Children's Hearings (Implementation of Secure Accommodation Authorisation) (Scotland) Regulations 2012

23 February 2012

SCRA response to the Scottish Government's consultation

Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- That children who offend and children who are in need of care and protection are dealt with in the same system
- That the welfare of the child remains at the centre of all decision making

Summary response

SCRA welcomes the opportunity to comment on the Implementation of Secure Accommodation Authorisation (Scotland) Regulations 2012. While we are supportive of the general intent of the regulations, we do have a number of specific comments on the content.

As with the draft Procedural Rules, we consider that the style of the regulations is overly complex and prescriptive in some areas (though not to the same extent). Again, as with the Procedural Rules, the result is an at-times very bureaucratic process which is likely to cause confusion to the child, notwithstanding some genuine attempts to better facilitate the child's engagement and participation. We believe that a more streamlined process would be preferable.

In relation to the Sheriff's powers at appeal of the Chief Social Work Officer's decision to vary or terminate the entire CSO even where the appeal is unsuccessful, we are concerned that the effect of the regulations is to further shift the balance which exists between the Sheriff and the Children's Hearing away from the Hearing, detracting from its primacy as the key decision maker in the System. We remain uncomfortable with the extent to which this has taken place within the 2011 Act and would not wish to see it go any further.

Detailed response

Consultation

Although we are supportive of the desire to make the child's voice heard in the process, and for the CSWO to make a decision whether or not to implement a secure authorisation as quickly as possible, we question how easy it will be for the CSWO to consult meaningfully with the child and with the relevant persons in the time available. We recognise that in some ways, any consultation is better than none, but there will be a need to consider how this can best be done and how the child can be supported to communicate their views. This is true of the consultation provisions in regulations 4, 7 and 8.

We are surprised to see that, although the regulations require the CSWO to consult with various people, they do not require him/her to take into account the reasons for the Children's Hearing's decision. As the Hearing is the decision making tribunal that has authorised the placement in secure, the regulations should be amended to require the CSWO to consider the reasons for the Hearing's decision to make the secure authorisation.

The draft regulations say that the CSWO has to consult with "the child's relevant person". This should be amended to the plural to reflect the fact that a child is likely to have more than one relevant person, and probably will have many more.

Criteria for decision making

Throughout the regulations, the criteria for the CSWO's decisions to implement a secure authorisation (or not implement, or to remove from secure) are stated as:

(a) Whether the conditions for making a secure authorisation in the Act (e.g. the previous absconding etc) continue to apply in respect of the child; and
(b) Whether placement in secure is in the child's best interests.

We do not believe that either of these criteria are appropriate.

In an initial decision to implement a secure authorisation, the CSWO will be making a decision within 48/72 hours of a Children's Hearing or Sheriff deciding that one of the statutory criteria applies. Although it is correct for the CSWO to consider the reasons why the Hearing/Sheriff considered that one of the conditions was met (as noted above), to explicitly require the CSWO to consider the same criteria looks like the CSWO is revisiting and reviewing the decision of the Hearing/Sheriff. It is important to note that the Chief Social Work Officer's (CSWO's) discretion is limited to whether or not to implement the secure authorisation part of the order made by the Hearing. In all other respects he/she is bound by the local authority's duty to implement the Hearing's decision and should not therefore have the ability to revisit and revise it.

The CSWO's decision to implement the secure authorisation is different from the Hearing's decision to add a secure authorisation to a CSO/ICSO. The Hearing only authorises placement in secure; the CSWO actually places the child in secure. For that reason therefore it is appropriate for a different test to be applied.

Section 151(4) of the 2011 Act already refers to a test of necessity in saying that the CSWO must remove the child from secure if the CSWO "considers it unnecessary for the child to be kept there".

Section 26 of the 2011 Act enables a Hearing to make a decision that is not consistent with the child's welfare if the decision is necessary to protect the public from serious harm. It is inconsistent with this provision for the CSWO to consider only whether the placement is in the child's best interests. It is not clear how the policy intention that the decision making of the CSWO is to be based on the best interests of the child (see page 2 of the consultation document) can be considered consistent with section 26.

A test that is more consistent with the primary legislation, and that avoids the CSWO revisiting the decision of the Hearing or Sheriff, would be whether the CSWO considers that placement in secure accommodation is *necessary* either:

- To promote the welfare of the child; or
- To protect the public from serious harm

Rather than being prescriptive in the secondary legislation as to the factors the CSWO must consider in this decision, these could be set out in guidance.

The policy intention is that the decision making by the CSWO is fair, transparent and robust (as well as in the best interests of the child – see comment above). A requirement that the placement is simply "necessary" (supplemented by guidance), rather than stating specific criteria, is equally consistent with this policy intention. The separate requirements of recording the CSWO's decision, the reasons and the information obtained when consulting, together with the requirement to notify parties of the decision, are sufficient to ensure fairness, transparency and a robust process.

Requirement to arrange a review children's hearing

Although the CSWO must notify the Principal Reporter (PR) of a decision not to implement a secure authorisation or to remove a child from secure, the regulations do not then require the PR to arrange any review Children's Hearing. However, if the Head of Unit decides not to consent to the child being placed in secure, the CSWO must notify the PR and the PR must arrange a Hearing ("for the purposes of reviewing the secure authorisation") to take place within 3 working days.

As the decisions of the CSWO and Head of Unit have the same result of the secure authorisation not being implemented, there is no good reason that one should lead to an urgent review Hearing while the other does not. On balance we do not think a review should be required by the regulations. If the secure authorisation is on a CSO, the local authority can request a review Hearing and can keep the child in a place of safety (including a secure place) in the meantime. If the secure authorisation is on a ICSO (or interim variation of a CSO), there will be another Hearing soon anyway.

See our additional comments on the separate decision making powers of the CSWO and the Head of Unit.

Requirement to notify the Principal Reporter

The regulations require the CSWO to notify the Principal Reporter (amongst others, including the child and relevant persons) of various decisions about the secure authorisation:

- The initial decision to implement (or not to implement) the secure authorisation;
- The decision on whether to continue to implement the secure authorisation when reviewing the initial decision (the regs require regular reviews at set times);
- The decision on whether to implement the secure authorisation when the CSWO has been asked to review a decision not to implement (or to remove a child from secure) by the child or relevant person;
- The decision to remove the child from secure accommodation.

We do not believe that it should be necessary for the CSWO to notify the PR of a decision when it is not relevant or when it would not need to result in an action by the Principal Reporter.

Review of CSWO's decision

Although the regulations provide that a request for the CSWO to review his decision must be made within 72 hours, there does not appear to be a time period for the CSWO to actually carry out the review. We would suggest that one is needed.

Regulation 8(6)(a)(ii) states that the record should include the CSWO's views on whether the child should "remain in secure accommodation". However, this rule relates to review of a decision not to implement a secure authorisation so the child will not be in secure at the point the review takes place.

The review process does not appear to envisage that the CSWO will change his decision. This means that it is not fully linked in to the rest of the regulations. For example, regulation 8(6)(b) provides for notification

of the child, RP and Principal Reporter, but not of the Head of Unit, whose consent would presumably be required if the CSWO had changed his decision and wanted to place the child in secure. Likewise, regulation 9(1)(b) does not link in with regulation 8. We note that this would be less of a problem if our suggestion to streamline the decision-making process were to be accepted.

Regulation 13(1) provides that where the CSWO makes a decision to remove the child from secure, the child and RP may request a review of that decision. However, once the child has been removed, there is no authority to put them back into secure without another Hearing taking place. There is therefore no purpose to this right of review.

Regulation 13(2) should provide that in addition to carrying out the requirements in regulation 11(3) and 11(4), the CSWO should carry out the requirements in regulation 12.

Appeals to Sheriff against decisions of CSWO – timescale for appeal

Regulation 14(2)(b) requires an appeal to be heard and disposed of before the expiry of 3 days "*beginning with the day* on which the appeal is made".

Section 157(2) of the 2011 Act requires that appeals against certain decisions are heard and disposed of before the expiry of 3 days "*beginning with the day after the day* on which the appeal was made".

Although the appeals are for different reasons, we believe that a consistent approach to these timescales should be adopted and regulation 14 should be amended to correspond with section 157.

Appeals to Sheriff against decisions of CSWO – powers of Sheriff on appeal

This appeal to the Sheriff is against the decision of the CSWO to implement or not to implement a secure authorisation, or to remove a child from secure accommodation. The Act provides a separate right of appeal against the Hearing's decision to make the order with the secure authorisation. The regulations therefore should require the Sheriff to focus on whether the CSWO's decision was justified.

As the appeal is against the CSWO's decision, one would expect the Sheriff's powers in the appeal to relate to that decision. Consistent with this approach are the sheriff's powers to:

- Confirm the CSWO's decision;
- Direct the CSWO to remove the child from secure (reg 15(3)(a);
- Direct the CSWO to implement the secure authorisation and place the child in secure (regs 16(3)(a) and 17(3)(a)).

However, the regulations extend the Sheriff's powers in this appeal to include making decisions about the order or warrant that included the secure authorisation, in particular the Sheriff has the power to:

- Continue, vary or terminate the order or warrant (reg 15(3)(b), 16(2)(b), 17(2)(b) and 17(3)(b));
- Discharge the child from any further Hearing or other proceedings in relation to the grounds (reg 15(3)(d), 16(2)(b), 17(2)(b)).

As the appeal will focus on whether the CSWO's decision was justified, and not that of the Children's Hearing, it is not appropriate for the Sheriff to have significant powers to interfere with the Hearing's decision. This detracts from the primacy of the Hearing as the key forum for making decisions about children and in effect would require the Sheriff to rehear the case. This would further exacerbate an already confused situation whereby there might be an appeal in relation to the Hearing's decision running concurrently with an appeal against the CSWO's decision, especially as the result could be two conflicting decisions in relation to the CSO or ICSO. To further confuse the situation, the review of the CSWO's decision could be taking place at the same time as the two appeals.

Furthermore, even if the Sheriff decides the CSWO's decision was justified, the draft regulations provide that the Sheriff can exercise the powers he would have had if he considered the decision was not justified. It is not necessary or appropriate to give the Sheriff such powers when an appeal is unsuccessful, particularly if those powers are as wide as they are in the current drafting.

The Sheriff's powers (in relation to all of his decisions on appeal under the regulations) include a power to require the PR to arrange a Children's Hearing for any purpose (e.g. to review the CSO). This power is also not logically connected with a consideration of the CSWO's decision.

If the Sheriff decides the CSWO's decision to not implement the secure authorisation (or to remove the child from secure) was not justified, the CSWO can be required to place the child in secure. However, although the Sheriff can require the CSWO to place the child, he cannot impose any requirement as to how long the child must remain there – that will be for the CSWO to decide in terms of these regulations. This is to be welcomed.

However, the regulations don't say whether the Head of Unit requires to consent to that placement. We assume that it is not intended for the Head of Unit to be able to overrule the Sheriff, so the regulations should say that the Sheriff requires both the CSWO and Head of Unit to implement the secure authorisation.

Involvement of the Head of Unit

The provisions for incorporating the Head of Unit into the decision making process are in our view overly complex and seem to be logically inconsistent.

As we understand it, the Government chose to add in a right of appeal to the CSWO's decision to tackle a perceived ECHR vulnerability (notwithstanding the decision in the Proudfoot case) – in that the CSWO could decide whether to implement the secure authorisation without that decision being appealable. We can see no reason why therefore, having solved that perceived problem by providing for a right of appeal against the CSWO's decision, the regulations then insert another decision-maker into the process (the Head of Unit) with a veto over whether the child is placed in secure, but whose decision is not appealable. If the lack of an appeal right for the CSWO's decision was an ECHR problem, then surely the same applies for the Head of Unit's decision.

We do not however, believe that yet another appeal right should be inserted into an already overly complex process. Rather, we would suggest that the whole process be simplified. Instead of requiring two distinct decisions, each with their own timescales and notification requirements, we see no reason why it couldn't all combined into a single decision by the CSWO (which could still give the Head of Unit their place – if it were to be stated that the CSWO could only decide to implement the authorisation if they consented). This would enable the CSWO to take a little extra time for their decision (combining the two 48 hour periods into one longer one – perhaps of 72 hours), which would in turn give them a slightly better chance of consulting meaningfully with the child. It would also be less confusing for the child (who would otherwise be receiving three separate decisions about whether he should be placed in secure in the space of a week). Finally, as there would only be one decision, the appeal right could remain in place for the CSWO's decision without creating the logical inconsistency outlined above.

Conclusion

We believe there is a need to streamline and simplify these regulations and the processes that they define with a view to producing a system which is more straightforward, accessible and easily comprehensible for the child and family.

SCRA
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