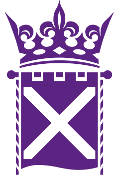


The Scottish Parliament
Pàrlamaid na h-Alba

Published 7 November 2018
SP Paper 411
5th Report, 2018 (Session 5)

Equalities and Human Rights Committee
Comataidh Co-ionnanachd agus Còraichean Daonna

Age of Criminal Responsibility (Scotland) Bill Stage 1 Report

Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
http://www.parliament.scot/abouttheparliament/91279.aspx

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

© Parliamentary copyright. Scottish Parliament Corporate Body
The Scottish Parliament's copyright policy can be found on the website —
www.parliament.scot

Contents

Executive Summary 1
Introduction 5
Purpose of the Bill 5
Legislative Background 6
Historical context and development of the policy approach 6
Scottish Law Commission 6
UN Committee on the Rights of the Child 7
Attempts to raise the age of criminal responsibility 7
Independent Advisory Group on the Minimum Age of Criminal Responsibility 8
Consideration of the Bill 10
Participation and engagement 10
Stakeholder engagement 11
Consideration by other Committees 12
Delegated Powers and Law Reform Committee 12
Finance and Constitution Committee 12
Financial Memorandum 14
Part 1 - Age of Criminal Responsibility 15
Setting the age of criminal responsibility at 12 15
Raising the age of criminal responsibility beyond 12 18
Cognitive Development 22
Participation and Protection Rights 23
Conclusions on the age of criminal responsibility 26
Children's Hearings 28
Conclusion on children's hearings 30
Part 2 - Disclosure of convictions and other relevant information rleating to time when a person is under 12 31
ORI (‘other relevant information’) – current processes 31
Disclosure of information relating to under-12s 32
Independent Reviewer 33
Appeals Process 38
Looked After Children and Disclosures 38
Part 3 - Victim Information 40
Sharing of information - Children's Hearing on offence grounds 40
Variability of information and support provided 41
Rights of victims and those who cause harm 42

Public awareness raising 44
Part 4 - Police Powers 46
Criminalisation 48
Police powers - general 48
"Place of safety" 49
Definition of a "place of saftey" 50
Use of police station as a 'place of safety' 51
Search Powers 58
Interviewing of children 61
Advocacy Provision 65
Right to Silence 69
Taking of prints and forensic samples 71
General Principles of the Bill 73
Annex A: Age of Criminal Responsibility Toolkit 74
Annex B: Written and Oral Evidence 77

Equalities and Human Rights Committee

To consider and report on matters relating to equal opportunities and upon the observance of equal opportunities within the Parliament (and any additional matter added under Rule 6.1.5A). In these Rules, "equal opportunities" includes the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds or on grounds of disability, age, sexual orientation, language or social origin or of other personal attributes, including beliefs or opinions such as religious beliefs or political opinions.
Human rights, including Convention rights (within the meaning of section 1 of the Human Rights Act 1998) and other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom.

http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/Equalities-Human-Rights-Committee.aspx

equalities.humanrights@parliament.scot

0131 348 6040

Committee Membership

Convener
Ruth Maguire
Scottish National Party

Deputy Convener
Alex Cole-Hamilton
Scottish Liberal Democrats

Mary Fee
Scottish Labour

Fulton MacGregor
Scottish National Party

Oliver Mundell
Scottish Conservative and Unionist Party

Gail Ross
Scottish National Party

Annie Wells
Scottish Conservative and Unionist Party

Executive Summary

- At eight years old, Scotland currently has the youngest age of criminal responsibility in Europe.
- In 2010 the Criminal Justice and Licensing (Scotland) Act raised the minimum age of criminal prosecution in Scotland to 12. This meant that children under the age of 12 could no longer be prosecuted through the adult courts.
- The disparity between the age of criminal responsibility and the age of criminal prosecution, however, meant that children aged eight-11 years could still obtain a conviction via a Children's Hearing, either by admitting or having an offence ground established via a proof hearing at the Sheriff Court.
- Any convictions gained at that age had the potential to appear on a higher level Disclosure check or PVG scheme record later in the child's life, potentially preventing them from moving on from an incident in childhood or restricting their ability to undertake the training course or career of their choice.
- Scotland has faced repeated criticism from human rights bodies, such as the UN Committee on the Rights of the Child, for its low age of criminal responsibility. The UN Committee has suggested that 12 is the absolute minimum age that is internationally acceptable. It has urged states who have signed up to the UN Convention on the Rights of the Child, including the UK, to progressively increase this.
- There have been repeated attempts to raise the age of criminal responsibility in Scotland, most recently via the Criminal Justice (Scotland) Bill (now 2016 Act). At the time, Michael Matheson, then Cabinet Secretary for Justice, suggested that in order to raise the age, there would need to be certainty around the Disclosure of criminal records, the use of forensic samples, police investigatory powers and the rights of victims.[i]
- In 2015, the Scottish Government announced the formation of a short-life Advisory Group to explore the implications of a potential increase in the age of criminal responsibility. The Advisory Group was comprised of representatives from a range of bodies, including the Crown Office Procurator Fiscal Service, youth justice bodies, victims' organisations, children's organisations and children's rights bodies.
- The Advisory Group published their report in February 2016. The report was published alongside a detailed Children's Rights and Wellbeing Impact Assessment and research by the Scottish Children's Reporter Administration, which examined the number and nature of offences for which children aged eight-11 years were currently being referred to the Children's Reporter. A commitment to legislate to increase the age of criminal responsibility followed soon afterwards.
- Following publication of the Advisory Group's report, the Scottish Government issued a public consultation on raising the age of criminal responsibility to 12. Analysis of the consultation results found that found that 95% of those responding to the consultation favoured increasing the age of criminal responsibility to 12 or older. [ii]

---

i Official Report, Justice Committee, 8 September 2015

- The Age of Criminal Responsibility (Scotland) Bill was introduced to the Scottish Parliament on 13 March 2018. The Bill seeks to raise the age of criminal responsibility to 12; makes a number of provisions relating to police powers to investigate an incident of harmful behaviour by a child under 12; changes to Disclosure processes and the release of non-conviction information (known as 'other relevant information') for under 12s and information for victims of harmful behaviour. The Bill makes clear that no behaviour by a child under the age of 12 can be regarded as 'criminal'.

- We issued a call for evidence on 27 April 2018 and received 41 submissions. Thirty-nine responses commented on the age. There was, however, significant disagreement about where the new age of criminal responsibility should sit. Whilst all supported a move to a minimum 12 years old, others felt that the age needed to be set above 12, with various stakeholders recommending that it be set at 14, 16 or even 18 years old.

- In our oral sessions, the majority of stakeholders queried whether a move to 12 was 'progressive' or likely to meet Scotland's international human rights commitments (as suggested by the Bill's Policy Memorandum). They pointed out that increasing the age to 12 would only achieve the minimum internationally acceptable age, as defined by the UN Committee on the Rights of the Child. Such a move would also only just lift Scotland off the bottom of the EU league table.

- The Age of Criminal Responsibility (Scotland) Bill aims to right a wrong in the way that younger children in Scotland have been treated in the youth justice system in Scotland. The evidence of harm caused by treating children as 'offenders' from such a young age is clear.

- The Edinburgh Study on Youth Transitions clearly demonstrates that involvement in formal processes doesn't stop harmful behaviour, rather it is much more likely to lead to further harm.[iii] For those who manage to move on from early childhood behaviour, the current disparity between the age of criminal responsibility and the age of criminal prosecution has led to incidents in early childhood following them well into adulthood, in some cases severely restricting educational and employment opportunities.

- We recognise that the approach taken by the Scottish Government towards this Bill is grounded in the desire to make significant improvements to the ways in which adults respond to younger children's behaviour.

- Where that behaviour is serious in nature and the harm caused to others is great, then the Bill seeks a balance between managing any risk that child might still pose with a better understanding of the reasons behind that behaviour. The Bill recognises that in addressing that trauma, the child has the best chance to move on from early behaviour and have the same chance to succeed as any other child.

- This approach is evident throughout the Bill and is clear that much thought has gone into the way in which the Bill has been framed.

- We struggled, however, to reach a shared view on whether 12 was a sufficiently high age to achieve the outcomes sought. Some Members felt that if a move to 12 years

---

ii Scottish Government, Minimum Age of Criminal Responsibility Analysis of Consultation results

iii Written submission, the Centre for Youth and Criminal Justice para 2

old could deliver significant improvements to children's outcomes, then why should the same opportunities not be afforded to a young person of 14, 16 or even 18?

- We also found it difficult to reconcile the desire to allow children to move on from early childhood behaviour with some of the police powers created in the Bill. We heard evidence from those who had experience of youth justice processes at a young age, who described feeling scared, confused and unable to understand what was going or unable to have their voice heard. As such we have sought further clarity in this area.

- Whilst there are some investigative measures that clearly acknowledge the fact that these are young children, for example, the inclusion of an Advocacy Worker, there are issues in relation to where such interviews may be held and what constitutes a 'child-friendly' environment. We have asked for further detail on these provisions.

- The Bill also seeks to ensure the child has a voice in proceedings. This is most welcome. However, we note that this is not applied consistently throughout the Bill. There are some circumstances in which there is a duty to explain to children what is happening in an age appropriate way and there are some circumstances where, even if the child has a right not to answer questions, the power imbalance between a police officer and a young child is likely to lead to that right being rarely exercised. We have highlighted the need for more guidance in this area. In addition, we have asked for information on the process to be in a child-friendly format and to take account of the needs of children with additional support needs, including speech, language and communication difficulties and hidden disabilities, such as autism.

- In relation to our consideration of the ''place of safety'' provisions in the Bill, we believe that this has uncovered a much broader issue, in relation to the availability of suitable places throughout Scotland. Police Scotland indicated their estate simply wasn't designed for children. We were concerned that the use of police cells, as 'places of safety' still occurred.

- We heard distressing evidence from Lynzy Hanvidge, a care-experienced policy ambassador with Who Cares? Scotland, who was held in a police cell overnight at the age of 13. We were struck with the unfairness of her experience, where on the very night she was taken into care, she acquired her first police charge. We were impacted by her description of how her trauma had bred further trauma and that this Bill, as currently drafted, would not have avoided this situation because she was aged 13 years old.

- We heard evidence that it is children who are most traumatised who are also the most likely to become involved in serious harmful behaviour. We also heard that children receiving support to address the root causes of that behaviour, which may be trauma-related, were significantly less likely to repeat those harmful behaviours.

- As such, we believe that many of the investigative functions outlined in the Bill could be dealt with through existing child protection procedures and through welfare-based processes. This would ensure it was still possible to establish 'the truth of the matter'[iv], for example, via a Joint Investigative Interview, and it would still be possible to assess any ongoing risk the child might pose to themselves or others. However, the

---

iv The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016

process would feel different and the focus would be on the needs of the child, rather on what that child was believed to have done.

- If the premise is that a child under 12 cannot be held criminally responsible in Scotland, then they cannot be made to feel as if they are
- In relation to search powers, we are mindful of the statutory Code of Practice on Stop and Search and the provisions made for children and young people in Chapter 7 of that code. We consider comprehensive guidance is required to take account of the powers under the Bill.
- We recognise the Bill achieves significant progress in a number of areas. The focus on Disclosure, and in particular on non-conviction information ('other relevant information'), is very welcome, as is the creation of the Independent Reviewer role. We also recognise the potential for the Disclosure principles in this Bill to be applied more widely to under 18s and warmly welcome this.
- Raising the age of criminal responsibility in Scotland will bring benefits not just to children and young people, but to Scotland as a whole. It fits within Scotland's wider context of being a trauma-informed nation, and recognises that dealing with the root causes of harmful behaviour supports the child to move on from harmful behaviour, but also lessens the odds of that behaviour being repeated.
- We recognise that victims' rights are fundamental to this whole process, but rather than taking rights away from victims, we see this Bill as an opportunity to think more widely about what is required and to put in place the right support at the right time.
- We agreed with the general principles of the Bill.

Introduction

1. The Age of Criminal Responsibility (Scotland) Bill was introduced by the Deputy First Minister, John Swinney MSP to the Scottish Parliament on 13 March 2018. The Bill was referred to the Equalities and Human Rights Committee as lead committee for consideration. We are required to report to the Scottish Parliament on the general principles of the Bill. [v]

2. The Bill was accompanied by:

   - A Policy Memorandum
   - Explanatory Notes
   - Financial Memorandum
   - Statements on Legislative Competence
   - Delegated Powers Memorandum

Purpose of the Bill

3. The main purpose of the Bill is to raise the age of criminal responsibility in Scotland from eight to 12, to align it with the current minimum age of prosecution. Age of criminal responsibility is the age below which a child is deemed to lack capacity to commit a crime[vi].

4. In policy terms the Bill's objective[vii] is to better protect children from the harmful effects of early criminalisation, while ensuring that incidents of harmful behaviour by those aged under 12 can continue to be effectively investigated and responded to. Harmful behaviour involving children under 12 will continue to be fully investigated to find the facts of what happened and to ensure that victims and others affected by that behaviour continue to be protected.

5. The Policy Memorandum states that "Scotland's current age of criminal responsibility (ACR), at age eight, is the lowest in Europe. With this Bill, all children in Scotland under 12 will know that they cannot be treated as a criminal who has committed an offence. They will no longer be left with a criminal record for any behaviour under that age"[viii].

6. In relation to the number of children and young people who will be affected by the Bill, the Policy Memorandum[ix] explains the context in which legislative change is being proposed and that the number of under 12s offending is "small and reducing". Figures from Scottish Children's Reporter Administration (SCRA)[x]indicate around 204 children will be impacted by the Bill.

---

v Age of Criminal Responsibility (Scotland) Bill, SP Bill 29, Session 5 (2018)
vi Section 41 of the Criminal Procedure (Scotland) Act 1995 link
vii Financial Memorandum, Para 5
viii Policy Memorandum, Para 4
ix Policy Memorandum, Para 5

SCRA offence ground referrals for children ages eight to 11

Year	2013/14	2014/15	2015/16	2016/17
Number of offence ground referrals for children aged eight to 11	212	213	210	204

7. Regarding the type of offending behaviour in this age group, the Policy Memorandum states it is "minor to moderate in nature and impact" and recognises the link between early offending and adverse childhood experiences, stating that a "disproportionate number of the under-12s currently dealt with for offending concerns have faced significant prior disadvantage and multiple adversity in early childhood".[xi]

Legislative Background

8. A summary of how the law currently operates is noted below:

   - children under the age of eight - lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds
   - children aged between eight and 11 - cannot be prosecuted in the criminal courts but can be referred to the children's hearings system on both offence and non-offence grounds
   - children aged between 12 and 16 can be prosecuted in the criminal courts (subject to the guidance of the Lord Advocate) or referred to the children's hearings system on both offence and non-offence grounds[xii]

9. More detail on the legislation the Bill amends can be found in the Explanatory Notes which accompany the Bill.

Historical context and development of the policy approach

10. The current age of criminal responsibility was set by section 14 of the Children and Young Persons (Scotland) Act 1932.[xiii]

Scottish Law Commission

11. The Scottish Law Commission undertook a review of the Age of Criminal Responsibility[xiv] and laid its report before the Scottish Parliament on January 2002.

---

x Financial Memorandum, Para 10
xi Policy Memorandum, Para 5
xii SPICe Briefing on the Bill, Background, Page 4
xiii Report on the Age of Criminal Responsibility, Scottish Law Commission, para 2.5, (Scot Law Com No 185)

UN Committee on the Rights of the Child

12. In 2007, the UN Committee on the Rights of the Child published their General Comment 10 on Children's Rights in Juvenile Justice. This General Comment was designed to aid interpretation of the UN Convention on the Rights of the Child (UNCRC) [xv]and provide a clear steer in terms of how signatories to the Convention should approach offending behaviour by children.

13. In looking at the various ages of criminal responsibility in use by signatory countries, the UN Committee on the Rights of the Child contrasted those with a 'very low level of 7 or 8 years old' with those with a 'commendable high level of 14 or 16'. The General Comment also suggested that 12 should be the minimum internationally acceptable age of criminal responsibility.

Attempts to raise the age of criminal responsibility

14. Over the years there have been a number of attempts to raise the age of criminal responsibility. The most recent attempt to raise the age took place in 2015, when the Criminal Justice (Scotland) Bill (now 2016 Act) was progressing through the Scottish Parliament. An amendment was tabled by Alison McInnes MSP at Stage 2 of the Bill's consideration. This proposed raising the age of criminal responsibility to 12 to bring it into line with the age of criminal prosecution. Then Cabinet Secretary for Justice, Michael Matheson, argued that raising the age of criminal responsibility was not straightforward and that "the minimum age of criminal responsibility is a substantial and complex issue"[xvi]. He suggested that there were "significant underlying issues on the disclosure of criminal records, use of forensic samples, police investigatory powers and the rights of victims"[xvii]. The Amendment was not agreed to.

15. The Cabinet Secretary subsequently announced the creation of an independent advisory group, the Minimum Age of Criminal Responsibility Advisory Group "the Advisory Group" tasked with examining "the underlying issues in respect of disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the children's hearings system, and UNCRC compliance"[xviii].

16. A further amendment was tabled by Alison McInnes MSP at Stage 3 of the Bill. This was not agreed to, however, as there was a concern from some MSPs that it would pre-empt the findings of the Advisory Group.

---

xiv Report on the Age of Criminal Responsibility, Scottish Law Commission, (Scot Law Com No 185)

xv UN Convention on the Rights of the Child (UNCRC)

xvi Official Report, Justice Committee, 8 September 2015

xvii Official Report, Justice Committee, 8 September 2015

xviii Official Report, Justice Committee, 8 September 2015

Independent Advisory Group on the Minimum Age of Criminal Responsibility

17. The Independent Advisory Group on the Minimum Age of Criminal Responsibility was created in September 2015 and comprised of organisations working in the Crown Office Procurator Fiscal Service, the Scottish Children's Reporter Administration, bodies working in youth justice, children's organisations, victims' organisations and children's rights groups.

18. The Advisory Group was tasked with looking at the areas previously set out by the Cabinet Secretary, with a particular focus on:

    - The way in which any ongoing risks posed by a younger child's harmful behaviour should be managed.
    - The implications of removing the ability to refer a child under the age of 12 on offence grounds to the Children's Hearings System.
    - The impact an increase in the age of criminal responsibility would have on Police Scotland's ability to investigate incidents and establish what had happened and who was responsible (even if their age meant that they were not held criminally responsible).
    - Changes required to the Disclosure system to allow younger children to move on from an incident of harmful behaviour. This also encompassed the weeding and retention of non-conviction information held by the police.[xix], [xx]

19. The Advisory Group published its report in March 2016 and made a number of key recommendations:

    - The Scottish Government and Scottish Parliament should take early action to raise the age of criminal responsibility to 12 years
    - Reform should mark a clear departure from the involvement of young children under 12 in criminal procedures or in disclosure systems
    - That there is appropriate and effective support available to those victims affected by harmful behaviour
    - That any non-conviction information relating to children under 12 at the time of an incident, which is, in exceptional circumstances, then submitted to the Police or other government bodies for inclusion on an Enhanced Disclosure or PVG Scheme Record, should undergo independent ratification before release
    - In the most serious circumstances, a power should be created to allow the police to take a child to a ‘‘place of safety’’, to allow enquiries to be made in relation to the child's needs, including where the support of a parent or carer is not forthcoming

---

xix Non-conviction information is referred to as ‘Other Relevant Information’ when it is disclosed on a higher level Disclosure certificate or Protection of Vulnerable Groups (PVG) scheme record

xx The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016

- In the most serious circumstances, a power should be created to allow for the interview of children, with appropriate safeguards, including where the support of a parent or carer is not forthcoming. Those safeguards should be based on the principles of Child Protection Procedures and Joint Investigative Interviews
- That a power should be created to allow for forensic samples to be obtained in exceptional circumstances and to establish "the truth of the matter". This would allow a child to either prove their innocence or enable support to be put in place to prevent such harmful behaviour being repeated.[xxi]

20. The report was published alongside a comprehensive Children's Rights and Wellbeing Impact Assessment[xxii] and research from the Scottish Children's Reporter Administration (SCRA)[xxiii], examining the current behaviours of eight-11 year olds being referred to the Children's Reporter on offence grounds.

21. Immediately following the publication of the Advisory Group's report, the Scottish Government issued a consultation asking if the age of criminal responsibility should be raised to 12. The consultation ran from March-June 2016. An analysis of consultation responses was published in December 2016[xxiv].

22. This analysis found that 95% of those responding to the consultation favoured increasing the age of criminal responsibility to 12 or older.[xxv]

---

xxi The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, Children's Rights and Wellbeing Impact Assessment, 2016

xxii Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending, Scottish Children's Reporter Administration research, March 2016:

xxiii Scottish Government Minimum Age of Criminal Responsibility: Analysis of Consultation Responses, and Engagement with Children and Young People, December 2016

xxiv Scottish Government, Minimum Age of Criminal Responsibility Analysis of Consultation results.

xxv **Ref to SG analysis of ACR consultation results**

Consideration of the Bill

23. The Bill is in five parts:

- Part 1 deals with raising the age of criminal responsibility
- Part 2 relates to disclosure of convictions and other information
- Part 3 deals with the provision of information to victims
- Part 4 relates to the investigatory and other powers of the police
- Part 5 includes final provisions

24. This report covers the sections of the Bill which have provoked discussion during our consideration of the Bill. It does not therefore comment on all sections of the Bill. The report also sets out our conclusions and recommendations.

25. The costs associated with the Bill and the findings of the Delegated Powers and Law Reform Committee have formed part of this Committee's scrutiny of the Bill and are considered further below (see paragraphs 35-41).

Participation and engagement

26. We issued a call for evidence between 27 April and 6 July 2018. It sought views on the Bill's provisions and gathered 41 written submissions.[xxvi] Submissions were received from local authorities including children's services and social work services, organisations representing looked-after children and other children-centred groups, advocacy services, victims, as well as equality and inclusion groups, the legal profession, the Police, the Children and Young People's Commissioner for Scotland, the Care Inspectorate and those involved with the Children's Hearing system, and a few individuals.

27. We took oral evidence from six panels of stakeholder witnesses and held a further panel with Maree Todd, Minister for Children and Young People, and her officials.

28. The evidence sessions took place on the following dates (key areas of discussion in brackets):

- 6 September 2018 (Children's Hearings, youth justice and the impact of current processes on children and young people)
- 20 September 2018 (Police powers, advocacy and victims' rights)
- 27 September 2018 (Disclosure, children's rights and trauma-informed practice)
- 4 October 2018 (Minister for Children and Young People and officials)

---

xxvi Age of Criminal Responsibility (Scotland) Bill, Equalities and Human Rights Committee, Stage 1 consideration, Written Submissions.

Stakeholder engagement

29. To assist our considerations, it was important we engaged with a wide range of stakeholders, particularly children and young people and those who had experience of the youth justice system.

30. To increase participation, and to bring this topic to the attention of a broader section of young people, we developed an Age of Criminal Responsibility (Scotland) Bill toolkit[xxvii], which was used as the basis of Parliament outreach school visits across Scotland and also widely publicised via social media to encourage teachers to hold a discussion on the topic. Schools said they really appreciated the opportunity to be involved in something real. Details of the schools participating and key findings arising from this work are included in Appendix A to this report.

31. In addition, we carried out a number of fact-finding visits to inform our work. These included visits to three secure accommodation units: Edinburgh Secure Services Howdenhall, Edinburgh; Kibble Group Secure Unit, Paisley; and St Mary's Kenmure Secure Unit, Bishopbriggs; where we had an opportunity to speak with young people who had experience of the youth justice system. We would like to express our thanks to the young people who so candidly shared their difficult experiences, and their thoughts on how the system could be improved. We also spent time with the staff learning about their trauma-informed approach to young people and the challenges of providing a secure accommodation service. We thank those who made these visits possible and provided valuable background to the issues we are considering.

32. Also, we are grateful to the Scottish Children's Reporter Administration for facilitating our observations of Children's Hearings and to the children and young people who consented to this. This brought to life the hearings process which supports child protection and youth justice.

33. Finally, we partnered with the Scottish Youth Parliament at their sitting in Kilmarnock in October 2018, to produce a workshop on disclosure and non-conviction information. Again, we would like to thank the Members of the Youth Parliament[xxviii] who participated in this workshop and who contributed to our thinking in this area.

34. We would like to thank everyone who took the time to contribute to our consideration of the Bill, whether that was through written submissions, oral evidence, consultation events, visits or informal meetings. We recognise that this Bill has the potential to change many children's lives and allow them to move on from incidents that would otherwise have negatively impacted upon their life chances for years to come.

---

xxvii Age of Criminal Responsibility (Scotland) Bill Toolkit
xxviii Members of the Scottish Youth Parliament

Consideration by other Committees

Delegated Powers and Law Reform Committee

35. In addition to our consideration of the Age of Criminal Responsibility (Scotland) Bill, the Delegated Powers and Law Reform Committee (DPLRC) considered the Bill's delegated powers on 15 May, 4 September and 11 September.

36. At its meeting on Tuesday 15 May, the DPLRC agreed to write to the Scottish Government to raise questions in relation to five of the delegated powers in the Bill.

37. The DPLRC subsequently produced a report with a series of recommendations which we note.

38. These recommendations focus primarily on section 19 of the Bill (in respect of how the functions of the Independent Reviewer role created by section 6 of the Bill can be modified) and section 67 (in respect of an omission to the ancillary powers of the Bill).

39. We note the findings of the DPLRC, which suggest that the regulation-making powers in section 19 of the Bill are currently too broad and ill-defined.

40. Additionally, we note the DPLRC recommendation to amend this section to ensure that the circumstances under which the Independent Reviewer's remit can be changed are both limited and transparent.

41. As the Scottish Government has already indicated to the DPLRC their intention to bring forward an amendment at Stage 2 of the Bill's consideration to address the concerns raised around ancillary powers, we note this commitment.

Finance and Constitution Committee

42. The Finance and Constitution Committee invited views until 18 June 2018 and received one submission, from the Scottish Courts and Tribunals Service (SCTS). The Committee agreed that it would give no further consideration to the Financial Memorandum.

43. SCTS provided the Bill team with costs set out in paragraph 22 of the Financial Memorandum on the understanding that the SCTS would "receive, at a later date, the full detail of the Bill in order to properly assess its financial impact."[xxix].

44. An estimate of costs was provided by SCTS on the basis of uncontested civil application. This costing was caveated that it took no account of the increased costs to the SCTS should such applications become contested. On the new appeal to the sheriff under section 15 of the Bill or appeals under Part 4 of the Bill, SCTS advised they were not given the opportunity to provide cost estimates.[xxx]

---

xxix Written Submission to Finance and Constitution Committee, Scottish Courts and Tribunal Service

xxx Written Submission to Finance and Constitution Committee, Scottish Courts and Tribunal Service

45. SCTS goes on to acknowledge, however, that given both applications and appeals (under Parts 2 and 4 of the Bill) are civil proceedings, SCTS are of the view that the Scottish Government's policy of full cost recovery (including judicial costs) would apply and on this basis any additional costs to SCTS would be met through existing or amended court fees.[xxxi]

46. We note the concerns of SCTS and intend to make no further recommendations in this regard.

[xxxi] Written Submission to Finance and Constitution Committee, Scottish Courts and Tribunal Service

Financial Memorandum

47. We considered the figures provided in the Financial Memorandum accompanying the Bill.

48. We are generally content with the Financial Memorandum. However, we note that depending on the final approach taken to Advocacy Provision and "Places of safety", there may a financial impact at later amending stages of the Bill.

49. These are outlined in the relevant sections of this report:

Advocacy Provision:paragraphs 336-362

"Place of safety":paragraphs 270-298

Part 1 - Age of Criminal Responsibility

50. Part 1, sections 1 to 3, make provision for the age of criminal responsibility in Scotland to be raised to 12.

51. The Explanatory Notes which accompany the Bill explain that section 1 raises the age of criminal responsibility to 12 and, when taken together with sections 2 and 3, ensure that from the date new section 41[xxxii] comes into force, no child will be prosecuted, or referred to a children's hearing on the basis of the offence ground in relation to pre-12 behaviour. This applies regardless of whether the child's behaviour occurred before or after the change in the age of criminal responsibility.[xxxiii]

52. After new section 41 comes into force, where a child who is referred to a children's hearing, for behaviour that occurred while the child was aged eight to 11 and which would previously have constituted an offence, the child will not necessarily be dealt with any differently in terms of whether a compulsory supervision order is made (and, if so, the measures authorised by the order). The Explanatory Notes further explain that, “This is because, as already noted, the child's welfare is already the paramount consideration in determining what action should be taken in response to the child's behaviour, not the grounds on which the child is referred”.[xxxiv]

Setting the age of criminal responsibility at 12

53. The Policy Memorandum states that the Scottish Government considered raising the age of criminal responsibility above 12, possibly to 14, but rejected this on the basis that “No child under 12 is currently responded to in the adversarial criminal justice system, or subject to punitive sanctions. Instead, they are responded to using a welfare based approach in the children's hearings system". [xxxv]

54. Thirty-nine out the 41 responses received to our call for evidence took a view on the age of criminal responsibility (ACR). Out of those 39, 15 respondents (roughly 38%) agreed that 12 was the appropriate age at which to set the ACR. A further 20 respondents (51%) agreed that the ACR should be raised to 12 for now, but with a view to considering increasing the ACR further in future. In summary, this indicates there was a desire amongst stakeholders to increase the age of criminal responsibility to 12 years old now with the majority of both written and oral contributors signalling a desire to go still further.

55. We noted that in the past Scotland's welfare-based system for dealing with youth justice issues was cited as a potential reason for any reluctance to increase the age. Malcom Schaffer of the Scottish Children's Reporter Administration believed “The children's hearing system has almost been getting in the way of looking at

---

xxxii This refers to section 41 of the Criminal Procedure (Scotland) Act which sets out the age at which a child can be held criminally responsible in Scotland

xxxiii ACR Bill, Explanatory Notes, p.5, para 20
xxxiv ACR Bill, Explanatory Notes, p.5, para 21
xxxv Policy Memorandum, p.17, para 75

proper reform by lulling us into complacency. We have not recognised the sort of criminalisation effects that an appearance at a hearing for committing an offence can have, particularly in terms of disclosure."[xxxvi]

Inconsistencies in Scots Law

56. One of the reasons provided in the policy memorandum as to why 12 was an appropriate age was that age 12 already has significance in Scots law. For example, children aged 12 and over can make a will, and consent to or veto their own adoption. Also, children aged 12 or over were presumed to have sufficient understanding to express views on matters such as future arrangements for their own care in private law proceedings, to form a view to express at a children's hearing, and to instruct a solicitor.[xxxvii]

57. Several submissions emphasised significant inconsistencies in the way in which children and young people are currently treated.

58. North Ayrshire Health and Social Care Partnership commented that "….legislation and government policies governing the rights of children is very muddled."[xxxviii]

59. In relation to a child's maturity, the Scottish Association of Social Work highlighted differing assumptions, stating that "…should the proposed MACR [minimum age of criminal responsibility] be enforced, a child of 12 can be charged and receive a criminal record at the age of 12, despite not being considered sufficiently mature enough to make decision about their sexual behaviour, or drink alcohol."[xxxix]

60. While David Orr[xl] noted that Scotland's approach towards children and young people meant that whilst some protections were extended to the age of 25[xli], others assumed adulthood at 16[xlii], stating that "there is a wider and urgent debate required as to what is meant by a 'child' in numerous pieces of legislation. … There are legislative inconsistencies at present which have created a confusing picture."[xliii]

61. Pointing to a stark example, Dr Claire McDiarmid, Deputy Head of the School of Law at the University of Strathclyde, stated a child can be held criminally responsible for their actions before a court at the age of 12, whilst being considered insufficiently mature to sit as a juror in that same court until the age of 18.[xliv]

---

xxxvi Official Report, 6 September 2018, Col 3
xxxvii Policy Memorandum, p.17, para 75
xxxviii Ref Written submission – N Ayrshire Health and Social Care Partnership
xxxix Ref Written submission – The Scottish Association of Social Work
xl David Orr indicated that he was responding to the Call for Evidence as an individual and his views were his own, rather than those of his employer.

xli For example, in relation to the Children and Young People (Scotland) Act 2014, which extends support to some care-experienced young people up to the age of 25.

xlii For example, the right to marry.

xliii Written submission, David Orr
xliv Official Report, 6 September 2018, Col 2

Age 12 and international human right standards

62. According to the Policy Memorandum, age 12 reflects “Scotland's progressive commitment to international human rights standards”[xlv]. It also states that “Having the lowest ACR in Europe tarnishes Scotland's reputation internationally”[xlvi]. Raising the age of criminal responsibility to 12 would, the Memorandum said, give clearer effect to the United Nations Convention on the Rights of the Child (UNCRC) and responds positively to criticisms from the UN Committee on the Rights of the Child.[xlvii] The European Convention on Human Rights does not require a particular age of criminal responsibility to be set by member states, although the Council of Europe Parliamentary Assembly, resolution[xlviii] recommended a minimum age of criminal responsibility of at least 14 years of age, while establishing a range of suitable alternatives to formal prosecution for younger offenders.

63. Scotland (as part of the UK) currently has the lowest age of criminal responsibility amongst European Union member states, with the rest of the UK (England, Wales and Northern Ireland) having a slightly higher age at 10. In fact, it is understood from the Children and Young Peoples Commissioner that it is the lowest age of criminal responsibility in the world[xlix].

64. If, as the Bill proposes, the age of criminal responsibility is raised to 12, Scotland would have a higher age than the rest of the UK and would place Scotland at the same level as Belgium, Ireland and the Netherlands, but this would still be amongst the lowest in Europe.

65. Bruce Adamson, Children and Young People's Commissioner Scotland, referred to United Nations Committee on the Rights of the Child consideration of the matter in 2007, which concluded “12 was the absolute minimum age acceptable in international law at that point”. He explained there was a danger in assuming that age 12 would still be considered acceptable today:

> “It specifically said that no one should lower that age to 12, which was never intended as a target but the absolute minimum with immediate effect in 2007. Any country where the age was already 12 in 2007 needed to raise it progressively. Even 10 years ago, the committee said that a higher age of criminal responsibility—for instance, 14 or 16—contributes to a better juvenile justice system…I am very confused about why we are talking about 12."[l]

66. Professor Susan McVie, University of Edinburgh, questioned whether age 12 represented a progressive commitment to international human rights standards.[li]

---

xlv Policy Memorandum, page 13, para 58

xlvi Policy Memorandum, page 17, para 74

xlvii Policy Memorandum, page 43, para 200

xlviii Council of Europe Parliamentary Assembly, Child-friendly juvenile justice: from rhetoric to reality, Resolution 2010 (2014) Final Version:

xlix Written Submission, CYPCS

l Official Report, 27 September 2018, Col 22

li Official Report, 6 September 2018, Col 2

67. Professor Elaine Sutherland, University of Stirling, considered it also important to look at article 40 of UNCRC, which "talks about how children ought to be treated when they come into contact with the criminal justice system" and "emphasises the importance of reintegrating the child into society". She described the Bill as "positive" and "going in the right direction".[lii]

68. Maree Todd, Minister for Children and Young People (the Minister) emphasised that she was keen to hear views but it was her view that the age proposed was the right one, commenting:

> "It is supported by the majority of respondents to our consultation and in the written evidence received by the committee. It is the age at which there is shared professional and public confidence in our proposals."[liii]

Raising the age of criminal responsibility beyond 12

69. A key area raised in evidence was whether the age of 12 was high enough. This was closely followed by what age, beyond 12, should the age of criminal responsibility be set at.

70. Responses to our call for views showed that of the 39 responses, twenty (51%) respondents agreed that the ACR should be raised to 12 but with a view to considering increasing the ACR further in future, with a further 4 (10%) respondents stating that the ACR should be raised further by the Bill either to 16 or 18. This demonstrates 62% would like to see the age raised beyond 12.

Identifying an age higher than 12

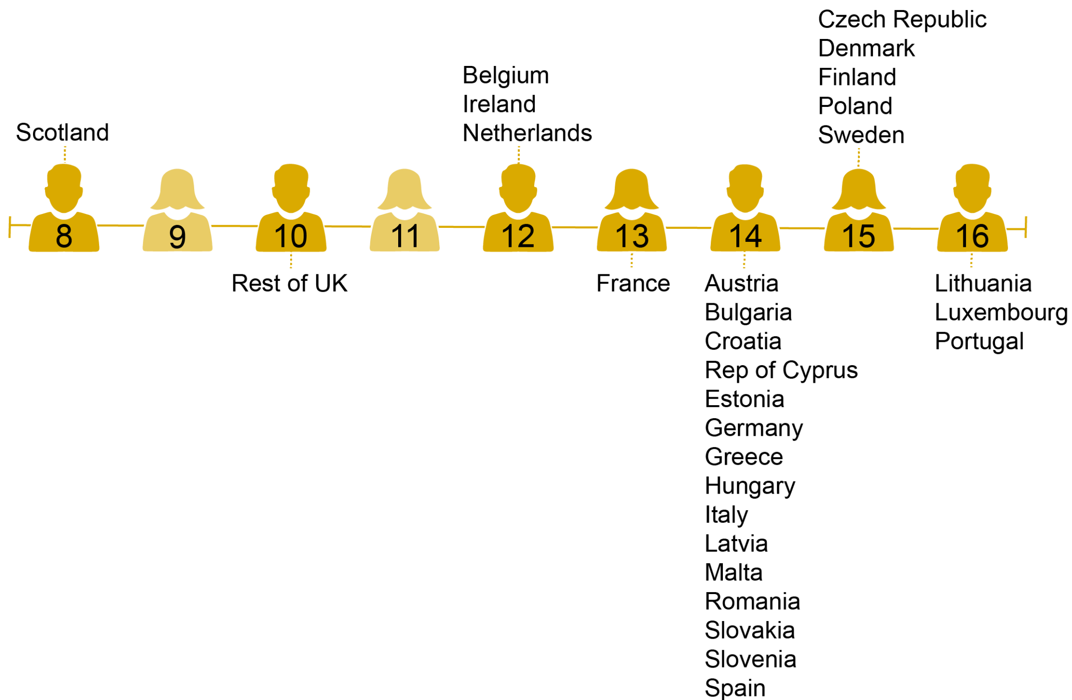
71. Some stakeholders expressed frustration at what they perceived to be a lack of ambition by the Scottish Government in only raising the age to 12.

72. The Policy Memorandum[liv] provides a table of ages of criminal responsibility currently in use across the EU. Based on the table, UK aside, fifteen countries have an ACR of 14, five at 15, three at 12 and 16, one at 13 This is reproduced below.

---

lii Official Report, 27 September 2018, Col 22
liii Official Report, 4 October 2018, Col 2
liv ACR Bill Policy Memo, page 3

Ages of criminal responsibility in the EU



Source: Figures from the Policy Memorandum to the Bill

73. Duncan Dunlop, Chief Executive of Who Cares? Scotland, suggested that a move to 12 wasn't enough. He stated, “this is not making Scotland the best place in the world to grow up in; it is just about getting us on a par with the worst places in Europe”[lv]. Furthermore, he said “the involvement of the police and in fact – bizarrely – the justice system means that people are more likely to continue offending. We have to look at a different approach and we should seize this opportunity. The age of 12 is really nothing”[lvi].

74. Police Scotland suggested, however, that 12 was the most appropriate age, stating “whilst we understand the debate regarding setting the age of criminal responsibility at a higher age, we are mindful that the nature of children’s actions and the prevalence of that behaviour changes as the age group increases to 12 and above.”[lvii]

75. Howard League Scotland (HLS) suggested that “the UN Committee makes the case that a MACR of 14 or 16 sits well with the UNCRC. While HLS welcomed the introduction of legislation to raise the minimum age in line with the current minimum age for prosecution, we urge the Scottish Parliament to adopt the higher age of at least 16, in the interests of promoting a forward-thinking and fair system of justice for young people in Scotland.”[lviii]

76. Malcolm Schaffer, Head of Practice and Policy at the Scottish Children’s Reporter Administration, suggested that increasing the age to 12, and bringing the age of

lv Official Report, 6 September 2018, Col 22

lvi Official Report, 6 September 2018, Col 22
lvii Written submission, Police Scotland
lviii Written submission, Howard League Scotland

criminal responsibility into line with the age of prosecution, was "an easy one to crack in terms of the legislative impact"[lix]. He went on to acknowledge, however, that an increase to 16 would be desirable, but that an increase to a higher age would require further work to "identify any potential gaps in powers"[lx], including the need to think about "the implications for the case of somebody who commits a very serious and significant offence at the age of 15 years and 11 months. If the powers in the hearing system last only until the age of 18, but there is still a need for support after that, how will that support be provided?"[lxi]

77. Bruce Adamson, the Children and Young People's Commissioner Scotland drew attention to the UN Convention on the Rights of the Child:

> "Children are children up to the age of 18 and the question should not be how to justify raising the age from eight to 12, but how we justify treating children under 18 in a criminal manner. There may well be justifications, but the starting point for our discussions needs to be 18 and we need to be looking at 14 or 16 as the norm, internationally."[lxii]

Age of criminal responsibility international trends

78. Comparing progress internationally, Bruce Adamson, observed that "The dominant international trend in MACRs has been upwards. Between 1989 and 2008, 41 countries raised their MACR and 23 countries proposed to…"[lxiii]

79. He went on to express concern that an increase to 12 would do little to improve the UK and devolved governments' standing in an international human rights context, stating that "a MACR of 12 will bring Scotland ahead of only Switzerland, England, Wales and Northern Ireland, and in line with a small group of European countries, one of which is considering raising it to 14 years.[lxiv] The most common MACR in Europe is 14, while for the Nordic countries, the MACR is 15 years."[lxv]

80. In considering the approach to children and young people Juliet Harris, Together, advised Scotland to look at, countries such as Norway, Sweden and Iceland, which all have an age of criminal responsibility of 15.[lxvi]

81. In response to the international evidence the Minister urged caution:

---

lix Official Report 6 September 2018, Col 7

lx Official Report 6 September 2018, Col 17

lxi Official Report 6 September 2018, Col 17
lxii Official Report, 27 September 2018, Col 23
lxiii Written submission, CYPCS
lxiv In 2018, an independent advisory body to the Dutch Government recommended raising the MACR to at least 14.

lxv Written submission, CYPCS
lxvi Official Report, 20 September 2018, Col 2

> “When you look at other countries, it is clear that you cannot make direct comparisons between countries because the headline age does not capture the nuance. The age means different things in different countries. In Scotland, beyond the age of 12, the vast majority of children will continue to be dealt with by the children’s hearings system and not by the criminal justice system. That is vital to understand. Cultural context is also important. We will have the highest age of criminal responsibility within the United Kingdom.” [lxvii]

82. She pointed to Luxembourg as an example, which had “a headline age of 18, but there are real idiosyncrasies in that...children who are under 16,… although they nominally have a criminal age of responsibility of 18, have to be dealt with in a youth court and the youth court can impose penal measures, including deprivation of liberty and solitary confinement for up to 10 days. There is no age limit on that. I therefore do not think that it is useful to look just at the headline age.” [lxviii]

Comparative studies of other countries approach

83. In 2016, to accompany the Advisory Group on the Minimum Age of Criminal Responsibility's report, the Centre for Youth and Criminal Justice produced a series of case studies[lxix] exploring the ways in which other countries approached the minimum age of criminal responsibility. This included analysis of how the age operated in Germany, the Republic of Ireland, New Zealand, Portugal and Sweden.

84. These case studies set out how the age of criminal responsibility was applied in each country and what, exceptions, if any, were put in place to deal with seriously harmful behaviour.

85. More recent comparative data and analysis can also be found on the Child Rights International Network website[lxx].

86. Commenting on the international approaches, Professor Susan McVie, Chair of Quantitative Criminology of the School of Law at the University of Strathclyde, suggested it was unhelpful for countries to put in place exceptions to the minimum age of criminal responsibility to allow for very serious behaviour to be dealt with via an adult court. She suggested Scotland should take a different approach, stating “some countries put in place caveats on the age of criminal responsibility, but I think that is dangerous….If the principle is that we want to protect and support our young people, we have to accept that sometimes they do bad things, even though that is relatively rare.”[lxxi]

---

lxvii Official Report 4 October 2018, Col 5
lxviii Official Report, 4 October 2018, Col 5
lxix Minimum Age of Criminal Responsibility (MACR) – Comparative Analysis International Profile - Germany
lxx Child Rights International Network Website

lxxi Official Report 6 September 2018, Col 16

Cognitive Development

87. We heard from a range of professionals that children's brains often did not fully mature until much later in life, with full emotional maturity not being achieved until the late teens or even up to the age of 25.

88. North Ayrshire Health and Social Care Partnership suggested that "the way a child's brain processes information is very different to that of an adult, with marked differences in their ability in areas such as social reasoning, self-control, problem-solving and consequential thinking"[lxxii].

89. Children 1st observed that "Not all children mature at the same rate and some understand and interpret consequences and processes differently to others."[lxxiii]

90. An example of this might be a child who pushes another child in anger. The child is likely to understand on a basic level that pushing another child is wrong. However, the consequences of such an action could range from the very minor (e.g. a scraped knee) up to the very serious (e.g. if the child falls and hits their head).

91. The Centre for Youth and Criminal Justice advised that "for children growing up in families and communities where others around them are engaged in criminal and harmful behaviours, it can be extremely difficult, if not impossible, for them to understand what criminal behaviour is and also to be able to exercise choice over what they do."[lxxiv]

Legal Defence on the basis of criminal incapacity

92. A small number of stakeholders considered there was merit in introducing a legal defence of criminal incapacity for children over the age of 12, but under 16 or 18 years old.

93. Dr Claire McDiarmid suggested that "One possible way….might be to make provision for a defence for young people aged over 12 but under a specified higher age (which could be 16, 18 or 25 depending on the criteria applied) to have a defence which they could plead to a criminal charge where they do lack criminal capacity….This has the advantage of allowing the certainty of an age of criminal responsibility alongside the provision of a safety net for those older young people who need, and merit, it."[lxxv]

94. The Centre for Youth and Criminal Justice highlighted an example from Germany "which has an age of criminal responsibility of 14 but children between the ages of 14-18 can only be held responsible if they are "morally and mentally mature when the offence took place;…can realise the unlawfulness of his/her behaviour and act according to that realisation"[lxxvi], [lxxvii].

---

lxxii Written submission, North Ayrshire Health and Social Care Partnership

lxxiii Written submission, Children 1st
lxxiv Written submission, CYCJ
lxxv Written submission Dr Claire McDiarmid
lxxvi Papadodimitraki, 2016). Minimum Age of Criminal Responsibility (MACR) – Comparative Analysis International Profile: Germany

95. The Centre suggested that a similar set of provisions could be applied in Scotland and that “we believe that including these additional tests to the proposed legislation would be a sensible and just approach which takes into account the issues of free will; trauma, adversity and poverty; and brain development, maturity and understanding, as raised above".

96. Gerard Hart of Disclosure Scotland suggested, however, that such a test was unnecessary and that the way in which the Bill had been constructed did not rely on a capacity test, stating “the reasons for that are, first, that there may not be an easy way to agree on a test that could be scientifically validated and, secondly, that there would also be a difficulty with subjectivity, given the huge complexity of each individual child's story, their background and their behaviour”[lxxviii].

97. He went on to suggest that under the current arrangements for dealing with a child’s behaviour “the establishment of capacity, culpability and vulnerability is already done” and that any child appearing in front of a Children's Hearing will “already be subject to those protections”[lxxix].

Participation and Protection Rights

98. Several stakeholders indicated that understanding the distinction between rights that are participation rights and those that are protection rights, was crucial in relation to how children and young people’s harmful behaviour was approached.

99. Bruce Adamson, the Children and Young People’s Commissioner Scotland explained that “the rights in the UN Convention on the Rights of the Child and the broader framework are often grouped into rights for survival, development, participation and protection. Participation and protection rights are really important. The idea is that, from a very young age, children have the right to be involved in decisions that affect them not just directly but at a societal level...[lxxx] His written evidence stated that protection rights need to stay with children and young people until they are 18. The starting point is that a protection right, such as not being criminalised for actions, applies until 18, and the decision to lower that age needs justification.[lxxxi]

100. The Centre for Youth and Criminal Justice also suggested that “it is entirely appropriate that as children mature they are given greater rights to exercise autonomy and make choices about their lives, so there needs to be a tiered approach” whilst acknowledging that “criminal responsibility, however, needs careful consideration, because holding a child solely, exclusively and criminally responsible can have long-term and profound consequences”[lxxxii].

---

lxxvii Written Submission , CYCJ
lxxviii Official Report, 27 September 2018, Col 16
lxxix Official Report, 27 September 2018, Col 16
lxxx Official Report, 27 September 2018, Col 36

lxxxi Written submission, CYPCS
lxxxii Written submission, CYCJ

101. Chris McCully of the Criminal Justice Voluntary Sector Forum, however, suggested "the fundamental basis of human rights is not what is politically acceptable, but what is right. After all, that is why they are called rights, and if you want to take them seriously, you enforce them, regardless of the political consensus"[lxxxiii].

102. The Minister acknowledged that there were differing views on what the right age should be:

> Our distinct children's hearings system plays a critical role in addressing and responding to children's behaviour. It provides a flexible, child-centred and welfare-based framework for exploring and addressing the harmful behaviours that some children and young people engage in. It is where decisions are taken to safeguard and promote the child's welfare. The system focuses on the needs of children, whether they are perpetrators or victims with broader needs. the committee. It is the age at which there is shared professional and public confidence in our proposals.[lxxxiv]"

An incremental approach to raising the age

103. Several stakeholders expressed a desire to increase the age incrementally, and suggested a review mechanism would provide a means of doing so.

104. Claire Lightowler, Director, Centre for Youth and Criminal Justice, University of Strathclyde, was keen we explored ways to raise the age of criminal responsibility higher than 12, because "a child could grow up in a criminal family in a criminal community and they might be exploited. Serious organised crime groups target vulnerable children... A child can be sexually exploited and then be used to commit a range of drug offences. What are we doing when we hold children who are in those circumstances criminally responsible?"[lxxxv].

105. Professor Elaine E Sutherland considered 12 a compromise solution and that "rather than jeopardising what is undoubtedly progress, it may be prudent to accept raising the age to 12 for now. The matter can always be revisited in the future."[lxxxvi]

106. Orkney Islands Council believed "there is a clear case to raise the age of criminal responsibility to 16 but that is some way off in terms of public support or political appetite to pursue given the challenges to get to 12 years."[lxxxvii]

107. This view was shared by Detective Chief Superintendent Boal of Police Scotland who suggested "whether the age increases to 12 or higher, it has to be recognised and accepted that it must have societal buy-in"[lxxxviii].

108. Community Justice Scotland suggested that 'the ACR should be subject to review by Parliament within a designated period - on the basis of evidence – to access how appropriate the current ACR proposal is." [lxxxix]

---

lxxxiii Official Report, 27 September 2018, Col 35
lxxxiv Official Report, 4 October 2018, Col 2
lxxxv Official Report, 6 September 2018, Col 25
lxxxvi Written submission, Professor Elaine E Sutherland, University of Stirling
lxxxvii Written submission, Orkney Islands Council
lxxxviii Official Report, 20 September 2018, Col 3

109. A similar view was expressed by Social Work Scotland, suggesting that "there should be a clause inserted into the Bill which would require a review of the legislation within 3 years with a view to incrementally raising the age until all children are afforded protected status in the criminal justice system." [xc]

110. Maggie Mellon, Howard League Scotland, counselled against taking such an approach, stating "Scotland set the age of criminal responsibility at 8 in 1937. In 1964, Lord Kilbrandon said that there was no clinical evidence to suggest that that had made any sense at all: we were calling for the age to be higher in 1964. In considering review, the committee should bear it in mind that it might take 100 years for evidence to come back, despite there being lots of international evidence showing different thinking about the age of childhood and youth"[xci].

111. The Minister said that "the UNCRC advises us to keep further reform in this area on the agenda and we definitely will. Future moves have to follow the evidence. We would need to be sure that the move to age 12 had worked well. The public would have to have confidence in what we are doing." [xcii]

112. She was "very interested in hearing the committee's views on what would be a reasonable length of time for letting the system bed in and be tested and what we might need to monitor in the interim period so that we can have confidence about moving from the age of 12." [xciii]

Conclusion on an incremental approach to raising the age

113. In considering this suggestion, we received no comprehensive details about how this would work in practice.

114. A review mechanism could, we understand, take one of several forms. We agreed that a review should take place, and that it should look at whether the legislation had improved outcomes for young people. Some Members felt this review should be used as an opportunity to increase the age of criminal responsibility still further. A review provision could set a timescale in the Bill for the issue to be revisited in future or it could cause the Bill to expire after a specified time period - forcing Parliament to revisit this. In the meantime, further work could be undertaken to examine the changes needed to make an increase beyond 12 a reality, in the same way the Advisory Group had looked at raising the age from eight-12 years. It is also noted a review could combine a number of these factors.

115. We consider there are inherent risks in pursuing the option of a review mechanism; for example, any review could overlap with the end of one Parliamentary session and the beginning of another.

116. Much of the work in identifying what a 'non-criminalising' approach towards harmful behaviour would look like in Scotland has already been done in the context of drafting this Bill. As such, we see no merit in repeating that exercise.

---

lxxxix Written submission, Community Justice Scotland
xc Written submission, Social Work Scotland
xci Official Report, 27 September 2018, Col 10
xcii Official Report, 4 October 2018, Col 6
xciii Official Report, 4 October 2018, Col 6

Conclusions on the age of criminal responsibility

117. From the Scottish Government's consultation, our call for views, and some of our witnesses' testimony, the age of criminal responsibility as set out in the Bill appears to be a publicly acceptable age.

118. We note the Scottish Government's view that the Bill's proposals have both "professional and public confidence".

119. Whilst public opinion may be a factor in considering the age at which the age of criminal responsibility should be set, it should not, we believe, be the only driver for change. Welfare and the protection of the child should be paramount.

120. We heard evidence that children and young people who ended up in the youth criminal justice system had in most cases experienced trauma in their life. Once exposed to the criminal justice system, children tend to continue within it and move on to become part of the adult offending system. Professionals were clear having a trauma-informed approach rather than criminalising resulted in better outcomes for children and young people.

121. We recommend that, in future, the way in which any decisions are made about very serious harmful behaviours by all children, whether criminally responsible for their actions or not, must start from a need to approach this from a trauma-informed perspective. We ask the Scottish Government and other relevant public authorities to amend any supporting guidance and training materials to make this clear for all operational staff.

122. The Scottish Government argued that 12 is a good fit with the way in which Scotland approaches children and young people's decision-making under the law e.g. instructing a solicitor or making a will. Evidence highlighted, however, a significant number of inconsistences in relation to the treatment of children under Scots law. In addition, these rights fall into the basket of participation rights, and not protection rights under the UNCRC which should follow a young person until they are 18. Some Members therefore feel this reasoning is not particularly robust.

123. We also know from our inquiry into Human Rights and the Scottish Parliament that work has started on an audit of the Scottish Government's compliance with the UNCRC to assist in its commitment to incorporate children's rights and that will, we expect uncover a number of inconsistences in the way children and young people are treated under Scots law.

124. We ask the Scottish Government, prior to Stage 1 debate on the Bill, for an indication of when this audit will be completed, whether the age of criminal responsibility will form part of this work, and the timescale for incorporating the UNCRC.

125. Work on incorporation of the UNCRC also raises an important issue around reconciling the age of criminal responsibility proposed in the Bill -12 - with international human rights standards. Article 1 of UNCRC states that a child is a

child up to the age of 18. Given its commitment to incorporate UNCRC, we suggest it should be the benchmark by which the Scottish Government tests its new policy and legislative proposals.

126. While we also understand 12 would meet the minimum international standard, we also note the General Comment setting this standard was made in 2007 and the international direction of travel is upwards. Fifteen European countries have an age of criminal responsibility of 14. The minimum age of 12 would just put us on the 'floor' amongst other European countries - it is the *de minimis* position – and, some Members feel, this is out of step with the Scottish Government's objective to be a fairer Scotland and to lead in human rights.

127. Allied to the points made above, we considered whether we are doing enough to protect our children and young people. As we outlined above, there is a clear distinction between children and young people's participation rights and those that are protection rights. We refer in particular to Bruce Adamson's comments, "Protection rights need to stay with children and young people until they are 18. The starting point is that a protection right, such as not being criminalised for actions, applies until 18, and the decision to lower that age needs justification."[xciv]

128. The Minister said, "the bill represents a balanced, thoughtful and ambitious reform package for Scotland" [xcv]. The Scottish Government argues age 12 is appropriate because it has public confidence, is a natural jumping-off point in childhood i.e. primary school age. This legislation and in its current form would assist only around 200 of Scotland's children each year.

129. Because the Advisory Group's work was predicated on the impact on eight-11 years olds, we do not consider the Scottish Government focused sufficiently on exploring the options for setting a higher age of criminal responsibility, even though child development research, international precedent and international human rights standards support a higher age of criminal responsibility. Our evidence showed that research on developmental psychology shows development is at different rates in different children and that the necessary intellectual development to understand the consequences of their actions might not come through till the mid-teens. Therefore, the focus on pre-teens will not address this point.

130. We do recognise however, that much of the Advisory Group's work in identifying what a 'non-criminalising' approach towards harmful behaviour would look like in Scotland has already been done in the context of drafting this Bill and some Members believe this could be extended to other age groups.

131. We heard evidence that there are significant reasons as to why the age of criminal responsibility should be higher than 12.

132. Some Members were therefore not convinced the Scottish Government has provided robust enough evidence to be confident there is sufficient justification to set the age as low as 12 and called into question whether the Bill as currently drafted is ambitious enough in human rights terms and for the protection of Scotland's children

---

[xciv] Official Report, 27 September 2018, Col 36
[xcv] Official Report, 4 October 2018, Col 2

133. We wish to see progress on the protection of children and young people in Scotland, and so we agree with increasing the age of criminal responsibility to 12, as set out in the Bill.

134. Some Members, however, consider the Scottish Government has missed an opportunity to realise and protect the rights of more children and young people in Scotland by setting the new age of criminal responsibility at 12.

Children's Hearings

135. Section 3 of the Bill makes provision for the removal of the offence ground for all children under the age of 12 in a Children's Hearing. This means that in future, children's behaviour in that age group will only be able to be dealt with via a referral to the Children's Hearings system on care and protection grounds.

136. In 2016, The Scottish Children's Reporter Administration produced research[xcvi] which examined the circumstances surrounding children aged eight-11 years (i.e. above the current age of criminal responsibility, but below the age of criminal prosecution) being referred to a Children's Hearing on offence grounds.

137. The research looked at a sample of 100 children aged eight to 11 years old who were referred to the Reporter in 2013-14.

138. The report found that:

- 39% of children had disabilities and physical and/or mental health problems.
- There were recorded concerns about educational achievement, attendance or behaviour in school for 53% of those children.
- A quarter (25%) had been victims of physical and/or sexual abuse
- 75% had service involvement for at least a year, and over half had been involved with services for at least five years.
- 75% had previous referrals to the Reporter. Seventy children had been referred on non-offence grounds and five on offence grounds. Twenty-six children were on Compulsory Supervision Orders (CSO) at the time of the offence referral incident in 2013-14[xcvii].

139. The report therefore established a clear link between younger children's welfare needs and harmful behaviour.

---

xcvi Scottish Children's Reporter: Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending
xcvii Scottish Children's Reporter: Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending

140. It was on the basis of this research, and on the recommendation of the Advisory Group, that a decision was made not to create a new ground for referral for children whose behaviour is currently dealt with via an offence ground.

141. This point was largely welcomed by those responding to our Call for Evidence, given that it clearly linked harmful behaviour with trauma occurring in a child's life.

142. One concern raised with us related to how a move away from offence grounds would impact upon the burden of proof used to establish a child's involvement in an incident.

143. Professor Elaine E. Sutherland explained that "Where non-offence grounds of referral are not accepted by the child or the relevant persons, establishing them before the sheriff requires proof on the balance of probabilities, rather than the higher criminal standard. That would be the case even if the substance of the allegation against the child related to harmful behaviour that would previously have been criminal. Thus, what would once have required proof beyond reasonable doubt in the past would only have to be established on the balance of probabilities under the proposed legislation."[xcviii]

144. Furthermore, she stated that "since the disposal – what actually happens to the child – is decided on the basis of the child's welfare, the difference in the standard of proof may not seem important. However, the substance of the proven allegations could be recorded and retained for the purpose of future disclosure. As a result the child's (formerly criminal, now harmful) behaviour might follow him or her into adult life, being disclosed to a prospective employer without the child having the protection afforded to all other persons in respect of criminal conduct of having that conduct proved beyond reasonable doubt."[xcix]

145. Professor Sutherland suggested a potential solution to deal with this issue would be to create a new ground of referral. It could cover conduct that would have been criminal, but for the child's age, and require proof beyond reasonable doubt in disputed cases. Such a ground for referral, could be:

> the child has behaved in a manner which had they been twelve years of age or over which would require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest.[c]

146. In relation to the concern that a lesser standard of proof could impact on a child's life chances through disclosure, Gerard Hart, Disclosure Scotland, provided assurance that the independent reviewer (see para 172) "will work to statutory guidance that ministers will produce, which will set out the parameters within which the role will be discharged". He went on to say, "the independent reviewer will be a much faster way to get the matter sorted out. It will also allow us to provide guidance, which will help to make the process much clearer for everyone concerned" and that it "should be a guidance document that provides a wide range of advice"[ci].

---

xcviii Written submission, Prof Elaine Sutherland
xcix Written submission, Prof Elaine Sutherland
c Written submission, Prof Elaine Sutherland
ci Official Report, 27 September 2018, Col 20-21

147. Simon Poutain, an Independent Monitor for the Disclosure and Barring Service, said "the list in the bill of people from whom the reviewer may request information is useful, because it includes not only the statutory partners—as happens in the parts of the country where I work—but "any other person" who is considered relevant, which could include the victim or medical teams and so on"[cii].

Conclusion on children's hearings

148. We recognise that the change in the standard of proof is likely to have an impact on children aged eight-11 years old who might otherwise have been referred to a Children's Hearing on offence grounds.

149. Also, we recognised that decisions about children under the current age of criminal responsibility (i.e. under eight years old), were already based on this civil standard of proof (as the child could not be found guilty of an offence).

150. Creation of an Independent Reviewer, would, we consider, guard against children aged eight-11 years having information about behaviour they denied included on a higher level Disclosure or PVG scheme record. On this basis, we do not feel it necessary to create a new ground for referral.

151. We consider there is merit in the Scottish Government considering carefully the issue of any change to the burden of proof in its wider work around the PVG review and Disclosure to ensure that children aged eight-11 are not negatively impacted by this change. We ask the Scottish Government to provide us with an assurance this issue will be included into its wider work in advance of the Stage 1 debate. Additionally, we ask the Scottish Government to provide an update on progress prior to Stage 2 consideration of the Bill

152. We recommend that when the Scottish Government creates the guidance for the Independent Reviewer that this change to the burden of proof is specifically referenced, and that the applicant's right to make representations to the Independent Reviewer should be made explicit in accompanying guidance.

---

cii Official Report, 27 September 2018, Col 21

Part 2 - Disclosure of convictions and other relevant information rleating to time when a person is under 12

153. Part 2 of the Bill, sections 4 to 21, deals with issues around the disclosure of information relating to a child's convictions and behaviour when they were under the age of 12.

154. In the Explanatory Notes accompanying the Bill, it is states that "Section 4 of the Bill changes the position in relation to convictions acquired prior to the change in the age of criminal responsibility. It amends the definition of "conviction" in sections 112 and 113A of the 1997 Act[ciii] so as to exclude convictions for offences committed whilst a person was aged eight to 11"[civ].

155. The effect of this is that the provisions in this Bill will apply retrospectively, i.e. that any conviction information relating to children aged eight-11 years at the time of the offence (whether before or after the provisions of this Bill comes into effect), can no longer be described as a 'conviction' and cannot be disclosed via a higher level Disclosure or PVG Scheme Record."[cv]

156. Section 5 of the Bill still makes provision, however, for the release of non-conviction information (other relevant information) relating to behaviour under the age of 12. This provision is only to be used in exceptional circumstances and safeguards have been put in place to ensure that this is the case (these are explained in the section headed 'Independent Reviewer').

ORI ('other relevant information') – current processes

157. At present, the discretion to include such non-conviction information, known as 'other relevant information' or 'ORI' on a person's higher level Disclosure certificate or PVG Scheme Record lies with the Chief Constable of Police Scotland.

158. Gerard Hart of Disclosure Scotland provided a definition of ORI as "a paragraph of text that can relate to matters that never went to court and were not tested in that way but which the chief constable reasonably believes to be pertinent to the kind of work that the individual is seeking to do or the vulnerable group that the individual is seeking to work with. That could happen with an enhanced disclosure in relation to a specific post, or with a protection of vulnerable groups disclosure in relation a whole vulnerable group—children or protected adults."[cvi]

---

ciii Police Act 1997, Section 112 and 113A

civ Explanatory Notes, p.8, para 36
cv Explanatory Notes, p.9, para 38
cvi Official Report, 27 September 2018, Col 4

159. The key difficulties identified with the current system is that children are often not aware that this information is being recorded at the time or what the likely implications of that might be. ORI can sometimes be recorded without context, making it difficult to assess if there is any ongoing risk and, whilst the information may be weeded out from Police Scotland's systems over time, there is still the potential for it to be held indefinitely. There is also no clear process in place to allow a person to challenge the inclusion of such information or its relevancy to the training or employment opportunity they may be seeking to undertake.[cvii]

160. The Advisory Group on the Minimum Age of Criminal Responsibility recommended that "there should be a strong presumption against the Police including non-conviction information on disclosures about conduct that occurred under the age of 12."[cviii] It further recommended that in future, ORI relating to behaviour under the age of 12 "ought to occur only when absolutely necessary for public protection and should be subject to independent ratification by a party other than the Chief Constable before disclosure takes place."[cix]

161. Bruce Adamson, Children and Young People's Commissioner Scotland, suggested that weeding and retention processes also required to be more closely examined stating. "In order to fully understand the rights implications and the proportionality of these measures, there needs to be greater clarity around what is recorded as ORI and how long it will be retained for. There is a need for clear guidance and rules to govern practice in this area, and there should be a strong presumption that information should be recorded and retained about children under 12 only where there is a clear welfare/best interest rationale for doing so."[cx]

162. It is important to note that the provisions of the Bill do not prevent the recording of information by Police Scotland, but rather its release.

Disclosure of information relating to under-12s

163. We understand recent legislative changes have impacted on the number of people having information disclosed about their behaviour under the age of 12.

164. Gerard Hart of Disclosure Scotland, advised the PVG review consultation has just closed and that "the proposals would free most children, most of the time, from the longitudinal consequences of disclosure of their criminal record"[cxi]

165. Gerard Hart also stated that "in 2016 and 2017, in the whole of Scotland, there were fewer than five cases in which conduct by children under the age of 12 was the

---

cvii The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, Children's Rights and Wellbeing Impact Assessment, 2016
cviii The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, para 5.13, p. 43, 18 March 2016

cix The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, p.43, 18 March 2016
cx Written submission CYPCS
cxi Official Report, 27 September 2018, Col 13

subject of disclosure at a later date. In 2014 and 2015, the figures were 53 and 27, respectively. The reason for that drop was that the Government introduced the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015, which introduced a rules list, an always list and new protections, particularly for young people, by getting rid of minor and trivial matters from subsequent disclosure".[cxii]

166. Police Scotland suggested that "it should be noted that Police Scotland's analysis has revealed that there have been no disclosures or cases for those under 12".[cxiii]

167. In examining the provisions in Part 2 of the Bill, we noted the Advisory Group's recommendation that any person independently verifying a decision to release information relating to under 12s, should also have a role in ensuring that young people under the age of 18 could move on from childhood behaviour.

168. As such, we welcome the Scottish Government's commitment to consider this further via the Management of Offenders (Scotland) Bill (which is being considered at Stage 1 by the Justice Committee) and in relation to the review of the Protection of Vulnerable Groups (PVG) scheme, which has just been consulted on.[cxiv]

169. We ask that the Scottish Government to provide us with a progress update in relation to both the Management of Offenders (Scotland) Bill and the review of the Protection of Vulnerable Groups (PVG) scheme, prior to Stage 2 consideration of the Bill.

Independent Reviewer

170. As previously stated, currently the decision about whether to release non-conviction information relating to a child's behaviour under the age of 12 lies with the Chief Constable of Police Scotland.

171. However, the Advisory Group on the Minimum Age of Criminal Responsibility recommended in their report[cxv] that, in order to ensure that such information was released only exceptionally, it should be independently verified by another person before doing so.

172. This process of independent verification will create a new role of Independent Reviewer in Scotland. Sections 6 to 8 of the Bill provide for the appointment of an independent reviewer.

173. Provisions relating to functions of the independent reviewer are set out in sections 9 to 19, with the process for review covered in sections 9 to 15. The independent

cxii Official Report, 27 September 2018, Col 3
cxiii Written submission, Police Scotland

cxiv Official Report, 4 October, Col 5
cxv The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016

reviewer will be able to seek information from a range of people about the child's (or young person's or adult's - depending on when a higher level Disclosure certificate or PVG scheme record was sought) current circumstances, allowing the applicant to make representations and for an accurate assessment of future risk to be formed, before any decision is taken whether to release information.

174. The concept of independent verification for these purposes is new in Scotland. However, the role has been modelled on the existing roles of Independent Monitor in England and Wales and the Independent Reviewer in Northern Ireland (who have, until recently, been the same person).

175. Whilst the remits in other jurisdictions may vary from that envisaged for the Independent Reviewer in Scotland, the basic principle behind them is the same. That is, that a person's childhood behaviour should not negatively impact on their future life chances, save for in a very few exceptional cases, for example, where a child's behaviour might pose a continuous risk either to themselves or to the wider public.

176. Simon Pountain, who was then both the Independent Monitor for England and Wales and the Independent Reviewer in Northern Ireland, explained how his work impacted upon children and young people. A lot of the work in Northern Ireland, he explained, involved people around the ages of 13, 14 and 15 who were in care and offended over a short period, but who have not offended since. Cases arose when those people applied to work with vulnerable groups later in life. He considered whether the information was relevant on the basis of whether the removal of the information would impact on the safeguarding of vulnerable people. If it would not, then the information should be removed.[cxvi]

[cxvi] Official Report, 27 September 2018, Col 16

Simon Pountain gives evidence to the Committee

Source: Scottish Parliament

177. Simon Pountain said that in many cases the way in which an incident is presented can sometimes be misleading. He gave an example, "an algorithm might determine that certain offences are so serious that they need to be disclosed but, under sexual offences, there could be indecent behaviour and, although the title of that offence sounds like it should be disclosed, it could cover something as simple as urinating in the street, which might not be relevant to the work that someone is applying for. Objectively looking at the issue rather than just looking at the title of the offence could work when we consider children between different ages"[cxvii].

178. He went on to explain that in Northern Ireland 87% of the offences that he saw were deleted from the criminal records.[cxviii]

---

cxvii Official Report, 27 September 2018, Cols 15-16
cxviii Official Report, 27 September 2018, Col 10

179. The role that the Bill envisages for the Independent Reviewer in Scotland for children under the age of criminal responsibility will differ from the roles in England, Wales and Northern Ireland in that it will require the Reviewer to decide whether the inclusion of non-conviction information relating to an incident before the age of 12 on a higher level Disclosure or PVG scheme record is appropriate, *before* that information is released.

180. What that means in practice is that if the Independent Reviewer in Scotland finds that a piece of information should not be disclosed for a particular purpose[cxix] then it will not enter the public domain[cxx]. For example, it will not be disclosed to educational establishments or potential employers and the person will be able to move on from that behaviour with the same options and opportunities available to them as if the behaviour had never happened.

181. In England, Wales and Northern Ireland, the information about childhood behaviour and convictions may already have appeared on a person's record and the appeal to the Independent Monitor or Independent Reviewer usually relates to a request to remove such information from a person's record. This might be, for example, where it was an isolated incident or where a substantial period has passed since it took place.

182. Tom McNamara of the Scottish Government explained that the Independent Reviewer, in coming to a decision about release of information, would have the ability to look into the person's current circumstances and "be empowered to take information from the children's reporter, the local authority, the courts and anybody else that they deemed appropriate in order to form an accurate picture of the individual young person and how they had progressed or otherwise since the incident that caused concern".[cxxi]

183. Those responding to our Call for Evidence were generally very supportive of the introduction of the Independent Reviewer's role. However, the Howard League Scotland observed that if the age of criminal responsibility was raised to 12, then there "can be no such thing as 'offending behaviour' by anyone below the minimum age" and suggested that for under 12s "there should be no suggestion that the police can hold or disclose information about behaviour"[cxxii], a view with which NSPCC Scotland also agreed.[cxxiii]

184. Barnardo's Scotland noted that, as currently drafted, the Bill provides the Independent Reviewer with the ability to seek further information from a range of sources, including the applicant. This could be strengthened, however, by including "a presumption that they would do so".[cxxiv]

---

cxix It is important to note that this is situation specific so, where a piece of information might be highly relevant to one training course/job role, it may be irrelevant to another.

cxx Subject to an appeals process set out in section 15 of the Bill, which allows both the applicant and the Chief Constable to appeal the Independent Reviewer's decision on a point of law only.

cxxi Offcial Report. 4 October 2018, Col 12

cxxii Written submission, Howard League Scotland

cxxiii Written submission, NSPCC Scotland

185. Other stakeholders noted that the Bill leaves much of the detail around the Independent Reviewer's role to guidance. We received a number of written submissions[cxxv] expressing concern that this meant that the criteria used by the Independent Reviewer to decide whether behaviour should be included as "other relevant information", and the weight attached to each of these factors, could not be adequately scrutinised, with Children in Scotland urging "that the guidance on what ought to be disclosed be developed with a range of stakeholders, including children and young people."[cxxvi]

186. Further concerns focused on the ability of children to understand that information about behaviour under 12 might reappear as "other relevant information' later in life, with the Scottish Child Law Centre observing that 'the current disclosure regime is essentially impossible to explain to the child and it is almost certainly impossible for the child to navigate him/herself."[cxxvii]

187. In her oral evidence, Maggie Mellon of Howard League Scotland suggested that sometimes children – or their parents – would admit to an offence ground in order to access support, without realising the potential long-term consequences of doing so.[cxxviii]

188. Together (Scottish Alliance for Children's Rights) suggested that if a decision to include 'other relevant information' was based on the premise that the child/young person continues to pose a risk to themselves or to others, then this should be clearly evidenced via a risk assessment carried out by the Independent Reviewer[cxxix].

189. We support the creation of the Independent Reviewer role and the presumption against the release of information relating to a child's behaviour under the age of 12. We agree that there should be a presumption that a child's voice should be heard in relation to any decisions made by the Independent Reviewer (unless this is not in the child's best interests).

190. We ask the Scottish Government to ensure guidance governing the Independent Reviewer's role in Scotland must be informed by the views of children and young people, including those with experience of the justice system.

191. Children and young people, and the adults supporting them, require clarity about what it will mean in future to admit to or have harmful behaviour established, and what impact it may have on their life chances in the longer-term. This is true of younger children, but the principle needs to be applied to all children attending Children's Hearings, as well as to those whose behaviour is dealt with through other channels.

---

cxxiv Written submission, Barnardo's Scotland
cxxv Written submission, Together (Scottish Alliance for Children's Rights)

cxxvi Written submission, Children in Scotland
cxxvii Written submission, Scottish Child Law Centre
cxxviii Official Report, 27 September 2018, Col 2
cxxix Written submission, Together (Scottish Alliance for Children's Rights)

192. We ask the Scottish Government to develop a suite of materials to ensure that children, young people, and adults have a good understanding of both the short and longer-term implications of admitting involvement in harmful behaviour. Children and young people must play a crucial role in ensuring that these are accessible and fit for purpose. This includes children and young people with experience of Children's Hearings and other forms of youth justice. These materials should be available for the relevant provisions coming into force.

193. In relation to the Independent Reviewer's decision to release information, we ask the Scottish Government to explain in advance of Stage 2 consideration of the Bill how the child's voice will be taken into account.

Appeals Process

194. Section 15 of the Bill provides for an appeals process, whereby a person can appeal against the Independent Reviewer's inclusion of 'other relevant information' relating to behaviour under the age of 12. This right of appeal also applies to the Chief Constable.

195. We note that this appeal right is on a point of law only (i.e. that it relates to whether the Independent Reviewer has followed the correct procedure, rather than the inclusion of information itself). The appeal is to the Sheriff and the Sheriff's decision is regarded as final.

196. As currently worded, however, we are unclear as to whether a child/young person/ adult will have the opportunity to revisit this decision in future, and under which circumstances that might be possible. Without such an ability, the very premise of having an Independent Reviewer may be undermined and 'other relevant information' may appear indefinitely. This, we consider, would go against the ethos of the Bill, which is to allow a child to move on from behaviour in childhood.

197. We ask the Scottish Government to clarify the circumstances under which a person can reapply to the Independent Reviewer to have information removed and consider whether the Bill needs to be amended to reflect that at Stage 2.

Looked After Children and Disclosures

198. A range of stakeholders suggested looked after children and young people were more likely to acquire a criminal record at a young age than children without care experience. Often, they explained, this was due to the way in which incidents were handled, rather than on account of these children and young people being more likely to become involved in harmful behaviour.

199. Who Cares? Scotland highlighted many of these incidents could be low-level in nature, but had a significant impact on a child or young person's life chances. They described how one young person had thrown a plate in a residential unit which resulted in them being charged with an offence.[cxxx]

200. In 2016, the Centre for Youth and Criminal Justice published a report entitled 'Between a Rock and a Hard Place'[cxxxi] which looked at current responses to offending in residential childcare. The report recognised some of the challenges facing staff, but made a clear link between the way in which an incident was handled in the childcare setting (e.g. whether it was common for staff to call the police for a minor incident) and the likelihood of the child acquiring a criminal record or having 'other relevant information' held by the Police.

201. The Scottish Government should address specifically the additional challenges faced by looked after children and care experienced young people in the guidance setting out the Independent Reviewer's criteria. We ask the Scottish Government to consult under section 17(2)(b) of the Bill care-experienced young people to ensure the guidance reflects their particular circumstances.

202. In addition, we ask the Scottish Government to reflect the needs of children with speech, language and communication difficulties and those of children with disabilities and hidden disabilities in any guidance created for the Independent Reviewer's role. Again, these groups should be consulted under section 17(2)(b) of the Bill on their experiences.

cxxx Written submission, Who Cares? Scotland
cxxxi Between a Rock and a Hard Place, October 2016

Part 3 - Victim Information

203. The provision of information to victims is dealt with in Part 3 of the Bill, under section 22.

204. The Policy Memorandum[cxxxii] explains the current legislative context for victims' rights. EU Victims Directive (2012/29/EU) and the Victims and Witnesses (Scotland) Act 2014 provide the legislative basis for victims' rights in Scotland.

205. These two legislative instruments place a range of obligations on the criminal justice authorities, which include the provision of a Victim's Care Card, access to information and support, and rights to compensation. These rights apply to victims of alleged crime, irrespective of the age of the alleged perpetrator. The Criminal Justice (Scotland) Act 2003 also includes provisions for victims to receive information where a case is referred to the Principal Reporter.[cxxxiii]

Sharing of information - Children's Hearing on offence grounds

206. The Policy Memorandum explains the current arrangements for the sharing of information with victims when a child has come before a Children's Hearing on offence grounds:

> Currently, the Principal Reporter is able to contact the victims of those referred on offence grounds (or the parents/carers of child victims) to let them know basic information about how a case has been disposed of via the children's hearings system. In practice, the Scottish Children's Reporter Administration (SCRA) delivers this through its Victim Information Service (VIS). The Principal Reporter may provide basic information about the Reporter's decision (i.e. whether or not to bring the child to a hearing) and whether or not the Hearing has made a Compulsory Supervision Order (CSO). The identity of the child perpetrator is not revealed nor confirmed.
>
> If the child was referred on multiple grounds then the victim would only be entitled to know about the specific ground in which they are identified as the victim. For example, if the Reporter brings the child to a hearing on multiple offence grounds, the victim would only be told the decision in relation to —their ground.[cxxxiv]

207. All cases involving under 12s, as at present, will be dealt with via a Children's Hearing. Once the age is raised, then all referrals to a Children's Hearing about harmful behaviour before the age of 12, will be dealt with via care and protection grounds.

208. The Bill, as currently drafted, will lead to harmful behaviour of all under 12s potentially falling under the Victim Information Service (i.e. those under eights who

---

cxxxii ACR Bill Policy Memorandum, p.23, para 108
cxxxiii ACR Bill Policy Memorandum, p.23, para 108
cxxxiv ACR Bill Policy Memorandum, p.23, para 109

would not have previously been covered will now fall under these provisions). This is something which the Advisory Group recognised as a potential difficulty but decided that having one approach for all children under the age of criminal responsibility was preferable to having a two-tier approach (i.e. one where under eights and those children aged eight-11 would be treated differently).

209. The Scottish Association of Social Work argued “that general information should be given to child victims in all cases, not just the most serious cases. This would set out basic information about what happens when a child under 12 engages in harmful behaviour and what steps can be taken to address this. It is imperative that any information intended for children is written/delivered in language that the reader will understand (child-friendly)".[cxxxv]

210. Victim Support Scotland acknowledged that they "appreciate the protection of victims’ rights and the provision of information to victims have been areas of focus throughout the policy development of the Bill".[cxxxvi]

Variability of information and support provided

211. The Centre for Youth and Criminal Justice (CYCJ) commented that the Bill provided an opportunity to look more widely at the support that was currently provided to victims. CYCJ suggested “at present the information and support provided to victims varies, with significant gaps in support. Victims need to be reassured that society acknowledges the harm done, that the risk posed by any child is taken seriously and that work is being undertaken to prevent future harm to others. Victims also need to be provided with the emotional, financial and practical supports they need, regardless of the age of the person they were harmed by and whether they are ‘criminally’ responsible or not.”[cxxxvii]

212. The Scottish Children’s Reporter Administration’s Victim Information Service (VIS) currently offer very limited information to victims. Information might include a decision whether a Children’s Hearing is to be held or a decision to put in place a compulsory supervision requirement. We heard the victim would not be entitled to detailed information about what had happened to the person thought to have caused harmful behaviour, neither would they have any access to information about the circumstances of that child (e.g. whether they were experiencing neglect, subject to domestic abuse etc).[cxxxviii]

213. Where information and support is provided to victims, Community Justice Scotland stressed the need to ensure this happened timeously, suggesting that "statutory services often report back to victims and their families after a considerable amount of time, dependent on the conclusion of a Children’s Hearing process".[cxxxix]

---

cxxxv Written submission The Scottish Association of Social Work
cxxxvi Written submission, Victim Support Scotland
cxxxvii Written submission, Centre for Youth and Criminal Justice
cxxxviii Written submission, Community Justice Scotland
cxxxix Written submission, Community Justice Scotland

214. We received a case study[cxl] from Victim Support Scotland, which showed the impact of not sharing information timeously and in a manner that was inclusive to the victim and their adult support.

Rights of victims and those who cause harm

215. One of the areas raised in evidence was the difficult balance between reassuring victims that an incident and the harm caused by it had been acknowledged, with the right of the child causing that harm to privacy.

216. Together, stated that “we appreciate the important role that information can play for victims (particularly child victims) in having their experiences validated and knowing that harmful behaviour by another child has been taken seriously. Existing support for child victims should be enhanced rather than diminished in order to promote the best interests of the child victim under Article 3 UNCRC. From the perspective of the child who engaged in harmful behaviour, the provision of information to victims has clear implications for the right to privacy under Article 16 UNCRC (and Article 8 ECHR). Accordingly, it is crucial that careful consideration is given to the type of information which may be provided to victims and the level of detail it may contain.”[cxli]

217. They were of the view that the Bill struck “an appropriate balance between the rights of child victims and the rights of the child who engaged in the harmful behaviour”[cxlii].

Victims' rights

218. On achieving this balance, Professor Elaine E. Sutherland, Professor of Child and Family Law at the University of Stirling, suggested that “a small but important component is the victim getting to hear what happened to the person who caused harm.” However, she said a more important component was victim support generally:

> Irrespective of what a victim is told about the person who harmed them—or even if that person is never identified—the crucial bit of the puzzle is that we have in place effective systems to support children and adults who have been victims.[cxliii]

219. Bruce Adamson, Children and Young People’s Commissioner for Scotland commented on what an effective remedy was for victims of harmful behaviour. He said “From a rights perspective, paragraph 3 of article 2 of the International Covenant on Civil and Political Rights and article 13 of the European convention on human rights talk about the right to (an effective remedy) for victims of rights violations. In the assessment of what an effective remedy looks like, victims refer to all the support that they need and may refer to restitution and compensation”[cxliv].

---

cxl Case Study, Victim Support Scotland
cxli Written submission, Together (Scottish Alliance for Children’s Rights)
cxlii Written submission, Together (Scottish Alliance for Children’s Rights)
cxliii Official Report, September 27 2018

220. He went on to say, for victims it was not necessarily about punishing the person, but about ensuring that what happened did not happen again. He emphasised that "criminalising children does not guarantee non-repetition—in fact, it creates the risk of more harm—and that guarantee as an important part of a right to an effective remedy is best served by the kind of trauma-informed supportive approach that we have talked about."[cxlv]

221. The Minister also picked up on the importance for victims of ensuring that harmful behaviour is not repeated:

> We have recognised that the children who are involved in harmful behaviour are often victims of other people's harmful behaviour. They are some of Scotland's most vulnerable citizens, and the way in which we respond to them when they are in crisis can help to turn their lives around. They are undoubtedly victims…. when we speak to victims, we hear that the thing that they want most is for nobody else to have to go through what they have gone through.[cxlvi]

Privacy rights for children considered to have caused harm

222. Centre for Excellence for Looked After Children in Scotland noted that

> Victims have rights and require support. The raising of the age of criminal responsibility does not change this, nor should it. In raising the age of criminal responsibility to 12, we believe there will be few circumstances where it would be appropriate to share information about a child with the victim; an exception being the sharing of very general information about the support the child is receiving to address the original harmful behaviour. Where any information is to be shared, it should be done with the child's consent.[cxlvii]

223. Bruce Adamson, Children and Young People's Commissioner Scotland, also recognised the importance of safeguarding the privacy rights of the child thought to have caused harm, and said that this was vital in order avoid any rights breach. In his view it was not proportionate for the victim to know what has happened to child who has harmed them. He said:

> If children are not criminally responsible for the actions, it is not appropriate to share their personal details. This may constitute a breach of article 8 of the ECHR and Articles 16 and 40 of the UNCRC. Part 2 (vii) of Article 40 states children have the right 'to have his or her privacy full respected at all stages of the proceedings'. The UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) (1985) also state that 'the right to privacy means that the records of child offenders should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.[cxlviii]

---

cxliv Official Report, 27 September 2018, Col 37
cxlv Official Report, 27 September 2018, Col 37
cxlvi Official Report 4 October, Col 22
cxlvii Written submission, CELCIS
cxlviii Written submission, CYPCS

224. He went on to explain there were rare occasions where it might be appropriate and in the best interests of the child to share limited information. He considered in these instances there should be a requirement for the Reporter to consult the child/family before deciding on the release of information on best interests grounds.[cxlix]

225. Victim Support Scotland advised they were satisfied that section 22 provided power for the Principal Reporter to disclose certain information about the reporter's response to certain behaviours on the part of a child:

> We consider latitude important so proportionality is applied and all the circumstances taken into account, including whether it is right in the circumstances to breach the child's Article 8 Rights. We believe with appropriate safeguards this flexibility will better protect the interests of victims, ensuring that victims of certain forms of behaviour are informed of the response to that behaviour.[cl]

Public awareness raising

226. Aberdeenshire Council highlighted the need for broader public awareness raising in respect of how incidents involving children under 12 would be dealt with in future. The Council suggested that as Community Justice Scotland was already progressing national work to increase community understanding and perception of community justice, and the justice system in general, it would make sense for similar work to be done in relation to increasing the minimum age of criminal responsibility.[cli]

Conclusion on victim information

227. It is our view that the correct balance has been struck in the Bill between the rights of victims to know what has happened (in very broad terms) and the privacy rights of the child causing that harm. However, we recognise that this Bill offers significant opportunities to expand the support offered to victims and witnesses.

228. Similarly, there are opportunities to ensure that the information provided to child victims, adult victims of children's behaviour and those supporting them, in the immediate aftermath of an incident and at key points throughout the process is timely, age appropriate, accessible and allows children to form a clear picture of what is happening.

229. Also, we recognise the concerns of some stakeholders that there is the potential for too much information about a child implicated in harmful behaviour to be shared. We are confident that the Victim Information Service provided by the Scottish Children's Reporter Administration will carefully balance the rights of victims with those of the child thought to have caused harm.

---

cxlix Written submission, CYPCS
cl Written submission, Victim Support Scotland
cli Written submission, Aberdeenshire Council

230. We ask the Scottish Government, in consultation with relevant stakeholders, to provide comprehensive guidance to underpin section 22 of the Bill which enables information about a child under 12 to be shared. This should set out clear parameters for what information should, and should not, be shared and the circumstances under which it is appropriate to do so. This will assist the Victim Information Service in their decision-making and to provide clarity to both victims and children demonstrating harmful behaviour.

231. We recommend the Scottish Government develops appropriate materials to help victims, including child victims, understand how the harmful behaviour of children under the age of 12 is dealt with.

232. We ask the Scottish Government to provide us with information on what support is currently available to victims in Scotland, with a particular focus on the support available to children and young people. We would welcome sight of this information ahead of Stage 2 consideration of the Bill.

233. We seek assurances from the Scottish Government that the schemes currently available to victims (e.g. compensation schemes etc.), will continue to be made available to the victims of harmful behaviour caused by under 12s.

Part 4 - Police Powers

234. Part 4 of the Age of Criminal Responsibility (Scotland) Bill, sections 23 to 63, outlines a number of Police Investigatory and other powers.

235. The Policy Memorandum accompanying the Bill states that "Part 4 of the Bill creates a package of powers designed to ensure that serious behaviour by any child under the age of 12 can be investigated, but that such investigations are carried out in a child-centred way that is in keeping with the ethos of removing young children from criminal justice processes."

236. It goes on to state that "to ensure that the new powers are justifiable and proportionate, the Bill restricts its application of these powers to the most serious cases – that is, where it is thought that the child has caused (or risked causing) death or serious injury by acting in a violent or dangerous way, or that the child has harmed (or risk harming) someone with sexually violent or sexually coercive behaviour."

237. The police powers in the Age of Criminal Responsibility (Scotland) Bill include:

- The ability to take a child to an emergency ‘‘place of safety’’ where a constable has reasonable grounds to believe that a child under 12 "is behaving or is likely to behave in a way that is causing or risks causing significant harm to another person."[clii]
- The "search of a child without warrant under existing enactment"[cliii] – that is, the ability to search a child under 12 where their behaviour would have justified a search under existing statutory search powers if they were over 12.
- Section 26 of the Bill provides for an order authorising the search of a child under 12 in certain circumstances (e.g. if the child is behaving in a violent or sexually violent way).
- Child interview orders, covering behaviour under the age of 12 years old – and how such interviews should be planned for/conducted.
- A child’s right to have an Advocacy Worker present when the child is being interviewed.
- Provisions for questioning children in urgent cases.

238. The Bill also makes provision for a number of forensic processes, including:

- The taking of prints and samples from children under 12 (and from children over 12 where an incident occurred when the child was under 12 years old).
- An order-making process to ensure that such samples cannot routinely be taken.

---

clii Section 23(1), Age of Criminal Responsibility (Scotland) Bill
cliii Section 25, Age of Criminal Responsibility (Scotland) Bill

- The destruction of prints and samples

239. In their 2016 report, the Advisory Group on the Minimum Age of Criminal Responsibility wrestled with the issue of police investigatory powers, acknowledging that the expectation would be that, should the age be raised to 12, then a child should have no involvement in processes traditionally associated with the investigation of crime.[cliv]

240. The Advisory Group acknowledged that many of the police powers required to fully investigate a case would disappear when the age of criminal responsibility was raised, as they were predicated on the suspicion that a crime had taken place.[clv]

241. However, they also looked at what the removal of such investigative powers might mean for a child who was innocent, and decided that, on balance, some powers should be retained, or recreated, to either confirm the child's involvement, and allow appropriate support to be put in place for them, or exclude their involvement, allowing for the person responsible to be identified.[clvi]

242. As outlined above, the Bill sets out a number of key powers in this Part, including a power to take a child to an emergency ‘‘place of safety’’ (sections 23 and 24); the search of children under 12 (sections 25 to 30); the questioning of children (sections 31 to 46); the taking of prints and samples from children under 12 (sections 47 to 58) and a number of general provisions relating to this Part (sections 59 to 63).

243. We looked at each of these key provisions, but also looked more generally at whether the use of these powers could inadvertently lead to the ‘criminalisation’ of children i.e. whether the use of these processes could mean a child felt they were being treated as a criminal, despite not being able to be held criminally responsible for their actions.

244. In the Financial Memorandum accompanying the Bill, the Scottish Government analyses referrals to the Children's Reporter on offence grounds for children aged eight-11 years over the last four years, in order to predict the number of children likely to engage with the police powers in the Bill in future.

245. Figures for offence ground referrals from 2013-17 ranged between 204 and 213 per annum. On the basis of these figures, the Scottish Government estimated that between 30-39 cases each year would have engaged one or more of the Bill's police powers, had they been in place at that point in time. [clvii]

246. Whilst this represents a relatively small percentage of overall numbers, we are conscious to ensure the needs of those children, who become engaged in the police powers provided for in the Bill, continue to be met. Specifically, we looked at whether, in drafting these provisions, the Scottish Government had fulfilled the dual

---

cliv The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016
clv The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016
clvi The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, 18 March 2016
clvii Financial Memorandum, Page 2, para 10

aim of allowing the police to investigate what had happened and who had been involved, and to do so in a way that did not 'criminalise' the child.

Criminalisation

247. Renfrewshire Council Children's Services saw few benefits in taking an approach based around current police processes, observing that "responding to childhood behaviour in a criminalising, stigmatising manner serves only to promote escalation and further harm."[clviii]

248. Several witnesses referred in their evidence to the findings of the Edinburgh Study of Youth Transitions, a longitudinal study of young people growing up in the late 1990s and early 2000s.[clix] Professor Susan McVie, from the University of Edinburgh, was co-author of the study. She told us that the study found "the vast majority of children were getting involved in some bad behaviour", describing this as "a normal aspect of adolescent development" and observing that "the vast majority of those children do not have any need for any formal services"[clx]

249. Crucially, the Edinburgh Study identified that "of the children who travelled through the children's hearings system during their mid-teenage years, some went on to a chronic pathway of….convictions and ended up in the criminal justice system, whilst others did not."[clxi] Professor McVie goes on to state that 'When we looked at the key factors that decided whether someone followed that chronic pathway, we found that it was not their serious offending that was behind it, but a series of other things, including continuous and increasing police contact with the youth justice system"[clxii].

250. The Edinburgh Study also found that "school exclusion was also a key factor in determining those young people's lives"[clxiii].

251. Professor McVie also acknowledged the long-term impact a child or young person's behaviour being viewed as offending might have on them personally, observing that "the labels that are attached to young people never come off"[clxiv].

Police powers - general

252. Together (Scottish Alliance for Children's Rights) welcomed provisions in the Bill to make it easier for children's voices to be heard. However, they suggested there were gaps in some parts of the Bill where children's voices were not sought, and

---

clviii Written submission, Renfrewshire Council Children's Services
clix Official Report, 6 September 2018, Col 17
clx Official Report, 6 September 2018, Col 17
clxi Official Report, 6 September 2018, Col 18
clxii Official Report, 6 September 2018, Col 18
clxiii Official Report, 6 September 2018, Col 18
clxiv Official Report, 6 September 2018, Col 11

some processes that did not require police constables to explain what was happening and to check a child's understanding of this.[clxv]

253. Police Scotland expressed concern that the powers, as currently framed, were "narrow and prescriptive"[clxvi] and likely to make enquiries "more time consuming, operationally demanding and thereby resource intensive"[clxvii].

254. The Minister stated "We are also clear that safeguards are required. There will be a small number of cases that constitute really serious harmful behaviour. The Bill provides that in those very rare situations, where it is necessary to use the powers, safeguarding and promoting the wellbeing of the child has to remain a primary focus for all those involved when setting out the steps that should be followed."[clxviii]

"Place of safety"

255. Section 23 of the Bill provides for a child to be taken to an emergency 'place of safety' for a maximum of 24 hours, where the child is 'behaving or likely to behave in a way that is causing or risks causing significant harm to another person'. The purpose of such a power is stated as being to:

- 'put in place arrangements for the care or protection of the child', or
- 'for an order under section 52 authorising the taking of intimate samples from the child to be obtained'.

256. The Explanatory Notes[clxix] accompanying the Bill suggest that such a power is necessary, as previously a child aged eight or over (i.e. over the current age of criminal responsibility) would have been arrested and taken to a police station (which would have constituted a ''place of safety'').

Clarification of the circumstances of use of the "place of safety" provision

257. The Policy Memorandum states that it may be possible for "a constable to remove a child who is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person to a ''place of safety'' conferred by section 56 of the 2011 Act, but this does depend on the police constable being satisfied that the child him or herself is at risk of harm"[clxx].

258. The ''place of safety'' provisions under section 56 of the Children's Hearings (Scotland) Act 2011 focus on the need to remove those who are at risk of harm.

259. Police Scotland also noted that, although the powers in section 23 are designed to closely fit with existing child protection powers in section 56 of the Children's

---

clxv Together (Scottish Alliance for Children's Rights), written submission
clxvi Written submission, Police Scotland

clxvii Written Submission Police Scotland
clxviii Official Report, 4 October 2018, Col 3
clxix Page 15, para 71, Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill
clxx Page 15, para 73, Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill

Hearings (Scotland) Act 2011, “there are important differences, however, between the drafting of those sections. Section 56 requires that the police notify the Principal Reporter, however, that power is not replicated here. We would welcome the views of Social Work Scotland about whether the current drafting of section 23(4)(a)(i) is sufficiently robust to allow them to take action to protect the child when they receive such a report from Police Scotland.”[clxxi]

Conclusion on the use of circumstances of use of the "place of safety" provision

260. We are unclear whether the Bill’s provisions are designed to plug a perceived gap in provision, should a child be thought to be involved in harm, but is not thought to be at risk of harm themselves.

261. Clarity is also needed around whether these provisions are only designed to be used where there are other children in the household (or nearby children) who may continue to be at risk of the child’s behaviour, or whether they will be used more generally – e.g. to allow for intimate samples to be taken, even when the continuing risk to others may be low.

262. We are concerned this approach of targeting the child who is thought to have caused harm, may have a criminalising and stigmatising effect on the child, particularly when their involvement in an incident has not yet been established. It is our belief that any intervention must be framed in terms of their wellbeing, rather than any risk they might pose to others. We believe therefore that the policy aim of keeping children safe following an incident of harmful behaviour would be best achieved via the existing child protection framework.

263. Prior to Stage 2 consideration, we ask the Scottish Government to explore opportunities to adapt existing child protection processes to ensure that children suspected of causing harmful behaviour can be taken to a ‘‘place of safety’’ on the basis of their requirement for protection, rather than any suspicion that they might cause harm to others.

Definition of a "place of saftey"

264. Section 23(5) of the Bill states that "a child may be kept in a 'place of safety' that is a police station only if it is not reasonably practicable to keep the child in a 'place of safety' that is not a police station."

265. Whilst section 23(8) of the Bill provides for the definition of ‘‘place of safety’’ to have the same meaning as section 202(1) of the Children’s Hearings (Scotland) Act 2011, this includes:

1. a residential or other establishment provided by a local authority;
2. a community home within the meaning of section 53 of the Children Act 1989;
3. a police station;

[clxxi] **Written submission, Police Scotland**

4. a hospital or surgery, the person or body of persons responsible for the management of which is willing temporarily to receive the child;

5. the dwelling-house of a suitable person who is so willing, or

6. any other suitable place the occupier of which is so willing.[clxxii]

266. These provisions allow for a child to be taken to a ‘‘place of safety’’ that would include a relative's or a friend's house.

267. We are concerned there is a risk that if a police station is the only ‘‘place of safety’’ mentioned in the Bill, their use will become the default position. this is concerning given the purpose of this Bill is to ensure that children's behaviour is not treated as criminal under the age of 12.

268. When asked about the drafting approach taken to the definition of a ‘‘place of safety’’ in the Bill, Liz Blair, Scottish Government senior legal adviser explained,

> section 23(8) defines ‘‘place of safety’’ by reference to a provision in the Children’s Hearings (Scotland) Act 2011. As you know, it is common to cross-refer in legislation. There are six places listed in the Children’s Hearings (Scotland) Act 2011, one of which is a police station. On whether there is a need for those also to be included in the bill, I would say that in legislative terms, they are already there.[clxxiii]

269. Although we acknowledge the technical drafting reasons for the approach taken to the definition of a ‘‘place of safety’’, as provided by Scottish Government officials, we believe in order to ensure that a police station is truly seen as a last resort for a ‘‘place of safety’’, it is necessary for the Scottish Government to replicate the options provided for in section 202(1) of the Children’s Hearings (Scotland) Act 2011, within section 23 of the Bill, Power to take a child under 12 to a ‘‘place of safety’’.

Use of police station as a 'place of safety'

Impact on child of being removed to a police station

270. We heard distressing evidence from Lynzy Hanvidge, a care-experienced policy ambassador with Who Cares? Scotland, who when she was age of 13 was held in a police cell overnight:

---

clxxii Children's Hearings (Scotland) 2011 Act, section 202(1)
clxxiii Official Report, 4 October 2018, Col 17

> The first night I went into care was in May 2007. It was Friday night, and I remember I was away to baby-sit just along the street from where my mum lived. When I came home that night, there were loads of police outside the flat that we lived in, and social work was there. When I went up the stairs, they told me that I, my brother and my sister were getting taken away from my mum.
>
> I remember feeling angry and sad. I did not know what to do. I did not want to leave my mum. They tried to force me. The social workers tried to force me out of the house, and that did not go down too well. As you can imagine, being 13, I had all these emotions building up. I kicked off a little bit and I told them I did not want to leave my mum. My mum was going to be left by herself. They took my behaviour as harmful behaviour, as if I was just kicking off. That is how it felt to me—as if I was just kicking off for the sake of it.
>
> They put me in handcuffs in my mum's house in front of her and my brother and my sister. I was 13, my sister was six and my brother was 15…….
>
> I got my first charge that night. When I got to the bottom of the close, they were pulling me about the place—I was quite a wee girl when I was 13—and I hit him. It was just that I wanted him away. I wanted to get back up the stairs and make sure my mum was okay. I got taken to the police station that night. This happened at about 10 or 11 o'clock at night. I was not picked up until about half 7 the next morning. I was taken to a children's home where my brother and my sister were. They had spent their first night in a children's home. I spent my first night in care in a prison cell, locked up. I had not done anything wrong, but I felt like I had done something wrong.[clxxiv]

Lynzy Hanvidge attends the Committee

Source: Who Cares? Scotland

271. Our discussions with young people in secure units reinforced the negative impact being held in a police station could have. One boy said, "children should not be

---

clxxiv Official Report, 6 September 2018, Col 26

taken to a police cell, when it happened to me I could hear old men shouting and screaming". Another boy who was held in a cell for twenty four hours said "it was noisy" and he "could hear people kicking the walls". A young girl we spoke to said "it was scary at first" but then she got used to it as she told us she had been "in and out a lot".[clxxv]

272. Professor McVie said "if you have ever had to remove a child to a 'place of safety', you will know that it is a hugely distressing event. No one should be under any illusion: a child who is removed under such circumstances is in severe distress. To take the child to a police station seems like one of the least humane things that could be done." [clxxvi]

273. Chris McCully from the Criminal Justice Voluntary Sector Forum suggested that the very act of taking a child to a police station could be traumatising and that

> ….it is all well and good talking about the back end of the process, such as whether they gain a conviction that will stay with them for life and how we mitigate that. However, before that, the context of arrest and being taken to a 'place of safety' is deeply damaging for a child and we need to ensure that the appropriate support is being given to them in the right environment.[clxxvii]

274. Sergeant James Devoy of Police Scotland reassured us that "our officers will do everything possible to be as friendly and supportive as we can and to ensure that the child is in a suitable setting to minimise the impact on them of being in a police office. We never lose sight of the fact that they are children first"[clxxviii].

275. James Docherty from the Violence Reduction Unit drew upon his own experiences:

> "I spent time in prison cells as a wee boy and I was terrified—that is the overarching feeling that I can remember of being in a police station as a wee boy. It was too clinical and full of noise… what was never taken into account was the psychological and emotional impact that it had on me. That is why I always ask people who are looking at a bill to think about what they would want it to look like for their own wean." [clxxix]

---

clxxv St Mary's Secure Unit , Bishopbriggs visit
clxxvi Official Report, 6 September 2018, Col 20
clxxvii Official Report, 27 September 2018, Col 25
clxxviii Official Report, 20 September 2018, Col 16
clxxix Official Report, 27 September 2018, Col 25

James Docherty, Violence Reduction Unit, gives evidence at the Committee

Source: Scottish Parliament

276. Detective Chief Superintendent Lesley Boal, stated that

> a police station is not the best place for a child, especially in circumstances in which there has been trauma or anxiety. We have reached out to our 13 local policing divisions on this, and the difficulty around Scotland is: where else is there locally to take the child? There might always be circumstances in which it is absolute necessary that a child is taken to a police station because of what is happening. I absolutely agree that that must be the last resort. However, there have to be resources and suitable premises to which a child can be taken and in which they feel safe.[clxxx]

277. The Minister described the ‘‘place of safety’’ provisions as allowing “exceptional responses to be made to exceptional situations”[clxxxi] and suggested that “We are talking about a genuine ‘place of safety’. This is not about taking a child away for questioning or interrogation, but about providing an emergency space in which they can cool off. In most cases, the ‘place of safety’ will be the child’s home, which is the very obvious place for children to go to. However, it could also be a friend’s home, a relative’s home or even a children’s home. Those are regularly used as places of safety in other situations." [clxxxii]

---

clxxx Official Report, 20 September 2018, Col 14

Rural areas

278. Some children could be more likely to be taken to a police station than others, simply on the basis of where they lived. For example, a child in a more rural or remote area might be more likely to be taken to a police station, than a child from an urban area, where alternative places of safety might be more readily available.

279. The Minister did acknowledge there would sometimes be situations where a child may have to be taken to a police station as a last resort, stating that

> as someone who represents an extremely vast rural area, I can conceive of situations in which something might happen out of hours and there is no other 'place of safety' to which a child could be removed without taking them hundreds of miles away, which would also be traumatic. I therefore think that the provision needs to be in the bill, as a last resort. As I have said, it will not be used routinely. The first 'place of safety' will be the child's home[clxxxiii]

280. The Care Inspectorate noted that "children and young people in small or rural communities whom we meet in the course of our scrutiny and improvement activities often describe more stigma when they, or members of their family, are involved in offending than their peers in urban communities. For them, the impact of being labelled as 'criminal' within their own community can be devastating and permanent"[clxxxiv].

Information provided to a child removed to a 'place of safety'

281. Together (Scottish Alliance for Children's Rights) also highlighted that "whilst several of the police powers under the Bill include a duty to provide the child with information in a manner appropriate to their age and maturity, there is no such duty in relation to taking the child to a 'place of safety'". They supported amendment to the Bill to ensure that the child is made aware that the purpose of their removal to a 'place of safety' is welfare-based, and not an investigation of criminality."[clxxxv]

Conclusion on the use of police station as a 'place of safety'

282. We are conscious that many of the police investigatory powers set out in this Bill are designed to be used only exceptionally. However, the exceptional nature of the powers inevitably means that it is the most serious of cases that will use these processes, and potentially children who are the most vulnerable who will experience them. We also recognise that we are talking about very young children coming into contact with police processes that may be unfamiliar and frightening to them.

283. We are struck by the unfairness of Lynzy Hanvidge's experience, where on the night she was taken into care, she acquired her first police charge. Her description of how her trauma had bred further trauma in her life and that the Bill would not have avoided this situation because she was aged 13 years old at the time raised

---

clxxxi Official Report, 4 October 2018, Col 16

clxxxii Official Report, 4 October 2018, Col 16
clxxxiii Official Report, 4 October 2018, Col 16
clxxxiv Written submission, Care Inspectorate
clxxxv Official Report, 20 September 2018, Col 9

questions about this Bill provision. We thank Lynzy for having the courage to describe her experiences and the effect they had on her life, so we could better understand how we might protect children in the future from the treatment she received.

284. In light of the evidence and our concerns, we ask the Scottish Government, in advance of Stage 2 to provide further clarity on its views on the suitability of using police stations as a ‘‘place of safety’’.

285. Although we would prefer for a police station not to be a ‘‘place of safety’’, we did hear evidence that this may be difficult to avoid in rural areas and so recognise that other spaces in a police station might be suitable. Notwithstanding this, it is important to us that in these circumstances a child is not held in a cell. Any room/space where a child is to be kept should be child-friendly, to ensure the child is not traumatised further from being held in a police station. Evidence from Lynzy Hanvidge of Who Cares? Scotland and James Docherty from the Violence Reduction Unit clearly demonstrated what a frightening experience it could be for a child and the damaging impact it could have on their lives.

286. To inform Stage 2 consideration, we ask the Scottish Government to provide us with a list of criteria which would provide a clear outline of what is deemed acceptable as a child-friendly space in a police station and bring forward amendments at Stage 2 prohibiting the use of cells in the context of ‘‘place of safety’’ provisions.

287. Where a child is removed to a ‘‘place of safety’’, we ask the Scottish Government to ensure information on the use of a ‘‘place of safety’’ is provided to the child. To give statutory effect to this, we ask the Scottish Government to include a provision which expresses the child’s right to this information. Materials should be developed to ensure that children are aware of their rights and how to access support. Any materials produced should take account of all forms of disability the child might have. In creating materials about children and young people’s rights, recognition should be made of the need for these to be readily available in accessible formats. That includes, but is not limited to, Easy Read, BSL etc.

Alternatives to taking a child to a police station

288. Children 1st highlighted that there was potential to explore whether a Scottish ‘Barnahus’ model could be used which could “provide child-centred support for children displaying harmful behaviour in addition to providing support to child victims and witnesses”[clxxxvi].

289. Bruce Adamson, the Children and Young People’s Commissioner, said “the Barnahus[clxxxvii] system deals with children who have been subject to harm as well as children who have harmed and need psychological support” and that he had visited Iceland to learn more about the system. He learned that it worked effectively

clxxxvi Written submission, Children 1st

for those under 15, because it was a holistic approach and there were no criminal consequences which allowed for more discussion, which helped to keep children safer.[clxxxviii]

290. When asked about the potential of using a Barnahus model in Scotland, Professor McVie said “If we want to take the issue seriously under the human rights standard, we need to have humane places to which we can take children who are in distressing circumstances”. However, she noted “social work centres and family resource centres are also in short supply”[clxxxix].

291. Other options for dealing with children in crisis were highlighted to us in evidence as credible alternatives to using a police station as a ‘‘place of safety’’. In advance of Stage 2, we would welcome an update from the Scottish Government on the feasibility of introducing Barnahus facilities in Scotland, the likely timescales for their introduction and whether the Scottish Government considers these a suitable ‘‘place of safety’’.

Monitoring the use of police stations as a 'place of safety'

292. We requested further information from the Minister about the current use of places of safety for child protection purposes. In correspondence with us, the Minister provided the following information: [cxc]

“In 2016/17, there were 473 individual children and young people taken to a ‘place of safety’ under child protection measures, under a total of 619 placements[cxci]. The table below gives further detail on the placement types that were used as a ‘place of safety’.”

Home/ Family / Friends	124
Foster Care	438
Other Community	8
Residential home	18
Other residential	31
Total	**619**
Number of children	473

293. The Minister explained, “the disparity between the number of placements and the number of children is due to the common pattern of a short term measure being immediately followed by a longer term measure for the same child. Also, these

clxxxvii Barnahus is the guidelines set out by the Children Commissioner for "Improving the response to child sexual abuse"

clxxxviii Official Report, 27 September 2018, Col 27
clxxxix Official Report, 6 September 2018, Col 20
cxc Letter from Minister from Children and Young People 11 October 2018
cxci Placements were used under the following powers: Child Protection Order; Child Assessment Order; Emergency powers under S55-56 of Children’s Hearings (Scotland) Act 2011; Emergency Protection where an order was not available. The criteria for their use is set out in the Children’s Hearings (Scotland) Act 2011. Disaggregated details of the orders and individual case specifics are not available.

placement types do not specifically indicate how many children were at any point taken to a police station as a 'place of safety', however briefly"[cxcii].

294. She advised she was seeking clarification on this from Police Scotland. Reinforced by the numbers above and by the 2015 SCRA research into CPOs[cxciii], it is exceptionally rare that a police station would be used as a 'place of safety' under child protection measures.

295. The Minister also provided 'details of the number of children and young people in 2017/18 who were held in custody prior to their case being jointly reported to SCRA and the Crown Office and Procurator Fiscal Service. The table below shows the age breakdown for this figure.'[cxciv]

Age of receipt	Year 2017/18
13	2
14	6
15	20
Total	28

296. Whilst the Minister gave us some helpful information, we felt there were gaps in that information around whether a child was held at a police station prior to being taken to another 'place of safety', and that the length of time a child might spend there, could be significant. We understand that this information is currently collected in different ways across the country, which makes collation of the figures more challenging.

297. Section 24 of the Bill provides for a regulation-making power to set out who should be notified in the event that a child is taken to a 'place of safety' under the terms of section 23 of the Bill, although we note there do not appear to be any reporting provisions to monitor the use of a police station as a 'place of safety'.

298. We are concerned that there is no requirement to monitor the use of the 'place of safety' power in section 23 of the Bill. As such, we ask the Scottish Government to amend the Bill to provide for data about the use of the power to be recorded in such a way as to allow analysis of a) the reason for the child's removal; b) details of the specific location(s) to which the child is taken; c) the length of time spent at each location; and d) where the location is a police station the reasons why an alternative 'place of safety' could not be used and confirmation that at no point was the cell estate used in the context of 'place of safety'.

Search Powers

299. The police currently have a range of statutory powers to search children under 12. Where those search powers hinge on suspicion that someone is committing an offence they would no longer be available to the police unless the Bill made explicit

cxcii Letter from Minister from Children and Young People 11 October 2018
cxciii SCRA Research Report, Child Protection Orders, 2015, pg 24
cxciv Letter from Minister from Children and Young People 11 October 2018

provision. Currently, the police can also search children under 12, such as a condition of entry into an event(s), or in the wider interests of public safety

300. Sections 25 to 30 of the Bill make provision for the search of children under the age of 12. The Bill seeks to replicate existing statutory powers of search to ensure that, when necessary and proportionate, the powers can still be used in relation to children under 12. By doing so, it creates a consistent position for all children under 12. It also provides for searches of premises or vehicles "as part of an investigation into a serious act that [the police] suspect has been carried out by a child under the ACR [age of criminal responsibility], but do not have an automatic statutory power to do so"[cxcv].

301. The Explanatory Notes emphasise that stopping and searching children under 12 is a rare occurrence, stating "Police Scotland figures show that in the year to April 2017 only 10 searches of children under 12 took place (and those were all children aged 10 or 11)"[cxcvi], although they go on to describe the power to search for and remove items from younger children as 'crucial'. [cxcvii]

Timing of use of search powers

302. Police Scotland state that "it is noted that the power to search without a warrant in other enactments is carried over into this Bill through the provisions in section 25. However, ….it does not appear to confer a power to take action immediately after an incident or in circumstances where the risk might be difficult to quantify"[cxcviii].

Extension of search powers

303. Some witnesses were concerned about the extension of search powers under the Bill, as well as the manner in which they had been extended

304. CELCIS (the Centre for Excellence in Looked After Children in Scotland) were concerned about the extension of search powers as this was not an area the Advisory Group had reported or on made any recommendation. CELCIS considered preservation of existing powers of search (and extension of these in relation to all children under the age of criminal responsibility) had clear implications for children's rights, and required full, public discussion."[cxcix]

305. Includem said "it is the wrong way round to extend a power of stop and search to all under 12s without any suspicion of having committed a criminal offence before any evidence exists that those blanket provisions are required. The Committee could look at specific conditions on stop and search as an interim measure until such evidence is available."[cc]

306. Together (Scottish Alliance for Children's Rights) noted the provisions in the Bill involved "extending certain search powers (such as the power to search for knives)

---

cxcv Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill, page 31, para 140
cxcvi Policy Memorandum, page 30, para 144

cxcvii Page 30, para 144, Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill
cxcviii Written submission, Police Scotland
cxcix Written submission, CELCIS
cc Written submission, Includem

which previously only applied to children aged over eight. Whilst we appreciate the intention is not to create a three-tiered system under which under 8s, eight-11s and over 12s are subject to different systems, we would emphasise that there must be a very strong presumption against the use of such new search powers on under 8s, with this power only available in the most serious cases under authorisation by the Sheriff"[cci].

Safeguards when using search powers

307. We note there are a number of safeguards already built into the search powers through the Criminal Justice (Scotland) Act 2016. Some safeguards are specific to children and young people and these still need to be adhered to, e.g. searches must be carried out in a way to minimise distress to children. Further safeguards are provided for under the Bill. For example, section 25(3)(a) prevents the arrest of the child and section 25(3)(c)(i) and (ii) state that the child cannot be guilty of an offence if the child 'obstructs the constable in the exercise of a power conferred under or by virtue of the enactment or fails to comply with any requirement made of the child by the constable.'

308. Dr Claire McDiarmid of the University of Strathclyde considered the search provisions "very well safeguarded in terms of protecting the rights of the child"[ccii]. Similarly, Professor McVie commented "bill is pretty tight around the circumstances in which stop and search can take place"[cciii].

309. The Explanatory Notes also highlight the need for such searches to be carried out in accordance with the Statutory Code of Practice on Stop and Search, although this is not currently specified in the Bill.

310. On the practical use of the Code of Practice, the Code states that "some stop and search powers do not depend on the person concerned being suspected of committing an offence in relation to the object of the search. A child or a child's pram may also be used to conceal an item on behalf of an adult. A constable who has reasonable grounds to suspect that a child or young person is in innocent possession of a stolen or prohibited article, controlled drug or other item for which the constable is empowered to search, may stop and search the child or young person." [cciv]

311. Professor McVie said, "police officers have adapted very well to the introduction of the code of practice, which, in addition to the legislation, has given a fairly detailed set of circumstances around which it is expected that stop and search can take place"[ccv]. She went on to advise that the "12-month review of the stop and search processes is being done at the moment, and the report will make recommendations for the Cabinet Secretary for Justice"[ccvi].

[cci] Written submission, Together (Scottish Alliance for Children's Rights)
[ccii] Official Report, 6 September 2018, Col 19

[cciii] Official Report, 6 September 2018, Col 20
[cciv] Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland, Laid before the Scottish Parliament 11 January 2017
[ccv] Official Report, 6 September 2018, Col 20

Conclusion of search powers

312. We note the existence of the statutory Code of Practice on Stop and Search[ccvii], which includes a specific chapter on the needs of children and young people. This Code of Practice recognises that there are significant power imbalances between a child and a police constable and that children can find the experience of being searched traumatising.[ccviii]

313. We also note that there is an ongoing review of the stop and search powers.

314. On the evidence we received, it is difficult for us to determine whether the use of the power to stop and search is proportionate or indeed necessary, without further examples of when it would be used under the Bill. Given this insufficiency of evidence, we ask the Scottish Government to provide examples of when the powers would be likely to be used under the Bill. Additionally, we understand the stop and search powers are currently under review. We would be interested to know what account the Review has taken of the approach set out in the Bill, and what the timescale for completion of the Review. It would be helpful to have this information ahead of Stage 2 proceedings.

315. Where an urgent search of a child under the age of criminal responsibility is required to preserve life, then this should be done so in line with the principles outlined in Chapter 7 of the statutory Code of Practice on Stop and Search. We ask the Scottish Government to confirm that this will be clearly communicated to the Independent Advisory Group on Stop and Search.

316. Also, we ask the Scottish Government to confirm that any guidance on the use of search powers in the Bill, reflects Chapter 7 of the statutory Code of Practice on Stop and Search.

Interviewing of children

317. Part 4, Chapter 3 of the Bill outlines when a child may be interviewed about their potential involvement in harmful behaviour occurring before the age of 12.

318. Section 31 of the Bill limits the questioning of children under the age of 12 to where a police constable has reasonable grounds to suspect that the child ‘by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person’.[ccix]

---

ccvi Official Report, 6 September 2018, Cols 20-21

ccvii Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland, Laid before the Scottish Parliament 11 January 2017

ccviii Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland, Laid before the Scottish Parliament 11 January 2017, Chapter 7, page 17-21

319. This section specifies that, other than in urgent cases (for which provision is made in section 44 of the Bill), the police should apply for a Child Interview Order before interviewing the child. It also makes provision for the police constable to contact the child's local authority and to consult with them prior to making an application for such a child interview order (unless this is not practicable).

320. Sections 33 and 34 of the Bill set out the process for applying for a Child Interview Order and the factors that the Sheriff must take into account when deciding whether an order is appropriate. Section 34(3)(b) asks the Sheriff to consider 'whether an investigative interview of the child is appropriate given the child's circumstances (including the child's age and any matter related to the child's behaviour)'

321. Section 33(3)(b) also provides for the Sheriff to consider whether the child should be given the opportunity to make representations to him/her in relation to the order.

322. If the order is granted, Section 35 of the Bill provides for the child and their parents to be notified. Section 35(2)(ii) suggests that "in so far as practicable, [a police constable should] explain the information contained in the order to the child in a way that is appropriate to the child's age and maturity". Also, section 35(2)(b) makes provision for the child's supporter and advocacy worker to receive a copy of the order, as soon as they are known.

323. The Explanatory Notes accompanying the Bill set out the current arrangement for interviewing children aged eight-11 years old:

> The statutory powers of police constables to detain and question criminal suspects are set out in Part 1 of the 2016 Act[ccx]. Chapter 1 of that Act gives constables power to arrest a person without warrant where the constable has reasonable grounds for suspecting that the person has committed or is committing an offence. This power (and other powers in relation to arrested persons) currently extend to children aged eight to 11 (as such children can, at present, commit an offence) but not to children aged under eight (who cannot).[ccxi]

324. The Explanatory notes also explain when the police can speak to members of the public, including children on a consent basis, stating:

> …even where a person is suspected of committing an offence, the person may attend for interview voluntarily rather than being arrested. Where a child aged eight to 11 is suspected of committing an offence and is interviewed voluntarily, the rights conferred by sections 31 and 32[ccxii] of the 2016 Act apply. By virtue of section 33 of the 2016 Act, such a child cannot consent to be interviewed (even voluntarily) without a solicitor being present. Children aged under eight cannot be suspected of committing an offence and so the powers in the 2016 Act do not apply, although such children can still be interviewed voluntarily[ccxiii].

---

ccix Criminal Justice (Scotland) Act 2016 , Section 2(a) and (b)(i) and (ii)
ccx Criminal Justice (Scotland) Act 2016

ccxi Bill Explanatory Notes, p.22, para 116
ccxii Section 31 of the Criminal Justice (Scotland) Act 2016 provides for a right to be given certain information and section 32 provides for a right to have a solicitor present.

325. The Minister stressed that the Bill was about "decriminalisation of children under 12 so that their contact with the justice system is not traumatic for them."[ccxiv] She outlined that the Bill formed part of a larger shift in the way in which behaviour by children and young people was dealt with in Scotland, suggesting:

> Over a number of years, we have taken a very different approach to children and young people—the whole-system approach[ccxv] —which embodies the GIRFEC[ccxvi] principles and is an example of a preventative multi-agency approach. It is really about improving outcomes. There have been fewer children going into the system and being seen at children's hearings than there were 10 years ago. The children and young people who arrive at hearings on offence grounds are generally at the more complex end, and they are the children who need our help most. We have seen that trend reflected in disclosure—I have the figures here. From 2014 to 2017—the last three years for which we have data—there were six convictions accrued when the applicant was under 12, which were disclosed in 2017. That figure is down 92 per cent from 2014, when there were 79.[ccxvii]

326. Bruce Adamson, the Children and Young People's Commissioner Scotland, expressed concern that "Part 4 of the Bill provides for the retention by the police of significant investigatory powers in relation to children under the age of 12, even though the behaviour will no longer be able to be considered a crime…There is an obvious danger with this in that more children could be brought into contact with the police than would have previously been the case"[ccxviii] suggesting that instead "the police should be able to intervene on a welfare basis to protect children and help ensure that those in need receive appropriate interventions through the hearings system"[ccxix].

327. This sentiment was echoed by Clan Childlaw, who stated that "Children whose behaviour is not deemed criminal must not face criminal consequences for their actions. While it is right that police must be able to investigate the most serious incidents in order to keep the child and others safe, such cases should be treated as child protection concerns."[ccxx]

328. Children 1st suggested that there was a need for some police powers to be retained, stating "these powers are crucial to establishing the truth of the matter, informing decisions about a child's welfare and the risk they pose to themselves and others and to ensuring the rights of victims"[ccxxi]. However, they stressed "the

---

ccxiii Bill Explanatory Notes, p.22, para 118
ccxiv Official Report, 4 October 2018, Col 13
ccxv Scottish Government explanation of the Whole System Approach

ccxvi GIRFEC – Scottish Govt approach towards children and young people, entitled 'Getting It Right for Every Child'

ccxvii Official Report, 4 October 2018, Col 13
ccxviii Written submission, CYPCS

ccxix Written submission, CYPCS
ccxx Written submission, Clan Childlaw

importance of ensuring that children are fully aware that they are not subject to a 'criminal' investigation and that steps are taken to put in place procedures and processes that are trauma-sensitive and compassionate"[ccxxii].

329. Police Scotland were "extremely concerned by the use of the word 'unlawful' in section 31(1). This appears to make any questioning outwith the terms of an Order 'unlawful'…. our agency is unique in this process in that we are charged with establishing the facts. We are not aware of any other enactment which would place our officers in the position that they were acting outwith the law by asking questions when they initially attend an incident to establish what has happened. We will often only have very limited information at the start of an investigation. Only by asking questions of those who are either witnesses or who have potentially caused harm will we be able to establish those initial facts".[ccxxiii]

330. We are concerned, therefore, that the processes set out in the Bill are unnecessarily formal and that a child's actions could still be explored via a Joint Investigative Interview (where there were significant child protection concerns arising from the child's behaviour), via a voluntary interview with the police or via a Children's Hearing. Some of the safeguards outlined in the Bill could be adapted for those purposes, including the right to access an advocacy worker to help a child understand proceedings and to ensure that their voice was heard.

331. It is noted that, whilst the Explanatory Notes accompanying the Bill suggest that "questioning is permitted (on a voluntary basis) until the constable forms a reasonable suspicion that the child has acted as mentioned in subsection 2(b)"[ccxxiv],[ccxxv], that this will be a difficult distinction for police constables to make and that, in order to avoid 'unlawful' questioning[ccxxvi], it is most likely that police officers will avoid questioning children under 12 completely or will rely on the formal processes laid out in the Bill for serious incidents of harmful behaviour.

332. One of the Advisory Group's reasons for retaining some police powers was that it would allow a child to exonerate themselves when they had done nothing wrong. For a child, the sense of injustice when they have been accused of something they haven't done isn't necessarily linked to the gravity of the incident. The power imbalances that naturally exist between a child and an adult authority figure (such as a police constable) are likely to make it difficult for the child to speak up about this, without being given a clear opportunity to do so.

Conclusion on the interviewing of children

333. The Policy Memorandum suggests that conduct by eight-11 year olds that would have been dealt with previously under Children's Hearing offence grounds was

---

ccxxi Written submission, Children 1st

ccxxii Written submission. Children 1st

ccxxiii Written submission, Police Scotland

ccxxiv Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill, p.23, para 121

ccxxv Age of Criminal Responsibility (Scotland) Bill, section 31(2)(b)(i) and (ii)

ccxxvi Section 31(1), Age of Criminal Responsibility (Scotland) Bill

'typically of a minor to moderate severity'[ccxxvii] with very serious harmful behaviour being described as 'comparatively rare'[ccxxviii]. It quotes data collected by the Scottish Children's Reporter Administration in 2014-2015, which found that:

> 75 children were referred to the Principal Reporter as a result of being charged with an assault, 55 for threatening or abusive behaviour, 50 for vandalism, 28 for distress/racial alarm, 15 for theft by shoplifting, 14 for theft and 13 for assault to injury.
>
> During the 4 year period 2011-2012 to 2014-2015, 150 referrals were made to the Principal Reporter for offences of a serious violent or serious sexual nature (e.g. serious assault, fire-raising or sexual assaults on young children).[ccxxix]

334. We are concerned that the narrow way in which these provisions have been drafted may inadvertently lead to younger children being unable to present their version of events, in particular where a decision is made not to convene a Children's Hearing (but where the child might feel their version of events has not yet been heard).

335. We would welcome the Scottish Government's views, in advance of Stage 2, on how the Bill could be amended to address the situation under the current provisions in the Bill where younger children are unable to present their version of events, in particular where a decision is made not to convene a Children's Hearing.

Advocacy Provision

336. One of the key safeguards introduced by section 40 of the Bill is the presence of a legally qualified advocacy worker in an investigative interview.

337. This was broadly welcomed by stakeholders responding to our Call for Evidence. There was some confusion expressed by some stakeholders, however, as to how these provisions might work in practice.

338. At present, the Criminal Justice (Scotland) Act 2016 provides that a child aged eight-11 years old who is interviewed about a potential offence has the right to have a solicitor present. Under the arrangements proposed by the Bill, a child under 12 would no longer be capable of committing an offence. The Bill suggests that a solicitor would therefore no longer be required, and instead the child would have a right to a legally qualified advocacy worker.

339. Stakeholders highlighted that even if a child could no longer acquire a criminal record, information resulting from a police incident might subsequently appear as 'other relevant information' on a higher level Disclosure or PVG Scheme Record.

---

ccxxvii Policy Memo, Age of Criminal Responsibility (Scotland) Bill , p.21, para 98

ccxxviii Policy Memo, Age of Criminal Responsibility (Scotland) Bill, p.21, para 98

ccxxix Policy Memo, Age of Criminal Responsibility (Scotland) Bill, p.21, para 98

Therefore, it would be important for the child to understand the potential longer-term consequences of admitting any involvement in an incident.

Role of an advocacy professional

340. Clan Childlaw highlighted their concern that "…. there is a risk of confusion around the respective roles of a legally qualified advocacy worker and a solicitor acting for the child. Further, a child being interviewed without a solicitor where there is a risk of alleged behaviour being disclosed as ORI later in life will be placed at an unfair disadvantage compared to those who have been accused of an offence and are above the age of criminal responsibility."[ccxxx]

341. Shaben Begum of the Scottish Independent Advocacy Alliance explained how she thought the provision of advocacy could be helpful to a child, suggesting that

> in my experience, advocacy often slows down processes, because advocates are there to make sure that the young person fully understands the situation. The independent advocate is independent of all parties and is there solely for the child or young person. From talking to some of our members who work in the children's hearings context, I know that the child or young person and the parents or carers all want the situation to be over as soon as possible, so that they can put it behind them and move on. Often, it is the independent advocate who ensures that the child or young person fully understands what is going on. Part of the advocate's role is to talk through the consequences of any action.[ccxxxi]

342. Deaf scotland observed that advocacy provision would need to take into account any additional support needs the child might have, including any requirement for BSL interpreting or other communication support, such as electronic note-taking. [ccxxxii]

343. Police Scotland highlighted that any advocacy service created as a result of the Bill would need to be responsive to both operational need and the needs of the child, noting that "it is important that those performing this role are available to support enquiries at a time that is convenient for the child, their family and consistent with the needs of the enquiry. This may include availability in the evening and at weekends."[ccxxxiii]

Appropriate qualifications for an advocate

344. There was recognition by some stakeholders that a legal qualification did not necessarily ensure that someone was skilled in talking to a child. The key to ensuring provisions were as child-friendly as possible, would be to strike up a good working relationship with the child and to build trust.

345. The Law Society of Scotland considered that "a mere law qualification will in our view not suffice. They would need to have an understanding as well as experience

---

ccxxx Written submission, Clan Childlaw
ccxxxi Official Report, 20 September 2018, Col 28
ccxxxii Written Submission, Deaf Scotland
ccxxxiii Written submission, Police Scotland

of the practice of criminal law and of the children's hearings system, including the implications of the evidence or information provided during an interview."[ccxxxiv]

346. Children 1st highlighted the need to involve children and young people in the development of an advocacy service associated with this Bill, noting that "children have consistently reflected that they don't like re-telling their story numerous times to different professionals and also that relationships with trusted individuals are important to them. If the advocacy worker is a new professional in their life it will be important to ensure there is time to build a trusting relationship with the child so that the fully understand their role."[ccxxxv]

Resourcing - new advocacy professionals

347. We also heard evidence from a range of witnesses that advocacy provision in Scotland for children and young people was currently patchy and inconsistent. Availability varied hugely between different parts of Scotland, leading to the potential for a 'postcode lottery'.

348. In their written evidence, the Scottish Independent Advocacy Alliance explained where they believed the key difficulties lay:

> Due to funding arrangements, referral criteria to access children's independent advocacy services is fairly rigid, i.e. children must have a mental health issue or an additional support need. This means that services can only be offered to certain categories of children in funded areas, and many more vulnerable children cannot access advocacy support if they do not meet the referral criteria…. Advocacy projects often operate waiting lists as they are in very high demand, so such provision as suggested in the Bill would exacerbate this situation without sufficient financial investment to deliver a fully accessible and responsive advocacy service.[ccxxxvi]

349. Barnardo's Scotland also observed in their written evidence that "it is worth noting that in other contexts a right to advocacy support is curtailed by the availability of advocates on the ground; to make this commitment meaningful, advocacy services will need to be properly resourced."[ccxxxvii]

350. Prof Elaine E Sutherland warned that previous commitments to introduce broad advocacy provisions for children in Scotland had not yet materialised, stating "it would be worth reflecting on how to ensure that effective advocacy is actually provided. The Children's Hearings (Scotland) Act 2011, s122 made provision for children's advocacy services. Seven years later, the section is still not in force, there is no comprehensive service available to children across Scotland and local provision varies considerably…"[ccxxxviii]

351. This point was also picked up by Includem who noted that "there may be underlying issues around implementation that will have to be seriously considered before we

---

ccxxxiv Written submission, Law Society of Scotland
ccxxxv Written submission, Children 1st
ccxxxvi Written submission, SIAA
ccxxxvii Written submission, Barnardo's Scotland
ccxxxviii Written submission, Prof Elaine E Sutherland

can rely on this level of support being universally accessible for children across Scotland."[ccxxxix]

352. The Law Society of Scotland noted that "there is a need for a clearly defined robust and relevant scheme for the appointment, role, training, monitoring and review of the 'advocacy worker' system."[ccxl]

353. The Scottish Independent Advocacy Alliance also highlighted the need for training to be factored into any budget considerations, stating that they believed "…there will be significant training implications for any advocacy organisation delivering this service as it is vital that workers are fully conversant with the legislation and the onward legal processes."[ccxli]

354. Tom McNamara, Head of Youth Justice and Children's Hearings at the Scottish Government explained that the Scottish Government had already established who might fulfil the role of Advocacy Worker, stating

> We are talking about drawing on and then supporting an existing cohort of legally qualified solicitors who are already operating on the children's legal assistance scheme, so they have already been required to demonstrate the capacity for child-centred practice. There is a quality-assurance mechanism in place in relation to that, and those solicitors also already have the wider obligations of—and the assurance and oversight that are offered by—professional solicitor status. However, they would also be able to operate in a very child-focused and child-centred way.[ccxlii]

Conclusion on the resourcing of new advocacy professionals

355. Given the evidence that has been provided by witnesses as to the current lack of availability of advocacy support for children across Scotland, we were concerned that the resources allocated to this in the Financial Memorandum, specifically that this might be insufficient to deliver the service envisaged by the Bill.

356. We appreciate the Scottish Government's assurances that resources were already in place which could be drawn upon in the context of the Bill. However, we noted stakeholders' concerns that there was the potential for this to cause confusion and a blurring of roles.

357. We also recognised that it was difficult to form a true picture of the resources required, without a clear indication of how this would fit within the wider context of the commencement of section 122 of the Children's Hearings (Scotland) Act 2011.

358. We ask the Scottish Government to reflect on the evidence we received on the availability of legally qualified, independent advocacy workers required to implement the Bill. In advance of Stage 2 it would be helpful to have the Scottish Government's views on the financial implications raised.

---

ccxxxix Written submission, Includem
ccxl Written submission, Law Society of Scotland
ccxli Written submission SIAA
ccxlii Official Report, October 4 2018, Col 20

Questioning of a child in urgent cases

359. We also noted that under section 44 of the Bill, as currently drafted, where the interview of a child is carried out in situations where there is a threat to life, the child will not have access to an Advocacy Worker. We also noted the provisions in section 45(5) and (6) which compel a police constable to inform an advocacy worker that questioning has taken place under section 44 and require a police constable to apply for a child interview order 'as soon as practicable after authorisation is granted under section 44'.[ccxliii]

360. Police Scotland noted that there is "…an apparent anomaly in the drafting of section 45 (Procedure following authorisation of questioning under section 44 (Questioning of child in urgent cases)). Section 45(5) states that a constable must notify an advocacy worker about the authorisation under section 44, however, the Bill does not state when this should be done. Section 44 envisages the most serious and rare of circumstances, in which urgency is imperative. We anticipate that the notification to the advocacy worker is actually carried out in conjunction with section 45(6), as soon as reasonably practicable applying for a child interview order. Police Scotland would welcome clarification on this point."[ccxliv]

361. We ask the Scottish Government to provide clarification on when a constable must notify an advocacy worker about the authorisation to question a child in urgent cases, prior to Stage 2 proceedings.

Role of social work in the interview

362. Social Work Scotland cautioned against

> any assumption that the provision of an advocacy service alone will protect a child's rights. A social workers' training and role is steeped in providing rights based support and to this end they play an equally critical role – we would point out that whilst the questions from the Committee are referring to a "police interview", our reading of the Bill is that the intention is for these interviews, when required, to be at least jointly planned between police and social work. Our view is that the social work role will be important and care will need to be taken in drafting the role of the advocacy support provision to ensure that it complements rather than competes with the social work role in any planning or interview.[ccxlv]

Right to Silence

363. It is understood that under the interview provisions of the Bill a child will no longer have a right to silence. Instead the Bill makes provision in section 38 of the Bill for a child 'not to answer questions.'[ccxlvi]

---

ccxliii Age of Criminal Responsibility (Scotland) Bill Bill, section 45(5) and (6)
ccxliv Written submission, Police Scotland
ccxlv Written submission, Social Work Scotland
ccxlvi Section 38(1) and (2), Age of Criminal Responsibility (Scotland) Bill Bill

364. Article 6 of the European Convention on Human Rights provides a person's right to a fair trial. Implicit in this Article is the right to silence[ccxlvii] where a person is accused of a crime. However, if the age of criminal responsibility is raised to 12, then a child under that age will no longer be criminally responsible and, as such, Article 6 will no longer apply.

365. Shaben Begum of the Scottish Independent Advocacy Alliance suggested that advocacy may help children address some of the power imbalances which exist between them and the police, suggesting that "some of us might have experience of situations, possibly intimidating ones, in which people use language that is unfamiliar to us or in which there is a massive power imbalance between us and the people who are doing things to us, for want of a better phrase. Advocacy addresses such situations and imbalances of power. It provides emotional support and much more besides."[ccxlviii]

366. Kate Rocks of Social Work Scotland expressed concern, however, that the interview provisions in the Bill themselves were likely to make it more difficult for children to make their views known, stating "we have spent a lot of time in child protection debating how to reduce the number of adults who may be part of that formal interview. Our aspiration is to have one adult with the child, whereas under the bill there could be up to four adults in the room".[ccxlix]

367. She continued, "In the main, only the adult who is the supporter of the child will be known to them—and we will have to define what that means, because we might not know about the culpability of that supporter with regards to the reason why the child is there. Three of those four adults will not be known to the child, which does not provide the best conditions for children to give any kind of information or evidence", although she emphasised the interview was not about gathering evidence, but trying to find out what happened to the child.[ccl]

368. Detective Chief Superintendent Lesley Boal voiced her frustration about the interview process saying, "we have framed the model for how we interview the child according to the very model that we want to avoid, which is a criminal justice model". She explained, "a number of people have to be present and we have to explain that there is, basically, a right to silence, which is a criminal justice process—and a process that the child should never be in".[ccli]

369. Andrew Alexander of the Law Society of Scotland recognised the need "to avoid a situation in which proceedings might feel particularly criminal", although he did consider "there are important safeguards in place such as reminding the child that they do not need to answer questions if they do not want to. There is also an opportunity for guidance to be issued under section 46 in order to highlight more detail, but some provisions could also be brought into the bill itself"[cclii].

---

ccxlvii Liberty, Article 6 - Fair Trials
ccxlviii Official Report, 20 September 2018, Col 26
ccxlix Official Report, 20 September 2018, Col 18
ccl Official Report, 20 September 2018, Col 18
ccli Official Report, 20 September 2018, Col 19
cclii Official Report, 20 September 2018, Col 22-23

370. Tom McNamara of the Scottish Government stated that "it is probably better for people to come forward and talk about their experiences and concerns, and what has led to the incident or series of incidents, so that we can put the right support in place around them. It should not be about their being in trouble"[ccliii].

Conclusion on the right to silence

371. Whilst the right under section 38 not to answer questions is potentially helpful in indicating to a child that they are under no obligation to answer questions, we were conscious that a child may find it very difficult to exercise that right without appropriate support.

372. In advance of Stage 2 we ask the Scottish Government whether it considers a child's 'right not to answer questions' in the Bill offers as much legal protection as the 'right to silence' afforded an adult in a similar situation and, if not, whether it would consider amending the Bill to address this. Also, we ask the Scottish Government whether it plans to cover this issue in guidance under section 46 of the Bill.

Taking of prints and forensic samples

373. Chapter 4 of the Bill, sections 47 to 58 make provisions relating to the taking of fingerprints and samples from certain children under the age of 12.

374. The Explanatory Notes accompanying the Bill explain that "the Bill will put in place new arrangements for the taking of prints and samples from children under 12 and from children of 12 and over in relation to conduct which occurred when they were under 12".[ccliv]

375. These arrangements are available only "where the police have reasonable grounds to suspect that the child, by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person; or, by behaving in a sexually violent and coercive way, caused or risked causing harm to another person".[cclv]

376. A small number of stakeholders commented on the forensic powers outlined in the Bill.

377. Detective Chief Superintendent Lesley Boal reassured us that "for the vast majority of children who present with harmful behaviour, there will be no requirement to take any forensic or biometric samples"[cclvi].

378. Together (Scottish Alliance for Children's Rights) expressed concern that section 57 of the Bill (in relation to emergency samples) 'does not include a duty to explain to

---

ccliii Official Report, 4 October 2018, Col 20
ccliv Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill, p.30, para 152
cclv Explanatory Notes, Age of Criminal Responsibility (Scotland) Bill Bill, p.31, para 161
cclvi Official Report, 20 September 2018, Col 11

the child what is happening in a manner appropriate to their age and maturity', stating that 'a duty must be introduced on to the face of the Bill.'[cclvii]

379. The Law Society of Scotland welcomed the fact 'that samples taken from a child should not be retained beyond the immediate investigation.'[cclviii]

380. Victim Support Scotland felt that the forensic powers in the Bill were helpful, stating:

> We understand the essence of the Bill is about creating child friendly processes for young people, especially in respect of less serious matters where state interventions would likely be less intrusive and we acknowledge the cross organisation/referral approaches taken in less serious cases. However, we are mindful of victims in all instances, and so we are encouraged, that Police will retain powers in some form for children under the age of twelve in exceptional and serious cases.[cclix]

381. Clan Childlaw, however, said that they could "not support any proposal to take forensic samples from under 12s on the basis that this would be a disproportionate interference in the privacy rights of a child whose behaviour is not deemed criminal. Under the proposal, the consent of the child is not relevant to obtaining the order. The process of providing samples can be an extremely difficult and traumatising experience for a child."[cclx]

382. Section 56 provides for an appeal against a decision made under section 52, 'Order authorising taking prints and samples from child.

383. Detective Chief Superintendent Boal raised concerns that "there could be an appeal against such an order. With a serious crime that we wanted to investigate timeously", she asked whether the police "would we have to wait for an appeal process to be concluded? If that was the case, the opportunity to take sensitive forensic samples might be lost"[cclxi].

Conclusion on taking of prints and forensic samples

384. We agree that it is desirable to have some means of proving, or excluding, a child's involvement in a serious incident and therefore support the limited inclusion of forensic powers in this Bill, as long as such samples are not retained.

385. We acknowledge that the taking of samples has the potential to be traumatic for a child. We are unclear if there is any current guidance or provision for guidance under the Bill which sets how forensic samples from children should be taken. We therefore seek clarification on this point. Notwithstanding this, we ask the Scottish Government to amend guidance to explain to a child, in age appropriate language, what is happening, that they have the right to refuse to provide a sample, and for how long and what uses any particular sample might be retained.

---

cclvii Written submission, Together (Scottish Alliance for Children's Rights)
cclviii Law Society of Scotland, Written Submission
cclix Written submission, Victim Support Scotland
cclx Written submission, Clan Childlaw
cclxi Official Report, 20 September 2018, Col 11

General Principles of the Bill

386. We note that the age of criminal responsibility in Scotland was last increased 86 years ago. The Bill is, therefore, a long-awaited opportunity to address some of the most pressing issues around the criminalisation of children and young people.

387. We support the raising of the age of criminal responsibility in Scotland from eight to 12. However, some Members do so in the knowledge that the Bill could be used to raise the age to 14, 16 or 18 years old. Also, the benefits offered by this Bill could be extended to a much wider group of children and young people.

388. Increasing the age of criminal responsibility to 12 will still leave Scotland's age of criminal responsibility amongst the lowest in the EU.

389. To reach a consensus, and in the interests of a shared commitment to improving outcomes for children and young people, the Equalities and Human Rights Committee supports the general principles of the Age of Criminal Responsibility (Scotland) Bill and commends them to the Scottish Parliament.

Annex A: Age of Criminal Responsibility Toolkit

From June to October 2018, the Committee invited responses from schools and youth groups on the age of criminal responsibility. Downloadable toolkits were available on the Committee website, and the Parliament's Outreach Education service delivered sessions in schools around the country.

Over 1000 secondary students and over 200 primary age pupils engaged with the Committee through these sessions and the toolkit. A list of those schools which participated is included as an annex.

Of the schools that responded to the Committee directly, the majority of students in each class agreed that the age of criminal responsibility should be raised to 12. However, none of the classes felt that the age should be raised higher than 12. Their comments are collated below:

- Concerns that older children might be used by criminal gangs.
- Some children would prefer ACR being 10 or 11 to coincide with the end of primary school instead of 12.
- If the age is older than eight, you might not take crime seriously because you'd get off with it.
- The human brain isn't fully developed into an adult brain until age 20, so that should be a major factor in deciding whether a young person is criminally responsible or not.
- The age of criminal responsibility should be dependent on the severity of the crime.
- A child's future could be greatly affected by a permanent record. At eight years old someone doesn't have full awareness of the consequences of their actions.
- The age should be raised because the brain is developmentally immature.
- We are not in line with other EU countries.
- Having a criminal record when you're young can affect getting a job. Raising the age will give children a chance to be responsible for their actions.
- People are using young children as drug dealers
- When I was 10 I knew the difference between good and bad.
- Regardless of what age is chosen, a criminal record should be for anyone who has done wrong.
- The age should be eight-10.
- From birth we are taught the difference between right and wrong – though our brains may not be fully developed they are developed enough to tell us whether what we are doing is a good choice or not.

- Different children realise what they are doing is wrong/mature/take responsibility for their actions at different ages
- We feel at 12 you have enough knowledge and awareness of the consequences of your actions to understand.
- At 12 you know that you would be breaking the law and the level of wrongness.
- 12 is the age most young people enter high school. They know the difference between right and wrong.
- People more or less know the law at the age of 12.
- 8 year olds are still learning and don’t fully know right from wrong. 12 is a reasonable age because you know you can’t just get away with anything and you are more aware of what’s right and what’s wrong
- Young children cannot really make life-impacting decisions.

Response from Outreach Schools

Of the schools who participated in Outreach sessions, the majority (77%) voted to increase the age of criminal responsibility to 12. One school was evenly split between increasing to 12 and maintaining the age at eight. 20% of schools voted against increasing the minimum age of criminal responsibility.

Of those who participated in a session, the majority suggested that 12 was the appropriate age. Six classes suggested an age of higher than 12, with two agreeing that 16 should be the new age of criminal responsibility.

The majority of teenagers involved in the school consultations felt that the age is presently too low and should rise. In some schools, pupils had understood that not going to court before age 16 meant that there was no criminal liability before 16. These pupils tended to be shocked when they were told the actual position and were very opposed to keeping the present age, with most of them saying that they thought 16 was “about right”.

Those who suggested that the age of criminal responsibility should be at eight had strong support for an education campaign delivered preferably by the police visiting schools. They felt it should be made clear to pupils in P3 classes that they are criminally responsible liable for their actions, and that if this was done it would act as a deterrent. Several teenagers asked if there was data on how other European countries had decided on their age, and how successful it was felt to be.

Though several schools did vote to maintain the age of criminal responsibility at eight, most of the pupils who did so were clear that it was only because the question didn’t allow them to differentiate between severity of crimes.

Other comments, especially from schools which voted not to raise the age of criminal responsibility, were that the rights of victims were important, and that letting young people face ‘no consequences’ would devalue victims of crime.

One major concern was that while petty or accidental crimes should have an older age, serious assault, sexual crimes and murder should be treated as criminal regardless of age, and people who commit those crimes should carry a criminal record.

One anecdotal response was reported from a pupil who had been referred for an incident that took place when they were eight. This pupil did not want the age of criminal responsibility raised because "I knew exactly what I was doing and I knew it was wrong".

The following table sets out the reasons given by the schools visited by Outreach for their choice of the age of criminal responsibility:

Reasons given by young people for their choice of the appropriate age of criminal responsiblity

Age	Reason
8	• The system "ain't broke, so don't fix it". • Children know right from wrong and can be held responsible at 8 years of age. • The science on brain development is unproven. • Young children are easily manipulated. If the age is raised they will be at more risk of being used by adults or older children to commit crimes that they wouldn't otherwise have committed. • Older children could play the system. If the age is raised they might feel they can get away with crimes.
12	• It's secondary school age, so a natural break from early childhood. • Children have more exposure to the company of older teenagers so are more liable to commit crimes. They should be accountable. • It's the UNCRC recommendation. • Children are maturing physically, especially girls. If they look older they are more likely to be treated as older and led into crime by others.
13	• It's the start of teenage years, so a sort of rite of passage. • Pupils are going into S2 and starting to think about choosing subjects for a life beyond school. They will be more likely to take on board that a criminal record will damage their future. • It's the social media age. Children will have more unsupervised contact with strangers.
14	• It's midway in the European norms. If it works for them, it's probably about right for us. • Puberty will be mostly over. Teenagers are "properly teenaged" and more capable of making rational choices, therefore knowingly choosing to behave in a criminal manner.
15	• Puberty is over and adulthood starting.
16	• *De facto* adulthood. A teenager can legally marry and start a family, so should be legally liable for crime. • a number of schools where pupils supported or considered 16 as an option noted that it is the voting age, with one pupil commenting "How come you can be responsible enough to choose to do something that'll get you lifted when you're eight, but you can't be trusted to choose your MSP till you're 16?"
18	• A few pupils felt that the age should be even higher and criminal responsibility should start at legal adulthood. The drinking age was also mentioned as a factor – if this was combined with the age of criminal responsibility it might reinforce the "drink responsibly" message. This was a minority view with most teenagers actively opposed.

Annex B: Written and Oral Evidence

The minutes and official reports of the Committee meeting relevant to the Bill can be found online.

Copies of the written evidence received are also online.