

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Aberlour Child Care Trust

About Aberlour

Aberlour is Scotland's largest solely Scottish children's charity. Working in over 40 locations across Scotland in fields such as disabilities; residential and foster care for looked after children and parental substance use, we've been helping to improve the lives of Scotland's most vulnerable children, young people and their families for 140 years.

Our service portfolio links into criminal justice issues in a number of areas, including the work we do in HMP Cornton Vale supporting the Mother and Baby Unit there; in working with young unaccompanied asylum seekers and victims of trafficking in Scotland's only guardianship service; in our street based youth work service.

YouthPoint which seeks to offer diversionary activities to young people who might otherwise be associated with antisocial behaviour and in our work with families affected by parental substance use. As such we have a keen interest in certain aspects of the draft bill. We shall restrict our comments to only those sections of the Bill which pertain to children in general or those areas in which we work.

The age of criminal responsibility

The Scottish Government's 2012 publication reporting on its action plan to deliver progress against the 2008 concluding observations of the UN Committee of the Rights of the Child: 'Do the right thing – a progress report' stated:

'Following the raising of the age of criminal prosecution in the Criminal Justice and Licensing (Scotland) Act 2010, we will give fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament.'

Given that this Bill represents an entirely appropriate legislative vehicle for such a change, we were dismayed that no such provision has been made in the Bill, particularly when sections 31-33 deal directly with protecting the rights of child suspects.

We strongly urge the Committee to consider using this Bill as an opportunity to act on the Scottish Government's 2012 commitment to the UN Committee by increasing the age of criminal responsibility to 12.

The rights of child suspects

We welcome provisions in chapter 5 sections 30-33 of the Bill which seek to ensure that the highest standards of protection are offered to children in the formal justice system. Ensuring access to the support of a parent, carer or other responsible person goes some way to honouring our country's outstanding commitments to article 37 of the UN Convention on the Rights of the Child. As such we would urge the committee to seek explicit reference to article 37 in sections 30-33 of the Bill.

Provision of advocacy to child suspects - chapter 5 section 32

Section 32 supports the right of under 18's in custody to have ready access to the person or persons intimated about their arrest. The Bill stipulates that this will normally be the child's parent or carer or other 'responsible person'. Where it is inappropriate for the parent or carer to support the child in custody or they cannot be located, the Bill suggests that it will be up to the local authority to appoint a 'responsible person' to support that child.

We feel that this section would be strengthened with an explicit provision for a right to independent advocacy in the context of the 'other person' that a child may have access to in section 32. This would be consistent with section 122 of the Children's Hearings (Scotland) Act which gives the right to the service of a trained advocate for children appearing before the panel. Such a right to advocacy must be underpinned by the standards defined in the Government's guidance: *'Independent Advocacy and Guide to Commissioners 2013'*

A trained advocate is different but complimentary to the role of a solicitor in this regard in that they are trained to interpret what is happening for the child in question and communicate the point of view of the child more effectively. If we recognise the needs of children to have access to the service of a trained advocate in the legally sanctioned proceedings of a children's panel, to cut through technical language and processes on behalf of a child, then we should make similar provision in the formal criminal justice system.

The repeal of section 51 of the Criminal Justice (Scotland) Act 2003

Section 51 of the 2003 Act creates a legal defence of 'justifiable assault' for parents who hit their children (with certain limitations). It is our contention that this defence is unlawful and in direct contravention to our commitments to the UN Convention on the Rights of the Child and as one of only 5 member states still to offer such a defence, that we should now take the opportunity afforded by this bill to consider giving equal protection from assault for our children by repealing it.

In the past, proponents of retaining the 'Justifiable assault' defence have argued that without this defence we would criminalise the normal parenting behaviour of thousands of Scottish parents who would subsequently be charged and possibly imprisoned. Organisations like ours who support the removal of this defence have sought not to criminalise parents but to bring about a cultural shift, through legislation that would end physical punishment in the same way legislation shifted attitudes to smoking in public places.

The element of discretion afforded to police constables in clauses 1-3 of **Chapter 1 Section 1: Power of a Constable** in the Bill could support the possible repeal of section 51 of the 2003 Act. This section establishes a reality in which constables are further encouraged to exercise judgement and proportionality when deciding whether to arrest. This would support the cultural shift intended in the repeal of section 51 without leading to the unnecessary criminalisation or prosecution of hundreds of parents.

We ask that the committee consider the repeal of the 'justifiable assault' defence in the context of Chapter 1 in this Bill.

Definition of well-being

Section 42 (subsection 2) covers the consideration of a child's best interests when a constable is deciding whether to place a child under arrest. That subsection states:

In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration.

We are not clear why the Government has sought to prioritise the well-being of the child when the Children's Hearings (Scotland) Act 2011, makes a child's *welfare* the primary concern.

The Scottish Government uses the term 'well-being' interchangeably but the most prevalent definition of well-being is found in the application of Getting it Right for Every Child in the context of the Government's SHANARRI well-being indicators. Whilst the intent of this subsection is to be welcomed, we would contend that depriving a child of their liberty may not always be compatible with SHANARRI indicators. As such, if the intent is to proceed with the definition of well-being we would like to see explicit reference to GIRFEC and SHANARRI well-being indicators in the context of section 42 either on the face of the Bill or in robust guidance underpinning this.

Aggravation in connection with people trafficking

Working with Scotland's young unaccompanied asylum seekers, many of whom have been trafficked into this country against their will, we warmly welcome the aggravation that this Bill seeks to attach to an offence connected with people trafficking in section 83.

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