**FACULTY OF ADVOCATES**

**RESPONSE**

**to**

**CHILDREN'S HEARINGS REDESIGN – SCOTTISH GOVERNMENT PUBLIC CONSULTATION ON POLICY PROPOSALS**

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This response has been prepared by the Advocates' Family Law Association on behalf of the Faculty of Advocates.

## INTRODUCTION

We consider that this wide ranging and large consultation on the re-design of children's hearings may be premature. A significant issue for consultation – the creation of a new "legal member" – is embryonic in its development.

At paragraph 2 of the consultation, the Scottish Government set out the policy aims of the consultation paper and include at bullet point 3:

*"To minimise the obligations and expectations on children and families to prepare for, and to attend proceedings - while preserving essential rights and participation protections"*

It appears to us that the preservation of essential rights and participation protections must necessarily be paramount and the priority for the Scottish Government in any proposed re-design of the children's hearing; we have some concern about the achievement of this in instances detailed in our response below. Decisions of children's hearings (and the courts in proceedings emanating therefrom) have far

reaching consequences for children and families and the priority must be to ensure that the rights of those children and families are protected.

## SECTION 4: THE PRINCIPLES OF A REDESIGNED CHILDREN'S HEARINGS SYSTEM

### 4.2 Proposals

***What principles should underpin a re-designed children's hearings system and why?***

Following upon the Kilbrandon Report and through the decisions of the Inner House of the Court of Session and the Supreme Court, the principles which ought to underpin a re-designed children's system are the principles which underpin the current system. A child's welfare throughout their childhood is the paramount consideration for decision makers in the children's hearing system. The system itself and the decisions thereof require to be compliant with Articles 6 and 8 of the European Convention on Human Rights ("ECHR"). In connection with the children's hearing system, any child or young person (up to the age of 18), must be afforded a sufficient opportunity to be heard and participate in proceedings which affect her or him. Those principles are already enshrined in the Children's Hearings (Scotland) Act 2011 ("the 2011 Act").

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

The above principles are already enshrined in the 2011 Act. The extension of overarching principles to GIRFEC and SHANARRI concepts would be disadvantageous. They are concepts which assist in interpretation of "welfare" and ought not to be the basis for legislation. Legislation needs to be clear, concise and readily understood and interpreted.

## SECTION 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?***

We do not consider there ought to be any updating of language in the existing referral criteria. The making of a compulsory supervision order ("CSO") is a significant interference in the family life of a child and their family. It is only justifiable in limited circumstances. Removal of the word "treatment" would be misleading especially where a child's CSO may contain authorisations for medical treatment. Removal of the word "control" would also be misleading where measures in a CSO may limit the child's liberty (secure accommodation) or may prohibit the child's presence in a particular property or area.

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

No. See answer above.

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

See answer above.

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

No. See answer above.

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

No. The change appears to be one of form rather than substance and is unnecessary.

5.2 – Before the Hearing – Relevant Persons

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

The present definition permits the full participation in children's hearings of a biological parent who has had no involvement in a child's life. Where that parent does not have parental responsibilities and parental rights, there is no statutory mechanism for removal of that parent's status as relevant person no matter the circumstances (parental responsibilities and parental rights cannot be removed from a person who has never had same). The consequences are far reaching. Such a person will have access to the child's (and frequently to other relevant persons') sensitive personal data. They will have a right to participate in decision making in relation to the child. Those circumstances are the subject of an ongoing judicial review in the Court of Session which is at avizandum. A decision of the Lord Ordinary is imminent. Any consideration of changing the definition of "relevant person" ought to be informed by the decision in that case. See also answers below.

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

Yes. Any definition ought to be limited to parents with parental responsibilities and parental rights (unless they have been removed). A mechanism exists (as was suggested by the Supreme Court in *Principal Reporter v K [2010] UKSC 56*) for parents without parental responsibilities and parental rights to be deemed a relevant person.

***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?***

In the event of the legislation continuing to have an expansive definition of parent, a mechanism is required to allow a hearing to remove the status of relevant person. Those provisions must be subject to specific procedure and appeal mechanisms to ensure compliance with Article 6 of ECHR.

***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?***

The referral of a child to the Reporter ought to identify all those with significant involvement in the child's life and the referral agencies supported with adequate resources to provide as much information to the Reporter as possible. At present, there can only be limited investigation of those with involvement in the child's life and their views to enable the Reporter to invite attendance 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?***

As highlighted by the Supreme Court in *ABC, Petitioner [2020] UKSC 26*, the children's hearing must use the statutory scheme and rules of the children's hearing to ensure the hearing has all the relevant information in relation to a child. The creation of a statutory class of persons who would not be required to attend the children's hearing but who would have the right to participation would appear to us to be advantageous to ensure consistency and to ensure those with involvement in a child's life are enabled to participate in decision making related to the child.

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?***

No. The attendance of the child at their hearing ought to be a central feature of any children's hearings system. The decisions of a children's hearing have far reaching consequences for children who ought to be involved the decision making. Their presence is required.

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

If the obligation to attend is removed, a power to require the child to attend is necessary.

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

If the obligation to attend is removed, local authorities would require to be adequately resourced to obtain all relevant information from the child in advance of the hearing and to provide that, in a separate document, to the hearing. Further, the power to require the child to attend would be necessary to ensure participation where sufficient information is not made available.

***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?***

If the general obligation to attend is removed, it must be retained for offence grounds.

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 re-designed children's hearings system?***

Yes. Local authorities must be adequately resourced to enable same without filtering.

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?***

The wording of legislation requires to ensure that a child is offered advocacy services at the very earliest opportunity in relation to referral to a children's hearing. Such advocacy services must be properly and adequately resourced. Faculty is aware of problems with implementation of provision of the advocacy service included in the Children (Scotland) Act 2020. Any statutory provision requiring advocacy services to be offered to a child ought to be implemented before framework legislation is enacted.

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

By adequately resourcing an advocacy service and making it available to all children.

***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?***

No. A child's advocacy worker ought to be the child's alone and not have a wider representative function in respect of the child's family. There may be conflict between the child's interests and those of their family. The sharing of personal and sensitive data ought to be limited. The width of the question suggests sharing of information with "other people". The child's advocacy worker should be provided with sufficient information to enable them to represent the views of the child in a children's hearing. Beyond that there should be no requirement for sharing sensitive and personal information in relation to the child.

<u>5.6 - Amplifying children's voices throughout the process</u>

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

Yes – with the caveat that such a system must be supported by the provision of the child's views and participation preferences in an adequately resourced manner. Any

such statutory process must be designed in such a way as to avoid it becoming a tick-list which is satisfied in form rather than substance.

5.7 - Before the Hearing – Provision of Papers

We would suggest that the system for provision of papers to the child, relevant persons and children's hearings members ought to enable consideration of the papers in advance of the children's hearing and limit the necessity for continued hearings. That should extend to a consistent system for the provision of papers to legal representatives who are known by the Reporter to represent a child or relevant person. Modern mechanisms for the provision of papers ought to be adopted as far as possible while preserving security of personal and sensitive data. In a small jurisdiction like Scotland, consistency of approach ought to be easily achieved.

## SECTION 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?***

Whether to change the grounds of referrals from those currently listed in s.67(2) to grounds that are aligned to the statutory wellbeing indicators is a matter of policy and Faculty does not comment on the principle of adopting such an approach. However, the following observations are made to inform consideration of the suggested change in approach:

- Faculty is unaware of any empirical research that indicates that children and families do not understand why they are in the children's hearings system where that lack of understanding is caused by the statutory language in s.67.

- That being so, Faculty would draw attention to the benefit that comes from the currently-worded grounds of referral (and the similarly-worded predecessor

grounds contained in the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968 before that) having been the subject of many years of judicial analysis.[1] The benefit is in solicitors, counsel and others being able to advise their clients on the tests that the court will apply in determining whether grounds are established; and the assistance the courts themselves derive from previous judicial determinations, including at an appellate level, on the constituent elements of the grounds and the proof required to establish same. In a rights-based society, in particular in cases involving state interference with family life, it is of the utmost importance that there is some certainty in what the Reporter will require to prove in order for a ground of referral to be established. That factor should weigh heavily in the balance when considering whether a change is required.

- In any event, at present (and in the statutory predecessor to the 2011 Act), the supporting facts set out the basis upon which the Reporter believes a ground of referral exists. It is not clear to Faculty how a positively framed ground of referral could be supported by negatively framed supporting facts. A major premise of the kind suggested ("the child is entitled to be cared for in a safe and nurturing environment") would not, on an ordinary reading, be supported by a minor premise setting out the manner in which the child is said not to have been provided with such an environment.

- Finally, there could be unintended consequences of aligning the language of grounds of referral with positively framed wellbeing indicators. For example, it may not be strictly legally accurate to say that a child "has a right" or "is entitled" not "to be a member of the same household as a child in respect of whom a schedule 1 offence has been committed". The consequence of a ground framed in such terms being established could be (unintentionally) to suggest to the

[1] By way of just one example, see the case law on the s.67(2)(a) ground ("child is likely to suffer unnecessarily…"), e.g. *M v McGregor* 1982 SLT 41, *D v Kelly* 1995 SLT 1220, *H v Harkness* 1998 SLT 1431, *McGregor v L* 1982 SLT 193, *B v Authority Reporter* 2011 SLT (Sh Ct) 55.

children's hearing – the ultimate decision-maker – that a compulsory supervision order in particular terms ought to be made. That is a risk which Faculty considers should be avoided. It is on any view more neutral for it to be established, simply, that the child "is, or is likely to become, a member of the same household…", without mentioning rights or entitlements, and to leave it for the children's hearing to determine what if any order it ought to make in the light of that established ground.

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

See answer above.

***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?***

See answer above.

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?***

Faculty in principle endorses better engagement between the Reporter and families and has no particularly strong views on this proposal as a matter of principle. However, the following should be considered in the development of any such proposal:

- It would require to be made clear to the children and relevant persons what purpose the 'discussion' is serving and to what use anything that is said by anyone attending the discussion will be put. In particular, if the Reporter would be able to rely upon anything said by anyone at the discussion, then that – and the attendant right against self-incrimination – would require to be made clear.

- It would require to be enshrined in any changes to rules of procedure/practice notes that no inference could be drawn from a decision to decline the offer to attend the discussion.

- It is not clear what is meant by 'family'. If that includes members of the family who either raised the concerns in the first place or who might be witnesses for the Reporter, that may add complexity to, and diminish the value of, any such discussion.

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

Depending on the purpose of the discussion and the use to which anything said at it could be put, those attending ought to be entitled to be accompanied by their solicitor.

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?***

Faculty considers that there would be no advantages to this proposal. Indeed, Faculty has considerable concerns with this proposal. Before setting out those concerns, the following background is worth noting:

- The children's hearings system as currently constituted is one which has evolved since its creation in 1968 and in its current iteration represents a careful balance of rights. In so saying, Faculty does not submit that the system cannot be improved upon nor that the balance has been struck correctly in all aspects of the system. However, it is a system that throughout its evolutions in 1968,

1995 and 2011 has had at its fore two basic premises which, as Professor Norrie notes,[2] provide the system's philosophy:

- First, it is assumed that child who has committed an offence is just as much in need of protection, guidance, treatment and control as is the child against whom an offence has been committed; an assumption at the heart of the s.25 welfare principle.

- Secondly, a court of law, with its adversarial traditions, is an appropriate forum to resolve disputes of fact. However, a court is inappropriate for determining, in a welfare context, what if any form of protection, guidance, treatment or control a child needs.

In other words, as Professor Norrie goes on to say, the court is accepted as the appropriate forum to find out the truth, but a less appropriate forum, in this context, to determine how to react in the light of the discovered truth.

- While the children's hearing is often described as "informal", that is a fundamental misunderstanding of the hearing's role. It is a quasi-judicial tribunal that must conform to the standards of natural justice and the protections enshrined in Art.6 and 8 ECHR. Both the Reporter and the hearing itself are public authorities for the purposes of the Human Rights Act 1998 and are obliged to act in a manner consistent with the ECHR and also the UN Convention on the Rights of the Child. It follows that the process from start to finish must be consistent with ECHR and UNCRC requirements. The 1998 Act and the rights incorporated therein by the ECHR has been the subject of many litigations arising out of the children's hearings system, including cases which reached the UK Supreme Court and the European Court of Human Rights.[3] In cases where the Art.6 ECHR rights of a relevant person were the issue,[4] the

[2] K. McK. Norrie, *Children's Hearings in Scotland* (4th edn) at pp 3-4.

[3] See, e.g., *McMichael v United Kingdom* (1995) 20 EHRR 205; *Principal Reporter v K* 2011 SC (UKSC) 91; *ABC v Principal Reporter* 2020 SC (UKSC) 47. See also *S v Miller* 2001 SC 977 and *M v Authority Reporter* 2014 SLT (Sh Ct) 57.

[4] In particular *McMichael v United Kingdom, S v Miller* and *M v Authority Reporter*.

courts' assessment of the system were in each case founded, at least in part, in the bifurcation of responsibilities as between the children's hearing and the Sheriff. Indeed, it is of import to note that in relation to the child-offence ground (s.67(2)(j)), the sheriff with jurisdiction to determine the grounds application is the sheriff who would have jurisdiction if the child were being prosecuted for the offence (s.102(2)).

- This separation between the issues of adjudication of the allegations in the grounds of referral – a task to be performed by a court of law – and the consideration of whether a CSO should be made – a task to be performed by the lay panel – was described by the Lord President (Hope) as the "genius" of the Kilbrandon reforms (*Sloan v B* 1991 SLT 530 at 548E).

- The right to dispute the grounds of referral is plainly an essential part of the children's hearings system and indeed of its ECHR compatibility. Given the gravity of the interference with the right to respect for family life enshrined in Art.8 ECHR that the making of a compulsory supervision order can bring about, the importance of the right to dispute the grounds can hardly be overstated.

With all that in mind, Faculty is unclear why it is being proposed to transfer the fact-finding role of the sheriff to "the Legal Member". Faculty notes that the careful review conducted by Sheriff David Mackie in *Hearings for Children* made no such recommendation; indeed, that review described the role of the Sheriff as being "fundamental" to the children's hearings system and called for Sheriffs to be given a more expansive role and for there to be specialist sheriffs conducting the proceedings.[5] But much more important than the fact that this proposed transfer was not recommended by Sheriff Mackie are the following concerns:

1. It is nowhere set out in the consultation precisely who the Legal Member would be (other than that they would be legally qualified) or of what organisation they would be a member. Despite repeated attempts to obtain clarification, it is

[5] *Hearings for Children: Hearings System Working Group's Redesign Report* (May 2023), page 87.

apparent the Scottish Government has not yet identified the organisation of which they would be a member. The proposal is thereby premature for consultation. However, Faculty comments further as follows. Since determining grounds of referral engages the ECHR and since the process involves the determination of Art.6 rights, the tribunal or court so determining must be independent of all parties. In the context of the bifurcation of responsibilities as summarised above, that includes independence from the children's hearing which will make the welfare-based decisions. That independence does not require to be established when it comes to those holding the office of Sheriff; they are independent by virtue of the office itself.[6] The same cannot be said for the Legal Member as proposed in the consultation. While it is said that they would not be (and of course could not be) a children's panel member, it is unclear of which organisation they will form part; who will be responsible for their training, education and professional regulation; who will be responsible for promulgating the rules of procedure under which they will operate; how they will obtain their powers; what powers they will have; and where any appeal against their decisions would be heard. That lack of information is all the more concerning given what is stated at page 29 of the consultation, *viz*.: *"The proposals could also bring the realisation of the concept of continuity of decision-maker…within the* ***direct control*** *of the appropriate and discrete mechanisms integral to the redesigned children's hearings system, and potentially relieving the courts system of the burden of the demand."* (emphasis added.)

2. The matters which are currently the subject of proofs before Sheriffs are almost without exception serious. Indeed, although heard in the Sheriff Court, the matter which has prompted the Reporter to refer the child to the children's hearing can involve allegations of the most serious criminality that the Scottish courts hear, including, of course, rape and murder. It is far from uncommon for the Sheriff to require to determine whether something has occurred which, were

[6] See *X v Brown* 2014 SLT 454 for a recent analysis by the Inner House of the independence of the judiciary and in particular of the office of Sheriff.

it to be the subject of criminal proceedings, could only be heard by a jury in the High Court of Justiciary. The professional backgrounds of Sheriffs, the training and support that they receive from *inter alios* the Judicial Institute for Scotland and their familiarity with presiding over criminal trials is to the considerable benefit of every party to the proceedings, all of which would be lost by the consultation proposal.

3. The consultation says in terms that it is **not** proposed that the legal member replaces the decision-making role of the children's hearing but rather replaces the roles currently carried out by (i) grounds hearings, relating to procedural and *interim* decisions and (ii) Sheriffs in determining statements of grounds. It should be noted that the transfer to the Legal Member of (i) will indeed replace the decision-making role of the children's hearing.

4. Sheriffs currently hear a number of appeals against decisions of children's hearings. The consultation does not propose removing that appellate jurisdiction from Sheriffs. However, that jurisdiction works particularly well since Sheriffs currently have the active role that they do in determining grounds of referral. Were that latter role to be removed from Sheriffs but the former appellate role retained, there is a risk that Sheriffs could become more detached from Referral proceedings as a whole which come at the cost of the expertise that they bring to their appellate jurisdiction.

Given the seriousness of the subject matter, and the experience that Sheriffs have of *inter alia* trauma-informed practice; vulnerable witnesses; contempt of court; ordering attendance of witnesses; issuing warrants for arrest; controlling witnesses (and parties); ensuring that appropriate warnings are given so as to guard against self-incrimination; making findings-in-fact; and issuing fully-reasoned judgments in writing, it is difficult to conceive of any benefit to the parties – including the child – were Legal Members to replace the experienced Sheriffs who currently determine grounds of referral. It will be seen that such concerns would apply equally were it to be confirmed that the proposed Legal Member would, somehow, fall under the auspices of the

Tribunals System. The point is that the seriousness of the subject matter demands the attention of a (comparatively) senior judicial office holder.

Taking that together, Faculty has serious concerns that the proposed transfer of functions from the Sheriff to the Legal Member could risk the ECHR compatibility of the children's hearings system, in particular the Art.6 rights of those whose conduct is the subject of adjudication and whose civil rights are being determined. The concerns apply equally to the establishing of all grounds of referral, including s.67(2)(j). In summary, the proposal would transfer functions from a cadre of experienced, professional judges to fee-paid, legally qualified chairs at an unnecessary cost to the fairness of the proceedings and to the public purse.

In addition, the creation of a layer of decision making by a Legal Member would appear to add a layer of decision making to the system. As one of the aims is to simplify the system, this proposal appears to be contrary to the aims of the re-design.

***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?***

No.

***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****?*

The appeal arrangements being proposed are not explained in the consultation. In the absence of such explanation, Faculty finds it difficult to comment save as follows:

- If the intention is to provide an appeal from the Legal Member to the Sheriff, that would add a layer of appeal to the current process. That should be avoided.

- If the proposal to proceed with a Legal Member is pursued, Faculty considers it essential for Art.6 compliance that any appeal therefrom is in the order of a review rather than an appeal on a point of law.

- Faculty considers that in any re-worked system of appeals, the right to appeal either to the Sheriff Appeal Court **or** to the Court of Session should be retained.

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

***(i) present the statement of grounds to the child and family and receive responses?***

***(ii) make* interim *orders?***

No.

***What would be the advantages and disadvantages to replacing grounds hearings with a fact finding hearing where the process would be undertaken by a single 'legal member'?***

For the reasons given above, Faculty does not consider there to be any benefit in the proposal to create Legal Members. Faculty also notes that what Sheriff Mackie proposed was the abolition of grounds hearings entirely and, in appropriate cases (presumably in the main applications currently made by the Reporter under s.94(2)(a)), for grounds to be established by the Sheriff administratively without the need for parties to attend court.[7]

Faculty does not consider that what is proposed in the consultation would implement that recommendation.

[7] *Hearings for Children,* page 138.

As for the principle of 'fact finding hearings', Faculty does not consider that there is enough detail provided in the consultation in order to comment usefully and would simply reiterate the concerns enumerated above about the concept of a 'Legal Member' and the importance of retaining the right to proceed to proof before the Sheriff.

***Is it proportionate and necessary for there to be a fact finding hearing in every case?***

Faculty considers that there must always be a hearing before an ECHR-compliant tribunal where, at the least, it can be confirmed by all parties present, or on their behalf by legal representatives, whether the grounds of referral are in dispute.

6.6 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?***

Yes. That may be particularly important in cases where it cannot be ascertained with sufficient confidence that the grounds of referral and supporting facts have been understood, or where only one relevant person attends a particular hearing and proceeds to accept a ground of referral principally involving alleged acts by the non-attending relevant person.

***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?***

Faculty would simply draw attention to the recommendation of *Hearings for Children* in relation to support for the youngest children.

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?***

Yes, subject to the time limit being capable of variation on cause shown.

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

N/A

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?***

Faculty does not consider there is any need to change the process for appointing safeguarders. Both the children's hearing (s.30) and the Sheriff (s.31) have a continuing duty to consider whether to appoint a safeguarder. Whilst the Faculty agrees with *Hearings for Children* that there must be active consideration of the need for safeguarders as proceedings progress, it is not thought that a legislative change would be required in order to remind children's hearings (and indeed Sheriffs) of their existing duties under ss.30 and 31.

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

N/A

***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?***

Faculty does not consider there should be any presumptions built-in to the system for appointing safeguarders.

## SECTION 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?***

Currently, the Children's Reporter in Scotland has no role prior to a child's birth and the Children's Hearing system cannot be engaged.

There are adequate safeguards that exist under the statutory obligations that local authorities are required to meet in respect of families in need. Their procedures allow for social work departments, alongside healthcare professionals and if necessary, other agencies within a multidisciplinary team, to monitor and investigate the circumstances of the child, prepare pre-birth assessments and recommend and provide support and protection to families in need. This system of support is working and there are no practical ways to better protect babies with the involvement of the Children's Reporter in these pre-birth measures. Where there is a defined risk which has been properly assessed within the pre-birth procedures, the family will be referred to the Principal Reporter. The procedure is flexible to accommodate urgent referrals, very shortly after birth through the local authority seeking a CPO or in less urgent cases. Through the standard process of referral.

The current system maintains a clear separation between the Reporter's role and referring agencies. Enhancing pre-referral involvement could lead to the blurring of lines between the Reporter's investigative function and the functions and duties of social work and health. It could impinge on the Reporter's impartiality by the direct involvement with agencies, in particular social work, it could prejudice or potentially prejudice the Reporter's later decision making. Strong emphasis is placed on family involvement and consent in pre-birth support procedures. If there were any formalised procedure prior to the birth of a child, in which the children's hearing was involved, the parents would need to have access to legal aid and a right to legal representation in the pre-birth procedure.

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

Faculty considers that no improvements can be made by the earlier involvement of the children's hearing system. The reasons for this are covered in the answer above.

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?***

Faculty agrees that it would be sufficient to review existing guidance and protocols and revise those if necessary to take account of any enhanced pre- referral role that the Reporter has.

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?***

While allowing earlier reviews could provide more flexibility, it could be seen to blur the distinct role and independence of the Reporter. There may be a justification for the Reporter having a supervisory role to call an early review but if that was implemented, a clear criterion of circumstances or a 'threshold test' for when the Reporter can initiate an early review would need established. For example, when a child's placement has broken down and a child has moved from their place of residence named under a CSO out of necessity.

***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 may be a benefit for doing so but there must be a balance between responsiveness and stability: a shorter review period could make the system more responsive to changes in circumstances, taking account of the fact that three months

is a long time, particularly in a young child's life. However, the impact of that is that a child's placement may be subject to instability and insecurity. If shorter review periods are implemented, consider introducing safeguards against potential misuse, such as requiring evidence of changed circumstances for early review requests.

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?***

Treating re-referrals as continuations could provide better continuity of assessment and intervention. However, this approach could potentially infringe on the right to a fair hearing for new circumstances, as highlighted by the Scottish Government. The scope, nature and seriousness of the new referral may be remarkably different and by linking the new referral to a pre-existing referral may lead to an infringement of a party's ECHR article 6 rights. If such a procedure was invoked, the same procedural safeguards and rights to participation would need to apply.

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

N/A

## SECTION 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?***

In part, but alongside the recommendation of the Hearings for Children report to introduce legally qualified chairs. A legally qualified chairperson with lay members is consistent with the format adopted for many other statutory tribunals. It strikes a

careful balance between the recognised benefits lay members bring (life experience, common sense) with a recognition that the nature of the issues being determined in many cases can involve complex and challenging legal and procedural issues (which a legally qualified chair would bring specialist knowledge to assist with). This would better equip hearings to address cases effectively, whilst balancing this against the existing ethos and structure of the Children's Hearing system consistent with the principles dating back to the Kilbrandon report.

***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 (legally qualified), 2 Volunteer Panel Members.**

***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 policy choices for the Scottish Government. We would simply express the view that a properly funded system is essential to its proper function, having regard to the importance of the issues decided upon and seriousness of the consequences of those decisions.

***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?***

We consider that a full panel of 3 members should take all substantive decisions. This reflects that it is input to substantive decision making where lay members will be best placed to contribute. If legally qualified chairs were introduced, then they could be responsible for taking procedural decisions that arise either before hearings (at a PHP) or during children's hearings. That is consistent with the expertise they would bring. The rules already provide for the chairperson to take certain limited procedural decisions.

If a legally qualified chairperson was 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 a cohort of experienced chairpersons with particular training.

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?***

It is important to begin from the point of the distinct separation of functions within children's hearings. Administrative functions are performed by the Reporter, and in that context, they will be responsible for welcoming the family and providing all necessary pre-hearing information. Those are essential parts of their role. The panel members are performing the role of judicial decision maker. There is no need for them to become involved in administrative matters. This may cause confusion to the child or family in understanding the boundaries and limitations of the different roles performed.

***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. Informality (insofar as possible) is a key principle of the system.

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?***

There is an attraction to decision makers having the opportunity to confer to ensure properly thought through decision making. However, that presupposes that the hearing is seeking to come to a single decision (if possible). In reality, the structure operated is that each panel member gives a discrete decision and discrete set of reasons. The majority of those decisions then becomes 'the decision' of the panel as a whole. A

process of recess/adjournment may also give rise to perceptions on the part of children and families of a lack of transparency or the risk of influence. The present operation of the system is designed to avoid such concerns (for example, relevant persons and representatives being entitled to remain whilst written reasons are prepared after the hearing). There is also a concern that such breaks would heighten stress and anxiety for children and families whilst they wait for decisions to be made behind closed doors.

The position may be different in the event of a legally qualified chair being introduced. Recognising the different roles being performed, a recess/adjournment would ensure that the other members had the benefit of the legal and procedural expertise of the chair before making decisions. A recess/adjournment also avoids the problem that arises in a small number of cases where 3 different decisions are given and the panel require to attempt, in real time, to achieve a majority decision (effectively a process of conferring but in the presence of parties).

If a recess/adjournment was to be introduced, it would be essential that the issues described above be mitigated against (for example, by there being a duty on the chair to give full oral reasons for each decision taken that identified the thought processes leading to that decision). Another safeguard would be the Reporter remaining present and keeping a written record of the discussion that would then be available in certain circumstances (e.g. in the case of a s.154 appeal).

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

Yes, that system works effectively in general terms.

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

We would be concerned that compelling a unanimous decision negates an essential purpose and benefit of the present structure, which is to allow for a range of views and contributions to decision making. Requiring that might lead to 'strong personalities' having a disproportionate influence on the overall decision-making or (in the event

legally qualified chairs are introduced) that lay members feel obligated to defer to legally qualified members. In the event that a period of recess/adjournment is allowed for conferring, then a better solution may be to permit (rather than confer) a single decision to be given by the chair if the decision is unanimous. In the event it is not unanimous, the chair could give the majority decision followed by the dissenting minority decision, both to then be recorded in the record of proceedings with full written reasons. That may strike a balance between avoiding repetition but not stymying contributions.

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

Yes, we fully support that. It is essential for transparency.

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?***

On the limited information provided within the consultation documentation, we are unclear what exactly is intended here. We are also unclear on the perceived benefits. Section 83(2) already clearly defines the types of measures that may be made as part of a CSO or ICSO. Those appear sufficiently well-defined, with more general measures available to anticipate and address issues that may arise from the perspective of the child or the implementation authority: see s.83(2)(h) and (i). We would be concerned about risks of confusion and over-complication if a different layer of language is introduced.

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

It is not clear what this would achieve from the perspective of the child. The system operates on the basis that decisions are of finite duration, with mandatory review and scope for more frequent review. This is consistent with the core principle in s.28 of minimum intervention, whilst allowing sufficient flexibility to react to the child's evolving needs and circumstances. In those circumstances, it is not clear what the proposal would add.

8.6 Timely notification of children's hearings decisions

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

If this were practicable, it would be beneficial. Decisions are generally written up immediately after hearings so it should generally be possible to achieve this. Effective use of electronic communication (e.g. emailing decisions to parents and young persons where they nominate that mode of communication) would assist with this.

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

This would be particularly helpful, given the time limits for appeal and the implications for effectively doing so given the nature of the decisions. We would consider decisions in respect of ICSOs, IVCSOs, second working day hearings following CPOs, and decisions of pre-hearing panels should all fall into this category.

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?***

Continuity can be beneficial in some cases, particularly deferred hearings where no substantive decision is made and knowledge of the previous discussions would assist. On the other hand, a perceived benefit of the system is that different panel members bring different life experience and perspectives. Continuity can be problematic in some cases, for example where a difficult hearing takes place and children or families

perceive that they have been treated unfairly. This could risk increased conflict. Continuity should be decided on a case-by-case basis. It may be helpful to permit children and relevant persons to make requests for continuity, or to require continuity to be an issue considered at every hearing.

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

For the reasons above, we think this would be problematic. There is also a risk that requiring same could cause delay (e.g. because hearing must be scheduled to accommodate the availability of a single person – which may not be possible with hearings that are required within particular time frames, such as re. ICSOs)

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?***

We support the front loading of procedural decision making, as explained earlier in this response. We have also set out support for the introduction of legally qualified chairs, in line with the recommendation of Hearings for Children (2023). Consistent with those, we can see the benefit in procedural decisions prior to full hearings being taken by a legally qualified chair alone. There is no reason why, in principle, most PHPs could not be held by a chair alone. This is reflective of the different strengths and weaknesses it is anticipated that different types of panel members (legally qualified vs lay) would bring. However, such an approach may be less suitable where any procedural decisions involve a fact-finding exercise (e.g. decisions about deemed relevant person status). If a single chair was going to make such decisions, it would be important that there were sufficiently broad and robust safeguards in place (e.g. a right of review against that decision, rather than a right of appeal).

***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?***

See above.

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?***

The rules regulate invitation and participation, with responsibility for giving effect to this pre-hearing resting with the Reporter. During the hearing, the chair has discretion to permit other persons to attend. The panel members also have pre-existing powers and duties to ensure effective participation (e.g. excluding relevant persons or representatives in certain circumstances). On the face of it, the existing procedural provisions are generally sufficient. However, it may be appropriate to make uniform provision that all of those are the responsibility of, and to be exercised by, the legally qualified chair. One exception to the above is provision for split hearings. This is a practice that is commonly used but is not actually found in the rules. It may be helpful for the chair to have more general powers to regulate the procedure on the day to permit arrangements such as this.

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

Subject to the above, yes.

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

The existing structure permits and facilitates an inquisitorial approach and this is generally adequate. As well as the above, children's hearings have powers under the

rules to request reports be obtained by the Reporter or to appoint a Safeguarder. One additional provision might be to permit a chair to require that a particular person be invited to a children's hearing to provide information, as opposed to the chair simply determining questions about the participation of 'other' persons where those persons are already in attendance. There may be cases where, in deferring, the hearing considers that there is essential information that could be given by a source and they would prefer to hear from – and possibly ask questions of – that person, as opposed to obtaining a report.

8.10 Recording of Children's Hearings

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

Hearings involve private discussions about exceptionally sensitive information related to children and families. There are potentially serious issues related to Article 8 privacy in hearings being recorded. Any interference with privacy requires to be necessary and proportionate to its purpose. It is not clear what the purpose of recording them would be. What would the recordings be used for? Who would have access to them? In what circumstances? How would they be stored? We see issues with how consent would be obtained in advance. Alternatively, if consent is not required, how would the intention to record the hearing be communicated? What would happen if a particular participant objected?

The decisions and reasons are already recorded in the record of proceedings. Participants are permitted to take notes and the Reporter does so, with these notes often being made available for s.154 appeals where there is any dispute about or question relating to what was said at the hearing. The recording may also be impracticable: queries about what was said are most likely to arise in relation to complex or lengthier hearings. Such hearings can sometimes last for 2 hours, or even more.

On the other hand, we do recognise that the recording of hearings gives a clear and comprehensive record of the hearings. The issue is whether that is sufficiently necessary to justify a uniform practice of recording of hearings and all that brings. On

the basis of the information provided, we do not consider a case for that has been made out.

***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?***

The benefits and risks of same are set out above. If such a system were to be introduced, the method of recording would depend upon the circumstances in which it might be used and who would have access to it.

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

This should already be recorded. However, we recognise that many s.154 appeals can concern the adequacy of reasons given. There can be issues where verbal reasons differ from written reasons, or where written reasons do not reflect the full discussion that has taken place. We can see, in principle, advantages to the decisions and reasons being recorded by other means (e.g. audio or video) to ensure they are as accurate as possible. This goes to the issue of proportionality above. There would still be many of the same considerations we have set out which would require careful consideration.

<u>8.11 Child friendly summaries of decisions</u>

***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 include the child in their communication and, where possible and appropriate, to explain the decisions to children in age-appropriate language. That is something that should also be actively considered and applied when written reasons are being prepared in cases where the child is going to receive that.

***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 relevant person status, yes, those excerpts of the decision which they will have access to, should be understandable to them based upon their age and stage. 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?***

Children's hearings have the power to defer where they need further information. A modification of the rules to specifically deal with situations where other processes are to take place, or information about them is required, is consistent with that existing set of powers. We would be concerned, however, about a requirement that hearings be deferred for certain purposes. Each child's care is unique. Deferring causes delay and can cause uncertainty.

## SECTION 9: AFTER A CHILDREN'S HEARING

9.1 – 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)?***

We can only address this question from the legal perspective: whether in practice there are advantages and disadvantages is a matter of policy and practical impact. With that caveat and noting in passing that any evidence base gleaned from a temporary extension of the time period during the extra-ordinary Covid-19 pandemic must at best be viewed with caution, we would respond as follows.

Advantages

- There is an advantage in flexibility and tailoring the length of the interim order to the child's needs.

- This puts the child's needs at the centre, so long as the focus remains on the child and not the convenience of others.

Disadvantages

- One of the original purposes of fixing a relatively short time frame was to avoid drift and delay, which is recognised in the Hearings for Children Report[8]. As such an interim order is there to deal with short term needs and not long term goals. The period of 22 days in s. 86 of the 2011 Act was therefore fixed with a view to expediency. To leave the period down to the decision maker risks encouraging drift and delay even where that is not intentional.

- Whilst one would hope that trust could be placed in the decision maker, there is a danger that this is not effectively policed and kept in check. Appeals or reviews are going to be difficult to implement expeditiously,

[8] For example, at p. 247.

and they detract from the purpose of the ICSO, to deal with only urgent matters.

- Following on from that, it is all very well to say that any variation of the time limit must be ECHR compliant, but appeal or review procedures must be realistic.

- If the period is flexible this gives less certainty for the child.

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

As noted above flexibility, in the sense of tailoring the duration to each child, does focus the issue on the child, so long as it is not simply for the convenience of others.

We would agree that, to avoid drift and to allow some degree of certainty, a default period should be stated, perhaps at 22 days as it is at present. That default period could be extended at the discretion of the decision maker, but on grounds and in circumstances which are focussed on the child.

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

It would be a matter of policy to list circumstances in which a variation of the duration would be appropriate[9].

From a legal perspective, one would have to trust the decision maker to apply their mind properly to the circumstances of each individual case and having regard to the welfare of the child as the paramount consideration.

[9] We would note that Norrie *Children's Hearings in Scotland* 4th Edition has a non-exhaustive list of examples where a decision might be deferred, and we refer to that for illustrative purposes only.

Any maximum duration period would be arbitrary, and a matter of policy. However, we consider that there should be a maximum period.

***Could ICSO reviews be undertaken by lone children's panel members?***

See our response to Chapter 8.

9.2 – 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?***

We interpret this to mean a statutory child's exit plan, given that there exists a policy-based GIRFEC plan.

We are not convinced that it would be possible to legislate for an exit plan in any detail. Flexibility should be key, and the focus should obviously be on the child.

In general, however, any formal guidance on a child's exit from the system is to be welcomed.

***What elements should be included in any child's exit plan?***

There must be clarity as to any specific legal orders which may linger after exit from the system, i.e. as to whether they remain necessary.

Having said that, the exit plan should not be seen as requiring a child to be constrained by orders or directions which in reality see the child remining in a "system" by another mechanism.

Other than that, this is a matter of policy and very fact dependent.

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.

9.4 – Secure Accommodation – timescales for review

***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?***

We see no reason to alter the current timescales for review.