



RESPONDENT INFORMATION FORM



this form **must** be returned with your response to ensure that we handle your response appropriately.

1. Name/Organisation

Organisation Name

Scottish Children's Reporter Administration

Title Mr Ms Mrs Miss Dr *Please tick as appropriate*

Surname

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public through the Carloway Review web site?

Please tick as appropriate Yes No*

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

- (c) The name and address of your organisation **will be** made available to the public through the Carloway Review web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

- (d) The independent Carloway Review is preparing a report for the consideration of the Cabinet Secretary for Justice, which may lead to proposals from the Scottish Government for legislation. If you have agreed that your response may be made public, the Scottish Government may wish to contact you in the future, but they require your permission to do so. Are you content for the Scottish Government to contact you in relation to this consultation exercise?

Please tick as appropriate

Yes

No

RESPONSE FORM – ALL QUESTIONS AND TEXT BOXES FOR RESPONSES

1.0 – Key elements of Custody

1.1 The suspect

1. Should the terms of Article 5 be incorporated into Scots Law to provide the sole grounds for taking a person into custody?

We have no specific comment to make at this stage.

2. Should the law recognise the suspect as having a distinct legal status with statutorily defined rights?

We have no specific comment to make at this stage.

1.2 Rights relating to custody and questioning

3. When should a suspect's right to legal assistance arise?

We have no specific comment to make at this stage.

4. Should there be a statutory provision on the waiver of rights?

Please see our response to Q12 in relation to children and young people.

1.3 Putting rights into effect

5. What forms of legal advice are sufficient?

We have no specific comment to make at this stage.

6. In what circumstances, if any, should a suspect be entitled to a solicitor of choice?

We have no specific comment to make at this stage.

7. What obligations, if any, should there be on the police in relation to the disclosure of information prior to questioning?

We have no specific comment to make at this stage.

1.4 Police questioning

8. Are the parameters of legitimate police questioning clear?

Our comments in relation to children are included in our answer to question 11.

9. When must questioning stop?

We have no specific comment to make at this stage.

1.5 Child and vulnerable suspects

10. What age should define the child suspect? Should any distinction be drawn between older children and younger children?

The United Nations Convention on the Rights of the Child defines a child as being aged up to 18 years. SCRA agrees with this definition. However, we recognise that for 16-17 year olds there may need to be special provision in relation to, for instance, automatic notification of parents. This is because some 16-17 year olds may not wish their parents to be notified, with a consequent balance to be struck with their right to respect their private life.

11. Are current safeguards sufficient to protect the Convention rights of the child suspect? If not, what other provision should be made for the protection of child suspects?

In considering the position of child suspects we recognise that there is a significant tension between:

- *the vulnerability of children and the consequent need to ensure that their rights are properly respected; and*
- *the approach in Scotland to children who commit offences which seeks to avoid involving them in formal systems in addressing their offending behaviour*

There are no easy ways in which this tension can be resolved, but we would welcome the opportunity to meet with the Review team to explore this issue further.

In considering the issues, we believe there are a number of factors which must be considered:

- *In responding to offending there is an increasing emphasis on using informal measures that do not require the child to be referred to the reporter (see for example the implementation guidance on Multi-agency Early and Effective Intervention: <http://www.scotland.gov.uk/Topics/Justice/crimes/youth-justice/young-people/EvaluationReport>). This more informal approach continues when a child is referred to the reporter, with only a minority being referred to a children's hearing to consider grounds for referral that involve a child committing an offence.*
- *In looking to use informal measures to address offending behaviour, whether in decision making by the reporter or Early and Effective Intervention groups, a child's acceptance of responsibility for their behaviour is an important factor.*
- *Consistent with the informal approach, many children suspected of committing an offence are interviewed by the police in their home in the presence of a parent.*

- *We consider that it would be inconsistent with the informal approach, and a disproportionate response that would be detrimental to children, if the police cannot interview a child at home and always require to carry out a formal interview of a child in a police station.*
- *In assessing the evidence for a ground for referral that involves a child committing an offence, the reporter will apply the criminal rules of evidence and standard of proof. The sheriff will apply the same rules in Children's Hearings proof proceedings arising from such a ground.*
- *SCRA's view is that a statement made by a child during an informal interview at home (in the absence of legal representation or the waiving of the right to such representation) would not be admissible as evidence in Children's Hearings proof proceedings.*
- *Some offences committed by children can be categorised as more "serious":*
 - *offences in the Lord Advocate's Guidelines to Chief Constables Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children – these offences result in the child being jointly reported to the reporter and PF and may result in the child being prosecuted;*
 - *offences listed in The Retention of Samples etc. (Children's Hearings) (Scotland) Order 2011 – these offences result in the retention of samples taken from the child if the offence is accepted at a children's hearing or established in Children's Hearings proof proceedings*
 - *offences to be listed in a statutory instrument to be made by Scottish Ministers under section 113A(6)(ba) of the Police Act 1997 (to be inserted by section 188 of the Children's Hearings (Scotland) Act 2011 when implemented) – these offences will be a "relevant matter" for the purposes of Standard and Enhanced Disclosure certificates.*
- *We note that the role of the "appropriate adult" is described as being "to facilitate communication between a mentally disordered person and the police and, as far as is possible, ensure understanding by both parties.....An appropriate adult is allowed to intercede for the purposes of checking understanding and conferring with the interviewee or police officers about their understanding."¹ Although when interviewed by the police a child is entitled to be accompanied by a parent or other adult, there is no similar description of the role of the parent or other adult in supporting and assisting the child. We consider that the role of the parent or accompanying adult should be described in similar terms to that of the "appropriate adult".*

12. How should the question of waiver be approached in respect of children?

SCRA believes that children should have the right in some circumstances to waive their right to legal representation. However, we recognise that there are some circumstances where the potential consequences for the child are such that no waiver should be possible. The Criminal Justice and Licensing (Scotland) Act 2010 provides that acceptance or establishment of grounds in relation to one of a list of sexual/violent offences will trigger the retention of DNA and forensic evidence, while the changes to the application of the Rehabilitation of Offenders Act brought forward as part of the Children's Hearings (Scotland) Act 2011 will also involve the

¹ <http://www.scotland.gov.uk/Topics/Justice/law/victims-witnesses/Appropriate-Adult>

development of a similar list where offence outcome information will be retained for an extended period of time. We suggest as a starting point for discussion that where the child is alleged to have committed one of the offences on either of those lists, or one of the offences that falls within the Lord Advocate's guidelines that no waiver of the right to legal representation should be possible.

13. How should the vulnerable adult suspect be defined?

We have no specific comment to make at this stage.

14. What rights of the vulnerable adult suspect, beyond those in the European Convention, require to be safeguarded and how should those rights be defined?

We have no specific comment to make at this stage.

2.0 – Key stages of Custody

2.1 Arrest and detention

15. Should the concepts of detention and arrest continue or should a system of arrest on reasonable suspicion replace them?

We have no specific comment to make at this stage.

16. Does the police charge serve any useful practical function?

Yes in relation to children. See answer to question 17.

17. Instead of charging a suspect should the police simply notify the suspect that the case is to be referred to the Procurator Fiscal to consider whether charges should be brought and, if so, what form those charges should take?

No. This approach does not apply to children other than the very small minority who will be Jointly Reported to the PF and Reporter and may be prosecuted. Although at that stage it is unlikely that the police will be able to be clear about the procedural course that will be taken, we consider that the charge does provide an important indication to a child (and the parent or other adult who is accompanying them) of the offence that the police believe they have committed and that the process will now proceed to the next stage.

2.2 Length of custody

18. What should the time limits for custody be and under what circumstances should they be extended?

SCRA considers that the use of custody for children should continue to be a last resort.

19. Should the police have the power to liberate a suspect from custody temporarily subject to certain conditions?

We have no specific comment to make at this stage.

20. Should a Saturday Custody Court be reintroduced?

We have no specific comment to make at this stage.

3.0 – Evidence

3.1 Sufficiency of evidence

21. Should the requirement for corroboration be abolished?

We recognise the complexities of this issue. As in the adult criminal justice system, it is likely that the abolition of corroboration would make it easier for the Reporter to establish grounds for referral that involve a child committing a sexual offence, for example. However, it is also true that due to legislative provision in the Criminal Justice and Licensing (Scotland) Act and the Rehabilitation of Offenders Act (as modified by the Children’s Hearings (Scotland) Act 2011), acceptance/establishment of offence grounds within the Hearings System can result in potentially significant consequences for the child (e.g retention of DNA and forensic evidence or matters appearing in disclosure checks for an extended length of time). In the present set of circumstances, where these consequences can last beyond the point at which the child’s needs have been successfully addressed (which is the locus for the Hearings System intervening in that child’s life) SCRA’s view is that corroboration is a necessary safeguard which should continue.

22. What should the test for sufficiency of evidence be?

We have no specific comment to make at this stage.

3.2 Admissibility of statements

23. If exclusionary rules exist, should they be set out in statute?

We have no specific comment to make at this stage.

24. Should the Common Law fairness test for the admissibility of statements be clarified in statute?

We have no specific comment to make at this stage.

25. What standard of proof should be applied in determining whether a statement was fairly obtained?

We have no specific comment to make at this stage.

26. Should all statements made by accused persons be admissible as proof of fact?

We have no specific comment to make at this stage.

3.3 Inferences from silence

27. Should the court be allowed to draw an adverse inference from a suspect's silence when questioned by the police?

We have no specific comment to make at this stage.

28. What practical difference would such a provision make, especially where silence is maintained upon the advice of a solicitor?

We have no specific comment to make at this stage.

4.0 – Appeals

4.1 Appeals

29. Should there be a time limit for the lodging of a Notice of Intention to Appeal and/or a Note of Appeal beyond which no application for leave to appeal can be considered? If so what should that time limit be?

We have no specific comment to make at this stage.

30. Should the test for allowing a late appeal and for allowing amendments to the grounds be provided for in statute? If so, what should that test be?

We have no specific comment to make at this stage.

31. Should there be statutory provision entitling the court to dismiss an appeal, or to apply lesser sanctions, where the appellant has not conducted the appeal in accordance with the rules or the orders of the court?

We have no specific comment to make at this stage.

32. Is there any purpose in retaining Petitions to the *nobile officium* and Bills of Advocation and Suspension as a mode of appeal or review be abolished?

We have no specific comment to make at this stage.

4.2 SCCRC

33. Should the factors which bear upon the test of “the interests of justice” to be applied by the SCCRC be set out in legislation?

We have no specific comment to make at this stage.

34. Should the High Court have the power to refuse to consider a reference from the SCCRC on the basis that it is not in the interests of justice?

We have no specific comment to make at this stage.

Conclusion

We recognise the complexity of many of these issues and welcome the Review team’s appreciation of the need to fully take account of the particular needs of the Children’s Hearings System. Our answers to the questions above raise many of the issues which will need to be considered and we look forward to discussing these in more detail with the Review team.