

SEXUAL OFFENCES (SCOTLAND) BILL

**CALL FOR EVIDENCE AT STAGE 1 – JUSTICE
COMMITTEE**

SCOTTISH CHILDREN’S REPORTER ADMINISTRATION

Introduction

The Scottish Children's Reporter Administration (SCRA) welcomes the opportunity to provide written evidence to the Justice Committee at Stage One of its consideration of the Sexual Offences (Scotland) Bill.

SCRA responded both to the Scottish Law Commission's (SLC) consultation and to the subsequent Scottish Government consultation on the SLC's recommendations and draft Bill.

SCRA Submission

At this stage in the consideration of the Bill, the Committee has asked for comments on the general principles of the legislation, including the stated purposes of the Bill and on the extent to which improvements can be expected from the proposed measures. SCRA's comments are largely focused on Part 4 of the Bill, which deals with offences committed against, and in some circumstances by, children and young people.

Stated purposes of the Bill

The Policy Memorandum attached to the Bill states that, in relation to Part 4, the policy objective is to create protective offences which prohibit sexual contact with children recognising that children are particularly vulnerable to sexual exploitation.

SCRA is supportive of these principles and recognises the benefit of reforming and clarifying the law in this area.

SCRA's view is that it is important that there should be an ability to respond to concerns regarding the sexual behaviour of children of any age. SCRA suggests that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. A mechanism for this response would be by way of a new ground for referral to the Reporter.

However, SCRA supports the position that any sexual activity involving coercive behaviour by an older child remains an offence.

SCRA agrees with the Scottish Government's statement in paragraph 110 of the Policy Memorandum, that "...the law should continue to make clear that society does not encourage underage sexual intercourse as it can be a cause for concern for the welfare of a child, even where it is consensual".

Proposed measures: specific comment

With regards to the extent to which improvements can be expected from the proposed measures, SCRA does have comments and concerns in relation to some aspects of the Bill, which are detailed below. The comments below relate to the legislation as presently drafted.

Parts 1 to 3

SCRA agrees with the provisions of Parts 1 to 3 of the Bill.

Part 4 – Children

The Bill distinguishes between “young children” under 13 years of age, who are considered to have no capacity to consent, and those between the ages of 13 and 15, who are considered to have a limited capacity to consent to sexual activity.

Young children (under 13 years old)

SCRA agrees with the protective principle that underpins the policy objective of sections 17 to 20, and with the principle that young children have no capacity to consent to sexual activity.

It is important that there is an ability to respond to concerns regarding the sexual behaviour of young children. SCRA considers that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. A mechanism for this response would be by way of a new ground for referral to the Reporter.

SCRA notes that the definition of sexual activity and behaviour set out in the draft Bill is so broadly set that there is a potential to include behaviours which currently would not be considered an offence and which would not, reasonably, be deemed concerning.

While SCRA understands that the intention of this section is to provide necessary protection to children under 13 who might be engaging in concerning sexual behaviour with an older person, the legislation as currently drafted also sets up the potential for sexual behaviour between two younger children to be regarded as a criminal offence. This is at odds with SCRA’s position that such concerns would be most effectively and appropriately addressed as an issue of welfare, care and protection. As stated, a mechanism for this response would be by way of a new ground for referral to the Reporter.

Furthermore, as currently drafted, the legislation creates a contradiction where in relation to situations where both person (A) and person (B) are young children, they are considered incapable of consenting to any sexual activity but are considered capable, if over the age of criminal responsibility, of committing an offence by being involved in that sexual activity.

Older children (13-15 years of age)

SCRA agrees with the provisions in sections 21 to 26.

SCRA agrees with the Scottish Government's statement in paragraph 110 of the Policy Memorandum, that "...the law should continue to make clear that society does not encourage underage sexual intercourse as it can be cause for concern for the welfare of a child, even where it is consensual".

Section 27

In relation to Section 27, it remains SCRA's position that concerns regarding the sexual behaviour of children of any age would be most effectively and appropriately addressed as an issue of welfare, care and protection. SCRA notes that the law presently responds to other concerns about the welfare of children that arise out of their behaviour (for example; misusing alcohol or drugs, misusing a volatile substance, being beyond the control of a parent, falling into bad associations or being exposed to moral danger) by way of a ground for referral to the Reporter on non-offence grounds.

SCRA notes an anomaly in the proposals that by criminalising girls for having sexual intercourse with boys (where both are "older children") the proposed law creates what may be an unintended consequence. If a 15 year old girl has sexual intercourse with a 15 year old boy, *she* commits an offence, as does the boy; if she has sexual intercourse with an 18 year old boy *she* does not, while the boy does. However, it must be recognised that the current law contains a similar anomaly for boys i.e. a 15 year old boy does not commit an offence if he has intercourse with a 17 year old girl; he does commit an offence if the girl is 15 years.

It is often difficult to establish issues of consent in such relationships and if for example a girl who is an "older child" has penetrative sexual intercourse with a boy who is an "older child", the creation of an offence in section 27 makes the girl's legal position one of two contrasting possibilities:

- If she did not consent to the intercourse, she is the victim of the serious offence of rape;
- If she did consent to the intercourse, she is the victim of the offence in section 27(1) and has committed the offence in section 27(4).

As a result, this may lead to uncertainty or inconsistency with regard to how the concerns for the welfare of the girl are reported by the police and responded to by COPFS or SCRA.

Sections 29 & 30

SCRA agrees with the "age proximity defence" in section 29(3), which simplifies the calculation by making it a gap of two calendar years.

SCRA agrees in principle with the provisions of section 30 (Special provision as regards failure to establish whether child has or has not attained age of 13 years) However, it is possible that the accused will be a "child" (i.e. aged 16 or 17 years and

subject to a Supervision Requirement) and will be dealt with in the Children's Hearings System in relation to offences under sections 21 to 26. Therefore SCRA recommends that section 29 be amended to make it clear that it applies to Children's Hearings court proceedings.

Offences against younger and older children

Although SCRA agrees with the abolition of the common law offence of lewd, indecent and libidinous practice, we have concerns that sections 17 to 19 and 24 to 26 of the Bill may not extend to some behaviours that would currently come within this common law offence.

Although SCRA welcomes the protective nature of sections 17 to 19 (in relation to young children) and 24 to 26 (in relation to older children), the protection offered may be restricted by the need to establish that the purpose of the conduct in question is for sexual gratification or for humiliating, distressing or alarming the child.

Causing a child to be present during sexual activity, or to look at an image of sexual activity or sending an indecent communication to a child may be done intentionally, but proof of these purposes may not be easily achievable especially where it is carried out as part of a plan to groom a child, or where it is carried out with disregard for the potential harm to a child.

SCRA suggests that removing the need to prove a purpose in the offences in these sections would provide better protection for the child. However, it is recognised that it would be necessary to exempt the showing of images to a child for educational purposes.

Part 5 – Abuse of Position of Trust

SCRA agrees with the general principle that there should be offences prohibiting sexual activity between persons one of whom holds a position of trust and authority over the other. However, the categories of 'positions of trust' in section 32 may exclude some 'positions of trust' such as family friends. Rather than being prescriptive in terms of defining positions of trust it may offer greater protection to children if this section began with text such as that suggested by the SLC i.e. "Position of trust should be defined as including, but not restricted to cases, where..."

Part 7 – Miscellaneous and general

Power to convict for offence other than that charged

SCRA agrees with there being a power for a court to convict for an alternative offence. However, it is essential that this power is also available to Sheriffs in Children's Hearings proof proceedings where the offence can be committed by a child (including a 16 or 17 year old subject to a Supervision Requirement made by a Children's Hearing).

Schedule 4

SCRA notes that, despite the proposed abolition of the offence of lewd, indecent or libidinous practice and behaviour towards children, the “catch-all” category in Schedule 1 (4) of **the Criminal Procedure (Scotland) Act 1995** “any offence involving the use of lewd, indecent or libidinous practice or behaviour towards a child under the age of 17 years” has not been amended.

Although this uses similar language to the common law offence, its terms are wider as they include *any* offence that involves such behaviour. SCRA strongly recommends that such a “catch-all” category relating to sexual behaviour towards a child is retained. However, as the common law offence is to be abolished SCRA suggests that it would be appropriate to revise the wording of this paragraph of Schedule 1 of **the Criminal Procedure (Scotland) Act 1995**.