

Equalities and Human Rights Committee AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL Submission from the Centre for Youth & Criminal Justice

The UN Committee on the Rights of the Child recommends that the age of criminal responsibility is a minimum of 12 years old, which the Bill adheres to. What are your views on the appropriate age of criminal responsibility in Scotland?

The Centre for Youth and Criminal Justice (CYCJ) conducts research and supports the development of practice and policy across youth and criminal justice. Over the past five years we have undertaken a range of research projects to support the consideration of the age of criminal responsibility, including [international case studies](#) about how different jurisdictions approach the age of criminal responsibility, and a survey about workforce development needs as a consequence of any change. CYCJ staff have also been members of the advisory group established to investigate the age of criminal responsibility, and continue to be involved in supporting the workstreams developing specific areas of practice to support any legislative change.

Almost all children at some point in their childhood commit an offence, usually a low level offence such as underage drinking, graffiti, or illegally downloading material. A large study of over 4000 children in Edinburgh (the Edinburgh study) found that 96% of children commit an offence at some point during their childhood (McAra & McVie, 2010). As children test boundaries, challenge authority and develop their sense of agency, offending is a normal part of childhood, whether we like it or not. Whilst requiring a response from parents, carers, teachers or peers, in most cases this is behaviour that we need to be careful about criminalising. Most children grow out of it, and intervening through a criminal system labels them and can exclude them, and increases the likelihood that they will continue to offend as they grow up. The Edinburgh Study children who were formally responded to through the criminal justice system were more likely to continue offending than those who were not (taking both severity and frequency of offending into account). In short, the justice lens makes offending more likely (McAra & McVie, 2010).

Whilst most children commit an offence at some point in their childhood, there is a group of children who regularly commit offences, or who are involved in more serious offending. For these children, there is a need to manage the risk they pose to others and address the underlying reasons for their behaviour. However, criminal responsibility is a blunt tool, because there is only one person, in this case a child, being held to account. Approaching the harm caused by children through a criminal lens therefore can miss the reasons for behaviour, hold the wrong person accountable, prevent issues from being addressed, and introduce additional barriers to them living happy and positive lives.

We welcome the proposal to increase the age of criminal responsibility to 12 and note the importance of this change in sending out a signal about how we respond to our children who cause harm. However, we have concerns about whether 12 goes far enough both as an age of criminal responsibility and as an age of prosecution. This is for three key reasons: free will; trauma, adversity and poverty; and, brain development, maturity and comprehension.

1. Free will: Criminal Exploitation

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.

An international study looking at 3 million children across different countries found that children in families where parents offend are almost twice as likely to offend as those whose parents do not offend, with this link stronger in countries with more punitive penal policies (e.g. United States of America) (Besemer, Ahmad, Hinshaw, & Farrington, 2017). Children from communities with high levels of deprivation are particularly vulnerable to exploitation by crime networks, with more vulnerable children targeted because they can be easily controlled (Crocker, Webb, Garner, & Skidmore, 2017). There are close links between child sexual exploitation groups and serious organised crime groups, with children who are sexually exploited sometimes also used for drug dealing (Crocker et al., 2017). Recent research into serious organised crime in Scotland highlighted that children are seen as ideal recruits particularly for drug dealing. Evidence from Ireland has highlighted that certain types of offending by children can be warning signs to adult involvement, particularly burglary and drug offences, which require logistics and networks which children are less likely to have access to alone (Department of Children and Youth Affairs, 2016).

If criminal activity is a family business or if vulnerable children are pressured by criminal groups, to what extent are they truly exercising free will and displaying criminal intent? In such cases, it is more appropriate to think about these children as being criminally exploited by the adults around them, rather than acting as independent free agents. Is it appropriate, fair or just to hold children who grow up in such circumstances criminally responsible for their actions?

2. Trauma, adversity and poverty

Children who present a serious risk of harm to others have almost always experienced significant trauma, adversity and poverty. In our work with children who pose a serious risk to others from across Scotland, there were significantly higher levels of abuse and neglect than the general population. 71% were care experienced children and at least 61% had experienced domestic violence (based on where this is reported) (Vaswani, 2018). We also know that children who experience multiple adverse childhood experiences are more likely to engage in risk taking behaviour, which can sometimes be associated with criminal behaviour (Vaswani, 2018). The majority of children who come into contact with our Children's Hearings System or justice system have experienced significant poverty. Moreover, as recognised in the Policy Memorandum for this Bill, the behaviours of care experienced children, including minor offences and trauma-related behaviours, are more likely to have been reported to police and therefore to attract a criminalising state response than other children. Our research has highlighted that children in residential childcare continue to be criminalised for behaviours (trashing rooms, taking food, throwing items) that in other family settings would not be met with a formal justice response, which then has significant implications for the child (Nolan & Moodie, 2016). Therefore, we need to be very careful to see the distress behind behaviour, respond with a broader lens rather than simply focusing on the child's actions, and ensure we do not punish or criminalise need and vulnerability. We need to be very cautious of labelling children who are experiencing distress as 'offending' or 'criminal' as this has the potential to further traumatise, blame and exclude these children.

3. Brain development, maturity and comprehension

Emerging evidence about brain development highlights that the brain does not fully develop until the mid-20s. In particular, the area of the brain associated with risk taking and the regulation of behaviour is not fully formed until early adulthood. There is therefore an argument that children are not capable of fully understanding the implications of their behaviour, or regulating it – even children who grow up in a loving, supportive and stable environment. For our children who have experienced trauma, their level of maturity and comprehension can be further delayed, and they can experience additional difficulties in regulating their behaviour, responding to peer pressure, and managing their emotions. Around 60% of children involved in the justice system have a speech, language or communication difficulty, which can be a factor in their offending behaviour in the first place. Such difficulties also make contact with the justice system more likely, as other children may be able to explain their behaviour, or understand what is being asked. Where children with these difficulties are not supported through justice processes, they may be up-tariffed through the system, hence making it more difficult to get out of the system. There are therefore real concerns about treating children as criminally responsible when they are not mature enough to take this responsibility.

The House of Commons Justice Committee has conducted a useful inquiry regarding the treatment of young adults (18-25 year olds) in the justice system which collates some of the evidence on these issues, and considers the possibility of specialist provisions for this young adult age group (House of Commons Justice Committee, 2016). Issues around brain development appear to be more clearly examined in other jurisdictions, and were one reason why, in 2017, the State of New York raised the age of criminal responsibility from 16 to 18 (Dyer, 2016).

These issues suggest that the age of 12 remains too low for an age of criminal responsibility, and we note that the European norm is 14 with calls for this to be increased, potentially up to the age of 18. In reality, of course, selecting any specific age simplifies the reality that different children are able to exercise very different levels of control over their lives and their behaviour at different ages. Given this, it is worth reflecting on the approach taken by 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”

(Papadodimitraki, 2016)

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. It would ensure that all children aged under 18 are treated carefully due to their status as children, in compliance with the United Nations Convention on the Rights of the Child (UNCRC), a *legally binding international agreement which specifies that across the UK, children under the age of 18 require particular protections and rights due to their status as children. It would also enable a more individualised approach to be adopted, which is arguably imperative in ensuring the best interests of the child is a primary consideration, as enshrined in the UNCRC.* The adoption of such an approach makes the issue of the age of criminal responsibility alone less significant, though we would still argue, for the reasons given above, that 12 is too young as the minimum age.

We appreciate that whilst the international legal position is clear, Scotland’s policies, legislation and practice around childhood is complex and at times confused, with a range of rights and protections for children introduced or lifted across the age course. For instance, 18 is the age at which you can buy fireworks, you can give blood

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when you are 17, at 16 you can have sex or get married, and at 13 you can join a social networking site (Young Scot, 2018). There is also legal recognition that young people over the age of 18 can require unique support and protection, as illustrated in the Children and Young People (Scotland) Act in respect to support of care leavers up to the age of 25.

It is entirely appropriate that as children mature they are given greater rights to exercise autonomy and make choices about their lives, so there should be a tiered approach. Criminal responsibility, however, needs careful consideration, because holding a child solely, exclusively and criminally responsible can have long-term and profound consequences. It is critically important that an age and approach is chosen which gives society confidence that the child concerned is able to be held fully and criminally responsible. We suggest that a higher minimum age combined with the addition of tests for maturity, comprehension of the lawfulness of their behaviour, and the ability to act, would strengthen the proposed approach.

This does not mean that children under the age of criminal responsibility should not take any responsibility for their actions, or that any risk they pose to others should not be taken extremely seriously and appropriately managed, but as Dr McDiarmid queries, it is “possible to do this outwith the highly charged criminal justice arena”, keeping in mind that these are children, and that responsibility for their behaviour is shared and will often require a broader response within the family and wider community (McDiarmid, 2013). The Children’s Hearings System in Scotland can help this approach because at its best it can “facilitate a dialogue with a young person around his/her offence and its wrongfulness, which can assist with his/her own voluntary assumption of responsibility” (McDiarmid, 2013). Indeed, we would argue it is not only possible to do this outwith the criminal justice system, but essential we do so if we are to avoid the pitfalls detailed above.

We would recommend that whatever age and approach is taken, the age of criminal responsibility is kept under review so that these issues can be explored again as our attitudes towards children change over time, and so we can make sure that we understand all of the effects, and the intended and unintended consequences, of a change to the age of criminal responsibility.

These are complicated issues and there is limited evidence about what the Scottish public think about children, their capacity, and particularly the age of criminal responsibility. Events we have held at CYCJ have highlighted that there is often a lack of understanding about what the current age of criminal responsibility is, and what this means. There is also a lack of awareness that the age of criminal responsibility is under review and there are many people who have not had opportunities to fully consider the relevant issues, discuss them, and develop informed views on the subject. Research we undertook with community councils about children involved in offending revealed that people wanted to know more about these issues, and engage with these debates, and we hope that this Bill presents an opportunity to engage in a broader conversation about children in trouble and our collective response (Vaswani & Moodie, 2015).

The Bill makes a number of changes relating to the disclosure of offences and provides that any conduct by a child below the age of 12 (should the ACR be increased) that would previously have been recorded as a conviction will no longer be recorded as such. The Bill does however, allow for disclosure of ‘other relevant information’ held by the police about pre-12 behaviour. The Committee would welcome views on whether the Bill strikes the right balance in terms of addressing offending behaviour by young children under 12 and the disclosure of such information.

If we are to genuinely mark a change in how we treat children then we need to be very careful about how we record behaviour about the harm they cause others and how we share this with other agencies. We have a variety of concerns about the disclosure of “other relevant information” (ORI), and indeed the current system of

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disclosure (some of which have been recognised in the provisions made in the Bill), how any such change will be translated in practice and the appropriateness of being able to disclose “other relevant information” for any child particularly those under the age of 12. We have fundamental concerns about the rights impact of the disclosure of ORI, which for children under 12 will be non-conviction information. We also have concerns regarding the ability for such information to be disclosed indefinitely and the potential removal of the lower age range for the disclosure of ORI (the Bill proposes disclosure for all under 12s rather than only those aged over 8 years). We would welcome further discussion about ORI overall, particularly in respect of children.

If such information is to be disclosed, it is essential that this occurs only when it is deemed absolutely necessary to do so, and in these instances we welcome the appointment of an independent reviewer to oversee these decisions. The guidance given to the independent reviewer will be crucial in informing how such decisions are made, as will the transparency of the decision making process, the lack of which in the present system is a current ORI concern (Nolan, 2018). Ensuring the independence of this role will also be imperative.

It will be important to uphold an individual's right to make representations before any disclosure of information to a third party takes place, in addition to the right to appeal the independent reviewer's determination. These rights must be clearly communicated and appropriate support provided to make such representations, recognising that this may take place some years after the event and could apply in childhood and adulthood.

A consistent theme of our work on disclosure has been the difficulty in understanding the current system of disclosure, including an individual's rights within this and how these can be exercised, the onus being placed on the individual to challenge information and thus to exercise their rights, the time taken to appeal decisions, and any costs involved in doing so. Presently, where opportunities exist for such rights to be fulfilled, the support to do so is extremely limited (Nolan, 2018).

As such, it is extremely important that the provisions made under this Bill and subsequent Act do not once again become rights in law only – rights which are extremely difficult to actually exercise and inaccessible to many in reality. Communicating responsibilities and expectations for sharing of information by relevant sources will also be important in supporting decision making and in increasing understanding of these changes. It is also critical that the frequency of use of these disclosure powers, and the circumstances surrounding their use is monitored. This will ensure that these powers are being appropriately used, that the changes proposed have their intended impact, and that children are able to ‘move on’ from previous behaviour. We appreciate that this will likely be undertaken via annual reporting provisions, but in the interests of transparency, it is important that this information is widely accessible and readily available. The importance of such monitoring, in our opinion, extends to all provisions proposed under the Bill.

Raising the age of criminal responsibility would necessitate a number of changes in relation to information which can be provided to victims. The Bill seeks to balance the best interests of victims (including child victims) and the best interests of the child responsible for any harm caused. Again, the Committee would welcome views on whether an appropriate balance in this area has been achieved.

Whilst the bill focuses primarily on information for victims we would also suggest that increasing the age of criminal responsibility also needs to go alongside increased support to victims. At present the information and support provided to victims varies, with significant gaps in support (Youth Justice Improvement Board, 2017). 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.

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Ensuring that victims are always able to exercise their right to support, in addition to improving our response to children who cause harm are both essential components of a change to the age of criminal responsibility, regardless of the age chosen, and are not mutually exclusive. We agree there is an important balance to be maintained in terms of information sharing, but if children are not criminally responsible for their actions, we do not think it is appropriate to share personal details about the child and their situation. We do, however, believe that victims have a right to be reassured that the harm caused is being taken seriously, and that there is work being undertaken to ensure such harm is not caused again. In addition to information, there should be a formal acknowledgment of the harm caused through the offer of financial, emotional and practical supports as appropriate.

Part 4 of the Bill relates to police powers and provides 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. Those powers include, amongst other things, the taking of forensic samples, removing a child to a place of safety and the power to search children. The Bill restricts the application of most of these powers so that they are only available to the police in the most serious of cases. The Committee would welcome views on the approach taken to police powers in the Bill.

We think there is an important principle to hold onto when it comes to considering police powers and that regardless of the seriousness of their actions, this legislation will signal that they are not to be held criminally responsible for it. In all but name, there is the potential for these police powers to re-introduce a philosophy and approach of criminal responsibility. We therefore call for particular caution regarding the danger of unintended consequences in seeking to develop practice for the rarest and most concerning incidents. It is worth noting the lack of specific police powers, in relation to children, under the current system. How these powers operate in practice will be key, and would benefit from close scrutiny and accountability.

Whilst recognising that, in the course of a police investigation there is need to establish what has happened, we wonder about the appropriateness of police led interviews, sample taking and searches, given that a child under the age of criminal responsibility is by definition not capable of committing a criminal act.

We wonder if it would be possible instead for a multi-agency response, so that any connotations with the police around criminal acts are avoided. We are mindful of the important developments about joint investigative interviewing between police and social work, as well as the proposed development of a Scottish Barnahus (Children's House) for child witnesses and victims, where investigations, samples and searches are conducted in a child-centred environment designed to minimise any trauma and harm associated with these processes (Johansson, Stefansen, Bakketeig, & Kaldal, 2017). We would argue that there is an opportunity here for the Barnahus approach to be extended for children under the age of criminal responsibility who might have caused harm. This would have the potential to both improve the quality of the information from a young child, and ensure that the investigative process is as trauma-informed as possible.

References

- Besemer, S., Ahmad, S. I., Hinshaw, S. P., & Farrington, D. P. (2017). A systematic review and meta-analysis of the intergenerational transmission of criminal behavior. *Aggression and Violent Behavior, 37*, 161-178. Retrieved from <https://doi.org/10.1016/j.avb.2017.10.004>
- Crocker, R., Webb, S., Garner, S., & Skidmore, M. (2017). *The impact of organised crime in local communities*. Retrieved from http://www.police-foundation.org.uk/2017/wp-content/uploads/2017/10/oc_in_local_communities_final.pdf
- Department of Children and Youth Affairs. (2016). *Lifting the Lid on Greentown – Why we should be concerned about the influence criminal networks have on children’s offending behaviour in Ireland*. Retrieved from http://ulsites.ul.ie/law/sites/default/files/3910_DCYA_Greentown_%20Full%20report%20final%20version.pdf
- Dyer, F. (2016). The New York Way: Part One. Retrieved from <http://www.cycj.org.uk/the-new-york-way-part-one/>
- House of Commons Justice Committee. (2016). *The treatment of young adults in the criminal justice system*. Retrieved from <https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/169/169.pdf>
- Johansson, S., Stefansen, K., Bakketeig, E., & Kaldal, A. (2017). Implementing the Nordic Barnahus Model: Characteristics and Local Adaptions. In S. Johansson, K. Stefansen, E. Bakketeig, & A. Kaldal (Eds.), *Collaborating Against Child Abuse: Exploring the Nordic Barnahus Model* (pp. 1-31). Cham: Springer International Publishing.
- McAra, L., & McVie, S. (2010). Youth crime and justice: Key messages from the Edinburgh study of youth transitions and crime. *Criminology and Criminal Justice, 211*-230.
- McDiarmid, C. (2013). An Age of Complexity: Children and Criminal Responsibility in Law. *Youth Justice, 13*(2), 145-160. doi:10.1177/1473225413492056
- Nolan, D. (2018). *Debating Disclosure - Improving Life Chances Through Awareness and Understanding*. Retrieved from <http://www.cycj.org.uk/wp-content/uploads/2018/06/Debating-Disclosure-write-up-final.docx>
- Nolan, D., & Moodie, K. (2016). “Between a rock and a hard place”: Responses to Offending in Residential Childcare. Retrieved from <http://www.cycj.org.uk/wp-content/uploads/2016/10/Responses-to-Offending-in-Residential-Childcare.pdf>
- Papadodimitraki, Y. (2016). *Minimum Age of Criminal Responsibility (MACR) – Comparative Analysis International Profile: Germany*. Retrieved from <http://www.cycj.org.uk/wp-content/uploads/2016/03/MACR-International-Profile-Germany.pdf>
- Vaswani, N. (2018). *Adverse Childhood Experiences in children at high risk of harm to others. A gendered perspective*. Retrieved from <http://www.cycj.org.uk/resource/adverse-childhood-experiences-in-children-at-high-risk-of-harm-to-others-a-gendered-perspective/>
- Vaswani, N., & Moodie, K. (2015). *CYCJ: A Stakeholder’s Perspective Findings from the 2014 Stakeholder Survey*. Retrieved from http://www.cycj.org.uk/wp-content/uploads/2015/03/SS_2014_Final2.pdf
- Young Scot. (2018). What you can do at what age. Retrieved from <https://young.scot/information/rights/what-can-you-do-at-what-age/>
- Youth Justice Improvement Board. (2017). *Information and Support to Victims of Youth Crime and Young Victims of Crime*. Retrieved from <http://www.cycj.org.uk/resource/information-and-support-to-victims-of-youth-crime-and-young-victims-of-crime/>