

OPINION OF COUNSEL
FOR
VICTIM SUPPORT SCOTLAND

Introduction

1. I refer to my emailed letter of instruction on behalf of Victim Support Scotland dated 4th and 5th April 2024. Victim Support Scotland (“VSS”) is a charity that operates under the vision that people affected by crime are treated with dignity and respect and are at the heart of the justice system in Scotland (VSS strategy 2021 – 2026, page 7). Influencing government policy and legislation as a mechanism or upholding and improving the rights of victims of crime is an important part of VSS’ function. Scrutiny of policy and legislation is integral to that.

2. This opinion relates to the Children (Care and Justice) (Scotland) Bill (as amended at stage 2) (“the Bill”). The Bill proposed to make changes to the law in relation to the care of children and the involvement of children in the criminal justice system. The Bill makes significant changes to the operation of the children’s hearings system.

Papers

3. No written material has been provided by VSS to prepare this opinion. I have had access to information which is available to members of the public on the Scottish Parliament website.

The Remit of this Opinion

4. I am asked to opine on the following:
 - 1) To what extent does the Children (Care and Justice) (Scotland) Bill (as amended at stage 2) protect the rights of victims in the children's hearings system?
 - 2) What rights would victims lose with the Bill as amended at stage 2?
 - 3) At stage 3 of the Bill, what amendments could be proposed to ensure victims' rights are protected to a greater extent?
 - 4) What other mechanisms could ensure victims' rights are protected to a greater extent?

Limitations of my Opinion

5. There are two important limitations of my opinion.
6. First, the scope of this opinion is wide-ranging. It addressed complex issues of law. Without any time constraints this opinion is one which could conceivably be in the region of 100 pages. The remit for my opinion was finalised on Friday 5th April 2024. The Bill is at stage 3. The deadline for amendments to the Bill are to be submitted by 12 noon on Wednesday 17th April 2024. VSS require to prepare a briefing note before then. My opinion has been requested by Friday 12th April 2024 at the latest. It has therefore been prepared in a manner which is commensurate with that deadline.
7. Second, I do not offer my opinion on the policy of the Bill.

Terminology

8. A brief comment on terminology may assist. References to 'the children's hearing system' encompasses any proceedings under the Children's Hearings (Scotland) Act 2011. The term 'children's referral proceedings' shall refer to Sheriff Court proceedings which take place under part 10 of the 2011 Act. Any reference to 'criminal proceedings' reference to court proceedings in the criminal justice system.
9. The term 'statement of grounds' shall be used. The statement of grounds are defined in s.200 of the 2011 Act under reference to s.89(3). This is a document which contains the section 67 ground which the Principal Reporter believes applies to the referred child. Within the statement of grounds there ordinarily be a series of supporting facts upon which the Principal Reporter believes any given section 67 ground applies to that referred child. As the section 67 grounds are contained within the document called the statement of grounds, they are sometimes referred to as 'grounds for referral'. Where the term 'grounds for referral' is used in this opinion it relates to the particular ground or grounds referred to in the statement of grounds.
10. The statement of grounds is the equivalent of the indictment in solemn criminal proceedings or the complaint in (summary criminal proceedings). The supporting facts in the statement of grounds are the equivalent of the libel in criminal proceedings.

Context and Background

11. The background is important in the context of the questions upon which the opinion is sought.

The legislative proposal and effect in terms of 16 – 17 year olds

12. Under current law, a child over the age of 16 years can only be referred to the children's reporter if they are already subject to a Compulsory Supervision Order ("CSO"), or if they were referred before 16 years of age and a decision to arrange a hearing or to make a CSO is pending (s.199). The definition of 'child' in the 2011 Act and related legislation will be amended to mean that anyone under the age of 18 is considered a child (see ss. 1, 8 and 10 of the Bill). Section 15 of the Bill will, *inter alia*, allow criminal courts to remit the disposal for a child without the need for advice from the children's hearing.

13. The effect of the Bill is that it is likely to be that more of those aged 16 – 17 who are accused, and convicted of, an offence will be determined through the children's hearing system rather than in the criminal courts. That has an important impact on the rights of victims. VSS have concern in relation to how victims' rights will be safeguarded in the children's hearing system.

The wider legislative environment in relations to victim of crime

14. In Scotland, there have been a myriad of steps taken to advance the right of victims of crime including primary and secondary legislation. At present, another Bill is at stage 1 – the Victims, Witnesses, and Justice Reform (Scotland) Bill. This Bill has the aim of, *inter alia*, improving the experience of victims in the justice system.

15. In the context of the Bill, the role of the United Nations Convention on the Rights of the Child (“UNCRC”) is important. This convention provides a global framework for the protection of the rights of children. United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 received Royal Assent on 16th January 2024. The following day sections 42, 45, 46, 47 and 48 came into force. The remaining provisions come into force on 16th July 2024 (s.47(2)(a)). Two articles are particular significance for victims of crime. First, article 19(1) provides that state parties are required to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of harm. Second, article 39 makes it incumbent on state parties to take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of harm.

The Subject of this Opinion

Question 1: to what extent does the Children (Care and Justice) (Scotland) Bill (as amended at stage 2) protect the rights of victims in the children’s hearings system?

16. This answer will be divided into three parts. The parts are:

- 1) Information Sharing
- 2) Victims’ involvement in the decision-making process in the children’s hearing system.
- 3) The implementation of orders in the children’s hearing system.

17. A summary will then provide a direct answer to question 1.

Information Sharing

18. As a preliminary comment, there will always be a fine balancing, where the provision of information relates to competing rights to sensitive, personal information of an individual. Respective rights to privacy in terms of article 8 must be considered. Two provisions in the Bill broadly seek to address the provision of information for victims – s.6 and s.6B.

19. Before turning to the proposed information, a victim could receive in the children’s hearing system as a result of the Bill, it is worthwhile considering the information victims would receive in criminal proceedings. The differences between the systems provides a stark difference to the right that would be afforded to victims in the children’s hearing system under the Bill and the rights which are given to victim in criminal proceedings.

Victims’ rights to information in criminal proceedings

20. The Victims and Witnesses (Scotland) Act 2014 (“the 2014 Act”) is an Act of the Scottish Parliament which made provision for rights and support for victims and witnesses and included provision for implementing Directive 2012/29/EU of the European Parliament and the Council.

21. The 2014 Act sets out general principles in relation to victims which certain statutory bodies must have regards to when performing their statutory functions (ss.1 and 1A). In relation to the provision of information, the 2014 Act provides that victims should be able to obtain information about what is happening in the criminal investigation or criminal proceedings (s.1(3)(a)).

22. The 2014 Act incorporates the Victims' Code for Scotland (s.3B). The Code provides a detailed regime in which victims can obtain general information and case-specific information in relation to criminal investigations or criminal proceedings that relate to the particular victim.
23. As a whole, the 2014 Act provides a statutory basis upon which victims can receive information in relation to criminal proceedings. A person may request "qualifying information" in relation to an offence or alleged offence and any criminal investigation or criminal proceedings where they appear to be a victim (s.6). The police, prosecutor or Scottish Court are under a statutory duty to provide that information unless inappropriate to do so (ss. 6(3) and 6(5)).
24. The qualifying information is set out in s.6(6). As a comparison will be drawn between the children's hearing system the list is set out in full:
- 1) Information that relates to the offences or alleged offences - s.6(6)(b).
 - 2) Information that is specified in a request by the victim - s.6(6)(a).
 - 3) A decision not to proceed with a criminal investigation and any reasons for it - s.6(7)(a).
 - 4) A decision to end a criminal investigation and any reasons for it - s.6(7)(b).
 - 5) A decision not to institute criminal proceedings against a person and any reasons for it - s.6(7)(c).

- 6) The place in which a trial is to be held - s.6(7)(d).
- 7) The date on which and time at which a trial is to be held - s.6(7)(e).
- 8) The nature of charges libelled against a person - s.6(7)(f).
- 9) The place in which the hearing of an appeal arising from a trial is to be held - s.6(7)(g).
- 10) The date on which and time at which the hearing of an appeal arising from a trial is to be held - s.6(7)(h).
- 11) The stage that criminal proceedings have reached - s.6(7)(i)
- 12) The final decision of a court in a trial or any appeal arising from a trial, and any reasons for it - s.6(7)(j)

25. It is clear that, in the context of criminal proceedings, there is a regime whereby the victim is appraised of matters before, during and after a criminal trial. As shall be explained, the Bill does not provide victims with the same provision of information in equivalent proceedings under part 10 of the 2011 Act.

Section 6 of the Bill

26. Turning to the Bill, section 6 makes provision to amend ss.179A, 179B, and 179C of the 2011 Act. These provisions are the information sharing system that currently exists in the 2011 Act.

Information to a Relevant Person of a Victim

27. Section 6 places a duty on the reporter that they must, so far as reasonably practicable, inform “any” relevant person, as well as, or instead of the child of the right to request certain information. A potential issue arises where the child in question does not want the relevant person to have sensitive information. The definition of relevant person is wide (see. s.200 of the 2011 Act read together with article 3 of the Children’s Hearings (Scotland) Act 2011 (Review of Contact Directions and Definition of Relevant Persons) Order 2013 (SSI 2013/193). As an example, the child who is a victim of an offence who has no contact with a parent (who potentially does not have PRRs) may not want that parent to have personal, sensitive information about them. While the reporter can exercise a discretion of whether to inform the relevant person of the right to request information, tension could foreseeably arise if the child in question and the reporter do not agree that the relevant person should be informed. It is not clear how that tension would be resolved. The provision provides the reporter “need not inform”, *inter alia*, any relevant person in relation to that child of their right to request information where, if satisfied doing so would be detrimental to the best interest of the child [victim] (s.179(5B)(b)(i)). The use of the words “need not” is relatively unusual statutory language. Those words have the propensity to create uncertainty.

What information will be provided in terms of the Bill?

28. In Scots criminal law, there is a move to provide victims with more information in relation to proceedings where the subject matters involved harm or alleged harm to them. For example, in criminal proceedings a victim should be able to obtain information about what is happening in the investigations and

proceedings (s.1(3)(a) of the Victims and Witnesses (Scotland) Act 2014). Importantly, however children's hearings are not criminal justice settings as recognised in the policy memorandum to the Bill (para.82).

29. The current position of what information a victim can receive in the children's hearing system is set out in s.179B of the 2011 Act. The information is limited. The victim is entitled to know whether or not a children's hearing is required to be arranged (a 'grounds' hearing) (s.179B(1)(a)). If a grounds hearing is arranged, the victim may be told whether a CSO has been made in respect of the referred child or, as the case may be, whether any CSO which is already in force has been terminated, varied or continued, or how the referral to the children's hearing was otherwise discharged (ss.179B(1)(a) and 179B(2)(b)). If a grounds hearing was not arranged, the victim may be told whether the reporter determined that a section 67 grounds applied and what other action has been taken by the reporter (ss.179B(1)(b) and 179B(2)(b)). From the victims' perspective there are several deficiencies with the current system. Broadly, this is less information than a victim would be entitled to obtain in criminal proceedings.

30. The Bill seeks to remedy the current position in terms of sections 6(2A) and 6B. Section 6(2A) does so by amending s.179B in the 2011 Act. Section 6B does so by placing a statutory duty on the Scottish Ministers to establish an information sharing system through a single point of contact for the victim.

Section 6(2A)

31. Section 6(2A) expands the information which can be given to a victim with the inclusion of a new sub-section 3. That provides:

(3) The information referred to in subsection (1)(a)(ii) and (b) is—

(a) information as to whether a compulsory supervision order has been made in respect of the child or, as the case may be, whether a compulsory supervision order which is already in force in respect of the child has been terminated, varied or continued,

(b) where such an order has been made or, as the case may be, varied or continued, information as to—

(i) whether a measure has been included in the order which prohibits the child from approaching, communicating with, attempting to approach or communicate with or otherwise contacting the person who made the request or, where that person is a relevant person, the child in relation to whom that person is a relevant person,

(ii) whether a secure accommodation authorisation has been included in the order,

(c) information as to how the referral to the children's hearing was otherwise discharged.

32. From victims' perspective, it is positive that they may be made aware of one specific measure which may be included in a child's CSO (see the new s.179B(3)(b)(i)). It is notable that only one of the two new measures which can be attached to a CSO are included in the information that can be given to a victim. It is unclear why, if the children's hearing has been satisfied that it is necessary to include a measure in an order, a prohibition on the referred child entering a specified place in terms of s.83(2)(ca), the victim is not made aware

of that insofar as it relates to them. The specific place could be a locus where the victim frequents on a regular basis. Being provided with information would be integral to any planning to ensure the safety of the victim.

33. Despite these changes, victims still do not receive the same level of information that someone in their position would receive in criminal proceedings. This could be perceived as having the effect of creating a two-tier system for victims under Scots law. As a matter of law, that is undesirable. It would not serve victims' interests as it could mean that some victims have less rights than others.

34. The Bill appears to have no cognisance of the technical and complex route that a children's referral case can take. By way of example, there would be little scope for a victim to receive any information which the panel members at a grounds hearing have directed the Principal Reporter to make an application to the Sheriff under s.93(2). In criminal proceedings, a victim would have the right to request case specific information from Scottish Court and Tribunal Service. For example, the dates of any court hearings, the final decision of a court in a trial or any appeal arising from a trial, and any reasons for it (Victims' Code for Scotland, page 4 and s.3B of the Victims and Witnesses (Scotland) Act 2014). As set out in answer to the second question, I do not consider the Victims' Code applies to proceedings in the children's hearings system.

Section 6B

35. Section 6B places a duty on the Scottish Ministers to establish an information sharing system. From victims' perspective, there has two positive introductions in the Bill. First, the information that relates to offending behaviour is to be

shared through a single point on contact. This is consistent with the ethos of trauma informed practices. If that is implemented in practice that is likely to be positive for victims. Second, the tiered approach to information sharing appears to be appropriate. The provision of information of when a referred child shall be transferred to prison or released is required for safety planning for victims. Information which is to be shared under this system is divided into two categories - mandatory and discretionary.

Section 6B(3): Mandatory Information

36. In the main, the mandatory information relates to general information such as how the children's hearing system works access to victim support and the "*joint reporting process*" (a term which is not defined in the Bill and it is difficult to understand the precise means of this term from the context of the Bill read as a whole).

37. As presently framed, the only case specific information the Bill makes provision for victims to receive is the date of the children's hearing and the outcome insofar as it is relevant to their safety planning (s.6B(3)(d) and where the Principal Reporter decides not to make a referral to the children's hearing, information of that fact (but there is no requirement for the reasons for that decision) (s.6B(3)(e)). From victim's perspective, as presently drafted this creates difficulties. In addition to the lack of specific case related information, there are four particular difficulties with the mandatory information:

- 1) First, it is unclear what the regulations will entail. The detail of the regulations is crucial for victims. If the regulations follow the same theme as the Bill, with victims' rights being considered as a secondary issue, then

their rights are not likely to be fully respected (at least not to the same extent as in criminal proceedings).

- 2) Second, there is no requirement that a victim is told of the reasons that the Principal Reporter decided not to arrange a children's hearing. From the victims' perspective, the absence of information creates uncertainty. It is not unforeseeable that a victim could question whether the outside perception is that they had been untruthful about certain behaviour or conduct.
- 3) Third, the Bill refers to "*the*" date of "*the*" children's hearing (s.6B(3)(d)(i)). While it is assumed this is a grounds hearing which takes place under ss.90 – 95 of the 2011 Act, that is not made clear in the Bill. The double use of the word "*the*" in this provision implies that a single children's hearing will take place and a victim will only be informed of a single children's hearing. In ordinary practice, it is rare for a single children's hearing to take place in relation to a referred child. If a referred child is made subject to an ICSO at a grounds hearing and remains on ICSOs while the grounds are determined at court, there are likely to be at least two further children's hearings to consider the extension of an ICSO. Should any grounds for referral be established and the Sheriff directs the reporter to arrange a children's hearing, there will, in all likelihood, be further children's hearings.
- 4) Fourth, in terms of the qualification s.6B(3)(d)(ii) indicates that unless regulations permit, the limited amount of information in this provision will be all that a victim has the mandatory right to receive. There will inevitably be difficulty in assessing what is relevant to safety planning for the victim. The issue of relevance specified in s.6B(3)(d)(ii) in the context of safety planning is subjective and open to different interpretations.

Section 6B(4): Discretionary Information

38. The provision in the Bill purports that regulations “*may*” provide for a victim to be told about non-compliance with a CSO and what action will be taken in the event of that (s.6B(4)(c – d)). Three difficulties arise:

- 1) This provision does apply to non-compliance ICSOs. It does not take into account the practical realities of the operation of the children’s hearing system. A children can be subject to several ICSOs before being made subject to CSO. While an ICSO can last for up to 22 days, the 2011 Act does not provide a limit for the amount of ICSOs can be made subject to, nor does the Act provide a maximum duration that a child may be subject to an ICSO for. In practice, therefore, a child can be subject several consecutive ICSOs for a considerable period of time.
- 2) This provision only relates to non-compliance with a CSO and not measures within an order. In light of the new measures which are proposed in s.3 of the Bill, it is particularly important that there is an associated enforcement mechanism attached to these measures to ensure their effectiveness.
- 3) Third, the victim should, on a mandatory basis be told about any non-compliance. Non-compliance with a CSO or ICSO or any measure thereof would indicate inability or incapability of conducting themselves in accordance with the law. That is integral to any safety panning for the victim. The victim ought to be made aware of that so that any planning can be effective.

Difficulties in the children's hearing system

39. The equivalent of a criminal trial in the children's hearing system is a proof.

This is the process where evidence is taken from witnesses before a determination is made on an issue or issues.

40. There are several procedural steps which takes place before a proof. These key procedural steps are outlined in sequential order below:

1) The reporter must have decided that a section 67 ground applies to the referred child (s.66(2) of the 2011 Act.

2) The reporter must then decide to convene a children's hearing (s.69(2)).

3) Unless the grounds are understood and accepted by the child, and all relevant persons, the panel members must then direct the reporter to make an application to the Sheriff to make a determination on any grounds for referral (s.93(2)(a)).

4) Within a period of 7 days of the panel members making that direction, the reporter must lodge the application with the Sheriff Court (rule 3.45(1) of the Act of Sederunt (Child Care and Maintenance Rules) 1997 Statutory Instrument 1997 No. 291 (S.19)).

5) Within 28 days of the reporter's application, a hearing takes place (s.101(2)). In practice, where grounds for referral are in dispute they will not be determined on the first occasion the case calls in court. Unlike other criminal proceedings, there are no prescribed timescales for certain steps such as a

first diet or a preliminary hearing. An adjournment can be granted to allow further time for inquiry (rule 3.49).

6) In a complex case, a proof will usually begin place some months after the case is initially held in court.

7) A children's case can take months and in some case years to conclude.

41. The procedure in proof for children's referral proceedings is complex. Timescales are uncertain. In practice, complex cases take multiple days to be assigned. Regrettably, there is a developing practice in Sheriff Courts where a single day for any proof/evidential hearing is allocated for each sitting. Usually the future dates are not known until completion of the first day of evidence. My recent experience includes conducting a proof involving allegations of rape of a teenage child by another child where four separate days were assigned. That practice is not unusual. In the last 22 months, I have conducted children's referral proofs in four separate Sheriffdoms in Scotland. These were cases which were deemed complex cases by the court. Despite that status, on no occasions in any of those Sheriffdoms have consecutive days been assigned for proof.

42. The procedure in children's referral proofs is relevant to victims and their experience. As a result of a greater level of uncertainty in the children's hearing system, it is arguable that victims require a high level of information. The Bill makes little provision for a victim to receive any information between the panel members directing the Principal Reporter to make an application to court a case returning to children's hearings.

43. There is no provision in section 6B of the Bill for a victim to have the equivalent information in equivalent proceedings which are undertaken before a Sheriff in children's referral proceedings. At present, in absence the regulations mentioned in s.6B(1) of the Bill or their content, some obvious differences arise between criminal proceedings and children's referral proceedings:

- 1) While the victim must be told the date of "*the*" children's hearing but there is no requirement to tell a victim whether the panel members at a grounds hearing directed the reporter to make an application to the Sheriff.
- 2) There is no provision for a victim to know when a case will first call in the children's referral court under s.101(2).
- 3) Unlike a victim in criminal proceedings, there is no right to know when or where a proof (the equivalent of a trial) will take place.
- 4) In criminal proceedings, a victim will have the equivalent right to know the stage and status of criminal proceedings by virtue of s.6(7)(i) of the 2014 Act. The Bill makes no provision for victim to have that right in children's referral proceedings.
- 5) Importantly, a victim in the children's hearing system has no right or ability to know what is contained within the statement of grounds. In criminal proceedings, a victim will have the equivalent right to know the nature of charges against an accused by virtue of s.6(7)(f) of the 2014 Act.

- 6) In the children's hearing system, the Bill does not provide a victim with the right to know the decision of the Sheriff in determining any grounds for referral or the reasons for any decision. The equivalent right is afforded in criminal proceedings in terms of s.6(7)(j) of the 2014 Act. The victim could possibly infer that grounds have been established, if they are advised that a children's hearings will take place. Even if they are notified, however, there is no provision for the victim to know what grounds for referral and supporting facts were established and what, if any, amendment or amendments were made by the Sheriff.
- 7) There is no provision in the Bill for the victim to know if the perpetrator accepted any responsibility for their actions during the court proceedings before a Sheriff.
- 8) In criminal proceedings, the victim can receive information about appellate proceedings ss.6(7)(g), 6(7)(h) and 6(7)(j) of the 2014 Act. There is no such provision in the Bill for victims to be afforded the same rights if an appeal is taken in the children's hearing system under part 15 of the 2011 Act.

44. From victims' perspective these differences are unsatisfactory. By failing to make appropriate provision for victims to obtain information about court proceedings is incongruent with the wider approach in Scotland to treat victims with respect and provide them with relevant information.

45. While the ensuing regulations may, in due course provide for equal treatment, at present there is little reassurance that victims will be afforded the same level

of information as their victims in the criminal justice system. There is no objective reason why victims of the exact same offences should be afforded different rights and different levels of information as a result of the offences being determined in different forums.

46. Proposed wording set out in response to questions 3 and 4 below to ameliorate these difficulties.

Victims' involvement in decision-making process in the Children's Hearing System

47. This section shall address two specific parts in which victims may be afforded less rights in the decision-making process in the children's hearing system than in criminal proceedings: (i) disposals following a finding that an offence has been committed in respect of the victim; and (ii) victim's representations in any release from prison or secure accommodation.

Disposals following a finding that an offence has been committed in respect of the victim

48. In criminal proceedings, cases are ordinarily disposed of in the form of sentencing, typically by the trial Judge or Sheriff. There is a material difference in the children's hearing system. Once a Sheriff makes a finding that a ground for referral has been established, they must direct the reporter to arrange a children's hearing (s.108(2) of the 2011 Act). A Sheriff has no power to make a CSO but may make an ICSO (s.109). It is then for the children's hearing to make a determination on whether a CSO is necessary. It is the panel members at the ensuing children's hearing who determine the long term disposal.

49. In criminal proceedings, there is scope for the victim to be involved in the decision-making process which leads to the disposal. For example, a victim statement can be put before the Judge or Sheriff for consideration of what sentence to impose (s.14 of the Criminal Justice (Scotland) Act 2003).
50. Where a ground is established (which could include serious violent or sexual offending) in the children's hearing system, there is no such provision for victims' involvement. In most cases, the victim has no locus to attend a children's hearing (s.78(1) of the 2011 Act). While the chairing member of the children's hearing has the power to allow a person to attend a hearing, this right is not ordinarily exercised because of the chair's duty to ensure the number of persons present is kept to a minimum (ss.78(2) and 78(4)).
51. Similarly, there is provision for what type of written material which can be placed before the children's hearing following a ground being established by the Sheriff at court. The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 ("the 2013 rules") sets out procedural rules for the operation of children's hearings. Part 8 of the 2013 rules sets out, *inter alia*, what material can be placed before that type of hearing. There are no express rules which allow a victim statement to be put before the hearing. The Bill makes no provision for that.
52. The position is that a victim of an offence has limited locus to attend a children's hearing and no ability to put any written material before any hearing. From victims' perspective, the lack of involvement in decision making process is a deficiency in the Bill.

Victim's representations in any release from prison or secure accommodation

53. In criminal proceedings, there is provision for victims to be made aware when a prisoner will be realised from prison and to make representations (ss.27 – 29 of the 2014 Act). The Bill does make provision for regulations to provide for a victim to be made aware when a referred child is to be released for secure accommodation or transferred to an adult prison (s.6B(2)(a)(iii)).
54. The Bill does not make provision for a victim to make representations in relation to the proposed release from secure accommodation of the perpetrator of an offence. As mentioned above, the victim is likely to have no locus to attend any children's hearing that makes decisions nor do they have the right or ability to put written material before the hearing to inform the decision-making process. This is another area in which victims' involvement in the decision-making process is lacking and is not properly addressed by the Bill.

The implementation of orders in the children's hearing system

55. This section considers the important issues of the implementation of orders in the children's hearing system. The term 'orders' refers to a compulsory supervision order ("CSO") and an interim compulsory supervision order ("ICSO"). A CSO can last for a period of up to one year whereas an ICSO can last for up to 22 days (ss.83(1)(c) and 83(7); and ss.86(1)(c) and 86(3) of the 2011 Act).
56. The implementation of an order in the children's hearing system is dealt with under part 14 of the 2011 Act. The implementation authority must give effect to a CSO (s.144(1)). The panel members or Sheriff who make a CSO or ICSO

must specify a local authority which is to be responsible for giving effect to the measures included in the order (ss.83(1)(b) and 86(1)(b)).

57. In addition to existing powers that relate to secure accommodation and a movement restriction condition, the Bill introduces two new measures which may be included in a CSO or ICSO (s.3(2) of the Bill). The first is a prohibition on the referred child entering a specified place. The second is a prohibition on the child approaching or communicating with a specified person or class of persons. Collectively, these shall be referred to as the “new measures”. As an additional layer of protection, these are welcome additions from victims’ perspective but the manner in which they can be implemented and policed is important.

58. The new measures are akin to an interdict or bail conditions in that they have the same effect of restricting the liberty of the person who is subject to those orders. It is an offence to breach a condition of bail (s.27(1)(b) of the Criminal Procedure (Scotland) Act 1995). A person may be arrested, without the need for a warrant, where a police officer suspects a condition of bail has been broken (s.28(1) of the Criminal Procedure (Scotland) Act 1995). In terms of the Bill, it is not an offence for a child to breach any measures included in a CSO or ICSO nor could a child be arrested for doing so. From a perpetrator’s perspective, the repercussions of breaching a measure of a CSO or ICSO are less severe than breaching a bail condition. The implications of this, arising in part from the Bill, mean that victims are in a more vulnerable situation than if the perpetrator was subject to bail conditions.

59. The procedural steps following a breach of a CSO or ICSO are relevant to victims. It is notable the Bill does not amend the procedure for a breach of an order. The following difficulties arise in relation to the breach of an order.

The victim has no locus to convene a children's hearing to address the breach

60. If a referred child is subject to a movement restriction condition ("MRC") or one of the new measure, they may prevent, *inter alia*, contact with a victim. In circumstances where a referred child breaches any such measure, the victim has no locus to convene a children's hearing in order for that breach to be addressed. The Bill does not extend the categories of persons that may call for a review of a child's CSO under the 2011 Act. Therefore, the persons who can call a review are the child or a relevant person three months after the previous decision (s.132(4) of the 2011 Act). Aside from them the report may only initiate a review of the CSO if it will expire within three months (s.133(a) of the 2011 Act) or the panel members at a previous hearing ordered a review (s.125(3)). Other than that, only the implementation authority can initiate a review of the child's CSO (s.131). In practice, it will only be the implementation authority who initiate the review unless it is in the last three months of the terms of an existing order.

The number of procedural steps that need to be taken to address the potential harm

61. If an order is breached in a manner which harms a victim there continues to be an elongated process for that non-compliance to be brought before a children's hearing. In practice, the victim would require to report this to the police, a parent or organisation who can then notify implementation authority. Only the

implementation authority (in practice the social work department) can request the review. A request requires to be made to the reporter. The reporter then convenes a hearing.

62. There are several steps in that process before the panel members have the opportunity to address any non-compliance. This can be compared to the swift process relating to bail conditions where a person can be arrested thus addressing the potential for immediate harm to the victim swiftly. This practical barrier prevents the non-compliance from being addressed quickly in a manner which can promptly safeguard the victim.

63. It is notable that one of the aims of the Bill is to avoid any recurrence of any past trauma (s.6B(7)(b)(iii)(A)). The current regime does not provide a sufficient deterrent which would prevent a perpetrator from behaviour which could re-traumatise the victim.

The speed at which a children's hearing can be convened.

64. The Bill makes no provision for a convening a children's hearing expeditiously. In practice, experience suggest that it will take approximately three weeks for a hearing to be convened. From victims' perspective that timeframe such that it provides scope for further instances of non-compliance. An extension of the reporter's powers to convene a hearing and the timescale which the hearing shall take place is proposed below.

Remedies at a Children's Hearing in relation to non-compliance with an order

65. Once a children's hearing has been convened the powers available to panel members have not been strengthen by the Bill. While the option of secure accommodation may be available, the deprivation of a child's liberty is

considered as an option of last resort having considered all other options (see s.83(5)(c) of the 2011 Act). Other than secure accommodation, the options available to a hearing are limited.

66. Where the child is subject to a MRC or one of the new measures relate to the victim, the victim has already been harmed. A breach of an MRC or one of the new measures is likely to be a second occurrence of harm. There ought to be a mechanism whereby the panel members can address the non-compliance quickly. The Bill makes no such provision. In relation to MRCs this is a particular surprising omission. At consultation stage, respondents from social work (who are typically the implementation authority for the purposes of implementing order) reported that MRCs can be difficult to enforce (policy memorandum, para. 76). Strengthening the children's hearings powers in the event of breach of MRC was ruled out as the existing review mechanism (policy memorandum, para. 72). The refusal to strengthen those powers ought to be considered in the context of the existing powers that a children's hearing has on review.

Summary of the answer to Question 1

67. To summarise, while there are some additions which may benefit victims, overall, the Bill does not sufficiently protect their rights in the children's hearing system. In the wider context, victims' protection in the children's hearing system is incongruent with the wider positive developments in protecting victims' rights in Scotland. The Bill does not go far enough in protecting victims' rights.

68. From the perspective of victims, the following issues have been identified with the Bill:

- 1) There are insufficient safeguards to prevent a relevant person (for whom a child does not want to have information) from receiving notifications of their right to obtain information about that child.
- 2) The information which will be given to a victim in the children's hearing system is unknown and appears to be less than a victim in criminal proceedings.
- 3) There is no provision in the Bill for the victim to be involved in the decision-making process following grounds for referral being established by the Sheriff. Similarly, there is no provision in the bill for the victim to be involved in the decision-making process in relation to a perpetrator being considered for secure accommodation or a movement restriction condition or the variation of termination of those measures.
- 4) The mechanisms for enforcing orders made in the children's hearing system are insufficient to adequately protect victims.
- 5) The Bill does not provide for the Victims' Code for Scotland to apply in the children's hearing system. Nor does it make provision for the Principal Reporter or the panel members (through Children's Hearings Scotland) to be bound to follow, and act in accordance with, the principles of the code.

Question 2: what rights would victims lose with the Bill as amended at stage 2?

69. The answer to this question shall begin by addressing the terms of the question. The Bill does not, *per se*, take away rights from victims. As mentioned, however,

it does appear to create difference in the manner in which victims are treated in the children's hearing system, and in criminal proceedings. This answer will therefore focus on what differences would prevail in those systems if the Bill was passed in its current form. The issue of loss shall therefore address what rights victims would lose if a case is dealt with in the children's hearing system as opposed to in criminal proceedings.

The Victims' Code for Scotland

70. The Bill does not incorporate the Victims' Code into the children's hearing system. This is material because my view is that the Victims' Code does not apply to proceedings in the children's hearings system for the following reasons:

- 1) The explanatory notes which provide an overview of the 2014 Act make no reference to the children's hearing system.
- 2) The opening section of the 2014 Act expressly states that the general principles apply in relation to "*a criminal investigation or criminal proceedings*" (s.1(1)).
- 3) SCRA, CHS nor the Principal Reporter is listed as one of the statutory bodies whose functions must be performed having regard to the general principles set out in section 1 (see, s.1(2)).
- 4) In this context of the provisions in the 2014 Act which addresses certain victims' right, "*a hearing in relevant criminal proceedings*" means any

hearing in the course of any criminal proceedings in the High Court, sheriff court or justice of the peace court in relation to an offence or alleged offence (s.3E(8)).

5) Neither the 2014 Act nor the Victims' Code are referred to in the policy memorandum which accompanies the Bill. More importantly, neither are expressly incorporated into children's hearing proceedings by the terms of the bill.

6) in the context of the policy of the provision of information to victim, the policy memorandum to the Bill states, "*Crucially, children's hearings are not criminal justice settings...*" (para. 82 on page 18).

71. If the bill passed in its present form at stage 2, victims dealing with cases in the children's hearing system would lose the right to the protection offered under the Victims' Code. This includes:

1) The right to request certain case-specific information from Police, Crown Office and Procurator Fiscal Service ("COPFS) and Scottish Courts and Tribunals Service ("SCTS").

2) The right to register with the victim notification scheme which provides for information about the perpetrator's release, transfer outwith Scotland, eligibility for temporary release, escape and return to prison.

3) The right to provide a victim statement to the court to inform any sentencing of the preparator.

- 4) The right to make representations for any proposed release of a prisoner.
- 5) The right to benefit from the safety and protection of bail conditions including the potential for special bail conditions with the perpetrator being notified of power of arrest for non-compliance.

Qualifying Information

72. As mentioned, the 2014 Act sets out a detailed regime for victims to be provided with qualifying information as specified in s.6(6). Regrettably, the Bill does not make provision for victims in the children's hearing system to obtain the equivalent information in relation to court proceedings under the 2011 Act.

Other rights for Victims under the 2014 Act

73. The 2014 Act contains other rights for victims. These statutory rights which would not be replicated with equivalent rights in the children's hearing system in the Bill's present form include:

- 1) The right to specify the gender of the interviewer for the investigation of any crime where certain offences are committed including sexual offences and domestic abuse – s.8.
- 2) The right to have an interview into the investigation of crime conducted with undue delay and to be accompanied by a legal representative – s.9A.
- 3) The right to the protection of their privacy – s.9E.

4) The right to the victim surcharge – s.26.

5) The right to make representations in relation to a temporary release from prison – s.29.

74. The Bill in its present form would not confer any of these rights upon victims in the children's hearing system.

The 2024 Bill: Independent Legal Representation

75. If this Bill and the 2024 Bill passed in their present form, then victims in criminal proceeding would benefit from independent legal representation and their ability to make submissions on applications under s.275 whereas victims for cases in the children's hearing system would not obtain that right for those same issues.

Question 3: at stage 3 of the Bill, what amendments could be proposed to ensure victims' rights are protected to a greater extent?

Question 4: what other mechanisms could ensure victims' rights are protected to a greater extent?

76. These questions shall be addressed together under reference to the issues outlined above. As mentioned, I do not offer an opinion on the policy of the Bill. Should, however, VSS wish to achieve any of the objectives which seeks to remedy difficulties with the Bill then the following would enable that.

Issue 1: There are insufficient safeguards to prevent a relevant person (for whom a child does not want to have information) from receiving notifications of their right to obtain information about that child

77. A provision which made the Principal Reporter's duty subject to a mandatory requirement not to inform a relevant person in certain circumstances would provide a greater degree of certainty. This circumstances in which a relevant person would not be notified of this right would be two-fold. They would not be notified where doing so where either: (a) the victim has expressed a view they do not want the relevant person to have that information; or (b) it would be detrimental to the best interests of the child victims against whom the offence appears to have been committed. This would ensure the provision is properly focused on the experience of the victim. The following wording in the insertion of a new provision s.179A(5C) would achieve that:

“(5C) The Principal Reporter must not inform the relevant person of any person against whom any offence appears to have been committed if:

(1) that person has indicated (whether to the Principal Reporter or otherwise) that they do not wish the relevant person to be notified of that right;

(2) doing so would be detrimental to the best interests of that person;
or

(3) if satisfied, having regard to the factors mentioned in section 179C(2), that it would be inappropriate in the circumstances of the case to do so”

Issue 2: The information which will be given to a victim in the children's hearing system is unknown and appears to be less than a victim in criminal proceedings

78. Section 6B places a duty on Ministers to establish regulations for an information sharing scheme. While there are a series of rights available to victims under the 2014 Act, that applies to the nuances of criminal proceedings. Children's referral proceedings are of a different nature, has different procedure and different procedural rules. As a result of different procedure, the rights in the 2014 Act cannot simply be transferred over to the children's hearing system.

79. The following wording, whether in the ensuing regulations or as a standalone provision in the Bill, would align victims' rights in children's hearing system with those in criminal proceedings:

Disclosure of information about children's referral proceedings

(1) A person mentioned in subsection (2) (a "requester") may at any time request a qualifying person to disclose to the requester qualifying information in relation to an investigation by the Principal Reporter or children's referral proceedings relating to it.

(2) The persons are —

- (a) a person who appears to be a victim of the offence or alleged offence,*
- (b) a person who is referred to in any statement of grounds,*
- (c) a person who is to give, or is likely to give, evidence in any proceedings under part 10 of the 2011 Act,*

(d) a person who has given a statement in relation to the offence or alleged offence to a constable or the prosecutor.

(3) Where a request is made under subsection (1), the qualifying person must disclose to the requester any qualifying information which the person holds.

(4) In the case where the qualifying information falls within paragraph (a), (b) or (c) of subsection (7), a qualifying person must not comply with a request under subsection (1) in so far as disclosure of the qualifying information would require disclosure of information supplied by a Minister of the Crown or a department of the Government of the United Kingdom that is held in confidence by the person.

(5) A qualifying person need not comply with a request under subsection (1) in so far as the qualifying person considers that it would be inappropriate to disclose any qualifying information.

(6) In this section —

“CSO” mean a compulsory supervision order as defined in s.83 of the Children’s Hearings (Scotland) Act 2011

“ICSO” mean an interim compulsory supervision order as defined in s.86 of the Children’s Hearings (Scotland) Act 2011

“prescribed” means prescribed by the Scottish Ministers by order,

“qualifying information” means information that —

- (a) falls within subsection (7),*
- (b) relates to the investigation by the Principal Reporter or children's referral proceedings, and*
- (c) is specified in the request under subsection (1),*
- (d) where a child does not comply with the terms of any qualifying order or any measure contained within any qualifying order*

"qualifying order" means—

- (a) a compulsory supervision order in terms of s.83 of the Children's Hearings (Scotland) Act 2011*
- (b) an interim compulsory supervision order in terms of s.86 of the Children's Hearings (Scotland) Act 2011*

"qualifying person" means—

- (a) the chief constable of the Police Service of Scotland,*
- (b) the Principal Reporter,*
- (c) the Scottish Court and Tribunal Service.*

"the 2011 Act" means the Children's Hearings (Scotland) Act 2011

(7) Information falls within this subsection if it is—

- (a) Where the Principal Reporter decided not to proceed with any investigation under s.66 of the 2011 Act and any reasons for that.*
- (b) Where the Principal Reporter decides to end any investigation under s.66 of the 2011 Act and any reasons for that.*

- (c) *Where the Principal Reporter makes a determination under s.68 of the 2011 Act that there shall be no referral to a children's hearing and any reasons for that,*
- (d) *Where the Principal Reporter makes a determination under s.69 of the 2011 Act that there shall be a referral to a children's hearing and the date of any grounds hearing which takes place under s.90 of the 2011 Act,*
- (e) *Where a grounds hearing takes place under s.90 of the 2011 Act, what decision the children's hearing made under s.93(2) of the 2011 Act and a summary of the hearing's written reasons for that decision,*
- (f) *At any children's hearing which takes place under the 2011 Act, whether a CSO or ICSO was made and details of any measure that relates to the requester or safety planning for any person who appears to be affected by the child's offence or behaviour,*
- (g) *the nature of any ground for referral under s.67(2) of the 2011 Act,*
- (h) *the date, time and location of any initial court hearing under s.101(2) of the 2011 Act,*
- (i) *The date of any subsequent court hearing for any proceedings under part 10 of the 2011 Act,*

- (j) *The dates of any evidential hearing including where any evidence is taken on commission,*
 - (k) *The determination by the Sheriff of any application by the Principal Reporter for an ICSO under ss.98 or 99 of the 2011 Act or where such order is made under s.100 and details of any measure that relates to the requester or safety planning for any person who appears to be affected by the child's offence or behaviour,*
 - (l) *Where any person makes an application is made under s.175 of the 2011 Act, information that relates to the person's dignity and privacy,*
 - (m) *the date and, where practicable, the time upon which the Sheriff will make a determination on any statement of grounds,,*
 - (n) *The determination of any outcome by the Sheriff, and where practicable, a summary of the reasons for any determination,*
 - (o) *The determination by the Sheriff of any application by the Principal Reporter for an ICSO under s.109 of the 2011 Act and details of any measure that relates to the requester or safety planning for any person who appears to be affected by the child's offence or behaviour,*
- (8) *The Scottish Ministers may by order modify—*
- (a) *the definition of "qualifying person" in subsection (6),*
 - (b) *subsection (7).*

Issue 3: There is no provision in the Bill for the victim to be involved in the decision-making process following grounds for referral being established by the Sheriff

80. Participation in children's hearing is a vexed issue. A case which related to the right of siblings and their participation in children's hearings ended up in the Supreme Court of the United Kingdom (*ABC v Principal Reporter* 2020 UKSC 26; 2020 SC (UKSC) 47). A full analysis of participation rights in the children's hearings system is beyond the scope of this opinion. However, it is important to note that the 2011 act prescribes strict criteria for persons who can participate in children's hearings. VSS should have cognisance of that if any changes are to be proposed to the Bill.

81. Allowing victims full participation right would require wholesale changes to relevant person status and participation rights in the hearing system. For a range of reasons, it is unlikely that will happen. What may, however, allow victims a more effective right would be to allow them to make written representation which would be included in any material placed before the panel members at a children's hearing where a Sheriff has directed the reporter to arrange a children's hearing to consider making a CSO. This would have to form part of the wider rights package which would allow the victim to be aware of what the Sheriff has established. It would, therefore, sit alongside the proposal identified above where a requester can, after making an application, receive information relating to the determination of any outcome by the Sheriff, and where practicable, a summary of the reasons for any determination (as can be done in equivalent criminal proceedings).

82. The following wording could achieve the objective of involving victims in the decision-making process at certain children's hearings:

7A Provision of information to victims: notification of Children's Hearings

(1) The Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 is amended as follows:

(2) In rule 22 after sub-paragraph (2)(f) insert –

(g) Any person to whom qualifying information has been provided by any qualifying person.

7B Victim's rights to make written representations in Children's Hearings

(1) Where a requester has received any qualifying information from any qualifying person this section applies.

(2) Where any children's hearing takes place under the 2011 Act the requester shall be entitled to put written representation before that hearing.

(3) Written representation shall consist of:

(a) the way in which, and degree to which, that offence, or apparent offence or other behaviour narrated in the statement of grounds has affected and as the case may be continues to affect the requester;

(b) any measures that the requester considers should be included in any compulsory supervision order or any compulsory supervision order

(4) Written representation shall be provided to the Principal Reporter by the requester 10 days before any children's hearing.

(5) Written representation shall be provided by the Principal Reporter to those person referred to in rule 26(4) of the Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013

Issue 4: The mechanisms for enforcing orders made in the children's hearing system are insufficient to adequately protect victims

83. Part 16 of the 2011 Act provides for the enforcement of orders where the child is absconding from a place or a person (ss.169 and 170). The court may grant warrant to enter premises to search for the child and the child may be apprehended and detained, taken to an authorised place. Where a child fails to comply with a measures in terms of s.83(2)(ca), s.83(2)(ca) or a MRC, the powers of enforcement of order akin to those in part 16 would provide a stronger deterrent for non-compliance.

84. Two mechanisms could address this. The first is extending the Principal Reporter's powers to convene a children's hearing:

(see overleaf)

7C Principal Reporter's duty to initiate review

(1) The 2011 Act 2011 is amended as follows:

(2) In section 133 after sub-paragraph (b) insert –

(c) they receive notification from any person that any measures within a compulsory supervision order is not being complied with

Where a review is initiated under sub-section (3), the hearing must take place within 7 days

85. While 7 days may not allow sufficient time for any relevant person, child and panel members to received papers, it does provide a mechanism for any non-compliance to be ventilated swiftly.

86. The second would be to make it an offence to fail to comply with a measures in terms of s.83(2)(ca), s.83(2)(cb) or a movement restriction condition. A new provision, s.4A, could be amended into the Bill with the following wording:

4A Non-compliance with movement restrictions conditions and certain measures

(1) A person commits an offence if they knowingly breach the terms of:

(a) any condition attached to a movement restriction condition;

(b) a prohibition measure in terms of s.83(2)(ca);

(c) a prohibition measure in terms of s.83(2)(cb).

(2) A person who without reasonable excuse contravenes subsection 1 above is guilty of an offence and is liable on conviction in the JP court, to a fine not exceeding level 3 on the standard scale or to imprisonment for a period not exceeding 60 days or to both.

Issue 5: The Bill does not provide for the Victims' Code for Scotland to apply in the children's hearing system. Nor does it make provision for the Principal Reporter or the panel members (through Children's Hearings Scotland) to be bound to following, and act in accordance with, the principles of the code

87. There is an inherent difficulty with bringing the Victims' Code for Scotland under the jurisdiction of the children's hearing system because the Code is tailored to criminal proceedings. An equivalent code, which is tailored to the complexities and nuances of the children's hearing system is likely to be required in order for it to be effective for victims. What could be achieved is creating a duty for Ministers to procure an equivalent Code for the purposes of the children's hearing system. Following the numbered paragraph above, the following working ought to put a duty on the Ministers:

(see overleaf)

**7E Victim's Code for proceedings under the Children's Hearing (Scotland) Act
2011**

(1) The Scottish Ministers must by regulations, and in conjunction with specified persons, establish a Victims' Code for the children's hearing system.

(2) specified persons, for the purposes of this section, means:

(a) the Lord Advocate,

(b) Police Scotland,

(c) the Scottish Court and Tribunal Service,

(d) the Scottish Children's Reporter administration,

(e) Children's Hearings Scotland

(3) Each person mentioned in sub-section (2) must have regard to the principles mentioned in the Victims' Code for the children's hearing system in carrying out functions conferred on the person by or under any enactment in so far as those functions relate to a person who is or appears to be a victim in relation to any behaviours narrated in any statement of grounds.

(4) The Scottish Ministers may by order modify the definition of "specified person" in subsection (2).

Final Observations

88. Inevitably it is not possible to address every permutation and potential issue that may arise in a complex of area of law like this. The proposals outlined in answer to question 3 and 4 may need adjusted. For complex drafting like this, there would, ordinarily be detailed consultation and several discussions. In light of the timescale upon which this opinion is required to completed that has not been possible here.

89. VSS should not hesitate to contact me should further questions arise. If it would assist to have a consultation on the issues raised in this opinion, please let my clerks or I know of that. I would be happy to oblige.

90. Finally, I understand that VSS are due to address the issues raised in the Bill at stage 3. I would like to take the opportunity to wish them well with that.

**THE OPINION OF
JOHN LAING, ADVOCATE
ADVOCATES LIBRARY
PARLIAMENT HOUSE
EDINBURGH**

12th APRIL 2024

**OPINION OF COUNSEL
FOR
VICTIM SUPPORT SCOTLAND**

**JOHN LAING, ADVOCATE
12th APRIL 2024**

