

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Children in Scotland

Evidence on Criminal Justice (Scotland) Bill

Thank you for the opportunity to provide written evidence for the Committee's Stage One proceedings on the Criminal Justice (Scotland) Bill. Children in Scotland previously contributed to the Scottish Government's consultation on Lord Carloway's recommendations leading up to this Bill. Further to that we warmly welcome the apparent reflection of those recommendations in section 42 of the Bill in respect of placing a duty on police constables to consider the best interests of the child when holding, arresting, interviewing or charging a child. We would however seek assurance that the use of the word "well-being" in section 42 (2) in the Bill is fully consistent with this. We also warmly welcome the Bill's definition of a child as under-18 in line with the United Nations Convention on the Rights of the Child (UNCRC) and view these as important steps forward. We would, however, like to focus our Committee evidence to two areas of particular interest and concern, which we feel should also be addressed through this Bill.

Age of Criminal Responsibility and Prosecution of Children

Children in Scotland was amongst signatories to a joint letter to the Minister for Children & Young People following the Bill's publication from a range of children's organisations concerned at the omission in the Bill to raise the minimum age of criminal responsibility from eight to 12 years old in line with the commitment in the Scottish Government's *Do the Right Thing Progress Report 2012* to give this fresh consideration "with a view to bringing forward any legislative change in the lifetime of this Parliament."¹

We would, however point out that a minimum age of 12 would still be lower than most other European jurisdictions which (apart from Scotland) range from ten in England & Wales to 16 in Belgium. In practice most alleged offences committed by children under the age of 16 are dealt with through the Children's Hearings system providing for child's "needs and deeds" to be considered in the round with an overarching welfare and rehabilitation focus in line with the ethos of the Kilbrandon Report.² In this regard Scotland is an exemplar to the rest of the world, however it does however mean that, unlike the rest of the UK, Scotland does not have a distinct system of juvenile courts. As such it remains theoretically possible, and has occurred in practice, for a child as young as 12 (or for a crime alleged to have been committed at that age) to be prosecuted as an adult and obtain a conviction and criminal record for which it may be unclear relates to when he or she was a minor with the attendant impact that may have on that child's future life chances.

Whilst we recognise that children can, and sometimes do, engage in offending behaviour, we strongly believe that, even if reflected in sentencing and slightly different provisions under the Rehabilitation of Offenders Act 1974, it is inappropriate

¹ (2012) Scottish Government: <http://www.scotland.gov.uk/Publications/2012/05/3593/23>

² (1964) Scottish Office: <http://www.scotland.gov.uk/Resource/Doc/47049/0023863.pdf>

a child can be prosecuted and receive the same conviction and criminal record as a fully mature adult.

It should be made clear that none of this is to say that offending behaviour by children should not be addressed or appropriately punished, but recognises that the mental, physical and sexual maturation process is by definition less advanced in children and scope for change and rehabilitation considerably greater and that this should be reflected in the procedures and sanctions pursued and imposed. Children are not simply small adults.

In addition to the moral issues concerning the treatment and welfare of an individual child, there are also wider practical reasons arising from societal benefits, both socially and financially for the focus to be on addressing offending behaviour and rehabilitation rather than early criminalisation. There is a range of examples of effective good practice provided by a number of our membership organisations in this regard.

As such we would support a strengthened presumption against criminal prosecution and in favour of constructive alternatives for children aged up to at least 16. For the same reasons we would also be in favour of widening the definition of a “child” as described in section 199 of the Children’s Hearings (Scotland) Act 2011 to a person under the age of 18. At the moment the definition extends only to those 16 and over who are subject to a compulsory supervision order or if referred to the Principal Reporter before they turned 16. This would be a logical extension of Lord Carloway’s recommendation taken forward in the Bill that, for the purposes of arrest, detention and questioning a “child” should be defined as anyone under the age of 18 years as previously mentioned. It would also be in keeping with the definition found in the United Nations Convention on the Rights of the Child (UNCRC) to which the UK is a signatory and which the Scottish Government has a stated commitment to as well as the definition set out in its current Children & Young People (Scotland) Bill.

If not reflected in primary legislation we would also impress on the Committee the need to ensure robust guidance for police and Procurators Fiscal in relation to proceedings, criminal or otherwise where children are involved. Developments in technology and legislation have created extra scope for falling foul of the law through, for example posting of inappropriate comments or images online. Whilst we are very concerned about the potential consequences and support appropriate action preventing and dealing with so-called “cyber-bullying” and “sexting” for example, it should be recognised for reasons mentioned above that the nature of such behaviour and the appropriate sanctions are very different if perpetrated by children than by a fully mature adult towards a child and that such nuances should be properly taken account of in a consistent manner. It remains a considerable anomaly that a child can in theory be prosecuted and convicted like an adult and even placed on the sex offenders register for activity to which they are rightly legally unable to properly consent. It is particularly important to avoid a situation where children and young people may feel prevented from seeking help or advice or are potentially vulnerable to blackmail on this basis.

Equal Protection from Assault

As the law currently stands children are the only group not to be protected by law from being hit due to the defence of “justifiable assault” (physical punishment) in the Criminal Justice Act 2003. While this legislation did prohibit the use of implements, blows to the head and shaking, the fact that children are not afforded *at least* the same protection as every any other individual against physical assault, particularly the enshrinement in law of certain forms of assault against children as “justifiable”, leaves Scotland increasingly out of step with the majority of other European jurisdictions.

In the European Union, 17 out of the 26 states have achieved full prohibition of corporal punishment with a further seven moving towards this. Only five states are yet to commit to such reform: the UK, Belgium, France, Ireland and Malta. 19 countries in Europe (EU and other) now give children equal protection: Austria (1989), Bulgaria (2000), Croatia (1999), Cyprus (1994), Denmark (1997), Finland (1983), Germany (2000), Greece (2006), Hungary (2004), Iceland (2003), Italy (1996), Latvia (1998), Netherlands (2007), Norway (1987), Portugal (2007), Romania (2004), Spain (2007), Sweden (1979) and Ukraine (2004).

In May of this year, the UN Committee Against Torture examined the UK’s (including Scotland’s) compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Its concluding recommendations state: “The Committee takes note of amendments in legislation in England, Wales, Scotland and Northern Ireland, which limit the application of the defence of ‘reasonable punishment’ (or ‘justifiable assault’ in Scotland), but remains concerned that some forms of corporal punishment are still legally permissible in the home for parents and those *in loco parentis*.,The Committee recommends that the State party prohibits corporal punishment of children in all settings...repealing all legal defences currently in place, and further promote positive non-violent forms of discipline via public campaigns as an alternative to corporal punishment.”³

This call has been echoed by the GB Equality and Human Rights Commission (EHRC)⁴, the Scottish Human Rights Commission (SHRC)⁵ and Scotland’s Commissioner for Children and Young People.⁶

If the Scottish Government is serious about its stated commitments to make Scotland “The best place to grow up” and to the United Nations Convention on the Rights of the Child it needs to explain why it will allow Scotland to be one of the increasing minority of European jurisdictions where equal protection for children from assault is not in place.

This is not to say that children do not need to be disciplined, but that hitting is neither an appropriate, constructive nor an effective form of punishment and that parents should be supported to use other methods to teach children correct behaviour. The current law is confusing, ambiguous and undermines the ability to protect children

³ Para 27 <http://www2.ohchr.org/english/bodies/cat/cats50.htm>

⁴ (August 2012) EHRC submission to CAT on list of issues on the UK 5th periodic report

⁵ (April 2003) SHRC submission to CAT, Para 31

⁶ (18 July 2012) The Herald, <http://www.heraldscotland.com/news/crime-courts/new-call-for-ban-on-smacking.18178200>

from harm. Arguments that prohibition of corporal punishment would lead to widespread criminalisation of parents or juvenile indiscipline have not been borne out in the jurisdictions which have changed their law to provide equal protection from assault. What we do know is that smacking can, give a bad example of how to handle strong emotions, may lead to children hitting or otherwise bullying others and can lead to anger and resentment adversely affecting their development.⁷ Similarly, the argument that corporal punishment is a necessary last resort as children do not have the full capacity to reason would be totally unacceptable in relation to vulnerable adults.

We therefore view the absence of any provisions in this Criminal Justice Bill to take similar steps to other European countries in this regard as a serious omission and missed opportunity to match the Scottish Government's stated ambitions on children's rights and wellbeing.

I hope this is helpful to the Committee in its deliberations but please do not hesitate to contact us if we can be of any further assistance to its Members or staff.

Yours faithfully

Children in Scotland
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⁷ (2003) Save the Children Sweden:
<http://www.endcorporalpunishment.org/pages/pdfs/hittingwrong.pdf>