

“Strengthening for the Future: A consultation on the reform of the Children’s Hearings System

The full proposal that precedes the questions is available. The text in grey is to guide the reader to understand Sacro’s response that was submitted online at <http://www.scotland.gov.uk/consultations/justice/childhearingbill.asp>

PART ONE: STRUCTURAL CHANGE, A NATIONAL BODY

Background

On 18 January 2008, the Scottish Government announced a radical proposal to create a single body to undertake the functions currently delivered by the Scottish Children’s Reporter Administration, the Children’s Panels and the Children’s Panel Advisory Committees (CPACs). We also intend to bring the Panels of Safeguarders within the ambit of the new body. At the time of this announcement, which received widespread support from key stakeholders, Ministers made clear their continuing commitment to local delivery of Children’s Hearings.

Following this announcement, the Scottish Government embarked on a programme of bilateral meetings with key stakeholders to develop its thinking on the broad thrust of the reforms and to firm up the more detailed proposals contained in this document. An important aspect of these discussions has been the exploration of the respective roles of the Scottish Government and of local government.

The Role of the Scottish Government

In order to ensure the decision-makers are independent from Government, the new national body will be a Non-Departmental Public Body (NDPB). The Scottish Government will therefore have responsibility for setting the strategic direction of this body, for providing resources and for the sponsorship of the body through a set of corporate governance arrangements, e.g. agreeing organisational objectives and outcomes. The Government will also be responsible for making appointments to the Board of the new body through the Public Appointments process.

In light of the establishment of the national body the Scottish Government will cease to be directly involved in the recruitment and appointment of Panel members and in national recruitment campaigns.

Sacro opening comments:

Although not directly involved in the Children’s Hearing System, Sacro have for several years taken cases both as a diversion from a Children’s Hearing and more recently as well as a Hearing (on a purely voluntary basis). Sacro are therefore delighted to take this opportunity to give feed back on the review and are encouraged by the overall aim of the work. Any changes made to the current system that result in strengthening the Children’s Hearings System are welcomed. However, some of the suggestions in the consultation could actually weaken the current system. The inclusion of all children and young people in the Getting it right for every child policy is particularly welcomed. However, many of the suggestions in the proposed changes look as if they would simply more bureaucracy as opposed to reduce it. Indeed, changing legislation when it may not need it can never be a good thing.

Sacro fully endorse the priorities as set out on page 9. However, are not confident that the legislative and practical changes are necessary to achieve this.

Q1. What is your opinion on these proposals for Government’s role in the future?

The proposals for the Government’s role to create a single body seem ambitious. So far as the SCRA, the Children’s Panels and the Children’s Panel Advisory Committees

are concerned this could help streamline the training and managing of these bodies. However, it is essential that decision making is kept separate from the Government and a new Non-Departmental Public Body that has strategic leadership and resources provided by the Government might not be perceived and trusted as independent. How would this be achieved and how would they remain independent?

The Role of Local Government

Local government will continue to have two key roles to play. As now, local government will be responsible for giving effect to the decisions made by a children's hearing. This will involve delivering or securing services to children and families focussed on meeting the needs of each child and working with children and their families to address and resolve problems. It will be essential for the different parts of local government to work effectively together, and to work with other agencies in order to deliver the decisions of the hearings and provide children and families with the necessary support and assistance.

Local government already has a role in relation to promoting the Children's Hearings system to local communities, raising public awareness and understanding, and stimulating interest amongst local people in volunteering as Panel members. We propose that this should become a more substantial focus of local authority activity, in partnership with local Reporters and with the new national body.

We think that the community planning and Children's Services planning arrangements provide an ideal forum for drawing together the bodies and individuals with key contributions to make to ensuring the effectiveness of the Children's Hearings system locally. We see local partnership between the various players as being a key component in ensuring the needs of vulnerable children are met.

In light of the establishment of the national body to ensure appropriate consistency within the Children's Hearings system, we propose that local authorities should no longer be responsible for the provision of in-service training to volunteer Panel members nor for the setting and payment of volunteers' expenses. All of these functions will become the responsibility of the national body.

Local authorities will retain responsibility for giving effect to Panel decisions, and we propose that they should have an enhanced role in promoting the Children's Hearings system locally, and in developing effective partnerships to meet the needs of vulnerable children locally.

Q2. What is your opinion on the proposals for local government's role?

There are positives and negatives here. Local Authorities retaining responsibility for the provision of services based on a Panel's decisions is welcomed. However, as far as creating the new National body is concerned, much work has already been done through 'Getting it Right for Every Child' and the 'Youth Justice Framework'. These proposals creating one single body seem at odds with these policies where separate bodies are encouraged to work together, thus keeping their independence. All agencies have indeed worked toward signed information sharing protocols enabling them to develop the 'single plan' and develop 'single outcome agreements'. The work done so far could be seen to mean that a new National Body is unnecessary and would be perceived as greying out important boundaries. This could then be seen as an expensive training body for Panel members, if all the other functions are already being provided in other ways. Obviously streamlining is welcomed, but it could fall foul of the dangers inherent in coterminosity. These being where people have a range of roles are only able to do the high need end of the work and that results in some important services not being delivered. The positive side of the training being delivered by a 'central' body would be that there would be more consistency in the awareness of the Panel members of what was available nationally, but this could mean that crucial local knowledge would be lost.

The New Body – The Children's Hearings Agency

We propose that a new body, provisionally to be called the Scottish Children's Hearings Agency, should be set up to facilitate the functions of the Principal Reporter, the Children's Panel, Safeguarders and possibly legal representation of children appearing at hearings.

This will involve the provision of accommodation for children's hearings throughout the country; employment of staff, including office-holders; "backroom" functions such as HR, finance, IT, and planning; the recruitment, training and monitoring of Panel members; and quality assurance of Panel decision-making. The new body will be a Non-Departmental Public Body (NDPB) and will employ staff, including the office-holders on terms and conditions to be approved by the Scottish Government.

The body will be overseen by a Board whose members will be appointed by Scottish Ministers through the Public Appointments process. It is suggested that the Board should have a Chair and Deputy Chair and between 5 and 8 other members. Specific legislative provision will be required to ensure that the Board of the new body has no influence over the decision-making functions of the Principal Reporter, children's panel or Safeguarders. This point is addressed in greater detail below.

Q3. We invite views on the nature, functions and title of the new body.

Sacro feel that the creation of the new body, the 'Scottish Children's Hearing Agency' could undermine the clear boundaries between the functions it is set up to oversee. Sacro feel that these functions must be kept separate. As with the response to Question 1, having the SCRA, the Children's Panels and the Children's Panel Advisory Committees under one new agency seems unnecessary. (see points raised in the response to Question 2). Particularly the legal representation and the role of the Safeguarders should be kept separate. If Legal representation is taken into the umbrella agency, would this not start to create a legal atmosphere? This would be detrimental to the underpinning Kilbrandon principles of a balanced approach to deeds and needs. The same goes for the Safeguarders as their role is also a separate and essential resource that needs to be kept apart from all of the other functions. This proposal could be seen to lump everything together and perceptually, it would be very difficult for the children, young people and their families to tell one from the other. The whole basis of the Children's Hearing System is that it is not a youth version of the adult system. This would need to be retained in the current proposed changes and if the proposed changes do go ahead, then robust systems would need to be put in place to guard these boundaries. Again these necessary systems are likely to create the very bureaucracy that the proposals hope to reduce.

Independence of Functions and ECHR Compliance

In creating the new body it will be essential that the current independence of the decision-making functions (currently exercised initially by the Principal Reporter and local Reporters as authorised by the Principal Reporter, and at the hearings themselves by Panel members) is secured within the new arrangements. This is one element in ensuring the continuing compatibility of the Children's Hearings system with the provisions of ECHR.

This requires consideration of the individual functions undertaken by the existing bodies and exploration of how these might be appropriately delivered through the new national body. In broad terms, we think it will be necessary to secure appropriate separation of the functions and responsibilities of Reporters (including the Principal Reporter and local Reporters); of the members of the Children's Panel (the volunteers); the proposed President of the Panel; all appointments, training and quality assurance functions in relation to the Panel; and of the appointments and functions of Safeguarders and legal representatives.

Similar issues were addressed in the Local Government etc. (Scotland) Act 1994, which established the SCRA. Section 128(8) of that Act states that "Nothing in this section or any other provision of this Act shall be taken as authorising the Administration [SCRA] to direct or guide the Principal Reporter in the performance of his functions under the Children (Scotland) Act 1995 and any other enactment conferring functions upon him."

This offers a model for addressing through legislation the issue of separation of functions and independence.

These separations will require to be reflected legislatively, structurally and in the performance of day-to-day responsibilities. In our discussions to date with stakeholders we have described the necessary separation as “firewalls”, and will continue to use this term for the sake of simplicity. The Scottish Government will give further consideration to this issue in the light of consultation responses which will be essential as we move, in due course, to more detailed consideration of the business model to be implemented within the new body to ensure ECHR compliance.

Q4. Do you have any thoughts on how the necessary separation (“firewalls”) can be achieved in the structure and day-to-day business of the new body?

Rather than using firewalls, it might be best to simply keep the functions separate. The theory of having clear boundaries and the practice is often very different. There has been a lot of talk of the successes of ‘coterminosity’ where it gets rid of the difficulties in information sharing and helps with timescales etc. , however, where this has been combined with generic working, many of the important service provision that is deemed as low priority simply disappeared. Examples are the provision of restorative justice services in many areas of Scotland when they were taken in-house simply stopped. Sacro would be afraid that a similar result could happen with the new proposed range of functions of the Children’s Reporter roles if the new body is adopted.

The Chief Executive Officer (CEO)

This post will be the chief operating officer of the Scottish Children’s Hearings Agency, and will have overall responsibility for the efficient operation of the new body in the exercise of all its administrative functions e.g. HR, finance, procurement, legal services and IT functions, throughout Scotland. The CEO will be responsible for the staff carrying out these functions within the new body, and will be accountable to the Board of the Scottish Children’s Hearings Agency. The CEO will have no authority in relation to the exercise of the professional responsibilities of the Principal Reporter nor will the CEO have any authority in respect of the exercise of the functions proposed for the new post of President of the Children’s Panel.

Q5. What are your views on the proposed role and functions of the Chief Executive Officer?

Chief Operating Officer would be a better title, reporting to the Principal Reporter.

If the proposals go ahead then this seems to cover the role appropriately. The COO could ensure that clear boundaries are kept between the various roles as a priority at all times. However, this seems as if yet another tier is being created thus there is a risk of creating more bureaucracy rather than less.

Principal Reporter and Reporters

The Principal Reporter will be employed by the Board of the new body, and will continue to have statutory decision-making functions as currently defined in the Children (Scotland) Act 1995 and the Criminal Procedure (Scotland) Act 1995. As at present, the Principal Reporter (and such senior Reporter staff as may be designated) will continue to have a right of appeal to Scottish Ministers in the event of the post holder being dismissed from employment by the Board.

The role of the Children’s Reporter, acting under the authority of the Principal Reporter, is to investigate a child’s circumstances following a referral by any individual. In the light of that investigation the Reporter must decide whether there may be a need for a compulsory intervention in the child’s life. If so, the Reporter will refer the matter on to a children’s hearing.

Reporters currently make decisions about the scheduling of hearings, including the number of cases to be heard. The Reporter is required by law to take a note of proceedings of a hearing, covering a range of matters specified in the 1996 Rules. This note is intended to assist the Reporter in the event of an appeal. The Reporter will act at Court in the event of grounds being denied or an appeal being made.

Over time, the practice has evolved of the reporter also offering legal and/or procedural advice at a hearing, following his or her determination that a referral is appropriate. This role is not set out in the 1995 Act. The proposed reforms provide an opportunity to re-examine aspects of the current role of the Reporter and to consider how to make best use of the special expertise of Reporters and to ensure appropriate separation of functions.

Some commentators have expressed concerns about the current practice of the Reporter offering legal or procedural advice at a hearing, and have suggested that this practice may not provide sufficient separation of functions in the light of ECHR provisions. In essence, they suggest that since the Reporter is responsible for deciding whether a child should be referred to a hearing, he or she should not be able to offer legal or procedural advice to the Panel members at that hearing. As noted above, this role is not enshrined in legislation but has evolved over time.

The Scottish Government believes that the current arrangements conform with the requirements of ECHR. However, given such concerns and the fact that the structural changes we are proposing would bring Reporters and Panel members together in a single organisation, this is an important opportunity to consider how the proposed structures can address these concerns and minimise any future risk of challenge to the Children's Hearings system on that basis.

The Scottish Government will give further consideration to this issue in the light of consultation responses which will be essential as we move, in due course, to more detailed consideration to ensure ECHR compliance. In particular, in moving forward with the reforms, it seems clear that, in order to protect the independence of advice and support given to children and families, the role currently fulfilled by Reporters during different elements of a hearing require to be separated both in terms of practice and accountability.

This could be achieved by separating out the tasks currently undertaken by Reporters prior to, during and after a hearing. Two separate teams of Reporters could be established through legislation. One team would deal solely with determining the need for referral to a hearing and appeals to the Court (accountable to the Principal Reporter) and the other team would solely provide legal or procedural advice at hearings (accountable to the President of the Children's Panel). Another option would be to clarify simply in law that Reporters should not provide legal or procedural advice and leave it for Panels to make other local arrangements for the provision of this function. We think this would lead to differential and inconsistent practices developing at hearings, which would run counter to the spirit of the rest of our proposed reforms. As a result, we do not support this option.

Q6. We invite comment on the options outlined above. Do you have any other suggestions about how the concerns about separation of functions might be addressed? Are there other functions which need to be re-considered or re-allocated?

Sacro would also express concerns about the current practice of the Reporter offering legal or procedural advice at a hearing. The suggestion that this practice may not provide sufficient separation of functions in the light of ECHR provisions is also supported agreeing that since the Reporter is responsible for deciding whether a child should be referred to a hearing, he or she should not be able to offer legal advice at the Hearing as well. This function should be a separate role and Reporter's having a dual role of Reporting to the Panel and giving legal advice would be unfair on the Children, Young people and their families as well as themselves as professionals.

President of the Children's Panel

We propose to establish a new post - the President of the Children's Panel - to be employed by the Board of the new body. We propose that the President should be responsible for: the recruitment, appointment and training of Panel members; for quality assuring the decision-making function of Panels; and for setting the level and ensuring payment of Panel members' expenses. These responsibilities are currently assigned variously to Scottish Ministers, local authorities and CPACs.

We see these as key functions in securing a more equitable and consistent national approach to the exercise of Panel responsibilities. The President of the Children's Panel would also be responsible for removing Panel members, but only with the consent of the Lord President of the Court of Session.

We propose that the President should also be responsible for securing local arrangements for the Panel member rota (a role currently undertaken by the Chair of the Children's Panel). This will require the appointment of local co-ordinators or team leaders, appointed by, and accountable to, the President.

New powers would be needed to permit the President to specify "best practice" and to determine the content of training.

Q7. What are your views on these proposals?

Sacro support this post, should the proposals be implemented. However, repeat that this could be achieved under the current system rather than adding these expensive high level tiers as with the creation of a CEO/COO post, as in our comments above.

Safeguarders

The role of the Safeguarder is to act in the child's best interests. This role will be unchanged. A Safeguarder may be appointed for a child by a children's hearing, or by a Sheriff in hearings-related court cases. Safeguarders provide children's hearings and courts with an independent assessment of what is in the child's best interests. On average, around 1 child in 5 attending a hearing receives the services of a Safeguarder. The Scottish Government considers that Safeguarders are an integral and key element of the Children's Hearings system. We therefore propose to bring Safeguarders within the ambit of the national body.

Safeguarders are currently appointed to local Panels by the local authority - with cases being allocated following decisions made by children's hearings or Sheriffs. Training is available for Safeguarders (pre- and in-service). However no provision currently exists to agree remuneration and best practice nationally, to deal with complaints or to monitor performance.

We propose to create a single panel of Safeguarders - to be employed by the Board of the new body - under the discrete management of an employee appointed for that purpose. Although they would constitute a single, national panel, we propose that individual Safeguarders should be able to indicate the local areas where they are willing to accept appointments. A single national panel of Safeguarders would require the creation of a discrete element within the new national body in order to secure the necessary degree of independence for the function. This arm of the national body would be responsible for recruiting individuals as Safeguarders and for training, allocating cases, remuneration, setting and defining "best practice" as well as monitoring performance. Sheriffs and children's hearings would remain free to choose whether to appoint a Safeguarder, as is currently the case.

Q8. What are your views of these proposals?

The same issues arise as in the legal representative, in that there would be no perceptual distinction between the Reporters, the Panel members and the Safeguarders if they are all under the same agency. Local knowledge is also undermined in the proposed system Sacro would suggest keeping the Safeguarders

completely separate from the agency to ensure that they not only operate independently, but are readily perceived as so doing.

PART TWO: POLICY AND LEGISLATIVE CHANGES

New statutory system on the legal representation of children:

Legal representation is considered necessary where a children's hearing is giving active consideration to placing a child in secure accommodation and/or complex legal issues are at play. The current interim scheme, which was introduced in 2002, is based on legal aid arrangements for court settings and is rather basic which has given rise to some concerns about both access and quality.

At present, legal representatives are drawn from members of the panels of Safeguarders and Curators ad Litem and Reporting Officers. As set out above, we are proposing that Panels of Safeguarders should be subsumed within the new national body. It is therefore necessary to consider how legal representation should be supported in a permanent scheme.

Researchers are currently examining the experience of the current system of legal representation by the users of these services - children, families, solicitors, panel members and reporters. This research will report in Autumn 2008 and will inform further consideration as to how legal representation can most effectively be supported in the context of the Children's Hearings system.

We believe the nature of the legal representative's role at hearings should reflect particular circumstances and needs of children as clients of legal representation. The nature of a children's hearing is fundamentally different to a court. We suggest that the role of the legal representative is similarly different. One option might be to develop a bespoke code of practice for legal representatives acting on behalf of children and young people at children's hearings. Such a code would need to be approved by the Law Society of Scotland. We will consider this matter further in the light of responses to this consultation, and the outcome of the research referred to above.

Q9. We invite views on the best way to provide an appropriate, statutory scheme for legal representation of children and young people (in the circumstances specified above) who are involved in the Children's Hearings system.

Sacro would stress the point that since the system was designed as non-adversarial, this code of practice should reflect this. It is crucial that the legal representative is independent of the larger system and the role clearly represent the legal needs of the child or young person where necessary, as opposed to the system becoming a young people's version of the adult court system.

Withholding information provided by the child

The rights of parents and others involved in a children's hearing to full information about a child has led to the disclosure of information that may place children at risk. At present, where a child passes on a view or shares information with the children's Reporter or the children's hearing, the full substance of the communication **must** be shared with the parents.

Previous consultation on the Children's Services (Scotland) Bill contained a proposal to legislate to enable children's hearings and Reporters to withhold information provided by the child when they considered its release would place a child at risk. Almost 90% of respondents expressed support for this proposal. A similarly high proportion of respondents stated that they felt the proposal would meet the objectives.

The Scottish Government proposes to bring forward such a provision in draft legislation

Q10. What are your views on this proposal?

Sacro's view remains the same as in the previous consultation (to Question 9 of the Children's Services Bill). Sacro wholeheartedly support the suggested new provision to withhold information about the child where disclosure would be significantly against the child's interests .

Indeed Sacro suggest widening this power to assist in data protection of information sharing between agencies. Limits need to be put upon what is appropriate to share as there is increasing pressure to divulge inappropriately due to misinterpretation of information sharing protocols. Sacro do not encourage unnecessary obstructions to the sharing of relevant and appropriate information, however the misuse of protocols can be a danger to the best interests of the child.

Streamlining the establishment of the grounds for referral

At present where a child is too young, not sufficiently mature or does not understand the grounds for referral, but the parents accept them, it is necessary for a proof hearing to be arranged at the Sheriff Court. Procedurally, this must be preceded by a children's hearing. We consider this process causes unnecessary delay. Once again, consultation on the Children's Services (Scotland) Bill proposed a solution to streamline the establishment of the grounds for referral. This received widespread support with 86% of respondents in favour of the proposal.

The Scottish Government proposes to bring forward such a provision in its draft legislation.

Q11. What are your views on this proposal?

Streamlining the process seems fair, however if the 'children's hearing' is missed then crucial parts of the system are dropped. There would then be a danger of moving straight to the adversarial setting and of this practice widening. This could result in less appropriate cases being referred straight to a proof hearing to save precious resources. Sacro would therefore prefer that the Hearing was always a focal part of the process.

Procedural Changes to the Children's Hearings system

At present, if a children's hearing is unable to dispose of a case and considers it necessary to detain a child in a place of safety, the appropriate provision under which to grant a warrant is generally determined by the reason why the hearing is unable to dispose of the case. The appropriate provision may therefore vary at subsequent hearings. The reason for a hearing being unable to dispose of a case will often not be known in advance of the hearing.

The current warrant provisions are complex and can be difficult to manage. The proposed reforms provide an opportunity to simplify the structure of the warrant provisions and ensure that no child in need of detention in a place of safety is disadvantaged because of technicalities around which warrant provision the hearing relied upon. We therefore propose to bring forward amended warrant provisions. We also propose to bring forward another change which was consulted on in the draft Children's Services (Scotland) Bill. This is in relation to section 63 of the Children (Scotland) Act 1995.

At present, where a child has been detained by the police in a place of safety and it is decided charges are not to be proceeded through the court, the Principal Reporter must on the same day as the information is received decide whether compulsory measures of supervision are required (and if so arrange a hearing to take place within 3 days). A difficulty arises if the Principal Reporter does not have sufficient information to take an informed decision at that time. In that case, the default position is the child is released with no further possibility of a hearing.

It is therefore proposed that the Principal Reporter should be able to release the child from detention in the place of safety while being able to continue to investigate matters and to decide (under s56 of the Children (Scotland) Act 1995) at a later date whether to arrange a hearing.

The Scottish Government proposes to bring forward such a provision in its draft legislation.

Q12. Do you agree these are areas which should be addressed?

Yes there is a need to address these areas. It seems wrong that a child or young person is put in a place of safety and then released due to an unrealistic timescale. The Children's Reporter should be allowed more time to seek further information and the child or young person should be retained in the place of safety until this happens and an informed decision can be made. This would also be less disruptive to the child or young person.

Papers for children

In the *S Case*, the Court considered that children should have a fettered right of access to reports. The Principal Reporter gave an assurance that a scheme would be promoted to enable this to happen. However, while an administrative based scheme has been promoted, children still have no statutory right of access to the reports - unlike parents. We propose to remedy this in our draft legislation.

Q13. Do you agree that the Scottish Government should bring forward such a provision in the draft Bill?

Yes, children have a right to see what is said about them and indeed should be able to influence this unless it is in their best interests to have some information withheld. In this case information can be held in the restricted information section of their file.

Other legislative implications

A raft of primary and secondary legislation would require significant amendment including the Children (Scotland) Act 1995, the Local Government etc. (Scotland) Act 1994, the Criminal Procedure (Scotland) Act 1995, the Children's Hearings (Scotland) Rules 1996, the Children's Hearings (Legal Representations) (Scotland) Rules 2002, and the Panels of Persons to Safeguard the Interests of Children (Scotland) Regulations 2001.

Q14. Are there any other issues which you think might be addressed in the reform programme or proposed legislation?

None at the moment.

PART THREE: REGULATORY IMPACT ASSESSMENT (RIA)

Further consultation on the key provisions of the draft Children's Hearings (Scotland) Bill is planned for the early part of 2009. An RIA will be incorporated within that process. This will identify and analyse the benefits, risks, costs and compliance issues arising from the various proposals that may have implications for resources.

Equality and Equal Opportunities

We do not believe there will be any implications for the issues of equality, equity and fairness in the proposals which are being developed. However, in bringing forward a draft Bill, equality and equal opportunities issues will be considered in the light of the detailed proposals.

Resources for Local Authorities

It has been estimated that local authorities currently spend around £3m per year on supporting the work of the Children's Panels and CPACs. We are confident this continuing level of funding would fully meet any pressure of increased activity in relation to promoting the work of the Children's Hearings system since that increase would be offset by the proposed removal of the local authorities' current responsibilities for in-service training of the volunteers and payment of their expenses.

**PART FOUR: THE SCOTTISH GOVERNMENT
CONSULTATION PROCESS**

Next Steps see the fill document attached for the remaining text.