Criminal Justice and Licensing (Scotland) Bill

SCRA submission to the Justice Committee

Introduction

SCRA welcomes the opportunity to provide written evidence to the Committee on this important piece of legislation. The Bill contains a number of provisions which impact on the Children's Hearings System and our submission deals with each in turn. Due to the significance of these proposals to the Children's Hearings System, SCRA would welcome the opportunity to speak to this submission

SCRA background

Established in 1996, the Scottish Children's Reporter Administration (SCRA) assumed responsibility for the Children's Reporter service across Scotland and operates as a Non-Departmental Public Body (NDPB), funded by the Scottish Government. While the Principal Reporter is independent in terms of his/her decision-making powers in relation to children referred, the organisation and Board of SCRA is responsible and accountable to Scottish Ministers.

In 2007-08, 50,314 children were referred to the Children's Reporter. This figure represents 5.5% of all the children in Scotland. 40,204 of these children were referred on non-offence grounds, while 14,506 had allegedly committed an offence. 4,396 children were referred on both care and protection and offence grounds.

Section 14 – Community payback orders

Response

Section 14 of the Bill inserts a section (s.227G) into the 1995 Act which creates an order termed a "supervision requirement", which is defined as follows:

- *In this Act, a "supervision requirement" is, in relation to an offender, a requirement that, during the specified period, the offender must attend 5 appointments with the responsible officer or another person determined by the responsible officer, at such time and place as may be determined by the responsible officer, for the purpose of promoting the offender's rehabilitation.*

Committee members will be aware that "Supervision Requirement" is also the name given to an order made by a Children's Hearing under s.70 of the Children (Scotland) Act 1995. As it is possible that both types of Supervision

Requirement might apply to an individual child or young person, SCRA suggests that another name is found for the order created under s.14 to avoid confusion.

Section 38 – Prosecution of children

Background and context

Section 38 of the Criminal Justice and Licensing (Scotland) Bill proposes to raise the threshold age at which children can be prosecuted from 8 to 12 years. We note that the Scottish Government's proposals are based on some of the recommendations of the Scottish Law Commission's report on the subject in 2002.

In effect, section 38 of the Bill would result in two distinct ages of criminal responsibility. The age of criminal capacity, below which no child is considered capable of formulating the mens rea of an offence, is set at 8, and the Scottish Government does not propose any change here. The age below which children are immune from criminal prosecution is also 8 at present, but the Bill proposes to raise that age to 12.

Summary of response

SCRA is supportive of the Scottish Government's proposals, as we firmly believes that the Children's Hearings System is the best way to deal with children who offend. Many of these children also come to the attention of the Reporter due to concerns about their welfare and the Hearings System is able to ensure they get the most appropriate form of intervention and support, while addressing concerning behaviour.
However, if the System is to deal with the small number of very serious offences committed by 8-12 year olds it must be properly resourced and interventions must be focused and effectively delivered.

Current system

Currently, s.42 of the Criminal Procedure (Scotland) Act 1995 states that:
"no child under the age of 16 years shall be prosecuted for any offence, except on the instructions of the Lord Advocate"

The Lord Advocate's Guidelines direct the police as to when cases involving children need to be reported both to the Procurator Fiscal (PF) and the Reporter. Where a case is jointly reported, the Procurator Fiscal and the Reporter will discuss the case and a decision will be made by the PF on whether to prosecute.

Various factors will be taken into account in reaching this decision – the seriousness of the offence, the current situation for the child and an assessment of evidence required to support the alleged offence.

Scottish Government and Crown Office figures suggest that there were less than five prosecutions of under-12s in the years 2002/03 to 2006/07.

It is important to bear in mind, that even where a child is prosecuted, the Sheriff may still remit the matter back to a Children's Hearing for advice or disposal. Indeed, if the child is subject to a Supervision Requirement at the time of the offence, the Sheriff is obliged to ask a Hearing for advice.

Children's Hearings System – key principles

It is important to understand the differences between the Children's Hearings System and the criminal justice system.

The Children's Hearings System has been in operation since 1971 and is centred on the welfare of the child. The fundamental principles are that the needs of the child should be the key test; that children who offend and children who are in need of care and protection should be dealt with in the same system (as they are often the same children).

As each child is unique, Hearings make decisions on the basis of the needs and circumstances of the individual child who comes before them. As the Hearings System is designed to be relatively informal and child focused, it requires an individualised and more informed approach to the needs of the individual child in the family and community context.

Possible implications for the Children's Hearings System

We note that, as a result of the changes proposed in the Bill, the Children's Hearings System might be required to deal with a very small number of children referred for committing very serious offences. The way in which it does so will be no different in practical terms to the way the System currently deals with children referred on offence grounds. In other words:

- The criminal standard of proof would apply
- Criminal rules of evidence would apply
- The Reporter and the Hearing would be concerned with the requirement for compulsory measures of supervision, rather than questions of guilt
- Acceptance or establishment of offence grounds for referral would not be a determination of a criminal charge

There are however questions around whether certain police powers, e.g to detain and arrest the child; carry out a formal interview of the child as a suspect; charge the child with an offence; and seize productions and obtain DNA and fingerprints where relevant are linked to the prospect of prosecution.

We believe that the Hearings System continues to be the best way to deal with children who offend, as it can ensure they get the most appropriate available form of intervention and support to address their behaviour and needs.

For example, one of the strengths of the Children's Hearings System is that a Supervision Requirement made by a Children's Hearing is subject to review at

minimum once every 12 months in order to consider the child's circumstances and the appropriateness of the measures in place. In addition, a review can be requested by the child or family as well as the local authority (no earlier than 3 months after the Hearing date), which allows the compulsory measures put in place for the child to be revisited regularly. It means that there can be an appropriate and timely response to any change in the child's circumstances, behaviour and needs.

Resources and partnership working
SCRA notes that the kinds of interventions required by the small number of children to whom the provisions of section 38 apply are likely to be resource intensive. The ability of the Children's Hearings System to respond effectively to children's needs and behaviour and needs is dependent on fully resourced, focused and effectively delivered interventions. The Children's Hearing can place a child on Supervision, with conditions that it considers will address his/her behaviour, but implementation of that Supervision Requirement is the statutory responsibility of the local authority. Indeed, some programmes for young offenders may be delivered by the voluntary sector, contracted by the local authority.

It will be important for good practice in this area to be identified and disseminated. The Scottish Government's Preventing Offending by Young People Framework includes a strand, led jointly by SCRA and COPFS, which is focused on supporting the development of effective assessment and interventions for high risk young people and disseminating good practice on multi-agency responses. The work of this group will be important in ensuring that the Children's Hearings System is able to respond appropriately to the particular challenges presented by this group of young people.

Section 47 – Remand and committal of children and young persons

Response
SCRA is supportive of the policy objectives of the provisions, which are defined in the Policy Memorandum accompanying the Bill as being:
"…to ensure children (accused of offences) no longer suffer the adverse effects of being remanded in adult prisons alongside convicted adult criminals".

We note that the recent report of the Securing Our Future Initiative (SOFI) recommended a planned reduction in the capacity of the secure estate from 124 beds to 118, but also suggested that the needs of some high risk young people could be met safely and cost-effectively in their communities using programmes such as the Intensive Support and Monitoring Services (ISMS) model. These recommendations will be important in ensuring that the most effective and appropriate interventions are provided for children and young people, whether that is within the secure estate or via a community-based programme.

In addition to those young people who present a risk to others, secure accommodation also offers a safe and secure environment to young people who are a risk to themselves (often the same young people). It will be important to ensure in implementing any changes to the legislation that the nature or purpose of secure accommodation does not change or shift focus away from the individual needs and welfare of each child placed there. The SOFI report was clear about the need to retain the welfare focus of secure accommodation, and made some recommendations around earlier, more effective care planning and better provision of services for children with particular needs which will help to ensure that this remains the case.

Section 59 - Retention of samples from children referred to children's hearings

Response summary

SCRA recognises that there is a small group of children and young people who may pose a risk of serious harm to themselves or to others.

We also recognise that there may be some circumstances where children's DNA and forensic evidence requires to be retained for a limited period of time in order to serve the needs of public protection. SCRA believes however, that while some of these children may present within the Children's Hearings System due to their offending, it is not the appropriate place for a decision on the retention of DNA and forensic evidence to be taken as it might delay or inhibit the ability of the system to respond to the needs and behaviour of children who offend.

The Multi-Agency Public Protection Arrangements (MAPPA) set out in the Management of Offenders (Scotland) Act 2005 are an established means of identifying, risk-assessing and managing those children and young people who are prosecuted via the criminal justice system and are considered to pose a risk of serious harm. The Scottish Government's best practice guidance *'Getting it right for children and young people who pose a risk of serious harm'*[1] states that these principles should also be applied to children who are dealt with solely by the Hearings System. SCRA agrees with this approach.

If, as part of that assessment and management of risk it is considered necessary to retain DNA or forensic evidence from a child, SCRA believes that there should be a judicial process, separate from the Children's Hearings System, which allows all parties, including the child, to be heard and which incorporates all necessary legal protections. Each case should be considered on its own merits and decisions should not be based solely on a specific offence or type of behaviour, although a list of offences might provide a trigger for consideration. Application to the court could be made by the police.

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[1] *Getting it right for children and young people who pose a risk of serious harm – Scottish Government (2008)*

This would ensure that DNA and forensic evidence would only be retained where there was a clear and justifiable reason for doing so, based on sound and established risk management principles. It would also ensure that the ability of the Children's Hearings System to respond to the needs and behaviour of children who offend is not compromised or inhibited.

Possible impacts on the Children's Hearings System
Children who offend are treated differently from adults who offend, because of their vulnerability, lack of maturity and experience, and other factors related to their youth. The child's welfare is the paramount consideration [unless the *risk of serious harm principle* in section 16(5) of the Children (Scotland) Act 1995 applies].

The taking and retention of a DNA sample could be considered to constitute a serious intrusion on a person's right to privacy. The UNCRC states the need to provide children with special legal protections. This is found in the Convention's preamble, which states: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection."

The operation of Scotland's Children's Hearings System is consistent with these principles. If children's DNA or forensic evidence were to be retained via the Children's Hearings system, there would be a need to extend the availability of legal representation to ensure appropriate safeguards were provided for children in terms of the consequences of admitting grounds at a Children's Hearing.

It should be noted here that there has been a longstanding concern that the introduction of legal representation more widely within the Hearings System would lead to a more adversarial process and result in a system which placed less emphasis on the child's participation, becoming less effective as a result.

SCRA has previously expressed concern[2] that one of the unintended consequences of the Scottish Government's proposals might be that more children and families choose or are advised not to accept grounds of referral due to the consequences of doing so. This would lead to more grounds requiring to go before the Sheriff for proof, consequent delays in the resolution of cases and in the provision of intervention and support for children and families.

Decision making in the Children's Hearings System
When deciding whether to refer a child to a Hearing, the Reporter considers other factors as well as the referral and the sufficiency of evidence (e.g. the offence incident). Even where the Reporter has concluded that evidence is

[2] *Consultation on the acquisition and retention of DNA and fingerprint data in Scotland – Scottish Children's Reporter Administration Response*

sufficient, there may not be a requirement for compulsory intervention, for example, because the incident is entirely out of character, there are no other significant concerns about the child and the parental response has been both appropriate and proportionate to the incident. In other circumstances, compulsion may not be needed because the child and family are accepting of the problem and are engaged in work with agencies such as restorative justice or social work.

In making the judgement on the need for compulsion, the Reporter will consider a range of factors which may be present in the child's background, which might include issues such as parental substance misuse or exposure to domestic violence.

As a result, the establishment of a defined list of offences which automatically trigger the retention of DNA or forensic evidence **if grounds are accepted or established** does not represent an effective or proportionate method of identifying those children who may pose a risk of serious harm to themselves or others. In reality, the proposals are likely to result in the retention of the DNA or forensic evidence of the most vulnerable children, as the retention provisions could only be triggered for those children who go to a Hearing. Conversely, those children who commit a relevant offence but are dealt with on a voluntary basis will not be covered at all by the Bill's proposals.

Providing for a separate judicial process, entirely outwith the Hearings system, whereby the police may apply to the Sheriff for the ability to retain DNA or forensic evidence allows any list of relevant offences to be used as a threshold for consideration, rather than as an automatic trigger for retention.

List of relevant offences
We note that s.59(6) of the Bill says:
"A relevant offence is such relevant sexual offence or relevant violent offence as the Scottish Ministers may by order made by statutory instrument prescribe"

However, s.59(10) says
"In this section—
'relevant sexual offence' and 'relevant violent offence' have the same meanings as in section 19A(6) and include any attempt, conspiracy or incitement to commit such an offence."

If such a list is to be produced, either as a starting point for a more detailed multi-agency risk assessment, or as an automatic trigger for DNA retention, we believe that it should be developed by an expert working group representing all interests, including those of children and young people themselves.

SCRA
28 April 2008