

The Promise Scotland's response to the Education, Children and Young People Committee's call for views on the Children (Care and Justice) (Scotland) Bill

March 2023

The Promise Scotland is the organisation set up to support Scotland in its delivery of the implementation of the findings of the Independent Care Review, the [promise](#). The promise was guided by the stories, views and experience of children and families. The Care Review heard a variety of experiences from children, their families, care experienced adults and members of the paid and unpaid workforce about how the Children's Hearings system currently operates. The Children's Hearings System and Looked After Child Reviews were mentioned frequently and referenced as pivotal moments in the care journey, where children and their families should be involved, listened to and able to participate and engage in important decisions about their lives.

The promise was clear that the principles that underpin Scotland's unique Children's Hearings System must be upheld, but there must be a more active consideration of underlying structures so that the Children's Hearings System is best placed to truly listen and uphold the legal rights of children and their families. It also stated that the disproportionate criminalisation of care experienced children and young people must end and that 16 and 17 year olds must no longer be placed in Young Offenders Institutes for sentence or on remand. Children who do need to have their liberty restricted must be cared for in small, secure, safe, trauma- informed environments that uphold their rights.

The Promise Scotland is facilitating a project to develop proposals around the redesign of the Children's Hearings System. That work will be published in early May and shared with the Scottish Government. If the recommendations are accepted and implemented, will represent a step change not only for the Children's Hearings System but for how we work alongside children and families across Scotland. As set out below, this implementation should be fully sequenced with the commencement of the Children (Care and Justice) (Scotland) Bill so that the Children's Hearings System is better able to support the introduction of an additional number of 16 and 17 year olds, and their families, into the system and ensure that it upholds and helps them to access their rights.

In its response to the promise, the Scottish Government committed to fully implement the conclusions of the Independent Care Review and this Bill forms an important building block in taking forward that commitment. The Promise Scotland is strongly supportive of the intent and ambition within the Bill and makes submissions on a number of points set out below based on the implementation of the promise and the work to redesign the Children's Hearings System.

The Bill widens access to the Children's Hearings System to all 16 and 17 year olds. What are your views on this?

Increased access to the Children's Hearings System for 16 and 17 year olds is clearly in line with the original intentions of the Kilbrandon Committee and with the definition of a child as under the age of 18 years, in accordance with the UNCRC ahead of the planned move to incorporate the UNCRC into Scots Law. The Promise Scotland is therefore strongly supportive of the changes set out in Part 1 of the Bill. This is a welcome change and allows the special protections and approach of the Children's Hearings System to extend to all children. It allows teenagers in need of care and protection, who had not been previously known to the Children's Hearings System, to be supported in a way that addresses their underlying needs.

It is critical that the Children's Hearings System is understood and supported to be a place where children's rights are upheld and that those organisations and authorities who refer and provide support to children and families are well placed to facilitate the support they require. Many of the children who will be referred to the Children's Hearings System under the changes will require help and support due to adversities that they have experienced in their early life. Increasing access to earlier help and support for these children and—where appropriate—their families is a core preventative measure that will help to keep the promise. If provided with holistic, trauma- informed emotional, practical and financial support at an earlier stage The Promise Scotland is of the view that it is much more likely that these children will grow up to be safe, happy, healthy and loved in their own families and communities.

In order to meet the anticipated significant increase of 16 and 17 year olds referred to the Children's Hearings System—regardless of the grounds on which they are referred—preparation will be required to ensure all decision- makers are fully equipped and trained to understand the complexities of the circumstances of older children and to uphold their rights.

Structural change to referrals is important and there is much of this Bill that is in line with the promise and the UNCRC. However, it is critical that the lens of enquiry is not simply on how the Children's Hearings System itself will accommodate these changes, but how implementing authorities, who will be charged with facilitating the support specified in Compulsory Supervision Orders (CSOs) and a Child's Plan, will make sure 16 and 17 year olds are able to access adequate help and support to uphold their right to care and protection. This includes ensuring that the current crisis with respect to the retention and recruitment of social workers is urgently addressed and that the broader child care, protection and support landscape is ready and prepared for the number of 16 and 17 year olds that will require help and support—and the complexity of the challenges that they are likely to be face. Investment and resources must be available with respect to upholding the rights of older children engaged in the Children's Hearings System (and those accessing support through section 25 of the Children (Scotland) Act 1995) to adequate housing, transport, healthcare and education. There should also be access to mental health support, substance use services and consideration of the pervasive impact of poverty on many of the children who will be entering the Children's

Hearings System. They must have a Child's Plan, which should clearly set out how their needs are met and their rights are upheld.

There should also be adequate provision to uphold children's right to aftercare and continuing care support and to ensure their needs are fully reflected by corporate parents and in the work on meeting the child poverty targets and Children's Services Plans. Some of these children may be parents themselves, and that should be taken into account as the Children's Hearings System engages in their lives. The specific needs of unaccompanied children should be taken into account, including resources to facilitate interpretation and translation and there should be a laser-sharp awareness and understanding of the impact of grooming, trafficking, child criminal exploitation and child sexual exploitation on children.

The Promise Scotland is leading the Children's Hearings System Working Group, Chaired by Sheriff David Mackie that is due to report to children, families and care experienced adults and to the Scottish Government in May 2022.

The Group was set up to address the concerns raised by children, families and care experienced adults with experience of the Children's Hearings System and shared with the Independent Care Review. This work will fundamentally redesign the Children's Hearings System, in line with the ambition set out in the promise. The report will outline out a number of changes to the way in which the Children's Hearings System should operate and the way in which children and families experience the system. In October 2022, the HSWG published an [Emerging Themes Report](#), which set out the initial thinking of the Group, and gave the first indications of the themes and issues that were emerging following the information and evidence that they have heard. This report may be a useful indication to the Committee of the issues that the Group is considering prior to the final report being published later this year.

As the Committee begins to hear evidence on the Children (Care and Justice) (Scotland) Bill, the draft recommendations of the Hearings System Working Group are being finalised and tested through a series of engagement and information sessions with children and families, care experienced adults, foster carers, kinship carers and those working alongside and as part of the Children's Hearings System, including social workers, police officers, family support workers, legal representatives and Safeguarders.

As stated above, The Promise Scotland is strongly supportive of the intention behind this Bill and is committed to working closely alongside the Scottish Parliament and the Scottish Government to ensure that there is clear cohesion and collaboration between the commencement of the duties in the Bill and the implementation of recommendations (if accepted) relating to the redesign of the Children's Hearings System. The Promise Scotland does not wish to pre-empt the conclusions of the Hearings System Working Group, but the report is likely to include specific recommendations with respect to the consistency of Panel members, the recruitment and administration of Children's Hearings, the need for help and support for children and their families and the need for stronger, more robust and rights-based decision making processes. The commencement of the duties in the Bill should be coordinated closely with the implementation of these recommendations so that there are clear

strategic oversight mechanisms in place and a thoughtful and measured plan for commencement to reduce and prevent confusion, duplication and overlap.

The child protection, care and support workforce should not be overwhelmed by the initiation of new measures at a time when they are already being asked to implement the promise and prepare for a new National Care Service, the incorporation of the UNCRC and the relatively new Child Protection Guidance. Additionally, the Committee will be aware of the interlinked commitments to commence the duties in the Children (Scotland) Act 2020, to ensure all children have access to a Bairnshoose by 2025, to implement the findings from [Lady Dorian's Governance Group](#) overseeing the recommendations of the report into Improving the Management of Sexual Offences Cases, and to redesign Secure Care in line with the promise.

The implementation of the Bill and the recommendations from the Hearings System Working Group should therefore be streamlined alongside these other important policy commitments and there should be clear communication to help children, families, care experienced adults and those working alongside them that the changes are part of broader work to keep the promise and will be sufficiently resourced. Sequencing and prioritisation, including with respect to commencement of the duties, should be considered in full. In particular, although The Promise Scotland cannot foresee any changes required to the Bill following the publication of the recommendations from the Hearings System Working Group it is important to note that there may require to be changes to the Financial Memorandum and to the way the proposed changes to the Children's Hearings System brought forward by the Bill will be realised and administered in practice.

Most certainly the Group will set out recommendations that will impact on the *experiences* of all children within the Children's Hearings System, including 16 and 17 year olds. If these recommendations are accepted this will need to be taken into account as the duties commence.

Finally, it should be noted that the Children's Hearings System should not be seen as a gateway to accessing help and support. The Promise Scotland is aware of the tight financial constraints facing local authorities at the moment and is mindful that referrals to the Reporter might increase based on a need to secure resources. The Scottish Government should therefore ensure that there are adequate resources to provide help and support to 16 and 17 year olds working alongside the local authority on a voluntary basis and should ensure that all children who need it are able to access support via section 25 of the Children (Scotland) Act 1995.

The Bill suggests that the law should be changed so that most offences committed by 16 and 17 year olds will be dealt with through the Children's Hearings System in future. What are your views on this?

The Promise Scotland is strongly supportive of the proposed change that most offences committed by 16 and 17 year olds be dealt with through the Children's Hearings System. The promise was clear that the disproportionate criminalisation of care experienced children must end. It states that when children are before the courts on offence

grounds, they must be dealt with in a way that is appropriate, proportionate, recognises their age and is trauma informed and responsive. It was clear that to ensure that all children benefit from the Kilbrandon approach to youth justice, there must be more efforts to keep children within the Children's Hearings System and calls for a more progressive, rights- based youth justice approach.

Ensuring more children who are in conflict with the law are engaged with the Children's Hearings System allows them to be supported in a way envisaged by the original Kilbrandon approach (needs not deeds). As set out above, a preventative, inquisitive approach that seeks to understand the root causes of children's offending behaviour, the adversities and challenges in their lives and the help and support that they need is welcome and in line with the promise. It should, however, be clear that the Children's Hearings System is not a 'light touch' option for children who are in conflict with the law—rather that the Children's Hearings System is the most robust, appropriate decision- making legal tribunal for children.

Inclusion of this group of children and young people will mean a significant change to the way in which the Children's Hearings System operates. This change in the law is likely to bring a large increase of children into the Children's Hearings System, and to increase both the complexity of circumstances and the seriousness of offences heard by the Panels.

It is important to note that although the Lord Advocate's Joint Referral Guidelines are not within the scope of this Bill they will likely determine the numbers of 16 and 17 year olds referred and the types of offences that the Children's Hearings System is able to manage. It is vital that all guidelines and processes, including the Lord Advocate's Guidelines, are child rights compliant and also reflect the policy intention as set out in this Bill, Scotland's broader commitments to the promise and the recommendations (if accepted) of the Hearings System Working Group.

The specific needs of 16 and 17 year olds in conflict with the law should be taken into account with respect to an increased need for evidence- based help and support such as community justice social work, peer support and community justice measures alongside a potential increased need for restorative justice services. All decision- makers in the Children's Hearings System and those working alongside them should be fully trained in trauma, child development and communication and the needs and rights of children in conflict with the law.

All children going through the Children's Hearings System should be fully informed of their right to legal representation and to advocacy support and should understand how they can access these rights. This means that children should be informed of their right to legal representation and to advocacy support and that they should be entitled to access legal aid. The Promise Scotland refers to the submission from Clan Childlaw which sets out the details of access to legal aid, and the changes that will be required to ensure children can access legal aid when the duties in the Bill are enacted. There must be no unintended consequences for children in terms of their ability to instruct a lawyer and access their right to legal representation when they are engaged in the Children's Hearings System as opposed to the criminal Courts.

It should be fully understood that some children's behaviour while engaged with the Children's Hearings System may be due to their previous experiences and their heightened sense of fear and anxiety. While this does not in any way excuse or mitigate offending behaviour—including the extremely serious offences that some children may have been accused of—there must be a clear connection between what has happened to a child in the past and the reasons for their referral into the Children's Hearings System should be discussed and considered in order to understand the most appropriate help and support that they need. These discussions and considerations should take place alongside children rather than around them.

The consequences and implications of children accepting offence grounds should be fully explained and understood, given the significant implications that this can have in terms of criminal record checks.

The Bill makes several changes to Compulsory Supervision Orders. What are your views on these proposed changes?

The changes to Compulsory Supervision Orders gives the Children's Hearings System greater choice in determining which measure or combination of measures is most likely to meet the needs of the child and to manage any relevant risks.

The Promise Scotland welcomes the broader scope and flexibility that the Children's Hearing System will have in dealing with the facts and circumstances that surround the lives of children and the circumstances under which they will appear before a Panel.

Particular care must be taken in relation to ensuring specific legal safeguards are in place when aspects of a CSO restrict or deprive a child of their liberty. Movement Restriction Condition (MRC) should be carefully utilised and further work is required to ensure that they are only in place when necessary and in ways that do not infringe on children's rights. It is particularly important to consider the use of MRCs with respect to child victims of trafficking, child sexual exploitation and child criminal exploitation and to ensure that the Children's Hearings System has fully explored the reasons behind offending behaviour and what help and support a child might require. The enforcement and monitoring arrangements relating to the new provisions must be clear.

The Promise Scotland refers to the submissions from the Children and Young People's Commissioner for Scotland, Together Scotland (Scottish Alliance for Children's Rights) and Who Cares? Scotland for further detail on the implications with respect to children's rights. Imposition of an MRC, whilst may be necessary to protect the child and/or others and prevent the need to place a child in Secure Care, represent a restriction on the child's liberty. It is therefore important that if they are considered as a likely part of a CSO then the child has access to legal representation and is fully informed of and aware of their rights and how to access them.

The most significant restriction that can be applied is the approval to place a child in Secure Care. As aligned with the decision to restrict liberty it is critical that young people have access to legal advice and representation.

What impact (if any) do you think the Bill could have on young people who have been harmed by another young person?

Scotland's Children's Hearings System has been built on the premise that children who harm are in as much need for care and protection as those who are harmed by others. It was ahead of its time in taking an approach that understood that the deeds of a child were best understood through a framework of their needs.

Having increased options in relation to what can form part of a CSO will allow the Children's Hearings System a higher degree of flexibility of approach, ensuring that the best interests of all children are upheld and relevant risk is managed.

As 16 and 17 year olds begin to appear before the Children's Hearings System it is important to ensure, and for Panels to question, the levels of support that children and young people receive as part of a CSO. Restrictions and expectations placed on children must be married with high levels of support and care to facilitate recovery rehabilitation.

The rights of victims, including where there are other children involved, should be fully considered by the Committee as the Bill progresses. In particular, it is important to note that the Scottish Government has committed to ensuring that all children have access to a Bairnshoose by 2025. This important commitment should align closely with the commencement of this Bill, including in relation to the specific protections for child victims and witnesses that a Bairnshoose will bring.

The Bill makes changes to the current law around when information should be offered to a person who has been affected by a child's offence or behaviour. What are your views on what is being suggested?

The changes set out in Part 1, Section 6 give more discretion to the Principal Reporter in relation to the provision of information to persons affected by a child's offence. These are important changes that align the information framework more clearly with Article 17 Article 40 and Article 3 of UNCRC. It may not always be in a child victims' best interest to be informed about a referral to the Reporter of the child who harmed them, and providing the Reporter with a level of discretion is critical in ensuring an overall child rights and wellbeing approach to provision of information.

The exercise of the discretion to provide information must be supported by strong guidance that reflects the complexity of these decisions and views them through a child rights lens. These provisions should be aligned with the work to implement a Bairnshoose and the broader changes in protections and provisions for child victims and witnesses.

Do you wish to say anything else about the proposals to increase the age at which young people can be referred to a Children's Hearing?

Please refer to the responses above, and to the Emerging Themes Report from the Hearings System Working Group.

The Bill makes several changes to existing Criminal Justice and Procedure. These are related to raising the age at which young people can be referred to the Children's Hearings System. Do you have any comments on these proposals?

In line with above, The Promise Scotland supports the policy intent around the increased engagement of 16 and 17 year olds in the Children's Hearings System. These changes should be carefully considered in relation to the recommendations of the Hearings System Working Group and adequate resourcing must be provided not only for the administration of the system itself but the broader child protection, care and support landscape for children and their families so that it meets the needs and upholds the rights of older children in the system.

16 and 17 year olds should not merely be placed in a holding pattern until they are old enough for adult criminal justice processes, but rather the engagement of the Children's Hearings System should mean a broader, more holistic assessment of their needs. In order to prevent children from entering into the adult system once they reach 18 some children will require significant levels of help and support, including with respect to housing, employment and financial security and sustainability. Many of these children will have significant challenges and complexities in their lives and require mental health, substance use and trauma recovery support. These needs should be met within the context of the engagement of the Children's Hearings System and in the spirit of keeping the promise. An order for MRCs or Secure Care should, therefore, link much more closely to the overall needs of older children.

There must be creative ways to uphold children's right to be heard in ways that make sense to them and to ensure that they understand the systems and processes of the Children's Hearings System.

Additionally, it is important that there are clear connections between children's and adult services so that children do not experience a 'cliff edge' when they turn 18 and that children are not left in limbo at age 17 and a half due to a concern that there is not enough 'time' for them to engage with the Children's Hearings System. The duty for the Principal Reporter to provide supervision and guidance after children turn 18 up to age 19 is welcome and The Promise Scotland would welcome further clarity about how this will be operationalised, including how it will be monitored, and how much resourcing is being allocated to this duty in practice.

The Bill changes the law so that young people aged 16 and 17 who are accused of or found guilty of an offence can no longer be sent to a Young Offenders' Institution or a prison. What are your views on these proposals?

This is a vital step in upholding the rights of children in Scotland and in keeping the promise, which is clear that Young Offenders Institutions (YOIs) are not appropriate places for children and only serve to perpetuate the pain that many of them have experienced.

There has been demonstrable progress over the last few years to reduce the numbers of children who are remanded and sentenced to YOI provision. The Bill provides an important full stop on a practice that is not in line with UNCRC and with the overall Kilbrandon approach that Scotland has championed for generations.

Secure Care must be a last resort for children and there should be safeguards and mechanisms in place to ensure that all other options have been fully explored and exhausted. This may require the Panel working closely alongside the implementing authority and the child's social worker. It also requires considerable investment in early help and support for families to ensure that children are safe and secure within their families and communities, where possible.

There will, however, be some young people who do need to be deprived of their liberty in order to protect themselves and others, and Secure Care providers must be supported to ensure that young people and relevant risk is managed in a supportive, trauma informed way.

[Plan 21-24](#), which is a set of outcomes in place to reach by 2024, has made clear that there must be thorough planning and support to take forward the way in which Secure Care and other places where children live is managed. The Promise Scotland is supportive of the work that the Scottish Government is undertaking to redesign Secure Care and to ensure that providers and the workforce are ready for the changes that the Bill will bring. Clear leadership, strategic oversight of the various different moving pieces which represent this welcome change and sufficient resourcing is vital to ensure that the operationalisation of these duties are smooth and streamlined. As this work progresses The Promise Scotland is mindful that further legislative changes may be required with respect to Secure Care, which must be included in the forthcoming Promise Bill in 2026.

The Bill changes the way in which secure accommodation is regulated. It would also introduce regulation for cross-border placements (for example, a child placed in Scotland as a result of an order made in England). What are your views on the proposed changes?

The conclusions of the Independent Care Review made clear that cross border placements must end. However, this has been difficult due to the problems of availability of residential placements in England. This has led to increased demand and increase in the numbers of applications of children being placed in residential and secure care in Scotland.

The Committee has previously approved Regulations to change the way in which orders made in England and Wales have effect in Scotland. These changes make clear that a 'non Scottish order' should be considered in Scotland in the same way as a CSO or ICSO.

The recent Care Review in England recommended the development of regional collaboratives that can plan and provide for homes for children. The Promise Scotland has been clear that this should be implemented urgently.

In the meantime, a clear plan cross- Governmental plan should be prioritised alongside the provisions set out in this Bill to reduce the numbers of children being placed away from their homes and communities across the border. There needs to be strong cross-border working between the Scottish and the UK Governments as the duties in this Bill are enacted to ensure that the following is in place for children and young people who do need to come to Scotland for care and support:

- Help and support beyond the bricks and mortar of the ‘placement’ itself. That means that any consequent help and support for the child that is required from Scotland’s Local Authorities and Health Boards is clear and specified and can be reviewed. For example, mental health or trauma recovery support beyond the placement itself.
- Information about the child’s support need and plans are properly shared with the implementing authority in Scotland so there can be collaborative and joint working and the child’s rights can be upheld.
- Provisions are robust to ensure that the places children are asked to live are well regulated and supported to manage the specific needs of children who are living far away from their family and communities.

The provisions set out in Section 25 of the Bill should support improved information sharing and clarity over the legal status of children who are moving between England and Scotland. No child should be left in limbo, far away from their family and community while administrative and bureaucratic processes prevent the help and support that children need from being put in place.

In addition, the promise was clear that Scotland must strive to become a nation that does not restrain its children. The Promise Scotland supports the calls for the legislation on restraint to be consolidated and clarified and considers that the Committee may wish to explore this issue further as the Bill progresses.

What are your views on the proposals set out in Part 4 of the Bill?

The Promise Scotland is supportive of changes to the Antisocial Behaviour etc. (Scotland) Act 2004 to bring the Act in line with the UNCRC.

Do you have any comments on the impact assessments accompanying this Bill?

The Child Rights and Wellbeing Impact Assessment demonstrates areas of the Bill where there is a required balancing of rights. It is welcome that the impact assessment demonstrates the risk that “changing tests for MRC and secure accommodation could result in more children having their liberty restricted or deprived.” However it is also made clear that is not the intended policy intent. Children should only be engaged in the Children’s Hearings System if the legal support that the system offers (including MRC and Secure Care) is necessary. Help and support must be in place to prevent unnecessary restriction and deprivation of a child’s rights. Critically, in order to ensure individual children’s rights are upheld in the context of restriction and deprivation of



liberty it is important that children have ready access to legal advice and representation and advocacy support.

For any questions or comments please contact Chloe Riddell, The Promise Scotland's Policy Lead via chloe@thepromise.scot