

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from COSLA

1. COSLA welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill and is generally supportive of the stated policy goals of the Bill to enhance efficiency and ensure appropriate balance between the rights of the accused and effective access to justice for victims. Although the provisions of the bill are wide-ranging, the majority of the five themes identified in the committee's call for evidence relate to police powers and the technical aspects of law and detention. A minority of these may impact on local partnerships, depending on the nature of those arrangements, and our members may wish to make individual comment in this respect. For the purposes of this response, we have focused on those points our members feel are likely to impact across local authorities and which are of political concern; there may be further issues of a professional nature and again, our members may wish to comment on these separately and/or through relevant professional networks and associations.

2. Our comments deal mainly with the first of the Committee's scrutiny themes (theme i. Police powers and rights of suspects) and specifically with those provisions relating to the provision of responsible persons for 16-17 year olds and solicitor access, and support for vulnerable adults in custody (Part I, Chapter 4, section 25 and Part I, Chapter 5, sections 31 to 33). We would also wish to draw the Committee's attention to a number of further issues, which, although not included within the provisions of the Bill itself, relate to regulations Ministers may make in exercising powers the Bill establishes, or to further service reform which may be considered in the future.

Provision of an "Appropriate Person" for children (Part 1, Chapter 5, section 31)

3. The Bill establishes the requirement for intimation to be sent to an 'appropriate person' when a person under 18 years of age has been taken in to police custody. In practice, there may be occasions where local authority social work staff are required to fulfil this role – for example, where the child is in local authority care, or where attempts to contact a parent or guardian have been unsuccessful. While this is entirely in keeping with the historical role and current expectations of the social work profession, we would caution that it may not always be the case that the 'appropriate person' is a registered social worker.

4. Indeed, the Bill itself does not seem to include any requirements in relation to the qualification levels of an appropriate person. However, it will be important to ensure that any supporting regulations or guidance reflect this and make it absolutely clear that local authorities can exercise discretion when identifying an appropriate person, and that there is no requirement for this person to be a registered social worker. Any attempt to remove this discretion through regulations relating to the training, qualification or experience levels of an appropriate person would limit local

authorities' ability to meet need and incur additional costs which have not been accounted for in the financial memorandum accompanying this Bill.

Young People aged 16 & 17 years (Part 1, Chapter 5, section 32)

5. The supporting documentation accompanying the Bill (Financial Memorandum, paragraph 227 ff) acknowledges that the provisions of the Bill in relation to 16 and 17 year-olds mean that local authority provision will be the 'backstop' where no other appropriate person is available. We understand that the detail of this role is still to be developed, but that it is intended the appropriate person would be required to:

- Act as the 'relevant person' described in section 25(3), with whom any request by the young person to be interviewed without a solicitor present must be agreed
- Remain in the police interview whether the lawyer is present or not, if it is requested by the 16 or 17yr old

6. It will be important that appropriate guidance to clarify the scope and nature of this role is formulated and that this is developed in partnership with COSLA and ADSW, as there are a number of potential issues arising which are dealt with in the section on solicitor access below.

Solicitor Access (Part I, Chapter 4, section 25)

7. The Bill sets out circumstances under which 16 and 17 year olds may consent to being interviewed without having a solicitor present and establishes a requirement for this to be agreed with a 'relevant person'. In practice, there may be occasions when a social worker acting as an appropriate person is asked to fulfil this role. The Bill is not sufficiently clear about what is being asked of the appropriate person here. It could be read as them being asked to determine whether the 16-17yr old understands and is able to make this decision, or to decide whether it is the right decision and one with which the social worker agrees.

8. We would argue that an appropriate person should only be expected to agree on whether the young person understands the situation and is capable of making an informed decision, and never to form a view on whether their decision is the right one. To ask a person to consider the crime and circumstance of the 16-17yr olds and come to their own view about whether a solicitor's advice is needed goes beyond what can be reasonably expected of a person who does not have the relevant legal training or experience, and begins to encroach on other roles such as that of safeguarders. This would apply irrespective of whether the appropriate person is a registered social worker or not. The Bill needs to be amended in this respect and regulations and guidance will need to make it clear that appropriate persons can only form a view on whether the young person is capable of making a decision, and not whether the decision is the right one.

Support for vulnerable persons (Part I, Chapter 5, section 33)

9. As COSLA understands it, one of the Bill's aims is to ensure that vulnerable adults who are taken in to custody are supported to understand what is happening,

and that effective communication between the vulnerable person and the police can take place. We further understand that the bill places no new or additional duties on local authorities in relation to vulnerable adults, but rather requires the police to contact a person they consider suitable to provide support, to inform them of the situation.

10. Although this places no new duties on local authorities, in practice, local authorities are often the agency that police contact – either directly, or through an ‘appropriate adult’ service that the local authority commissions. Some councils feel that this new police duty is likely to result in a rise in the number of occasions when the police contact the relevant appropriate adult services that are provided or commissioned by local authorities. Indeed some councils are already experiencing a shift in practice for requests for appropriate adults and a move away from providing victim support to providing support to vulnerable suspects or accused persons, which has resulted in significantly increased demand.

11. The provisions of the Bill will make this practice a requirement, and although this shift is to be welcomed in policy terms, it may result in significant increases in demand for appropriate adult services, and a resulting rise in the cost of meeting that demand. It is difficult to estimate how demand and cost may increase across Scotland as there are variations in both, for example in relation to the service model and in terms of the effect of deprivation on the numbers of people being taken in to custody. However, some councils who have experienced the described shift in practice, have reported referrals tripling over a four-year period.

Future regulation further defining appropriate or relevant persons (Part I, Chapter 5, section 34)

12. The Bill establishes Ministerial powers to make changes to the nature of support to be provided by ‘appropriate persons’; and (through future regulation) to specify who can act as an appropriate person – including what training, qualifications and experience they should have. We would caution against any regulations which move away from the flexibility on the face of the Bill in relation to appropriate persons. Depending on where the ‘bar’ was set, for example at registered social worker level, this could lead to additional costs and difficulties in identifying appropriate persons at certain times or in certain circumstances and may not be necessary to deliver the required support.

13. Local authorities should be given maximum flexibility in shaping appropriate person provision to fit with local need. For example, there may be occasions where a qualified social worker is required, however there may also be occasions where this is not needed and a local voluntary or community organisation is better-placed to provide support. Local authorities need to be able to shape provision to respond to local need and to build on community assets – regulations which restrict local flexibility could arguably act as a barrier to this.

14. These points notwithstanding, regulations which specify who can act as an appropriate person will have cost implications that rise in proportion to where the bar is set in terms of training, qualifications or experience. Should these powers remain within the Bill, we would seek assurance that any subsequent regulations protect

local authorities' discretion and are agreed with COSLA and ADSW. We would also seek assurances that any cost implications are met in full by the Scottish Government.

Service models

15. We also understand that different service models that could be adopted in the future are currently the subject of discussion with the police, and that this includes a model whereby the police would centrally co-ordinate and commission appropriate adults services. COSLA hasn't yet had the opportunity to view these proposals, and while we recognise that this discussion is not connected to the Criminal Justice Bill itself, we would want to be clear that any move to further centralise local authority functions, or to change their role or funding arrangements, would need the political agreement of COSLA and professional agreement through ADSW.

Resources

16. Given that the requirements of the Bill will result in increased demand, we would want to be clear that the provisions in relation to vulnerable persons will not be cost-neutral. As highlighted above, some councils are already experiencing increases of as much as 300% as a result of shifts in policy intent. It is reasonable to expect that this trajectory will continue and gather pace as the police move from a voluntary policy position operating in some areas, to a legal duty that will apply across Scotland.

17. Furthermore, although the costs attached to appropriate persons provision are not significant when compared to the overall local government settlement, the financial memorandum (at paragraph 230) dismisses these as 'opportunity costs'. We would wish to be clear that local government cannot continue to absorb even small amounts within the current economic environment, and we would therefore expect that the provisions of the Bill should not result in any additional costs to local authorities. That point notwithstanding, we are also concerned that those estimates set out at table 26 of the financial memorandum may prove to be too conservative – they relate to new provision for 16 to 17 year olds and we therefore have limited means to say with any certainty whether those estimates are accurate. Even if overall estimates of case numbers were accurate, it is difficult to say within that what the level of need will be. Equally, we cannot say with certainty how complex the cases will be and how long an appropriate person would be required to stay, and 4 hours may be an under-estimate in a number of cases. This will also vary depending on issues of rurality, transport infrastructure etc.

18. We would therefore want an assurance that all assumptions (and the overall cost of provision, including for both young people and vulnerable adults) will be closely monitored and would be reassessed after a set period to reflect emerging evidence. We would also want the Scottish Government to discuss the distribution of these funds with COSLA.

COSLA
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