EDUCATION, LIFELONG LEARNING AND CULTURE COMMITTEE

AGENDA

10th Meeting, 2010 (Session 3)

Wednesday 14 April 2010

The Committee will meet at 10.00 am in Committee Room 5.

1. **Children's Hearings (Scotland) Bill**: The Committee will take evidence on the Bill at Stage 1 from—

   Tam Baillie, Scotland's Commissioner for Children and Young People;

   Morag Driscoll, Director, Scottish Child Law Centre;

   Louise Warde Hunter, Strategic Director of Children's Services, Action for Children Scotland;

   SallyAnn Kelly, Head of Children's Service Operations, Barnardo's Scotland;

   Heather Gray, Chief Executive, Who Cares? Scotland;

   and then from—

   Paula Evans, Policy Manager, Community Resourcing and Children and Young People, COSLA;

   Carol Kirk, Corporate Director, Educational Services, North Ayrshire Council, Association of Directors of Education in Scotland;

The papers for this meeting are as follows—

**Agenda item 1**

- SPICe briefing: summary of written evidence

Information relating to the Children's Hearings (Scotland) Bill, including written evidence submitted to the Committee

SPICe briefing on the Children's Hearings (Scotland) Bill
Children’s Hearings (Scotland) Bill

Summary of written evidence by SPICe

Background

This paper summarises the main themes in written evidence received by 7th April 2010. Evidence was received from 36 organisations (listed in annexe). This included:

- 6 local authorities and their professional organisations
- 8 organisations or personnel directly involved in the hearings system
- 5 children’s organisations
- 5 legal organisations.

Overall reaction to the Bill

In general, respondents gave qualified support to the Bill, welcoming the intention of modernising the system. There was also praise for the consultation process. However, 8 submissions had significant concerns about the creation of the new body, including COSLA\(^1\). The CPCG advised that a quarter of their members supported the Bill, a third supported it subject to amendment and 10% did not support it. The most commonly mentioned concerns across all submissions related to the implementation of hearing decisions by local authorities and their enforcement and monitoring. Other concerns related to maintaining local connection, whether the threshold for referral is raised, the definition of relevant person, the need for a stronger framework for safeguarders, the ‘criminalisation’ of children and requests for a right to advocacy.

Structure

Some submissions had concerns about whether the new body was necessary, whether it was too big and bureaucratic, whether local connection would be maintained and whether the National Convener could be both a figurehead and monitor standards.

The need for change

Some\(^2\) saw scope for improvement but no need to change the whole system. Angus and East Ayrshire said the Bill created a layer of bureaucracy. East Lothian and Renfrewshire suggested that national standards and monitoring would be enough. CPAG and the East Renfrewshire panel and CPACs (East Renfrewshire) supported a small, ‘light touch’ body. COSLA said that the changes needed to be considered in the broader context of “new ways of working together on children’s services.”

Alternatively others suggested that the changes would address real problems. For example CPCG said that lack of consistent support for volunteers had been a significant issue in the past. Children’s Hearing Training Officers (CHTO), West Lothian and South Ayrshire thought the changes would increase consistency and quality. While CHTO stated that

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\(^1\) Angus, CPAG, East Lothian, East Renfrewshire panel and CPAC, Highland CPC, North Lanarkshire, Renfrewshire, East Ayrshire, COSLA

\(^2\) CPAG, East Lothian, East Renfrewshire panel and CPAC, North Lanarkshire and Renfrewshire
training was very inconsistent, North Lanarkshire said there was no evidence of deficiencies. Whereas East Lothian questioned whether the changes would improve outcomes for children, South Ayrshire said that they would.

Local connection
There were a number of concerns about the need to maintain the ‘local connection’ in the system. SACP, Cl@n childlaw and East Renfrewshire suggested that a panel member should only sit outside their area 'in exceptional circumstances'. East Renfrewshire also suggested that members should have a choice about this. However, CHTO welcomed the flexibility provided by s.8 on the location of a hearing.

North Ayrshire and ADES were concerned that Area Support Teams (ASTs) might weaken the local connection. CPCG and Renfrewshire were unclear about the role of ASTs. CPCG and East Renfrewshire thought that ‘pastoral support’ should continue to be provided by panel chairs. East Renfrewshire and North Lanarkshire didn’t see the need to transfer setting the rota. COSLA said there was a ‘worrying lack of detail’ about the provision for ASTs leaving a ‘very confused picture’ of the role of local authorities. COSLA did not think the provisions for consulting local authorities are sufficient to ensure ‘meaningful local connection.’

National Convener
There were a number of concerns about how the National Convener would, in practice, give advice to hearings. CHTO and Cl@n childlaw were sceptical about it being provided over the phone. The Law Society thought this function would sit better with the Principal Reporter than the National Convener.

John Anderson, Barnardos and CPAG queried whether the National Convener can act as a figurehead for the whole system while also acting to monitor standards. ADES queried this because the NC is only responsible for Children’s Panels. COSLA considered that there is potential conflict of interest for one organisation to be given the roles of representing the system and holding it to account. They also have a concern about the democratic accountability of the National Convener. They propose an alternative model, with a small national body acting as an advocate for panel members, provide legal advice to hearings, manage training and set national standards. Statutory national standards would be produced by the Scottish Government. CPACs would be abolished and their remaining role subsumed within local authorities. On a different theme, SCRA queried the Ministerial power to change the functions of the National Convener.

Safeguards
A number of submissions suggested that there should be some kind of national framework for safeguarders. SCRA stated that there was widespread dissatisfaction with the current situation which had no proper regulation or national oversight. CHTO, East Renfrewshire and West Lothian suggested a national panel whereas ADSW and CPAG suggested national recruitment and administration. Glasgow and Inverclyde suggested national standards. While CPCG was happy to leave control to local authorities they suggested a ‘principal safeguarder’ to provide training and support. The Law Society and Scottish Child Law Centre (SCLC) proposed the implementation of Lord Gill’s recommendations in this

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3 John Anderson, Angus, Cl@n childlaw, East Renfrewshire panel and CPAC, SACP, COSLA
4 CPCG, Cl@n childlaw, CHTO, SCCYP, South Ayrshire
5 The role of the reporter in giving advice to hearings has been the subject of much debate leading to the proposal that the function be given to the National Convener.
regard. These related to the appointment, recruitment, training, remuneration and quality assurance of safeguarders, curators ad litem and reporters. SCLC asked for a clear definition in the Bill of the safeguarder’s role. COSLA proposed that safeguarders should not be managed by local authorities.

Other issues with structural change

- concern about the Ministerial power to alter reporter’s functions (SCRA, CPCG)
- reporters should be able to request reports directly from organisations (Cl@n childlaw)
- local authority role is unclear (West Lothian, East Renfrewshire, COSLA)
- CPAG and East Renfrewshire thought the requirement that only the Lord President could remove a panel member was too bureaucratic and North Lanarkshire referred to the Philip report recommendations.

Implementation of hearing decisions

There was considerable comment on the duty of local authorities to implement hearing decisions and the enforcement and monitoring of this (sections 138, 140-44 and 173). In general, while children’s organisations welcomed these provisions local authorities were concerned about the financial implications and the failure to place similar duties on other agencies such as the NHS.

Concerns about cost mainly relate to two provisions. Section 138(3) provides that conditions or services in a Compulsory Supervision Order can include those which the local authority does not currently provide and s.147(7) provides that when hearing decides to start the enforcement process, they should not take into account the cost of the providing measures in question. These provisions, although re-worded, do not appear to be a policy change from the 1995 Act. ADES, Glasgow, Inverclyde and COSLA considered that these provisions require local authorities to implement hearing decisions ‘without limit of cost’. ADSW considered it was unrealistic and impractical not to have regard for local authority capacity. Renfrewshire said it would compromise the ability of local government to manage their financial performance and North Ayrshire said it was necessary to balance the needs of a few specific individuals against the general needs of all children. COSLA argues that this raises issues of democratic accountability in that the hearing makes decisions but is not accountable for the financial consequences.

The Bill retains the existing provisions for enforcement but in moving the powers from the Principal Reporter to the National Convener, also removes the discretion whether to proceed. The Children’s Commissioner, Who Cares and Cl@n childlaw welcomed these provisions although others said that discretion was essential in order to allow for negotiation and a child’s changing circumstances.

There was also much comment particularly with reference to GIRFEC on the absence of any implementation or information duties on other agencies which provide services to

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7 Lord Philip reported in 2008 on the future administration and supervision of tribunals in Scotland.
8 S.70(3B), 1995 Act provides that duties can include those ‘other than that provided by the relevant local authority’ and 71A(4), 1995 provides that the Principal Reporter should not take into account the adequacy of means of the local authority.
9 Glasgow, ADSW, Inverclyde, Renfrewshire, SCRA, Barnardos, COSLA
children such as the NHS.  SCRA referred to the Health Committee’s inquiry on CAMHS which said the delays in providing mental health assessment to Hearings were ‘totally unacceptable’ and SCRA suggested a duty on health services to provide such information. Glasgow suggested that delivering reports be the shared responsibility of partner agencies.

The Bill provides a ‘feedback loop’ at s.171 by which local authorities will provide the National Convener with general information about the implementation of decisions. Children in Scotland said that information should be provided on actual decisions – not just general information. However, North Ayrshire and Renfrewshire thought it duplicated existing audit and inspection through SWIA and Audit Scotland. Angus asked for a review next year of this ‘additional burden’ on local authorities. COSLA described it as ‘an additional and substantial reporting burden’, which does not fit with the Crerar reforms and is akin to inspection. They propose: “better local training about what is available and its effectiveness and a better partnership approach to service planning.”

Children’s rights

The two main themes on children’s rights were requests for a free advocacy service and concern about the consequences of children accepting an offence ground. There were also views on withholding information, children’s views and provision of documents.

It is mainly children’s organisations that recommend that children are offered free, independent advocacy.  While Children 1st and Who Cares? Scotland would like to see it in the Bill, the Children’s Commissioner accepts that further development work is required but would like more details as soon as possible on the Government’s thinking. However, the Scottish Child Law Centre does not support the formation of an advocacy service. Rather children should be able to choose the support that suits them – whether a friend, lay advocate, professional or legally qualified representative.

Six responses raised concerns about ‘criminalisation of children’.  UNISON said: “A child can sometimes accept an offence ground where evidence might not exist” and recommended that children should have proper support and advice before accepting offence grounds. The Children’s Commissioner referred to the impact of raising the age of criminal prosecution to 12 but leaving the age of criminal responsibility at 8.  The Scottish Child Law Centre recommended that having accepted an offence ground should not appear on an enhanced disclosure certificate later in life.

It was Clanchildlaw’s view that it is inconsistent to refer a young person who has committed an offence to a hearing if they already have a supervision order but to an adult court if they do not. They suggest that anyone under 18 should be able to be referred to a hearing. A similar point was made by the Scottish Child Law Centre.

The provision at s.171 for information to be withheld from relevant persons was welcomed by the Children’s Commissioner, Who Cares? Scotland and Children 1st. Others had concerns about the relevant persons’ rights. Clanchildlaw and SACP said it might raise appeal issues, the Law Society referred to cases which call into question whether this

10 ADSW, East Lothian, Highland CPC, ADES, Inverclyde, North Ayrshire
11 Barnardos, Children 1st, CPCG, Children’s Commissioner and Who Cares Scotland
12 Children’s Commissioner, Children 1st, John Anderson, SCRA, UNISON, Scottish Child Law Centre
13 Section 38 of the Criminal Justice and Licensing (Scotland) Bill provides that no-one under 12 can be prosecuted in the criminal courts. It does not however change the age of criminal responsibility from 8 years. Robert Brown has proposed amendment 379 to that Bill to raise this to 12.
breaches ECHR and the SCRA said that it should be clear that where the information forms part of the reasons for the decision, then it should be disclosed.

A number of submissions referred to the reports and documents before a hearing. Children in Scotland and SCRA considered that the hearing should always get a report on the child’s views. The Children’s Commissioner stated that the right for children to receive documents should be on the face of the Bill and Children in Scotland said that any reports should be in child friendly language and explained to the child prior to the hearing. SACP said children and families should receive documents 3 days before a hearing so that they had time to understand them. Finally, Renfrewshire and Children in Scotland commented on the presumption that children aged 12 or older were mature enough to give their views and noted that children under 12 years were often well able to give their views.

Grounds and threshold for referral

Generally, submissions welcomed the changes to the grounds for referral, particularly the inclusion of a new ground on domestic abuse. There were concerns however, that the threshold for a child to be referred to the Reporter had been raised.

The existing Act at s.53 requires local authorities to refer a child to the reporter if they think a child may need compulsory measures of supervision. Section 58 of the Bill requires local authorities to refer where they think that a compulsory supervision order should be made. This change from ‘may’ to ‘should’ has provoked strong comment. The Law Society considers that it is: “a fundamental and significant departure from the existing law” which “leaves the local authority as gatekeeper.” UNISON said it will lead to higher rates of unmet need and Highland CPC said removes the reporter’s role to assess borderline cases. Similar points are made by CPCG, SCRA and Glasgow. However, Cl@n childlaw welcome similar changes in relation to referrals from the police, saying it fits better with the GIRFEC approach.

There were views that some terms in the grounds needed further clarification. These were: domestic abuse (Children in Scotland, SCRA), ‘conduct’ (CHTO) and ‘special measures to support’ (Law Society) and ‘close connection’ with a child (CHTO, Children in Scotland). However, ADES and North Ayrshire welcomed ‘close connection.’

The Law Society suggested further changes including the addition of specific additional grounds relating to anti-social behaviour and forced marriage and (along with SCRA) queried why the drafting of what in the Bill is ground (n) had changed from ‘beyond control of any relevant person’ to ‘not within the control of a relevant person.’

Relevant person

There were a number of concerns with the new definition of relevant person, particularly that ‘significant involvement’ with the child is too broad.14 South Ayrshire said that the changes meant that a pre-hearing panel would now be required to recognise grandparents or foster parents as relevant persons. Who Cares? Scotland, UNISON and SCRA queried how someone’s relevant person status would be reviewed if the child’s relationship with them changed. The Law Society thought the hearing should not have discretion to ‘deem’ someone a relevant person and also queried whether s.185(1) and (2) would be competent under ECHR as it appears to preclude someone with a contact order from being a relevant

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14 Barnardos, CPCG, SCRA, UNISON, South Ayrshire
person.\(^\text{15}\) SCRA recognised that having relevant person status gives someone wide ranging rights and suggested there might be a middle ground where involvement of others could be allowed without giving them full relevant person rights.

**Secure accommodation**

The Bill provides for regulations and appeal relating to secure accommodation authorisations. The regulations were welcomed by the Children’s Commissioner and North Ayrshire and the appeal provisions were welcomed by Cl@n childlaw. CPCG do not agree that the Chief Social Worker should continue to have discretion whether to place a child in secure but do think there should be discretion regarding ending a placement. SACP think that the decision to remove a child from secure should not be the decision of only the Chief Social Work Officer. UNISON queried what the reporter’s role would be in an appeal against a secure accommodation authorisation.

**Legal representation**

In general, the provision of a scheme of legal aid was approved of but there were varied concerns about the detail. SLAB submitted detailed comments. Their concerns related to mainly to changes to the tests for legal aid, the availability of legal aid for adults other than relevant persons, duplication in the role of safeguarders and curators ad litem and the absence legal aid for court proceedings granting child protection orders and child assessment orders. They also noted that costs for legal aid may be higher than the estimates given in the Financial Memorandum. The Scottish Family Law Association thought SLAB – because they administer legal aid should not have responsibility for the Code of Practice nor make the decision whether legal aid is in the child’s best interests.

Other submissions raised apparent omissions to the criteria for legal aid. These included: when a movement restriction order is being considered (Cl@n childlaw, Law Society) where it is necessary to ensure effective participation (Cl@n childlaw) and when a decision is made to put the protection of the public above the welfare of the child (Law Society). CPCG queried whether there would be equal access across the country to appropriately trained solicitors.

**Appeals**

There were some concerns that the Bill widens the scope of appeal.\(^\text{16}\) For example, UNISON is concerned at the change from a sheriff allowing an appeal if the: “decision of the hearing is not justified in all the circumstances” to not allowing it “if satisfied that the decision is justified" and consider that this changes the balance against the hearing.

**Drafting**

Some submissions criticised the drafting. The Law Society said the Bill was ‘not as accessible as it needs to be’ and Children in Scotland said some sections of the Bill are unclear, ambiguous or confusing. CHTO and Law Society listed a number of drafting points. However, East Lothian said the Bill was clearer and more logical than the existing legislation, but did say it was too long. Reference to a police station being an appropriate

\(^{15}\text{The policy memorandum at para 477 suggests that such a person could still seek RP status from a pre-hearing panel under s.80.}\)

\(^{16}\text{John Anderson, Barnardos, Cl@n childlaw, SCRA and UNISON}\)
place of safety should be removed.\textsuperscript{17} ADSW and Inverclyde said that reference to Chief Social Worker should be to Chief Social Work Officer. UNISON was ‘disappointed’ that the criteria for orders still referred to ‘treatment and control’ of children rather than being something more welfare based.

\textbf{Financial Memorandum}

There was little substantive comment on the Financial Memorandum. North Lanarkshire considered that £2.5m extra cost was an underestimate and West Lothian said it was unclear how efficiency savings would be achieved. The CHTO considered that some provisions for training were not included in the costs and the SACP said there was no allocation for continued funding for a group like theirs which represented panel members. Given the extent of the revisions, East Lothian stated that guidance and training will need to be re-written which they hoped would receive similar support from the Scottish Government as was provided for the introduction of the 1995 Act. SLAB said the costs for legal representation were probably under-estimated.

\textbf{Other issues raised}

A wide range of other points were raised, including the following:

1. SACP were concerned that the Bill allows inconsistent expenses to continue as it provides for different payments in different circumstances.

2. The interaction of permanency planning and the hearing system can cause delay (Barnardos, South Lanarkshire). Similarly, the Law Society said that children should not be subject to two statutory regimes at once.

3. South Ayrshire suggested that the power of the courts at s.60 to refer children to the reporter in certain types of cases should be changed to a duty.

4. The Law Society proposed that where there is a dispute about which local authority is the relevant one (s.159), then an interim local authority should be given responsibility with provision to reclaim expenses once the issue is decided.

5. The Law Society and Renfrewshire suggested that local authorities should have the right to attend a hearing. SCAP queried why ASTs had this right which was not available to CPACs.

6. CPCG thought the provisions for the pre-hearing panel are complex and time consuming and UNISON wanted local authorities to be able to call such a panel.

7. North Ayrshire and ADES welcomed the provision at s.110 for a quicker procedure where grounds go to proof because although the relevant person has accepted the ground the child doesn’t understand them. However, South Ayrshire queried why a case needed to be referred for proof at all in these circumstances.

8. The Law Society object that s.118(3) (giving the sheriff power to refer a child for ‘voluntary measures’) is a ‘supervision order by the back door’ and similar provisions in older legislation were expressly not included in the 1995 Act.

\textsuperscript{17} Law Society, UNISON, Children in Scotland, Cl@n childlaw
9. The Law Society asked for the 3 day time limit on Child Assessment Orders to be changed back to 7 days and also stated that, in s.128, three months is too long to wait before a child or relevant person has the right to request a review.

10. CHTO and Clan Childlaw queried why, in s.83, a hearing should review before dealing with fresh grounds.

11. The Scottish Child Law Centre said that the ability of a hearing to terminate a parental responsibilities and rights direction at s.40(3) is ‘a significant change to the law.’ At present this is terminated either by the sheriff or when a child protection order ceases to have effect (1995 Act s.58 (7)).

12. South Ayrshire was concerned that the new interim compulsory supervision orders might be used routinely and ‘block up’ the system and the Family Law Association thought that being able to attach the same conditions as a full compulsory supervision order risked creating a ‘parallel system’ and could raise human rights issues.

13. Children 1st said there should be family group conferencing at all stages of a hearing.

Camilla Kidner
SPICe
7 April 2010
Written evidence received by type of organisation

**Local authority or professional association**
1. ADES
2. ADSW
3. Angus
4. COSLA
5. Dumfries and Galloway
6. East Ayrshire
7. East Lothian
8. Glasgow
9. Highland CPC
10. Inverclyde – social services
11. North Ayrshire
12. North Lanarkshire
13. Renfrewshire
14. South Ayrshire
15. South Lanarkshire
16. West Lothian

**Personnel in the hearing’s system**
17. Anderson, John
18. Children’s Hearings Training Officers
19. Children’s Panel Advisory Group
20. Children’s Panel Chairs Group
21. East Renfrewshire panel and CPAC
22. Inverclyde – clerk to CPAC
23. Scottish Association of Children’s Panels
24. SCRA

**Children’s organisations**
25. Barnardos
26. Children 1st
27. Children in Scotland
28. Scotland’s Commissioner for Children and Young People
29. Who Cares? Scotland

**Legal**
30. Cl@n childlaw
31. Family Law Association
32. Law Society of Scotland
33. Scottish Child Law Centre
34. Scottish Legal Aid Board

**Other**
35. ACPOS
36. UNISON
Camilla Kidner

The Children’s Hearings (Scotland) Bill (the Bill) was introduced in the Parliament on 23 February 2010 by Michael Russell, Cabinet Secretary for Education and Lifelong Learning. The Bill restates much of the existing law relating to children’s hearings. It also creates a new NDPB (Children’s Hearings Scotland) to take on functions of the Children’s Panel Advisory Committees, local authority functions relating to local training and paying expenses and functions of Ministers in relation to recruitment, appointment and national training of panel members. Instead of 32 separate children’s panels, there will be a single panel with members appointed by the National Convener of Children’s Hearings Scotland. In addition, there are various changes to the hearing process including rationalisation of warrants and orders, modernising the grounds for referral and providing for a national scheme through the civil legal aid system for state-funded legal representation in children’s hearings and associated court proceedings. Key drivers for reforms are the need to ensure the requirements of human rights law are met and improve consistency across the system.
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EXECUTIVE SUMMARY

The main proposal in the Bill is to enable a single, national children’s panel to be created instead of the existing 32 local panels and the establishment of a new non-departmental public body (NDPB) to be called Children’s Hearings Scotland. As a result, some functions of Scottish Ministers local authorities and panel chairs would move to the new body. Children’s Panel Advisory Committee’s would no longer exist, with their functions taken up by Children’s Hearings Scotland.

Since 2004 there have been three consultations and two draft bills leading up to the current Bill. Key drivers for reform have been the need to introduce greater consistency across the system and to ensure that it is robust in terms of the European Convention on Human Rights (ECHR). While there has always been support for the Kilbrandon principles of a welfare based system based in the local community, the particular proposals for reform have changed considerably over the years. This is especially true of the type of restructuring suggested. In 2008 it was proposed that all the various components of the system (reporters, panel, safeguarders, CPACs, ministerial and local authority roles) be merged into one organisation but this was rejected as were proposals in the 2009 draft Bill to change the role of the reporter. Consistent themes in responses to all the consultations have been the need to preserve the Kilbrandon principles, the need for the right balance between local and national control and the need to place the child’s rights at the centre of the process.

Substantial parts of this Bill re-enact existing legislation with no policy change. The main elements of new policy are listed below. These mainly relate to organising the structure of the system, reflecting human rights issues and simplifying other processes.

Structural changes
1. Creating a new NDPB, Children’s Hearings Scotland headed by a National Convener, to take on the functions of Children’s Panels Advisory Committees (CPACs), and some functions of local authorities and Ministers (Part 1, sch 1 and 2).

2. Implementing minor changes to the governance arrangements of the Scottish Children’s Reporter Administration (SCRA) (sch 3).

Reflecting human rights issues
3. Enabling a person to seek a determination of whether they are a relevant person from a pre-hearing panel and to appeal that decision (s78).

4. Enabling information provided by the child to the hearing to be withheld from the relevant person where its release could harm the child (s171).

5. Introducing a permanent scheme of state funded legal representation for children and relevant persons and transferring the administration of this to the Scottish Legal Aid Board (Part 19).

6. Allowing for an appeal against a Chief Social Worker’s decision to implement an authorisation for secure care (s156).

1 Generally the relevant person is a parent. See p15 for changes made in the Bill.
7. Providing for rules to be made to give the child and relevant person a right to attend a pre-hearing panel (the new name for business meetings) and for children to receive documents (s170). Regulations will also specify more clearly the process of secure accommodation decisions (s145).

Other changes to processes and implementation

8. Modernising the drafting of the grounds for referral and introducing a new ground related to domestic abuse (s65).

9. Simplifying the provisions for place of safety warrants and introducing a new order: an interim compulsory supervision order (Parts 5, 9, 10 and 11).

10. Giving safeguarders a right to appeal (s148). 2

11. Extending restrictions to the admissibility of evidence relating to a person’s sexual character and behaviour (s166-68).

12. Allowing prior statements to be used as evidence in hearings on offence grounds and allowing the reporter to lodge child witness notices or vulnerable witness applications in these hearings or apply for a review of arrangements (s169).

13. Requiring the reporter to share information with Crown Office and Procurator Fiscal Service (COPFS) in relation to criminal proceedings which are in any way connected with a child at a hearing (s.172).

14. Introducing a ‘feedback loop’ to provide general information to panel members, via the National Convener, on how the local authority implements its compulsory supervision orders (s.173).

The 36 submissions to the Education Lifelong Learning and Culture Committee (the Committee) generally gave qualified support to the Bill, welcoming the intention of modernising the system. There was also praise for the consultation process. However, 8 submissions, including COSLA had significant concerns about the creation of a new body 3. The Children’s Panel Chairs Group (CPCG) advised that a quarter of their members supported the Bill, a third supported it subject to amendment and 10% did not support it. The most commonly mentioned concerns across all submissions related to the implementation of hearing decisions by local authorities and their enforcement and monitoring. Other concerns related to maintaining local connection, whether the threshold for referral is raised, the definition of relevant person, the need for a stronger framework for safeguarders, the ‘criminalisation’ of children and requests for a right to advocacy.

The Bill is in 20 Parts with 6 Schedules. Part 1 and schedule 1 provide for the establishment of Children’s Hearings Scotland and the National Convener. The remaining structure of the Bill is intended to reflect the order in which processes happen. So, Child Protection Orders, as an emergency procedure are in Part 5, investigation and decisions to hold a hearing are in Part 6, the hearing on the grounds is in Part 9 and application to the sheriff for proof of grounds in Part 10. Reviews, implementation, appeals and enforcement are in Parts 13 to 16 respectively. Provision for a permanent scheme for legal representation is in Part 19.

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2 Safeguarders can be appointed to protect the child’s interests.
3 Angus, CPAG, East Lothian, East Renfrewshire panel and CPAC, Highland CPC, North Lanarkshire, Renfrewshire, East Ayrshire, COSLA
INTRODUCTION TO THE CURRENT SYSTEM

The children’s hearings system was introduced in 1971 following the Kilbrandon Report of 1964 and the Social Work (Scotland) Act 1968. Kilbrandon recommended a welfare based system to provide an integrated approach to children who had committed offences and children in need of care and protection. It assumes that the child who has committed an offence is just as much in need of protection as the child who has been offended against. It is a lay tribunal which does not have the formality of the normal courts. The legislation was substantially revised in the Children (Scotland) Act 1995 but the key principles have remained constant.

CURRENT STRUCTURE

Currently, each local authority has to establish a Children’s Panel, a Children’s Panel Advisory Committee (CPAC) and a Safeguards’ Panel. CPACs advise Ministers on panel member appointment and support general administration. Safeguards can be appointed by a hearing or by the sheriff to safeguard a child’s interests. Each local authority area also has a reporter – although they are employed by the Scottish Children’s Reporter Administration (an NDPB established under the Local Government etc (Scotland) Act 1994). The reporter investigates referrals and arranges a hearing if necessary. He or she takes a record of the hearing decision and conducts proceedings before the sheriff. Local authorities appoint and manage CPACs and safeguards’ panels and provide training, expenses and allowances to panel members. Crucially, it is the local authority which implements the decision of a hearing. Scottish Ministers appoint panel members, run a national recruitment campaign and organise national training for panel members.

OUTLINE OF GENERAL PROCEDURE

The following gives a very brief overview of the main stages of a hearing. Throughout, the procedures are informed by the key principles of the system which are:

- the welfare of the child is the paramount consideration
- an order will only be made if it is necessary (i.e. the state should not interfere in a child’s life any more than is strictly necessary), and
- the views of the child will be considered, with due regard for age and maturity

The hearing should have the character of a discussion about the child’s needs. A sheriff court is generally only involved if grounds of referral are in dispute or not understood, a child protection or child assessment order is required or there is an appeal against a decision of a hearing. The aim is to balance the ‘lay’ character of the system with the guarantees of individual rights afforded by a court system.

Anyone can make a referral to the reporter, but in practice most referrals are made by the police (SCRA 2009). The reporter investigates and decides whether a hearing is required. This decision is based on whether there is sufficient evidence that a statutory ground for referral has been met and if so, whether compulsory measures of supervision are needed. If a hearing is required, the reporter arranges one and three members of the local children’s panel are selected to form the hearing (the Bill proposes that they will only have to be from the local area ‘as far as practicable’).

The child and relevant persons have a duty to attend a hearing unless they are excused. They also have a right to attend. Relevant persons are those with parental responsibilities and rights.

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4 Local Authorities can establish joint CPACs
5 although the relevant person can be excluded temporarily from a hearing
and those who, other than by reason of employment, ordinarily have charge or control of a child. At the hearing, the grounds for the referral must either be accepted by the relevant persons and child or established by the sheriff in order to proceed.

In considering the case, everyone should have the opportunity to participate freely. If necessary, a relevant person can be temporarily excluded if this is needed to allow the child to express his or her views or to prevent distress to the child. A safeguarder, whose role is to protect the child’s interests, can be appointed at any time during the hearings process. A child or relevant person can be represented at a hearing and there is state funding available in particular circumstances for legal representation. A scheme for children has been available since 2002 and this was extended to relevant persons in June 2009.

Once the case has been considered the hearing can; continue the case (i.e. defer decision to a later hearing), discharge the referral, refer to restorative justice (if child aged 8 to 17 and referred on an offence ground) or make a supervision requirement (re-named ‘compulsory supervision orders’ in the Bill). A supervision requirement can set out where the child is to live and with whom he or she will have contact. It can have any condition attached to it including, authorising placement in secure accommodation, requiring a medical examination or a ‘movement restriction condition’ (electronic tagging) and imposes duties on the relevant local authority. It can be reviewed at any time and will cease to have effect unless it is reviewed within a year.

The local authority must implement a supervision requirement. If it does not do so, the hearing can ask the reporter to apply to the sheriff principal for an enforcement order.

Appeals can be made by the child (where considered to have the capacity) or relevant person to the sheriff and then to sheriff principal or Court of Session. (The Bill adds a right of appeal for the safeguarder).

Although the above gives an outline, the detail of the hearings system is quite complex. For example, in addition to the above, it provides for the emergency protection of children through consideration of child protection orders and for various warrants and orders for the removal of children to a place of safety or for a medical assessment. There are strict time limits with regard to the detention of children which vary according to the circumstances in which an order is sought. Part of the complexity is a result of the need to ensure that emergency protection or any detention of a child is followed up timeously with full consideration of the child’s needs.

STATISTICS

Around 5% of all children were referred to the reporter in 2008/09, most of them on non-offence grounds. Of the 47,178 children referred, 39,105 were referred on non-offence grounds and 11,805 on offence grounds.6

There were 83,742 individual referrals to the reporter in respect of those 47,178 children (88% of them from the police). While the number of children referred has declined since 2006/07, this follows a dramatic rise in the previous 10 years. In 1997/98 the number of children referred on offence and non-offence grounds had been similar at around 15,000 each. The number of children referred on offence grounds reached a peak of 17,641 in 2005/06 but has since declined. Children referred on non-offence grounds reached a peak of 44,629 in 2006 although this too has started to decline in the last two reporting years (SCRA 2009 and on-line).

In the majority of cases the reporter decides that a hearing is not necessary. In these situations the reporter can refer the child to the local authority so that assistance can be given on a voluntary basis. Of cases decided in 2008/09, only 14.2% of children referred to the reporter had a hearing arranged. The four most common grounds for referrals in 2008/09 are set out in the table below:

6 some children will have been referred on both offence and non-offence grounds.
Table 1: Most common grounds of referral to the reporter 2008/09

<table>
<thead>
<tr>
<th>Number of children</th>
<th>Ground</th>
<th>Further breakdown</th>
</tr>
</thead>
<tbody>
<tr>
<td>18,621</td>
<td>victim of schedule 1 offence</td>
<td>of which, 17,234 are under s.12 of Children and Young Persons (Scotland) Act 1937 - child victim of ill treatment, abandonment, neglect and exposure</td>
</tr>
<tr>
<td>15,320</td>
<td>lack of parental care</td>
<td>particularly younger children – 19.4% under two years</td>
</tr>
<tr>
<td>11,805</td>
<td>allegedly committed an offence</td>
<td>of the 42,146 offences alleged</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8,963 were breach of the peace</td>
</tr>
<tr>
<td></td>
<td></td>
<td>8,864 were vandalism/malicious mischief, and</td>
</tr>
<tr>
<td></td>
<td></td>
<td>7,582 were assault</td>
</tr>
<tr>
<td>4,433</td>
<td>beyond the control of any relevant person</td>
<td>particularly 13 to 16 year olds</td>
</tr>
</tbody>
</table>

Source: Tables 5, 6 and 7 plus figs 9 and 10 SCRA 2009

Although the number of referrals is falling, the number of hearings is increasing – from 38,734 in 2005/06 to 42,866 in 2008/09. Most hearings are actually review hearings (63% in 2008/09) with only 16% of hearings in 2008/09 relating to new grounds.

Referrals on non-offence grounds take twice as long to deal with as referrals on offence grounds. The average time taken from receipt of referral to hearing decision in 2008/09 was 64 days for offence grounds and 120 days for non-offence grounds.

Where grounds are not accepted or understood the hearing applies to the sheriff for proof. In 2008/09, there were around 4,000 such applications. Nearly two thirds (64% or 2,584 applications) occurred because the child didn’t understand the grounds and they were also denied by the relevant person. There were 581 applications when the child didn’t understand the grounds but they were accepted by the relevant person. The Bill proposes a quicker procedure in this latter situation.

Hearings can make a number of decisions, the main one being whether or not to impose a supervision requirement. Other decisions include authorising the child to be detained in a place of safety, reviewing a child protection order and authorising the placing of the child in secure accommodation.\(^7\) The following lists the main decisions made in 2008/09:

- new supervision requirements 4,471 (most often 14 and 15 year olds)
- place of safety warrants 2,078 (most often children under one year of age)
- child protection orders considered 661
- secure authorisations 347

While very few hearing decisions are appealed, the number has been increasing in recent years. In 2008/09 there were 592 appeals to the sheriff about children’s hearings, with the hearing decision upheld in 65% of cases (SCRA 2009).

POLICY DEVELOPMENT

The Bill follows a number of different sets of proposals starting with the review of the children’s hearings system in 2004 and culminating in the draft Children’s Hearings (Scotland) Bill published in June 2009. Proposals have been made in:

\(^7\) This is done as a condition on a supervision requirement or a warrant
• 2004 Review of Children’s Hearings, Phase 1 - requested views on broad themes and key principles (Scottish Executive 2004).

• 2005 Getting it Right for Every Child: Proposals for Action - linked children’s hearings to the broader agenda of Getting it Right for Every Child (GIRFEC) and invited views on whether there should be a national or regional structure for panel support (Scottish Executive 2005).

• 2006 draft Children’s Services (Scotland) Bill - based on Proposals for Action (see above) and was much broader than just reforming the children’s hearings system. Part 1 sought to place a duty on a wide range of public agencies to collaborate in addressing children’s needs. Part 2 proposed changes to the children’s hearings system. There was an analysis of responses but due to the 2007 election, a Bill was never introduced (Scottish Executive 2006a).

• 2008 Strengthening for the Future – the main proposal was for a national body to coordinate the hearings system, bringing together the SCRA, CPACs, the 32 children’s panels, the safeguarders’ panel and the functions of Scottish Ministers and local authorities with regard to training and recruitment of panel members (Scottish Government 2008).

• 2009 Children’s Hearings (Scotland) Draft Bill - the main proposal was a new national body to take on the function of recruiting and training panel members and arranging hearings. This Bill also re-stated the legislation on children’s hearings (Scottish Government 2009a).

The following sets out the main proposals in consultations and draft legislation since 2006 and indicates in bold whether the change is taken forward in the current Bill. The main proposals in part 2 of the draft Children’s Services Bill (Scotland) 2006 were:

• not restricting panel members to their own local authority area

• a statutory scheme for children’s legal representation

• enabling a reporter to liberate the child from detention in the place of safety while continuing to investigate and decide whether to arrange a hearing

• hearings to have a power to withhold information, if its disclosure would be harmful to a child

• changing the grounds of referral and providing that children should only be referred if they have unmet needs with respect to well-being

• provision for a quicker process for establishing grounds where it has to go to the sheriff because the child does not understand the grounds

• introduction of interim supervision requirements

• a power for hearings to impose duties on agencies other than the local authority relating to the implementation of supervision requirements

• removal of the discretion of the manager of secure accommodation and the Chief Social Worker in relation to whether a child should be placed in secure accommodation

• some simplification of warrants and orders

The main new proposals in Strengthening for the Future (2008) were:

• establish an NDPB, (The Children’s Hearings Agency), to bring together into a single body the functions of the 32 children’s panels, the SCRA, the safeguarders’ panels, CPACs, and the relevant functions of local authorities and Scottish Ministers.

• inviting views on taking forward the interim scheme for children’s legal representation.
• general proposal to streamline the grounds for referral. Specific changes were not suggested
• child to be given the hearing papers unless this would cause them harm (current provision is not statutory)

The main new proposals in the draft Children’s Hearings (Scotland) Bill 2009 were:

• a complete re-statement of the legislation on children’s hearings
• establishing an NDPB, the Scottish Children’s Hearings Tribunal to bring together the 32 children’s panels and deal with the administration of hearings. This included transferring many of the reporter’s functions to the new body.
• re-wording and re-ordering of grounds
• revision of orders and warrants

THE NEED FOR CHANGE

The changes in structure are primarily intended to improve consistency. The policy memorandum refers to a lack of clear accountability (para 80) and an ‘unacceptable variety of practice’ in paying expenses (para 81). Previous attempts to standardised training have proved ineffective (para 79) and “the quality of training is crucial in moving forward with this reform agenda.” (PM para 61) The number of appeals is small but increasing. There were less than 500 appeals in 06/07 but 592 in 2008/09. While the need to make structural changes was identified early in the reform process, the actual proposals have altered considerably as they have developed. Key issues of contention have been the balance between local and national organisation and the role of the reporter.

In 2004, Phase 1 of the children’s hearings consultation showed that: “the system was under strain as panel members were often poorly supported and were frustrated when their decisions were not always acted upon.” (Scottish Executive 2004) In 2008, Strengthening for the Future stated that: “support for panel members varies enormously between the 32 local areas” which can: “adversely affect the quality of panel member practice” (Scottish Government 2008). While the local link is valued, this 2008 consultation referred to: “the behaviours generated by an over-dependence on local support and the absence of underpinning standards.” It also stated that the current system is overly complex and has unclear accountabilities.

CONSULTATION AND CHANGES TO PROPOSALS

In 2005, the Scottish Executive consulted on whether there should be regional bodies or a national system for standards and administration (Scottish Executive 2005). It proposed that children’s panel boundaries would not be linked to local authority boundaries, that panel members and CPACs would not be Ministerial appointments and that there would be new arrangements to oversee standards and procedures.

Nearly a third (32%) of respondents to the 2005 consultation opposed allowing panel members to sit in other local authority areas. The strongest opposition was from CPACs and panel members (Scottish Executive 2006b para 5.40). There was concern amongst both supporters and opposers that any change should not diminish the link between panel members and their local community and local authority. While many acknowledged the need for greater flexibility, national standards and improved training many felt this could be achieved through improving the way the current structure worked rather than introducing a new structure. At that time, the proposal for a national body was supported by 40% of respondents.

Strengthening for the Future (2008) proposed a national body to bring together the functions of the SCRA, the CPACs, the 32 children’s panels, 32 safeguarders’ panels and possibly legal
representation into one organisation. This would also take on the functions of Scottish Ministers and local authorities in relation to appointment, recruitment, training and paying expenses. Scottish Ministers would retain general policy oversight and local authorities would retain their role in implementing decisions and have a greater role in promoting the system locally. The new body would be called the Children’s Hearings Agency. The President of the Children’s Panel, Principal Reporter and Chief Executive Officer would be employed by the Board of this agency.

The consultation analysis referred to a number of concerns with these proposals, although it did not quantify these. It did however refer to ‘serious concerns’ that the SCRA should remain a separate body and reiteration of previous views that any changes must not be at the expense of local decision-making and delivery. There were ‘many’ views that the proposals to prevent conflict of interest between the different functions of the new body would not be adequate (Scottish Government 2009d).

In April 2009, the Scottish Government announced a change to the proposals. The body would now be called the Scottish Children’s Hearings Tribunal and its functions would relate to Children’s Panels. The SCRA would remain separate and local authorities would continue to manage the provision of safeguarders. Panel members would continue to be recruited, selected, trained and sit on hearings on a local basis (Scottish Parliament 2009a).

Following this announcement, a draft Children’s Hearings (Scotland) Bill was published in June 2009 (Scottish Government 2009a). This proposed an NDPB, the Scottish Children’s Hearing Tribunal to take on the functions of supporting children’s panels. It also made a new proposal that this new body would take on certain functions which currently lie with reporters. These were: arranging the hearing, providing accommodation and facilities, advising the hearing on procedure, warrants and orders and taking a record of business meetings and hearings.

While there wasn’t a formal consultation process or analysis of responses to this draft Bill, the Scottish Government held events to discuss the proposals. They also established five working groups (Scottish Government 2009e). The group on organisational support considered changes to the structure of the system. The ‘child at the centre’ group considered how best to ensure that children’s rights were reflected in the Bill and a ‘virtual’ working group looked at the detail of the Bill. The other two groups were on training and implementation. There was also stakeholder representation on the strategic project board including COSLA, SCRA, Children’s Panel Chairmen’s Group (CPCG), Children’s Panel Advisory Group (CPAG), Scottish Association of Children’s Panels (SACP), Association of the Directors of Social Work (ADSW), Association of Chief Police Officers in Scotland (ACPOS), Administrative Justice and Tribunals Council (AJTC), and NHS Grampian (Scottish Government 2009b).

There were a great many comments on the changes to the reporter’s role. There were concerns that moving some reporter functions to the new body would remove the continuity of involvement which the reporter has with the child and family. (It is the reporter who investigates, arranges a hearing, is present at the hearing and represents the hearing at the Sheriff Court). The draft Bill had also proposed a new role of ‘hearing adviser’ as a way to deal with potential conflict of interest in the reporter investigating a case and advising the hearing. This was opposed as respondents thought it would only add to the number of adults attending.

The working group on ‘organisational support’ agreed that at a national level there should be: a children’s panel and NDPB to support it, a recruitment campaign and training standards. Interviewing, appointment and delivery of training should be at a local level. However, there was no consensus on how support should actually be delivered locally, for example whether it should be locally or centrally managed, how quality assurance should be arranged and where responsibility for safeguarders should lie (Scottish Government 2009f).

Subsequent to these discussions, the Bill as introduced provides for a national body with a National Convener to appoint and support panel members, does not fundamentally change the role of the reporter and leaves the appointment of safeguarder panels with local authorities.
Some submissions to the Committee\(^8\) saw scope for improvement but no need to change the whole system. Angus and East Ayrshire thought the Bill created an additional layer of bureaucracy. East Lothian and Renfrewshire suggested that national standards and monitoring would be enough. CPAG and the East Renfrewshire panel and CPACs (East Renfrewshire) supported a small, ‘light touch’ body. CPCG said 10% of their members did not support the Bill. COSLA does not believe that the proposals are necessary and is unclear how they improve the links between the hearings system and local authorities.

However, most responses supported the new structure. For example CPCG said that lack of consistent support for volunteers had been a significant issue in the past. CHTO, West Lothian and South Ayrshire thought the changes would increase consistency and quality.

**STRUCTURAL CHANGES**

As mentioned, there have been various different proposals for the establishment of a national body over the past few years. The following sets out the current proposals in more detail. Part 1 of the Bill provides for the major change - the establishment of a new NDPB ‘Children’s Hearings Scotland’ with five to eight board members headed by a National Convener.

**THE NATIONAL CONVENER**

The National Convener is to be appointed by members of Children’s Hearings Scotland, with the approval of Scottish Ministers (sch 1 para 8), although the first appointment will be by Ministers (s1). The post’s functions will be:

- to recruit and appoint panel members (sch 2 para 1 and s.4), publish a list of panel members (sch 2 para 2) and select members for hearings (s6), who between them must be from all 32 local authority areas (s4). These functions are currently shared between local authorities, CPACs and Scottish Ministers.

- to train, monitor the performance of and pay allowances to panel members (sch 2 para 3 and 4). Training is currently organised both nationally and locally and expenses are paid by local authorities. The National Convener will take responsibility for quality assurance of panel member performance (Policy Memorandum (PM) para 58).

- to appoint committees known as Area Support Teams (sch 1, para 12). Their functions are very similar to CPACs.

- to give advice at hearings (s9). The potential conflict of interest in the provision of advice to hearings has been much debated and is discussed further at p16.

Functions which can be delegated to Area Support Teams include the selection of members for a hearing and recruitment (sch 1 para 13). The explanatory notes suggest that functions might be delegated to employees of Children’s Hearings Scotland, volunteers or other members of local area support teams such as local authority representatives (Ex Notes para 324). Some functions cannot be delegated to Area Support teams. These are provision of advice and functions relating to appointment of panel members. The National Convener cannot delegate any functions to the Principal Reporter, the SCRA or a local authority. In particular, the provision of advice cannot be delegated to an employee of the SCRA or a local authority (sch 1 para 10 (4)).

The Bill provides at s.12 that no person can direct or guide the National Convener in the carrying out of his or her functions. This is however subject to regulations under s.10 by which Scottish Ministers can specify the manner in which, or period within which a function is to be performed.

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\(^{8}\) CPAG, East Lothian, East Renfrewshire panel and CPAC, North Lanarkshire, Renfrewshire and COSLA
carried out. The policy memorandum notes the importance of independence and states that this power: “will not be used to influence individual decision-making” (PM para 66).

AREA SUPPORT TEAMS

The National Convener must appoint committees known as Area Support Teams (sch 1 para 12). These will take on the functions currently provided by CPACs and local panel chairs (PM para 88). The geographical areas to be covered by each team will be decided in consultation with local authorities who can also nominate members (sch 1 para 12). The Explanatory Notes suggest at para 324 that Area Support Teams will include local authority representation and volunteers, but this isn’t specified in the Bill. Following consultation with local authorities, the National Convener can delegate some functions to the Area Support Teams including recruitment and selection of panel members for a hearing and can issue directions about how these functions are to be carried out (sch 1 para 13). However the National Convener cannot delegate the provision of advice to hearings or the appointment and removal of panel members to area support teams (sch 1 para 13).

THE CHILDREN’S PANEL

There are currently 2,422 children’s panel members in Scotland (PM para 143). At present, each local authority area must establish a children’s panel from which to select the members of a children’s hearing. The Bill proposes that a single children’s panel is established by the National Convener (s4). Panel members will no longer be appointed by Ministers on the advice of CPACs but by the National Convener (sch 2 para 1). As at present, a Children’s Hearing will have to include both male and female panel members and one member will be appointed Chair (s6). However, whereas at present all members are required to be from the relevant local authority area, the Bill introduces a degree of flexibility to this, requiring that: “so far as practicable, [a hearing] consists only of members” who live and work in the relevant local authority area (s6(2)(b)). SACP and Clan Child Law suggested in evidence to the Committee that panel members should only sit outside their local authority area in exceptional circumstances. East Renfrewshire panel suggested that panel members should have the choice whether to sit in other areas.

SCOTTISH CHILDREN’S REPORTER ADMINISTRATION (SCRA)

Unlike in previous proposals, the functions of the SCRA and the Principal Reporter do not change much although the Bill does provide power for Ministers to change the functions of the Principal Reporter by affirmative regulation (s17). While the Bill does not change the reporter’s role, their practice has been altered recently in order to ensure compliance with ECHR (see discussion below). Although the SCRA is legally separate from Children’s Hearings Scotland (CHS), discussions are ongoing with SCRA about sharing services such as human resources, ICT and finance services (FM para 424).

SAFEGUARDERS

Part 4 of the Bill requires each local authority to establish a national panel of Safeguarders with the detail to be set out in regulations. A number of submissions to the Committee suggested that there should be some kind of national framework for safeguarders. SCRA stated that there was widespread dissatisfaction with the current situation which had no proper regulation or national oversight. Children’s Hearing Training Officers (CHTO), East Renfrewshire panel and CPAC (East Renfrewshire) and West Lothian suggested a national panel whereas ADSW and CPAG suggested national recruitment and administration. Glasgow and Inverclyde suggested national standards. While CPCG was happy to leave control to local authorities they suggested...
a ‘principal safeguarder’ to provide training and support. The Law Society and the Scottish Child Law Centre (SCLC) proposed the implementation of Lord Gill’s recommendations in this regard\(^9\). These related to the appointment, recruitment, training, remuneration and quality assurance of safeguarders, curators ad litem and reporters.

**FUNCTIONS OF SCOTTISH MINISTERS AND LOCAL AUTHORITIES**

Scottish Ministers will no longer run the national recruitment campaign, arrange national training or appoint panel members. This leaves them with a general oversight of the whole system and power to change the functions of the National Convener via affirmative regulations.

Local authorities will no longer be required to establish children’s panels or CPACs. This leaves them with the statutory functions of appointing a panel of safeguarders (s.30) and implementing hearing decisions. The Bill gives them the new statutory functions of: nominating members of Area Support Teams, being consulted by the National Convener on the establishment of Area Support Teams and on the delegation of functions to them (sch 1 para 12 and 13) and providing information to the National Convener about the implementation of hearing decisions (s.173).

It is expected that local authorities will continue to provide “accommodation, administrative support and support for recruitment of panel members” (FM para 445). These functions are not specified in the Bill. They aren’t specified in the 1995 Act either, but might be considered to flow from the duties to establish panels and CPACs which the current Bill removes.

In its submission to the Committee, COSLA described the proposed role of local authorities and ASTs as very confused and considered that the proposals weaken the local connection. They objected to the extent of powers granted the National Convener and suggested that the role be restricted to advocating for panel members, providing advice, training and expenses and leading the development of national standards.

**IMPLEMENTATION OF HEARING DECISIONS BY LOCAL AUTHORITIES**

Under s70 of the 1995 Act, local authorities must implement a supervision requirement and this duty is replicated in s138 of the Bill. A common concern of panel members is that they do not know whether or how local authorities comply with this. At s173, the Bill enables the National Convener to require information from local authorities about the implementation of these orders which can then be passed on to panel members. This will not be specific information on each case but generalised information such as policy statements, statistics and general information about how the local authority goes about implementing compulsory supervision orders (PM para 426-7).

In addition, the Bill makes a slight change to existing powers for enforcing local authority implementation of supervision requirements. Since 2004 hearings have been able to request that the reporter seek enforcement from the sheriff principal. The reporter therefore has discretion whether to comply with this request. The reporter must first give notice to the local authority and can only proceed if they continue to fail to implement the duty. If they do fail to implement it, then the sheriff principal can require the local authority to perform the duty in question (s71A 1995 Act). It seems that these provisions have been little used. There have been 10 cases of serving a notice and all have been complied with without the need to apply to the sheriff principal (PM para 307). Sections 140-42 restate these provisions but transfer the function of the reporter to the National Convener and remove the discretionary element.

There was considerable comment in submissions to the Committee on the duty of local authorities to implement hearing decisions and the enforcement and monitoring of this. In general, while children’s organisations welcomed these provisions local authorities were concerned about the implications of s140(7) which requires that a hearing does not consider the

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financial means available for implementation. Some submissions asked for the National Convener to have discretion whether to pursue a local authority. There was also much comment particularly with reference to GIRFEC on the absence of any implementation or information duties on other agencies which provide services to children such as the NHS.

FINANCIAL MEMORANDUM

The financial memorandum (FM) estimates the cost of the system as around £32m and that the Bill will add £2.51m to this. The main expense of the system is the SCRA which receives grant in aid of £26.19m and this will not change. Nor will there be any change to the £3m estimated spend by local authorities on supporting hearings. Nearly all the costs of the Bill relate to the provisions for changed structure.

The main funding implication is Children’s Hearings Scotland which will cost around £4.5m a year to run. The main increases in costs created through its establishment are the provision of expenses to panel members and area support teams at a total of nearly £1m and the provision of staff and corporate services for Children’s Hearings Scotland also around £1m (table 2, financial memorandum). This will be partially offset by a reduction in Government staff costs.

As discussed above, local authorities will lose some functions but will gain a requirement to provide information. This cost will be met by savings in expenses payments and the cost of training which will pass to the National Convener. On the understanding that local authorities will continue to provide local support to the hearings system, they will retain the £3m which they currently spend on matters such as CPACs, expenses and local training. However, the financial memorandum notes that if they do not continue to support the hearings system, this cost will need to be met by Scottish Government (FM para 402).

The other main cost in the Bill is the increased budget for legal representation from £300,000 to £441,000 (see below p18). However, it is not clear whether this increase is directly a result of the Bill or would have been required anyway if the current scheme continued.

HUMAN RIGHTS AND CHILDREN’S HEARINGS

Two key policy objectives of the Bill are to place children’s rights at the heart of the system and to ensure that the Bill meets human rights requirements now and in the future. The two most relevant conventions are the United Nations Convention on the Rights of the Child (UNCRC) and the European Convention on Human Rights (ECHR). The key provisions relate to the best interests of the child (art 3, UNCRC) the views of the child (art 12, UNCRC), the right to a fair trial (art 6 of ECHR), rights in relation to deprivation of liberty (art. 5, ECHR) and the protection of family life (art 8, ECHR). Whereas the ECHR has been incorporated into UK law through the Human Rights Act 1998, UNCRC has not. Therefore, while some provisions and principles in UNCRC are reflected in domestic legislation (such as having regard to the views of the child), it is not possible to bring a case directly on breach of the UNCRC itself. See annex 1 for more detail. Proposals in the Bill where human rights issues are particularly relevant include:

- providing for rules to give children and relevant persons a right to attend the pre-hearing panel
- provision for someone to seek a decision about whether they are a relevant person
- providing for regulations to provide documents to children
- providing for the National Convener to give independent advice to a hearing

10 ADSW, Barnardos, Glasgow, Inverclyde, Renfrewshire, West Lothian and East Ayrshire
11 ADSW, East Lothian, Highland CPC, ADES, Inverclyde, North Ayrshire and COSLA
• the proposal that information provided by the child will not be passed on to relevant persons if to do so might harm the child
• providing for a clearer process for decisions about secure care and new right of appeal
• provision of a permanent scheme for legal representation for relevant persons and children through legal aid

ENABLING CHILDREN TO EXPRESS THEIR VIEWS

Responses to the 2009 draft Bill suggested that further action was required to “ensure better participation in the system by children and young people” (Scottish Government 2009e). The child at the centre working group’s recommendations included:

• a statutory right for children to receive advocacy support. This was not taken up by the Government (Scottish Government 2009g).
• the ability to withhold information given by the child if its release could harm the child (see discussion below).
• the removal of the right of the press and AJTC to observe hearings. This was not taken up by the Government.

The Government has agreed that it will develop guidance on ensuring that legal representatives are suitable for children, that reports include the child’s views and that children attend hearings. It will also improve training materials relating to communicating with children. Some submissions to the Committee recommended that children at a hearing should be offered free, independent advocacy. While Children 1st and Who Cares Scotland would like to see it in the Bill, the Children’s Commissioner accepts that further development work is required but would like more details as soon as possible on the Government’s thinking in this area.

RIGHT TO ATTEND A PRE-HEARING PANEL

Part 8 of the Bill changes the name of the ‘business meeting’ to a ‘pre-hearing panel.’ Secondary legislation under s170 will be able to give the child and relevant person notification of these meetings and the opportunity to attend. This reflects the principle under Article 6 that there is a right to attend civil proceedings where serious issues are at stake and also reflects the SCRA practice guidance of September 2009 that a reporter and a hearing should not have private discussions. No consultation has taken place on this issue (PM para 238).

DECIDING WHO IS A RELEVANT PERSON

Part 8 of the Bill introduces at s78 a right for a person to argue that they should be considered a relevant person. At present, this is a decision the business meeting can make, but there is no requirement for them to consider a request for this. The existing criteria are that someone has parental responsibilities and rights (PRR) or is “ordinarily in charge or control of a child (except through employment)”. The policy memorandum refers to some mixed opinion about whether a person with PRRs under s11(2)(d) of the 1995 Act should automatically be considered a relevant person (PM para 472). This tends to affect unmarried fathers (unless they are named on a birth certificate dated 2006 or later). The Bill provides at s185(1) who automatically has relevant person status. This includes: someone with PRRs under Part 1 of the 1995 Act or through a permanence order under the Adoption and Children (Scotland) Act 2007. Having a contact order under s11(2)(d) or a specific issue order under s11(2)(e) alone is not sufficient to qualify automatically for relevant person status (s.185(2)). However, under s.78 anyone can

12 Barnardos, Children 1st, CPCG, Children’s Commissioner and Who Cares Scotland
make a case to the pre-hearing panel that they should be considered a relevant person on the
grounds that they have recently had significant involvement in the upbringing of the child. As at
present, the hearing is not bound by the decisions of the pre-hearing (PM 231).

This change was not consulted on (PM para 238). In submissions to the Committee there were
a number of concerns with the new definition; particularly that ‘significant involvement’ with the
child is too broad. SCRA recognised that it gives someone wide ranging rights and suggested
a middle ground where involvement of others could be allowed without giving them full relevant
person rights.

PROVISION OF DOCUMENTS

A key ECHR principle is the ability to participate effectively in proceedings. The right of parents
to receive reports was settled in McMichael v UK 1995. The provision of documents to children
arose in S v Miller 2001, following which a non-statutory scheme was introduced. In the current
scheme, children over 12 are sent the same documents as everyone else, although information
can be taken out if it would cause distress. Children under 12 are only sent documents if the
child or their representative requests them (PM para 45).

The proposal for a statutory scheme was made in Strengthening for the Future and received
almost unanimous support (96%). The current rules provide that parents and relevant persons
receive documents (rule 5.3 1996 rules). At section 170 the Bill enables the rules to include
provision of documents to children. In his submission to the Committee, the Children’s
Commissioner asked for this to be on the face of the Bill.

REPORTER GIVING ADVICE TO HEARINGS

One area of concern has been the potential conflict of interest in the reporter’s role. Under
article 6(1) the children’s hearing must act as an independent and impartial tribunal. Reporters
had been offering legal and procedural advice to a hearing although this role is not provided for
in legislation. This could risk ECHR challenge because it could be considered a conflict of
interest to have the same person investigate and bring a case and then also advise those
deciding a case. To address this, a practice note issued by the principal reporter in September
2009 stated that the reporter can point out procedural irregularities, but: “a tribunal is not
independent and impartial if it relies on the advice of an adversary, or party, in the proceedings”. In
addition, private discussion between the panel and the hearing should be minimised:

“Any contact which does take place must not involve discussion of the substance of the
case, must maintain the overall ECHR compatibility of the children’s hearing system,
must be as limited as possible and must be made as transparent as possible.”

The practice note set out situations where a reporter can bring certain issues to the hearing’s
attention. For example:

- if the hearing has not discussed a material issue
- if a panel member has not given reasons for their decision, the decision is unclear or
  incompetent
- if the hearing has failed to ask for someone’s views on a material issue

While the Bill does not prohibit reporters from giving advice at hearings, the guidance issued in
September makes clear how limited that role is. The Bill does however, at s9, provide for the
National Convener to advise hearings. The policy memorandum refers to advice being provided
through written guidance, on-line advice, telephone discussion or in person by a legal adviser.
It is expected that reference materials will be the first source of advice “and that reference to the

13 Barnardos, CPCG, SCRA, UNISON, South Ayrshire
advice service would therefore also be limited to complex cases” (FM para 442). The need for advice is “seen as an interim measure […] until such time as the improved training for all panel members has built capacity and understanding” (FM para 440). Costs are estimated at £100,000 pa (FM table 2) based on three times the cost of the SCRA helpline run for reporters (FM para 441). In submissions to the Committee, there were a number of concerns about how the National Convener would, in practice, give advice to Hearings.  

WITHHOLDING INFORMATION

Another provision which raises ECHR issues is the proposal at s171 to withhold information from a relevant person if releasing it would be significantly against the interests of the child. This raises the important problem of how best to balance adult and children’s rights within the system. Currently, a person can be excluded from a hearing in order to avoid distress to the child. However, the excluded person must be told the substance of what is said in their absence, (s46(2) 1995 Act) so nothing can be completely confidential. The policy memorandum states that: “we know that in certain circumstances this deters children from informing the hearing about events in their life (e.g. emotional abuse) or from giving the hearing the true reason for their behaviour” (PM para 407).

This proposal was originally consulted on in 2005, with 90% of respondents supporting it. Some qualified their support with concerns about ECHR implications. It was consulted on again in Strengthening for the Future in 2008 when 68% of respondents supported the proposal and a further 18% expressed qualified support. Thirteen per cent of respondents (27) clearly disagreed. The provision was not in the 2009 draft Bill but was reinstated at the request of children’s organisations (PM para 414).

Article 8 requires procedural fairness where important decisions affecting family life are made. Although the relevant person is not ‘on trial’, the hearing can make decisions which could lead to their child being placed in care. The policy memorandum states that where the information is material to the hearing’s consideration, it may require to be disclosed in order to enable parties to exercise their right to appeal (PM para 410). However, this is not provided for explicitly.

The provision for information to be withheld was welcomed by the Children’s Commissioner, Who Cares and Children 1st. Others had concerns about the relevant persons’ rights. Cl@n Child Law and SACP said it might raise appeal issues, the Law Society referred to cases which call into question whether it breaches ECHR and the SCRA said that it should be made clear that if information forms part of the reasons for the decision, then it should be disclosed.

SECURE CARE AUTHORISATIONS

In 2008/09 there were 347 secure authorisations made by hearings, 164 as a condition of a supervision requirement and 183 as a condition of a warrant (SCRA 2009). Although the hearing authorises the placement, the final decision to place a child is with the Chief Social Worker and residential care manager. They are not required to give reasons and some local authorities do not keep a detailed audit trail of their decision making process (PM para 355). An estimated 60 to 70% of authorisations result in placement (PM para 3343). The policy memorandum refers to “a concern that discretion, while valuable, is not applied consistently, and not always in the best interests of the child” (PM para 338).

The Bill retains local authority discretion but provides for regulations which would introduce more transparency to the decision making process. The draft Children’s Services Bill in 2006 had proposed removing the element of discretion but the policy memorandum to the current Bill argues against this, partly because: “circumstances in children’s lives can change very quickly

14 CPCG, Cl@n Child Law, CHTO, Children’s Commissioner and South Ayrshire
15 i.e. a warrant to find and detain a child in a place of safety
and practitioners feel strongly that they need to retain flexibility in order to capitalise on any positive elements and protective factors they can” (PM para 358). Removing discretion would increase numbers in secure care and this is both costly and against government policy of reducing the use of secure (PM para 359).

The Chief Social Worker takes an administrative rather than a judicial or quasi-judicial decision. It is not the decision of a tribunal. In some cases, administrative decision making can meet article 6 requirements for a fair trial if there is a sufficient right of review or appeal (Simor and Emmerson 2005 at para 6.106). The current provision for appeal is that any decision of a hearing can be appealed (s51 (5) 1995 Act), which suggests that the decision to authorise secure care can be appealed. Currently, there is no right of appeal against the decision of the local authority. However, the Bill provides a right of appeal for both the hearing authorisation (s148) and the local authority decision (s156) (PM para 375).

LEGAL REPRESENTATION

Currently, state funded legal advice is available (under advice and assistance scheme) to the child and relevant person, if they are financially eligible both before and after the hearing. An interim Government scheme, the Children's Legal Representation Grant Scheme provides state funded legal representation during a hearing without applying a means test. Legal aid may be available for proceedings before the sheriff and subsequent appeals subject to eligibility.

Part 19 of the Bill proposes to extend legal aid to cover children and relevant persons at hearings. This will replace the current Government scheme and reflects the Scottish Legal Aid Board's (SLAB) response to Strengthening for the Future which proposed: “a more rationalised single scheme to remunerate solicitors which would ensure greater consistency and clarity”. The Bill therefore at s178, inserts new Parts 5A and 5B into the Legal Aid (Scotland) Act 1986. SLAB would be responsible for making decisions on support and ensuring sufficient numbers of appropriately qualified solicitors are available. The Bill provides for SLAB to establish a register of solicitors eligible to provide children’s legal assistance, a Code of Practice and a duty to monitor compliance with that Code (s178 inserting new s.28N).

It has always been possible to have self-funded legal representation but it is only since 2002 (for children) and June 2009 (for relevant persons) that there has been a scheme for state funded representation. In the six months to 30 September 2009 there were 507 applications for legal representation for children and in the three months to December 2009 there were 124 applications for relevant persons. The financial memorandum therefore estimates an annual demand of 1020 legal representatives for children and 500 for relevant persons. This increases the budget from the current £300,000 to £441,000 (FM para 451).

An evaluation of the interim children’s scheme in 2009 found variation in the way the scheme was administered between local areas, some lack of clarity about when a lawyer needed to be appointed and barriers to lawyers taking on cases including: low fees, short notice and long distance to travel to rural areas. The policy memorandum refers to the current arrangements as “not ideal in terms of demonstrable fairness and independence” because local authorities have an interest in the cases, are responsible for identifying solicitors and are not “well placed to ensure good quality representation” (PM para 440).

The Government scheme was introduced in order to comply with article 6 ECHR. This followed the 2001 case of S v Miller involving a 15 year old before the hearing on the offence ground. Although he had legal advice and assistance before the hearing and legal aid for legal representation at the appeal to the sheriff, he did not have legal representation at the hearing itself. The court found that:

“the lack of free legal representation before the hearing might well significantly impair the child’s ability to affect the outcome of the hearing. In any event, the child would not
receive a fair hearing within the meaning of Article 6(1) before the children’s hearing. (…) It is not sufficient that legal aid would be available on appeal to the sheriff (paras 38-39).

In 2009, SK v Paterson came to a similar conclusion with regard to a mother whose baby was placed in foster care. As the mother had the cognitive abilities of a child under 10 years of age it was found that without legal representation she would not be able to participate effectively in the hearing. The court found that the absence of any state funded legal representation for relevant persons was “an inbuilt systematic flaw in the system”:

“We recognise that in proceedings before a children’s hearing, the rights and obligations of a child’s parent are different from those of the child who is the subject of the referral. However, the rights of a parent during any hearing where that parent’s civil rights are determined include the protection of a fair hearing afforded by Article 6. In these circumstances, we agree that the absence of any statutory provision entitling state-funded legal representation to be made available to relevant persons whose civil rights would be determined at a children’s hearing, but who would be unable, without such representation, to participate effectively during it, amounted to an inbuilt systematic flaw in the legal aid scheme as it applied to the children’s hearing.” (para 60)

Prior to the decision in SK v Paterson the Scottish Government accepted that legal representation needed to be provided to relevant persons in some circumstances. This led to the introduction of the Children’s Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211) which amended the 2002 Rules. Concerns were raised with MSPs particularly by the chairs of Scotland’s children’s panels. These included concern that:

- the measures would introduce a more legalistic approach
- there could be a large number of cases affected
- the criteria used in the rules may not be the best way to deal with the issue
- it was a move away from the child centred nature of the system
- the rules were being introduced without consultation

A motion to annul the rules was defeated in the Scottish Parliament 65 votes to 60 with one abstention. 16

Legal Aid at the hearing

The Bill makes changes to the criteria for appointment of legal representatives. Legal aid will be available for certain types of hearings automatically and there is provision to extend this through regulations. The current rules are set out in Children’s Hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002/63) (as amended). These provide that a ‘business meeting’ (pre-hearing panel) can appoint a state funded legal representative:

- for a child if: it is necessary to allow the child to participate effectively in the hearing; or it is likely that a supervision requirement with an authorisation for secure will be made
- for a relevant person if: it may be necessary to make or review a supervision requirement affecting contact, residence or parental rights; and such an appointment is necessary to ensure effective participation. This is to be decided with reference to the complexity of the case, the nature of the issues involved, the person’s ability to challenge a document and the person’s ability to present their views effectively

16 The SSI was made on 2 June 2009, laid in the Scottish Parliament on 3 June and came into force on 4 June. The 21 day rule was breached because the rules were used to remedy an ECHR breach. The rules came before the Education, Lifelong Learning and Culture Committee in September and a motion to annul was lodged. The motion to annul would have had the effect of suspending regulations already in operation. The motion to annul was defeated on 9 September so the rules remain in force.
The Bill provides for legal aid to automatically be available for children or adults for hearings:

- following a child protection order (under s43 or 44)
- if compulsory supervision with a secure authorisation might be necessary
- following arrest and reporter referral under s67(5)

The explanatory notes state at para 267 that legal representation will be available for the above types of hearings without a means test. The extension of legal aid to other types of hearings (with the inclusion of a means test) is left to regulations.

**Legal Aid at the sheriff, sheriff principal and Court of Session**

Currently legal aid is available under s.29 of the 1986 Act for proceedings before the sheriff and subsequent appeals. The Bill replaces these provisions with a new Part 5A. This provides that in all situations, the decision will be by SLAB rather than the sheriff. It also provides that financial resources will always be taken into account whereas at present they are not relevant to appeals on warrants.

**Table 2: Criteria for legal aid in proceedings before the sheriff or Court of Session**

<table>
<thead>
<tr>
<th>Current</th>
<th>Proposed</th>
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</table>
| for child protection orders, grounds hearings or any other decision of a hearing, apply to the sheriff who must be satisfied that it is:  
  - in the interests of the child  
  - required due to lack of financial resources  
for appeals on warrants, apply to the sheriff (no means test).  
for appeals to the sheriff principal or Court of Session, apply to SLAB, who must be satisfied that it is:  
  - required due to lack of financial resources  
  - there are substantial grounds for appeal  
  - reasonable in the circumstances | For proceedings at sheriff, apply to the Board who must be satisfied that it is:  
  - in the best interests of the child (for child legal aid only)  
  - reasonable in the circumstances  
  - required due to lack of financial resources  
  - in addition, for proceedings at sheriff principal or Court of Session, there must be substantial grounds for appeal |

In their submission to the Committee, SLAB generally welcomed the provisions on legal aid but had a number of concerns. These related to changes to the tests for legal aid, the availability of legal aid for adults other than relevant persons, duplication in the role of safeguarders and curators ad litem,\(^\text{17}\) the absence of legal aid for court proceedings granting child protection orders and child assessment orders and that the costs for legal aid may be higher than the estimates given in the financial memorandum. The Scottish Family Law Association objected to SLAB being given responsibility for the Code of Practice and the decision whether legal aid is in the child’s best interests.

\(^{17}\) Curators ad litem represent a person in court, making decisions in their interests. They are appointed for children and for adults who lack capacity.
HEARING PROCEDURE

A reporter receiving a referral investigates and, if a ground is met and a reporter considers that compulsory measures are required, arranges a hearing. If the grounds are not accepted or understood then they go to the sheriff for proof. At various stages, the hearing or the sheriff can make warrants for the child’s attendance and orders for their supervision or assessment. The following sets out the main changes in the Bill relating to hearing procedure not already raised in the discussion of human rights issues. These relate to changes to the grounds of referral, procedure for proof at sheriff court and provisions for warrants and orders.

CHANGES TO GROUNDS

Section 65 of the Bill restates the grounds for referral with the intention of modernising rather than substantially changing them. There is one completely new ground relating to domestic violence and the ground relating to glue sniffing which has been removed. Although the ground relating to the Anti-Social Behaviour (Scotland) Act 2004 has been removed, a child with an anti-social behaviour order can still be referred to a hearing under s12 of that Act.

Many grounds remain the same, if reworded to varying degrees and presented in a different order. For example, whereas the 1995 Act referred to various offences committed by ‘a member of the same household’ as the child, the Bill refers to someone with ‘a close connection’ to the child. The most extensive re-wording is old ground b of ‘falling into bad associations or exposed to moral danger’. This has been ‘modernised’ and replaced with new grounds e and m which refer to the child being abused or harmed, and to conduct which has ‘a serious adverse effect’ on their health, safety or development.

A slightly different set of re-stated grounds appeared in the 2009 draft Bill and they were presented in a different order. There were objections to the offence grounds being placed first and this has been changed.

Annex 2 compares the grounds in the 1995 Act with those in the current Bill. Changes are highlighted in bold. It also shows the number of referrals under each of the 1995 Act grounds in 2008/09 which shows that the most commonly used grounds are not changing.

Generally, submissions welcomed the changes to the grounds for referral, particularly the inclusion of a new ground on domestic abuse. There were concerns however, that the threshold for a child to be referred to the reporter had been raised. The 1995 Act at s53 requires local authorities to refer a child to the reporter if they think a child may need compulsory measures of supervision. Section 58 of the Bill requires local authorities to refer where they think that a compulsory supervision order should be made. This change from ‘may’ to ‘should’ has provoked strong comment. For example, the Law Society considers that it is: “a fundamental and significant departure from the existing law” and Highland CPC said removes the reporter’s role in assessing borderline cases. Similar points were made by CPCG, SCRA and Glasgow City Council. However, Clan Child Law welcomed similar changes in relation to referrals from the police, saying it fits better with the GIRFEC approach.

PROOF OF GROUNDS

Expedited procedure

Currently, if a child doesn’t understand the grounds but they are accepted by the relevant person, they must go to the sheriff for proof. This situation applied to 581 cases in 2008/09. The Bill proposes at s110 that in this situation the sheriff can dispense with a formal hearing and proceed on the basis of papers only. This change was supported in consultation by 89% of respondents to Strengthening for the Future.
Under the Bill s113, a sheriff can issue an interim compulsory supervision order (see p.27) if he finds grounds established. In effect this is very similar to the existing power to issue a warrant to be kept in a place of safety prior to a hearing being arranged.

The remainder of the provisions for proof of grounds appear to be the same. When a ground is found proven by the sheriff there is a right to a review. On review, the sheriff can find other grounds, not mentioned in the original application are established and remit this back to a hearing. This is provided for under s85(7)(b) of the 1995 Act and s119 of the Bill. While this doesn’t appear to be a policy change, Norrie (2005 at p182) notes of the existing provision to find new grounds that: “a finding to this effect would be consistent with Art 6, it is submitted, only if the child and relevant persons were given due notice and the opportunity to challenge the allegations upon which the sheriff is making his finding”.

**Character or sexual behaviour evidence**

Currently, there are restrictions on the admissibility of evidence relating to a person’s character or sexual behaviour. These restrictions only apply when the child is referred on certain grounds which relate to the sexual behaviour of another person (s68A of the 1995 Act, referring to grounds b, d, e and f see annex 2) and do not currently apply where the child has committed an offence. At s166-9, the Bill simplifies and extends the provisions to restrict the questioning of any person where the ground relates to the sexual behaviour of any person. This will allow the sheriff to prevent the intrusive questioning of a child alleged to have committed a sexual offence. The Bill also applies these restrictions to hearsay evidence and to evidence taken by a commissioner. This is intended to prevent a person from attacking the character of someone whose statements are being used in evidence, regardless of whether the evidence is given directly at the hearing or not (PM para 393-4).

**Provision for vulnerable witnesses**

At s169(5) the Bill amends the Vulnerable Witnesses (Scotland) Act 2004 to allow a child referred on an offence ground to record a statement prior to the sheriff hearing to avoid having to be taken through distressing material in court. This already applies to witnesses in criminal proceedings (PM para 399). These provisions were not consulted on but the policy memorandum states they were “prompted by operational experience” (PM para 402).

Other amendments are proposed to the Vulnerable Witnesses (Scotland) Act 2004 as section 169(3) and (4). These make further provision regarding the timing for lodging child witness notices and vulnerable witness applications in children’s hearings related proceedings before a sheriff. They also permit the reporter to lodge these applications or to apply for a review of arrangements on behalf of the witness.

**Accepting offence grounds**

Five submissions to the Committee raised concerns about ‘criminalisation’ of children. UNISON said: “a child can sometimes accept an offence ground where evidence might not exist” and recommended that children should not do so without proper advice. The Children’s Commissioner referred to the impact raising of the age of criminal prosecution to 12 but leaving the age of criminal responsibility at eight. Section 38 of the Criminal Justice and Licensing (Scotland) Bill provides that no-one under 12 years can be prosecuted in the criminal courts. It does not however change the age of criminal responsibility which remains at eight years. Robert Brown has put forward amendment 379 to that Bill to raise this to 12.

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18 Children’s Commissioner, Children 1st, John Anderson, SCRA and Unison
WARRANTS AND ORDERS

One aim of the Bill is to simplify the provisions for warrants and introduce a new type of order – the interim compulsory supervision order (ICSO). A hearing can make certain decisions about a child, the main one being imposing a ‘supervision requirement’ (re-named in the Bill a compulsory supervision order). This lasts for a year and can set out things like who a child has contact with and where they will live. There are also measures for emergency protection. A child protection order is granted by the sheriff and lasts for up to a week. The 1995 Act also makes various provisions for children to be detained under a warrant either in an emergency to ensure their safety or to ensure that they attend a court, hearing or medical assessment. Much of the Bill re-enacts existing provision. The following focuses on where there is policy change.

Child Protection Orders

Sections 35 – 57 of the Bill provide for child protection orders (CPO). These are for the emergency protection of the child and can only last up to eight days. They can require the detention of the child in a place of safety and that the location of this place of safety is not disclosed to certain persons. Similar powers already exist in 1995 Act s57(4). In 2008/09 there were 661 children referred to hearings following a CPO and 40% of them were under 2 years of age. The only policy change is to extend the scope of information that can be withheld and to require the sheriff to consider this (s.38). This is a response to concerns from practitioners about parents seeking out children’s whereabouts.

Child Assessment Orders

Sections 33-34 of the Bill provide for child assessment orders (CAO). A local authority can apply for a CAO where it needs to establish whether a child is being neglected but is unable to do so without an order for the child to be taken for assessment of his or her health, development or treatment. They are not often used. CAOs are for the emergency protection of the child and currently last seven days. The Bill reduces this to three days and also requires that an assessment starts no later than 24 hours after the order is granted. Child assessment orders do not, themselves, lead to a hearing. However, the outcome of an assessment could result in a referral to the reporter or an application to the sheriff for a child protection order. Child Protection Committees and the Multi-Agency Resource Services at Stirling University were consulted on this change (PM para 181). The Law Society’s submission to the Committee suggested that the time limit be changed back to seven days.

Child arrested by police

Another short term measure is the detention of a child by the police under s.43 Criminal Procedure (Scotland) Act 1995 while it is decided whether a hearing is required. When a child is detained by the police but they have decided not to proceed with charges, the police must tell the reporter who must then decide whether a hearing is required. Any hearing must start within three days of the reporter having being told about the child’s detention. During these three days if the reporter decides that a hearing is not required, then the child must be released, otherwise, he or she may be kept in a place of safety (s63, 1995 Act).

Sections 63 and 71 of the Bill change these provisions slightly to make it clear that a child can be released while the reporter decides whether a hearing is required and, if it is decided to have a hearing, the child can be released before the hearing starts. This change was requested by the Principal Reporter and was also consulted on in the draft Children’s Services Bill in 2006.
Warrants

Warrants are available to the hearing or the sheriff to keep a child in a place of safety. Existing warrants under the 1995 Act are complex and in the Bill have been simplified into: a warrant for attendance lasting seven or 14 days, an interim compulsory supervision order lasting 22 days and medical examination order lasting 22 days. Existing provision for warrants in the 1995 Act and their nearest equivalents in the Bill are set out in the table 3 (see p25).

Under s152, the following appeals must be decided within three days. Appeals against; warrants to secure attendance, interim compulsory supervision orders, medical examination orders and compulsory supervision orders if they have a secure authorisation or movement restriction condition. This reflects the current position under s51(8) 1995 Act that appeals on warrants must be disposed of within three days.

Interim Compulsory Supervision Orders

This is a new order, defined in s101 of the Bill which lasts 22 days but can be extended. In many respects it replaces and expands on provisions for warrants available in the 1995 Act in s 63, 66 and 69. It can be issued where a final decision whether to implement a CSO cannot be issued but “the nature of the child’s circumstances are such that for the protection, guidance, treatment or control of the child it is necessary as a matter of urgency.”

The main difference between an ICSO and existing warrants is that it can have any condition attached to it in the same way as a CSO. This means that where a hearing defers a decision about a CSO or where grounds have not yet been proven, the hearing or sheriff can still impose similar requirements. Previously, a warrant could authorise nothing but the removal of the child to a place of safety.

It can be extended twice by a hearing (i.e. up to 66 days) and any number of times by the sheriff. When it is extended by the sheriff beyond 66 days (s.103), the criteria no longer require it to be necessary ‘as a matter of urgency’ and the criteria are therefore the same as for a CSO, i.e. that it is necessary for the protection, guidance, treatment or control of the child. This is because these particular ICSOs would already have had a lifespan of around 66 days extended under s96(3). It is expected that this provision to extend will be used only rarely.  

Medical Examination Orders

Section 101 of the Bill defines a medical examination order which is very similar to the existing warrant under s69 1995 Act. They are granted when a hearing needs to investigate an issue further and lasts for 22 days. The child can be required to attend a hospital or clinic and submit to medical examination. It can include a secure care authorisation and a direction regulating contact with another person. The changes are in the drafting and there do not seem to be any policy changes. The policy memorandum notes at para 287 that it is not possible to further simplify provisions by merging medical examination orders with ICSOs because it is not appropriate for medical examination orders to be issued before the grounds for referral have been established. Whereas an ICSO or a compulsory supervision order can include a condition of medical treatment (s.97(2)(f)(ii)), a medical examination order can only be used for a medical examination.

Compulsory Supervision Orders

If compulsory measures of supervision are required a hearing must issue a Compulsory Supervision Order (CSO) after grounds of referral have been established. These can last for up to a year (although they can be extended on review) and are defined in s.97 of the Bill. They

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20 Scottish Government personal communication, 5 March 2010
21 Scottish Government, personal communication, 5 March 2010
replace supervision requirements made under s70 of the 1995 Act. Other than the change of
name and greater specification of conditions that can be attached, there is very little change
from the current provisions. A CSO, like other orders, can have a number of conditions
attached to it which are set out in s.97(2). Under 97(3) the hearing or sheriff must consider
whether to impose a contact order. Conditions that can be attached include: residence, secure
authorisation, movement restriction condition (tagging), contact direction and a requirement that
the local authority carry out specified duties.
<table>
<thead>
<tr>
<th>Section</th>
<th>Situation</th>
<th>Duration &amp; Conditions</th>
<th>Section/ Title</th>
<th>Situation</th>
<th>Duration &amp; Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>45(4)</td>
<td>hearing grants to ensure attendance at a hearing</td>
<td>7 days</td>
<td>warrant to secure attendance s102</td>
<td>to ensure attendance at a hearing. Granted by sheriff or hearing if they consider that a child may not attend.</td>
<td>7 days. Can include secure authorisation</td>
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<td>45(5)</td>
<td>hearing grants when child fails to attend hearing</td>
<td>7 days</td>
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<td>68(6)</td>
<td>to ensure attendance for proof hearing. Granted by sheriff.</td>
<td>14 days</td>
<td>s68(7)</td>
<td>to ensure attendance for proof hearing. Granted by sheriff.</td>
<td>14 days. Can include secure authorisation</td>
</tr>
<tr>
<td>66</td>
<td>granted by hearing when unable to dispose of case and, where relevant child may not attend hearing or clinic, or need to detain child in place of safety for his/her welfare.</td>
<td>22 to 66 days, can include: medical examination, regulate contact, secure authorisation.</td>
<td>interim compulsory supervision order (ICSO) s100</td>
<td>granted by hearing when a hearing is deferred, or applies for proof, or by sheriff when hearing arranged following proof.</td>
<td>22 days, (or up to 66 days if extended by a hearing or more if extended by sheriff under s.103). Conditions include place of safety, and others as CSO including: contact, medical examination or treatment, secure accommodation, movement restriction, that local authority do certain things</td>
</tr>
<tr>
<td>67</td>
<td>further detention granted by sheriff</td>
<td>lasts until date specified on warrant. Conditions as above.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>69</td>
<td>when hearing deferred for further investigation</td>
<td>22 days, can include requirement to attend hospital, have a medical examination, secure authorisation</td>
<td>medical examination order s101</td>
<td>when hearing is deferred, and further information or investigation is required s83(3) and s121(3)</td>
<td>22 days, can include requirement to attend hospital, have a medical examination, regulate contact, non-disclosure of whereabouts, secure authorisation.</td>
</tr>
</tbody>
</table>
APPEALS

Part 15 of the Bill provides for appeals and the policy intention, with a few exceptions, is to clarify rather than change existing provision.

SCOPE OF APPEAL

There appears to be a difference of opinion about the scope of the current law on appeal which has been brought to the fore by the Bill’s attempts to clarify it. The current law allows a sheriff to impose his or her own decision for that of the hearing, but many are reluctant to do so. Norrie (2005) notes that:

“Adopting this option permits the sheriff to trespass into the role which, prior to the coming into effect of the 1995 Act, rested exclusively with the children’s hearing. Perhaps because they recognise that the children’s hearing is always the most appropriate forum for determining what compulsory measures of supervision will best meet the child’s needs and that it is in every child’s interests to have their case determined by the most appropriate forum, sheriffs have since acquiring this power been slow to use it. It is suggested that they are right to show reticence and that the power under this provision should be exercised only when it is clear that there is only one possible option that will serve the child’s interests and when, therefore, it would be a procedural waste of time to send the matter back to the children’s hearing for disposal.”

The 2009 draft Bill had sought to make it explicit that the scope was very wide by renaming ‘appeals’ as ‘reviews’. Respondents disagreed with this and asked the Government to ensure that the Bill continues existing practice, that a sheriff does not re-consider the whole case or impose a different disposal (Scottish Government 2009h). The Bill as introduced uses the current terminology of ‘appeal’, but the policy memorandum interprets this widely. It states that the Bill “makes it clear that the sheriff has available to him the power to conduct a wide review of the issues that a hearing considered” (PM para 380) and that: “the Bill seeks to remedy current ambiguity of current powers and allow for consistent application of the power for a wide review, if the sheriff considers it justifiable in all the circumstances.” (PM para 388).

There were some concerns in submissions to the Committee that the Bill does widen the scope of appeal.22 For example, UNISON were concerned at the change from a sheriff allowing an appeal if the: “decision of the hearing is not justified in all the circumstances” to not allowing it “if satisfied that the decision is justified” and consider that this changes the balance against the hearing.

SAFEGUARDER’S RIGHT TO APPEAL

Section 148 of the Bill introduces a statutory right for safeguarders to appeal in their own right. This was introduced at the request of the Scottish Safeguarders’ Association and has not been widely consulted on (PM 172). In their submission on Strengthening for the Future the safeguarders association explained their reasoning as: “where a hearing has got a disposal wrong it seems at best unfair and at worst absurd that the only persons authorised to lodge an appeal under Section 51 are the child or the very person the child may have to be protected against”.

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22 John Anderson, Barnardos, Clan Child Law, SCRA and UNISON
ANNEX 1: UNCRC AND ECHR

UNCRC
The UNCRC is a wide ranging convention including civil, social and economic rights. While there are specific provisions relating to juvenile justice and state protection of children, the key principles relate to the best interests of the child (article 3) and the views of the child (article 12).

3(1). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

12(1). States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

12(2). For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The current s16 of the 1995 Act reflects these principles by setting out that:
- the welfare of the child is the paramount consideration
- the child will be given the opportunity to express his views and they will be taken into consideration, taking account of their age and maturity and,
- no order will be made unless it is better for the child that one be made

These same principles are provided for in the Bill at sections 24 to 28.

ECHR Article 6
Article 6 is about procedural fairness in courts, guaranteeing a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. In S v Miller 2001 SLT 531, the court found that a Children's Hearing constituted civil proceedings which engage article 6(1) rights. The concept of a fair trial includes that:
- the system must be and appear to be independent and impartial
- cases must be progressed within a reasonable time, although what is reasonable will depend on the circumstances of the case
- in some cases there should be access to legal representation in order to ensure effective participation in the process. While generally the choice of how to ensure practical and effective access to a court is left to states, state funded legal representation has been found to be required in relation to both children and relevant persons in children’s hearings, where certain criteria are met (S v. Miller and SK v Paterson [2009] CSIH 76) (See discussion on p18).
- parties must be able to participate effectively in proceedings. This can include access to documents and a right to be present at a hearing.
  - failure of a hearing to provide copies of expert reports to parents was found to breach article 6 (McMichael v. United Kingdom (1995) EHRR 205).
  - depending on the seriousness of the issue, there is a right to be present in civil proceedings (X v. Sweden 1959 TB 354)
- a reasoned judgement should be given so that it can be challenged (Hadjianastassiou v. Greece (1993) 16 EHRR 219)
**ECHR Article 8**

Article 8 gives everyone the right to respect for their private and family life. Any interference by the state must be a proportionate way of pursuing a legitimate aim (for example protecting children from harm). Children’s hearings can make life changing decisions affecting the relationship between parents and their children and so article 8 rights will almost always be relevant. Article 8 has been taken to include a need for fair proceedings when decisions can have a serious effect on family life. This includes involving parents in care proceedings, (W v United Kingdom (1987) 10 EHRR 29), the avoidance of delay (W v. United Kingdom) and provision of documents to parents (McMichael v. UK (1995) 20 EHRR 205).

**ECHR Article 5**

Article 5 deals with the deprivation of liberty. Provision for detention should be in accordance with a procedure prescribed by law and no-one shall be deprived of their liberty except in certain cases. These include the detention of a minor for the purposes of educational supervision or to bring him or her before a competent legal authority. Article 5 rights also include that someone who has been detained has a right to: be informed promptly of the reasons for arrest, be brought promptly before a judge or someone with judicial power and be able to bring proceedings to decide quickly whether the detention is lawful.

A secure accommodation order in England has been found to constitute a deprivation of liberty for the purposes of educational supervision under art. 5(1)(d) (W Borough council v. DK, DJK AK (A Minor) and Delahunty, unreported, November 15 2000). In Scotland, the hearing only authorises that a child be placed in secure – it is the chief social worker and manager of the secure provision who make the actual decision.
## ANNEX 2: GROUNDS FOR REFERRAL, 1995 ACT AND 2010 BILL

<table>
<thead>
<tr>
<th>Referrals 2008/09</th>
<th>1995 Act, s.52</th>
<th>2010 Bill, s.65</th>
</tr>
</thead>
<tbody>
<tr>
<td>4,433</td>
<td>a) beyond the control of any relevant person</td>
<td>n) the child is not within the control of a relevant person</td>
</tr>
<tr>
<td>2,380</td>
<td>b) falling into bad associations or is exposed to moral danger</td>
<td>e) the child is being or likely to be, exposed to persons whose conduct is (or has been) such that it is likely that (i) the child will be abused or harmed, or (ii) the child’s health, safety or development will be seriously adversely affected.</td>
</tr>
<tr>
<td>15,320</td>
<td>c) is likely—(i) to suffer unnecessarily; or (ii) be impaired seriously in his health or development, due to a lack of parental care;</td>
<td>m) the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person.</td>
</tr>
<tr>
<td>18,621</td>
<td>d) is a child in respect of whom any of the offences mentioned in Schedule 1 of the Criminal Procedure (Scotland) Act 1995 has been committed;</td>
<td>b) a schedule 1 offence has been committed in respect of the child</td>
</tr>
<tr>
<td>1,375</td>
<td>e) is, or is likely to become, a member of the same household as a child in respect of whom any of the offences referred to in paragraph (d) above has been committed;</td>
<td>d) child is, or likely to become a member of the same household as a child in respect of whom a schedule 1 offence has been committed</td>
</tr>
<tr>
<td>615</td>
<td>f) is, or is likely to become, a member of the same household as a person who has committed any of the offences referred in paragraph (d) above;</td>
<td>c) the child has, or is likely to have, a close connection with a person who has committed a schedule 1 offence</td>
</tr>
<tr>
<td>15</td>
<td>g) is, or is likely to become, a member of the same household as a person in respect of whom an offence under sections 1 to 3 of the Criminal Law (Consolidation)(Scotland) Act 1995 (incest and intercourse with a child by step-parent or person in position of trust) has been committed by a member of that household;</td>
<td>Child has, or is likely to have, a close connection with a person who has been convicted of an offence under Part 1, 4 or 5 of the Sexual Offences (Scotland) Act 2009.</td>
</tr>
<tr>
<td>2,669</td>
<td>h) has failed to attend school regularly without reasonable excuse;</td>
<td>o) the child is of school age and has failed without reasonable excuse to attend regularly at school</td>
</tr>
<tr>
<td>11,805</td>
<td>i) has committed an offence;</td>
<td>j) the child has committed an offence</td>
</tr>
<tr>
<td>1,199</td>
<td>j) has misused alcohol or any drug, whether or not a controlled drug within the meaning of the Misuse of Drugs Act 1971;</td>
<td>k) the child has misused alcohol</td>
</tr>
<tr>
<td>23</td>
<td>k) has misused a volatile substance by deliberately inhaling its vapour, other than for medicinal purposes;</td>
<td>l) the child has misused a drug (whether or not a controlled drug)</td>
</tr>
<tr>
<td>32</td>
<td>l) is being provided with accommodation by a local authority under section 25, or is the subject of a parental responsibilities order obtained under section 86, of this Act and, in either case, his behaviour is such that special measures are necessary for his adequate supervision in his interest or the interest of others.</td>
<td>h) the child is being provided with accommodation by the local authority under s.25 of the 1995 Act and special measures are needed to support the child.</td>
</tr>
<tr>
<td>n/a</td>
<td>m) is a child where (a) a requirement is made of the Principal Reporter under section 12(1) of the Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8) (power of sheriff to require Principal Reporter to refer case to children's hearing) in respect of the child's case; and (b) the child is not subject to a supervision requirement.</td>
<td>i) a permanence order is in force in respect of the child and special measures are needed to support the child.</td>
</tr>
<tr>
<td>n/a</td>
<td>n/a</td>
<td>Not replicated as a s.65 ground but is covered by s.69.</td>
</tr>
<tr>
<td></td>
<td>f) child has, or is likely to have, a close connection with a person who has carried out domestic abuse</td>
<td></td>
</tr>
</tbody>
</table>
SOURCES


Scottish Children’s Reporter Administration. (Online) Statistical Dashboard Available at: http://www.scra.gov.uk/home/launch_of_online_statistical_service_dashboard.cfm Accessed 5 March 2010


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• Scotland’s Commissioner for Children and Young People.
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• West Lothian Council.
• Who Cares? Scotland.


UNCRC Text of convention at: http://www.unicef.org/crc/
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