the residential establishment that comprises or contains the secure accommodation in which the child is to be placed. So, the first requirement is aimed at ensuring the CSO can still be given effect to, even if the chief social work officer does not implement the secure accommodation authorisation.

the children's hearing or sheriff must be satisfied that it is necessary to include a secure accommodation authorisation in the CSO, having considered the other options available (including a movement restriction condition). Where a secure accommodation authorisation is included, special procedures apply in respect of its implementation and review.[29]

43. Section 7(2) amends the conditions listed in section 83(6) of the 2011 Act in two respects.

44. First, it adjusts each condition so that it applies more clearly in relation to a decision to keep (rather than place) a child in secure accommodation. So, when a CSO containing a secure accommodation authorisation is reviewed, a condition will apply if the relevant risk would be likely to materialise unless the child is kept in secure accommodation. This recognises that a child already in secure accommodation is unlikely to abscond or cause harm to themselves or others while they are receiving the kind of intensive care and support on offer in a secure setting.

45. Secondly, as mentioned in paragraph 36 of these Notes, it adjusts the condition in section 83(6)(c) to align it with the condition in new section 83(4A)(b) which applies in relation to a movement restriction condition. This makes sure that a CSO may include a secure accommodation authorisation if there is a likelihood of the child causing harm to another person, whether it be physical or psychological harm. Section 7(2) also amends the interpretation provision in section 83(8) of the 2011 Act to define "psychological harm" as including (but not limited to) fear, alarm and distress.

46. Section 86 of the 2011 Act makes provision for an ICSO. To that end, it provides for various provisions of section 83 to apply to an ICSO in the same way as they apply to a CSO (including the list of measures contained in section 83(2)). Section 7(3) consequentially amends the cross-references to those provisions in section 86(4) to make sure that the changes made by this section, and sections 4 to 6 of the Act, apply also in relation to ICSOs.

47. However, a secure accommodation authorisation is not a measure limited to CSOs or ICSOs. One can also be included in a medical examination order[30]or a warrant to secure attendance.[31] So, given that the same tests apply for secure accommodation authorisations attached to those orders and warrants, section 7(4) and (5) makes changes to the conditions listed in sections 87(4) and 88(3) of the 2011 Act which are equivalent to those made to section 83(6) by section 7(2).

Section 8 – provision of information to person affected by child's offence or behaviour

48. Under section 179A of the 2011 Act, certain persons are entitled to request information about the action taken by the Principal Reporter and the children's hearing in relation to a child who has committed an offence or, while under 12, acted or behaved in a way that was physically or sexually violent, sexually coercive, dangerous, threatening or abusive and which caused harm to another person.[32] Those persons are: persons against

[29] See sections 135 and 151 of the 2011 Act, the Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) and the Children's Hearings (Scotland) Act 2011 (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2013 (S.S.I. 2013/212).
[30] Defined in section 87 of the 2011 Act.
[31] Defined in section 88 of the 2011 Act.
[32] See section 179A(1) and (2) of the 2011 Act. Section 179B of the 2011 Act sets out the information that may be requested.

whom the offence was committed; persons who were harmed by the child's actions or behaviour; where either of those persons is a child, a "relevant person" in relation to that child; and persons specified by the Scottish Ministers by regulations.[33]

49. Section 8 amends section 179A(5) of the 2011 Act to place a duty on the Principal Reporter to inform the persons entitled to request information of their right to do so. The duty applies if it is reasonably practicable to do so. If, for instance, the Principal Reporter does not have and cannot find a person's contact details, then the person does not have to be informed. New subsection (5A), inserted into section 179A by section 8, will modify the duty to inform, where a person against whom the offence was committed, or who was harmed by the actions or behaviour, is themselves a child, so that the Principal Reporter can inform just the child, or a relevant person in relation to the child, or both.

50. New subsection (5B) disapplies the duty to inform in certain circumstances as set out in that subsection, including where the Principal Reporter is satisfied that it would be detrimental to the best interests of any child involved for the Principal Reporter to inform persons of their right to request information. This mirrors section 179C(1)(a) of the 2011 Act, under which the Principal Reporter can decline to comply with a request for information.[34]

51. Section 179B of the 2011 Act makes provision for the information that can be requested and provided under section 179A. That information varies depending on whether the Principal Reporter has decided to arrange a children's hearing or not in relation to the child. Where no hearing has been arranged, the Principal Reporter may[35] provide the information set out in section 179B(2)(a) – that is, what determination the Principal Reporter made under section 66(2) of the 2011 Act in respect of the child and any other action taken by the Principal Reporter. Where a children's hearing was arranged, section 179B(2)(b) governs the information that may be provided – namely, information as to whether a CSO has been made in respect of the child or, where the child was already subject to a CSO, whether the CSO has been terminated, varied or continued, or, where a CSO was not made, terminated, varied or continued, information as to how the referral to the children's hearing was otherwise discharged.

52. Section 8(3) amends section 179B so that, where a children's hearing is not arranged, the information to be provided is set out in a new version of section 179B(2). Where a hearing is arranged, the information and "further information" to be provided is set out in new section 179B(3) and (4). This sets out a broader range of information that can be provided where a children's hearing is arranged and a CSO or ICSO[36] is made in respect of the child. It now includes information as to measures included in the order – namely, measures such as those that might be included in a CSO or ICSO as a result of section 83(2)(ca) or (cb) (as inserted by section 5(2)(a) of this Act), and whether a secure accommodation authorisation has been included. It also includes other information necessary to help with safety planning by or in relation to the person against whom the offence was committed or who was harmed by the child's actions or behaviour. The Principal Reporter

[33] See section 179A(4) of the 2011 Act. For the meaning of "relevant person" in relation to a child, see section 200 of that Act.
[34] Section 179C(2) of the 2011 Act also sets out the other factors to which the Principal Reporter must have regard in deciding whether it is appropriate to comply with a request for information.
[35] Subject to section 179C of the 2011 Act.
[36] See section 179B(6) of the 2011 Act, as inserted by section 8(3)(c) of this Act.

can now also provide updates on that information. So, further information can be provided about any subsequent variation or continuation of a CSO or ICSO made in respect of the child – but only in so far as it relates to the inclusion, variation or removal of a measure of the kind mentioned in section 179B(3)(b)(i) or (ii) – or any subsequent termination of a CSO or ICSO made in respect of the child. Similarly, if there are other developments in the child's case, the Principal Reporter can provide further information necessary for safety planning purposes.

53. Section 8(4)(a) amends section 179C(1)(a) of the 2011 Act to bring it into line with new subsection (5B)(b) of section 179A. Section 8(4)(b) amends section 179C to insert a new subsection (4). This provides that the limitation in section 179C(3), on the ability of the Principal Reporter to provide information which is not directly related to the action taken in relation to the action or behaviour which caused harm or which constituted an offence, does not stop the Principal Reporter from providing information about the measures included in a CSO or ICSO if they relate to the person who requested the information under section 179A (or, where that person is a relevant person, the child in relation to whom that person is a relevant person).

Section 9 – support for victims in the children's hearings system

54. Section 9 amends the 2011 Act to insert a new section 179D. This requires the Scottish Ministers, by regulations,[37] to make provision for support services for the persons, mentioned in section 179D(2), who are entitled to request information under section 179A about the action taken by the Principal Reporter and the children's hearing in relation to a child who has committed an offence against them or otherwise acted or behaved in a physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive way and that has harmed the person. The regulations must specify one person or body who is to act as a point of contact for those persons to access support services. What is to constitute "support services", besides the provision of "relevant information" to the persons mentioned in section 179D(2), is to be set out in the regulations themselves.[38] Section 179D(4) contains an non-exhaustive list of the things that can be provided for in regulations. Section 179D(5) also enables the regulations to modify sections 179A to 179C of the 2011 Act to provide for the information set out in section 179B to be given automatically on an opt-out basis (rather than on request), to be given to the person providing support services (whether as well as, or instead of, to the persons mentioned in section 179D(2)), or to be given by the person providing support services instead of by the Principal Reporter directly. Before laying draft regulations before the Scottish Parliament for approval, subsection (6) requires the Scottish Ministers to consult a number of persons and bodies, including victim support organisations.[39]

Section 10 – support for victims in the children's hearings system: review and report

55. Section 10 imposes a duty on the Scottish Ministers to review and report on the operation of support services provided, by virtue of regulations under section 179D(1) of the 2011 Act,[40] to the persons mentioned in section 179D(2) of that Act (which principally includes those who are entitled to request information under section 179A of the 2011 Act

[37] Subject to the affirmative procedure – see section 179D(7) of the 2011 Act.
[38] See section 179D(8) of the 2011 Act, which defines "relevant information" and "support services".
[39] See, in particular, section 179D(6)(c) of the 2011 Act.
[40] As inserted by section 9 of this Act.

about the action taken by the Principal Reporter and the children's hearing in relation to a child who has committed an offence against them or otherwise acted or behaved in a way that was physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive and caused them harm). They must do so as soon as reasonably practicable after the end of each two-year review period, the first of which runs from the day on which regulations under section 179D(1) first come into force. In carrying out the review, Ministers must assess the effectiveness of support services (taking particular account of the number of, and feedback from, persons provided with those services) and identify what (if any) action they should take as a result of that assessment. They must also consult with a number of persons and bodies, including the single point of contact established or specified by virtue of section 179D(3) (mentioned in paragraph 54 of these Notes) as well as victim support organisations. Each report on the provision of support services must be laid before the Scottish Parliament and published.

Section 11 – supervision or guidance post-18

56. Where, on reviewing a CSO, the children's hearing decides that the CSO should come to an end, the hearing must consider whether the child nevertheless has a continuing need for supervision or guidance and make a statement to that effect.[41] Under section 138(7) of the 2011 Act, the relevant local authority[42] has a duty, in such a case, to provide the child with that supervision or guidance, subject to the child accepting it.

57. Section 11 amends section 138 in two ways. First, it requires the children's hearing to also consider whether the child might need supervision or guidance after the child turns 18. And, where the children's hearing makes a statement to the effect that the child does, the relevant local authority's duty under section 138(7) continues to have effect after the child turns 18. But the relevant local authority does not need to provide supervision and guidance after the child turns 19.

Part 2 – criminal justice and procedure

Involvement of children in criminal proceedings: general

Section 12 - meaning of "child"

58. The meaning of "child" for the purposes of the 1995 Act is set out in section 307(1). At root, "child" is defined by reference to section 199 of the 2011 Act. So, as explained in paragraph 16 of these Notes in the context of the children's hearings system, while all under 16s will be children for the purposes of the 1995 Act, some 16 and 17 year olds will also be children if already involved with the children's hearing system. An exception to that is in section 46(3) and schedule 1 of the 1995 Act, which, among other things, make special provision about certain offences that are committed against or in respect of children under 17.

59. Section 12 amends the definition of "child" in section 307(1) of the 1995 Act both to reflect changes to the definition of "child" in the 2011 Act and to remove the references to section 46(3) and schedule 1 of the 1995 Act. Those references are no longer needed as a result of amendments made by section 13 (see paragraphs 61 to 63 of these Notes). But the

[41] See section 138(6) of the 2011 Act.
[42] Defined in section 201 of the 2011 Act.

definition of "child" will still be linked to the definition in the 2011 Act, meaning that "child" will generally mean the same in both the children's hearings system and in the criminal justice system, namely a person under 18.[43]

60. Other provisions in the Act make further changes to the 1995 Act to reflect that all persons under 18 will now be children for the purpose of that Act. Most notably, see section 14 which deals with the prosecution of children over the age of criminal responsibility.[44]

Section 13 – offences against children to which special provisions apply

61. Schedule 1 of the 1995 Act contains a list of offences against children under the age of 17 in relation to which special provisions apply. Those provisions are in section 46 of the 1995 Act and include presumptions about the age of a child involved in criminal proceedings (either as the victim or as the offender) relating to offences under the Children and Young Persons (Scotland) Act 1937, those listed in schedule 1 of the 1995 Act and certain offences under the Criminal Law (Consolidation) (Scotland) Act 1995.

62. As all persons under 18 will now be regarded as children for the purposes of the 1995 Act, section 13 amends schedule 1 to remove references to children aged under 17. As a result, schedule 1 and section 46 will apply in relation to offences committed against all children under 18.

63. Section 13(3)(a) also repeals section 46(5)(b) as that paragraph is no longer needed, as whether a person was subject to a CSO is now irrelevant to the question of whether they are a child or not for the purposes of the 1995 Act.

Prosecution of children

Section 14 – prosecution of children over age of criminal responsibility

64. Section 42 of the 1995 Act currently provides that children aged 12[45] to 15 who commit an offence may be prosecuted only if the Lord Advocate authorises the prosecution. Children aged 16 or over can be prosecuted without this extra step, although a child of this age who offends while already subject to a compulsory supervision order may be referred back to a children's hearing.[46]

65. Section 14 amends section 42 so that all children over the age of criminal responsibility (all those aged 12 or over but under 18) may be prosecuted only if the Lord Advocate authorises this.

[43] In some circumstances, however, different provision is still made in the 1995 Act: see, for instance, section 227J(1) (unpaid work or other activity requirement: further provision) and section 234B(1) (drug treatment and testing order).
[44] That age is 12 years old by virtue of section 41 of the 1995 Act.
[45] 12 years old being the age of criminal responsibility by virtue of section 41 of the 1995 Act.
[46] See section 49 of the 1995 Act, which is amended by section 17 of the Act. See paragraphs 75 to 85 of these Notes.

Safeguards for children involved in criminal proceedings

Section 15 - custody of children before commencement of proceedings

66. The Criminal Justice (Scotland) Act 2016 ("the 2016 Act")[47] makes provision for what happens if a child is arrested and taken into police custody. Under section 22 of that Act, a child (being a person a constable believes is under 16 or a person subject to a CSO) must be kept in a place of safety until that person can be brought to court. Under section 23 of that Act, a parent of the child (if one can be found) must be informed. Section 24 also requires the local authority to be informed. Sections 31 to 37 make provision for the police to interview children suspected of or charged with offences, including the right to have a solicitor present. In the case of a child under 16, the right to a solicitor cannot be waived (see section 33 of the 2016 Act). A distinction is currently made between children aged 16 and 17 who are subject to a CSO and those who are not. The latter can waive the right to a solicitor if not subject to a CSO, whereas 16 and 17 year olds who are subject to a CSO cannot waive this right.

67. Sections 38 to 41 of the 2016 Act contain more safeguards for children in police custody. Under section 38, intimation must be sent to a parent of a child under 16. Where the person is 16 or over, the intimation will be sent only on the person requesting it and only to an adult named by the person making the request. Where the person in custody is under 18, the person to whom intimation is sent under section 38 must be asked to attend the place where the person under 18 is in custody. But the constable does not need to ask the person to attend where the person in custody is 16 or 17 years old and requests that the person not be asked to attend. Section 40 makes provision about the circumstances in which a parent or other person can have access to the child in custody. As with other provisions in the 2016 Act, a distinction is made between those under 16 and those under 18. Under section 41, the constable must send intimation that a child subject to a CSO is in custody to the local authority. Intimation must also be sent to the authority where the person in custody is under 18 and the constable delays sending intimation under section 38 in the interests of safeguarding and promoting the wellbeing of the person. The local authority may arrange for someone to visit the child if the child is under 16 or subject to a CSO. Where they do so, sections 38 to 40 of the 2016 Act cease to apply, so that no intimation is sent under section 38 and only the local authority will have access to the child. A local authority, where they do not visit the person in custody, may give advice to the constable as to whether the person to be sent intimation under section 38 should not be sent that intimation and advice as to who intimation should be sent to instead. The constable must have regard to that advice.

68. As a result of treating all under 18s as children for the purposes of the 2011 Act and the 1995 Act, section 15 makes various changes to the 2016 Act aimed at removing, in most cases, the distinction between children under 16 and children aged 16 and 17, and between children subject to CSOs and children not so subject.

69. Section 15(2) amends section 22(1) of the 2016 Act so that all under 18s in police custody must be kept in a place of safety. Section 15(3) amends section 23 so that where an under 18 is in custody and is to be brought to court, a parent will be given notice. Section 24 of the 2016 Act is amended by section 15(4) so that where an under 18 is in custody and is to be brought to court, the local authority will also be informed.

[47] Criminal Justice (Scotland) Act 2016 (legislation.gov.uk).

70. Section 15(5) amends section 33 of the 2016 Act so that no under 18 can waive the right to have a solicitor present at a police interview. Section 38 of the 2016 Act is amended by section 15(6) so that a constable may delay sending intimation under that section so that the local authority can give advice as to whether that intimation should be sent and, if not sent, who intimation should be sent to instead.

71. Section 15(7) makes a number of amendments to section 41 of the 2016 Act. The main change is to provide that the local authority is to be given intimation that an under 18 is in custody regardless of whether the child is subject to a CSO. The repeal of subsections (7) and (10) of section 41 is consequential on this change. In addition, new section 41(1A) provides for a number of other facts and events to be intimated to the local authority. Where such intimation is sent, the local authority will be able to consider whether to visit the child in custody as they can when intimation is sent under section 41(1). Section 15(7) also repeals section 41(8). The effect of this is that a local authority's ability under section 41(9), to advise the constable that the person due to be sent intimation under section 38 should not be sent it, will no longer depend on the local authority not visiting the child but instead can be exercised in response to intimation of any of the facts set out in new section 41(1A).

Section 16 – steps to safeguard welfare and safety of children in criminal proceedings

72. Section 50(6) of the 1995 Act requires every criminal court dealing with an offender who is a child to have regard to the welfare of the child. Section 16 adds a new subsection (7), which modifies this duty by requiring the court to consider what steps might be taken to facilitate the child's participation in the court proceedings while safeguarding the child's welfare. In addition, the court must take the steps it identifies unless it is not reasonably practicable to do so.

73. Section 16 also inserts new section 70B into the 1995 Act. Section 70B will make, for solemn proceedings, equivalent provision to that already made for summary proceedings by section 142 of the 1995 Act. Section 142 requires the court, dealing with a child accused of an offence, to sit in a different building or room from that usually used or to sit on different days from other courts in the building and to take other steps to modify the court proceedings. Section 70B(1) gives the court power to do this in solemn cases but leaves it to the discretion of the court whether and how to do so. In addition, section 70B(2) gives the court power to direct that the court be cleared except for essential persons, including representatives of the press. But the general public will be excluded. Section 70B(4) also makes provision for court proceedings in which a child is accused along with an adult in the same proceedings, requiring the court to ensure that the adult accused can participate effectively in the proceedings.

74. Section 142 of the 1995 Act, which makes provision along the same lines as section 70B, but for summary proceedings, does not contain provision equivalent to section 70B(4). Section 16 inserts new section 142A into the 1995 Act which makes that equivalent provision. Section 142A gives power to the court, dealing with a child accused of an offence who is accused along with an adult in the same proceedings, to sit in a different building or room from that usually used or to sit on different days from other courts in the building. Section 142A(2) also gives the court power to direct that the court be cleared except for essential persons, including representatives of the press. But the general public will be excluded. In taking any of these steps or making any direction, the court must ensure that the adult accused along with the child can participate effectively in the proceedings.

Remit to children's hearing from criminal courts

Section 17 – referral or remit to Principal Reporter of children guilty of offences

75. Section 49 of the 1995 Act is one of a number of sections that govern what the courts may do when a child pleads, or is found, guilty of an offence.[48] Section 49 deals with the interrelationship between the children's hearings system and the criminal justice system and provides that the court may seek advice from a children's hearing as to the appropriate disposal to make in the child's case, may remit the child's case to a children's hearing for that hearing to dispose of the case under the 2011 Act, or can dispose of the case itself (either straightaway or after getting advice from a children's hearing). How this works depends on the age of the child, whether the child is subject to a CSO, whether the court is the Justice of the Peace court, the sheriff court or the High Court, and whether the proceedings are solemn proceedings or summary proceedings. For instance, where a child is subject to a CSO, the sheriff court must seek advice from a children's hearing before it can dispose of the child's case.[49] It also depends on the offence involved.[50]

76. Section 17 makes a number of changes to section 49 of the 1995 Act, substituting new subsections (1) to (1F) for subsections (1) to (3) of section 49. The main change is that no distinction is made between a child subject to a CSO and a child not so subject. All under 18s will now be treated the same way. Summary cases and solemn cases are treated differently, and solemn cases in the sheriff court are treated differently from High Court cases.

77. In summary cases, the court has a duty to either request advice on the disposal of the child's case from a children's hearing or to remit the case to the hearing for disposal. See subsection (1A). The court can proceed straight to remitting the case to a children's hearing for disposal without first requesting advice. But it cannot generally dispose of the case itself without first requesting advice and considering that advice. See subsection (1E). The exception is where the child is within 6 months of turning 18. Where that is the case, and the court considers that it would not be practicable to either seek advice or remit the case for disposal by a children's hearing, the court may dispose of the case itself. See subsection (1C). As currently provided for by section 49(3), the court cannot remit the case to a children's hearing for disposal where the offence is one mentioned in new subsection (1F) (and for which there is a minimum sentence). And as currently provided for by section 49(5), where the offence is one for which the sentence is fixed by law, the court must dispose of the case itself.

78. In sheriff court solemn cases, the sheriff has a choice – to request advice from a children's hearing, to remit the case to a hearing for disposal, or to dispose of the case without a remit. See subsection (1A). But before the sheriff can dispose of the case without a remit, the sheriff must request advice from a children's hearing. The sheriff can proceed to dispose of the case without requesting advice in two circumstances. Either where the sheriff

[48] See also sections 44, 205, 207 and 208 of the 1995 Act, amended by section 19 of this Act.
[49] See section 49(3)(b) of the 1995 Act.
[50] Where the offence is under section 51A of the Firearms Act 1968 or section 29 of the Violent Crime Reduction Act 2006 – offences for which a minimum sentence is specified – then the court cannot remit the child's case for disposal but must dispose of the case itself. See section 49(3) of the 1995 Act. Where the offence is one for which the sentence is fixed by law – for instance, murder – then section 49 of the 1995 Act does not apply. See section 49(5). Instead, section 205(2) of the 1995 Act applies and stipulates that a child found guilty of murder must be sentenced to be detained without limit of time.

determines that it would not be in the interests of justice to do so. Or where the child is within 6 months of turning 18 and the sheriff considers that it would not be practicable to request advice before disposing of the case. See subsections (1B) and (1C). Subsections (1E), (1F) and (5) apply to the sheriff in a solemn case as they apply in summary cases.

79. In solemn cases in the High Court of Justiciary, the court has discretion as to how to proceed (subject to subsections (1F) and (5)), so may request advice before deciding how to dispose of the case, or remit the case to a children's hearing (with or without first requesting advice), or dispose of the case itself (again, with or without first requesting advice). See subsection (1D).

80. Section 17(2)(c) makes another amendment of section 49. Currently, section 49(4) provides that where a court remits a case to a children's hearing for disposal, the jurisdiction of the court in respect of the child comes to an end. As was decided in the case of *McCulloch v. Murray*,[51] this means that a court cannot disqualify a child from driving while at the same time otherwise remitting the disposal of the child's case to a children's hearing. The court must either remit the whole case or keep the case for disposal itself.

81. New subsections (4A) to (4C) modify section 49(4) in the case of three types of offence.

82. The first type is road traffic offences in relation to which a court can disqualify the person found guilty from driving or impose penalty points on the person's licence. As a result of subsection (4A), the court will be able to do so while otherwise remitting the disposal of the case to the children's hearing.

83. The second type is certain sexual offences in relation to which the notification requirements of Part 2 of the Sexual Offences Act 2003 apply.[52] Where the child pleads or is found guilty of one of these offences, subsection (4B) will make it clear that the notification requirements apply even though the child's case has been remitted to a children's hearing for disposal. However, in the case of some offences listed in schedule 3 of the 2003 Act, the notification requirements do not automatically apply but do so only where the court makes a finding of some sort. For instance, paragraph 60 of schedule 3, read with section 80 of the 2003 Act, provides that an offence in Scotland, other than an offence listed in paragraphs 36 to 59ZL of the schedule, triggers the notification requirements only if the court, in imposing sentence or otherwise disposing of the case, determines that there was a significant sexual aspect to the offender's behaviour in committing the offence. Where, however, the court remits the child's case to a children's hearing for disposal, the court will not impose sentence or otherwise dispose of the case and so no determination as to the sexual aspects of the offence will be made. Other offences listed in the schedule trigger the notification requirements only if the sentencing court determines that it is appropriate for the person convicted to be regarded for the purposes of Part 2 of the 2003 Act as a person who has committed the offence or that it is appropriate for Part 2 to apply to the person. Subsection (4B)(a), (b) and (c) therefore recognises this and makes clear that the notification requirements will not apply in such cases.

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[51] 2005 SCCR 775.

[52] See section 80(1)(a) of the Sexual Offences Act 2003 (legislation.gov.uk), which provides that a person becomes subject to the notification requirements if convicted of an offence listed in schedule 3. Colloquially, being subject to the notification requirements is known as being on the "sex offenders register".

84. The third type is offences in relation to which the court is entitled (under section 234A of the 1995 Act) or obliged (under section 234AZA of that Act) to impose a non-harassment order on the offender.[53] New subsection (4C) makes it clear that, where the court remits the child's case to a children's hearing for disposal, the court may still impose a non-harassment order.

85. Finally, section 17 repeals section 49(6) and (7) as these subsections are no longer necessary, the matters they deal with now being incorporated into new subsections (1) to (1F).

Remand, committal and detention of children

Section 18 – remand and committal of children before trial or sentence

Section 19 – detention of children on conviction

86. Sections 18 and 19 make provision about the detention of children involved in criminal proceedings, either on remand before trial, or after conviction but before sentence, or on sentence. They do so by amending sections 44, 51, 205, 207, 208 and 216 of the 1995 Act and by inserting new section 208A into that Act.

87. The amendments make two main changes. The first, in consequence of the change made by section 12 to the meaning of "child" for the purposes of the 1995 Act,[54] is to ensure that the provisions that apply to children apply to all persons under 18, with no distinction made between children subject to CSOs and other children. Currently, some provisions of the 1995 Act, such as section 51(1), refer to a person under 16 rather than to a child and distinguish between children aged 16 and above subject to CSOs and those not subject to CSOs. The other main change is to provide that a child cannot be held on remand or sentenced to detention in a young offenders institution. Generally, as a result of these amendments, children will be held in secure accommodation.[55]

88. Section 51 of the 1995 Act deals with detention on remand of persons under 21. Section 18 modifies section 51(1)(a), (aa) and (b) so that all children (i.e. persons under 18) will be dealt with the same way and, as a result, will be committed to a local authority to be detained, while on remand, either in secure accommodation[56] or in a place of safety.

89. New subsections (6) to (8) are inserted into section 51 so that the Scottish Ministers can, by regulations, make provision about the detention of such children in secure accommodation. This will allow provision to be made, similar to that already contained in the Secure Accommodation (Scotland) Regulations 2013 ("the 2013 Regulations"),[57] for the welfare of children detained in secure accommodation, including the review of their cases. The 2013 Regulations deal with children detained in a place of safety under section 51(1)(a)(ii),[58] and make provision for such children to be moved to secure accommodation if necessary, but they do not currently apply to children detained in secure accommodation by virtue of section 51(1)(a)(i). As subsection (7) makes clear, the regulations may also make

[53] For the offences involved, see sections 234A and 234AZA of the 1995 Act.
[54] Which itself depends on the change made by section 1 to the meaning of "child" in the 2011 Act.
[55] For more on the meaning of secure accommodation, and the regulation of providers of "secure accommodation services", see Part 4 of the Act and paragraphs 110 to 138 of these Notes.
[56] Defined in section 51(1)(a)(i) of the 1995 Act by reference to the definition in section 202(1) of the 2011 Act. Note that section 26 of this Act amends the definition of "secure accommodation" in section 202(1).
[57] The Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) (legislation.gov.uk).
[58] See regulation 12 of the 2013 Regulations.

provision for children to stay in secure accommodation after they turn 18, provided the provision made by the regulations does not permit them to so remain after turning 19. Without this sort of provision, a child in secure accommodation who turns 18 would be transferred to a young offenders institution. The power in subsections (6) and (7) will allow provision to be made to avoid this happening automatically, and allow the transfer to be tailored to the circumstances of the child and of the accommodation in which they are detained.

90. Note also that section 51(2A), which relates to the use of remand centres, is repealed by paragraph 16(2) of the schedule.[59]

91. Section 44 of the 1995 Act deals with the detention of children who plead guilty or are found guilty in summary proceedings. Such children may be detained in "residential accommodation" provided by local authorities under Part 2 of the Children (Scotland) Act 1995[60] for up to one year. By virtue of the regulation-making power in section 44(5), the Scottish Ministers can provide for such children to be detained in secure accommodation. The 2013 Regulations were made under this power.[61]

92. The amendments of section 44 made by section 19(2) change references to "residential accommodation" to references to "residential establishments", as it is the latter that local authorities provide under Part 2 of the Children (Scotland) Act 1995, as well as inserting a definition of "residential establishment" into section 44(11). The amendments also insert new subsections (5A) and (5B) into section 44, mirroring the amendments made to section 51, and providing power for the regulations made under section 44(5) to make provision for 18 year olds to remain in secure accommodation rather than automatically being transferred to young offenders institutions. The definition of "secure accommodation" in section 44(11) is also replaced with a definition that ties in to the definition in the 2011 Act.[62]

93. Section 19(6) inserts new section 208A into the 1995 Act. That section makes provision for the detention of children under section 205 (children guilty of murder) and to children convicted on indictment of other offences. Under those sections, the place of detention is determined by direction made by the Scottish Ministers.[63] Section 208A(2) modifies those direction-making powers so that children cannot be detained in young offenders institutions or in prison. It also makes clear that secure accommodation can be used as the place of detention. Section 208A(4) to (6) make the same provision, for this section, as is made in sections 44(5) to (5B) and 51(6) to (8), for regulations about the use of secure accommodation.

94. Section 19(7) amends section 216 of the 1995 to insert a similar regulation-making power into that section. Section 216 makes provision for imprisonment and detention for non-payment of fines. Section 216(7) deals with cases where the person who has failed to pay a fine is a child, and provides for detention, rather than imprisonment, in a place chosen by a local authority. New subsections (8) to (10) will allow regulations to make provision for the use of secure accommodation in such cases.

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[59] That repeal is linked to section 22 of the Act. See paragraphs 100 and 101 of these Notes.
[60] Children (Scotland) Act 1995 (legislation.gov.uk).
[61] They were also made under a number of other Acts.
[62] So the definition in section 44 of the 1995 Act now matches that in section 51 of that Act.
[63] See sections 205(2) and 208(1) of the 1995 Act. See also section 117 of the Scotland Act 1998, under which references to the "Secretary of State" in sections 205 and 208 are read as references to the "Scottish Ministers".

95. Finally, section 19(5) amends section 208 of the 1995 to provide that, where a court orders that a child, convicted on indictment, be detained, the place of detention can be in any part of the United Kingdom.[64]

Mental health disposals for convicted children

Section 20 – hospital directions

96. Under section 59A of the 1995 Act, the court can, in certain circumstances, make a hospital direction in relation to a person convicted on indictment who has a mental disorder. A hospital direction authorises the detention of the person in hospital (rather than in prison). However, hospital directions cannot be made in relation to children (as defined in section 307(1) of the 1995 Act). This means that they cannot be made in relation to persons under 16. In addition, where the person is under 18 and subject to a CSO, a hospital direction cannot be made. As a result, hospital directions can be made in relation to some 16 and 17 year olds – that is, those not subject to CSOs.

97. Following the amendments made by sections 1 and 12 of this Act, "child" will be defined as meaning a person under 18.

98. Section 20 amends section 59A to remove the restriction on making hospital directions in relation to children. This permits hospital directions to be made, where appropriate, in relation to all under 18s.[65]

Places where children can no longer be detained

Section 21 – meanings of "young offenders institution" and "young offender"

99. Section 21 amends section 19 of the Prisons (Scotland) Act 1989.[66] Under that section, the Scottish Ministers have a duty to provide young offenders institutions – places where offenders sentenced to detention in a young offenders institution, and those aged at least 14 but under 21 who are remanded in custody for trial or while awaiting sentence, can be held. As a result of amendments made to the 1995 Act by sections 18 and 19, no one under 18 will now be held in a young offenders institution. Section 21 amends section 19 of the 1989 Act so that young offenders institutions are defined as places for the detention of those aged 18 but under 21. Section 21 also amends the Prisons and Young Offenders Institutions (Scotland) Rules 2011,[67] which defines "young offender" to mean a person aged at least 16 but under 21 so that that expression will now mean a person aged at least 18 but under 21.

Section 22 – abolition of remand centres

100. Section 22 also amends section 19 of the Prisons (Scotland) Act 1989. Under that section, the Scottish Ministers have a duty to provide remand centres – places where those aged at least 14 but under 21 and remanded in custody either for trial or while awaiting sentence can be held. There are no remand centres in Scotland and the amendments remove the duty to provide them.

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[64] Section 44(1) of the 1995 Act already makes provision for this for summary proceedings.
[65] Subject to the age of criminal responsibility, which means hospital directions cannot be made in relation to those under 12: see section 41 of the 1995 Act.
[66] Prisons (Scotland) Act 1989 (legislation.gov.uk).
[67] The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (S.S.I. 2011/331) (legislation.gov.uk).

101. Part 6 of the schedule of the Act contains a number of further repeals which remove redundant and unnecessary references to "remand centres" in legislation.

Local authority duties in relation to detained children

Section 23 – duty of local authority to provide residential establishments for detained children

102. Sections 18 and 19 make changes to the places in which children can be detained, with the result that most children are likely to be detained in secure accommodation. As defined in the 2011 Act, as it is amended by section 26, "secure accommodation" in Scotland is accommodation provided for the purposes of depriving children of their liberty which is provided in a residential establishment by a secure accommodation service. A "residential establishment", also defined in the 2011 Act, is an establishment provided by a local authority, a voluntary organisation or by another person which provides accommodation for the purposes of the 2011 Act, the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968.

103. Under section 59 of the 1968 Act, local authorities have a duty to provide and maintain residential establishments that are required for their functions under a number of enactments.[68] But the list of enactments does not currently include the 1995 Act. Section 23 will add the 1995 Act to that list, so that the duty to provide and maintain residential establishments includes providing and maintaining these establishments for the purposes of local authority functions conferred under or by virtue of the 1995 Act.

Section 24 – children detained in secure accommodation to be treated as "looked after" children

104. Section 24 inserts new section 17A into the Children (Scotland) Act 1995. It provides that where a child is detained in secure accommodation under section 51, 205, 208 or 216[69] of the 1995 Act, the child will be treated as a child "looked after" by the local authority for the purposes of section 17 of the Children (Scotland) Act 1995. Section 17[70] puts various duties on local authorities, primarily to safeguard and promote the welfare of looked after children, which will now apply to children detained by order of the court in criminal proceedings.

105. Section 17A also provides that a child detained by order of the criminal court is treated as a looked after child for the purposes of sections 29, 30 and 31 of the Children (Scotland) Act 1995. These sections are about the provision of after-care for looked after children after they cease to be so looked after, including financial support for education or training, as well as about reviewing the cases of looked after children. These sections will now apply to detained children as they apply to former looked after children.

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[68] Local authorities may provide and maintain residential establishments themselves, jointly with other local authorities or by securing their provision by voluntary organisations or other person. See section 59(2) of the Social Work (Scotland) Act 1968 (legislation.gov.uk).

[69] These sections deal with detention on remand or committal before trial or sentence (section 51), detention without limit of time where the child is convicted of murder (section 205), detention when convicted on indictment (section 208) and detention for non-payment of fine (section 216). Although children can also be detained in secure accommodation by virtue of section 44 of the 1995 Act, section 17A does not need to apply to such children as section 44(3) provides that the local authority has the same powers and duties in relation to the child as if they were subject to a CSO. Section 17(6) of the Children (Scotland) Act 1995 provides that a "looked after" child includes a child subject to a CSO. So a child detained under section 44 is already treated as a looked after child.

[70] Subject to the Looked After Children (Scotland) Regulations 2009 (S.S.I. 2009/210) (legislation.gov.uk).

Part 3 – secure transportation

Section 25 – standards for provision of secure transportation

106. Section 25 inserts new Part 16A, containing three new sections (sections 90A to 90C) on secure transportation of children, into the Children and Young People (Scotland) Act 2014.

107. Section 90A requires the Scottish Ministers to publish standards applicable to the secure transportation of children[71] who are liable to be taken to or placed in, or kept or detained in, secure accommodation. Those providing secure transportation services will, under section 90B(1), be required to meet those standards in so far as they apply to the service that the person is providing. In addition, if local authorities or the Scottish Ministers make arrangements with a third party for the provision of secure transportation services, they must ensure that the service provided by the third party meets the standards applicable to it.

108. The minimum content of the standards that must be prepared and published under section 90A is set out in section 90A(2). These mainly relate to the safety of children being transported, as well as the safety of others. Different standards may be provided for different kinds of secure transportation service. The first standards must be published no later than 1 year after section 25 of this Act comes into force. The standards must be kept under review and the Scottish Ministers may publish revised standards when appropriate. Before publishing or revising the standards, the Scottish Ministers must consult those they consider appropriate. The first standards, and any revised standards, must be laid before the Scottish Parliament.

109. Section 90C deals with reporting requirements around secure transportation services. Where a local authority has provided such a service itself, or arranged for a third party to provide such a service, it must prepare and publish a report on how the service was monitored to ensure that the standards applicable to it were met and on the extent to which the service met those standards. As well as being published, the report is to be sent to the Scottish Ministers. The Scottish Ministers must publish a consolidated report, combining the information provided by local authorities together with information about secure transportation services provided by the Scottish Ministers themselves (or arranged by them). The reports must be prepared within the timescales set out in section 90C(8), that is, as soon as reasonably practicable after the end of the period of 3 years, beginning with the day section 25 of this Act comes into force, and after the end of each subsequent period of 3 years. The Scottish Ministers can, by regulations, specify a date after which reports no longer need to be prepared. Section 90C(9) also gives the Scottish Ministers power to add other persons or bodies, in addition to or instead of local authorities, to whom the reporting requirements apply.

[71] As well as some under 19s. Although secure accommodation is generally only used for children – i.e. those under 18 – some under 19s can be kept in secure accommodation rather than transferred to, for instance, a young offenders institution. See, for instance, section 208A(5) of the 1995 Act, being inserted into that Act by section 19(6) of this Act, which allows provision for this to be made by regulations.

Part 4 – residential and secure care

Section 26 – meaning of "secure accommodation"

110. Section 26(2)(a) amends the interpretation provision in section 202(1) of the 2011 Act to replace the definition of "secure accommodation" as it applies in relation to Scotland (its meaning in relation to England and Wales remains the same). This is to make the definition clearer in two respects.

111. First, the new definition makes it clear that secure accommodation is accommodation which is provided for the purpose of depriving children of their liberty (rather than for the purpose of restricting the liberty of children). This is to properly reflect that such accommodation is designed for, or has as its primary purpose, the deprivation of children's liberty. It provides a locked setting for children who are placed there for welfare reasons[72] as well as for children who are ordered to be detained there through the criminal justice system. The children are subject to a very high degree of supervision and control, albeit this is alongside provision of care and support to safeguard and promote their welfare whilst accommodated there. Existing secure accommodation settings are designed so that the children accommodated there cannot leave freely and can be subjected to continuous monitoring or surveillance. For instance, they may be subject to round-the-clock supervision by several members of staff, restrictions on their phone or internet use, or reasonable and proportionate measures of restraint. The system for placing and keeping children in secure accommodation therefore builds in the necessary procedural safeguards, including a clear legal basis and review process, to ensure that any deprivation of liberty is compatible with Article 5 of the European Convention on Human Rights (which concerns the right to liberty).

112. Secondly, the new definition makes it clear that secure accommodation is accommodation which is provided in a residential establishment by a secure accommodation service. Section 202(1) of the 2011 Act already defines "residential establishment" as an establishment in Scotland (whether managed by a local authority, a voluntary organisation or any other person) which provides residential accommodation for children for the purposes of the 2011 Act, the Children (Scotland) Act 1995 or the Social Work (Scotland) Act 1968. But section 26(2)(b) inserts a new definition of "secure accommodation service" into section 202(1). It explains that a secure accommodation service is a service which meets two criteria: (a) it is approved by the Scottish Ministers under paragraph 6(c) of schedule 12 of the 2010 Act, and in accordance with regulations made under section 78A of that Act, and (b) it is registered as a care service under Part 5 of that Act. This is to make sure that children may only be deprived of their liberty in secure accommodation that is run by a service which is approved by the Scottish Ministers and which is properly regulated and overseen by Social Care and Social Work Improvement Scotland (known as "the Care Inspectorate").[73]

Section 27 – secure accommodation services

113. Part 5 of the 2010 Act requires all care services to be registered with the Care Inspectorate. It is an offence under section 80 of the 2010 Act to provide a care service while not registered. A "secure accommodation service" is listed as a care service in section 47(1)(f) of the 2010 Act and defined in paragraph 6 of schedule 12 of that Act.

[72] By virtue of a secure accommodation authorisation attached to a CSO, an ICSO, a medical examination order or a warrant to secure attendance, to reduce the risk of a child absconding or causing harm to themselves or others.

[73] Established under section 44 of the 2010 Act.

114. Section 27(4) of this Act replaces the definition in paragraph 6 of schedule 12 of the 2010 Act to give a fuller and clearer explanation of what a secure accommodation service is. It defines such a service by reference to three characteristics.

115. The first characteristic is that it provides accommodation in a residential establishment for the purpose of depriving children of their liberty (rather than for the purpose of restricting the liberty of children). Section 27(4) inserts new paragraph 6A into schedule 12, which adopts the definition of "residential establishment" given in section 105(1) of the 2010 Act.[74] That definition mirrors paragraph (a) of the definition in section 202(1) of the 2011 Act (which is mentioned in paragraph 112 of these Notes), except that it also specifies the Criminal Procedure (Scotland) Act 1995 as an enactment for the purposes of which such residential accommodation is provided. This sets out the legal basis for a service providing secure accommodation and the routes by which children are placed there.

116. The second characteristic is that it also provides, in such an establishment, appropriate care, education and support for the purposes of safeguarding and promoting the welfare of the children who are accommodated there, as well as taking account of the effects of trauma which such children may have experienced. Section 27(4) inserts new paragraph 6B into schedule 12 to define "appropriate care, education and support". This means the kind of care, education and support required to meet the health, educational and other needs of the children.

117. The third characteristic is that it is approved by the Scottish Ministers, in accordance with regulations made under new section 78A of the 2010 Act, for those purposes.

118. Accordingly, section 27(2) inserts new section 78A into Part 5 of the 2010 Act, which confers a new regulation-making power on the Scottish Ministers.[75] This power enables the Scottish Ministers to set out in regulations a process for approving secure accommodation services under paragraph 6(c) of schedule 12.

119. Section 78A(2) of the 2010 Act provides a non-exhaustive list of the particular kinds of provision that the new power may be used to make. It includes provision about: the making of applications for approval; the procedure to be followed by the Scottish Ministers when deciding on applications; the duration of approvals; the attaching of conditions to approvals and the variation of such conditions; the review, renewal and withdrawal of approvals; and appeals against certain decisions of the Scottish Ministers in respect of approvals.

120. However, section 78A(3) of the 2010 Act provides that regulations under section 78A(1) must include provision requiring the Scottish Ministers to satisfy themselves of certain criteria before approving a secure accommodation service – namely, that the service will ensure that particular children are not placed together in the same residential establishment. The service must therefore show that no child who has been determined[76] to have committed an offence against or in respect of another child – or who has acted or behaved in a way that has had, or is likely to have had, a serious adverse effect on the health, safety or development of another child – will be accommodated within the same secure care unit as that other child.

[74] Inserted by section 28(5)(c) of this Act.
[75] Section 105(1) defines "regulations" as regulations made by the Scottish Ministers.
[76] Whether in proceedings under the 2011 Act or in criminal proceedings.

121. Section 27(3) amends section 104(2) of the 2010 Act so that any regulations made under section 78A will be subject to the affirmative procedure.[77] By virtue of section 104(1)(b) and (c), any such regulations may also include ancillary provision[78] and make different provision for different purposes.

122. Section 27(6) revokes regulation 10(3) of the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011.[79] This is because the changes made by this section supersede that regulation's requirement for ministerial approval of secure accommodation.

Section 28 – regulation of care services providing residential accommodation to children

123. Section 28 makes three main changes to Part 5 of the 2010 Act, which concerns the scrutiny and improvement of social care services.

124. The first main change is to section 50 of the 2010 Act, which requires the Scottish Ministers to prepare and publish standards and outcomes[80] applicable to care services (as well as social work services).[81] The standards and outcomes are taken into account by the Care Inspectorate when making decisions under Part 5 of the 2010 Act.

125. Section 28(2) inserts new subsections (1A) and (1B) into section 50 to confer a new function on the Scottish Ministers. So, in addition to their general duty under section 50(1), they will have the power under section 50(1A) to prepare and publish specific standards and outcomes for specific types of care service which provide residential accommodation to children who are subject to a cross-border placement. Those care services are: (a) care home services[82] which are provided wholly or mainly to children, (b) school care accommodation services,[83] and (c) secure accommodation services.[84] Section 28(5)(b) amends the interpretation provision in section 105(1) of the 2010 Act to include a definition of "cross-border placement". This means the placement of a child in a residential establishment in Scotland where (a) the child was, immediately before the placement, resident in England, Wales or Northern Ireland, and (b) the placement is authorised under the law in England and Wales or, as the case may be, in Northern Ireland. A placement may be so authorised by virtue of (a) an order made by a court in England and Wales or in Northern Ireland, and/or (b) any provision made by or under an Act of Parliament, an Act of Senedd Cymru, or Northern Ireland legislation (as defined by section 98(1) of the Northern Ireland Act 1998), whenever passed or made. Section 28(5)(c) further amends section 105(1) of the 2010 Act to define "residential establishment" (as mentioned in paragraph 115 of these Notes).

126. Section 28(2) makes further changes to section 50 in consequence of adding the new subsection (1A) power. The changes mean that the existing provisions in section 50 will apply to both the standards and outcomes published under section 50(1) and any standards and outcomes published under section 50(1A). Section 50 includes provision for: the review

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[77] See section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.
[78] Namely, consequential, supplemental, incidental, transitional, transitory or saving provision.
[79] The Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (S.S.I. 2011/210) (legislation.gov.uk).
[80] See the Health and Social Care Standards: my support, my life (www.gov.scot), published on 9 June 2017.
[81] The care services are listed in section 47(1), and defined in schedule 12, of the 2010 Act; "social work services" is defined in section 48 of the 2010 Act.
[82] Defined in paragraph 2 of schedule 12 of the 2010 Act.
[83] Defined in paragraph 3 of schedule 12 of the 2010 Act.
[84] Defined in paragraph 6 of schedule 12 of the 2010 Act, which is modified by section 27(4) of this Act.

and amendment of standards and outcomes; prepublication consultation with appropriate persons or groups of persons; the taking into account of standards and outcomes for the purposes of certain decisions and proceedings; and the making of different provision for different care services. The Scottish Ministers will also be able to delegate their function under section 50(1A) to the Care Inspectorate or anyone else they consider appropriate.[85]

127. The second main change is that section 28(3) inserts new section 59A into Part 5 of the 2010 Act, which makes further provision about the registration of care services under that Part. Section 59A(2) sets out two additional requirements that apply to the registration of certain care services for children.[86] Those care services are: (a) care home services which are provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services. As a result, a registration application for such a service must contain (a) any required information about cross-border placements, and (b) confirmation that notice of the application has been given to the persons mentioned in section 59A(3).

128. The persons mentioned in section 59A(3) are: (a) the local authority[87] for each area in which the service is to be provided, and (b) the relevant health board[88] for each such area. Under Part 3 of the Children and Young People (Scotland) Act 2014, they have the responsibility of preparing (every 3 years) a children's services plan for the local authority area. This is a document setting out their plans for the provision over that 3-year period of all children's services and related services.[89] In preparing the plan, section 10(1), (2) and (6) of the 2014 Act requires the local authority and relevant health board to consult with certain persons, including organisations which provide a service for children in the area. However, the notice requirement imposed by section 59A(2)(b) means that local authorities and relevant health boards will automatically be made aware of any prospective services for children in their respective areas for the purposes of children's services planning. To make sure that the notice requirement is complied with, section 59A(4) precludes the Care Inspectorate from considering an application in respect of any of the listed care services unless and until the required confirmation is given. Knowingly giving a false confirmation in an application would be an offence under section 81 of the 2010 Act.[90]

129. Section 59A(2)(a) enables the Scottish Ministers to prescribe,[91] by order, such information about cross-border placements as they deem appropriate to be included in an application for registration as a care service. Section 59A(2)(b) also enables them to prescribe, by order, the form in which notice of the application is to be given to the persons mentioned in section 59A(3). By virtue of section 104(1)(c) of the 2010 Act, those order-making powers include the power to make different provision for different purposes. Any order made under the new provisions[92] will be subject to the negative procedure[93] by virtue of section 104(3).

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[85] By virtue of section 50(8) of the 2010 Act.
[86] See section 59(2) of the 2010 Act for the standard requirements, along with the Social Care and Social Work Improvement Scotland (Applications) Order 2011 (S.S.I. 2011/29).
[87] See the definition of "local authority" in section 105(1) of the 2010 Act.
[88] As defined by section 7(1) of the Children and Young People (Scotland) Act 2014 (legislation.gov.uk).
[89] See section 7(1) of the 2014 Act for the definitions of "children's service" and "related service".
[90] And, under section 64 of the 2010 Act, being convicted of such an offence would be a ground for cancelling the registration of a care service whose registration was based on such a false confirmation.
[91] See the definition of "prescribed" in section 105(1) of the 2010 Act.
[92] As with an order made under section 59(2)(a) of the 2010 Act.

130. And, finally, the third main change relates to the regulation-making power in section 78(2) of the 2010 Act. This is a general power that enables the Scottish Ministers, by regulations,[94] to impose on care services any requirements which they consider appropriate for the purposes of Part 5 of the 2010 Act.[95] Section 28(4) inserts new subsections (2A) and (2B) into section 78 to expressly provide for the Scottish Ministers to impose specific requirements on specific types of care service which provide residential accommodation to children who are subject to cross-border placements. Those care services are: (a) care home services which are provided wholly or mainly to children, (b) school care accommodation services, and (c) secure accommodation services. Any requirements imposed by virtue of section 78(2A) would constitute "relevant requirements"[96] for the purposes of section 64(1)(b) of the 2010 Act. This means that a care service's failure to comply with any such requirement could result in its registration with the Care Inspectorate being cancelled.

131. Section 28(5)(a) amends the definition of "child" in section 105(1) of the 2010 Act for the purposes of the new provisions. As a result, references to "children" in sections 50(1A) and (1B), 59A and 78(2A) and (2B) are to persons who are under the age of 18 (rather than under the age of 16).

Section 29 – cross-border placements: effect of orders made outwith Scotland

132. Section 29 amends section 190 of the 2011 Act, which confers a regulation-making power on the Scottish Ministers to make provision for specific non-Scottish orders to have effect in Scotland.[97] Those are orders made by a court in England and Wales, or in Northern Ireland, which appear to the Scottish Ministers to be an equivalent of a CSO. The power enables them to provide for the orders to have effect in Scotland as if they were a CSO. To that end, regulations made under section 190 may apply the Social Work (Scotland) Act 1968 or the 2011 Act to the specified orders with such modifications as are necessary or appropriate.

133. The amendments give the Scottish Ministers greater flexibility in specifying how each specified non-Scottish order is to have effect.

134. Section 29(2) broadens the application of the power. It amends section 190(1) so that the power is no longer limited to treating CSO-equivalent orders as if they were CSOs. It replaces section 190(2) with a new version so that, instead, the power will cover giving such non-Scottish orders effect in Scotland either as if they were CSOs or in such other way as set out in the regulations.

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[93] See section 28 of the Interpretation and Legislative Reform (Scotland) Act 2010.

[94] See the definition of "regulations" in section 105(1) of the 2010 Act. By virtue of section 104(2) of that Act, regulations made under section 78(2) are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010).

[95] Such requirements are set out in the Social Care and Social Work Improvement Scotland (Requirements for Care Services) Regulations 2011 (S.S.I. 2011/210), the Secure Accommodation (Scotland) Regulations 2013 (S.S.I. 2013/205) and the Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 (S.S.I. 2013/227) (legislation.gov.uk).

[96] Defined in section 64(3)(b) of the 2010 Act.

[97] By virtue of sections 190(2)(c) and 195(2) of the 2011 Act, regulations made using this power are subject to the affirmative procedure and may include incidental, supplementary, consequential, transitional, transitory or saving provision, and they may also make different provision for different purposes. The power has been used to make the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 (S.S.I. 2013/99) (legislation.gov.uk) and the Cross-border Placements (Effect of Deprivation of Liberty Orders) (Scotland) Regulations 2022 (S.S.I. 2022/225) (legislation.gov.uk).

135. The new version of section 190(2) contains a number of changes. Paragraph (a)(i) and (ii) continues to provide that the Scottish Ministers may specify the circumstances in which, and the purposes for which, non-Scottish orders are to have effect in Scotland. But new paragraph (a)(iii) provides that they can also specify the conditions subject to which such orders are to have effect. New paragraph (b) sets out that Ministers can provide that a specified non-Scottish order is to have effect as if it were a CSO, or is to have whatever other effect they may specify. New paragraph (c) further sets out that Ministers can impose certain kinds of requirement in relation to specified non-Scottish orders. These relate to: the provision and sharing of information; the provision of services needed to support a child who is the subject of a non-Scottish order; and the payment of costs incurred in relation to, or as a consequence of, giving effect to a non-Scottish order. And, finally, new paragraph (d) includes the power to make provision as to the monitoring of compliance, and the consequences of any non-compliance, with any such condition or requirement specified under new paragraph (a)(iii) or (c).

136. Section 29(2) also inserts new section 190(2A), replacing section 190(2)(b) and (c). This does two things. First, it extends the power to apply other enactments in a modified way to a non-Scottish order – in that it now covers any enactment, including the Children (Scotland) Act 1995 as well as the Social Work (Scotland) Act 1968 and the 2011 Act. Secondly, it restates that regulations under section 190(1) are subject to the affirmative procedure.[98]

Section 30 – regulation of cross-border placements

137. Section 30 inserts new section 33A into the Children (Scotland) Act 1995, conferring a regulation-making power on the Scottish Ministers to make provision about cross-border placements. A "cross-border placement" is defined in section 33A(4). It is the placement of a child in a residential establishment in Scotland where (a) the child was, immediately before the placement, resident in England, Wales or Northern Ireland, and (b) the placement is authorised under the law in England and Wales or, as the case may be, in Northern Ireland. A placement may be so authorised by virtue of (a) an order made by a court in England and Wales or in Northern Ireland, and/or (b) any provision made by or under an Act of Parliament, and Act of Senedd Cymru, or Northern Ireland legislation (as defined by section 98(1) of the Northern Ireland Act 1998), whenever passed or made.[99]

138. Mirroring section 190 of the 2011 Act, as amended by section 29 of this Act, regulations under section 33A can include requirements as to: the provision and sharing of information; the provision of services needed to support a child who is the subject of a cross-border placement; and the payment of costs incurred in relation to, or as a consequence of, giving effect to a cross-border placement. Section 33A(2) also specifies that regulations can include provision requiring a cross-border placement to be kept under review. Regulations under section 33A are subject to the affirmative procedure.

[98] See section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

[99] This mirrors the definition of "cross-border placement" inserted into section 105(1) of the 2010 Act by section 28(5)(b) of this Act. "Residential establishment" is defined in section 93(1) of the Children (Scotland) Act 1995.

Part 5 – antisocial behaviour orders, named person and child's plan

Section 31 – antisocial behaviour orders relating to children

139. Section 31 amends section 18 of the Antisocial Behaviour etc. (Scotland) Act 2004 so that, except in one respect, "child" in that Act will mean a person under 18.

140. The exception is in the case of parenting orders, which currently can be made by the sheriff under section 13 of the 2004 Act only in respect of children under 16. That exception will remain and this is achieved by the amendment of section 13 contained in subsection (2) of section 31.

Section 32 – named person and child's plan

141. Section 32 repeals Parts 4 and 5, as well as schedules 2 and 3, of the Children and Young People (Scotland) Act 2014. Part 4 of the 2014 Act would make provision for every child and young person to have a named person. Part 5 would introduce the requirement for a child's plan when a child's wellbeing required the support of a targeted intervention. Schedules 2 and 3 relate, respectively, to Parts 4 and 5. These Parts, and those schedules, were not brought into force following the Supreme Court's judgment in *The Christian Institute and others (Appellants) v The Lord Advocate (Respondent)*[100] and the withdrawal of the Children and Young People (Information Sharing) (Scotland) Bill.[101]

142. Part 9 of the schedule of the Act contains a number of further repeals which are necessary in consequence of the repeal of Parts 4 and 5 of the 2014 Act.

Part 6 – UNCRC compatibility issues in criminal proceedings

Section 33 – UNCRC compatibility issues in relation to decisions to prosecute children

143. Section 33(2) inserts new section 288BZA into the 1995 Act. This makes provision about certain cases where a "UNCRC compatibility issue" (as defined by section 288BZA(7)) is raised[102] in criminal proceedings brought against a person who either is a child or was a child when the proceedings were brought. Criminal proceedings in this context exclude post-conviction appeal proceedings, and section 288BZA(6) sets out when proceedings are taken to be brought against a person.

144. Section 288BZA(2) limits how section 8(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ("the UNCRC Incorporation Act") applies to those cases. Under section 8(1), a criminal court may grant such relief or remedy, or make such order, within its powers as it considers effective, just and appropriate in relation to any act (or proposed act) of a public authority which it finds is (or would be) unlawful under section 6(1) of the UNCRC Incorporation Act. That is, unlawful because it is (or would be) incompatible with the UNCRC requirements (as defined by section 288BZA(7)). Section 288BZA(2) restricts the granting of two specific types of judicial remedy. The first is the

[100] [2016] UK SC 51.
[101] Announced in the Scottish Parliament by the Deputy First Minister, John Swinney MSP, on 19 September 2019.
[102] By virtue of section 7(1)(b) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 (legislation.gov.uk).

desertion of proceedings either *pro loco et tempore*[103] or *simpliciter.*[104] The second is the dismissal of the indictment (in solemn proceedings) or the complaint (in summary proceedings) or any part of the indictment or complaint. This restriction applies only where a criminal court is contemplating granting either type of remedy solely because of a court finding that the prosecutor, by bringing criminal proceedings against the child accused, has acted unlawfully under section 6(1) of the UNCRC Incorporation Act. It will not apply where a court is (instead or also) contemplating granting either type of remedy in consequence of determining any other kind of plea, issue or challenge (whether or not related to the bringing of proceedings). A court will therefore be free to use its remedial powers as it sees fit when determining, say, a common law plea in bar of trial, a plea to the competency of the indictment or complaint, an ECHR "compatibility issue",[105] or a UNCRC compatibility issue concerning the fairness of proceedings rather than the decision to prosecute.

145. So, where a court determines that a particular decision to prosecute was incompatible with the UNCRC requirements, it may not desert the proceedings or otherwise dismiss the indictment or complaint (either wholly or partially). Instead, it must give the prosecutor an opportunity to reconsider the decision to prosecute in a UNCRC-compatible way and adjourn or continue the proceedings to another diet to allow for this. Section 288BZA(5) further requires the court, before adjourning or continuing the case, to give the prosecutor an opportunity to apply for any necessary extension of a time bar which applies in respect of the proceedings.[106]

146. It will be for the prosecutor to decide whether or not to take up the opportunity to reconsider the decision to prosecute. The prosecutor may instead decide to appeal the finding of incompatibility.[107] Alternatively, the prosecutor may decide not to proceed with the prosecution (if, say, the prosecutor concedes the UNCRC compatibility issue and considers that the incompatibility cannot be remedied by reconsidering the case). But where the prosecutor does reconsider the decision to prosecute, and ultimately determines that the bringing of criminal proceedings is UNCRC-compatible, the court must decide anew under section 288BZA(2)(b)(iii) whether that is the case.

147. If, at the adjourned or continued diet, the court decides anew that the bringing of criminal proceedings is incompatible with the UNCRC requirements, it will then be able to desert or dismiss the case if it considers it just and appropriate to do so (subject to any successful appeal against that decision by the prosecutor). Otherwise, if the court is satisfied

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[103] This has the effect of ending the proceedings temporarily, without the facts being determined. The prosecutor would be entitled to re-raise proceedings provided there is no legal impediment to doing so, such as the case being time-barred.

[104] This has the effect of ending the proceedings permanently, without the facts being determined. The prosecutor would only be permitted to re-raise proceedings if the court's decision were reversed on appeal.

[105] As defined by section 288ZA of the 1995 Act.

[106] See the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (legislation.gov.uk), paragraphs 20 and 22 of the schedule, for temporary modifications of the references in section 65(1) and (4) of the 1995 Act to the periods "11 months", "12 months", "80 days", "110 days" and "140 days". The temporary modifications apply until the end of 30 November 2024 by virtue of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (S.S.I. 2023/360) (Extension and Expiry of Temporary Justice Measures) Regulations 2023 (legislation.gov.uk), regulation 3(2).

[107] For example, the prosecutor may lodge an appeal under section 74 of the 1995 Act if the UNCRC compatibility issue is decided at a first diet or preliminary hearing in solemn proceedings.

that the incompatibility has been remedied by a reconsideration of the case, the prosecution may then proceed (subject to any successful defence appeal against the court's decision under section 288BZA(2)(b)(iii)).

148. However, the restriction on judicial remedies will not apply if any of the three exceptions set out in section 288BZA(3) is relevant. The first exception is where there is no reasonable prospect of the decision to prosecute being reconsidered in a UNCRC-compatible way. For example, no reconsideration of a decision to prosecute a case based on facts that did not constitute a crime known to the law of Scotland at the time of the alleged wrongdoing could remedy such a breach of Article 40(2)(a) of the UNCRC.[108] The second exception is where there are exceptional circumstances which justify a court denying a reconsideration. A court may therefore proceed directly to desert the proceedings, or dismiss the indictment or complaint, where this is merited in a special case. The third exception is where the prosecutor has already had an opportunity to reconsider the decision to prosecute and the court decides under section 288BZA(2)(b)(iii) that the bringing of criminal proceedings remains incompatible with the UNCRC requirements. This means that the prosecutor gets only one chance to reconsider the decision to prosecute (unless a further, separate UNCRC compatibility issue is raised and the criteria in section 288BZA(1)(b) and (c) are met in relation to that other issue).

149. Finally, section 33(4) of the Act simply amends section 8 of the UNCRC Incoproration Act to signpost the restriction on judicial remedies contained in section 288BZA of the 1995 Act.

Part 7 – review of Act

Section 34 – review of Act

150. Section 34 imposes a duty on the Scottish Ministers to review and report on the operation of the Act. They must do so as soon as reasonably practicable after the end of each one-year review period, the first of which runs from the day of Royal Assent (4 June 2024). Ministers must report specifically on whether there are sufficient resources in place for the Act to be implemented effectively, and on what (if any) steps they intend to take as a result of the findings of their review. As soon as reasonably practicable after preparing their annual report, they must publish it and also lay it before the Scottish Parliament.

Part 8 – final provisions

Section 35 – ancillary provision

151. Section 35 provides that the Scottish Ministers can make ancillary provision, by regulations, where appropriate. Regulations made under this section may modify any legislation, including this Act. Where they textually amend primary legislation, they are subject to the affirmative procedure. Otherwise, they are subject to the negative procedure.[109]

[108] Which is a UNCRC requirement by virtue of section 1(2), and Part 1 of the schedule, of the UNCRC Incorporation Act. A plea to the relevancy of the indictment or complaint could also be made at common law, in which case the restriction in section 288BZA(2) would likewise not apply.

[109] For the negative procedure and the affirmative procedure, see sections 28 and 29 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 36 – interpretation

152. Section 36 sets out the meanings of various terms that are used in the Act.

Section 37 – modification of enactments

153. Section 37 introduces the schedule of the Act, which contains modifications of certain enactments.

Section 38 – commencement

154. Section 38 sets out when the provisions of the Act come into force (that is, when they begin to have an effect). For the most part, this will happen by regulations as determined by the Scottish Ministers. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure.[110] However, some of the final sections of the Act, including this section, came into force automatically on the day after the day on which the Bill for the Act received Royal Assent (so on 5 June 2024). Section 33 came into force on 16 July 2024 (which is the later of the two days specified, as Royal Assent was granted on 4 June 2024).[111]

155. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes.

Section 39 – short title

156. This section provides that the short title of the Act is the Children (Care and Justice) (Scotland) Act 2024.

Schedule – minor and consequential modifications

157. The schedule contains minor and consequential amendments and repeals and is organised in Parts that, while not corresponding exactly to the Parts of the Act, follow the order in those Parts of the topics to which they relate.

158. Part 1 of the schedule relates to sections 6 and 7 of the Act and contains amendments consequential on changes made to sections 83, 87 and 88 of the 2011 Act.

159. Part 2 of the schedule relates to section 12 of the Act and contains amendments consequential on the change in age in the definition of "child" in section 307(1) of the 1995 Act.

160. Part 3 of the schedule relates to section 13 of the Act and contains amendments consequential on the changes made by that section to schedule 1 of the 1995 Act.

161. Part 4 of the schedule makes changes consequential on section 17 of the Act on remit from the criminal courts to the children's hearings system.

162. Part 5 of the schedule makes miscellaneous changes relating to the criminal justice system, mainly in consequence of or related to sections 12, 18 and 19 of the Act.

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[110] This is by virtue of section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.
[111] Since section 33 modifies the application of the UNCRC Incorporation Act, it came into force on the same day as that Act.

163. Part 6 of the schedule contains amendments and repeals consequential on the abolition of remand centres by section 22 of the Act.

164. Part 7 of the schedule amends the Social Work (Scotland) Act 1968 so that the Scottish Ministers can direct local authorities under section 5 of that Act as to how they exercise their functions in relation to children detained in secure accommodation in relation to criminal proceedings. It also removes a redundant reference from schedule 13 of the 2010 Act.

165. Part 8 of the schedule contains amendments related to section 26 of the Act and makes a number of changes to definitions of "secure accommodation" in a number of enactments to keep those in step with the amended definition in section 202(1) of the 2011 Act.

166. Part 9 of the schedule modifies enactments in consequence of the repeal of Parts 4 and 5 of the Children and Young People (Scotland) Act 2014 by section 32 of the Act.

PARLIAMENTARY HISTORY

167. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	***Reference***
INTRODUCTION	
Bill as introduced (13 December 2022)	SP Bill 22 Children (Care and Justice) (Scotland) Bill [as introduced] Session 6 (2022)
Policy Memorandum	SP Bill 22-PM Children (Care and Justice) (Scotland) Bill [policy memorandum] Session 6 (2022)
Explanatory Notes	SP Bill 22-EN Children (Care and Justice) (Scotland) Bill [explanatory notes] Session 6 (2022)
Financial Memorandum	SP Bill 22-FM Children (Care and Justice) (Scotland) Bill [financial memorandum] Session 6 (2022)
Delegated Powers Memorandum	SP Bill 22-DPM Children (Care and Justice) (Scotland) Bill [delegated powers memorandum] Session 6 (2022)
Statements on Legislative Competence	SP Bill 22-LC Children (Care and Justice) (Scotland) Bill [legislative competence] Session 6 (2022)
STAGE 1	
Education, Children and Young People Committee	
Evidence session, day 1 (22 March 2023)	SP OR Education, Children and Young People Committee 22 March 2023, col 1-58
Evidence session, day 2 (29 March 2023)	SP OR Education, Children and Young People Committee 29 March 2023, col 1-61
Evidence session, day 3 (26 April 2023)	SP OR Education, Children and Young People Committee 26 April 2023, col 3-42
Evidence session, day 4 (3 May 2023)	SP OR Education, Children and Young People Committee 3 May 2023, col 1-36
17th Meeting, 2023 (31 May 2023) (in private)	SP M Education, Children and Young People Committee 31 May 2023, para 1

Proceedings and reports	***Reference***
18th Meeting, 2023 (7 June 2023) (in private)	SP M Education, Children and Young People Committee 7 June 2023, para 3
Stage 1 Report (13 June 2023)	Education, Children and Young People Committee 4th report, 2023, Children (Care and Justice) (Scotland) Bill Stage 1 report (SPP 397)
Scottish Government's response to Education, Children and Young People Committee's Stage 1 Report (20 June 2023)	Letter dated 20 June 2023 from Minister for Children, Young People and Keeping the Promise to Convener of Education, Children and Young People Committee
Lord Advocate's response to Education, Children and Young People Committee's Stage 1 Report (27 June 2023)	Letter dated 27 June 2023 from Lord Advocate to Convener of Education, Children and Young People Committee
Scottish Government's response to Education, Children and Young People Committee's scrutiny of Financial Memorandum (21 July 2023)	Letter dated 21 July 2023 from Minister for Children, Young People and Keeping the Promise to Convener of Education, Children and Young People Committee
Education, Children and Young People Committee's response to Lord Advocate regarding Stage 1 Report (21 August 2023)	Letter dated 21 August 2023 from Convener of Education, Children and Young People Committee to Lord Advocate
Delegated Powers and Law Reform Committee	
6th Meeting, 2023 (21 February 2023) (in private)	SP M Delegated Powers and Law Reform Committee 21 February 2023, para 4
9th Meeting, 2023 (14 March 2023) (in private)	SP M Delegated Powers and Law Reform Committee 14 March 2023, para 4
Stage 1 Report (22 March 2023)	Delegated Powers and Law Reform Committee 23rd report, 2023, Children (Care and Justice) (Scotland) Bill Stage 1 report (SPP 341)
Criminal Justice Committee	
Evidence session, day 1 (29 March 2023)	SP OR Criminal Justice Committee 29 March 2023, col 2-48
Evidence session, day 2 (19 April 2023)	SP OR Criminal Justice Committee 19 April 2023, col 2-24
13th Meeting, 2023 (3 May 2023) (in private)	SP M Criminal Justice Committee 3 May 2023, para 5
Stage 1 Report (12 May 2023)	Criminal Justice Committee 7th report, 2023, Children (Care and Justice) (Scotland) Bill Stage 1 report (SPP 363)
Finance and Public Administration Committee	
Evidence session (9 May 2023)	SP OR Finance and Public Administration Committee 09 May 2023, col 25-46

Proceedings and reports	***Reference***
Finance and Public Administration Committee correspondence to Education, Children and Young People Committee, Financial Memorandum scrutiny (19 May 2023)	Letter dated 19 May 2023 from Deputy Convener of Finance and Public Administration Committee to Convener of Education, Children and Young People Committee
Whole Parliament	
Stage 1 debate on the Bill's general principles (22 June 2023)	SP OR 22 June 2023, col 74-109
STAGE 2	
Scottish Government's correspondence to Education, Children and Young People Committee on updated financial projections (6 October 2023)	Letter dated 06 October 2023 from Minister for Children, Young People and Keeping the Promise to Convener of Education, Children and Young People Committee
Education, Children and Young People Committee, evidence session, day 1 (25 October 2023)	SP OR Education, Children and Young People Committee 25 October 2023, col 2-44
Education, Children and Young People Committee, evidence session, day 2 (1 November 2023)	SP OR Education, Children and Young People Committee 01 November 2023, col 2-36
First Marshalled List of Amendments for Stage 2	SP Bill 22-ML Children (Care and Justice) (Scotland) Bill [1st marshalled list of amendments for Stage 2] Session 6 (2024)
First Groupings of Amendments for Stage 2	SP Bill 22-G Children (Care and Justice) (Scotland) Bill [1st groupings of amendments for Stage 2] Session 6 (2024)
Education, Children and Young People Committee, consideration of amendments, day 1 (24 January 2024)	SP OR Education, Children and Young People Committee 24 January 2024, col 1-68
Second Marshalled List of Amendments for Stage 2	SP Bill 22-ML2 Children (Care and Justice) (Scotland) Bill [2nd marshalled list of amendments for Stage 2] Session 6 (2024)
Second Groupings of Amendments for Stage 2	SP Bill 22-G2 Children (Care and Justice) (Scotland) Bill [2nd groupings of amendments for Stage 2] Session 6 (2024)
Education, Children and Young People Committee, consideration of amendments, day 2 (31 January 2024)	SP OR Education, Children and Young People Committee 31 January 2024, col 1-78

Proceedings and reports	***Reference***
Third Marshalled List of Amendments for Stage 2	SP Bill 22-ML3 Children (Care and Justice) (Scotland) Bill [3rd marshalled list of amendments for Stage 2] Session 6 (2024)
Third Groupings of Amendments for Stage 2	SP Bill 22-G3 Children (Care and Justice) (Scotland) Bill [3rd groupings of amendments for Stage 2] Session 6 (2024)
Education, Children and Young People Committee, consideration of amendments, day 3 (7 February 2024)	SP OR Education, Children and Young People Committee 07 February 2024, col 1-38
Bill as amended at Stage 2	SP Bill 22A Children (Care and Justice) (Scotland) Bill [as amended at Stage 2] Session 6 (2024)
Revised Explanatory Notes	SP Bill 22A-EN Children (Care and Justice) (Scotland) Bill [revised explanatory notes] Session 6 (2024)
Supplementary Financial Memorandum	SP Bill 22A-FM Children (Care and Justice) (Scotland) Bill [supplementary financial memorandum] Session 6 (2024)
Supplementary Delegated Powers Memorandum	SP Bill 22A-DPM Children (Care and Justice) (Scotland) Bill [supplementary delegated powers memorandum] Session 6 (2024)
Scottish Government's correspondence to Education, Children and Young People Committee on Victims Roundtable Event (20 February 2024)	Letter dated 20 February 2024 from Minister for Children, Young People and Keeping the Promise to Convener of Education, Children and Young People Committee
Delegated Powers and Law Reform Committee, 11th Meeting, 2024 (26 March 2024) (in private)	SP M Delegated Powers and Law Reform Committee 26 March 2024, para 5
Scottish Government's correspondence to Education, Children and Young People Committee on removal of provisions on reporting restrictions (28 March 2024)	Letter dated 28 March 2024 from Minister for Children, Young People and Keeping the Promise to Convener of Education, Children and Young People Committee
Delegated Powers and Law Reform Committee's Report on the delegated powers in the Bill as amended (4 April 2024)	Delegated Powers and Law Reform Committee 25th Report, 2024, Delegated powers in the Children (Care and Justice) (Scotland) Bill as amended at Stage 2 (SPP 565)
Scottish Government's correspondence to Education, Children and Young People Committee on anonymity for deceased child victims (16 April 2024)	Letter dated 16 April 2024 from Cabinet Secretary for Justice and Home Affairs to Convener of Education, Children and Young People Committee

Proceedings and reports	***Reference***
STAGE 3	
Marshalled List of Amendments for Stage 3	SP Bill 22A-ML Children (Care and Justice) (Scotland) Bill [marshalled list of amendments selected for Stage 3] Session 6 (2024)
Groupings of Amendments for Stage 3	SP Bill 22A-G Children (Care and Justice) (Scotland) Bill [groupings of amendments selected for Stage 3] Session 6 (2024)
Stage 3, day 1 – consideration of amendments (24 April 2024)	SP OR 24 April 2024, col 24-153
Stage 3, day 2 – debate on passing the Bill (25 April 2024)	SP OR 25 April 2024, col 58-84
Bill as passed (25 April 2024)	SP Bill 22B Children (Care and Justice) (Scotland) Bill [as passed] Session 6 (2024)
ROYAL ASSENT	
Royal Assent (4 June 2024)	Children (Care and Justice) (Scotland) Act 2024 (asp 5)

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