

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the 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

Committee members will be aware that legal assistance for children in the Hearings System is being dealt with as part of the reform programme related to the implementation of the Children's Hearings (Scotland) Act 2011. We will therefore be restricting our comments to Part One of this Bill.

Context - Children's Hearings court proceedings

SCRA has a clear interest in this area of policy and in the effective and efficient operation of the civil courts system, as Children's Hearings business accounts for a significant element of the work of the civil courts in Scotland.

In 2011/12, there were 3,795 proof hearings (where grounds for referral are sent to the Sheriff to be considered before a Hearing can dispose of the case, either

because the child or relevant persons do not accept the grounds or due to the child being too young to understand them). It is notable that, despite an overall pattern of decreasing referrals to the Reporter, it appears that proofs are becoming increasingly complex and lengthy, often requiring more court time and resources to conclude.

2011/12 also saw the courts consider 990 appeals of Children's Hearings decisions. We expect one of the impacts of the Children's Hearings (Scotland) Act 2011 to be a further rise in the number of appeals, due to a combination of factors, including the granting of appeal rights to a broader constituency of individuals. There were also 9 appeals to the Sheriff Principal in 2011/12 and a further 2 to the Court of Session.

Sheriffs may also grant Child Protection Orders (CPOs) and applications for these are also on the increase, with 781 being made in 2011/12. There has also been an increase in applications to recall or vary CPOs.

Scottish Civil Justice Council

We are fully supportive of the proposal to create a single Civil Justice Council for Scotland and of the range of activities that it is suggested that it should undertake.

We agree that the primary focus of the Council's workload over the initial years of its operation should be the implementation of the reforms recommended by Lord Gill. A number of those reforms are of relevance to the effective operation of the Children's Hearings System, in particular the proposal to create an office of "district judge" within whose remit the majority of Children's Hearings Court proceedings would sit. There are significant challenges as well as opportunities opened up by the implementation of these recommendations and SCRA therefore has a clear interest in the Council's work in this area.

We welcome the flexibility for the Lord President to ensure that a range of relevant interests are represented on the Council by providing for a number of limited term "Lord President's members". As we anticipate the Council's work in the first few years may relate closely to the implementation of the Gill reforms, we may consider putting ourselves forward as a potential Lord President's member of the Council for a single term of three years at its inception. In addition, we trust that provisions will be put in place to allow the Council to engage appropriately and effectively with other stakeholders who may not be Council members at any stage of its work plan.

We note the intention for the Civil Justice Council to take over the responsibilities of the Scottish Committee of the Administrative Justice and Tribunals Council when the Lord President becomes responsible for Tribunals in Scotland. One of the tribunals under the AJTC's jurisdiction is the Children's Hearings System. However, there is currently no proposal that we are aware of to incorporate the Children's Hearings System within a unified tribunals structure. Indeed, we have stated very clearly in our response to the Scottish Government's consultation on Tribunals Reform (see Annexe) that we do not believe it would be appropriate for the Hearings System to be incorporated into any such structure. We are unclear therefore whether it is intended for the Civil Justice Council to have any kind of responsibility for the Hearings System, either in terms of reviewing its operation (currently one of the

AJTC's functions) or producing its procedural rules (currently a responsibility of the Scottish Government). We would welcome some further clarification here.

Conclusion

We are supportive of the Bill and look forward to further discussions on the issues raised above as matters progress.

SCRA
27 July 2012

Annexe

SCRA response to the Scottish Government's consultation

Response

This response is restricted to the proposal in paragraph 4.63 of the consultation paper which would grant Scottish Ministers the power, by secondary legislation, to incorporate the Children's Hearings System into the unified Scottish Tribunals System at some future date. We are deeply concerned by this proposal, which we believe is based on a lack of understanding of the Children's Hearings System and which, as a result, fails to meet four of the five key policy objectives as set out in the consultation paper, namely:

- effectiveness in securing just and speedy outcomes
- efficiency in the administration of justice
- distinctiveness of different tribunals, including continuing specialisation
- centrality of tribunal users

Some of the reasons for our concern are set out below.

We recognise that there are potentially efficiencies to be gained by reforming the tribunals sector, and are broadly supportive of the reform agenda and of the need for all public bodies to identify opportunities for savings and efficiencies. In fact, we note that significant efficiencies have already been realised by SCRA and CHS driving forward a shared services agenda and a shared focus on improving structures, decision making and outcomes for children. We consider that there is no bar to similar arrangements being made with the Scottish Tribunals Service where opportunities to make efficiencies can be identified. This provides an opportunity to make savings without requiring the disruptive structural reorganisation which would be required to incorporate the Hearings System into the new Tribunal Service.

SCRA continues to believe strongly that the unique strengths of individual tribunal systems should be fully considered on an individual basis before any decisions are made about integration into a broader tribunals structure. In particular, we have not seen any evidence that a unified structure would achieve benefits for the children and families within the System. As the Administrative Justice and Tribunals Council

(AJTC) said in its report¹, which proposed the creation of a unified Scottish Tribunals Service “...the size and sophistication of the system, together with the substantial reforms to their governance currently progressing through the legislative process, are such that it is difficult to see what the Children’s Hearing system, or its users, would gain through being fully incorporated into our recommended governance structure”.

We agree with that assessment and note that some of the most important ways in which the Hearings System differs from the rest of the Scottish tribunals include:

- The Children’s Hearings System provides a forum for making decisions about the need for state intervention in the life of a child, it is not a system of administrative justice or of dispute resolution
- Unlike some other tribunals, Children’s Hearings are the key locus for decision making in the system. They do not exist to review decisions already made by other bodies
- Children and young people do not approach the Hearings System themselves, they are referred first to the Reporter by frontline services (mainly the police and social work), then by the Reporter to the Hearing itself based on a determination of the need for compulsory measures of supervision
- The Children’s Hearings System is a holistic and end-to-end system involving a number of organisations and individuals working closely in partnership, with a clear focus on producing better outcomes for vulnerable children
- This enables an on-going consideration and review of a child’s needs and circumstances over a period of time rather than simply providing for a one-off decision
- Unlike other tribunal members, the 2,600 Children’s Panel Members are unpaid, leading to significant and necessary differences in the way they are recruited, trained and supported
- The sheer volume of the case load dealt with by the Hearings System sets it apart from many other tribunals – in 2010/11 there were 41,825 Children’s Hearings in Scotland, involving 19,566 children
- Due to their specialist nature, both SCRA and CHS are able to take a very clear focus on the best interests of children and on children’s rights. There is a risk that this focus could be diluted if the Hearings System were to be subsumed within a larger structure.

It is important to recall that the Scottish Parliament has only recently passed the Children’s Hearings (Scotland) Act 2011. This legislation brings into being a number of structural reforms to the Hearings System, including the creation of a National Convenor (supported by an NDPB – Children’s Hearings Scotland) to take responsibility for recruitment, appointment, training, support and monitoring of Panel Members. We believe strongly that the 2011 Act and the structure it creates is the right vehicle for bringing forward the necessary reforms to the Hearings System and driving improvements in support, training, decision making and outcomes.

As previously noted Panel Members are unpaid, setting them apart from other tribunal members. It is important to note that they have strongly resisted any

¹ *Tribunal Reform in Scotland: A Vision for the Future*

suggestions in the past that they should be remunerated. It is hard to see how a unified Tribunals Service would be able to incorporate Children's Panel Members into a centralised support structure without having to make special arrangements for recruitment, training and support, which would obviate to a large degree any efficiencies which might otherwise be gained.

The structures put in place by the Children's Hearings (Scotland) Act 2011 are specifically designed with the particular status of panel members in mind and therefore are likely to represent a much better option for providing the necessary supports and for driving a process of continuous improvement in the System. Those structures also reflect the particular need for panel members to be supported at a local level, a factor to which Ministers and parliamentarians gave great weight during the passage of the 2011 Act. There is no provision within the proposed unified system for this local and more specialised support structure to exist and it is hard to see how a central administrative structure could provide anything other than a lesser standard of service to the volunteers upon whom the Hearings system depends.

In addition to the unique status and particular needs of panel members, there are also specialist roles within the Hearings System that simply do not exist in other tribunals. During the extensive debates over the draft Children's Hearings Bill, there was considerable discussion about the role of the Reporter and of SCRA's support staff. At the conclusion of that process, Ministers recognised the value of the holistic role of the Reporter and of SCRA's highly experienced and specialist support staff. It was agreed that these roles were especially important given the dynamic and non-linear nature of the Hearings System, which makes it unlike any other tribunal. Again, it is hard to see how such necessary specialist roles could be duplicated within a homogenous administrative structure, certainly without incurring significant additional costs and thereby removing any justification for making such an attempt.

Furthermore, we understand that policy responsibility for the unified tribunals system would rest with the Scottish Government's Justice Directorate. However, we believe that there are sound reasons why sponsorship of the Children's Hearings System sits with the Health and Social Care Directorate and within the specific portfolio of the Minister for Children and Young People. It is of particular note that the vast majority of cases dealt with in the Hearings System relate not to juvenile justice but to welfare concerns. As such, the Hearings System is an integral part of Scotland's child protection system.

Responsibility for GIRFEC, early years, child protection and youth justice also rests within the Health and Social Care Directorate and it would be entirely inappropriate for specific policy responsibility for the Hearings System to be vested elsewhere or to be removed from the portfolio of the Children's Minister.

Use of secondary legislation

We are therefore deeply concerned about the proposal for a power which would enable the use of secondary legislation to transfer the Children's Hearings System into the scope of the proposed unified Tribunals system at some undefined future date. While we take some reassurance from the Scottish Government's assertion that there is no intention at the current time to make use of this power, it does lead

us to wonder why it is considered to be required. Such powers should only be created where there is a reasonable expectation that they might be used at some point in the foreseeable future. We are not aware of any such expectation and therefore do not believe that the creation of this power is necessary or justifiable.

Furthermore, the simple existence of such a power will lead to further uncertainty and concern for panel members and others in the system, at a time when the focus needs to be on bedding down the reforms contained within the Children's Hearings (Scotland) Act 2011. The existence of such a power would risk substantially undermining the credibility and authority of Children's Hearings Scotland before that body has even fully taken up its responsibilities.

Perhaps more importantly, we also believe very strongly that the significant implications of such a move, should it ever be proposed, means that secondary legislation would be a completely inappropriate vehicle to utilise. There would be huge impacts for children, families, panel members, reporters and other Hearings System partners. As such, any proposal should be subject to the full scrutiny of the Scottish Parliament via primary legislation. The Children's Hearings (Scotland) Act 2011 was the result of a wide-ranging and broad-based consultation before the legislation even reached the Parliament. It was then vastly improved by the extensive consideration it was given by Parliamentarians and stakeholders throughout its passage, and by the additional time for consultation, debate and discussion which the primary legislative route guarantees.

Conclusion

We cannot support the proposal for the inclusion of this power within any future Bill. We urge the Scottish Government to provide clear and unambiguous reassurance that the lengthy process of review to which the Hearings system has been subject over the last eight years has now been concluded and that the reforms will be given time to take effect. Such reassurances and understanding would allow all partners to move forward together and be appropriately focused on improving outcomes for children.

SCRA
June 2012