



SCOTTISH  
**CHILDREN'S REPORTER**  
ADMINISTRATION

# **Practice Direction 9**

  

# **Children in Custody**

Date Issued:	21 June 2013
Date Implemented:	24 June 2013
Date Last Revised:	21 June 2013

## SUMMARY

- The police may detain a child in custody (in a place of safety) under section 43 of the Criminal Procedure (Scotland) Act 1995 for a jointly reportable offence. If the procurator fiscal decides not to proceed with the charge, the child is referred to the reporter under section 66(1)(a) of the 2011 Act.
- The reporter may direct either that the child be released from the place of safety (section 65 release) or that the child continue to be kept there until the reporter makes a decision on the referral.
- If the child is released from the place of safety under section 65, the referral becomes in effect a 'normal' referral.
- If the child is kept in the place of safety, any grounds hearing must take place no later than the third day after the reporter receives the referral. If the reporter decides not to arrange a hearing, the reporter must direct that the child be released from the place of safety.
- If the child is kept in the place of safety and a grounds hearing is arranged, the reporter may direct that the child be released from the place of safety pending the hearing (section 72 release). The hearing must be arranged before the child is so released and the 3 day time limit for the hearing applies.
- If the child is detained in the place of safety under section 65, the reporter is to arrange any grounds hearing for as soon as practicable, and generally on the same day the child was referred. .
- The initial hearing for a child detained is a 'normal' grounds hearing, though a shortened notification period applies.
- A detained child (even if released under section 72) is entitled automatically to legal aid for the grounds hearing or deferred hearing. The reporter is to trigger the SLAB duty scheme as appropriate.

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## **1. INTRODUCTION**

- 1.1 The Children's Hearings (Scotland) Act 2011 sets out the procedures for dealing with children detained in custody by the police who are referred to the reporter. These procedures apply from the point when it is decided that the reporter, rather than the procurator fiscal will deal with the offence. This Practice Direction gives information to reporters on the detail of the procedures and explains how they are to be applied in practice.
- 1.2 Although there are additional procedural considerations and decisions for the reporter in dealing with a custody referral, the reporter is under the same key duties as in other types of referral to reach a determination as to whether a section 67 ground applies and whether a compulsory supervision order is necessary (or if the child is already the subject of a compulsory supervision order, whether to refer the child to a children's hearing to consider a statement of grounds in relation to the offence). The Decision Making Framework applies to the decision about the need for a CSO (or need to refer to a hearing). As with other referrals, the Reporter is empowered to investigate and request reports under section 66(3) and (4).
- 1.3 The relevant statutory provisions are contained in the:
  - Criminal Procedure (Scotland) Act 1995 section 43
  - Children's Hearings (Scotland) Act 2011 sections 65, 66(1)(a)(vii), 68(2), 69(3) and 72
  - Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Rules 2013 rule 29

## **2. BACKGROUND**

- 2.1 The circumstances in which, and the offences for which, a child may be detained in custody by the police are determined by section 43 of the Criminal Procedure (Scotland) Act 1995 and the Lord Advocate's Guidelines. In summary, a child should only be kept in custody if (1) the offence falls within the categories of offences in the Lord Advocates Guidelines, and (2) if one of the following apply:
  - the charge is one of homicide or other grave crime;
  - it is necessary in the child's interest to remove him/her from association with any reputed criminal or prostitute; or
  - the officer has reason to believe that the child's liberation would defeat the ends of justice.

- 2.2 The initial stages of the procedures after a child has been detained involve discussion between the reporter and the procurator fiscal to decide which should deal with the offence. Reference should be made to the Joint Agreement between SCRA and the Crown Office and Procurator Fiscal Service for the principles and approach to be applied.
- 2.3 If the procurator fiscal retains the case, there is no further role for the reporter in terms of the 2011 Act. If the decision is for the reporter to deal with the offence, i.e. no criminal proceedings are to be taken, the case becomes a referral in terms of section 66(1)(a)(vii). It is not appropriate for the procurator fiscal to liberate the child if the case is being referred to the Reporter.
- 2.4 A referral under section 66(1)(a)(vii) arises when the reporter is informed that the procurator fiscal is not proceeding with the charge(s) against the child. In terms of section 43(5) of the Criminal Procedure (Scotland) Act 1995, a constable should so inform the Reporter, but in practice this will result from discussion between the reporter and the procurator fiscal.

### 3. PROCESS

- 3.1 On receipt of a custody referral, the reporter has power under section 65 to direct **either** that the child be released from the place of safety (i.e. from police custody), **or** that the child continue to be kept in the place of safety until the reporter makes a decision on the referral under s66(2) (i.e. a final decision on the referral).
- 3.2 If the reporter releases the child under section 65, no express timescale attaches to the reporter's decision-making under section 66(2). The referral in effect becomes a 'normal' referral.
- 3.3 If the reporter directs under section 65 that the child is to be kept in the place of safety, section 69(3)<sup>1</sup> requires that any grounds hearing must be arranged to take place no later than the third day after the reporter receives the referral (i.e. after the decision that the offence is to be dealt with by the reporter rather than by the procurator fiscal). Therefore if it is agreed on Monday that the reporter is to deal with the offence, the first of the three days is Tuesday and any grounds hearing must take place on Thursday at the latest.

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<sup>1</sup> The reference in section 69(3) to the child being kept in the place of safety under s43(4) of the Criminal Procedure (Scotland) Act 1995 is inconsistent with s68(2) and s72(1) of the 2011 Act, both of which refer to the child being kept in the place of safety under s65(2)(b) of the 2011 Act. As detention under s43(4) of the 1995 Act is superseded by the Reporter's direction under s65(2), s69(2) is to be interpreted as if the reference to s43(4) of the 1995 Act were a reference to s65(2)(b) of the 2011 Act.

- 3.4 If the reporter decides that there is insufficient evidence of the child having committed an offence or that it is not necessary for a compulsory supervision order to be made, the reporter must make a final decision not to arrange a hearing on the referral. The reporter must direct that the child be released from the place of safety – section 68(2).
- 3.5 If the reporter has not released the child under section 65 and decides to arrange a hearing, the reporter then has power under section 72 to direct **either** that the child be released from the place of safety **or** that the child continue to be kept in the place of safety until the children's hearing. In either case the hearing must take place within the three day timescale set out in section 69(3).
- 3.6 The hearing arranged by the reporter in relation to a custody referral is a normal grounds hearing which follows the same rules as any grounds hearing. The reporter must prepare the statement of grounds under s89 and these grounds must be put to the child and relevant persons at the start of the grounds hearing in terms of s90.
- 3.7 Where the child has been detained and the grounds hearing requires to be held within three days in terms of s69(3), there are specific notification requirements in rule 29. The usual timescales for notification are replaced by a requirement to notify the hearing and provide papers as soon as practicable before the beginning of the hearing. Please refer to the relevant table in Practice Direction 14 - Notifications and Papers.
- 3.8 A flowchart of the custody referral process is contained in Appendix 1 to this Practice Direction.

#### **4. SECTION 65 DECISION**

- 4.1 On receipt of the referral, the reporter is immediately to consider the decision to be made under section 65 and conduct any enquires required to enable him to make the decision. No express timescale is laid down for the making of the decision, but the decision is to be made forthwith subject only to essential immediate investigation.
- 4.2 The reporter is to inform the police forthwith on making the decision under section 65, whether the decision is to release the child or to require the child's continued detention.
- 4.3 In human rights terms, the reporter should not require the child to continue to be detained in custody unless there is justification for doing so. Therefore, before requiring the child's continued detention, the reporter must be satisfied that the nature and circumstances of the offence for which the child has been detained under section 43 raise such concerns for the child's immediate safety or welfare (or that of others) that he/she requires to be kept in a place of safety pending a custody hearing.

- 4.4 If the reporter decides to release the child under sections 65 then the reporter is to let the social work department know so they can liaise with the police if this is necessary or appropriate.

## **5. SECTION 72 DECISION**

- 5.1 Where the reporter decides to arrange a hearing for a child being kept in a place of safety, section 72(2) then empowers the reporter to direct **either** that the child be released from the place of safety **or** that the child continue to be kept in the place of safety until the hearing. The reporter only has power to act under section 72 **after** he or she has made a determination to arrange a hearing. The hearing must still be held within three days of the referral to the reporter (section 69(3)).
- 5.2 In making a decision under section 72 the reporter is to apply the same approach as for decision-making under section 65(2) – see paragraph 4.2. Therefore before requiring the child's continued detention, the reporter must be satisfied that the nature and circumstances of the offence for which the child has been detained under section 43 raise such concerns for the child's immediate safety or welfare (or that of others) that he/she requires to be kept in a place of safety pending the hearing.
- 5.3 The reporter is to notify the police forthwith of his/her decision under section 72, whether the decision is to release the child or require the child's ongoing detention. In many cases, the decision under section 72 will be contemporaneous with the decision under section 65.
- 5.4 If the Reporter exercises the power under section 72 to release the child, it may be possible to justify holding the hearing on a day later than the day of referral. See paragraph 6.1 for the general expectation that any custody hearing is held on the same day the reporter receives the referral. The hearing must always be held within three days. Reasons for holding the hearing later than the day of referral could include the need for more time to ensure that relevant persons are notified.
- 5.5 If the reporter decides to release the child under sections 72 then the reporter is to let the social work department know so they can liaise with the police if this is necessary or appropriate.

## **6. GROUNDS HEARING FOR CHILD KEPT IN CUSTODY**

- 6.1 A child should be detained in custody for as short a time as necessary. Where a child has not been released under section 65 (whether or not released under section 72) the reporter is therefore to arrange any grounds hearing as early as possible within the three-day time limit. This

should generally be on the same day the referral is received (subject to paragraph 5.4).

- 6.2 As the hearing is a normal grounds hearing, the reporter must prepare the statement of grounds, and notifications and papers must be given. Specific requirements for notification and papers are contained in rule 29. Rule 29 replaces the normal timescale for notification with a requirement that notification and papers are given as soon as practicable before the hearing. The reporter must notify the persons listed in rule 29(3) of the date, time and place of the hearing. As well as the child, relevant persons and any safeguarder, this includes any individual who appears to the reporter to have (or recently have had) significant involvement in the upbringing of the child. Any such person must be notified of their right to require a pre-hearing panel or children's hearing to determine whether they should be deemed to be a relevant person.
- 6.3 It is unlikely to be practicable to arrange a pre-hearing panel. Therefore any pre-hearing panel matters will likely be dealt with at the beginning of the hearing.
- 6.4 There is no express power for a grounds hearing to be deferred, though if proceeding would result in an unfair hearing a power for the hearing not to proceed can be implied. The reporter is to take the view that a decision not to proceed should be seen as an option of last resort where no other actions open to the hearing (eg adjournment) can remedy the unfairness. If the statement of grounds is not put to the child and relevant persons at the hearing, the hearing cannot make any interim decision.
- 6.5 Procedures after the hearing are the same as for any other grounds hearing in respect of notification of the hearing outcome.

## **7. LEGAL AID**

- 7.1 The child has an automatic right to legal aid for a custody hearing (whether or not the child is released under section 72) and any deferred hearing. If the child has not arranged his/her own legal representation through ABWOR, the reporter is to trigger the SLAB duty scheme. Full details on the operation of both ABWOR and the duty scheme are available in Practice Direction 22 on Legal Aid.
- 7.2 The police may be able to provide information about whether the child has made arrangements for legal representation at the hearing.

## **8. LIAISON WITH POLICE**

- 8.1 Clear arrangements with the police will require to be established within Localities to ensure decisions under section 65 and 72 are communicated effectively and speedily.

8.2 Where the reporter does not direct release of the child under sections 65 or 72, arrangements will require to be made with the police for bringing the child to the custody hearing.

## **9. OTHER RELEVANT MATERIALS**

- Joint Agreement between SCRA and the Crown Office and Procurator Fiscal Service
- Lord Advocate's Guidelines
- Practice Direction 14 - Notifications and Papers
- Practice Direction 15 on Grounds Hearings
- Practice Direction 22 on Legal Aid
- Practice Direction 7 on Statement of Grounds

**FLOWCHART OF PROCESS FOR CUSTODY REFERRALS**

All references are to the Children’s Hearings (Scotland) Act 2011 unless otherwise stated.

