Introduction

The Law Society of Scotland is the professional body for over 12,000 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.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation on the policy proposals for the Children’s Care and Justice Bill. The Committee has the following comments to put forward for consideration.
Consultation questions

Question 1: Where a person has been harmed by a child whose case is likely to proceed to the children's hearings system, should further information be made available to a person who has been harmed (and their parents if they are a child) beyond what is currently available?

• Yes / No

If yes: what further information should be made available?

If yes: are there specific circumstances when further information should be provided and what would those circumstances be?

Please give reasons for your answer

We have no comment.

Question 2: Where a person has been harmed by a child who has been referred to a children's hearing, should SCRA be empowered to share further information with a person who has been harmed (and their parents if they are a child) if the child is subject to measures that relate to that person?

• Yes / No

Please give reasons for your answer

We are of the view that it is reasonable for information to be given about conditions to keep the child away from specific persons or places or to restrict the child to a property during specific times. Comparably, this information is available to potential witnesses from the Victims Information and Advice service (VIA) provided by Crown Office and Procurator Fiscal Service (COPFS) if a child or young person is prosecuted in the criminal courts.

Question 3: Where a person has been harmed by a child who has been referred to the Principal Reporter, should additional support be made available to the person who has been harmed?

• Yes / No

If yes, what additional supports do you feel are necessary?
If yes, should this apply to all people who have been harmed or only in certain circumstances? (Please specify)

We have no comment.

**Question 4: Should a single point of contact to offer such support be introduced for a person who has been harmed?**

- Yes / No

If yes, should this be available to all people who have been harmed or only in certain circumstances? (Please specify)

If yes, who should be responsible for providing the single point of contact?

Please give reasons for your answers

We consider that it would be reassuring for a person harmed by a child or young person if a single point of contact were able to provide support and/or information (e.g., the police when the initial report was made). We are of the view that it would be of benefit if a single point of contact were able to provide, for example, a card with contact details for a named contact who could then be approached throughout the process to provide information such as

- advice on what measures are being put in place to reduce the likelihood of the child offending again in a similar manner,
- to advise if the person is likely to be required as a witness,
- if there is any avenue to obtain restitution or compensation etc.

We recognise that this support should ideally be universally available, and, if resources did not allow for that, perhaps those most seriously harmed could be prioritised within this scheme. We have no view on whether the single point of contact should be within the police service, SCRA or a newly created entity provided the police were able to provide their details to the person harmed at the earliest opportunity.

**Question 5: Should existing measures available through the children's hearings system be amended or enhanced for the protection of people who have been harmed?**

- Yes / No

Please give reasons for your answer

If yes, please provide details of how they should be amended or enhanced
We are of the view that consideration should be given to registration provisions being imposed for a \textit{finite period} for children who are being dealt with via the Children’s Hearing System (CHS) that are found to have committed sexual offences which would be registerable in terms of Sexual Offences Act 2003, had the child been dealt with in the criminal justice system. We also consider that this may provide a degree of reassurance to those persons harmed by the child that they will be closely monitored.

**Question 6: Should MRCs be made available to children who do not meet the current criteria for secure care?**

- Yes / No

**Please give reasons for your answer**

**If yes, what should the new criteria for MRCs be?**

Currently, Movement Restriction Conditions (MRC’s) can only be imposed where a child meets the criteria for secure care and where it is necessary to protect the public from serious harm. For example, where a child is likely to cause injury to another person. We suggest that consideration should also be given to whether such a condition may be appropriate e.g., just to protect the public from harm rather than from serious harm.

We note that in the current system, if a child is prosecuted via the criminal justice system the court has the power to place the child on bail with special conditions pending determination of their case which can include a movement restriction or curfew. We consider that imposing a mechanism which allows the Children’s Hearings System to impose a restriction of movement condition with a lower test for public protection could bring it in line with the court’s powers. However, it should be noted that sentences which impose a restriction of liberty order or restriction of movement order are used as direct alternatives to custody which is the higher test currently being applied in terms of section 26 of the Children’s Hearings (Scotland) Act 2011\(^1\).

**Question 7: Should any of the above options be considered further?**

- Yes / No

**If yes, which option(s)?**

**Please give reasons for your answer, including any positive or negative implications of any of the proposals.**

We have no comment.

\(^1\) [Children's Hearings (Scotland) Act 2011](https://www.legislation.gov.uk)
Question 8: Please give details of any other ways in which the use of the children's hearings system could be maximised, including how the interface between the children's hearings system and court could change.

We support raising of the maximum age for referral to the Principal Reporter, so that 16 and 17 year olds who are not subject to a CSO can also access this system. We are of the view that there is no sound basis for the two-tier approach which exists in the system at present. However, we would caution that there are challenges with the Children’s Hearings System in general, including volunteer panel members who are not experienced in dealing with children accused of a crime, and potentially have not received the appropriate level of training (including trauma informed training) which is required to fulfil their role. Concerns have also been expressed that children feel judged by panel members and feeling that panel members are not genuinely concerned about them, as well as a lack of understanding, and the very different socio-economic and age profile of panel members compared to the majority of children they see².

Question 9: Should any of the above options be considered further?

- Yes / No

If yes, which option(s)?

Please give reasons for your answer, including any positive or negative implications of any of the options. We are particularly interested in implications for people who have been harmed.

We have no comment.

Question 10: Where a child requires to be deprived of their liberty, should this be secure care rather than a YOI in all cases?

- Yes / No

Please give reasons for your answer

We are of the view that it is preferable for most cases to keep a child separate from the potential influence of older more experienced offenders for as long as possible but note that be funding would need to be made available to increase secure care provision which is, at present, very limited.

² Scotland’s approach to children in conflict with the law (cycj.org.uk) at page 58 and 59
Similarly, we support the use of secure care rather than placing children into Young Offenders Institutions (YOI’s). We also support the minimisation of cross border placements. We note that research supports this position\(^3\) that secure care is a more appropriate and positive approach\(^4\).

**Question 11: Should there be an explicit statutory prohibition on placing any child in a YOI, even in the gravest cases where a child faces a significant post-18 custodial sentence and/or where parts of a child's behaviour pose the greatest risk of serious harm?**

- Yes / No

*If no, in what exceptional circumstances should use of a YOI be considered?*

**Please give reasons for your answer**

We consider e.g., in murder cases where a child would require to transfer not only to a YOI but subsequently to an adult prison where considerations of trying to keep the child separate from more experienced offenders can necessarily only be for a limited duration anyway. We are of the view that there may be an argument for placing such a child in a YOI initially to reduce the disruption of repeated moves and to enable them to benefit from access to more services including mental health provisions and education.

**Question 12: Should existing duties on local authorities to assess and support children and care leavers who are remanded or sentenced be strengthened?**

- Yes / No

**Please give reasons for your answer**

We are of the view that this would be of benefit, with particular reference to rehabilitation for a child on leaving a custodial setting. We note that at present, there is invariably no certainty where accommodation will be provided. We consider that it be helpful if there was a nominated person such as that within the Social Work Department who could liaise with the young person in advance of leaving the custodial setting. We consider that providing firm plans about being picked up on release and taken to supported accommodation where assistance will be provided with e.g., registering for benefits, registering with relevant medical services, addiction support, employment and training agencies would be of benefit to the child or young person and would provide reassurance and certainty.

Children and young people leaving care without such support and assistance may struggle to live independently and may be at risk of recidivism.

\(^3\) Nolan et al. CCJ 2017 Just a wee boy not cut out for prison.pdf (strath.ac.uk)
\(^4\) Scotland’s approach to children in conflict with the law (cycj.org.uk) at para 3.9 and 3.10
Question 13: Do you agree that the three above changes related to anonymity should be made?

- Yes to all changes
- Yes but only to some changes (please identify which ones)
- No

Please give reasons for your answer

If yes, please provide details of how could this be achieved

The proposed anonymity changes would bring Scotland into line with proposals in England.

Question 14: Do you agree that the regulatory landscape relating to secure care needs to be simplified and clarified?

- Yes / No

Please give reasons for your answers

If yes, please provide details of how this could be achieved

At present, local authorities are responsible for the funding of secure care of children and young persons pre-sentence, thereafter this becomes the responsibility of Scottish Ministers.

Currently, 16 and 17 year olds not subject to SO's/ ISO's remanded by a court have to go to a YOI rather than secure accommodation. We submit that a review of the whole system would make it possible for all young persons of equivalent age to receive equal treatment.

Question 15: Do you feel that the current definition of "secure accommodation" meets Scotland's current and future needs?

- Yes / No

Please give reasons for your answers

If no, please provide details of how this could be changed

We have no comment.
Question 16: Do you agree that all children under the age of 18 should be able to be placed in secure care where this has been deemed necessary, proportionate and in their best interest?

- Yes through all routes
- Yes but only through certain routes
- No

Please give reasons for your answer, including any positive or negative implications

We have no comment.

Question 17: Should the costs of secure care placements for children placed on remand be met by Scottish Ministers?

- Yes / No

Please give reasons for your answer

We have no comment.

Question 18: Is a new national approach for considering the placement of children in secure care needed?

- Yes / No

Please give reasons for your answer

If yes, please provide details of what this approach should look like

As noted at question 14 above, Scottish Ministers currently fund YOIs. We are of the view that diversion of 16 and 17 year olds from YOIs to secure accommodation would free up some resources allowing Scottish Ministers to reapply funding secure placements which is hoped would solve the issue of the current secure accommodation providers requiring to accept cross border children as a way of maintaining financial viability.

Question 19: Is provision needed to enable secure transport to be utilised when necessary and justifiable for the safety of the child or others?

- Yes / No

Please give reasons for your answer
We have no comment.

**Question 20:** Are there any other factors that you think need to be taken into account in making this provision for secure transport?

- Yes / No

Please give reasons for your answer

We have no comment.

**Question 21:** Do you agree children should be able to remain in secure care beyond their 18th birthday, where necessary and in their best interests?

- Yes / No

If yes, for all children or only those who are remanded or sentenced?

If yes, how long for?

- For as long as the child’s needs require it
- To a maximum length of remand or sentence (and if so what should this be?)
- To a maximum age (and if so what should this be?)
- For another period (please specify)

Please give reasons for your answers

If yes, please provide details of these factors

Our view is that if the definition of secure care was redefined, it may be possible to extend its use beyond the age of 18 where appropriate. We suggest that this could incorporate the time remaining on remand or on a custodial sentence. We submit that such a system should be considered on a case by case basis and in specific reference to the child’s needs requirements rather than imposing a mandatory cut-off date for all cases.

**Question 22:** Do you agree with the introduction of pathways and standards for residential care for children and young people in Scotland?

- Yes / No

Please give reasons for your answer
If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

We agree that the introduction of Pathways and Standards for residential care of children in Scotland would be of benefit. We also consider that providing a link to the Care Inspectorate would provide a degree of transparency and predictably whilst also ensuring that standards of best practice are being adhered to.

Question 23: Do you agree that local strategic needs assessment should be required prior to approval of any new residential childcare provision?

- Yes / No

Please give reasons for your answer

If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

We submit that there will be a greater need for new residential childcare provision in areas of higher population density, however we contend that it would be unjustifiable to relocate children from rural areas away from family purely for financial and expediency reasons. We contend that consideration should be given to the creation of a few small, localised units that have an ability to share their services with larger more centralised units. We are of the view that this would allow a child to move to another unit for a specific period to complete a course or activity. This would probably require Supervision Requirements with a condition of residence to be amended to include such a possibility.

Question 24: Do you agree that there should be an increased role for the Care Inspectorate?

- Yes / No

Please give reasons for your answer

If yes, please provide details of what measures and provisions are needed and how you think this should operate in practice

We have no comment.
Question 25: Do you agree that all children and young people living in cross-border residential and secure care placements should be offered an advocate locally?

- Yes / No

If yes, please provide details of how you think this should operate in practice

We note that if a named person from the secure or residential placement was able to liaise with an advocate from the local area, it may be of benefit to the child or young person in certain circumstances. For example, it may allow them to maintain familial relationships by way of pre-arranged video calls for the child with family unable to travel to the placement.

Question 26: Whilst there are standards and procedures to follow to ensure restraint of children in care settings is carried out appropriately, do you think guidance and the law should be made clearer around this matter?

- Yes / No

If yes, please provide details of how this could be achieved

We have no comment.

Question 27: Do you agree that the review of the 2019 Act should take place, as set out, with the 3-year statutory review period?

- Yes / No

If no, what period do you think is appropriate?

If a shorter review period, how should the Scottish Government to address the lack of review findings or data to inform such a change?

We are of the view that there is a need for continual review. Further, we consider that this should take place over a shorter period. Whilst we acknowledge the recent change to the age of criminal responsibility in Scotland to age 12, we would caution that Scotland is behind international standards on this point (this was made during the passage of the 2019 Act itself)\(^5\).

We note that article 40 (3) of the United Nations Convention on the Rights of the Child, requires State parties to establish a minimum age of criminal responsibility. Whilst we recognise that the article itself does not specify an age, we note that it recommends a minimum age of at least 14 years old.

\(^5\) [Raising the age of criminal responsibility in Scotland – a step in the right direction (clanchildlaw.org)](https://www.clanchildlaw.org)
We could also draw reference to the 2019 General comment from the UN Committee on the Rights of the Child, *General Comment No. 24 (2019): Children’s rights in juvenile justice* which replaced General Comment No.10 (2007). In particular, at para 22 it is stated that: “Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. *States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.* Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.”

**Question 28:** 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?

We have no comment.

**Question 29:** 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?

We have no comment.

**Question 30:** 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?

We have no comment.
For further information, please contact:

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