



FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to

The Consultation on the Children (Care and Justice) (Scotland) Bill

The Faculty of Advocates welcomes the opportunity to comment on the Children (Care and Justice) (Scotland) Bill. Our comments are designed to address technical legal issues. We make no comment on the underlying policies reflected in the proposed legislation.

Question 1: The Bill widens access to the Children's Hearings system to all 16 and 17 year olds. What are your views on this?

- a. The Faculty appreciates the intentions of the Bill are to implement key concepts contained within the United Nations Convention on the Rights of the Child. The primary difficulty with the change proposed in terms of defining a "child" as a person under 18 years is that there remain varying statutory definitions of a child across the legislative landscape.
- b. The Faculty notes that complexity of legislation was identified as an issue in The Promise. The Bill has the consequence of exacerbating this problem. It adds to the existing piecemeal approach. A root and branch approach to the definition of "child" would be helpful to ensure consistency and reduce complexity.
- c. In particular, s1 and s2 of the Children (Scotland) Act 1995 define a child, for the purposes of all parental rights and all but one parental responsibility (that being the responsibility to provide the child with guidance), as a person under

the age of 16. It would therefore follow that a person would be a “child” as defined in s1 of the Bill, despite having the ability to regulate their own residence, manage their own affairs and in respect of whom no parental control is exercised.

- d. The consequences which may flow from this are numerous and far-reaching. In particular, the Faculty would wish to highlight the potential for referral of a child to the Children’s Hearing in terms of s67(a) “due to a lack of parental care” whilst, in fact, the children’s parents do not hold any parental rights and responsibilities such that the child is within their legal care and control.
- e. Further, s74 of the Children’s Hearing (Scotland) Act 2011 imposes a duty on relevant persons such as parents (the definition of whom is dealt with at 6a below) to attend a Children’s Hearing and makes non-attendance a criminal offence. This would persist despite parents no longer having care and control of a child beyond the age of 16.

Question 2: The Bill suggests that the law should be changed so that most offences committed by 16 and 17 year olds will be dealt with through the Children’s Hearings system in future. What are your views on this?

- a. It is appreciated that the intention of the legislation is to recognise the importance of treating young persons who have committed criminal offences differently from adult offenders. However, we continue to hold concerns that the Children’s Hearing system requires lay panel members to implement complex legislative provisions. To divert a significant volume of complex and difficult cases which involve criminal offences to the Children’s Hearing system will be to create a further burden on an already overstretched and overburdened system.
- b. Both s4 and s5 of the Bill continue to impose a threshold test for orders in relation to secure care and movement restriction but would differentiate the thresholds required for each order. Whilst there have always been conceptual challenges for panel members in reconciling their duty to implement a general welfare test in terms of s25 of the 2011 Act with the requirements of the threshold test in relation to restriction of a child’s liberty, the threshold test for both secure accommodation and movement restriction was previously the same. Faculty are concerned that a change to separate threshold tests to be applied to the most serious interference with a child’s rights which the Children’s Hearing system can implement places the provisions at risk of misinterpretation and confusion.

- c. Separately, s4 of the Bill makes changes to the threshold test in relation to the imposition of a movement restriction condition. Two conditions are presented, only one of which need be met in order for a MRC to be competently imposed. This leaves the potential for a Children's Hearing to be satisfied only that "the child's physical, mental or moral welfare is at risk" before a significant restriction on their liberty is imposed. Risk to welfare can arise in a variety of situations which are unrelated to a child's conduct or behaviour. The present proposed wording would allow for a child's liberty to be restricted due to the conduct of other persons. This would be an unfair and unwarranted interference with the child's rights in terms of ECHR (articles 5 and 8). The Faculty would propose an alternative wording of the new s83(4A) to specify the conditions as; "(a) that the child's physical, mental or moral welfare is at *grave risk as a result of their own conduct*, and (b) that the child is likely to cause physical or psychological harm to another person."

Question 3: The Bill makes several changes to Compulsory Supervision Orders. What are your views on these proposed changes?

- a. It appears to the Faculty that s2 and s22 of the Bill are at odds with one another and do not reflect the lived experience of many children subject to Compulsory Supervision Orders. Section 22 correctly seeks to clarify that the primary purpose of secure accommodation is to provide suitable provision for children deprived of their liberty. Section 2 seeks to make explicit that a CSO without secure accommodation or movement restriction authorisation cannot make measures which authorise any deprivation of a child's liberty.
- b. The Faculty are aware that children in residential care, but who are not in secure accommodation, regularly face interference with their liberties and freedoms. Such interferences are not authorised by a competent legal authority nor are they reflected in any order the child is subject to. Examples include children not permitted to socialise with certain persons, children not permitted to use mobile devices at certain times and children not permitted to travel outside of the residential placement without a chaperone. This is in direct contrast to children from England and Wales who are placed in Scotland subject to Deprivation of Liberty Orders made by the High Court of England and Wales where, for some, measures depriving them of liberty, short of placing them into secure accommodation, are expressly made. Section 2 of the proposed Bill makes explicit the lack of power to make similar directions in Scotland. This appears to

overlook that, as a matter of law, the extent of control over a child's liberty may mean that a child is deprived of their liberty despite not being placed in secure accommodation. In practice this potentially leaves children in Scotland subject to continued interference with their liberty without that having been a decision made by a competent authority and without having a right to review that decision.

- c. The Faculty raises whether, in line with the proposed prohibitions laid out in s3 of the Bill, there should be provision for conditions to be placed on Compulsory Supervision Orders which recognise and reflect the reality of the rules and conditions which are being imposed on children within residential care establishments. This would afford children the ability to seek review or refusal of those conditions by the Children's Hearing.

Question 4: What impact (if any) do you think the Bill could have on young people who have been harmed by another young person?

- a. No comment to make.

Question 5: The Bill makes changes to the current law around when information should be offered to a person who has been affected by a child's offence or behaviour. What are your views on what is being suggested?

- a. No comment to make.

Question 6: Do you wish to say anything else about the proposals to increase the age at which young people can be referred to a Children's Hearing?

- a. The Faculty is concerned in relation to the Article 8 rights of children who are subject to the Children's Hearing system and who wish for their personal information to be kept private from parents and other relevant persons. Section 200 of the 2011 Act defines a relevant person as a parent or guardian who holds parental rights or responsibilities. As indicated in 1b above, a child's parents retain responsibility for guidance in relation to a child from 16 – 18 years old. Parents would remain defined as relevant persons for the purposes of the 2011 Act and thus, (as per Rule 26 of the Rules of Procedure in Children's Hearings 2013) would be entitled to receipt of all papers and information to be considered by the Children's Hearing. The only basis for not disclosing such personal information is if the disclosure of the information would be likely to cause significant harm to the child in terms of s178(1) of the 2011 Act. This does not

cover a circumstance where the child simply seeks for the information to be kept private. This would create a distinction between children who are over 16 years old and not subject to the Children's Hearing system, who are able to keep their personal information private from parents or guardians, and children who are subject to the Children's Hearing system, who are not afforded such discretion.

Question 7: The Bill changes the law so that young people aged 16 and 17 who are accused of or found guilty of an offence can no longer be sent to a Young Offenders' Institution or a prison. What are your views on these proposals?

- a. The Faculty recognises the intention to treat children accused of or found guilty of an offence differently from adult offenders. However, it is observed that there is extremely limited provision for secure accommodation in Scotland. Such resources are overstretched and oversubscribed at present. The Bill will undoubtedly create more demand for such placements and consideration will require to be given to the provision of further resources in this area before implementation.

Question 8: The Bill changes the way in which secure accommodation is regulated. It would also introduce regulation for cross-border placements (for example, a child placed in Scotland as a result of an order made in England). What are your views on the proposed changes?

- a. Section 25 facilitates further regulation of cross-border placements. In so far as these placements put pressure on limited resources for Scottish children, they remain a matter of concern. The creation of different legal regimes for children, depending on whether they are subject to Scottish measures, or measures from elsewhere in the UK, remains unsatisfactory.

Question 9: What are your views on the proposals set out in Part 4 of the Bill?

- a. As presently drafted the Bill amends s13(3) of the Antisocial Behaviour etc. (Scotland) Act 2004 to read that "parent" and "child" have the meanings given by s117. Section 117 (interpretation of part 9 of the 2004 Act concerning parenting orders) does define parent (as per 9b below) but defines child as a person under 16. That definition is not changed by s26 of the Bill. Section 13 of the 2004 Act is concerned with anti-social behaviour orders. It may be the intention is for anti-

social behaviour orders to operate in relation to a child under the age of 18, but parenting orders only to relate to a child under 16. If that is the intention, it is not met by s26 of the Bill as a “child” is defined in s13 (in part 2) firstly by reference to s117 and then by reference to s18 where the definition is changed from 16 to 18.

- b. If the intention is to change the age of a child in relation to parenting orders (in part 9 of the Act), parent is defined by reference to parental responsibilities OR parental rights but has a catch all provision which is “any individual who appears to be an individual who ordinarily (other than by reason of employment) has charge over, or control over, the child”. As highlighted in 1b above, a parent does not have “charge over, or control over” a person aged 16 or 17 by virtue of retaining only a parental responsibility in relation to guidance once a child reaches the age of 16.

Question 10: Do you have any comments on the impact assessments accompanying this Bill?

- a. No comment to make.