

Response to Children's Hearings Redesign Public Consultation on Policy Proposals

Question 1: What principles should underpin a redesigned children's hearings system and why?

Answer

The current principles in relation to decision-making for children namely, the child's best interests, no order principle and regard to the child's views should continue to be enshrined in children's hearing proceedings.

Principles from other tribunals could be applicable and welcomed for these proceedings such as:

- I. Avoiding delay so far as compatible with the proper consideration of the issues (2017 Housing & Property Chamber Procedural Rules).
- II. Dealing with the proceedings in a manner which is proportionate to the complexity of the issues (2017 Housing & Property Chamber Procedural Rules).
- III. Ensuring proceedings are handled as fairly, expeditiously and efficiently as possible (2005 MHTS Procedural Rules).
- IV. Respect for opposing views (particularly where there is disagreement about the child's best interests).
- V. Trauma-informed approach to the hearing process and procedure, for example how hearings are convened and conducted, panel papers, communicating decisions.
- VI. Promoting effective participation of the child and family from the point of referral and throughout all stages in the proceedings.
- VII. Evidence-based decision-making with appropriate employment of experts.
- VIII. Adopting an inquisitorial approach to children's hearing could also be enshrined as a principle.

Question 2: What would be the advantages and disadvantages of enshrining overarching principles in legislation?

Answer

Advantages include being able to clearly refer to and reiterate these principles, for example, at the start of each hearing and/or in the context of tendering advice to clients. This should help promote the desired inquisitorial approach and remind parties of the purpose and aim of the hearing.

There is however a risk that if an "inquisitorial approach" is enshrined as a principle that there will be times when an adversarial approach is required in children's hearing proceedings, and this could be discouraged as being contrary to the stated principles.

Proposal: The Scottish Government is supportive of the ongoing work to promote the common use of accessible and sensitive language across the children's hearings system. We are interested in

respondents' views on whether the existing criteria need to be updated in the way suggested by the report, and why. (See section 5.1 of the consultation document).

Question 3: What elements of language in the existing referral criteria need to be updated, if any?

Answer

Check box options – ‘control’? ‘treatment’? other?

Other – We agree with the overall aim of the proposal which seeks to modernise and simplify the criteria that must be met in order to refer a child to the Children’s Reporter.

Question 4: Do you support the proposed referral criteria from the Hearings for Children report?

Answer

Check box options – Yes? No? (Please explain your answer).

No – Decision-making in relation to why a child has been referred to the Reporter can be confusing for the families that we represent. The referral process, both in terms of the timing of the referral and the intervention into private family life that follows as a result, can be highly distressing.

We have also acted in cases where we have required to make representations to the Reporter at the referral stage because it was predicated on inaccurate/incomplete information and/or that was clearly disproportionate.

Question 5: What are the advantages or disadvantages of the proposed draft referral criteria?

Answer

The key advantages therefore of the proposed new criteria (1. “safety, protection, care, guidance and support” versus the current “protection, guidance, treatment or control”; 2. “compulsory intervention is likely to be needed” versus the current “it might be necessary for a CSO to be made”; and 3. “only refer if proportionate and timely to do so”) are that it would replace the outdated and stigmatising language (for example, “control” and “treatment”) and frame the criteria in a way that:

- is easier for the child, family and statutory agencies to understand
- promotes the focus being on the child’s needs and care as opposed to deeds
- places greater emphasis on the system being geared towards supporting families who are struggling
- is more aligned with other child protection concepts and processes
- better highlights the requirement that referrals should only be made, and at a time, that is proportionate to the child’s circumstances.

Question 6: Do you have any other comments about potential changes to the referral criteria?

Answer

It is unclear based on the available information why it is proposed that both “safety” and “protection” should be included in the criteria when both words appear to cover the same, or at least very similar, child protection concerns.

Question 7: Do you support the proposal to change the applicable referral test that compulsory supervision ‘might be necessary’ to it being ‘likely to be needed’?

Answer

Check box options – Yes? No? (Please explain your answer).

No – “Likelihood” has been defined by case law and is well understood by practitioners. “Might” does not have a clear legal understanding to those in the profession and risks indicating a lower legal threshold. Uncertainty on this point could lead to disagreements between stakeholders involved in the process. We would also suggest that relevant training and written guidance on the legal meaning and significance should be provided to referral and other relevant agencies.

Proposal: Views are invited on where and how the current arrangements could be improved. In particular, we are interested in whether respondents’ feel it is necessary to legislate for the participation and engagement of a broader range of people in the preparation for a hearing. We would particularly be interested in views on whether there would be advantages in creating an additional class of person with certain rights to provide their views at an early stage, and to participate appropriately as the case proceeds. (See section 5.2 of the consultation document).

Question 8: What are the advantages and disadvantages of the current definition of “relevant person”?

Answer

The main advantages of the current definition are that it:

- I. establishes a high threshold that safeguards the child and parents’ right to a private and family life as access to, for example, confidential panel papers is rightly restricted.
- II. helps keep the number of participants at hearings to a minimum whilst
- III. ensuring relevant persons have guaranteed and clear rights, including full participation and appeal rights.

The main disadvantages are:

- I. the legal meaning is not well understood. This can result in inappropriate requests being made to the panel, leading to unnecessary pre-hearing panels and parents having to instruct their legal representative to oppose these requests. This in turn can generate conflict and misunderstanding between parents and other parties, for example temporary foster carers.
- II. the Reporter’s exclusive jurisdiction to determine automatic relevant person status and lack of recourse to appeal these decisions. This is particularly acute in disputed parentage cases where there is no prospect of a father (without PRRs) satisfying the “recent and significant involvement” test. The available remedies for putative fathers to challenge the Reporter’s decision-making are currently limited to either (a) initiating an action for judicial review and/or (b) raising an action for declarator of parentage within the Sheriff Court. Both legal routes can take several months to conclude, by which point, important and possibly long-term welfare decisions may be made in relation to the child.
- III. the definition does not encompass siblings. Promoting the rights of siblings within the Children’s Hearing System, particularly siblings who may not have had the opportunity to live with one another, remains an area based on our experience that requires further review.

Question 9: Should the legislation include a definition of “parent” and if so, what should it be?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We can see the benefit of introducing a “parent” category that could perhaps replace both arms of the current “relevant person” definition. This would help clarify, based on the ordinary meaning and understanding of that term, the individuals who should logically be entitled to and, where appropriate, applying for this status.

We would suggest that another designated category may be helpful for those individuals (such as foster carers, temporary kinship carers) whose article 8 rights are not engaged by the process to the same degree as parents, do not require copies of the confidential panel papers or recourse to appeal rights, yet have significant involvement in the child’s life and information that will assist the panel’s decision-making.

Question 10: 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?

Answer

The main risk we foresee is where the automatic relevant person is involved in concurrent legal proceedings in relation to the child, or there is a real prospect of them becoming so soon. The removal of their automatic status, and with that the ability to review panel papers and make meaningful representations to a children’s hearing, and thereafter challenge unsafe decisions via an appeal process, may impact their right to a fair hearing both in the context of the Children’s Hearings but also any parallel proceedings, for example permanence, adoption, S11 action.

We understand there are cases where some parents with automatic status choose not to participate in the Children’s Hearing process at all and are not involved in the child’s life. In these limited cases, including cases of disputed parentage where there is reliable evidence that the automatic relevant person is not the child’s biological parent, it could be beneficial for hearings to have the power to remove the automatic status. We would suggest that these circumstances should be limited and clearly set out in legislation; the initial decision to remove the status should be capable of appeal, and, that it would be appropriate in certain instances for the individual to have the right to request a future hearing re-consider the point where there has been a material change in circumstances.

Question 11: What are the advantages and disadvantages of an earlier process for deeming other people to be relevant persons?

Answer advantages

We agree with the HSWG report that engaging key parties earlier on in the process (for example an older sibling who may have cared for the child, extended family members, kinship carers) and ensuring parties understand their participation rights, their right to access legal advice and, where appropriate, challenge/appeal decisions, would be an improvement. It follows that deeming earlier on would promote better participation of these individuals from the outset, limit instances of individuals addressing panels about these matters at an advanced stage and reduce the impact of unexpected requests on the child and parents.

Answer disadvantages

The main risk would be if the earlier deeming process did not have a mechanism for deeming those individuals who appear later in the proceedings to have the status but were not considered at the start of the process.

Question 12: 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?

Answer

Framing a positive duty in the context of the Reporter's investigation to make reasonable enquiries and directly contact individuals involved with the child and who may meet the relevant tests.

Question 13: What changes could be made to the definition to allow for the appropriate involvement of others, while remaining focused on primary caregivers but giving important other contributors a proper opportunity to participate?

Answer

Refer to our answer to Question 9.

Question 14: 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?

Answer advantages

- I. safeguards the child and parents' right to a private and family life in terms of appropriately restricting access to confidential panel papers and the right to appeal decisions that directly impact the child and parents.
- II. reduces potential conflict/ tensions between parents and other important contributors.
- III. promotes better contribution and participation of other important contributors.

Answer disadvantages

- I. Multiple categories could conversely create confusion and add complexity for families as well as panel members and Children's Reporters.

Proposal: Views are sought on how to enable children to have a clear choice of how to participate in their hearing and alternative options for capturing their views. (See section 5.3 of the consultation document).

Question 15: 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?

Answer

Yes, we generally support the proposal that there should be a presumption that children (except for babies and infants) will attend their hearing and that this should replace the legal duty. When properly supported, a child's attendance is very important and the only way for the panel to hear from and observe the child directly, including their interactions with family members who may also be present. Where possible children should in our view be supported to attend their hearings and reasonable adjustment made to promote this.

However, we recognise that there can be legitimate reasons why a child is unable to attend. Currently where this is the case, the child will generally be excused. Provided the child's views on the salient points have been independently obtained prior to the hearing, and where appropriate they have been able to instruct a solicitor (or advocacy worker) to protect their interests in their absence should they wish to do so, we do not anticipate that this amendment would result in any significant or adverse difficulty.

Question 16: Does the hearing need a power to overrule the child’s preference not to attend their hearing in certain circumstances?

Answer

Check box options – Yes? No? (Please explain your answer).

No – We would reference our answer above and highlight the importance of adopting a trauma-informed approach. It is unclear how such a power would sit alongside or potentially replace the existing power that the panel already has (albeit on the Reporter’s application) to make a warrant to secure the child’s attendance. Therefore, if there were to be such a power it is suggested that this should only apply in very limited and exceptional circumstances where other means of obtaining the child’s views and/or ensuring that they have had the opportunity to take legal advice and understand their rights have been exhausted.

Question 17: What steps could be taken to support the child’s participation and protect their rights, if they choose not to attend their hearing?

Ensuring legal aid and legal representation is available for children in these circumstances to enable them to provide instructions to their solicitor who can then attend on their behalf and represent their interests if required. The appointment of a safeguarder and/or children’s rights officer/ advocacy worker where the child is unable or otherwise does not wish to instruct a solicitor would also help to safeguard their rights and interests.

Question 18: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

No – Please refer to our answers above.

Proposal: Voices of very young children (See section 5.4 of the consultation document).

Question 19: Do you agree that particular arrangements should be made to capture and share the voices and experiences of very young children in a redesigned children’s hearings system? If so, what should those arrangements be?

Answer

Capturing children’s views is crucial and we accept that children express their views in a variety of ways, including by their behaviour. We also accept that it is generally possible to capture the views of very young children and agree that arrangements should be made to capture and share this. However, appropriately capturing and interpreting children’s views, particularly the behaviours of very young children and babies, is a specialist and nuanced area that requires significant professional expertise.

We are aware from our casework that approaches to capturing views and interpreting behaviours can vary significantly. Cases can quickly become highly contentious when parents and professionals have conflicting opinions regarding the views, and meaning of same, of a very young child. We also recognize that there are instances where significant decisions (such as reducing and/or stopping family time) are made, at least in part, based on the panel’s understanding of the child’s views.

We would therefore support the involvement of independent and suitably qualified professionals to undertake this task and that at the very least, enhanced training, national standards and best practice guidance is developed.

Proposal: Views are sought on the offer of advocacy to the child (See section 5.5 of the consultation document).

Question 20: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – Children’s views and their right to access advocacy services, including their right to also have a solicitor in addition to an advocacy worker, should be fully discussed with all children well in advance of their hearings. We agree with the HSWG report that this should be done at the point of referral and regularly revisited with children throughout the process. It is not in the child’s best interests or conducive to the child’s effective participation in the proceedings for this to only be formally explored on day of the children’s hearing. The legal duty to inform children of their right to advocacy in advance of hearings should also in our view include a duty to explain the role of an advocacy worker as well as that of a solicitor and how children can access these supports. This is not something that is presently well understood by children or those supporting them. We would also suggest that there should be clearer referral routes for children to be referred to an advocacy worker and/or solicitor at the earliest opportunity and a positive duty on relevant professionals to refer children to these supports where children indicate they want this.

Question 21: How should the rights and the views of children and young people of all ages, including very young children, be better represented in the children’s hearings decision making?

Answer

We would refer to our previous responses to questions 17, 19 and 20. We would also highlight the importance of consistent working relationships and of those continuing throughout the child’s journey and at every hearing if the child wishes this. We know from our own casework that having the resources and time to build trusting relationships with child clients is critical. We would also suggest that where appropriate, the child’s views should be recorded within Record of Proceedings.

Question 22: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We would refer to our above response and specifically to our response to question 20.

Proposal: The Scottish Government is interested in the views of respondents on how changes to participation might operate in practice, to ensure children’s rights and best interests are upheld, and their views and wishes reflected to decision-makers (See section 5.6 of the consultation document).

Question 23: Do you support the creation of a statutory process, undertaken by the children’s reporter, to record the capturing of children’s views and participation preferences?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We support this being done at the earliest opportunity and as suggested by the HSWG, at the point of referral and revisited at regular intervals. The proposal that the Reporter record this information would ensure that this takes place and potentially provide a further check and balance so that the views and child's preferences have been independently obtained and accurately recorded.

Proposal: We are interested in would be interested in respondents' opinions on the timeframe requirements in the current 2013 Rules of Procedure (See section 5.7 of the consultation document).

Question 24: Should the timeframes for the provision of papers in advance of a children's hearing to the child and relevant persons as set out in the 2013 Rules of Procedure be altered?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – Current provision (that panel papers are provided at least three days prior to the hearing) does not, in our experience, allow enough time for the child or relevant persons to read, digest and respond to content within panel papers which often span several hundred pages. It also does not give individuals sufficient time to seek legal advice or for an advocacy worker to be appointed if a child or relevant person wishes to provide their views on the papers. The three-day time limit can be particularly problematic when papers are received by parties on a Friday for a Monday hearing.

There is an extensive amount of content within panel papers, and it can be difficult for us to first review this as the legal representative and thereafter take proper instructions from clients within such a limited timeframe. Those subject to the children's hearing system are often vulnerable and traumatised; panel papers can be triggering for them to re-visit prior to every hearing. We find that clients need time before their hearings: (i) to form a relationship with their legal representative (at least prior to the very first hearing) (ii) for their legal aid application to be processed (iii) have pertinent sections of the papers read aloud to them (iv) consider detailed legal advice and (v) arrive at an informed decision so they confirm their instructions to us. It is not always possible to achieve this within the current timescale.

A minimum of seven clear working days (if not longer) would be preferable. The more notice and time people can be given the better. This allows legal representatives to take proper instructions and provide individuals with a better opportunity to formulate a measured response to any content that they may disagree with.

In addition to extending the three-day timescale, we would suggest that as part of the Children's Reporter's role in preparing the panel papers, it would be helpful if this could extend to highlighting any new and updated information within the papers, particularly within social work reports, that differs from the previous set. This would enable families and legal representatives to immediately refer to and focus on the updated information that is pertinent to the upcoming hearing.

Also, that consideration is given to the current rules and practice in relation to how the Reporter determines which information and reports from previous panel papers are included in future papers for future hearings. Our experience is that following a substantive decision, no reports (including safeguarder and independent expert reports) from the previous panel papers are included in future papers. This can create an issue when we require to refer to a point or finding within a previous

safeguarder report which the subsequent panel has not had sight of. Whilst relevant persons and the child can in theory seek to lodge these reports independently, due to the narrow statutory timescales for doing so, this is often not possible in practice. A child's circumstances require to be understood in the context of the totality of the available information; not just the limited information that is before the panel on a particular day. We appreciate that there can be a balance for Reporters to consider in terms of not putting historic and irrelevant information before the panel. Consideration should perhaps be given to at least having certain important reports included, or consulting with relevant persons/ the child before finalising the panel papers to be sent out.

Question 25: Should the timeframes for the provision of papers to children's panel members as set out in the 2013 Rules of Procedure be altered?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – The current four-day timeframe can prevent relevant persons/ the child and their legal representatives from submitting information that comes to light after the four-day timeframe has passed. This is particularly the case when panel papers are only sent to us three days before the hearing. This can become even more difficult when statutory agencies lodge late reports/ updates out with the three-day limit and we require to take instructions from clients on the day of the hearing, often in a SCRA waiting room.

To illustrate the difficulty, we were instructed in a case where it was alleged in the panel papers that the child's nursery attendance was a concern. The day before the hearing, we managed to secure the child's nursery attendance records which evidenced that the child's attendance was generally good. There is however (unlike in the Sheriff Court) no mechanism for lodging this type of evidence late or bringing this to the panel's attention immediately before the hearing. It is then within the discretion of the children's panel on the day whether they will adjourn to consider this information.

In our experience, the four-day time limit does not allow our clients enough time to respond to the panel paper content (such as by making written representations to the panel outlining their views) and/or make attempts to gather evidence prior to hearings. Parties should in our view be allowed to submit pertinent information closer to the hearing date and preferably directly to the panel members.

Proposal: *Hearings for Children* recommended that: The drafting of grounds and the Statement of Facts should be reframed to take a rights-based approach to help families to better understand why grounds are being established and recognise themselves in the drafting (See section 6.1 of the consultation document).

Question 26: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

No – Prior to having the benefit of legal advice and being able to discuss the Statement of Grounds in detail, clients' understanding of the grounds can vary and depend on the specific ground at issue. Some grounds are specific enough that they can be reasonably expected to be understood. However,

for example ground 67(a) (which is the most common ground that we encounter in our casework), is not well understood and will require us to explain the different legal components and terminology.

Question 27: Do you agree that there should be changes to the current approach to grounds of referral?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – In addition to our comments in response to questions 26 and 28, we would highlight the difficulties that we encounter with the current approach of “putting grounds” to the child and their family at an initial Children’s Hearing. CLAO has had several clients come to us after the initial grounds hearing, having agreed to Grounds and Supporting Facts without fully understanding what they were accepting, or of the implications of acceptance. For example, we recently became aware of parents who, without the benefit of legal advice, accepted Grounds and Supporting Facts and their admissions were later relied upon to pursue a criminal action for neglect. Children and their families need to be aware of their right to legal advice and representation in these proceedings at the earliest opportunity and prior to a children’s hearing where grounds are going to be put to them.

Question 28: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We know from our experience of acting for parents and children that the current wording of s67 grounds can be a barrier. Framing the grounds in terms of expected standards would potentially enable families and children to better reflect upon their lives and whether they consider that their own personal circumstances currently meet these minimum expectations. Supporting Facts could then be used to identify both positive areas where standards are being met or even excelled, as well as areas where standards are falling short. This could help create more balance and promote active engagement in what is being said rather than an immediate defensive stance being taken which is a natural response to a list of statements perceived to be direct criticisms of past actions or inactions. Moreover, it could help families and statutory agencies take a more forward-looking approach where the focus is on what needs to change and how families can be supported to achieve this. This approach could also reinforce to children (and families) the minimum that they should be able to enjoy in their family lives and to understand that they are entitled to expect more.

Question 29: If a new scheme of grounds based on unmet expectations around wellbeing indicators were to be introduced, are any safeguards needed (statutory or operational)?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – Statutory and operational safeguards would be required if a new scheme of grounds based on unmet expectations is introduced. Children and families should have the protection of clearly and legally defined terms within legislation that requires to be considered by the Reporter, as well as by panel members when making their decisions about the requirement for compulsory measures (or otherwise). This would also benefit other professionals if these definitions were universally applied

within their own reports. For example, social work utilising the same wording and definitions in their reports flowing through to grounds and panel discussions would ensure consistency of terminology.

In addition, there needs to be a clear system of checks and balances to ensure that there is a consistent approach to drafting of the grounds, amendments to the grounds and eventual establishment of the grounds.

Proposal: The Scottish Government would welcome respondents' views on the suggestion for a post-referral discussion (See section 6.4 of the consultation document).

Question 30: Do you support the introduction of the offer of a post-referral discussion between the children's reporter and the child and family?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We support the introduction of the offer of a post-referral discussion between the children's reporter and the family. We would suggest that this should not be mandatory to avoid further exacerbating feelings of "meeting overwhelm" and that where clients have representation and are unable to meet with the Reporter directly, there is a mechanism for families to make representations to the Reporter at this stage via their representative, if required.

Question 30a: Who else, if anyone, should attend a post-referral discussion?

Answer

Whilst we are aware that families are currently able to contact the Reporter to discuss referrals that have been made, in our experience, relatively few clients are aware of their right to do this or of the merits in doing so. The main benefits we see in the Reporter having a positive duty to offer a post-referral discussion are that it will:

- promote families' understanding of the referral process and the underlying reasons why a child has been referred and potentially prompt early action to address concerns
- promote engagement, participation and relevant information-sharing between the family and the reporter at an early stage
- ensure that children and families' rights are protected from the outset of proceedings (for example, the Reporter can review families' understanding of the process and advise them of their rights to advocacy support, independent legal advice, other relevant supports and how these can be accessed.

As referenced earlier, we have acted in cases where because we were instructed at an early stage, we have been able to provide important evidence that resulted in the child not being brought before a children's hearing. Ensuring families have a clear way of sharing such information with the Reporter at the earliest opportunity is hugely important, particularly where there has been a breakdown in relationships with statutory agencies.

Proposal: The Scottish Government invites views on the proposal that grounds hearings be replaced with fact finding hearings to be presided over by a new, legally qualified member operating within the environment of the children's hearings system – the "legal member" (See section 6.5 of the consultation document).

Question 31: 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?

Answer advantages

- I. Continuity of legal member who presumably would be allocated to the case from commencement to conclusion.
- II. Dedicated legal member with specialist legal knowledge and experience dealing with this area of law on a day-to-day basis.
- III. Assuming sitting in full time role, opportunities for "grounds hearing" five days per week rather than allocated one day per week offered by the Sheriff Court. This may result in proceedings being completed within a shorter time frame.
- IV. Attempted informal environment albeit it is not accepted that this would cause less anxiety than Sheriff Court proceedings which parties tend not to attend until proof.

Answer disadvantages

- I. Risk of eroding parties' right to a fair hearing and ability to properly test evidence. Speed and informality are not always good; it takes time for evidence to be properly collated and presented to ensure that parties' right to a fair hearing, both in the context of the children's hearing proceedings as well as any relevant parallel legal proceedings, is observed. Sheriffs have that overall oversight and understanding by the nature of their multi-disciplinary legal role.
- II. Related to the above is how this new approach and role would operate in complex proof proceedings (for example, non-accidental injury cases) where counsel and expert witnesses require to be instructed.
- III. Risk of actual or perceived unconscious bias if only one legal member is assigned in post and presiding over all hearings. Mixing up sheriffs whilst having its negatives, allows better opportunities for clients to feel that they are getting an unbiased decision.
- IV. Unclear how this approach would impact current practices in relation to negotiating with the Reporter in relation to the grounds/ supporting facts. Negotiating grounds/ supporting facts is an important aspect of our practice and allows us to reach suitable negotiated positions where appropriate, without the need for a protracted/ distressing evidential hearing.
- V. It is unclear how ICSOs, once the 66-day maximum has been reached, would be dealt with and reviewed pending determination of the Statement of Grounds. The clear benefit of the current system is that the Sheriff provides an additional check and balance at this crucial stage in the proceedings by independently reviewing and considering the child's best interests.

Question 32: Do you consider that this proposal fulfils the intention of the recommendation that there should be a consistent specialist sheriff throughout the process?

Answer

Check box options – Yes? No? (Please explain your answer).

No – In the absence of further detail relating to how this proposal would operate in practice (specifically with regard to the above perceived disadvantages), the level of training and expertise that legal members would be expected to possess, and the safeguards that would be in place to ensure a fair hearing for families wishing to put forward a defence, it is difficult to comment further. A designated legal member would not be a direct replacement for a specialist Sheriff who has a wealth

of legal knowledge, practice and experience of presiding over such cases in a way that is independent, compliant with article 6 considerations and the laws of evidence. Such experience also brings with it an understanding of how to communicate with people in a way that is both engaged but at the same time operating at arm's length. The standard for legal members to match in this regard is very high although if consistently met, would be welcomed.

Question 33: Do you have any views on the proposed retention of the appeal arrangements within a redesigned children's hearings system?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – Appeals should remain available to a different body to the original decision-maker, as is currently the case. This ensures impartiality and separation of powers.

Question 34: Other than a legal member or sheriff is there another person or body who could:

Answer

Tick box – present the statement of grounds to the child and family and receive responses?

Tick box – make interim orders?

Question 35: 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'?

Answer

See answer provided at question 31.

Question 36: Is it proportionate and necessary for there to be a fact-finding hearing in every case?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – It would in our view be necessary to have at least the option of a fact-finding hearing in every case, whether that it is to confirm agreement/acceptance and understanding of the grounds or to confirm that they are opposed/rejected. If grounds are disputed, a fact-finding hearing is essential and indeed proportionate to ensure compliance with article 6 and that the participation rights of the child and family are respected and promoted.

It would also be necessary for parties and children to be made aware prior to the commencement of the fact-finding through a neutral discussion that they are entitled (and encouraged) to take independent legal advice and representation and how they can access this. Such a meeting could be scheduled with the legal member ahead of any fact-finding hearing. See also our earlier comments provided at question 27.

Proposal: The Scottish Government is interested in respondents' views on whether any additional safeguards would be needed for very young children (babies, infants) in a redesigned grounds process (See section 6.6 of the consultation document).

Question 37: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – It would be important in our view that the legal member has this discretion where very young children, who are too young to understand or confirm agreement, are at the centre of the application even if all parties appear to have agreed to the grounds. Relevant persons (especially those unrepresented) could be vulnerable adults, coping with a wide array of health and other difficulties, and agree grounds which otherwise would not be established if evidence were considered by an independent third party such as a Sheriff or legal member. If the legal member had no discretion the young child’s legal record could arguably reflect something inaccurate or which otherwise could not be proven. The permanence and far-reaching nature of this record, and which can be relied upon in other legal proceedings relevant to the child or indeed their siblings, requires accuracy and the legal member to have discretion to call a fact-finding.

Question 38: 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?

Answer

A safeguarder or other independent and appropriately trained professional with proper understanding of the legal consequences of the grounds proceedings could be automatically appointed in these cases to support the best interests of very young children. Consideration should be given to how the grounds are recorded within the child’s wider records as they will be capable of being accessed by the child at a future point and relied upon at various stages throughout their childhood.

Proposal: The Scottish Government is interested in respondents’ views around introducing a procedural rule whereby if the grounds of referral have not been established by a specified time, that situation should trigger a review by the decision-maker, be that a sheriff or legal member (See section 6.7 of the consultation document).

Question 39: 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.

Answer

We understand the basis for this proposal and the need to avoid drift and minimise delay in legal decision-making for children. Whilst we can perhaps understand the appeal of a introducing a three-month time-limit, the difficulty with an arbitrary time-limit is that there will be cases that require a longer period, due to their complexity, instruction of expert assessments, the availability of evidence and/or parties’ circumstances. Introducing additional layers of procedure and further hearings in already complex cases may be counterintuitive and place additional pressure on families and resources. Relevant persons and/or children from the outset of these proceedings currently have to “play catch up” in terms of preparation for any fact-finding hearing including the recovery, preparation and lodging of evidence in support of their position. This information is often in the hands of statutory agencies and there can be significant delays in obtaining this through no fault of the relevant person/child.

We would suggest that active case management, clear processes and expectations, a procedure that is tailored to complex as well as straightforward cases, strict time limits for SCRA to provide evidence and witness statements, promotion of early and candid information sharing between agencies and parties may help better achieve the stated aim. We see this currently in the case management of

adoption and permanence cases, where the use of Practice Notes, the Adoption Court Rules and active case management by the Sheriff generally in our experience helps ensure the efficient progression of these cases.

Also, we would suggest that these cases should always be kept under consideration and not just at three-month review hearings.

Question 40: If you support defining a time period, but not the suggested three months, should another time period be considered?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – See above answer.

Proposal: The Scottish Government seeks respondents' views on the potential involvement of safeguarders during and beyond grounds establishment in redesigned children's hearings proceedings (See section 6.8 of the consultation document).

Question 41: Do you agree that there should be earlier consideration of the appointment of a safeguarder in a redesigned system?

Answer

Not answered.

Question 42: Should the proposed legal member have discretion to appoint a safeguarder to assist them with establishing the grounds of referral?

Answer

Not answered.

Question 43. 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?

Answer

Not answered.

Proposal: Pre-birth activity by the children's reporter. To further inform Scottish Government's considerations, respondents' views are sought on proposals for expanding the children's reporter's role to pre-birth situations (See section 7.2 of the consultation document).

Question 44: How could a redesigned children's hearings system better protect babies shortly after their birth?

Answer

1. Early signposting to legal advice: We are regularly instructed in cases where a client's unborn child is subject to pre-birth child protection planning processes and/or multi-agency involvement. We know from representing expectant adults and children in such cases that these processes are experienced by our clients as distressing, confusing and highly stressful. Early signposting to legal support and representation is currently inconsistent and there remains a lack of understanding around how a solicitor can help parents better participate in discussions, understand the available

options and make informed decisions. Greater awareness among those regularly interacting with parents on the role of legal representatives, where and how parents can access legal advice and the importance of doing so at the earliest opportunity, would greatly assist families and promote a rights-based approach.

2. **Availability of tailored and consistent supports across Scotland:** We support the recommendation that intensive and tailored supports (for example, professional substance misuse and mental health supports and treatments, residential/mother and baby units, education and parenting classes, family mediation, advocacy services) should be provided to families at the earliest opportunity, for as long as is required and, where applicable, delivered in the family's preferred mode having regard to their specific support needs and wider equalities considerations. We are however aware of the current realities and acute resource pressures and waiting lists in this regard, particularly within the rural, highland and island areas that we operate in. We are keenly aware from our casework that early access to holistic supports and consistency in professional relationships is critical to positive legal outcomes.
3. **Practices in relation to Section 25 Agreements:** We would highlight some of the issues we encounter in practice in relation to parents being supported to provide informed consent to these agreements. We refer to previous comments regarding the importance of early signposting to legal advice in such cases and suggest that this should be done as a matter of course and as soon as possible where statutory agencies are discussing section 25 agreements with families. We have been instructed in cases where parents, particularly those with learning and/or significant mental health difficulties, have signed a section 25 Agreement and the child removed from their care as a result. However, at the point of later instructing a solicitor, it has been evident in certain instances that parents may not have provided informed consent. For example, we were involved in a case where a section 25 Agreement remained in place for over a year before the parents, who had learning disabilities, obtained legal advice from us. They primarily sought advice because their family time had been reduced against their wishes. By the time we were instructed, the status quo was that the child was having infrequent indirect contact with them. The length of time that had elapsed made it exceptionally challenging for the parents in that case to secure better supported family time via the Children's Hearing System. The practice around parents entering the English equivalent of section 25 Agreements appears to have been more extensively litigated south of the border. In our submission this is not because the practice is necessarily better in Scotland. Indeed, as the above example demonstrates, we encounter issues not just in relation to how s25 Agreements are entered into but also how they are reviewed to ensure that parents are still consenting to these arrangements. Ensuring that parents are properly informed at all points in the process helps better protect babies by enabling parents to effectively advocate for their child. In the event the Reporter's role is enhanced in line with the HSWG recommendation, we can see a benefit in this providing an additional safeguard to confirm that early signposting to legal advice and obtaining informed consent and regularly reviewing same in relation to section 25 Agreements is taking place. In addition, we would strongly support the development of best practice guidance and the delivery of training in this area.
4. **Practice in relation to CPOs:** We appreciate that the scope of this consultation does not extend to the CPO court process, however, we consider it pertinent to highlight the unique challenge for parents and their legal representatives when a CPO is applied for in relation to a newborn. There is currently no obligation to notify parents that a CPO application has been made or to intimate the date on which the application will be heard. Whilst we recognize that there may be instances where it is appropriate not to notify parents, in the context of many of the pre-birth child protection

cases we have been instructed in, the intention to seek a CPO has often been decided for some time and communicated to parents many weeks, sometimes months, before the child's birth. Limited or no prior notice of the CPO application in such instances excludes parents from decision making that has far-reaching consequences for the family. It is suggested that parents should receive some advanced notice of the CPO application process and be supported to participate in the hearing via their legal representative where possible. Improved collaborative working between statutory agencies and solicitors representing expectant parents would also be beneficial for families navigating this stage of the process.

Question 45: What can be done to improve interagency pre-birth preparatory work?

Answer

Covered in earlier answer.

Question 46: 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?

Answer

We understand the basis for the proposal that Reporters should have an enhanced role at the pre-birth stage to create a more planned approach, particularly if this can mitigate the distress associated with the CPO process or avoid a child being brought before a Children's Hearing unnecessarily. How this is managed in practice so as not to overwhelm parents, keep the number of professionals interacting with families to a minimum and safeguard against inappropriate disclosure of confidential information, or information that could prejudice families in concurrent or future legal proceedings, will be crucial. We understand Scottish Government intend to consult with the ICO, however, important detail regarding the parameters of the enhanced role, how this would operate in practice and interact with the existing statutory framework, whilst maintaining the Reporter's independence and overall observance with article 8 and 6 considerations require further clarification.

In the meantime, it is envisaged that legal representatives could have an important role, notably in relation to facilitating engagement and/or communication with the Reporter and help safeguard against inaccurate recording or inappropriate disclosure of information at such a sensitive time.

Proposal: Children's reporter's ability to call a review hearing. The Scottish Government wishes to consult on whether the current three-month period within which a CSO cannot be reviewed – at the request of a child, relevant person or other entitled person – should be abolished or shortened (See section 7.4 of the consultation document).

Question 47: 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?

Answer

We can see potential benefit in the Reporter having the ability to initiate an early review in limited circumstances. For example, where there is a failure or delay in implementing the order on the part of the Implementation Authority. The available mechanisms to deal with this scenario within the initial three-month period currently are limited. In practice it can involve the family having to make representations to the Reporter who in turn will advise the Implementation Authority to request a review. This can lead to unacceptable delay and uncertainty for the family.

In the case of new welfare concerns arising from fresh referrals to the Reporter in respect of a child already subject to a CSO, a streamlined and more child-centred approach to decision-making in response to a family's changing circumstances would be preferable. Particularly if this means (as we sometimes encounter) avoiding protracted legal proceedings simply to establish fresh grounds that do not in practice contribute much to future discussions at hearings, are largely similar to the already established statement of grounds, and that can be adequately addressed by existing CSO arrangements. This would of course be dependent on safeguards being in place in relation to the child and family's ability to still exercise their right and option to challenge disputed allegations, particularly in relation to alleged offences and, where appropriate, have these independently scrutinised by the Sheriff.

A key risk that we foresee is that depending on the reliability of the new welfare concerns and the extent of the Reporter and panel chair's new powers, the family's ability to challenge unsafe allegations is by-passed leading to welfare decisions being based on a flawed assessment of that new information. We are aware from our casework that the reports accompanying referrals to the Reporter do not always contain reliable and accurate information. Enhanced panel member training in relation to civil rules of evidence and scrutiny of new information and concerns in this context would therefore also, in our submission, be critical. As would provisions around the Reporter's investigative function and ensuring the involvement of families and their legal representatives in that process.

Question 48: 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?

Answer

We have certainly encountered instances where there has been a genuine need for families to make representations to a Children's Hearing before the expiry of the three-month period, particularly where there has been a material change in circumstances, serious concerns regarding the implementation of an order or where the child is in secure accommodation. We would broadly support the proposal for a shorter, and perhaps in some instances no, timescale in these situations. However, clear criteria would in our view be required to strike the right balance between enabling families and the child to call an earlier hearing where there is a genuine need for one whilst safeguarding against a party, for example, requesting a hearing simply because they did not agree with the previous decision.

Children's Hearings can be distressing and generate much uncertainty for our clients. Mitigating against unnecessary distress and disruption to the child and family would therefore be an important consideration when deciding the new parameters around the individual's right to request an early review.

Question 49: 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 forming part of the pre-existing referral?

Answer

We support the proposal and underlying aim of reducing the number of repeat referrals and with that the number of children's hearing proceedings in respect of the same child. We refer to paragraphs two and three of our answer to question 47 regarding what we see as the main benefits to this approach, as well as the potential risks, particularly in relation to article 6 considerations and the right to challenge disputed and serious allegations. Continuity of the Children's Reporter would also be

welcomed as we know how important consistent working relationships are to the families we represent.

The appropriate timescale would in our view need to reflect the need for families to have certainty regarding the Reporter's decision making whilst enabling the totality of the child's circumstances and best interests to remain the focus. It may be that the specifics of the case and consideration of other factors for example, the similarity, seriousness and complexity of the re-referral to the original, the views of the family and child, the child's age and current circumstances, the stage of other relevant proceedings, the need for independent expert evidence and so on should determine the appropriate timescale. For example, three to six months or significantly longer may be proportionate in some cases but not in others.

Proposal: Views are sought on the possibility of some measure of payment for panel members (See section 8 of the consultation document).

Question 50: 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?

Answer

As a service, we have over 10 years' experience of representing relevant persons and children at children's hearings throughout the Highland and Islands, Aberdeen and Aberdeenshire, and Argyll and Bute. During that time, we have observed how increasingly complicated, specialist and intricate children's cases have become in terms of the wider legal framework and competing considerations panel members now require to reconcile. Panel members are generally not legally qualified but instead have a broad range of experiences and backgrounds. We fully acknowledge that many panel members have presided on panels for many years and are very experienced. Their decisions are nevertheless legally binding and require a detailed understanding of the relevant legislation and case law. Decisions are also rarely made in a legal vacuum; it is increasingly common for there to be parallel family, domestic abuse, adoption/permanence, and criminal proceedings in addition to the children's hearing proceedings. Their decisions can therefore impact, directly or indirectly, the direction and outcome of other legal proceedings. Welfare decisions are also multifaceted, nuanced and have life-changing consequences for the children and families concerned. Contentious cases invariably involve factual disputes between the family and local authority that require to be resolved in a way that is fair, just and that correctly identifies when independent expert evidence is required. As we observe in practice, it can be difficult for panel members who are not legally qualified to fully appreciate and consider this wider context. We do therefore support the introduction of legally qualified panel members with relevant expertise to promote consistency of legal decision making and overall public confidence in the system. This would also help bring the Children's Hearing System more in line with other Scottish tribunal systems.

Question 51: 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?

Answer

Not answered.

Question 52: Do you have any views on the introduction of new roles into the children's panel:

- **Paid Chair**
- **Paid specialist Panel Member – possibly including care-experience**

- **Paid Panel Member**
- **Volunteer Panel Member.**

Answer

See our answer to question 50 above. For the above-mentioned reasons we see the benefit of introducing specialist professionally qualified panel members (for example legally qualified members, child psychologists, experienced independent social workers) to ensure well-rounded and evidenced based decision-making for children and families.

We also support the principle that individuals with lived experience of the care system should be represented on the panel. Clients will tell us about the perceived “disconnect” that can at times exist between panel members and the unique adversities and daily realities that our clients face. Having that unique perspective on panels would likely benefit our clients in terms of how they both experience and perceive the hearing system. This role should in our view be complemented by professionally qualified members.

Question 53: 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?

Answer

Not answered.

Question 54: Each children’s hearing currently consists of 3 panel members, with one chairing:

- Should the number of panel members required for each hearing be reduced?**
- Should all panel members, on completion of appropriate training, still be required to chair hearings?**
- Should some children’s panel members be 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.**

Answer

- In the event the number of panel members are reduced, it will be imperative that the remaining decision-makers are sufficiently qualified. As referenced in our response to question 67, we agree that there are limited instances where children’s panels could be presided over by a single decision-maker.
- We would support the retention of a “chairing member” role where there are multiple panel members. The chairing member has a pivotal role in structuring and ensuring a focused discussion which can in practice “make or break” participants’ experiences of the hearing.
- Not answered.

Proposal: Views are sought in relation to the potential engagement with the chair before the Children’s Hearing (See section 8.3 of the consultation document).

Question 55: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We understand the potential benefit of this proposal and that this could be positive for our clients in terms of making them feel more comfortable and help them understand the structure and role of the panel/hearing. However, as some clients may not wish to meet the chairing member, or may otherwise be unable to do so, this should perhaps be framed as an option that is open to relevant persons and the child. We agree with the HSWG that potential models for “pre-panel meetings” and how these might benefit children and families should be explored. Having the option to choose will be important and is more trauma-informed, particularly where there are multiple hearings taking place within a short period of time.

Adequate safeguards would also need to be in place to prevent the possibility of parties attempting to discuss the subject matter of the up-coming hearing. It may therefore be sensible for the Children’s Reporter to also be present.

Question 56: If a meeting is held in the hearings centre with the chairing member, would you support this being an informal meeting?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – The degree of formality in our view should be driven by the purpose and aim of the intended meeting. If the aim is to allow for introductions before the formal hearing, simple explanations as to the panel and chair’s role, show the family the hearing room, establish basic grounds rules and generally try to provide reassurance, this meeting would likely be better experienced by our clients as informal to avoid it feeling like a hearing. However, it is anticipated that safeguards to prevent discussions that may prejudice the substantive hearing will likely be required.

Proposal: The Scottish Government would welcome respondents’ views on whether the majority decision approach should be maintained, or whether in light of potential changes to the decision-making model, there should be consideration given to alternative approaches (See section 8.4 of the consultation document).

Question 57: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We support any measures that promote quality reasoning and decision-making. Children’s Hearing decisions have far-reaching consequences for the child and their families. We are also aware from our work that panel members are making decisions within an increasingly complex context requiring them to balance many, and often competing, factors when determining the child’s best interests. It can be, understandably, difficult to articulate detailed decisions and reasons immediately following a lengthy and in-depth discussion.

The current approach risks in our view perpetuating a perception (as our clients will tell us) that panel members can be unfairly influenced by one another, or, that the case has already been decided based on the papers.

The benefit of an adjournment is that it will:

- allow time for panel members to properly reflect on the discussion points, the totality of evidence before them and the legal framework
- enable panel members to fully consider the detail, such as the nuance of wording and specificity of measures to ensure these are in the child's best interests and that important practicalities have been properly thought through.
- enable panel members to consider the most effective way to communicate their decision and reasons to the family with thought given to the tone, manner and way in which reasoning should be shared with each participant
- resolve potential "hung" panels in a way that is preferable to the current situation where families are exposed to a back and forth between members and Reporters
- help instil confidence among families and service users that decisions and reasons have been properly scrutinised, reasoned and discussed before they are pronounced
- be an opportunity as the HSWG report highlights, for the child and relevant persons to reflect, decompress and have time away from the intensity of the Hearing; particularly for individuals with trauma, a pause in proceedings may allow time for them to regulate their emotions and be in a better position to absorb the final decision and reasoning of the panel members.

A similar adjournment/recess style procedure is routinely followed in other court and tribunal proceedings, including the Mental Health Tribunal and the Sheriff Court.

Consideration would however need to be given in relation to ensuring independent and transparent decision making. Practicalities for an adjournment should also be carefully considered. This may include for example, facilitating separate waiting rooms in domestic abuse cases to ensure all participants are kept safe. Snacks and water could be provided, particularly if children are in attendance. Families and children may require emotional and practical support during the adjournment, to help them feel comfortable, safe and at ease.

Question 58: Do you agree that the majority decision-making approach should be maintained?

Answer

Yes. Majority decisions are common in our experience and perhaps reflect the complexity and intricacy of the decision-making that children's panels undertake. They can therefore help promote confidence in the decision-making process.

The full reasoning and discussions between panel members that led to the panel's final decision should in our view be recorded in writing within the Record of Proceedings document. Any dissenting panel member's decision should also be recorded to provide an accurate representation of the discussion.

This promotes a rights-based approach by allowing children and families to have a holistic understanding of the discussions between panel members and the reasons for their final decisions. We often find that relevant persons and children are far more willing to accept decisions and continue to engage in the hearing process, regardless of whether the decision is favourable to them, provided that the decision-making is perceived as clear, fair and justifiable.

Furthermore, information in relation dissenting decisions will assist Sheriffs when determining appeals as this will allow the Court to consider a full and accurate representation of the discussions and reasoning that took place.

Question 59: Should the children’s hearing be asked to reach a unanimous decision during adjournment, in order to minimise repetition and potential retraumatisation?

Answer

If the decision is made to keep majority decision-making, and with that, the communicating of dissenting decisions to families, we can see the benefits of this as already stated above.

Steps to minimise repetition and potential re-traumatisation can already be taken, for example identical decisions and reasons should not need to be repeated by each panel member as this does not add to the family’s understanding of the decision and how it has been arrived at. Also, the current practice of panel members each giving their decision one by one, could potentially be distressing for children and families as they wait to hear the verdict from one person after another.

We agree that it may be more appropriate for the chair to deliver the totality of the decision and summary of reasons verbally to the family, including a summary of any dissenting view. The detailed reasons, including any dissenting reasons, would then be followed up in writing within the Record of Proceedings.

Question 60: If a majority decision approach remains, would you agree that any dissenting decision should be noted and explained?

Answer

Yes, for reasons stated above.

Proposal: The Scottish Government welcomes views on decision-making and specificity of measures in a Compulsory Supervision Order (CSO) (See section 8.5 of the consultation document).

Question 61: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – As noted, there are situations where a child’s liberty is restricted by interventions/interference resulting from measures which do not necessarily fall within the higher measure criteria currently set out by the legislations (that is, movement restriction and secure accommodation authorisation). For example, we have acted for children who have been in an open residential placement and their liberty has been restricted (for example physical restraint, limited access to the community) to their detriment. These experiences can be traumatic and heighten a child’s sense of powerlessness. Given the move towards a more trauma informed and rights-based approach, we agree that Children’s Hearings should have that overview, level of scrutiny and be more prescriptive when it comes to cases where children are placed away from home and those arrangements may infringe upon the child’s liberty. It would also help to ensure a greater sense of accountability and transparency by those providing the child’s care.

Question 62: If so, do you agree that a ‘maximum authorised intervention’ is an appropriate means of delivering that clarity to children and to professionals?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – For the above-mentioned reasons, we do see a benefit in the panel having oversight and authority in these matters. A Children’s Hearing provides an open and safe forum in which to have these discussions and for guidance to be clearly communicated to all parties.

Proposal: Timely notification of children’s hearings decisions. Views are sought in regard to the timely notification of children’s hearings decisions (See section 8.6 of the consultation document).

Question 63: Is the current time frames for written confirmation of the decision by the children’s hearing (5 working days) still appropriate?

Answer

Check box options – Yes? No? (Please explain your answer).

No – There are instances, particularly in contentious and/or complex cases or where we are instructed to explore a potential appeal point, where it would be helpful to have the written decision sooner than the current five working-day period. We would therefore support a shorter turnaround for written decisions where possible and in those urgent cases

However, we agree with the HSWG’s findings that the current approach to written decisions can vary considerably. Quite unlike written decisions issued by other tribunals that we appear in, Record of Proceedings tend to be brief without necessarily capturing all decision-making considerations. We would therefore support an improved approach requiring a detailed written narration of the relevant facts, evidence presented, points in dispute and the panel’s analysis of those. A balance would need to be struck between providing the family with certainty and sufficient time within which to appeal on the one hand and allowing the panel adequate time to draft a more detailed and fully reasoned decision on the other. If appropriate flexibility was built into the system to allow, for example, written decisions to be provided quickly in particularly urgent cases, and the 21-day appeal timeframe was varied to commence from the date that the written decision is intimated on or received by relevant persons/ the child, then we can see how it would be possible to reconcile both considerations.

Question 64: Should certain children’s decisions (e.g for an ICSO) have accelerated notification timeframes, relative to the urgency of the decision?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – certain children’s hearing decisions should have accelerated notification timeframes, particularly for urgent hearing purposes.

In our experience, some Reporters will advise immediately after an ICSO hearing has concluded when the next hearing will take place and in so doing consult with parties as to the proposed date/time. We are of the view that this should become mandatory as it allows all parties time to prepare for the next hearing and helps us identify when we should be arranging to take instructions from our client. It will also benefit our clients who often have multiple other meetings and hearings to attend within that 22-day period.

If a hearing is required to make an urgent decision, accelerated notification will give parties more time to sufficiently prepare and have productive discussions, along with potentially lodging anything relevant for the panel to read in the paperwork within sufficient time.

Question 65: Should consistency or continuity of chairing members be the default position for each child’s hearing?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – The advantages of chair member consistency/continuity are clear in that this would help promote a more trauma-informed approach (that is, mitigate the need for families to repeat and revisit distressing information; provide an opportunity for families to build trust with the chair) and more consistent decision-making. We therefore understand the rationale and broadly agree with the HSWG recommendation that where possible; chair consistency should be the default.

We appreciate however that it may also be difficult for some of our clients to attend hearings where a chair has previously made decisions that they did not agree with, such as reducing or stopping their family time. This could result in disagreements which may not be helpful for the purpose of the hearing and frustrations if the child and/or relevant persons do not feel that their point of view is being listened to when trying to illustrate positive progress made. Whilst this concern may not be capable of being overcome completely and in every circumstance, chair training, independence and ability to build trusting professional relationships with families will be important.

Question 66: Would you support one single children’s panel member’s consistent involvement as an alternative approach?

Answer

See our answer above which outlines the main advantages and disadvantages we foresee, and which equally apply to panel member continuity.

There is currently scope for panel member continuity to be requested by relevant persons and the child, and this is something that we are instructed by our clients to request in certain hearings, particularly in highly contentious cases or for those cases where there is a significant history. The difficulty is that this request is not always honoured in practice. Whilst we understand the resourcing challenges and reasons for this, we are of the view that if continuity is requested it should be guaranteed in all cases as this offers consistency for children and relevant persons.

Proposal: Substantive vs Procedural decisions (See section 8.8 of the consultation document).

Question 67: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – But only in limited and prescribed circumstances (for example, excusal of child or relevant person from attending, to consider requests to attend by electronic or other means).

Furthermore, the proposal should in our view, and in the absence of further detail regarding the qualifications/ training of the panel members, be limited in respect of procedural decisions that improve the conduct and experience of the Children’s Hearing, for the benefit of the children and families at the heart of the process and enable families to focus on the substantive issues. Any decisions that will impact on the care arrangements of the child(ren) or the relationship between parent and child should in our view remain decided by a full three member Children’s Hearing.

Question 68: Are there other areas you would consider appropriate for a single-member decision making approach?

Answer

Not answered.

Question 69: Would you propose additional safeguards to accompany these proceedings and decisions?

Answer

Not answered.

Proposal: Views are welcomed on empowering the chairing member to take difficult decisions on participation and attendance (See section 8.9 of the consultation document).

Question 70: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – In our experience as representatives for the family/child in these proceedings, the existing statutory powers to restrict participation when taken together with the various practical measures used (for example shuttle hearings; the various modes of participation now available to individuals; the relatively recent practice of only permitting certain individuals to participate at specific phases of the hearing) are generally adequate. The current system works reasonably well with chairing members able to exercise powers to manage attendance and participation. Current practice allows for those attending to provide information/views to the panel to do so and thereafter leave the hearing (advocacy workers, teachers). Provided children and families have legal representation at the hearing to ensure that if this can be challenged if not adhered to, the current powers of the chair are likely sufficient.

Whilst we agree that placing these practices and principles on a clearer statutory footing to ensure consistency could be beneficial, the issues we encounter are often in relation to how these powers and practices are currently exercised (or not), the understanding among professional participants of hearing procedure and the parameters of what each professional and/or foster carer can speak to.

Keeping attendees to a minimum can become particularly challenging in contentious cases. It is not unusual for us to have to challenge unacceptable numbers of local authority attendees and make requests on clients' behalf that certain professionals be excluded from all or part of the proceedings. If left unmanaged, this can result in unnecessarily high numbers of professionals in attendance, some of whom will be unknown to the family, creating a perception of (and in some cases a real) imbalance. Making training available to professionals who either regularly attend children's hearings or support colleagues and/or other individuals with this would likely help improve awareness and observance of the relevant principles and procedures.

Whilst we understand the need for proceedings to be conducted with relative informality and in a child-centred way, another issue we encounter is how the parameters of what those in attendance can speak to is managed. Where there are many individuals and professions in attendance, ensuring that everyone's role, remit and reason for attending is clear, that lines of questioning and input are

relevant and appropriate and that there is robust chairing to manage this and ensure effective participation of family members/the child is crucial.

Question 71: Are the existing powers of the chairing member and of the hearing sufficient to protect the rights of all involved?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – Please refer to the above response. In addition, we would emphasise that a key way to protect the rights of children and families in hearings is to ensure that they are aware of their right to legal representation and how to access this prior to any hearing. Local authorities and social work services have the benefit of their in-house legal team. The children’s reporter is present during hearings to answer chair/panel questions and provide a legal opinion if required. It is in the interests of fairness and justice that children and families have at all time access to a legal representative to protect their rights.

Question 72: What enhancements could be made to the existing powers of the chairing member and the hearing to promote inquisitorial approaches?

Answer

We would refer to the points made in our response to question 70.

In addition, we would highlight a challenge that we frequently encounter in relation to how recommendations are presented to panels. Our understanding of promoting an inquisitorial approach is that it would require panels to be empowered to explore all available options, including alternatives to the local authority’s recommendation, to independently determine the measures that are the child’s best interests. It can however be difficult for panel members to achieve this in practice as they are not always provided all the information regarding, for example, the potential risks associated with the local authority’s recommendation, the available alternatives and how these might be implemented.

The child’s social work report is often the only written report before the panel. This can at times lead to an imbalance in the information before the panel and be further compounded by resource pressures (for example, availability of residential placements or support services) and the understandable impact this has on child planning recommendations. At the very least therefore, any enhancement to existing powers should in our view seek to ensure panel members have all the relevant information in relation to reasonable alternatives, particularly in the context of far-reaching recommendations such as removing the child from parental care, significantly reducing or stopping family time and placing a child in secure accommodation.

Further, increased options, powers and guidance when the panel is considering instructing independent and expert reports would better promote an inquisitorial approach. This is particularly important in contentious cases where there are either significant areas of conflict or other complexities in relation to the child’s and/or family’s supports needs that would benefit from expert input. Whilst we understand that panels have an overriding responsibility to avoid drift and delay, a redesigned inquisitorial system should be able to recognise when there is a need for expert input and be adequately resourced so that reports/assessments can be completed within a reasonable timeframe.

Further, a relaxation in relation to the four-day time limit within which legal representatives of relevant persons/the child can submit documentary evidence or reports to the hearing could ensure that alternative viewpoints and options for disposal are in the minds of chair and panel members prior to the hearing taking place. This would promote an inquisitorial approach as the panel would be aware of the alternative views and outcomes sought by children and their families in advance and could direct their questions accordingly to extrapolate the relevant information. A formal mechanism by which such information can at short notice be lodged with panels (like the Sheriff Court where documents can be emailed and will generally be uploaded to an online platform marked for the Sheriff's attention) would also greatly assist as there is no means for agents to do this currently.

Proposal: Recording of Children's Hearings. Respondents' views are sought about whether hearings, in full or in part, should in principle be recorded. Comments and suggestions are also invited about the benefits and risks of video, audio or written recordings (See section 8.10 of the consultation document).

Question 73: In your view, should children's hearings be routinely recorded?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We refer to our answers provided at questions 63, 76 and 77 regarding our views on the benefit of detailed recording of decision-making and providing that information in a way that is appropriate to the child's and relevant person's communication needs and preferences.

We appreciate that some of our clients may indeed benefit from listening to an audio or watching a video recording of the final decision and reasons. This would promote accessibility and participation in the process.

Question 74: What are the main benefits and risks of this method of recording hearings?

Answer

The primary concern in relation to audio/video recording the entirety of the proceedings is that children's hearings can be very difficult and emotional; behaviours and language can become heightened in the moment. Very sensitive matters and confidential information are discussed.

Hearings can also be very lengthy, over two to three hours. It is not clear what the benefit would be for children and relevant persons in those instances to be able to view recordings of lengthy, upsetting and highly sensitive hearings. Linked to this concern is how knowledge of the recording may impact participants and whether it may lead to stifling discussions. Certain participants may also have strong objections to being recorded and this could add to tensions and anxieties on the day.

We can however see, where this is requested by a child or relevant person, particularly if they were unable to be present at the hearing and there is a need to consider a reasonable adjustment under the Equalities Act, there may be occasions where they would benefit from having a record of what happened. A written record would need to be provided in a way that is again tailored to the individual's communication and support needs (including translated into the individual's first language, where appropriate) and in plain English – otherwise, this would appear to defeat the purpose of the proposal. The main risk of a written record in that case would be in relation to how the accuracy of the record would be ensured and what weight, if any should be attached to it in the event there are disputes regarding the content, interpretation, and/or if a party sought to rely on this record within a court

process. Also, there would need to be consideration in relation to what degree participants should be able to input into the record. We can therefore foresee a degree of complexity with this proposal.

Question 75: If only the decision element of a children’s hearing were to be recorded, would this change your view?

Answer

No.

Proposal: Views are sought on the provision of child friendly, plain English summaries of decisions (See section 8.11 of the consultation document).

Question 76: Should there be a statutory requirement for the production of age and stage appropriate summaries of Children’s Hearing decisions?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We are aware from our experience of representing children within the hearing system, that panel papers (including Record of Proceedings) are not accessible to all children. Panel papers can also be distressing for children to review and discuss. Integral to promoting the child’s effective participation and a rights-based approach is ensuring that the decisions that impact them are communicated in a child-friendly, age and stage appropriate way, and tailored to the child’s specific communication preferences and needs. This proposal if introduced would in our view better support children to engage in the children’s hearing process. We would also support this principle extending to as much of the panel paper content as possible.

Question 77: Should the specific needs of other family members – especially other children - be taken into account when decisions and reasons are being prepared and issued?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – We regularly represent very young parents, parents with learning difficulties and communication needs. For those reasons and those referenced above, we would also strongly support improvements to the accessibility of panel papers more broadly and to written decisions and reasons specifically.

Proposal: We are seeking views on the operation of Family Group Decision Making (FGDM) and restorative justice services, and how they may appropriately interact with children’s hearings, require careful consideration (See section 8.12 of the consultation document).

Question 78: 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?

Answer

Not answered.

Question 79: What other ways could consideration of these processes feature in the redesigned hearings system?

Answer

Not answered.

Proposal: We are interested in respondents' views on how we can make positive changes with respect to the duration of interim orders, while safeguarding the rights of children and families (See section 9.1 of the consultation document).

Question 80: What are the advantages and disadvantages of increasing the statutory 22-day time limit for the duration of interim compulsory supervision orders (ICSOs)?

Answer advantages

- I. Longer recovery time between hearings. Hearings often generate significant anxiety and stress for our clients.
- II. Clients within the hearing system tend to have many other important meetings, appointments and/or are undergoing intensive assessments because of the children's hearing process. This proposal would likely lessen the burden on some clients having to manage these commitments.
- III. Beneficial in those cases where all parties agree with the child's care arrangements and there are no issues requiring to be brought to the panel's attention after 22 days. This would help ease resource pressure across CHS and SCRA but also statutory agencies in terms of report preparation time and solicitor time. It would also allow clients to focus on other aspects of the children's hearing process, for example, statement of grounds proceedings. We observed this during the temporary changes to ICSOs introduced during Covid.

Answer disadvantages

- I. In some instances, particularly in contentious and fast-moving cases (which can often be the case at this early point in the process), three weeks can be a long time for a child and their family where a review of measures by the panel is urgently needed.
- II. In cases where the ICSO has authorised extreme interventions (such as, for example, removing the child from home, reducing/stopping contact), having longer periods in between ICSOs will risk prejudicing families' legal positions and ability to effectively challenge these decisions due to the new status quo (established by the longer time period) becoming a more significant decision-making factor for panels.
- III. For the abovementioned reasons, this proposal may result in a larger number of appeals against ICSOs to the Sheriff Court.

Question 81: Do you feel that there should be more flexibility in the duration of these interim orders? If so, in what circumstances and what maximum duration do you consider appropriate?

Answer

We have highlighted the instances (for example, all parties agree with the arrangements and are not contesting the terms of the ICSO) where a longer duration, for example 44 days, would be beneficial. We would therefore support more flexibility so that ICSO decisions in relation to duration could be more tailored to the specific case, the child's needs and the rights of relevant persons. We would however emphasise that children's hearings are generally the only forum where families can fully participate in discussions and challenge recommendations regarding the child's care arrangements. Appropriate safeguards would therefore need to be in place to ensure that there is also flexibility to ensure that where needed, families can address panels and have matters reviewed without undue delay.

Question 82: Could ICSO reviews be undertaken by lone children's panel members? (See Chapter 8).

Answer

This would depend on the training and expertise of the individual panel member and the specifics of the case. Decisions in relation to ICISOs are as complex and far-reaching (for example, removing a child from parental care, reducing stopping contact, placing a child in secure accommodation, considering safeguarder and other expert recommendations) as CSOs. In practice therefore, ICISO decisions can determine the decision-making when it comes to a hearing deciding whether to place the child on a CSO, and if so, the measures to attach. These decisions are also susceptible to appeal.

We would not therefore generally support a proposal which introduced lone-children's panels for all ICISO decisions.

Question 83: Do you support the proposal to create a child's exit plan from the children's hearings system?

Answer

We can see the benefit in this proposal for children and families in many cases, particularly where the child is 16/17/18, there is a transition planned after the hearing's involvement, the family still needs a level of social work support, and/or, where there is a difficult relationship with statutory agencies.

Having clarity in relation to expectations and the supports and funding that will be made available to the family/child, may help mitigate future re-referrals, facilitate access to onwards services and better support children transition into adulthood.

Question 84: What elements should be included in a child's exit plan?

Answer

As stated above, we would suggest that it would be important that any plan include recommendations and expectations in relation local authority support and assistance, for example in relation to housing, higher education and employability for older children or social work and health support for families that still require a level of support.

Proposal: System Redesign Overall (See section 9.3 of the consultation document).

Question 85: Do you have any other suggestions where you consider that new legislation is needed to deliver a successfully redesigned children's hearings system?

Answer

We would suggest that consideration should be given to those cases where the child is subject to Children's Hearings proceedings and there is either, an adoption/ permanence plan in place to be progressed to Sheriff Court, or ongoing adoption/permanence proceedings. Primarily to consider if statutory provisions are required to better protect children and families' rights when decisions are made by Children's Hearing that will impact the family's defence to the adoption/ permanence proceedings. Also, to ensure that these cases are progressed to the Sheriff Court for a final determination as soon as possible. Currently we find that there can be many months, and sometimes several years, delay in these cases being brought to the Sheriff Court. By which point decisions have been made that directly impact the family's prospects of effectively participating in the adoption/ permanence proceedings.

Also, that in the case of appeals, to support continuous improvement, panel members should be notified when their decision has been appealed and of the ultimate outcome.

Proposal: Secure accommodation timescales for review (See section 9.4 of the consultation document).

Question 86: 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?

Answer

Check box options – Yes? No? (Please explain your answer).

Yes – The frequency of chief social work reviews is in our view likely adequate albeit we have had cases where a child is undergoing an independent expert assessment or working towards mobility (that is, being in the community) which may be completed before the expiry of the secure authorisation and/or the current review timescales that the Chief Social Worker is working towards.

It is suggested that where such an assessment or piece of work is being undertaken and may evidence that a child no longer meets the criteria, the Chief Social Worker should be informed, and an early review undertaken at that point.

In our experience, legal representatives, the child and relevant persons are not always informed about when a review has taken place. Another issue is whether children and parents are aware of their right to request that the Chief Social Worker undertake a review. Again, we would refer to earlier comments regarding the importance of signposting families in this context to legal advice but that at the very least, ensuring families are aware of their right to request such reviews and how they can input into this process.

To improve transparency in relation to these decisions, we would suggest that the child, relevant persons and their legal representatives are provided with a copy of the review and decision so that it can be considered and the family reassured that the child's circumstances are being kept under regular review in accordance with the legislative regime. We would also suggest that children's panel members make families aware of their right to request a review. We would also suggest that further panel member training in relation to the governing regulatory regime would be beneficial and help better protect children facing the prospect of being sent to secure accommodation.

On a related note, child clients, particularly those working towards a planned transition from secure to an alternative care setting, will sometimes tell us that they feel they are being unfairly kept in secure accommodation because there is no alternative available accommodation for them to move to. This is something that we have observed in practice and it is a concern that lack of resources can lead to some children remaining in secure longer than they should be.

Proposal: The Scottish Government will carry out impact assessments alongside the development of any new legislation which would be required to implement the changes proposed in this consultation. We would be interested in your views on these areas to help us in developing these and any other necessary assessments (See section 10.1 of the consultation document).

Question 87: What, if any, do you see as the data protection related issues that you feel could arise from the proposals set out in this consultation?

Answer

Not answered.

Question 88: What, if any, do you see as the children's rights and wellbeing issues that you feel could arise from the proposals set out in this consultation?

Answer

Not answered.

Question 89: What, if any, do you see as the main equality related issues that you feel could arise from the proposals set out in this consultation?

Answer

Not answered.

Question 90: Do you have any other suggestions where you consider that new legislation is needed to deliver a successfully redesigned children's hearings system?

Answer

Not answered.