

Justice Committee
Criminal Justice (Scotland) Bill

Written submission from Scotland's Commissioner for Children and Young People

I welcome the opportunity to submit comments on the Criminal Justice (Scotland) Bill to the Justice Committee.

Although the Bill's provisions are wide-ranging, I will focus on three issues of particular relevance from a children's rights perspective: the rights and treatment of child suspects; the removal of the requirement for corroborated evidence in children's hearings court proceedings; and the statutory aggravation relating to human trafficking offences.

I also wish to comment on three issues that are at present missing from the Bill: raising the age of criminal responsibility; the removal of defences to a charge relating to corporal punishment in the home; and taking into account the best interests of children of offenders and alleged offenders.

I. Comments on the Bill's Provisions

1. The Rights and Treatment of Child Suspects

The Policy Memorandum accompanying this Bill states that the aim of the Bill's provisions relating to child suspects is:

'to ensure that the highest standard of protection is offered to children who are involved in the formal criminal justice process.'¹

Whilst I question whether it is desirable to deal with children through the criminal justice system at all, I am pleased to note that the Bill, if enacted, would make some progress towards the Government's stated aim. There are, however, areas where the Bill could go further.

a. The Definition of Child

The Bill extends existing and new protections for child suspects to all children under 18. This is very welcome. Children who commit offences must be seen as children first and foremost. By virtue of their age and stage of development children are more vulnerable to violations of their rights, less able to assert their rights, and more dependent on adults to ensure that their rights are respected, protected and fulfilled.

Every international human rights instrument to which the UK has opted freely to commit itself and which defines 'child' requires or recommends that that definition include any person under the age of 18, as much of Scots child and family law has done for many years. I am therefore in full agreement with Lord Carloway's

¹ Criminal Justice (Scotland) Bill, *Policy Memorandum*, p. 18 at para 103.

conclusion to the effect that every suspect under 18 should be treated as a child, and welcome the Scottish Government's action on this through the Bill.

b. Waiver of Right to Legal Advice and Assistance of Parent/Adult

I note the provisions in s. 25, under which a child under 16 would be unable to waive their right to access to a solicitor at police interview, and a child aged 16-17 would not be able to do so without the consent of a 'relevant person'². This is in line with Lord Carloway's recommendations on this matter, which was underpinned by the key principle that child suspects are children first and foremost, and generally benefit from support and guidance during a police interview.

I accept that the Bill's provisions relating to waivers may be seen by some to be based on a degree of paternalism, not least because of the lack of any waiver for under-16s and the requirement for consent of an adult for 16-17 year-olds. However, on balance I support those provisions. It seems to me that it does make the effective protection of the child's rights more likely and prevents circumstances in which children and young people's rights are under-protected³. ECHR case law seems to support such a precautionary approach to providing support to children at police interview with reference to the power imbalance inherent in such situations, and the role of lawyers and others in addressing it⁴. The provision of access to a solicitor does of course not oblige the child to engage with the solicitor, should the child not wish to do so.

c. Duty on Police to Consider Child's Best Interests

I strongly endorse the duty on the police in s. 42 to treat the child's best interests as a primary consideration in decisions about arrest, detention, interview and charge.

I would add, however, that other decisions taken by the police under this Bill should also be included in the list in s. 42 (1); for example, those concerning any conditions imposed on a child under s. 14 (2) in the context of investigative liberation. Further, the language used in s. 42 is somewhat confused, in that the section title correctly refers to the child's best interests, as does the Policy Memorandum⁵, but s. 42 (2) refers to the child's 'well-being' as that which must be promoted and safeguarded. I suggest that subs. (2) be amended to reflect the requirement in article 3 of the UNCRC, Lord Carloway's recommendation, and the Government's apparent policy intention.

Making decisions concerning a child in a manner that regards the child's best interests as a primary consideration is a clear requirement of the UNCRC and one of its key principles⁶. Doing so would be broadly consonant with existing Scots Law in

² Notably, 'relevant person' in this Bill does not have the meaning of the same term in children's hearings legislation. This may cause some confusion, perhaps suggesting a need to reconsider the terminology.

³ In *Children's Reporter, Applicant* 2012 S.L.T. (Sh Ct) 217, a child aged 12 had no access to a solicitor because their parent waived that right on the child's behalf.

⁴ *Panovits v Cyprus*, Application No. 4268/04, 11 December 2008.

⁵ Criminal Justice (Scotland) Bill, Policy Memorandum, p. 18 at para 103.

⁶ *Article 3 (1) of the UNCRC*.

related areas⁷ as well as major children's policy initiatives such as *Getting It Right for Every Child*. It would further support the objectives of new diversionary approaches which are backed by our best evidence⁸. It would also be an opportunity for Scottish Ministers to demonstrate their stated commitment to the full implementation of the UNCRC in Scotland.

In practice, I would envisage that in order to fulfill the duty in s. 42, frontline decision-makers would assess all known circumstances of the child including the child's views⁹, to establish what course of action may be in the child's best interest. The result of that assessment would then be given due weight in the decision-making process alongside other relevant factors, and unless there are countervailing factors of 'considerable force', the option most in accordance with the child's best interest should be followed¹⁰. This would require guidance and training for police officers and others who may be involved at the various stages of the process, such as procurators fiscal, as well as effective monitoring and accountability mechanisms overseen by senior officers. I would suggest that there may be considerable synergy with measures already being taken across the police service to embed the principles and processes of *Getting It Right For Every Child*, which are likely to pick up pace in light of the Children and Young People (Scotland) Bill currently before Parliament.

2. Removal of Corroboration in Children's Hearings Court Proceedings

I note the provisions in Part 2 of the Bill abolishing the requirement for corroborated evidence in criminal proceedings, and Schedule 2, Part 2, Paragraph 21 which would have the same effect on proceedings before the sheriff relating to a referral to the Reporter on the ground that the child is alleged to have committed an offence. The likely result of this provision is that the Reporter's evidential test may be met in cases in which it would currently not be met because of a lack of corroborated evidence.

While many of the children concerned will be vulnerable and likely to benefit from the intervention of the system, this again highlights the need to address the 'unfinished business' of the passage through Parliament of the Criminal Justice and Licensing (Scotland) Act 2010 and the Children's Hearings (Scotland) Act 2011. I welcomed the limited progress being made on the 'decriminalisation' of children through those two Acts and secondary legislation to be made under the 2011 Act. However, it remains my position that the Scottish Government and its justice partners, particularly the police, should do more to ensure that the right balance is struck in terms of the retention of information on children and young people's offending. This is essential to ensuring that children and young people can 'move on' from past

⁷ See, for example, s. 16 of the Children (Scotland) Act 1995, and more recently ss. 25-27 of the Children's Hearings (Scotland) Act 2011.

⁸ For example, the *Whole Systems Approach*, which appears to heed the conclusion of the Edinburgh Study on Youth Transitions and Crime that an approach characterised by 'maximum diversion' is most effective in promoting children's desistance from offending; cf. McAra, Lesley & McVie, Susan (2007), 'Youth justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology* 4 (3), 315-345.

⁹ United Nations Committee on the Rights of the Child (2009), *General Comment No 12: The right of the child to be heard*, CRC/C/GC/12, para 70f.

¹⁰ *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4, per Lord Kerr at para 46. This judgment contains a very useful judicial discussion on the correct application of the best interest principle, albeit in a different context; especially Baroness Hale's and Lord Kerr's judgments.

offending and do not have their life chances curtailed by the data legacy and the stigma associated with it for what in most cases are relatively minor offences.

I therefore call on the Committee to urge the Scottish Government and Police Scotland to intensify their efforts to address this matter.

3. Statutory Aggravation for Human Trafficking-Related Offences

I welcome the statutory aggravation for offences relating to human trafficking in s. 83, which is intended to increase the effectiveness of the Scottish legal framework for the prosecution of this crime. However, I have some concerns that as the overall legal framework remains somewhat fragmented, the aggravation may become the preferred option for the prosecution of traffickers rather than the specific human trafficking offences. I understand this is not the intention, but it remains a possibility. There would therefore appear to be a case for a review of the operation of the specific trafficking legislation and any barriers to its use for police and prosecutors, and how its effectiveness can be improved.

II. Comments on Issues Omitted from the Bill

I also wish to comment on matters which are not currently included in the Bill, but ought to be.

1. Raising the Age of Criminal Responsibility

Scotland's very low age of criminal responsibility remains a matter of great concern to me. One of the lowest in the world at eight, it has long tarnished Scotland's international reputation in terms of children's rights: The UN Committee on the Rights of the Child recommended raising the age in 1995, 2002 and 2008¹¹, and its authoritative guidance on the implementation of the UNCRC in the context of youth justice denounces an age of criminal responsibility lower than 12 as 'not internationally acceptable'¹².

I therefore welcomed the Scottish Government's commitment to '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'¹³. Prosecution of a child under 12 is no longer competent¹⁴, and a recognition of the dangers of criminalisation of children is now reflected in law¹⁵. Policy and practice have been moving away from the discredited approach which relied on justice solutions and criminalisation, towards an approach based on 'maximum diversion' and tackling root causes of offending¹⁶.

¹¹ UN Committee on the Rights of the Child, *Consideration of Reports by States Parties Under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 1995: para 36; 2002: para 58 (b); 2008: para 78 (a).

¹² UN Committee on the Rights of the Child (2007), *General Comment No. 10: Children's Rights in Juvenile Justice*, para 32.

¹³ Scottish Government, *Do the Right Thing: Progress Report 2012*, p. 55.

¹⁴ Criminal Justice and Licensing (Scotland) Act 2010, s. 52 (2).

¹⁵ Children's Hearings (Scotland) Act 2011, ss. 187f.

¹⁶ See, for example, the Whole Systems Approach to tackling young people's offending: <http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/reoffending>.

As a result, the current age of criminal responsibility at eight seems anachronistic. However, it continues to result in criminalisation of a small number of children whose offending behaviour, while cause for concern, is nearly always minor and is appropriately dealt with informally through Early and Effective Intervention, or through our welfare-based children's hearings system and the wide range of interventions available to it.

I urge the Committee to press the Scottish Government on this issue, and to adopt an amendment raising the age of criminal responsibility in due course.

2. Equal Protection from Assault for Children¹⁷

A further issue of significant concern is the continuing legality of corporal punishment against children by their parents/carers in Scotland. Section 51 of the Criminal Justice (Scotland) Act 2003 provides a defence of 'justifiable assault' to a charge relating to such punishment, except where the assault involved a blow to the head, shaking, or the use of an implement¹⁸.

The Children and Young People (Scotland) Bill aims to 'make rights real'¹⁹ and to promote early intervention, including in the early years. The Scottish Government's consultation document *A Scotland for Children* refers to the evidence for attention to the early years such as the large and growing evidence base relating to infant brain development and the destructive impact that trauma and abuse can have on a child's whole life and their transition to adulthood²⁰. The single most important contribution the Criminal Justice (Scotland) Bill could make to the Scottish Government's vision to make Scotland 'the best place in the world for children to grow up'²¹ is to repeal s. 51 of the 2003 Act and any similar common law defences, which have perpetuated the permissibility of the infliction of exactly the kind of childhood trauma that *A Scotland for Children* highlights. The fact that this Bill and the Children and Young People (Scotland) Bill coincide in their parliamentary timetabling presents an ideal opportunity to remove the statutory endorsement of this unjustifiable risk to children's healthy development and wellbeing, and put in place improved support mechanisms for children and parents, coupled with initiatives promoting positive, non-violent parenting.

Providing equal protection from assault for children would answer a string of recommendations made by International Human Rights Treaty Bodies including the UN Committee on the Rights of the Child²², the Committee to Eliminate All Forms of Discrimination Against Women²³ and the UN Committee Against Torture²⁴, and by

¹⁷ Please also note the evidence submitted by Children Are Unbeatable, which I endorse.

¹⁸ Criminal Justice (Scotland) Act 2003, s. 51 (3).

¹⁹ Scottish Government (2012), *A Scotland for Children: A Consultation on the Children and Young People Bill*, para 33.

²⁰ *Ibid*, paras 1-31.

²¹ *Ibid*, p. 3.

²² *Op cit*, 1995: para 16; 2002: para 36; 2008: para 42.

²³ UN Committee on the Elimination of Discrimination Against Women (2013), *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*, para 35.

some of Scotland's allies such as Norway, Sweden and Finland²⁵, which are frequently cited as models for progressive social policy by Ministers and others.

3. Duty to Consider Best Interest of the Children of Offenders

I have welcomed above the provision in s. 42 of the Bill, which requires the police to consider the child's best interests in making decisions relating to arrest, charge and other matters. Another long-standing concern in the criminal justice system, which this office and its partners, especially Families Outside and Circle have been highlighting through a series of reports and other work since 2008 is the impact on children of the imprisonment of a parent²⁶.

A recent major study in 4 European countries including the UK confirmed much of our findings, and supported our recommendations²⁷. Chief among those has been the need to consider children's best interests at various points of their parent's journey through the criminal justice system including arrest, bail/remand decisions, sentencing and early release/Home Detention Curfew²⁸. We were pleased when the UK, with Scottish Government support, accepted a recommendation made in the course of the UK's human rights peer review at the UN Human Rights Council asked the UK to

'Ensure that the best interests of the child are taken into account when arresting, detaining, sentencing or considering early release for a sole or primary carer of the child, bearing in mind that visits of a parent in prison are primarily a right of the child rather than a privilege of the prisoner that can be withdrawn as a disciplinary measure.'²⁹

It is my view that this Bill presents a prime opportunity to make some progress on this important issue, which according to varying estimates affects up to 27,000 children and young people in Scotland each year³⁰.

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5 September 2013

²⁴ UN Committee Against Torture (2013), *Concluding observations on the fifth periodic report of the United Kingdom*, para 29.

²⁵ UN Human Rights Council (2012), *Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland*, Recommendations 110.78 (Sweden), 110.79 (Norway) and 110.80 (Finland).

²⁶ See, for example, Scotland's Commissioner for Children and Young People (2008, 2011), *Not Seen. Not Heard. Not Guilty: The Rights and Status of the Children of Prisoners in Scotland* (and Review 2011).

²⁷ Jones & Wainaina-Woźna (eds.) (2013), *Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health (COPING)*, Huddersfield, etc: University of Huddersfield and others.

²⁸ Scotland's Commissioner for Children and Young People (2011), *op cit*, Follow-Up Recommendation 5.

²⁹ UN Human Rights Council (2012), Recommendation 110.96 (Slovakia).

³⁰ Scottish Prison Service estimate, published in a response to a request under the Freedom of Information (Scotland) Act 2002 in January 2012.