Law Society of Scotland

Consultation Response

Children's Hearings Redesign – Policy Proposals: Consultation

October 2024

Photo: Gifford, East Lothian

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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Scottish Government consultation: Children's hearings redesign – policy proposals.[1] We have the following responses to put forward for consideration.

[1] Supporting documents - Children's hearings redesign - policy proposals: consultation - gov.scot (www.gov.scot)

Questions

4. The Principles of a Redesigned Children's Hearings System

What principles should underpin a redesigned children's hearing system and why?

The principles that already underpin the current system, which are captured within existing provisions: S25 of the 2011 Act (welfare of child as paramount consideration – which is consistent with a child-centred approach); s27 of the 2011 Act and Part 2 of the United Nations Convention on the Rights of the Child (Incorporation)(Scotland) Act 2024 (child's voice being essential to decision-making); Article 8 ECHR (right to family life; interference where necessary and proportionate); Article 6 ECHR (effective participation in hearings); and, more broadly, collaborative, strength-based approach to securing best outcomes for children.

What would be the advantages and disadvantages of enshrining overarching principles in legislation?

These principles are already enshrined in legislation via the combination of statutes referenced above. Therefore, this question presupposes either (or both) that (1) the 2011 Act is going to be replaced (in which case at least those principles contained therein will need to be restated) and/or (2) there is an intention to redraw the principles in some material way. In relation to the latter, it is noted that the recommendation in the Hearings for Children (2023) report about principles being enshrined in legislation was in the context of a proposal that the process be moved to a wholly inquisitorial process based upon a root and branch reformulation of the Children's Hearings system. That is not, it appears, the Scottish Government's intention and the consultation appears to recognise the existing principles as being the relevant and appropriate ones for children within the Children's Hearing system.

5. Before a Children's Hearing

5.1 Statutory Referral Criteria

What elements of language in the existing referral criteria need to be updated, if any?

o 'control'?

o 'treatment'?

o other?

It is not considered that any need for change in the language used in s.60, nor any clear benefit in doing so, has been made out. The language in s.60 is consistent

with the language used throughout the legislation as the "threshold test" for children's hearings and Sheriffs deciding whether a child requires compulsory measures. That consistency is important to ensure that children are only referred where there is a likelihood (in the sense of a real possibility) that they will become the subject of compulsory measures. Of the referral criteria in s.60(2)(a), it is the need for protection which will most commonly be the focus. However, each of the other conditions are intended to cover distinct situations that may give rise to a need for compulsory measures. They are also consistent with principles to be found in other, related legislation:

- guidance – this language is consistent with the parental responsibility in s.1(1)(b)(ii) of the 1995 Act which is the only one which subsists beyond age 16. A referral under this criteria might be appropriate, for example, in relation to a teenage child approaching 16 who has ongoing support needs which might persist beyond 16 (e.g. to engage the provisions for continuing care and after care in the 1995 Act).
- treatment – this might apply to a child who has medical needs where there is a disagreement on treatment between medical staff and parents. The child might otherwise be well-looked after but compulsory measures may be sought as a vehicle to secure authority for treatment. This would appear to be consistent with the provision in the 2011 Act for child assessment orders (as distinct from child protection orders).
- control – a child may be referred because they are beyond parental control, without fault or deficiency on the part of their parents/carers. That is a ground of referral in relation s.67(2)(n).

If it is accepted that the existing language serves an important purpose, the issue is simply whether there is any benefit from the reformulation proposed. It is not clear what the benefit from the proposed changes would be. These appear to be semantic in nature. The new terms – e.g. support – are vague so unlikely to give greater clarity. In any event, and importantly, the existing terminology is supported by a body of case law and guidance which has developed over a number of decades. There is a real risk that this revisal might cause substantial uncertainty.

Do you support the proposed referral criteria from the Hearings for Children report?

No. There is no discernible advantage in changing the statutory language. See above.

What are the advantages or disadvantages of the proposed draft referral criteria?

There is no discernible advantage. The obvious disadvantage is introducing new language is we lose well-established, tried and tested language that is understood

by stakeholders within children's hearing system and by the courts and in respect of which there is an established body of caselaw and guidance. New language can of course be understood but as with any new legislation, or significant amendments, there will be a period where this requires to be "tested", during which there will be greater scope for ambiguity, unnecessary debate, and likely delay.

Do you have any other comments about potential changes to the referral criteria?

No comments.

Do you support the proposal to change the applicable referral test that compulsory supervision 'might be necessary' to it being 'likely to be needed'?

This also appears to change for change's sake. Superficially the latter appears to introduce a higher threshold, but there is established caselaw which explains that 'likely' in the context of the 2011 Act means "real risk" or "real possibility" rather than "more likely than not". As such, it is not clear that the change is of as great significance as might first appear. Even if it is and the phrase "might be necessary" is viewed as materially broader in scope, that simply recognises the different stages of procedure and the different functions of the stakeholders at those stages. The purpose of s.60 is to ensure that children who are potentially in need come to the attention of the Principal Reporter. The purpose of s.66 is to require the Principal Reporter to assess any such referrals, and decide whether the criteria in s.66(2) are met [noting the threshold at that stage includes "whether the Principal Reporter considers that it is necessary for a compulsory supervision order to be made"]. That funnelling process is essential to ensure that decisions are made at the right stage by the right person. One unintended consequence of the change would be to concentrate decision making in the hands of local authorities; it may lead to some cases where the Principal Reporter would have considered that the test in s.66(2) was met not coming to his attention at all.

5.2 Before the Hearing – Relevant Persons

What are the advantages and disadvantages of the current definition of "relevant person"?

The main advantage is that the definition is clear. As it has been in effect since 2013 following introduction of 2011 Act, it is relatively well-understood by stakeholders. It has also been the subject to careful and comprehensive judicial consideration and clarification.

One potential disadvantage in the current definition is that there is no scope for exception. For example, in the case of automatic relevant person status this does not deal with situations where rights are in conflict; in the case of deemed relevant person status, there is no distinction drawn between persons who gain significant

involvement through familial or other ties to the child as against those who might gain that through employment status (e.g. foster carers).

Should the legislation include a definition of "parent" and if so, what should it be?"

No, the concept of parent is already well understood through the combination of s.200 of the 2011 Act and paragraph 3 of the Children's Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Person) Order 2013.

Do you have any views on whether it would be appropriate for a hearing to have the power to remove relevant person status from any relevant person in certain circumstances and if so, please explain?

The 2011 Act already provides for mechanism to review and remove deemed relevant person status where the statutory threshold is no longer met. Thus, such status is already under constant review.

The question of whether 'automatic' relevant person status should be capable of removal is far more challenging. There are 2 points that are worth noting, for context. Firstly, the purpose of having automatic status is to ensure the participation of those with the closest relationship to the child. Those persons will often be key participants in the factual matrix which gives rise to the referral to a children's hearing. Secondly, those persons are, themselves, likely to be directly or indirectly affected by decision making. Therefore, decision making in children's hearings will often involve an equilibrium of rights beyond those of the child in isolation. It is assumed that the concern is for the potential for the rights of the child and rights of relevant persons to come into conflict. Where concerning conflict of substantive rights, that is an issue that the children's hearing determine on a day-to-day basis. They are well-equipped to do so. Where concerning conflict of procedural rights (e.g. where there is a concern that the participation of a relevant person in children's hearings risks harm to the child or another relevant person), most – if not all – such issues can be resolved by using the suite of existing measures in the 2011 Act and 2013 Rules including: restricting the sharing of information to a relevant person, excluding relevant persons or representatives from hearings at certain times for certain purposes, and excusing the participation of the child or an effected relevant person. There may still be a small number of cases where those measures are insufficient and a real and substantial conflict might persist – e.g. between the child's Article 8 right to privacy and a relevant person's Article 6 and 8 rights to effective participation and family life, respectively. However, the law recognises that where legitimate policy decisions are made that might give rise to 'hard cases' and that will not normally invalidate or require change to the law.

Whilst making provision for removal of 'automatic' relevant person status may appear a solution, the consequence of doing so is to curtail the rights of the affected person. For example, if a non-resident parent's relevant person status is removed and a measure of no contact is made in respect of them, that excludes

them from decision making that directly affects them. It also, likely, deprives them of any remedy to challenge same. There is also a concern, as with any decision which requires the exercise of judgement on a case by case basis, of inconsistent, subjection or even capricious decision making. That is of particular concern where a lay tribunal would be asked to make such decisions.

Should the Scottish Government decide that it is appropriate for there to be a mechanism for removal of automatic relevant person status, that power should be conferred upon the Sheriff. That could be done by making provision for the Principal Reporter to apply by summary application to the Sheriff for removal of that status, with at least one right of appeal on a broad basis, with a second appeal available in prescribed circumstances (e.g. similar to those in other civil proceedings under the Court Reform (Scotland) Act 2014). However, if embarking upon this, the threshold test for removal should reflect the exceptional nature of this step and connote this being a step of last resort. An example would be "the Sheriff may remove the named person's automatic relevant person status where satisfied:

(a)(i) that the named person's exercise of that status has caused, or is likely to cause, the child serious harm; or

(ii) that the named person's exercise of that status has inhibited, or is likely to inhibit, the child or another relevant person's Article 8 rights;

(b) that all reasonably practicable alternative steps available to avoid or ameliorate those consequences have been considered; and

(c) in the whole circumstances, the Sheriff is satisfied that the removal of relevant persons status is necessary to give effect to its duties under s.25 of the 2011 Act and/or s.6 of the HRA 1998.

What are the advantages and disadvantages of an earlier process for deeming other people to be relevant persons?

We support front loading of cases to ensure the resolution of necessary procedural issues, and the dissemination of important information, at the earliest possible opportunity. As part of that, early determination of relevant person status is highly desirable. The main advantage is securing effective participation (Art 6 and 8, ECHR) and informed decision-making (s25 and Art 8; to an extent perhaps s27 insofar as the relevant person may be able to reflect child's views) from the outset, and all material stages including the determination of the grounds of referral. The only disadvantage is the additional administrative burden. In practice, this could be dealt with by having a wider ranging, mandatory pre-hearing panel in all cases.

What changes could be made to legislation to enable more effective gathering of information prior to a hearing and to support proper opportunities to participate for other people in the child's life?

- Imposing a duty upon referrers to identify and provide to SCRA at the point of referral contact details for key persons of particular, prescribed types (parents, carers, extended family members with known significant involvement);
- Impose a duty on local authorities when preparing reports to include details of such persons, their contact details (which can be provided separately to SCRA for GDPR purposes) and where a person's whereabouts are unknown, to detail the steps taken to trace them;
- Impose upon the Principal Reporter a duty to invite all persons who might meet the statutory definition of deemed relevant person status to a pre-hearing panel.

What are the advantages and disadvantages of the creation of an additional class of person whose views and participation are essential to the business of the hearing, but do not require the full rights and obligations of a relevant person?

The advantage is to ensure that the hearing has the fullest possible information to make decisions, without requiring that persons have conferred upon them rights that may be unnecessary, inappropriate or disproportionate to the circumstances of their involvement in the child's life. The disadvantage is that doing so further complicates matters, adding to a number of different statuses presently available. (the current legislation makes provision for additional class of persons, e.g. participation individual status and power of panel chairperson to permit any individual access to the children's hearing where they have information relevant to a determination to be made by the hearing).

5.3 Participation and Attendance

Do you agree with the recommendation to remove the child's obligation to attend their hearing, to be replaced with a presumption that the child will attend?

o If yes, what limitations would need to be applied to this presumption?

If such an approach were to be adopted, consideration should be given to it being linked to the child's age. There is a potential advantage in removing obligation and replacing with presumption where children are under a certain age, potentially removing some anxiety on the part of children and also removing need for certain perfunctory procedure (e.g., PHPs to dispense with obligation of an infant to attend a hearing). Such children may be limited in their ability to participate (e.g. responding to whether they accept or deny grounds of referral).

Equally, there is an attraction to retaining the obligation for older children, or where there are offence grounds (see below); if the former, 12 years old may be obvious cut-off point given status it otherwise holds in presumption of capacity.

However, the main disadvantage of removing the obligation is that it risks children who can, or wish, to participate in hearings being tacitly deprived of the opportunity

to do so. There is a risk that adults (e.g. parents, social workers, or foster carers) would end up making the decision on behalf of the child based upon their (the adult's) assessment of the child's best interests and without the check and balance that the existing system of requiring a children's hearing or pre-hearing panel to authorise excusal brings.

In practice, the issue here may be less about the legal threshold/presumption and more about the procedure for exercising same. If cases were front-loaded with a mandatory pre-hearing panel in every case, one of the issues to be determined could be whether the child's attendance should be excused or not. That would address the concern of children attending children's hearings against their wishes or where that would cause harm (as an aside, it is worth noting that while the children's hearing has power to issue warrant to secure child's attendance this is very rarely used as it generally cuts against s25), but ensure decision making is being made by an independent judicial decision maker on a case-by-case basis).

If a view were taken that the threshold should be a presumption rather than obligation, a mandatory pre-hearing panel would still be of use to ensure such issues are properly focussed and addressed. The same issue – whether a child's attendance should be excused or not – would arise.

Does the hearing need a power to overrule the child's preference not to attend their hearing in certain circumstances?

Under the present system, the hearing has a power in the form of warrant to secure attendance. That is rarely used, reflecting its exceptional nature (it may be appropriate, for example, in an offence ground case for an older child). Retaining the provision for hearings to review the issue of a child's attendance at the hearing (e.g. if a child is not excused but elects not to attend) allows for ongoing, informed decision making.

What steps could be taken to support the child's participation and protect their rights, if they choose not to attend their hearing?

Automatic access to advocacy to gather views; automatic access to legal advice to ensure they know their rights; duty on the children's hearing to consider the appointment of a safeguarder to represent the child's interests at the point a decision is made to excuse a child.

Should a child still be obliged to attend hearings held in consequence of offence referrals, or in consequence of the 2011 Act section 67(m) 'conduct' ground?

Given it is the child's conduct that is at issue, there is a benefit to continuing that obligation. Children's hearings are a vehicle by which children can not only give their views about their circumstances, potential causes of conduct and solutions or supports required, but also for the child to hear what the concerns are. Similarly,

children's hearings may consider the child's input to be essential to decision-making. The existing system is centred around grounds either being accepted or sent for proof (see s.93 and 94), so the child's participation at those earlier stages in participate is of some importance.

5.4 Voices of very young children

Do you agree that particular arrangements should be made to capture and share the voices and experiences of very young children in a redesigned children's hearings system?

o If so, what should those arrangements be?

It is accepted that children's voices being heard is an essential element of the children's hearing system. However, it is considered that the current arrangements are sufficient (subject to any changes on children's obligations to attend – see above). There is already a mandatory duty in s.27 to give children an opportunity to express a view where that is practicable. There are a range of means by which that can be achieved (the child attending; advocacy services; Safeguarders). If those current arrangements do not capture a child's voice and experience because they are "very young", it's likely because they're unable to articulate a view.

5.5 The offer of advocacy to the child

Should the focus and wording of section 122 of the 2011 Act be reformed to reflect an earlier, more agile and flexible approach to the offer of advocacy to the child?

Yes, to the extent of aligning the timing of the child's access to advocacy services with the 'front-loading' of decision making (discussed above). This could be achieved without any significant amendment to s.122 and, instead, by requiring the Reporter to make the child aware of the availability of advocacy services in the stages prior to the children's hearing.

How should the rights and the views of children and young people of all ages, including very young children, be better represented in the children's hearings decision making?

Consistent and unrestricted access to both (i) advocacy services and (ii) legal advice would ensure access to a wholly independent and fully informed source of information and support. At present, the policy is that a child is offered access to legal advice when secure accommodation is a possibility (and therefore the child's liberty is at stake), and possible interference with the child's family life should arguably attract similar protection. This is not necessarily done in other situations where the implications for the child can still be very serious. It can be difficult for

children to initiate access to such services themselves. There is also the risk of persons who attempt to assist the child being perceived to be trying to influence the child. Again, front loading cases would resolve this (e.g. by a child's need for access to advocacy or legal services being a mandatory consideration at a pre-hearing panel).

Should there be a statutory obligation to support the sharing of information to advocacy workers, and other people who can help children and families to understand their rights?

Yes, in the context of the front-loading referred to above.

5.6 Amplifying children's voices throughout the process

Do you support the creation of a statutory process, undertaken by the children's reporter, to record the capturing of children's views and participation preferences?

No. Any such process should be formal, and under the overview of the panel members as independent decision-maker. Beyond that, the capturing of participation preferences should already be standard practice. At ground level, that might be captured by the allocated social worker but the Reporter – with whom responsibility for convening the hearing lies – should be obtaining and retaining that information.

Any views expressed in written form are already logged by SCRA (e.g., All About Me forms), standardised social work reports already require a child's views to be obtained and recorded, and any views expressed orally during a hearing (whether by the child or on behalf of the child) should be recorded within the record of proceedings.

5.7 Before the Hearing – Provision of Papers

Should the timeframes for the provision of papers in advance of a children's hearing to the child and relevant persons as set out in the 2013 Rules of Procedure be altered?

Yes, early access to information – perhaps 7 days prior to a hearing as a minimum – would aid effective participation and minimise the risks of delays (e.g. hearings being deferred at relevant persons' requests to seek legal advice). This would, however, require qualification (and possible exemption) in the case of urgent hearings – e.g. second and eighth working day hearings following a CPO; suspension hearings etc.

Should the timeframes for the provision of papers to children's panel members as set out in the 2013 Rules of Procedure be altered?

It would make sense to keep this consistent with those for intimation to relevant persons if possible, although there may be arguments for why existing time limits are less problematic for panel members (e.g. because they are not dependent of third parties timescales such as a relevant person seeking legal advice).

6 Grounds for Referral and Associated Processes

6.1 Grounds of referral: concept and language

Do you consider the current scheme of stating the grounds of referral sufficiently promotes the understanding of children and families as to why they are in the children's hearings system?

Yes. There will inevitably be an element of 'formal' language, given the grounds of referral have a formal status as individual legal thresholds that must be satisfied in each case. These concepts and language used are settled and well-understood by stakeholders, including those who would provide advice to children and families. For example, the wording in s.67(2)(a) borrows concepts that date back to the wording in s.12 of the Children and Young Persons (Scotland) Act 1937, when defining want of reasonable care ["unnecessary suffering or injury to health"]. There is also a clear and established body of case law to assist interpretation and application of these concepts which would be lost, in the event of wholesale reformulation. As an example of both the importance of clearly defined and understood threshold tests, and the consequences of those being reformulated or expanded upon, see the discussion of the Supreme Court in In the matter of B (a Child) [2013] UKSC 33 (in particular, per Lady Hale at para 193).

Do you agree that there should be changes to the current approach to grounds of referral?

No. See below.

Do you agree with the proposal to set grounds positively as a range of wellbeing-orientated entitlements, before clarifying how the child's experience or conduct falls short of expectations - to the point that compulsory care is needed?

The introduction of "positive" language may cause confusion to what is already a well-established and well-understood statutory threshold. The example given, that a s67(a) would now read "the child is entitled to be care for in a safe and nurturing environment. The child has not been and/or is unlikely to be cared for in such an environment because..." is not necessarily easier for a layperson to understand. The change presupposes that the SHANARI wellbeing indicators are known to and well-

understood by children and families (whose understanding could be the only purpose behind a change in language, given the existing statutory language is already well-known to and understood by professionals), which seems unlikely. It also runs a considerable risk of making decision-making inconsistent, subjective and arbitrary because the 'woolly' language introduced is both difficult to define and open to interpretation. It risks conflating the purpose of grounds (legal threshold tests) with statements of fact (the case specific circumstances that have been assessed by the Principal Reporter as meeting one or more threshold test(s)). This may also increase the risk of unlawful interference with family life (Article 8 ECHR). All of this would occur without giving children and families any demonstrably greater level of clarity; clarity comes not just from the specific words used but from certainty and confidence in how they are used.

If a new scheme of grounds based on unmet expectations around wellbeing indicators were to be introduced, are any safeguards needed (statutory or operational)?

As noted, we are strongly opposed to such a change. If implemented, care would have to be taken to ensure:

(i) that the new grounds covered all of the same territory that the existing grounds did;
(ii) that any new language or phraseology used was clearly defined within the legislation, insofar as possible to mitigate the effect of losing the existing body of case law and guidance; and
(iii) that the new language sufficiently serves the purpose of identifying coherent, objectively assessable threshold tests that can be extrapolated out and applied to individual cases.

6.2 Ground of referral: processes, 6.3 Engagement between the children's reporter and children and families, 6.4 Children's views within Reporter investigation and decision making – a post-referral discussion

Do you support the introduction of the offer of a *post*-referral discussion between the children's reporter and the child and family?

There could be utility in offering a post-referral discussion but that does not require statutory change. There is also a concern that a perceived failure to engage in post-referral discussion – at a point where families may not have any legal advice – or what was said during same could form basis for criticism of family. There would have to be an understanding that such a discussion has a similar status as mediation, and cannot be relied upon in proceedings. The purpose, ultimately, should be limited to (i) aiding families' and children's

understandings of the nature of concerns and (ii) assisting families and children in contributing to the decision-making being taken in terms of s.66.

Who else, if anyone, should attend a *post*-referral discussion?

Any supports for the family, which are independent of the state (e.g. Solicitors, advocacy workers for children). It would not be appropriate for social work to be involved, given the different functions (and so the different purpose of this discussion) when compared with other types of meetings the families might be invited to.

6.5 Establishing Grounds of Referral

What would be the advantages and disadvantages of passing the fact-finding function from sheriffs to a new cohort of legal members within the redesigned children's hearings system?

This proposal seems, with respect, both unnecessary and poorly thought through. The consultation begins by recognising the principles within the Kilbrandon report as the cornerstone of the Children's Hearing system. A key part of that is the separation of function between the different machinations of the state (social work as investigators; the Principal Reporter as initial decision maker and 'prosecutor'; and the court as independent judicial decision maker on grounds). This proposal risks doing violence to that clear and well-defined demarcation in a way that risks Article 6 incompatibility. That includes:

- it not presently being clear that such persons would qualify as independent and impartial judicial decision makers for the purposes of Article 6.1;
- it not being clear what their relationship with the children's hearing members and/or the SCRA would be (noting the proposal that they would work "from existing hearing centres");
- It not being clear how such persons would be qualified (and, importantly, better qualified that Sheriffs) to make decisions on the complex issues of fact and law that are often decided by Sheriffs in grounds of referral processes; and
- It not being clear how such a procedure would replicate and preserve the existing procedural and evidential safeguards the existing proof procedure contains - we assume this is the reason for the proposed right of appeal to the Sheriff, effectively meaning this is an additional layer to (rather than a replacement for) the Sheriff's role in the existing structure.

We cannot identify any discernible advantage to such a proposal, on the information presently available. The separation of functions between Sheriffs and

Children's Hearings is a well-defined one that has been generally successful for many decades.

Do you consider that this proposal fulfils the intention of the recommendation from the Hearings for Children report that there should be a consistent specialist sheriff throughout the process?

Changes which improve expertise (e.g. via training or specialism) within the existing system are welcomed. However, we do not consider this recommendation bears any relation to the recommendation in the Hearings for Children report for specialist Sheriffs. We are concerned that this is an example of a change that may be driven by the challenging economics of implementing the recommendations of the Hearings for Children report. This proposal is, in our view, the worst of both worlds. To the extent there is a perception of a potential advantage by way of expedition (and we are not clear that would follow), this would inevitably come at the cost of fairness and robustness of fact finding. Continuity of decision-maker, for the purpose of fact finding, can and is already be achieved at sheriff court level via allocation of sheriff and case management.

Do you have any views on the proposed retention of the appeal arrangements - appeals going from legal member to Sheriff - within a redesigned children's hearings system?

If such a system were introduced, any appeal should be heard by a sheriff, with provision for further rights of appeal consistent with the existing arrangements. However, the need to do so calls into question whether the proposal actually gives rise to greater expedition or certainty for families and children.

Other than a legal member or sheriff is there another person or body who could:

- present the statement of grounds to the child and family and receive responses?
- make *interim* orders?

The panel members, as they currently do (for up to 3 ICSOs) and have done for years.

6.8 Babies, infants, very young children and the grounds of referral

In order to safeguard the interests of very young children, should the legal member or sheriff have discretion to convene a fact finding hearing, even if all relevant persons accept the statement of grounds?

Provision for this already exists. Section 106 addresses the situation where a ground is referred solely on the basis a child does not understanding (which would be under

s.94(2)(a). Section 106(2) is discretionary, and s.106(2)(b) specifically envisages the Sheriff assessing whether it is appropriate or not to determine the application without a hearing. The combination of rules 3.45(9) and 3.47(A1) of the Child Care and Maintenance Rules 1997 mean that, if such cases, the Sheriff is bound to hear evidence. That is an essential procedural safeguard, not only for very young children but for families who fail to participate (for whatever reason) in the proof procedure.

Do you have any other views about how the youngest children should be supported in this part of the process to establish grounds of referral?

Current provision is sufficient, particularly via appointment of Safeguaders (and mandatory requirement for both the children's hearing and Sheriff to consider their appointment before the first hearing on the Reporter's application).

6.7 Statutory time limits in establishing grounds of referral

A period of three months has been suggested as a time limit for triggering a review where an application to determine grounds of referral has not been dealt with.

Do you support a defined time period for triggering a review of the progress of the case?

No. Whilst avoiding delay is an important, and well-understood, principle, there are already existing safeguards in place by means of Sheriffs' case management powers and duties. A time limit of 3 months is arbitrary. The cases where that is unlikely to be capable to being met are those with particular legal or factual complexity (e.g. cases of non-accidental injury, sexual offences, or other serious criminal offending). The investigation and pre-proof procedure in those cases will be much more complex and time-consuming. To the extent they involve 'avoidable' delay, that will often be attributable to resource issues in terms of court availability, legal aid funding, and availability of Solicitors/Counsel (all of which are tied to the limitations of available funding). An imposed time limit is not a 'quick-fix' to those issues. However, it is recognised that one issue is the inconsistency of case management in different Sheriff Courts across Scotland. The Child Care and Maintenance Rules 1997 are brief, and only some Sheriffdoms (Glasgow and Strathkelvin, North Strathclyde) operate practice notes to further regulate procedure. Revisiting the rules to ensure more detailed, effective and early case management – perhaps based upon the structure of the aforesaid practice notes – might meet some of the concerns held.

If you support defining a time period, but not the suggested three months, should another time period be considered? Please explain why?

N/A. However, if the Scottish Government are of the view that timescales are appropriate, we would be of the view that those should be timescales for escalation and review of a case (e.g. a proof must be fixed within 12 weeks of the proof application being lodged, other than on cause shown; prior to the fixing of a proof the case should be reviewed at least every 4 weeks, other than on cause shown etc.) rather than hard and fast deadlines for grounds applications being determined. This is consistent with the position in adoptions and permanence order applications, where the procedural rules require a proof to be fixed within 12-16 weeks of a preliminary hearing, except on cause shown.

6.8 Potential involvement of safeguarder in grounds establishment proceedings

Do you agree that there should be earlier consideration of the appointment of a safeguarder in a redesigned system?

A Safeguarder is already involved in the grounds process where appointed. The children's hearing is under a duty to consider the appointment of a Safeguarder at every hearing [s.30(1)]. A Sheriff is under a duty to consider same when a grounds application or appeal is made [s.31(1)]. In practice, therefore, this means that the issue of the appointment of a Safeguarder is considered at least twice before a Sheriff considers an application for grounds. However, if there was a front-loading of procedure, there might be a benefit to having the children's hearing consider the appointment at the stage of any mandatory pre-hearing panel, bringing the Safeguarder in slightly earlier.

Should the proposed legal member have discretion to appoint a safeguarder to assist them with establishing the grounds of referral?

If the role of a Sheriff is being replaced by a legal member, then the existing provisions for the appointment of a Safeguarder during the fact-finding procedure should be replicated.

Do you support the suggestion that a safeguarder's early appointment to a child (before grounds have been established) should be presumed to end once grounds have been established?

No. The existing rules are similar, with the caveat that they provide for the appointment to continue until a decision on compulsory measures is made by the Children's Hearing following grounds being determined (or the determination of any appeal against any such decision). A Safeguarder's involvement is arguably most beneficial at disposal stage so should be retained until substantive decision, as presently provided for.

7. Role of the Children's Reporter

7.2 Pre-birth activity by the children's reporter

How could a redesigned children's hearings system better protect babies shortly after their birth?

The children's hearing system cannot be engaged until after a child's birth. There is good reason for that, as recognised by the Scottish Government. There are no practical ways in which the children's hearing system can better protect babies shortly after their birth. There are already existing safeguards in place for families in need to be supported, monitored and assessed pre-birth in terms of the obligations upon and procedures operated by local authority social work departments. There is no obvious role for the Reporter in that. Where there is an assessed and defined risk, the case comes to the attention of the Principal Reporter following any CPO sought by the local authority (where the risk is assessed as urgent, or following standard referral where there is not an urgency). Where the risks are to be assessed post-birth, a referral can be made in the usual way. The existing arrangements are sufficiently flexible to meet individual circumstances. The current scheme of legislation is fit for purpose.

What can be done to improve interagency pre-birth preparatory work?

No improvements can be made that involve the earlier involvement of the children's hearing system for reasons set out above. Any need for better communication can be addressed without the need for statutory change.

7.3 Pre-referral involvement of the children's reporter

Do you agree that non-statutory action (practice improvements and guidance updates) is sufficient to deliver an enhanced pre-referral role for the children's reporter in a redesigned hearings system?

Yes.

7.4 Children's reporter's ability to call a review hearing

Do you think it would be appropriate for the children's reporter to be able to initiate a review hearing before the expiry of the relevant period?

In principle, no. This bears upon independence and distinct role. However, there might be justification for them having a 'supervisory' duty to call a review where it comes to their attention that one of the statutory provisions for a review to be requested by someone else has been engaged but not acted upon (e.g. if the CSO is not being complied with but a require has not been requested by the

implementation authority – s.131; or where the child has been moved out of the place of residence named on CSO as a matter of urgent necessity – s.136).

Do you think the statutory three-month period should be revised so that individuals who are entitled to request a review of a child's CSO can do so within a shorter time period?

There could be a benefit in doing so for the reasons identified by the Scottish Government – that 3 months can be a long period of time in a child's life. The general drawback would be the risk of additional hearings with limited purpose. The right of appeal can be suspended where appeals are found to be frivolous and vexatious; a similar provision re right of review could potentially be used a counter balance if the time limitation was removed.

However, it is also worth observing that a 21 day appeal period exists following decisions, which means that in a 12 week period where the right of review cannot be exercised, it is only really 9 weeks where there is no recourse.

7.5 Re-referrals to the children's reporter within a given timeframe – a trigger for other action?

Do you consider that a child being re-referred to the children's reporter within a certain timeframe should result in that 're-referral' being treated as a continuation of the pre-existing referral?

There is some sense to the expectation that wherever possible this should be considered by the same Reporter. It is assumed that, even if not, the Reporter deciding upon a second or subsequent referral will have access to the information and decision making about the prior referral(s). However, treating a referral as a continuation of an earlier referral in some formal sense creates a risk that new concerns are inappropriately or unnecessarily linked to the previous concern, where they might be substantial different in scope or seriousness.

Insofar as the Scottish Government refers to this potentially being without family "being able to contest the new alleged facts", any new referral should require to be follow same process of being answered by family and determined by fact finder. Whether, for administrative reasons, viewed as separate referrals or a continuation of an existing referral, the same procedural safeguards and rights of participation should be guaranteed.

If yes, what would be an appropriate timeframe from the original referral for re-referrals to be treated in this way?

No comments.

8. The Children's Panel and Children's Hearings

8.1 A redesigned children's panel

Do you believe the children's panel element of the children's hearings system should retain the unpaid lay volunteer model in whole or in part?

Yes, in part. We support the recommendation of the Hearings for Children review. A legally qualified chairperson with lay volunteers in line with other tribunals is optimal. This would better equip hearings to address legal and procedural complexities that may arise, whilst balancing this against the benefits of the existing ethos and structure of the Children's Hearing system.

Would you support some measure of payment for panel members, over and above the current system of expenses, in return for the introduction of new and updated expectations?

Yes, for a legally qualified chairperson to ensure suitably qualified and skilled individuals can be attracted, consistent with other tribunals. Otherwise, this is a matter we consider to be a policy decision for the Scottish Government.

Do you have any views on the introduction of new roles into the children's panel –

o Paid Chair.

o Paid specialist Panel Member – possibly including care-experience.

o Paid Panel Member.

o Volunteer Panel Member.

1 Paid Chair, 2 Volunteer Panel Members. This is, however, on the basis that the chair is legally qualified: see above.

Recognising that payment of panel members/chairing members would represent a significant new national investment in decision making, do you have views on priority resourcing for other parts of the system?

We do not have sufficient information, either generally or within the consultation documentation, to comment. In any event, we consider that issues of priorities of funding are pre-eminently policy choices for the Scottish Government. We would simply express the view that a properly funded system may bring with it efficiency savings (e.g. reducing appeals, deferrals, and protracted procedure).

Each children's hearing currently consists of 3 panel members, with one chairing:

o Does every decision taken by a children's hearing need to be taken by three children's panel members in a redesigned system?

o Should all panel members, on completion of appropriate training, still be required to chair hearings in a redesigned system?

o Would you support some children's panel members being paid for 'specialist' knowledge, while others' involvement remains voluntary? E.g. a specialist panel member may have a particular qualification or expertise in childhood development, ACEs, or be a professional with prior experience of working with children in some other capacity.

o Would you support the remuneration of a cohort of care-experienced panel members?

Yes, three panel members should take all substantive decisions. The rules already provide for the chairperson to take certain procedural decisions. The introduction of a legally qualified chairperson should not necessarily alter this, as the point is that the chair and lay persons would be contributing to the overall expertise of the panel in different ways.

If a legally qualified chairpersons introduced, then there would no longer be a requirement for all panel members to chair hearings. If legally qualified chairpersons are not introduced, there would be a benefit in having experienced chairpersons with particular training (i.e., not requiring every panel member to chair).

Beyond those examples, we do not feel that we have sufficient information to comment upon different permutations or classes of panel members.

8.2 The Chair of the Children's hearing & 8.3 Engagement with the Chairing member before the Children's Hearing

Should the chairing member of the hearing meet the referred child, their family or representatives to welcome them to the centre and offer any appropriate explanations and reassurances before the actual children's hearing?

No, The Reporter fulfils this introductory and explanatory function. Opportunity for child to meet panel members on their own already exists. As independent decision maker, it is important to keep the roles of the Reporter and panel members distinct.

If an additional orientation / reassurance meeting is held in the hearings centre with the chairing member, would you support this being an informal meeting?

Yes.

8.4 Children's hearings decision making in a redesigned children's hearings system

Do you support the proposal that the children's hearing should have a brief period of recess/adjournment before reaching their decision and sharing it with those present?

No. Panel members should make decisions independently without "conferring". The recess/adjournment proposed runs contrary to transparency and risks creating a perception that decisions are not being reached independently. That might be particularly important if one member is legally qualified and others are not; the sharing of legal advice by a chair to lay panel members can and should occur in the presence of participants as that advice is relevant to them. It should be noted that panel members are already able to confer when preparing their written reasons.

While the consultation refers to the family being able to take a break and "decompress" as a potential benefit, on the other hand, delay of this kind also prolongs the fraught experience for the family.

Do you agree that the majority decision-making approach should be maintained, in respect of the relevant redesigned three member hearings?

Yes.

Should the children's hearing be asked to reach a unanimous decision during adjournment, in order to minimise repetition and potential retraumatisation?

No. For the reasons above, we consider that the current approach works. It allows for a range of views to be expressed. There is a concern that requiring a unanimous decision might lead to 'strong personalities' having a disproportionate influence on the overall decision-making. In addition, if legally qualified chairs are introduced, then there might be a risk that lay panel members defer to them.

If a majority decision approach remains, would you agree that any dissenting decision should be noted and explained?

Yes, which is the practice currently. This is helpful, particularly upon appeals under s.154.

8.5 Decision-making and specificity of measures in a Compulsory Supervision Order (CSO)

Do you agree that it is desirable or necessary to introduce clearer authorisation for particular interventions with children, or particular interferences with their liberty, on the face of measures included in an Interim Compulsory Supervision Order or Compulsory Supervision?

This is unnecessary. The statute identifies the specific classes of measures that may be made. As such, measures already require to be clearly defined. We consider it unrealistic to expect an order to make exhaustive provision for, or withhold provision for, all interferences that might occur under the auspices of an order. This proposal risks overcomplicating legislation, or making decision-making unduly legalistic. The provisions under s.83(2)(h) and (i) are particularly broad, and exist as a valuable 'catch-all' for the hearing to regulate issues of significance in a given case.

If so, do you agree that a 'maximum authorised intervention' is an appropriate means of delivering that clarity to children and to professionals?

No. Whatever "maximum" is put in place could presumably always be exceeded on grounds of immediate risk of harm anyway.

8.6 Timely notification of children's hearings decisions

Is the current time frames for written confirmation of the decision by the children's hearing (5 working days) still appropriate?

There is no obvious reason why this could not occur in a shorter period of time, bearing in mind the decision is written up at the conclusion of the hearing.

Should certain children's decisions (e.g for an ICSO) have accelerated notification timeframes, relative to the urgency of the decision?

Yes. If the 5 day time limit is retained, then decisions of a more limited duration (e.g. ICSOs) or with more restrictive time limits for appeal (e.g. deemed relevant person decisions) should be intimated in a shorter period. Effective use of electronic communication (e.g. email) should allow for this.

8.7 Continuity of Panel members in children's cases

Should consistency or continuity of chairing members be the default position for each child's hearing?

No, one of the strengths of the system is the diversity of panel members. Not every case benefits from continuity. Continuity can pose challenges for children and families if there has been a difficult hearing or perceive that they have been treated unfairly. Requiring children or families to actively advocate against panel member continuity is unnecessary and unhelpful. It is likely to increase conflict. The existing arrangement allows for panel member continuity to be requested in appropriate cases.

Would you support one single children's panel member's consistent involvement as an alternative approach?

No, for reasons above and also practical issues – availability could cause delays. It could also require a greater commitment from panel members which could deter during panel member recruitment.

8.8 Substantive vs Procedural decisions

Should children's panel members or chairing members, for certain procedural decisions, be able to take decisions without recourse to a full three member children's hearing?

In principle, no. There is a clear benefit in having three independent persons drawing on diverse backgrounds and experiences to determine issues. Having one lay person determining issues introduces additional risk of poor decisions. If a "procedural decision" is thought to be perfunctory, then it should not take long to determine and there would be little efficiency gained by delegating to fewer panel members. The exception to this is in respect of procedural decisions that might be appropriate for determination by a legally qualified chair alone. There are already some procedural decisions re the effective conduct of a hearing which are exclusively decided upon by the chair. In addition, if there was a move to 'front-load' procedural issues to be determined at a mandatory pre-hearing panel, consideration might be given to whether that hearing should or could be appropriately dealt with by a single, legally qualified chair. The advantage to same come from the legal and technical complexities such issues might involve, without them benefiting from the life experience and common sense that decision making about substantive issues would.

Are there other areas you would consider appropriate for a single-member decision making approach?

No.

Would you propose additional safeguards to accompany these proceedings and decisions?

No. If any decisions are delegated to a single decision maker, the requirement for clear written reasons and the rights of appeal should be retained as essential.

8.9 The Powers of the Chair during a Children's Hearing

Would it be beneficial for the chairing member to have a robust and clearly stated set of powers to manage how and when people attend and participate in the different phases of a children's hearing?

They already have sufficient powers to manage different phases of a hearing. Much of that is pre-empted by the role of the Reporter, who is responsible for notification and invitation – and who will often make practical arrangements in advance (e.g. when there is a need in a case to keep particular participants segregated, like via a split hearing).

Are the existing powers of the chairing member and of the hearing sufficient to protect the rights of all involved?

Yes, particularly in conjunction with the role of the Reporter.

What enhancements could be made to the existing powers of the chairing member and the hearing to promote inquisitorial approaches?

No comments.

8.10 Recording of Children's Hearings

In your view, should children's hearings be routinely recorded?

o If yes - which method of recording should be routinely used?

- Written
- Audio
- Video
- Other – write in.

o What are the main benefits and risks of this method of recording hearings?

o If no, what are your most significant concerns about recording hearings?

As above, privacy. Further, we see no identifiable benefit to recording.

If only the decision element of a children's hearing were to be recorded, would this change your view?

No. Decisions and the reasons for them are already recorded in writing. The Reporter – who does not participate in decision making – takes notes of the deliberations and reasons given, which are commonly referred to in s.154 appeals.

8.11 Child friendly summaries of decisions

Should there be a statutory requirement for the production of age and stage appropriate summaries of Children's Hearing decisions?

No. Where children are present at hearings, panel members already seek to adopt child-friendly summaries of decisions. Panel members should already be mindful of producing written reasons which are child-friendly. There would be a concern that doing so had the unintended consequence of depriving the recipient child of essential information. Further, this presupposes that panel members would have a clear understanding of a particular child's level of reading comprehension, use of language, cognitive abilities, and so on. This may be challenging in practice.

Should the specific needs of other family members – especially other children - be taken into account when decisions and reasons are being prepared and issued?

Where other children have PI status, yes, those excerpts of the decision which they will have access to should be understandable. Likewise, written reasons should be understandable for the children in respect of whom decisions are being made, and the relevant persons.

8.12 Family Group Decision Making (FGDM) and Restorative Justice

Is it appropriate for children's hearings to defer their decision in order for Family Group Decision Making or restorative justice processes to be offered, or to take place?

It can be, but this is not a one size fits all solution. Panels already have general powers to defer for this where they consider it appropriate, including when they do not have sufficient information. That would appear to cover this situation. The creation of a mandatory duty to do so (or consider doing so) may risk unnecessary delay: e.g. in the 'churn' of complex or contentious cases in the hope that a decision is made by someone else.

What other ways could consideration of these processes feature in the redesigned hearings system?

No comments.

9. After a Children's Hearing

9.1 After the Hearing – the length of interim orders

What are the advantages and disadvantages of increasing the statutory 22- day time limit for the duration of interim compulsory supervision orders (ICSOs)?

The advantage would be where there is a settled position it could allow for an order to last longer without requiring review – under 1995 Act the sheriff was empowered to extend equivalent orders beyond 22 day period. This could work provided there was a mechanism for child or RP to object during any order's lifespan, thereby initiating a review. That mechanism could be restricted so it is only effective after 22 days.

The disadvantage is a lack of opportunity for child's circumstances to be reviewed, for child and family to put forward their position, and to limit interference in line with statutory tests of necessity and proportionality. We consider it important to recognise that children's circumstances can be dynamic and fluid. Grounds processes come at a point of (and bring with them) substantial change for children and families. Decision making must be flexible enough to allow for the changing needs of children to be reacted to.

Do you feel that there should be more flexibility in the duration of these interim orders?

See above. If there is to be greater flexibility, it should be exercised by sheriffs rather than panel members (i.e. orders could only be longer than 22 days in duration after the 4th ICSO).

If so, in what circumstances and what maximum duration do you consider appropriate?

If the approach under the 1995 Act were reinstated, then these orders could be for as long as required. There was, under that scheme, a practice whereby equivalent orders would be continued until conclusion of proof.

Could ICSO reviews be undertaken by lone children's panel members? (See Chapter 8)

No. The limited duration of ICSOs makes them no less important – full panel required to engage the strengths of the children's hearing system. The decision making on ICSOs by children's hearings occur at the earliest stages of cases (the first 66 days), where circumstances are changing and there may be much uncertainty in respect of what child's welfare requires.

9.2 After the Hearing – the concept of a child's exit plan

Do you support the proposal to create a child's exit plan from the children's hearings system?

Yes, but achieving same through practice and policy rather than on legislative basis.

o what elements should be included in any child's exit plan

Timescales for any plan to allow discharge from children's hearing system; what that involves; and what supports will be available following discharge, which service will provide those, and recourse for child and family if those supports are not available or satisfactory. Again, all through practice and policy rather than on legislative basis.

9.3 System Redesign Overall

Do you have any other suggestions where you consider that new legislation is needed to deliver a successfully redesigned children's hearings system?

No.

9.6 Proposal

Do you agree that the timescales for review of a child's placement in secure accommodation in Scotland, as laid out in legislation, are still appropriate?

Yes.

10. Assessing Impact

10.1 Background

What, if any, do you see as the data protection related issues that you feel could arise from the proposals set out in this consultation?

No comments.

What, if any, do you see as the children's rights and wellbeing issues that you feel could arise from the proposals set out in this consultation?

No comments.

What, if any, do you see as the main equality related issues that you feel could arise from the proposals set out in this consultation?

No comments.

For further information, please contact:

Terri Cairns
Policy Executive
Law Society of Scotland
DD: 0131 476 8172
terricairns@lawscot.org.uk