

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Scottish Child Law Centre

INTRODUCTION

The Scottish Child Law Centre (SCLC or the Centre) is an independent charity, based in Edinburgh which provides services to the whole of Scotland. The Centre is the only law centre in Scotland dedicated solely to the law as it affects the under 21s. The aim of the Centre is to promote knowledge and use of Scots law and children's rights for the benefit of children and young people in Scotland. SCLC provides free advice by telephone, email and letter on all aspects of Scots law relating to children and young people. In addition, the Centre provides publications on a range of subjects as well as providing training, conferences and seminars. SCLC also has a consultative and advisory function for local and central government and through this seeks to improve the content and practice of the law as it relates to and affects children.

RESPONSE

The Centre's response is limited to those sections which affect children and young people. We support the aim of the changes that the bill proposes regarding children and young people, which is to safeguard their interests and extend protection.

Chapter Two: Custody: Person not officially accused

With regard to the time that a person may be kept in custody, we note that le s. 10 (b) provides a test that it must be necessary and proportionate. However we recommend that consideration be given to reducing the time that a child under 16 may be kept in custody.

We also recommend that a child be should be kept in custody in a police station only in exceptional circumstances. See comments to Chapter 8, s. 56 below.

Chapter Four: Police interview, rights of suspects

s. 23

The Centre notes that information given before interview is commonly provided by means of a telephone discussion with a solicitor. We are concerned that while this may be sufficient for adults, it is not adequate for children. A telephone conversation is not likely to be sufficient preparation for a child, and does not easily allow the solicitor to be satisfied that the advice has been understood. We recommend that consideration be given to requiring that a child under 16 is able to have face to face information from a qualified solicitor prior to interview.

s. 25(2)

(a) The Centre fully supports the extra protections given to children under 16, by ensuring that they have a solicitor present during a police interview. The calls to the advice line of the Scottish Child Law Centre have revealed too many young people who have waived their right, or have had it waived for them by their parents, and who have struggled as a result. We are also concerned that this protection should include all police interviews, not only those which take place in police stations. We have encountered a number of cases where children have been told that if they have a lawyer, they will have to go to the station and that that would be much harder for them.

(b) The Centre supports the extra protection for those aged 16 and 17, but notes that there is a great responsibility placed upon the constable to identify that the person has a mental disorder.

s. 25(3)

The SCLC welcomes the support given to those aged 16 and 17 by a relevant person. We note that a person to which this subsection applies may waive the right to a solicitor only with the agreement of a relevant person. It has been the experience of our advice service that parents often do not understand the implications of refusing legal advice for their children. A typical example is the belief that if you are innocent you do not need a lawyer during a police interview. We are concerned that it will be necessary for the police to provide relevant persons and young persons aged 16 and 17 with clear information as to the implications of refusing legal advice.

s. 26

The Centre has some concerns that it will be necessary for those under 17 to have clear explanations from the police about the lack of obligation to answer any questions apart from those listed in subsection 3.

Chapter Five: Rights of Suspects in police custody

The SCLC supports the right to have intimation sent to another person, not only for the under 16s, but for those aged 16 and 17. This solves a current problem. It is particularly welcome that the young person may choose the adult who is to be notified. Consideration should be given to ensuring that where the young person is in care intimation is sent to those who have the care of that person.

Chapter Six: Police powers and duties

The SCLC welcomes the requirement that the constable has a duty to consider the best interests of the child, however we are concerned at the use of “well being” in subsection (2). The UNCRC and the rest of Scottish Child Law use “best interests” and “welfare” when referring to children. These have well established legal meanings and considerable case law. “Well being” is proposed in the Children and Young person (Scotland) Bill and has been criticised by the Law Society of Scotland, the

Faculty of Advocates, and the SCLC as being unclear, and out of step with the rest of child law. It is not helpful to introduce a concept that is less clear to compete with the rest of established law.

Chapter Eight: General

s. 56

S. 189 of the Children's Hearing (Scotland) Act places restrictions upon a police station being used as a place of safety. This is for the good reason that a police station is not a suitable environment for a child. The SCLC recommends that similar restrictions be placed upon a child being detained in a police station. Detention in a police station should be for a minimum amount of time, and otherwise only in exceptional circumstances.

Part Two: Corroboration and statements

The requirement for corroboration has been an essential protection for those accused of criminal offences in Scotland for centuries. The SCLC questions whether it is equitable, just or justifiable for this protection to be removed.

The Scottish Child Law Centre has concerns that our court system may not be fully compliant with ECHR and UNCRC in cases where children are facing trial for serious offences. This Bill provides a suitable opportunity for the Scottish Parliament to consider how we can ensure our system is more compliant in these cases. We attach a proposal, contained in an appendix to our response, which may assist in these considerations.

Scottish Child Law Centre
6 September 2013

Scottish Child Law Centre response to the Criminal Justice (Scotland) Bill – appendix

Proposal

Where children have been accused of very serious criminal offences which are dealt with by the High Court, they are facing a complex legal procedure, must instruct not only a solicitor, but counsel, and will be required to face a stressful and often intellectually and emotionally challenging environment. While measures have been taken already to make that environment more “child friendly” there is more that can be done to ensure that a child has a trial that is compliant with the ECHR Article 6 (1) requirement that a trial be fair.

In the case of *SC v United Kingdom* (2005) 40 E.H.R.R. 10 the court held that Article 6(1) of the ECHR had been breached as the child had “notwithstanding his fitness to plead...was not capable of participating effectively in his trial to the extent required by Art 6(1).” We need to ensure that children in Scotland who are facing trial for serious offences are able to participate effectively in their own defence. In the case of *SC* it was stated that:

“a defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his own lawyers his version of events, point out any statements with which he disagrees and make them aware of any facts which should be put forward in his defence.”

This requires active participation, and an ability to understand often complex matters. The judgement further states that

“it is essential that proceedings take full account of his age, level of maturity and intellectual and emotional capacities, and that steps were taken to promote his ability to understand and participate, including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition.”

Children who become involved in the criminal justice system are often children who have complex difficulties. Studies have shown that a high proportion of young people in secure units and young person’s institutions have significant communication difficulties, and low educational attainment. In contrast to this, in cases involving sexual offences or serious injury, if the same child was a witness, rather than the accused, the presumption would be that they were vulnerable witnesses who would not even attend court to give evidence, but would give it from a remote location as the stress of attendance would be potentially too much to cope with.

In serious criminal cases the child’s capacity to instruct representation appears not given the same consideration as is the case in civil law. In recent years there have been cases in the English system where the children’s capacity to instruct was questionable. It is also the case that while a child may have capacity to instruct at the outset of a court case, the stress of the experience may lead to that capacity being reduced to the point where the child has no functional

capacity. While in recent years measures have been adopted with the intention of making the experience of court more “child friendly”, these measures do not fully address the problem of the child with limited or diminished capacity.

The Scottish Child Law Centre recommends that consideration be given to developing options for use in serious criminal cases, which would allow the evidence to be tested, while providing support for child accused to ensure that our criminal courts are further compliant with Article 6 (1) of the ECHR and Article 40 (3) of the UNCRC.

The following is an outline proposal only. Development would require expert criminal law contribution and evaluation.

When the options should be available to a court:

For use when a child is facing a High Court trial, although it should be available to a sheriff if a jury trial and they think circumstances warrant it. To ensure that in these comparatively rare cases that Scottish justice is fully ECHR compliant.

When should a court consider the options

Child should be assessed by suitably qualified professionals such as child psychology/ speech and language therapists for:

- Capacity to instruct legal advice and to participate in their own defence
- Assessed for factors such as: speech/language difficulties, any conditions such as ADHD/autism which may affect ability to participate, emotional age
- The child’s capacity to deal with the stress of attendance during parts of the proceedings

The results of the assessment should be made available to defence, prosecution and judge. If the assessment shows that a child will have difficulty in instructing legal representation, or coping with attendance at court then we suggest that a preliminary hearing could consider which options were appropriate for the child. Training for solicitors, advocates and judges would be needed to ensure they understood the relevant factors for the child. It would, of course, be for the judge to decide what explanation would be given to the jury.

Options open to the court could include:

- The appointment of a specialist curator. The curator should be a criminal law solicitor or advocate. He or she would have the responsibility of ensuring that the child understands what is going on, and assisting them to participate in instruction as much as possible. The curator would represent the interests of the child in proceedings, and would assist the child in following the evidence, and instructing legal representation. It would be necessary for he or she to attend the proceedings. The curator would be appointed for the child and their role with the child’s family should be limited, to avoid any conflict of interest.

- As with safeguarders in the children's hearing system, government would need to set standards and training requirements for those acting in this capacity.
- Excusing the child from attendance during parts of the proceedings if it was considered that the child will not cope and that there would be no risk to the fairness of the trial.
- Allowing the child to attend by video link from another location if it was in their best interests.

The courts can already take steps to adapt some of the provisions for vulnerable witnesses in the case of vulnerable accused, but the SCLC believes that consideration should be given to the development of clearer rules and procedures.

It may be necessary to reassess the capacity of a child during a trial, as the stress of the experience may lead to loss of capacity. It may be also be necessary to reassess the ability of the child to cope with the stress of the trial. It would be the responsibility of the curator, or in the absence of a curator, the defence to bring this to the attention of the court and ask for a hearing, similar to the preliminary hearing proposed above, to consider the matter.

Cost

The proposal would increase the cost of a criminal case, but as these cases are comparatively uncommon there should not be a disproportionate cost to the public purse.

Scottish Child Law Centre
6 September 2013