



Law Society
of Scotland



Consultation Response

Clinical Pathway for Children and Young People who
have disclosed sexual abuse

July 2019



Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Child and Family Law, Mental Health and Disability Law, and Criminal Law committees welcome the opportunity to consider and respond to the Scottish Government's consultation: Clinical Pathway for Children and Young People who have disclosed sexual abuse. The committees have the following comments to put forward for consideration.

Section 1: Introduction

1. Do you believe the pathway would improve and standardise services for children who have disclosed sexual abuse and their families?

Those children and young persons who are the victims of sexual abuse need to have confidence in the way that they are handled following such allegations. The pathway seeks to improve and standardise services. The standard of service should be child-centric and not affected by where they live or to whom they disclose. The pathway may do much to support provision of confidence, transparency and support for the child.

Paragraph 1.2 of the document notes that the pathway and guidance are to be used by healthcare professionals in Scotland. We suggest that others, including those working with children and young people such as teachers and social workers, also need to be aware of and understand the pathway. Publicity and awareness raising may be required to fully achieve the aims of the pathway.

2. Are there any key areas of research missing, or any general amendments you would suggest?

We note that the document refers to children and young people making ‘disclosures’ of sexual abuse. From a legal perspective, it would be more appropriate to use the term ‘allegations’, reflecting the fact that these procedures will be taking place at an early stage of investigations, and it will not yet have been established whether a sexual assault has occurred.

There is no specific reference to how this resource should be introduced to those healthcare professionals who will be working in relation to the pathway. We would be interested to know how this will be incorporated into the training and education of healthcare professionals and those working in other relevant fields.

3. Do you have any further general comments on the pathway document?

We have no further general comments.

Section 2: Context

1. Do you agree with the context given in the pathway document?

We have concerns over the definition of a child,¹ primarily in the differentiation of 16 and 17 year olds with “vulnerabilities and additional support needs”. Introducing the concept of ‘vulnerability’ as a qualifier risks a lack of clarity and certainty in the application of the pathway, and may not result in the best outcomes for the individual concerned. In addition, it is unclear how the assessment of vulnerability will be made, who will make that assessment, and what criteria will be applied.

Being defined as a child attracts specific protections in law. For instance, the Vulnerable Witness (Criminal Evidence) (Scotland) Act 2019 (2019 Act) provides for safeguards as to how the child should give evidence in serious cases which include those of sexual abuse. This provides for all those under the age of 18 to be treated as vulnerable witnesses. In addition, the United Nations Convention on the Rights of the Child, which the Scottish Government has stated its intention to incorporate into Scots law, applies to all those up to the age of 18, which is also reflected in the Children and Young People (Scotland) Act 2014. However, we also note that the definition of child varies across different pieces of legislation, for example the Sexual Offences (Scotland) Act 2009 uses the ages of 13 and 16 when framing sexual offences against children. It

¹ Paragraphs 1.4 and 4.1 of the consultation document

would be helpful to maintain consistency of approach across the range of relevant legislation regarding children that have been affected by sexual abuse.

Clarity and certainty in how the application of the clinical pathway is to operate should be the objective taking into account what provides the best outcomes for the individual concerned.

We would recommend that the pathway applies to all up to the age of 18, with regard to the different needs of different age groups.

The description of the law in this area could be more nuanced. Paragraph 4.2 of the consultation briefly highlights the Sexual Offences (Scotland) Act 2009 Act and the distinctions made in that Act between different age groups. More could be done to set out the legal context clearly and more comprehensively. It may also be worth noting that in limited circumstances, consensual sexual activity involving older children is not illegal (e.g. where both parties are aged 13-15 and the behaviour does not involve penile penetration or genital contact; or where a party is over 16 but the difference between A's age and B's age does not exceed 2 years and the behaviour does not involve penile penetration or oro-genital contact). However, while such conduct is not covered by an age-based offence, it would of course be covered by the general sexual offences, for example sexual assault if consent is not present

Section 3: Clinical Pathway

1. Do you agree with the aims of the pathway?

We support the aims of the pathway in that it sets out how the health service is to respond to allegations of sexual abuse. This transparency helps everyone to understand the process. The requirement that the “examination meets the forensic standards required to support any future criminal justice process” is paramount. This needs to consider the issue of future proofing – preserving such evidence for future and not currently envisaged purposes, while respecting the principles of data protection and privacy.

We note that the Scottish Biometrics Commissioner Bill was introduced on 31 May 2019.² Account may need to be taken of its provisions in preparing the pathway.

2. Do you agree with the layout and content of the pathway process?

We have no comment on the layout and content.

² <https://www.parliament.scot/parliamentarybusiness/Bills/111859.aspx>

Section 4: Medical Examination

1. Do you agree with the medical examination section of the pathway?

Paragraph 6 refers to the management of taking forensic evidence. It would be helpful to have more detail to explain the phrase “carefully managed”, including reference to any existing protocols, guidelines, or similar measures and resources. We would suggest that the model of Joint Investigative Interviews should be applied to this pathway. This is an established and understood process, allowing for collaborative working and a tailored approach for each child or young person affected. There is published guidance on the Joint Investigative Interviewing of Child Witnesses in Scotland issued in December 2011.³

2. Do you have any further comments or suggested amendments to the medical examination section of the pathway document?

We would suggest that this section would benefit from a discussion of capacity, and how to assess the ability of a child or young person to consent to, or refuse, medical examination. Further detail on obtaining the views and wishes of a child or young person may also be helpful.

In addition, we would suggest that there should be greater clarity in the role of parents in situations where the child or young person is capable of consenting to treatment, including situations where they may not want parental involvement. In a situation where the child or young person has capacity, parental consent is not a relevant factor. Section 2(4) of the Age of Criminal Responsibility (Scotland) Act 1991 expressly provides that a child under the age of 16 has the legal capacity to consent to medical procedures and treatments where they are capable of understanding the nature and possible consequences of such procedure or treatment. This is applicable in the context of the pathway, and should be reflected in the pathway document. Children and young people should be fully supported to understand and make decisions on these issues, and this is likely to be an area to be included in training and guidance for those who work with children and are involved in obtaining their consent or support in relation to such procedures.

³ Scottish Government, *Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland* (2011) available online at <https://www2.gov.scot/Resource/Doc/365398/0124263.pdf>

Section 5: Appendices

1. Do you have any comments on the appendices of the pathway document?

In relation to Appendix B: Legal Context, we would refer to our comments on section 4, above. We also note that reference should be made in this appendix to the Adults with Incapacity (Scotland) Act 2000. This Act applies to individuals age 16 and over, and is likely to be of particular relevance to people with “vulnerabilities and additional support needs”, who may have a guardian appointed to them. The pathway document should accordingly take account of the roles and functions of appointees and others under the 2000 Act.

It may also be useful to refer in more detail to some of the obligations undertaken by the United Kingdom by ratification of United Nations Convention on the Rights of the Child and Convention on the Rights of People with Disabilities.

Section 6: Final comments

1. Do you have any comments or additions on topics which are not covered in previous sections? Please be specific in your reasons and include any resources or references we should consider.

Table 2 of the consultation provides data for the number of persons proceeded against for sexual crimes relating to children but it is made clear that “convictions / proceedings data does not include any sexual crimes against children where the age of the victim was not specified in the legislation used to prosecute the offender”. It would be helpful to know which offences have been included here, and the possible impact that this method of calculating might have on the statistics. For example, the indication is that these figures would not include, for example, a prosecution of a person for the offence of rape in cases where the victim was an older child (age 13-15) because age of the victim is not specified in section 1 of the Sexual Offences (Scotland) Act 2009.



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