

SCRA response to the Justice Committee's call for evidence

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 panel members and other professionals such as social work, education, the police, the health service 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

Our response will be focused on two key elements of the Bill. Firstly, the proposal to transfer jurisdiction for children's hearings court business to the new post of summary sheriffs and secondly, the proposals in section 120 which provide for the administrative support for the Scottish Tribunals, and any other tribunal that Ministers may specify, to be transferred to the Scottish Courts Service.

Summary Sheriffs

We consider that the creation of the office of summary sheriff has the potential to drive real improvements in the delivery of justice. However, we also have a number of concerns about the practicalities of such a change, and what is necessary to ensure that those potential improvements will actually be realised. In our response to the Scottish Government's consultation on the draft Bill, we identified a number of requirements that the summary sheriff role would have to meet in order for us to be able to support it. Those considerations still stand.

We consider that, in order to be effective, summary sheriffs would need to be:



- Capable of highly effective case management, both in terms of their own skillset and having sufficient authority within the courts structure
- Available in sufficient numbers across Scotland to ensure proper access to justice and the timeous allocation and hearing of cases in both large urban, and smaller rural, courts
- Genuinely interested, engaged and experienced in the specialist areas of law for which they would be responsible
- Effectively quality-assured, both in terms of recruitment, appointment and ongoing performance

Background and Context – Proofs and Appeals

If the child and/or their relevant persons do not accept some or all of the grounds for referral which form the basis of the Children's Hearing, or the child does not understand the grounds, the Children's Hearing may direct the Reporter to apply to the Sheriff to establish the grounds for referral. Overall, 3,655 applications were concluded in 2012/13 and 89.8% were held to be established by the Sheriff.

We have seen over recent years a pattern of proofs, where evidence is led, becoming increasingly complex and lengthy with more reference to European case law and the ECHR on issues such as contact and procedural fairness. We expect this pattern to continue. Furthermore, Reporters are increasingly dealing with proofs that last several weeks or more in relation to issues such as child sexual abuse, domestic violence and neglect. To characterise these kinds of cases as "routine", "less complex" or low value" would be a fundamental misunderstanding. We certainly doubt whether Sheriffs regard them as such.

Children and/or their relevant persons can appeal to the Sheriff against decisions made by Children's Hearings. In 2012/13, appeals were made about 792 children. At appeal, 67% of the Hearings' decisions were upheld by the Sheriff. We expect the numbers of appeals to increase over the next few years for the reasons outlined below.

The Children's Hearings (Scotland) Act 2011 came into force on 24 June 2013. One of the impacts of the new legislation has been an increase in children's hearings court business, as the Act introduces new appeal rights, as well as new grounds for referral and legal processes which continue to be tested in court. The Act also results in an increase of court business with very tight timescales attached. For example, appeals from decisions of Pre-Hearing Panels to deem or not to deem someone a Relevant Person need to be heard and disposed within seven days, while other appeal rights have three day timescales attached. This is likely to add to the pressure of business on the courts and will present challenges around the management of cases.

Management of cases

We are aware that in some court areas there are currently considerable delays to children's hearings court cases including particular problems with scheduling proofs and appeals. Such delays can have a significant impact on children and families, resulting in increased pressure and distress. It can also mean that sometimes children have to remain subject to what ought to be short-term emergency measures for a considerable length of time, with all the uncertainty that entails. Even relatively short delays can be significant in the life of a child.

We would strongly argue that there is a need therefore for children's hearings cases to be prioritised and dealt with expeditiously so that impacts on children can be minimised. The need for prompt decision making is increasingly being recognised via Scottish Government policy for Looked After Children and the Early Years. It would be helpful therefore if this Bill could support the policy drive by placing the need to proactively manage cases and reduce delays and adjournments at the forefront of any new judicial role. We welcome therefore sections 96 and 97 which empower the Court of Session to make rules in relation to effective case management.

In relation to the criticality of good case management, we would draw attention to the Practice Note recently issued by the Sheriff Principal for Glasgow and Strathkelvin. It recognises the special status of children's hearings proceedings, which "...concern children who appear to be vulnerable and may be in



need of compulsory supervision. It is vital in the interests of the child that such referral proceedings are conducted and concluded as fairly, efficiently and expeditiously as possible”.

The Practice Note provides for a three step approach which promotes active case management at an early stage by a group of five sheriffs who have particular expertise and knowledge of the hearings system, relevant statute and case law (including European case law). We are hopeful that this approach, developed in partnership between SCRA and the Sheriff Principal’s office, will reduce delays and adjournments. Its effectiveness does however depend on sufficient numbers of sufficiently expert sheriffs to make it work.

Numbers

In light of the above, we are concerned therefore that the proposals seem to envisage a limited number of summary sheriffs (which would, we imagine, include even fewer who would be specialists in children’s hearings or family law proceedings). As noted above, delays are a serious concern in relation to children’s hearings court proceedings and if the summary sheriff role is to have a meaningful impact, there would need to be sufficient numbers across the country who specialise in children’s hearings/family business to enable cases to be allocated, managed and heard expeditiously. We note that the Policy Memorandum states that it is anticipated: “there will be a specialist sheriff in the categories of personal injury and family cases in all sheriffdoms”. However it is unclear whether this would be a summary sheriff or a sheriff and we are concerned that paragraph 74 suggests that it is envisaged that parties (which includes children and families) would potentially have to travel significant distances to access a specialist sheriff. We would welcome some reassurance from the Scottish Government on this point.

Jurisdiction and complexity

We note the suggestion that children’s hearings court business should be shared in terms of jurisdiction between the Sheriff and the summary Sheriff. We question whether this arrangement suggests that the summary Sheriff would not be considered capable of hearing “complex” cases. Paragraph 35 of the Policy Memorandum which states that “It is accepted that low value cases, or those that may appear straightforward, can give rise to a complex or novel point of law, but this can be catered for by having a system for remitting such cases to a higher court” seems to reinforce this point.

We would argue strongly that children’s hearings court proceedings are by no means always routine and straightforward – they can be extremely challenging to hear and decide. It may be that a case raises a particularly complex point of law (and one of the recent trends within the hearings system is the increasing influence of European case law) or it may be that the complexity lies more in the need to carefully manage the case. We note therefore the proposal that the Sheriff Principal would allocate cases either to a sheriff or summary sheriff based on their complexity and that cases could be transferred to a sheriff if they turned out to be more complex than first apparent. It will be critical for procedures to be put in place that minimise the delay such a transfer might involve and for similar reasons, there will need to be clear and widely understood criteria for parties to make an application for transfer.

We would perhaps draw a distinction between non-contested court business, which represents a significant portion of the cases that go to proof or appeal (around 80%), and those in which evidence is heard. Even if this distinction is drawn, the benefits that strong case management can bring include restricting the scope of cases in which evidence is heard, or even ensuring that some cases that would otherwise have progressed can be resolved at an earlier stage.

Section 120

Section 120 allows Ministers by secondary legislation to transfer the responsibility for administration of any tribunal to the Scottish Courts Service. However, we doubt whether a centralised generic support structure could fully meet the needs of the Children’s Hearings System. The Policy Memorandum defines “administrative support” in terms of “...property, services, officers and staff”, while the Delegated Powers Memorandum describes this as merely “an operational and administrative matter”. We believe that this



completely underplays the importance to tribunal members of an administrative support structure which meets their specialised needs and requirements. This is especially evident in the context of the Children's Hearings System, which is fundamentally different in character and structure from any other Scottish tribunal. We find it hard to imagine how a centralised more generic support structure would deliver anything other than a diminished, less specialised service to Panel Members.

Secondly, we note that such orders would be made by means of the affirmative procedure. While we are not aware of any immediate plans to make such an order in relation to the Hearings System, given the significant changes that would be involved in such a move, and our very serious concerns about whether a homogenous administrative structure is able to provide the kind of support required, we would strongly argue that the super-affirmative procedure is necessary.

Conclusion

The creation of the office of summary sheriff offers genuine opportunities to respond to some of the challenges around expeditious and effective disposal of children's hearings court proceedings. However, there needs to be reassurance around some of the issues we have outlined above. If not, then there is a risk that the Bill will simply create further problems and delays. In relation to section 120, we believe, at the minimum, that any order to bring the administrative support of another tribunal within the ambit of the SCTS should be subject to the super-affirmative procedure to ensure the appropriate levels of Parliamentary scrutiny.

SCRA
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