

Children's Care and Justice Bill: Stage 1 call for views

Education, Children and Young People Committee

March 2023

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse. We are a national strategic intermediary, and as such we act as a critical friend to Parliament and engage in research and campaigning as well as serve as the umbrella organisation for 34 local Women's Aid organisations across Scotland. They are grass-roots services that provide practical and emotional support to women, children and young people who experience domestic abuse, acting in partnership with national and local stakeholders. The services offered by our members include crisis intervention, advocacy, counselling, outreach, follow-on support and temporary refuge accommodation.

We welcome the opportunity to respond to this call for views for the Education, Children and Young People Committee. SWA recognises the important role the Children's Hearing system plays in its approach to protecting the wellbeing and upholding the rights of children and young people. Whilst the Bill presents important opportunities to strengthen compliance with the UNCRC, we have several concerns that the needs of children and young people under 18, who have experienced domestic abuse, are going unmet. In particular, the Bill must demonstrate greater awareness of young women's experiences of domestic abuse in their own intimate relationships, so that their protection and recovery needs are reflected within the Children's Hearing system.

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

We recognise the cross-sector support for this change and the precedent it sets for Scotland in becoming a children's rights respecting nation. We welcome approaches that align with the UNCRC's definition of a child as being under 18 years old. It is important to note that this change will likely result in more children and young people encountering the Children's Hearings System on offence and care grounds, including domestic abuse-related offences, stalking, and sexual abuse.

The second highest¹ ground of referral to the Scottish Children's Reporter Administration (SCRA) is domestic abuse perpetrated by parent or carer [under s. 67(2) of the Children's Hearings (Scotland) Act 2011]]. Research carried out by Scottish Women's Aid and Young

¹ <https://www.scra.gov.uk/wp-content/uploads/2022/09/SCRA-full-statistical-analysis-2021-22.pdf>

Women's Movement (YWCA)² found that 36% of surveyed young women have experienced domestic abuse by a partner or ex-partner. Research³ also suggest that young women are at a greater risk of experiencing sexual violence and report higher incidents of coercive control and stalking than their male peers. Young women's experiences of domestic abuse in their own intimate relationships, and their status as a victim of crime requiring support and protection, must be better reflected in the work of the Children's Hearings system.

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?

The Children's Hearings system plays an important and unique role in supporting the welfare of children who come into contact with it through care or offence grounds. We understand the complexity of respecting the rights of both children when one has caused harm to another, and we suggest that upholding the rights of both children is not a zero-sum game.

The impact of domestic abuse on young women who experience abuse in their own intimate relationships is no less traumatic than that experienced by adults; abusive, coercive and controlling behaviours are as present and as impactful in the relationships of young people. Young survivors of domestic abuse are experiencing the same risks and trauma, without the same protections of the adult system.

Current provisions within the Bill do not adequately support a victim's right to protection from harm (Article 19 UNCRC) and right to recovery (Article 39 UNCRC⁴). This includes failures to share information with a victim (section 6 of the Bill) and lack of robust protective orders to support victim's safety and recovery (sections 3 and 4 of the Bill). As the Bill looks to increase the age of referral to a Children's Hearing, improvements must be made to strengthen the protection of victim's rights and welfare alongside that of the child who has caused harm.

While we welcome the acknowledgement that the Lord Advocate and Procurators Fiscal will still be able to maintain their discretion to pursue criminal proceedings and to prosecute children in court where appropriate (⁵see Paragraph 7 of the Bill's Policy Memorandum), we would like further discussion about how and when the decision not to prosecute in cases of domestic abuse and sexual assault is made.

² Scottish Women's Aid (SWA) and Young Women's Movement Scotland (YWCA), 2022. The Rise Report: Supporting young women & girls facing abuse in their intimate relationships. Publication forthcoming.

³ <https://library.nspcc.org.uk/HeritageScripts/Hapi.dll/relatedsearch?SearchTerm=~%5B!C1739%5D~&PlainTerm=C1739%20%5BStd.%20No.%5D&SortOrder=Y1&Offset=1&Dispfmt=F&DataSetName=LIVEDATA>

⁴ <https://www.unicef.org.uk/rights-respecting-schools/wp-content/uploads/sites/4/2017/01/Summary-of-the-UNCRC.pdf>

⁵ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/children-care-and-justice-scotland-bill/introduced/policy-memo-accessible.pdf>

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

Strengthening the criteria for Compulsory supervision orders (CSOs) and Movement Restriction Conditions (MRCs) was one of the key issues raised in our response to the initial consultation⁶. CSOs and MRCs are important mechanisms that can be used by the Children's Hearing system to significantly improve a victim's sense of safety.

There are some welcome proposals within section 3 of the Bill that set out a greater range of measures that could be included in a CSO, including a prohibition on the child entering a specified place (new section 83(2) (ca) of the 2011 Act). In addition to this, a prohibition under new section 83(2) (cb), on the child communicating with third parties to prevent harassment, which explicitly includes communicating with a victim via social media. However, greater clarity is needed on the scope of these new measures and how they will be enforced.

It is unclear how the new prohibitions will be monitored to ensure victim safety. Paragraph 18 of the Bill's Explanatory Notes⁷ remarks that the *"New section 83(2) (ca) provides a less restrictive and intrusive measure than the alternative of a movement restriction condition, which may be included in a CSO... It is not subject to any preconditions or specific monitoring arrangements like a movement restriction condition"*. This flags concerns about accountability in cases of noncompliance with the conditions of a CSO. For example, where a young person who has offended enters a prohibited space without electronic tagging. Without clear approaches to governance and monitoring of CSOs, the provisions will fail to address risks presented by the offender to victims of domestic and sexual assault.

We have some concerns about section 4 of the Bill relating to MRCs. The existing use of MRCs is limited, and the Policy Memorandum at paragraph 63 acknowledges that there has been no evaluation of their usage. Existing guidance⁸ makes only one reference to victims. The Policy Memorandum at paragraph 68 notes the need for refreshed guidance on MRCs, and we urge that this guidance and subsequent training and support packages have a stronger focus on victim safety. In particular we would welcome more specifics on safeguards, enforcement and monitoring of MRCs.

Paragraph 64 of the Policy Memorandum states that there is *'no such thing as a breach of an MRC that results in automatic referral to a hearing'* and notes that Children's Reporters could decide to hold a review hearing to consider a child's compliance with CSO conditions. For victims of domestic and sexual abuse this language is ambiguous and undermines the importance of these orders in supporting victims to safety plan. A consistent approach to

⁶ <https://womensaid.scot/childrens-care-and-justice-bill-response-to-consultation-on-policy-proposals/>

⁷⁷ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/children-care-and-justice-scotland-bill/introduced/explanatory-notes-accessible.pdf>

⁸ <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2014/10/intensive-support-monitoring-system-guidance-use-movement-restriction-conditions-mrcs/documents/00461160-pdf/00461160-pdf/govscot%3Adocument/00461160.pdf>

reviewing non-compliance is needed that balances the wellbeing of both children when one has caused harm to another.

We note the amendments to the 2011 Act, applying a new set of conditions to MRCs, including where a child is likely to cause physical or ‘psychological’ harm to another person (new section 83(4A)(b)). Paragraph 26 of the Explanatory Notes defines ‘psychological harm’ *‘as including (but not limited to) fear, alarm and distress’*. While we welcome the shift to include a broader definition of ‘harm’ beyond physical injury, we caution against the use of the word *‘psychological’*. This term risks pathologising victims, and we would instead suggest a focus on emotional harm and trauma. In particular, we would welcome clarification on whether this definition will include behaviours associated with domestic abuse, such as stalking and coercive control.

The criteria for MRCs should reflect the range of potential harms, the effectiveness of an MRC in reducing the likelihood of that harm on other people, and the rights of the child who has offended. MRCs could be an effective measure for protecting victims of domestic abuse by preventing a child accused of abuse from approaching the home or workplace of their victim and continuing behaviours likely to further harm.

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

The provisions set out in this Bill do not offer an adequate safety net of protections for young victims of domestic abuse. As outlined throughout our response, it is imperative that the rights and wellbeing of children and young people who have been harmed are balanced fairly with the rights and wellbeing of children who have caused harm. The experience of young survivors coming into contact with the justice system at this age is highly likely to have lasting repercussions on their confidence in reporting; young survivors disclose feeling alienated from the justice system and being less likely to report again if their early reporting experiences are negative.

It is crucial that when seeking to protect the wellbeing of children who come into contact with Children’s Hearings, we avoid creating a hierarchy of rights, whereby the needs and rights of the victim are less visible within the system. Protecting children’s right to live free from harm and their right to recovery should be central to a child-friendly and rights respecting system.

There is an opportunity within the Bill to support greater joined up working with specialist services to enable victims to access the help they need when they need it. Children are not a homogenous group, and the provisions must reflect the needs of Black, Asian and Minority Ethnic, as well as LGBTQ children. We note that paragraph 170 of the Policy Memorandum refers to the work of the Youth Justice Action Plan, which seeks to engage partners and children on the development of child-friendly approaches, as well as the work of the

Hearing System Working group⁹ (HSWG). It is vital these pieces of work reflect the experiences and needs of *all* children, including victims of domestic abuse.

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?

As outlined in our response to the consultation, access to information throughout a Children's Hearing Process is paramount to a victim's recovery and safety planning. Survivors routinely highlight the importance of having access to information about what to expect when reporting abuse, why something is happening, who is involved, reasons for the decisions made, and how they will be implemented.¹⁰ They also want to have information as early on as possible in the process, a finding supported by Lady Dorrian's Review into the management of sexual offence cases.¹¹

The Children's Hearings system is designed first and foremost to protect the welfare and rights of children accused of an offence, but as we have reiterated throughout this response the rights and wellbeing of victim must also be realised. Access to information is particularly important when the child who has caused harm lives in close proximity to the victim. For children and young women who have experienced domestic abuse in their own relationships, it is highly likely they live in the same community or attend the same school as the child who has harmed. Information on the outcome of a Children's Hearing or any subsequent orders made are essential to support victim's day-to-day safety planning. The policy Memorandum paragraph 315 states that *'The provisions in respect of information sharing by the Children's Reporter; bolstering the ability for measures to be placed on a child through compulsory orders where necessary for the protection of the child and others.* However, as it stands the terms of the CSO are not disclosed with the victim. This means that a victim is not equipped with the important knowledge of whether or not the person that caused harm is prohibited from approaching or contacting them. This undermines a victim's day to day safety planning and risks prolonging the impacts of fear as a consequence of abuse they may have faced.

The information currently available for people harmed by a child whose case is likely to proceed in the Children's Hearings system is limited, inconsistent, and often not child-friendly. As outlined in the consultation paper, people who have been harmed and their families routinely voice their confusion and frustration with the current information-sharing approach of the Children's Hearings system. In the light of this, it is therefore disappointing to note the lack of robust provision in the Bill to ensure victims are provided with the necessary information to support their recovery.

⁹ <https://thepromise.scot/the-promise-scotland/what-the-promise-scotland-does/change-projects/hearings-system-working-group/>

¹⁰ Everyday Heroes Justice report (2018) <https://everydayheroes.sps.ed.ac.uk/wp-content/uploads/2018/11/everyday-heroes-briefing2-Justice.pdf>

¹¹ Improving the Management of Sexual Offence Cases: Final Report from the Lord Justice Clerk's Review Group. (2021) <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>

Section 6 of the Bill introduces a duty on the Principal Reporter to **inform** the person(s) of their **right** to access information. It does not go further to place a duty on the Principal Reporter to actively provide the relevant information, and we note that this is not a change from existing SCRA information sharing practices.

The Bill also states that this duty: *‘applies if it is reasonably practicable to do so. If, for instance, the Principal Reporter does not have and cannot find a person’s contact details, then the person does not have to be informed’* (Explanatory notes, paragraph 39). The Policy Memorandum, at paragraph 77 explains that “... *‘Information can only be provided where it would not be detrimental to the best interests of the referred child, or any other child, and where it is appropriate’*”. We are extremely concerned that this presents a legislative loophole that could lead to inconsistent information-sharing practices, particularly given that there is no indication in the Bill or accompanying papers as to the process the Principal Reporter is expected to undertake when deciding whether it is in the best interests of a victim.

The use of discretion not to inform a victim with necessary information could severely impede their recovery. Child and adult victims should be fully aware of the nature, extent and implications of conditions imposed for their protection, particularly in cases relating to domestic abuse, sexual offending or stalking.

The Policy Memorandum, at paragraph 94 highlights the consensus among victim organisations on the need to improve information sharing processes to victims of domestic and sexual abuse. *“There was widespread agreement amongst victim centred organisations that SCRA should be empowered to share further information with a person who has been harmed. Victims organisations stressed that this was particularly important for high-level harms, including sexual and domestic abuse”*. However, it is unclear the extent the Bill will seek to address this. Young survivors say that information is important to help them feel prepared and in control; they also highlight the fear caused by “drop-off” in information to them at crucial points in the process.¹²

Lady Dorrian’s Review into the management of sexual offence cases sets out recommendations for information-sharing in the children’s hearings system, including broader information for complainers addressing how the system works and why information is restricted. We would also urge that Children’s Hearings systems develop a stronger understanding of domestic and sexual abuse. Victims routinely disclose how traumatic and long-lasting the fear can be, and how damaging it is to their future lives and relationships. An understanding of this fear must be central to decisions taken regarding how victims are treated within Children’s Hearings, including the information they are given and support they are offered.

¹² Everyday Heroes Justice report (2018) <https://everydayheroes.sps.ed.ac.uk/wp-content/uploads/2018/11/everyday-heroes-briefing2-Justice.pdf>

The Bill makes several changes to existing Criminal Justice and Procedure. These are related to raising the age at which young people can be referred to the Children's Hearings System. Do you have any comments on these proposals?

As noted above, we recognise the need to raise the age at which young people can be referred to Children's System in line with UNCRC. We understand that within that the criminal justice system children may be less empowered to exercise their rights under UNCRC, and therefore feel unable to fully participate in court proceedings. Building provisions to safeguard a child accused of an offence should be matched with provisions to support victims. This is particularly important as more serious offences, that were previously dealt with by criminal courts, will now be part of Children's Hearings.

Section 10, relating to the prosecution of children over the age of criminal responsibility, notes that the Lord Advocate and Procurators Fiscal will maintain their discretion to pursue criminal proceedings and prosecute children in court where appropriate. We would welcome further discussion on how serious offences, such as domestic abuse and sexual assault carried out by 16 and 17-year old will routinely be treated in this regard. It is vital in these cases that victims have the same protections as they would in an adult system.

We welcome the note in the Policy Memorandum (paragraph 170) that acknowledges the responses within the consultation calling for greater consideration on how to best approach a move away from traditional courts for under 18s, including drawing on the views of people who have been harmed. Designing child friendly systems must seek to involve children and young people at all stages. Moreover, the system must be *victim friendly*, and work alongside victims to understand what support and information they need to feel safe and recover.

SWA welcomes the opportunity to submit our written evidence on the Bill and would be pleased to contribute further by providing oral evidence before the Committee. In the meantime, if the Committee wishes further information on our comments in this submission, please do not hesitate to contact us.