

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Children's Reporter Administration

Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- whether concerns relate to their welfare or behaviour, the needs of children or young people in trouble should be met through a single holistic and integrated system
- a preventative approach, involving early identification and diagnosis of problems, is essential
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

SCRA operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with other professionals such as social work, education, the police, the health service, the legal profession and the courts system.

SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

Response

Corroboration

We recognise the complexities of this issue and the need to balance a number of different considerations. As in the adult criminal justice system, it is likely that the removal of corroboration would make it easier for the Reporter to establish grounds for referral that involve a child committing an offence. This is mitigated to some extent as the Children's Hearings System is designed to promote the welfare of the child and the case of *S v Miller* confirmed that a child referred to a hearing on these grounds is not considered to be a person charged with a criminal offence. However, we recognise that, due to legislative provision in the Criminal Justice and Licensing (Scotland) Act and the Rehabilitation of Offenders Act (as modified by the Children's Hearings (Scotland) Act 2011), acceptance/establishment of offence grounds within the Hearings System can result in potentially significant consequences for the child

(e.g retention of DNA and forensic evidence or matters appearing in disclosure checks). On balance, we consider that if the requirement for corroboration is being removed for criminal proceedings, it should be removed in relation to our offence proofs as well.

In terms of potential impact, part of the Reporter's decision making when considering whether to bring a child to a hearing is about the sufficiency of evidence. They are required to anticipate whether, if the case went to proof, they could establish the grounds to the necessary standard of evidence. Clearly the removal of the requirement for corroboration would factor in to the decision at that stage. So, it is possible that more children might come to hearings on offence grounds as a result of this change and this is likely to relate most commonly to offences that are committed in private, such as sexual offences. However we do not expect the numbers to be significant.

We understand that there have been some discussions in the context of the criminal system around potential additional safeguards. In relation to the Children's Hearings System, we would make the following points.

Firstly, decision making within the hearings system takes place on a different basis than within the criminal system. For example, the test for referral to a children's hearing is not simply based on the sufficiency of evidence, but also on whether or not compulsory measures of supervision are necessary for the child. In doing so, Reporters will take account of the welfare of the child. This is arguably therefore a higher test than that applied by the Procurator Fiscal when deciding whether or not to prosecute.

Furthermore, we understand that one of the additional safeguards under consideration for the criminal system is the introduction of a power for the sheriff to rule, on application by the accused, that there is no case to answer. We note that in relation to children's hearings court proceedings, Rule 3.47(2) of the Child Care and Maintenance Rules requires the sheriff to consider whether sufficient evidence has been led of the offence at the close of the Reporter's evidence, with all parties being entitled to make submissions on the point. Effectively this is a "no case to answer" test to be applied by the sheriff, even though it is not expressed in these terms.

We do not therefore consider that there is a need for additional safeguards within the hearings system if the requirement for corroboration is removed. However, we are more than happy to consider any suggestions that might be brought forward by anyone else, with a view to ensuring that they fit within the overall ethos and structure of the system and that they would not have any adverse unintended consequences.

Child suspects

We are supportive of the provisions in Chapter 5 of the Bill, in relation to child suspects. In particular, the provisions which enshrine the need to make the best interests of the child a primary consideration in all decision making are to be welcomed. However, we note that there is some terminological inconsistency across legislation. The Children and Young People Bill, for example, refers to wellbeing.

While in practical terms there may be little difference in interpretation, some consistency would be welcome.

The definition of a child as being under 18 years of age is a positive step, as is the Bill's recognition that children's capacity evolves as they grow older and that there is a need for different provision for children aged 16 or 17 in relation to waiving their right to legal assistance or to the presence of an appropriate adult. We would suggest however that consideration is given to whether children aged 16 or 17 who are subject to compulsory measures of supervision, or who are subject to an open referral to the Reporter, should be granted additional protection as both are currently defined as "children" in the Criminal Procedure (Scotland) Act 1995 and Children's Hearings (Scotland) Act 2011.

Investigative liberation

While we welcome the policy intention of this provision, we have some concerns about how widely the power is drawn. Our understanding is that the power would apply to all children, in relation to any offences (although the policy memorandum says it will be used only in more serious offences), that the conditions imposed could include a curfew, and that the only way to seek to vary or remove the conditions would be for the child to apply to sheriff. We believe that further consideration is needed to define the scope of the power and to restrict its application only to more serious offences, otherwise there is a risk that children will be drawn into formal court processes unnecessarily. A possible starting point would be for investigative liberation to only be an option where the offence is one of those in the Lord Advocate's Guidelines to Chief Constables reporting to Procurators Fiscal of offences alleged to have been committed by children, in which case the child would be potentially subject to prosecution and the court would have a role.

In relation to the curfew power, we note that similar conditions imposed on children by a Children's Hearing would be accompanied by support for the child by the local authority. We do not believe that such restrictive conditions should be an option for the police if that kind of support is not available to sit alongside the curfew condition.

Other issues

Section 43 of the Criminal Procedure (Scotland) Act 1995 makes provision for situations where children are arrested and either kept in custody by the police or released on an undertaking to appear at court. Despite a clear link between this section and various provisions of the bill, it would appear that section 43 is not amended by the bill. We consider that the "necessary and proportionate" test should apply to the continued decision making by the police about keeping a child in custody (and about where the child should be kept) and that section 43 should be amended accordingly. We also consider that further thought should be given to ensure that section 43 "fits" appropriately and consistently with the provisions of the bill.

Conclusion

We welcome the Bill and, subject to our comments above, the provisions that focus specifically on children and on the Children's Hearings System. We look forward to

further discussions as the legislation progresses through the parliamentary scrutiny process.

SCRA
30 August 2013