

## **Criminal Justice Briefing – Stage 3 Children and Young People's Commissioner Scotland**

I welcome the opportunity to comment on the Criminal Justice (Scotland) Bill at Stage 3. Given the wide-ranging nature of this Bill, I have chosen to focus this briefing on four key areas which I believe are of particular relevance to the rights of children and young people across Scotland.

These are:

- The use of stop and search in relation to children and young people and alcohol
- The minimum age of criminal responsibility
- The length of time a child or young person can be held in Police custody without charge
- Measures to ensure the support needs of children are recognised and met when a parent is imprisoned.

These areas are explored in more detail below.

### Stop and Search & Alcohol

I wrote to the Justice Committee in September 2015, when I became aware of the Cabinet Secretary's intentions to legislate to address the recommendations of John Scott, QC's report. This report set out the findings of an Independent Advisory Group, tasked with looking at the use of Stop and Search across Scotland. In my letter, I stated that I was concerned that attempting to legislate via the Criminal Justice (Scotland) Bill on this matter was premature.

The Independent Advisory Group, of which my office was part, recommended via John Scott, QC's report, that *'the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under 18 for alcohol in circumstances where they have reasonable grounds to suspect they have alcohol in their possession'*<sup>1</sup>.

The report also noted that, in relation to this recommendation, it had *'not been able to form a conclusive view on whether a gap in powers exists that could not be dealt with by existing powers, and also on whether a power to search children for alcohol would be desirable'*.

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<sup>1</sup> The Report of the Advisory Group on Stop and Search, John Scott QC, see Recommendation 6: <http://www.gov.scot/Resource/0048/00484527.pdf>

Despite the recommendations of the Independent Advisory Group, the Cabinet Secretary was keen to press ahead with an amendment at Stage 2, which resulted in the creation of Section D1 in the Bill.

Section D1 (2) now states that *'Prior to laying before the Scottish Parliament a draft of an instrument containing regulations...the Scottish Ministers must consult publicly on the regulations they are proposing to make'<sup>2</sup>.*

My concern was that the Cabinet Secretary's approach was based on a presumption that there was a need to legislate and that any consultation should focus on the content of that legislation, rather than whether there was a need to legislate at all.

At Stage 2, I suggested to the Committee that there were other matters that needed to be fully considered prior to anything being enshrined in legislation, not least whether a statutory power to stop and search children and young people was likely to have a detrimental effect on them.

One of my key concerns was that children and young people may be inadvertently criminalised by a new statutory power. Another key concern was that the creation of such a power could lead to continued disproportionate targeting of stop and search on young people, albeit now on a statutory basis.

I would argue that the Cabinet Secretary could legitimately claim to have met Recommendation 6 of John Scott, QC's report by simply committing to an early consultation on the matter, without the need to make legislative provision.

**I therefore support Amendments 1 and 2 in the name of Alison McInnes, which seek to remove section D1 from the Bill and the associated sunset clause at E1 (2).**

At Stage 2, it was suggested that the Cabinet Secretary might consider the use of a super-affirmative procedure to ensure that there could be sufficient scrutiny of any draft regulations before they were laid before Parliament in the normal way. The Cabinet Secretary appeared to be willing to consider this at Stage 3.<sup>3</sup>

**Should Amendments 1 and 2 not be passed, then I support Amendment 84 in the name of Alison McInnes which would allow for a super-affirmative procedure to be used in considering any draft regulations associated with section D1.**

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<sup>2</sup> Section D1 (2), Criminal Justice (Scotland) Bill, as amended at Stage 2

<sup>3</sup> Col 12, Official Report, Justice Committee 29/9/15, available here:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10119&mode=pdf>

## Age of Criminal Responsibility

I have long campaigned for the Age of Criminal Responsibility to be raised to a minimum of 12 years in Scotland. This age is regarded as the minimum deemed acceptable by the UN Committee on the Rights of the Child<sup>4</sup>.

Scotland has been criticised on a number of occasions by the UN Committee on the Rights of the Child for having an age of criminal responsibility of 8, most recently in their Concluding Observations of 2008<sup>5</sup>. This is amongst the very lowest in Europe and is in clear conflict with the Scottish Government's stated aim of making Scotland the best place for children to grow up.

Whilst the Criminal Justice and Licensing (Scotland) Act 2010 introduced a minimum age of prosecution at 12, the age of Criminal Responsibility has remained at 8. This disparity continues to have a negative impact on children and young people across Scotland. This is most evident in relation to those 8-11 year olds admitting or having offence grounds established via the Children's Hearings system. For those children, the record of their offence can cause difficulties for them well into adulthood and can impact on their ability to work with particular groups or apply for certain university courses.

I am aware that the recent Police Act 1997 and Protection of Vulnerable Groups Act 2007 Remedial Order 2015 has made some progress in this respect, although I believe that there is still much to be done to ensure that an incident in childhood does not ruin a child or young person's future life chances.

The Cabinet Secretary has recently formed an expert working group to consider the policy, legislative and procedural implications of raising the age of criminal responsibility from 8 to 12 years<sup>6</sup>. My own office is represented on this group. The group will look at a range of issues, including Police investigatory powers, forensic (DNA) sampling, the role of Children's Hearings, Disclosure, Police Weeding and Retention and risk management. All of these were issues that the Cabinet Secretary suggested needed to be examined in detail before any change to the Minimum Age of Criminal Responsibility could be considered.

I am very supportive of the sentiments behind Alison McInnes' amendments. In common with my comments on the Scottish Government's approach towards Stop and Search, however, I believe that these amendments run the risk of pre-empting any findings of the expert working group. As such, and at this stage, I am reluctantly unable to support them.

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<sup>4</sup> UN Committee on the Rights of the Child, General Comment No. 10 (2007), 'Children's Rights in Juvenile Justice'. Available here: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

<sup>5</sup> UK Concluding Observations, UN Committee on the Rights of the Child. Available here: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>.

<sup>6</sup> For more information about the remit of the working group on the Minimum Age of Criminal Responsibility, see: <http://www.gov.scot/Topics/Justice/policies/young-offending/MACR>

**I therefore do not support Amendments 86 and 91 in the name of Alison McInnes.**

Length of Time a Child or Young Person Can Be Held in Custody without Charge

Amendment 3, in the name of Alison McInnes, seeks to remove the ability for children and young people under the age of 18, or adults with incapacity, to be held in custody without charge for a period of more than 12 hours.

As currently drafted, section 12A of the Bill allows the Police to authorise an extension of the time someone may be held in custody beyond an initial 12 hour period of detention. This would lead to a maximum time in custody without charge of 24 hours.

I do not believe that this is appropriate for children and young people under the age of 18 years, and is likely to negatively impact on their wellbeing. I would suggest, therefore, that children and young people should be removed from the scope of section 12A and should be held for an absolute maximum of 12 hours without charge.

**I therefore support Amendment 3 in the name of Alison McInnes.**

Children of Prisoners

Amendments 87, 88 and 89 in the name of Mary Fee seek to ensure that the support needs of a child are fully considered when a parent is imprisoned.

They create a procedure to establish, on admission to prison, whether a prisoner has a child or children. Where this is the case, it creates a duty to inform the child/children's Named Person of the parent's imprisonment. The purpose of doing so is to ensure that the child/children's support needs are identified and met at an early stage.

I am supportive of these amendments, as I know from our own research into this area<sup>7</sup>, that many children of prisoners find it difficult to ask for help, given the stigma associated with parental imprisonment.

I would suggest that, should these amendments be passed, it would be helpful to have some indication from the Scottish Government of what additional resources they calculate will be required in order to ensure that, where additional support for the children of prisoners is assessed as being required, this is available to them. It would also be helpful to know what type of framework will be created to help support the implementation of this duty.

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<sup>7</sup> 'Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland: 2011 Review', Children and Young People's Commissioner Scotland. Available here: <http://www.cypcs.org.uk/publications/children-of-prisoners>



Finally, it would be helpful to know what plans the Scottish Government has to monitor the implementation of such a duty.

**I therefore support amendments 87,88, and 89 in the name of Mary Fee.**

Should you require any further information regarding the content of this briefing, please contact Pauline McIntyre, Parliamentary and Policy Officer via [pauline.mcintyre@cypcs.org.uk](mailto:pauline.mcintyre@cypcs.org.uk).

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