Children and Young People's Centre for Justice

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Call For Views on Children (Care and Justice) (Scotland) Bill by Education Children and Young Person Parliamentary Committee

Submission from Children and Young People's Centre for Justice

Introduction:

The Children and Young People's Centre for Justice (CYCJ) works towards ensuring that Scotland's approach to children and young people in conflict with the law is rights-respecting, contributing to better outcomes for our children, young people and communities.

We produce robust internationally ground-breaking work, bringing together children and young people's contributions, research evidence, practice wisdom and system know-how to operate as a leader for child and youth justice thinking in Scotland and beyond. CYCJ's contribution to the youth justice sector in Scotland was defined in our 2020 evaluation as three-fold:

"...it produces information which is of use, and robust, for its audience; it offers boundary-spanning linkages to break down the silos between organisations, services, and kinds of practice; and it maintains a focus on seemingly intractable issues in the sector, providing a multi-pronged approach to untangling and unsettling the barriers to change"

(Stocks-Rankin, 2020:2).

In doing so, our focus is on three key activities:

Participation and engagement: amplifying the voices of children and young people;

Practice and policy development: developing, supporting and improving justice for children and young people;

Research: Improving our understanding of justice for children and young people.

These activities are underpinned and connected by communication and knowledge exchange work, which is focused on improving awareness of evidence in different forms, and supporting dialogue between different perspectives, types of knowledge and viewpoints.

Uniquely we provide support to individual practitioners and, for service development, to develop the vision of youth justice in Scotland and across a resource level, relationship level, and system development level. It is recognised that it is "...the ability to work at the highest echelons on policy making and governance and into the depth and detail of day-to-day practice that makes CYCJ effective" (Stocks-Rankin, 2020:2).

CYCJ is primarily funded by the Scottish Government and based within the University of Strathclyde. Our position both within a University and the additionality of funding beyond the Scottish Government are features that support our autonomy.

The team comprises a range of professional roles including social workers, psychologists and researchers, who have fulfilled frontline and managerial positions in social work and social care. Team members have also had experience of receiving, or a close family member or friend having received, social care or social work support.

Consultation Questions:

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

CYCJ welcome this element of the Bill and see it as a means by which the correct support can be offered to children when they require it. As we have noted in our previous response, the status quo allows for children to fall between the cracks of service provision, with myriad issues going unaddressed and children being exposed to harm. This proposal can go some way to ensuring that children receive the support that they require, and end the arbitrary nature of the current inclusion criteria.

We support this measure for a variety of reasons, namely:

Compliance with United Nations Convention on the Rights of the Child

Adoption of this change would reflect Scotland's progress towards a rights-respecting nation, and in particular would honour Article 1 which defines a child as anyone under the age of 18. CYCJ notes reference within the promise to affording everyone under the age of 18 the rights associated with childhood. This change, therefore, is one way that Scotland could strive to meet its commitment to achieving the targets set out within the promise.

Justice, fairness and rights

The role of the children's hearings system for those aged 16 or 17 is well established, and each year large numbers of children have their Compulsory Supervision Order extended beyond their 16th birthday. Indeed, Henderson (2017) suggests that this occurs in the majority of cases where children approach their 16th birthday. It is therefore unfair that this support mechanism is currently only available to some children, and that their peers who encounter identical situations, scenarios and risks are left in a far more precarious situation which lacks the support that the children's hearings system can offer. Not only is the current scenario inequitable, unjust and unfair, but it fails to honour the rights of the child to be provided with equal treatment to their contemporaries. This divergent system, based purely on the child's date of birth, does not appear to respect the rights of the child.

In 2008, the United Nations Committee on the Rights of the Child underlined the importance of ensuring that all children in conflict with the law are always dealt with within the juvenile justice system and never prosecuted and tried as adults. As well as specific United Nations Committee on the Rights of the Child articles in relation to juvenile justice and children appearing in adult courts (Article 40), Scotland must ensure that we also meet its four 'general principles' of non-discrimination (Article 2), best interest (Article 3), survival and development (Article 6) and participation (Article 12). The UN Committee reinforced the requirement for all children under the age of 18 to be treated as children in its revised 'General Comment No 24 (2019) on children's rights in the child justice system.' This principle echoes the Council of Europe Guidelines on child friendly justice (2010), which sets out basic rules that Council of Europe members should follow when adapting justice systems to meet the specific needs of children. As well as applying to 16 and 17 year olds, consideration also needs to be given to the small number of children under the age of 16 who continue to be prosecuted in adult court. For example, in 2019-20 there were 18 children under the age of 16 proceeded against in court.

Direction of travel

Maximising access to the children's hearings system would reflect the general direction of travel that Scotland has taken in recent years, including the raising of the age of criminal responsibility and extension of continuing care qualification and aftercare entitlements. As Scotland has recognised the need to both lift children out of the criminal sphere and also to offer support into early adulthood, maximising use of the children's hearings system would appear to be a further step towards creating and providing increased support to children aged 16 or 17 - and beyond - who encounter adversity. It further reinforces the view of childhood being more than a distinct period of time that ends upon a certain date, but rather appreciating that childhood is subjective, unique to each individual and is more fluid than has been suggested previously.

Brain development

CYCJ believes that policy decisions relating to children and young people must bear in mind that brain development continues until the individual reaches their mid-20s (McEwan, 2017). Apportioning full culpability, responsibility and comprehension to someone prior to that would fail to take cognisance of this fact. This argument has recently gained support amongst judicial circles, with Scotland's new sentencing guidelines for those aged 26 reflecting the literature and research regarding neurodevelopment.

Enabling wider access to the Children's Hearings System would therefore acknowledge that adolescent children are not always fully equipped to make the best decisions, and indeed this may have contributed to the grounds which have brought them to the attention of the Principal Reporter in the first instance. Proposals which address this issue would therefore respond to our growing understanding of the adolescent brain.

Premature creation or terminations of Compulsory Supervision Orders

At present the inability for a child to be referred to the Principal Reporter after their 16th birthday could result in the temptation for practitioners and panel members to impose a Compulsory Supervision Order 'just in case' as a means of extending access to the children's hearings system and the supports associated with it. This decision - whilst made under the best of intentions - is not in keeping with the minimum intervention principle and one could argue that it is an infringement upon the child's right to privacy. The current 'cut off' date of a child's 16th birthday creates a system that some professionals feel they ought to circumnavigate by adopting a cautious, risk averse approach that leads to children being made subject to a Compulsory Supervision Order in order to ensure protection and support remains available.

For those children who have been supported to address the factors in their lives which influenced the development of harmful behaviours, the termination of a Compulsory Supervision Order may lead to reduced support later if new or renewed concerns arise after they have turned 16. Practitioners, children and families may attempt to avoid this outcome by advocating for the continuation of a Compulsory Supervision Order when the level of risk and need for compulsion had dropped. This would be in contrary to the principle of minimum intervention, and ought to be discouraged by enabling a child to be referred to the Principal Reporter after their 16th birthday.

Likewise, the financial obligations and duties that are placed upon local authorities creates a perverse disincentive to terminate a Compulsory Supervision Order prior to the child's 16th birthday or due to outstanding court dates, and can result in the removal of support. Whilst Social Work Scotland have issued clear guidance that this should not take place without clear grounds to do so, and especially not due to outstanding court appearances, the reality of an era of austerity, placement shortages and rationed provisions must have some bearing on the conscious and subconscious logic applied by practitioners and panel members.

A change in legislation that makes premature terminations unnecessary would therefore serve to address these issues, thus ensuring that a child can access the support and protection available through the Children's Hearings System.

16 and 17 year olds in court

Whilst mindful that the implications of widening access to the children's hearings system extends well beyond the justice system, such a change could result in significant alterations to the way in which children who are in conflict with the law are responded to, resulting in far fewer children aged 16 or 17 appearing in court.

This would be advantageous for a number of reasons:

Firstly, it would provide a far swifter response to offending behaviour than would be available from court. The length of time between the commission of the offence, appearance at court, a period of bail, trial and then sentencing could stretch well over a year. During that time, the child may miss out on educational opportunities as a consequence of the pending matters and their situation may deteriorate, becoming more concerning. By comparison the delay from commission of the offence and social work becoming involved in the life of the child is far shorter - although not without its own delays - resulting in children and their families receiving support much quicker. This swifter response therefore increases its ultimate efficacy, as well as being more holistic and child-centred due to the nature of the children's hearings system.

This is not to say that all 16 and 17 year olds who come into conflict with the law ought to have their circumstances discussed formally at a children's hearing. Indeed, CYCJ hopes that Early and Effective Intervention (EEI) mechanisms across the country could be enhanced through this Bill, thus ensuring support is available to all children, of all ages regardless of their postcode. Similarly, the severity of the offence may not justify consideration of compulsory measures, so it should not be assumed that each case of a 16 or 17 year old in court would necessarily result in a Hearing being convened.

Secondly, removing the majority of children of this age from the court processes could have benefits for those who have been harmed, with a swifter resolution to matters being reached. Whilst the person who has been harmed may still require to provide evidence in a proof hearing should the child deny any grounds that are put to them, this is likely to occur far less often than through court proceedings. Given that a large number of victims of the children in question are themselves children, this could have a beneficial impact on their own wellbeing. Likewise, they themselves could be referred to the Principal Reporter in some instances, thus adding to the support offered by existing victim services. This change could also see an increase in the use of Restorative Justice practices across the country, including for children who themselves have been harmed by a 16 or 17 year old. This would expedite access to a service that is known to provide satisfactory results, and which is in keeping with the Scottish Government's drive towards greater use of this model.

Thirdly, research has found that the outcomes realised for those children who appear in court are not particularly positive. CYCJ is aware that a large proportion of children who come into conflict with the law are neurodiverse and experience Speech, Language and Communication Needs (SCLN). The adversarial environment of the court system is not conducive to affording the child - particularly one who encounters SLCN - the opportunity to participate in the various processes and therefore fair justice, and thus impinges upon their human rights. The vulnerable nature of this cohort of children, who are often affected by significant adversities including mental ill-health and disrupted childhood, also makes the court process intimidating, daunting and traumatising. Maximising the use of the children's hearings system is therefore a step towards providing a more trauma-responsive approach to episodes of harmful behaviour.

Harmonisation

The legislative framework that defines childhood is complex and contradictory, and serves as a barrier to those seeking and providing support. Multiple pieces of Scottish legislation refer to childhood in terms of chronological age of either 16 or 18, whilst the Whole System Approach has been extended to the age of 21 in some local authorities (Lightowler & Nolan, 2017). This results in a confusing and contradictory landscape for this cohort of children, riddled with gaps and anomalies. In practice, this means that children can be left without recourse to the support which the children's hearings system may offer (Lightowler, 2020). They are often inappropriately and unnecessarily subjected to prosecution in court - thus running contrary to Kilbrandon's welfare ethos - or fall between (or are squeezed within) a range of other legislation not designed for the purpose of ensuring child welfare. Maximising the use of the children's hearings system would therefore go some way towards harmonising the legislative framework relating to children of this age. It would be in keeping not only with Article 1 on the United Nations Convention on the Rights of the Child, but would reflect the spirit and content of the 2014 Children and Young People (Scotland) Act, whilst providing greater consistency in the way the state responds to those who are in need. In doing so, it would move Scotland towards a position of defining childhood as the period of time until the 18th birthday.

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

We believe that the premise of this question is flawed. Firstly, not every case that currently processes through court would or should automatically lead to involvement in the Children's Hearing System if greater use is made of Early and Effective Intervention (EEI). That may require adjustment to the Lord Advocate's guidelines regarding which offence types can be dealt with by that forum, and a greater appetite amongst stakeholders to ensure that EEI is made available to all children aged 16 and 17.

Furthermore, there may be instances where a child already subject to a Compulsory Supervision Order (CSO) accrues a charge. The Reporter may take the decision not to call a Hearing owing to the ongoing care plan and existing measures; indeed, this already happens for some children, often following conversation between the Reporter and relevant Social Worker. Similarly, the severity of the offence may not justify consideration of compulsory measures, so it should not be assumed that each case of a 16- or 17-year-old in court would necessarily result in a Hearing being convened. As such, it is not accurate to suggest that all 16- or 17-year-olds currently appearing in court would appear at a Hearing. The different priorities and functions of the judicial and Children's Hearings Systems render direct comparisons challenging.

Aside from these comments regarding the operational implications of this change, CYCJ are of the view that increased use of the Children's Hearing System, which has recently received the support and endorsement within the promise, would be a positive development in the way Scotland responds to children in conflict with the law. CYCJ echoes our comments from question 9 and are of the view that the use of the Children's Hearing System in lieu of Court is advantageous for several reasons.

Firstly, it would provide a far swifter response to offending behaviour than would be available from court. The length of time between the commission of the offence, appearance at court, a period of bail, trial and then sentencing could stretch well over a year. During that time, the child may miss out on educational opportunities because of the pending matters and their situation may deteriorate, becoming more concerning. By comparison the delay from commission of the offence and social work becoming involved in the life of the child is far shorter - although not without its own delays - resulting in children and their families receiving support much quicker. This swifter response therefore increases its ultimate efficacy, as well as being more holistic and child-centred due to

the nature of the children's hearings system. Of course, the use of EEI mechanisms could result in children being supported in that for a, rather than through the more intrusive and labour-intensive Hearings System.

Secondly, removing the majority of children of this age from the court processes could have benefits for those who have been harmed, with a swifter resolution to matters being reached. Whilst the person who has been harmed may still require to provide evidence in a proof hearing should the child deny any grounds that are put to them, this is likely to occur far less often than through court proceedings. A substantial portion of victims harmed by children are themselves children, and thus providing a response which avoids the stressful court system could have a beneficial impact on their wellbeing. Likewise, they themselves could be referred to the Principal Reporter in some instances, thus adding to the support offered by existing victim services. This change could also see an increase in the use of Restorative Practices across the country, including for children who themselves have been harmed by a 16- or 17-year-old. This would expedite access to a service that is known to provide satisfactory results, and which is in keeping with the Scottish Government's drive towards greater use of this model.

Thirdly, research has found that the outcomes realised for those children who appear in court are not particularly positive. CYCJ is aware that a large proportion of children who come into conflict with the law experience Speech, Language and Communication Needs (SCLN). The adversarial environment of the court system is not conducive to affording the child - particularly one who encounters SLCN - the opportunity to participate in the various processes and therefore fair justice, and thus impinges upon their human rights. The vulnerable nature of this cohort of children, who are often affected by significant adversities including mental ill-health and disrupted childhood, also makes the court process intimidating, daunting and traumatising. Maximising the use of the Children's Hearings System is therefore a step towards providing a more trauma-responsive approach to episodes of harmful behaviour.

Fourthly, Lightowler (2020) highlights data from 2017/18, where some 384 children aged 16 and 1,381 children aged 17 appeared in court. The vast majority of these matters were for offence types routinely dealt with by the Children's Hearings System, and indeed Lightowler queries whether the balance of cases being dealt with by COPFS rather than SCRA is in keeping with a rights-respecting agenda.

Whilst CYCJ support the spirit and ethos of this Bill, we are mindful that there may be the unintended consequence of pulling children into the Hearings system that could suitable be supported through the EEI process or other existing mechanisms. We would ask that caution is given that children and their families are not 'up-tariffed' into a more intense system than is necessary.

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

CYCJ note the alterations proposed by this Bill could impact upon a range of functions within the Children's Hearing System.

Compulsory Supervision Order

Sections 3(2)(a) and (b) of the Bill offer amendments to the 2011 Children's Hearing (Scotland) Act which could offer the desired levels of supervision and support when applied selectively and purposefully, and therefore CYCJ are broadly supportive of these proposals. The power to prohibit a child to enter a particular location or to make communication with an individual could be beneficial in protecting others from harm. CYCJ envision that these measures may most likely be used when a child has been accused of engaging in targeted harm of another person

or persons. It may provide greater confidence amongst the public in the Hearings system's ability to respond to children and young people who would otherwise be subject to Bail conditions

Moreover, these steps could have some benefit in assisting children to avoid exploitation by others. Mandating that they avoid a particular location or contact an individual may assist in addressing episodes of coercing and exploitation by others, albeit these prohibitions may prove more symbolic than practical. Such provisions must, of course, primarily focus on the person causing harm, rather than placing the responsibility to remain safe on to the child. Overall, these proposals could – when used appropriately – lead to greater protection for those at risk of harm, as well as supporting those children who are at risk themselves.

Caution must be applied however to the rationale and impact of any use of these measures. It may prove tempting for some parties to adopt a risk averse, prohibitive approach to a child who is deemed to pose a risk of harm to others through barring them from entering public parks, for example. Clearly this use of powers – unless in the most acute of scenarios – would be disproportionate and ultimately serve to stigmatise, exclude and dishearten the child. To avoid this scenario from arising guidance for social work practitioners and panel members must call on such measures to be used sparingly, and only when the risk of harm to or from the child is materially related to the prohibitions that are to be imposed. Such a conclusion can only confidentially be made following the completion of a thorough risk formulation which considers the child's life in its entirety.

Movement Restriction Condition

Proposed changes to the criteria surrounding a Movement Restriction Condition (MRC) could enable more flexible and tailored delivery, reflecting the nature of a child's life. As we have noted in various fora, MRCs must not be used in isolation and must always be accompanied by an intensive and robust care plan founded upon a thorough risk formulation.

This may result in the use of MRCs in conjunction with whole family support such as that described within the promise's conclusions and within existing guidance relating to Intensive Support and Monitoring Services. Such provision can be the most appropriate response for some children whose behaviour may pose a risk of serious harm or are exposed to a high risk of harm.

CYCJ are of the view that an MRC must only be considered where there is a clear assessment and evidence as to how its intended use is proportionate to manage the level of potential harm, and interrupt or minimise the opportunity for the serious harm to occur. CYCJ believe that aligning the MRC threshold to reflect circumstances where the child has engaged in acts of significant harm towards others and/or the child is at a significant risk of harm in the community and/or a risk formulation has been undertaken which indicates a significant risk to the child that can be reduced or managed through the use of an MRC with intensive support is advantageous.

Such provision must be accompanied by robust wraparound and individualised support for the child and their family that scaffolds them whilst addressing risk of harm, building on strengths, creating capacity and providing developmental opportunities. Those supporting the child must undertake a robust and evidence-based risk formulation which leads to clear and proportionate risk management plans with identified actions, which include mechanisms to be employed should the child not adhere to the MRC. This response must match the level of potential harm, the likelihood and impact should it occur. The potential use of an MRC with a child should only be where formal risk management processes, such as CARM, are in place. These should be approved by local Child Protection Committees, and only triggered when concerns regarding risk of significant harm are highlighted. This would provide appropriate review and scrutiny of proposed risk management plans through multi-agency decision making. To this end, revised guidance relating to the use of MRCs should be produced, and practitioners must become more confident in its use.

Research demonstrates that MRCs are not used in the variety of ways as they could be, and that too many children are placed in secure care following an extremely limited MRC assessment having been undertaken (Simpson & Dyer 2018). Practice with MRCs should be creative, flexible, responsive and reviewed at least every six weeks by both the children's hearings system and the responsible local authority in order to monitor the progress being made and gauge whether less restrictive measures were viable. The use of any restrictions applied should be considered through the prism of children's human rights.

CYCJ are pleased to see content within the Bill which promotes creative use of MRCs, such as use of an MRC to support a child to stay away from a particular location where that would be felt to best meet the child's needs and address the risk of harm that has been identified. Likewise, provision which calls on consideration of the frequency upon which the restrictions must be imposed, such as only imposing the condition on those days and times at which the relevant risk was felt to be at its highest, rather than for 12 hours each night of the week is to be welcomed. This flexibility may aid the child to access sport, recreation, educational and vocational opportunities and thus go some way towards adherence to Articles 3 and 37 of the United Nations Convention on the Rights of the Child.

There are some aspects which require caution. Extending availability of MRC will require scrutiny and oversight applied appropriately and proportionality. Using this as a tool should be where it would meaningfully meet the needs and manage the risks identified, and always alongside meaningful robust wraparound support. Evidence demonstrates that the support package accompanying an MRC is the driver to addressing the underlying risk factors; merely restricting a child's liberty does not address the underlying drivers of the harmful behaviour over the longer term. Guidance which stresses these points is therefore required in order to ensure that use of an MRC is always accompanied by a comprehensive assessment and suite of supports. Such guidance should urge close consideration of the human rights of the child subject to an MRC. We strongly believe that any restriction of liberty must always be proportionate to the circumstances of the child and their wider context, likelihood, seriousness and impact of any potential harm. As such, it would not be appropriate to restrict a child's liberty through an MRC when alternative responses would have secured the child's safety, and/or the safety of others, whilst also responding to the underlying needs in question.

Similarly, the 'de-coupling' of MRC threshold from the secure care criteria may lead to the unintended consequence of legal representation not being made available to a child for whom an MRC was being considered. This Bill could be strengthened, and the rights of children could be better protected, by making specific provision for legal representation to be made available whenever an MRC was under consideration by a Hearing. CYCJ believe that in much the same way as legal representation is mandatory when secure care is being contemplated, legal representation should be made available in those instances where an MRC has been proposed within hearing paperwork or is likely to arise in the course of the deliberations. In many cases a legal representative may already be appointed due to the potential for secure care authorisation to be granted by a panel, but for those cases where the new, lower threshold is being discussed this would require a change in practice from children's reporter or social work practitioners.

Whilst CYCJ is in support of expanding the use of MRCs in very specific circumstances, significant caution must be given to any change in this practice and the risk of net-widening must be avoided through the provision of stringent criteria and monitoring that ensures that those children who do not fully cooperate with the expectations of the measure do not experience negative or punitive outcomes. It should not be the case that a child in this position should automatically enter secure care, nor should the continuation of the CSO be at risk. MRCs should not be utilised in those cases that do not meet the high threshold suggested above. With decades of research demonstrating the adverse effect that results from disproportionately intense interventions, this would be counterproductive, impinge on children's human rights and would lead to poor outcomes for the child.

CYCJ are pleased to see consideration being given to the material design of MRCs in Scotland by considering alternative models of electronic monitoring. Traditional use of a device fitted around a child's ankle can be stigmatising and add to the negative self-image held by the child. Provision within this Bill can lead to alternative approaches and are therefore welcome.

Secure authorisation

CYCJ welcome the amendments to Section 83 of the 2011 Children's Hearings (Scotland) Act proposed within Section 5 of this Bill. These go some way towards crystallising the critical concerns relating to secure care admission and should assist panel members, reporters and social workers to respond to the needs of children who are deemed to pose, or be exposed to, the greatest risks.

Of merit is the proposal to establish provision for a child within secure who displays very few signs of vulnerability or of posing a risk to themselves or others, but for whom the situation drastically deteriorates immediately upon, or soon after, leaving the secure environment. Existing legislation is perhaps too vague in this matter and lacking the subtlety that this proposed section adds. In doing so, it better reflects the dynamic and contextually specific nature of children's lives, which can alter swiftly depending upon an array of factors.

The existing definition of psychological harm is perhaps too broad, and may lead to a greater number of children being deemed to have met the secure care criteria than was intended by this Bill. The Bill's proposal to include "fear, alarm and distress" as a feature of psychological harm could be interpreted in an overly liberal manner, particularly given the language associated in this clause and the wording of Section 38 of the Criminal Justice and licensing Act of 2010, which replaced the common Scots law offence of Breach of the Peace.

Further considerations

The nature and definition of compulsion should be considered within this Bill, reflecting the greater agency of children aged 16 and 17. The terminology of complusory may lead to confusion, with a child who engages fully with the proposed care plan being deemed unsuitable for the Order, and thus left without the legal supports and protectiosn that it brings. It may be that an amended title of 'Support and Supervision Order' woud more accurately describe the legal instrument.

The current nature of a Compulsory Supervision Order principally relates to requirements placed on the child and the duties placed on the implementation authority to give effect to and supervise this. This may be too narrow an approach to meet the needs of all children referred to the Children's Hearings System following the greater access for 16- and 17-year-olds. This Bill could seek to remedy this by re-examining the focus, breadth and parameters of a Compulsory Supervision Order. For example, the ability to place more explicit duties on public authorities to support or make provision for a child; an ability to place duties on other people to protect or cease contact or influence with a child. Implementation of this change should recognise the greater agency that older children enjoy, and as such the nature of compulsion may look different amongst those children who would otherwise have been dealt with by court. The need for support and supervision may well take greater prominence in the thinking of the Principal Reporter and other relevant actors.

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

This Bill can have a beneficial impact upon children who have been harmed by another child in a number of ways.

Firstly, raising the upper age of referral will grant children aged 16 or 17 access to the Children's Hearing System when they have been harmed. This is true in instances where the person causing the harm is a child and when it is an adult who is responsible. This could be episodes of sexual abuse, physical abuse, human trafficking, child criminal exploitation, modern slavery or other adverse circumstances and vulnerabilities. Access to the Children's Hearing System will afford this group of children access to support and care that has otherwise been denied of them.

Secondly, children who have been harmed by other children will benefit from the provision of the draft Bill through avoiding the traumatic and harmful process of appearing in court to give evidence, as well as the lengthy delays that often accompany that system. Children will thus benefit from not having to wait several months – if not years – before recounting episodes of harm. The swifter process of the Hearings system may also lead to that child recovering from the harm in a quicker manner than is currently possible.

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

Fundamentally, any changes made to existing provision must achieve a rights-respecting solution for both the person who has been harmed, and the child who is believed to have caused that harm.

We are mindful that the person who has been harmed already receives information from SCRA, and that any change to this should only be taken with caution and a focus on the rights of those involved. We also note that the nature and volume of information provided when matters are dealt with within the formal court system vary depending upon disposal, and as such it is a simplistic and erroneous view to take that existing provision within the judicial process leads to adequate or complete disclosure of information.

Should additional information be made available then this ought to be on a limited basis. Any sharing of information needs to be proportionate and in accordance with existing legal protection in respect of children's & human rights, including privacy and data protection. Information should only be shared in those circumstances where there are protective measures directly involving the person harmed, for example where there is a condition for the child not to approach the harmed person's house. We are mindful of the need to maintain and respect the privacy of children, including in cases where they are accused of causing harm to others. The Beijing Rules, for example, point to the limits within which states must act when responding to episodes of harm, and the need for information relating to the child to be shared only when absolutely necessary. Clarity on the circumstances within which such a step would be taken, and mechanisms in place to prevent inappropriate sharing of information, would be required in this instance. CYCJ is also mindful of the implications of increased information sharing in light of GDPR, Data Protection legislation and existing protections relating to personal information.

Other information relating to the child such as their home circumstances, health or outcome of the hearing may not be appropriate to share. This is important in terms of upholding Article 19 of the United Nations Committee on the Rights of the Child (the right to protection from violence, abuse and neglect) and Article 39 (the right to recovery from trauma and reintegration) where the person harmed is a child. In this respect, Section 106A(3) could be strengthened to ensure that information regarding a child's hometown is not disclosed, along with those pieces of information already stated in the Bill. This addition is particularly beneficial for those children living in small or rural locations whose identity could more easily be revealed through the publication of their hometown, for example. Protection surrounding the identity of the child could also be strengthened through revision of Section 106B(4) by calling on the social work department (or the responsible local authority) to be given the opportunity to comment on the merits or otherwise of reporting restrictions being dispensed. This body may have important information that would assist the court in their deliberations. Broadly, and on a point of principle, CYCJ believe that

the identity of children who cause harm whilst under the age of 18 should remain undisclosed through that individual's lifetime. CYCJ foresee no situations that would serve the interests of the child nor the community by naming the child publicly and believe that the long term prospects of desistance are supported through maintaining anonymity.

In order for people who have been harmed by a child to understand why certain information is not disclosable, and to aid their understanding of the children's hearings system, it would be advantageous for a general, illustrative account of the difficulties and experiences children who cause harm have often experienced themselves, and what types of responses help them to recover from this and not harm others in the future. Moreover, increased and extensive opportunities for Restorative Practices should be prioritised in order to address questions over the incident of harm, provide some context to the behaviour and support the healing process for the person who has been harmed. Consideration of these practices on all occasions where a child has caused another person harm should be built into Scotland's response to such behaviour. This provision may give the person harmed and those impacted by the behaviour an opportunity to have their voices heard. It is imperative that where this is embedded it is offered in instances of harm being caused, and not merely where a crime has been committed. This is an important distinction to make as any increase in age of criminal responsibility that may take place in the future could result in the harmful behaviour losing the label of 'criminal', yet they and the person who has been harmed may still benefit from restorative processes and practices.

The rights of both the child and victim must be upheld regardless of which system is employed to respond to the behaviour, and as such the information shared should remain limited. The frequency of this occurrence should be monitored, and any decision to release this information should be reported to the Scottish Government who must liaise with SCRA to publish data regarding the volume of such disclosures, nature of information shared and underlying patterns of these on an annual basis. It is important that this data is kept under review.

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

CYCJ are fully supportive of this measure for the reasons highlighted previously in this submission. It is a step that delivers a rights based approach to those in need, and one which is more suited to a nation that seeks to adhere to international treaties.

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

CYCJ have expressed a range of views which support the increase in upper age of referral to the Hearings System within this submission.

In addition to those already expressed, it is important to note that the Children's Hearing System is one which already responded to incidents of significant harm by some 16- and 17-year-olds; those who were subject to a CSO prior to their 16th birthday and whom the Procurator Fiscal and/or court have permitted the Hearing System to maintain jurisdiction.

Raising the age of referral into the Children's Hearing System will allow Scotland to meet its international obligations and own policy initiatives. Court settings fail to uphold or reflect the principles of the United Nations

CYCJ is primarily funded by the Scottish Government and based at the University of Strathclyde.

Committee on the Rights of the Child, Council of Europe Child Friendly Justice, General Comments CRC No. 24 and GIRFEC. The United Nations General Comment No 24, states that "every person under the age of 18 years at the time of the alleged commission of an offence has the right to be treated in accordance with the rules of juvenile justice, in a specific and specialized system, different from the criminal one applicable to adults" (2019, paragraph 37). A significant body of research, from a Scottish and international context, consistently demonstrates that in order for children and young adults to meaningfully participate, navigate and understand the justice system, a different approach is needed to that adopted for adults. CYCJ believe that the Children's Hearing System is the best arena within which to discuss the needs, risks, vulnerabilities and care of those children who come into conflict with the law.

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

CYCJ are fully supportive of this proposal and believe it is an important step in achieving the ambitions set out within the promise and in securing a response to children in conflict with the law that is both rights respecting and effective in reducing harm over the longer term. Use of secure care rather than a Young Offenders' Institution (YOI) is a far more appropriate venue for those children deprived of their liberty by court.

However, it is essential that alternative responses are fully considered when responding to a children who has caused significant harm and who poses a risk of further behaviour of that nature. A truly rights respecting nation would strive to support and supervise children in these circumstances through alternative, community based responses. This could include the expanded use of MRCs in certain situations, along with greater provision of community-based resources including intensive supports, adequately funded forensic mental health services and access to universal services including recreational activities and youth work services. To support children to remain within the community when they have caused the most significant levels of harm, Scotland must develop a sector within which risk is fully embraced, understood and addressed, as the promise has concluded. Enhancing practitioners' familiarity with procedures such as CARM and FRAME would contribute to this endeavour, whilst more widespread use of START-AV (as a means of creating a risk formulation concomitant with the needs of the child) would similarly enable practitioners to devise the best possible Child's Plan.

However, where it has been deemed necessary to deprive a child of their liberty - and where no alternative measure is likely to be successful in addressing the risk identified - CYCJ unequivocally believes that this must take place within the secure arena. We agree with the promise who concluded that "being placed in prison like settings is deeply inappropriate for children" (Independent Care Review, 2020: 82), and who called for all children to be removed from Young Offenders Institutions (YOIs) by 2024.

There are numerous reasons for CYCJ to hold such a position.

Evidence from CYCJ (Whitelaw and Gibson; forthcoming) show, the life experiences, adversities and display of harmful behaviours are fundamentally similar amongst both the secure care population and those children placed within a YOI. Their circumstances are indistinguishable, their exposure to Adverse Childhood Experiences (ACEs) are acute across both settings, and the levels of harm caused by each cohort are broadly comparable. To argue that children within one setting are in any material way different from their counterparts elsewhere would be inaccurate.

It is important to note that secure care already provides care, support and supervision to children who have been sentenced to a period of detention. The nature of the index offences in question have included murder, rape and other acts of acute violence. The secure estate is familiar with such issues and is well placed to deliver a response

to acts of significant harm. In light of their evident need themselves, CYCJ is of the view that should a child be deprived of their liberty, then the secure estate is best placed to promote long term desistance and supporting their eventual transition into the community.

Children who are deprived of their liberty within secure care have access to a range of supports within that setting which are not as freely available within the custodial estate. Education, for example, can be provided in smaller classes including 1:1 support. Whilst there may be grounds for secure care providers to consider the availability of additional, vocational qualifications alongside the curriculum for excellence, secure care does appear to be the most likely venue for children to achieve their academic potential. Provision of mental health support is similarly greater than in custodial settings, with the ability of community based mental health services to supplement and support the in-house provision that exists. Access to other community health services such as dentist, GP, hospital appointments and other similar services is also more reliable and available than when held in custody. Providing integrated residential care, secure care benefits from being able to synthesise any formulation undertaken by psychological services into the day-to-day routine of care. Owing to the larger population within custodial settings, and the lower level of interaction between prison officer and child, this is perhaps not as easily achieved there.

A further reason why secure should be used related to the scope for regular and meaningful visits from family members. These can take place within secure care on a more informal and private basis (upon the satisfaction of the staff responsible for providing care) and thus afforded the child and their family the opportunity to address any underlying relationship problems that they have experienced. Indeed, this may also be facilitated or supervised by a member of staff where necessary, including during transition and reintegration processes. Such opportunities to repair fractured family dynamics are essential to smooth the eventual transition of the child from the locked setting to the community. Given that the child will almost certainly return to the family home upon the end of the period of detention it is both pragmatic and morally right that both parties are afforded the greatest opportunity possible to amend any intra-familial conflict. Research indicates the benefits of ongoing family relationships and shows that transitions and reintegration can be more successful when children have meaningful contact with their family (Bullock, Litte and Millham, 1993; Carlson et al, 2019; Neil et al, 2020). Similarly, the increased involvement of family members permits greater scope for support and assistance to be offered to them; secure care staff can maintain regular contact with family members and thus assist the transition process. The Scottish Prison Survey demonstrates that significant levels of poverty and deprivation are found amongst the families of those in secure care, in addition to parental adversities including mental ill-health, addiction and domestic violence. Secure care is better placed to provide assistance in this regard than a YOI.

It is evident from the work of Vaswani (2018, 2019) and the annual Scottish Prison Service survey that those placed within custodial settings have experienced myriad adversities and exposure to various traumatic episodes. Despite attempts by colleagues working within custodial settings to develop a trauma-informed environment, it remains the fact that secure care centres are far better equipped to respond to the needs of children in a trauma informed way. With greater staffing levels, specialist training on childhood development, a smaller cohort of children to care for, and a more naturalistic living environment, the secure care arena has the greatest range of tools at their disposal to support children who have experienced such challenges. It could be argued however, that the size of secure care houses also needs to be reduced if they are to meet the needs of the children that they care for (Whitelaw, 2022).

Provision of targeted interventions which seek to address the factors that have led to the harmful behaviour and other needs is often delayed within the custodial setting due to the practice of not delivering such supports during periods of remand, and due to the lengthy waiting lists for certain programmes. At times, this can lead to the child not receiving any intervention before their period of detention comes to an end. Such challenges are far less common within the secure care provision, where a range of developmentally appropriate assessments and interventions can be made available soon after the child's admission. This can lead to holistic support being provided around needs including neurodiversity, trauma, learning disabilities or learning difficulties as well as

intensive family support and other factors that can precipitate episodes of harmful behaviour. Furthermore, a range of support can be provided which addresses wider welfare issues. Secure care therefore provides the best opportunity to affect change in areas of a child's life which may lead them to come into conflict with the law.

Adherence to childrens rights is another factor that should be considered when legislating over the use of secure care. YOIs continue to use pain-based restraint techniques, although are in the process of reviewing the suite of techniques and interventions that they utilise. Such measures are not employed within secure care, and as such the use of secure care rather than a YOI can help to protect children from experiencing episodes of harm.

The relatively small number of children currently held within HMP&YOI Polmont attests to the limited impact that migrating children over into the secure care sector would have on capacity there. Whilst numbers fluctuate, CYCJ is aware that the entire population of under 18s detained within Polmont has been less than five over recent months, with around 90% of these children held on remand at any one time. As Gibson (2020, 2021) shows, around one-third of children accommodated within secure care are placed by a local authority outwith Scotland, which has recently been as high as 50%. Should this Bill make provision to reduce the use of cross-border placements, then the additional capacity within secure care could be used in lieu of YOIs. Children's presence within a YOI is, of course, often due to the child not being subject to a Compulsory Supervision Order at that time and is yet a further reason to expand the window within which children can be referred to the Principal Reporter.

CYCJ is clear that secure care centres have the capacity to support all under 18s who have been detained due to conviction or remand. Indeed, they already accommodate many children who have been placed there for those very reasons, including those who have caused the most serious levels of harm and are convicted of the most serious of offences. The proportion of secure care residents who are 16 or 17 years old has gradually increased over the past decade, reflecting not only the impact of the Whole System Approach but the expertise within secure care of delivering care to this cohort of children (Gibson, 2021). Affording all children to access this resource when their liberty has been removed is therefore a sensible decision that will best address the causes of the harm caused, and more closely align Scotland to its commitment to the promise, the United Nations Committee on the Rights of the Child and other international treaties. Work is required in order to secure adequate capacity; on 12 March 2023 there were only three available beds within the four independent secure centres. Continued use of Scottish secure provisions by English and Welsh local authorities plays a role in this, as highlighted later in this response.

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

The proposed amendments to the way in which secure care is regulated appear to enhance the level of care that is provided to children in secure care in Scotland. Understanding the importance of local care, and how distance can affect critical relationships for children underpins this and means it is hard to see many situations where a child should be placed in a cross-border placement.

10. What are your views on the proposals set out in Part 4 of the Bill?

Whilst alteration to the definition of a child within the Anti-Social Behaviour Order (ASBO) legislation will lead to greater harmonisation across the legislative landscape, CYCJ believe that use of such legislation is regressive and ought to be avoided in any case. The risks and unintended consequences associated with such interventions are manifest, and ASBOs can be summarised as being both ineffective and draconian.

ASBOs have been shown to make little material difference to the underlying causes of behaviour that is deemed antisocial and are thus a poor use of resources and ineffective in achieving their desired outcome. Moreover, a broad range of stakeholders have lamented the nature and overly punitive approach associated with an ASBO, which places undue responsibility on children for the circumstances and situation they find themselves in and often leads to greater social exclusion. The correlation between community deprivation, poverty, austerity and antisocial behaviour is such that ASBO legislation often leads to children and their families being punished as a consequence of their circumstances. With this in mind CYCJ hope that this change in legislation will not see a renaissance of the 'respect' agenda which was shown to be so damaging at the turn of this century.

With regards to the repeal of Parts 4 and 5, as well as schedules 2 and 3 of the Children and Young People (Scotland) Act 2014 this move seems sensible given the direction of travel within practice and policy. Regardless of the merits or otherwise of these measures, it appears the settled will amongst stakeholders, policy makers and Scotland's political groups that alternative measures to support children are deemed the most appropriate course at this time.