

## **The Scottish Law Commission Report on Rape and Other Sexual Offences Consultation Response**

Barnardo's Scotland welcomes the opportunity to comment on the Scottish Law Commission's report on Rape and Other Sexual Offences and the draft bill following on from the recommendations. Barnardo's Scotland manages more than 60 children's services in Scotland, and the safeguarding of children and young people is a central issue. We currently run 3 services in Scotland that work with children and young people who exhibit harmful or problematic sexual behaviour, alongside services that support children who have been sexually abused. Barnardo's Scotland response has been informed by this practice experience.

### **General Comments**

- Barnardo's Scotland commends the report for its commitment to updating the law so that it has more clarity and consistency. Our experience in this area suggests that the law as it currently stands is often used inconsistently because it does not reflect the complex realities of young people's lives. The recommendations also challenge discriminatory inequalities that are perpetuated by the current legislation, especially in relation to gender and sexuality.
- Barnardo's Scotland acknowledges that this is a complex area which can generate polarised views. We believe that it is important that the experiences and views of young people should be sought before proposed changes are implemented. We would wish to support any proposals to seek the views of young people, if this was thought useful.
- Barnardo's Scotland acknowledges the difficulties of defining behaviours, but 'sexual activity' appears to cover a potentially wide spectrum of behaviours and it would be helpful to have a clearer definition of what this reasonably covers.

### **Specific Comments**

Barnardo's Scotland will focus comments on Part 4 and offences based on the protective principle.

#### **Recommendations 24 - 26**

Barnardo's Scotland supports the position that children below the age of 13 should not be considered to be able to provide consent in sexual matters.

However we are our concerned that the recommendations as framed could lead to further criminalisation of some children on account of their sexual behaviour.

For instance, where there is an admission of sexual activity involving two consenting 12 year olds, our understanding is that there would be a referral to the Reporter on criminal rather than welfare grounds. This seems anomalous when compared to the situation of two consenting young people aged 13-16 years who could, as a result of the proposals, be referred on welfare grounds.

In another instance, a 12 year old boy and a 12 year old girl may admit that they have had sexual intercourse and there is no evidence of coercion. One or both may be highly vulnerable and may have histories of sexual abuse and other trauma in their past. The behaviour is criminal and possibly harmful to both parties.

Barnardo's Scotland understanding of the proposed law reforms is that this would be treated as rape on the part of the boy and the principle of strict liability would mean that there would be no defence possible. Barnardo's Scotland suggests that in this instance there would be merit in joint remitting a rape charge to both Procurator Fiscal and the Reporter to ascertain where the case should best be heard. This would allow a balancing of the interest of the children and the principle of public interest, rather than requiring that the case is automatically heard in the High Court.

#### Recommendation 28

Barnardo's Scotland supports the recommendation of protective offences against children aged between 13 and 16 and we believe this will continue to safeguard vulnerable young people in this age group from sexual exploitation.

#### Recommendation 29

Barnardo's Scotland supports the recommendation of exclusion of young people under the age of 16 from protective offences against 13 – 16 year olds. Our understanding is that this will have the effect of decriminalising sexual behaviour for 13 to 16 year olds when there is consent on the part of both parties. In our view this is a pragmatic response to the reality that, at present, some young people choose to engage in sexual activity at an early age. We would be concerned as to how this message is portrayed as it is important to avoid the perception that the age of consent has been changed.

We already know that vulnerable and disadvantaged young people experience poor outcomes in relation to their sexual health, and that uptake of health services amongst that group is poor. Lack of knowledge about available services combined with confidentiality fears are a factor in preventing young people from seeking the help they need. A change in the law could enable appropriate support to be made available in a non punitive way and which is in the best interests of the individual child or young person. The overall policy objective should be to promote the provision of a comprehensive sexual health strategy for young people.

Healthcare personnel are generally clear about their role in providing sexual health services and advice for young people aged 13-16. However other workers such as social care staff, who are ideally placed to promote sex and relationship education with this age group, may feel hampered by fear of litigation.

Barnardo's Scotland believes decriminalising consensual sexual activity for 13-16 year olds would have a two fold benefit by: allowing young people to confidently and openly make best use of sexual health services; and enabling social care staff to legitimately exercise their professional judgement when offering information and advice to support young people to make informed choices about their sexual health

### Recommendation 30

Barnardo's Scotland welcomes the proposal to form a new ground of referral to the Reporter. Our understanding is that this will allow for a referral to the Reporter on welfare grounds rather than criminal grounds and this is welcomed. We note, that to date, there has been no research that looks at how the Children's Hearing system deals with these referrals which often constitute some of the most challenging cases the children's panels have to deal with. We would suggest some research on this would provide a baseline which would allow us to measure the impact of new legislation upon children and young people.