

RESPONSE TO EQUALITIES AND HUMAN RIGHTS COMMITTEE CALL FOR EVIDENCE ON THE AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL

June 2018

Children and young people with care experience are not a homogenous group. Their individual and familial experiences, and the reasons for local authorities' interventions in their lives, are diverse. As are their individual experiences within the care system.

But while the lives, needs and views of these care experienced children and young people are rich and varied, they have all experienced some major difficulties in their lives. Many will have experienced trauma, such as physical abuse or neglect, the impact of which can be felt across an individual's life course.

Research has identified that young people in care are more likely to be criminalised than their non-looked after peers¹, drawn into youth justice systems in part because of their increased proximity to public officials (e.g. social workers and police), and for behaviours which are shaped by and rooted in the trauma they have experienced. The impact of involvement in the criminal justice system has a lasting impact throughout their lives; and unfortunately, in too many instances, a negative one. We therefore welcome this opportunity to provide evidence to inform the Equality and Human Rights Commission's scrutiny of the Age of Criminal Responsibility (Scotland) Bill (the Bill) at Stage 1.

1. 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 UN Committee on the Rights of the Child recommends that the age of 12 years is the *absolute minimum* age at which it is internationally acceptable to consider a child to have criminal responsibility, and that States parties should continue to increase this age to still higher age levels.² We strongly agree with the principle of increasing the age of criminal responsibility in Scotland. We believe that the age should be set higher than 12, to reflect what we now know about the backgrounds of children involved in harmful behaviour, and the

neurological development of children in general. However, we accept that raising the age from 8 to 12 is a significant step in its own right, and that a more ambitious upper age limit may meet with resistance which impedes any progress. We therefore support the raising of the minimum age of criminal responsibility, in line with the recommendations of the Advisory Group on the Minimum Age of Criminal Responsibility (the Advisory Group)³, and hope that, once the rationale and benefits of this change are more widely understood, civil society will push for the age to be raised further still.

As evidenced by the research carried out by the Scottish Children's Reporters Administration (SCRA), children between the ages of 8-11 who undertake harmful behaviour are almost always children who have been subject to harm themselves.⁴ Often these are children who are looked after by local authorities, or live on the edges of statutory intervention. Many have significant mental health issues and learning disabilities. These children are in need of care and protection, not criminalisation. The Children's Hearing System, effective Child Protection practice and the Girfec National Practice Model are well placed to meet the needs of these children in a holistic, child centred way, removing them from formal youth justice processes.

Psychological development is significant in determining capacity and responsibility under the law, and unless moral reasoning, consequential thinking and rationality are sufficiently developed, an individual should not be held criminally responsible. There is evidence to suggest that decisions about criminal responsibility should involve more than simply a child's age, as per the approach taken in Germany.⁵ Research in England and Wales notes an overrepresentation in the criminal justice system of children with developmental difficulties (in terms of speech, language and communication)⁶, adding weight to suggestions that greater assessment and recognition of the developmental needs of individual children would strengthen an approach to criminal responsibility solely based on age.

2. 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.

There is a recognition that the disclosure of information from incidents of harmful behaviour can limit the future opportunities of children and young people, such as access to college/university and certain employment options.⁷ Looked after children and care leavers already face multiple, complex barriers to their access to such opportunities. Indeed, looked after children are structurally disadvantaged in comparison to their non-looked after peers, as due to their involvement in the care system they are much more likely than other children to

have contact with the police, and be involved in formal processes which lead to recording of behaviour.⁸ We support the position taken by Who Cares? Scotland, that there should be a presumption against disclosing any harmful behaviour conducted by care experienced children and young people under the age of 18.⁹

The Bill establishes that behaviours which would previously have been recorded as convictions, in the case of a child under 12, can never be disclosed automatically. This is welcomed and absolutely necessary. The Bill provides that such information, if relevant, could be disclosed on an enhanced disclosure or PVG scheme record, subject to independent review. We are concerned that this could breach the rights established in Articles 6 (right to a fair trial) and 8 (right to private and family life) of the European Convention on Human Rights (ECHR, 1998); and in Article 40 (juvenile justice) of the United Nations Convention on the Rights of the Child (UNCRC, 1989), as it would enable the indefinite disclosure of information regarding circumstances for which a child is not criminally responsible, has not been proven, and may be refuted. Where there is the possibility of alleged behaviour restricting an individual's opportunities later in life, there is a need for the safeguards which are afforded to children above the age of criminal responsibility to be available at the time, such as the advice of a solicitor.

We support the argument made by Clan Childlaw in their [consultation response](#) to the Scottish Government's consultation on the Minimum Age of Criminal Responsibility in 2016, that if a child is involved in harmful behaviour under the age of 12, but refrains from that behaviour through their teenage years (when they are considered criminally responsible), it should be accepted that the behaviour was the likely result of trauma or difficulties in childhood. If the behaviour has not continued then it should be accepted that they are unlikely to be a risk to the public.

If disclosure of pre-12 behaviour is ultimately deemed necessary, the safeguards established around disclosure in the Bill must be strengthened. We recognise the current protections, including the independent nature of review, the provision of Scottish Government guidance to independent reviewers, the power of the independent review to gather information from a range of sources (including from the individual concerned), and provision of the right of appeal. Further developments should include the presumption that the individual's views will be sought and afforded due consideration, and full consideration of the context of the child's circumstances (past and current) should be established in every case. Clear, robust guidance will need to be made available to police and the independent reviewer, indicating the kind of information which would be relevant for disclosure, and emphasising the importance of involving the young person in the process.

3. The Bill provides that children under 12 who are subject to a police interview will have the right to have an advocacy worker present during the interview. What will the impact be on your organisation or on the children you work with who might access the advocacy service?

We fully support the provision within the Bill of the rights for children subject to police interview to have access to both a supporter (for reassurance) and an advocate (for support and representation). Even where there is no criminal responsibility, formal contact with the police in this type of setting can be traumatic and upsetting, particularly for children and young people with care experience.¹⁰

Even where criminal responsibility is not in question, where there is potential for information discussed to have an impact on a child's opportunities later in life (as noted above), in order to protect children's rights and interests, we agree it is vital that advocates must have appropriate legal qualifications. We note the association made within the Bill's Policy Memorandum (page 36) with the implementation of advocacy services provided for in the Children's Hearings (Scotland) Act 2011, which has not yet commenced. In this context, advocates are not required to have legal training. We welcome the clarification that this area will be subject to consultation, as it is clearly complex. To ensure suitably qualified, skilled advocates are available to all children who need (and are entitled to) one, in both Children's Hearings and police interviews, requires robust planning, sufficient resource and a close, evidence informed attention to its implementation, over the multiple years it will take for any new system to be in and function properly.

4. 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.

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. The provisions within the Bill generally align with this, by allowing the Principal Reporter discretion to share information which is proportionate and justified, where a victim has experienced harm in relation to very serious behaviours which are clearly defined. Further provisions requiring the Principal Reporter to seek the views of the child whose information may be shared, and to provide them with the information which has been shared, would strengthen the Bill.

5. 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 believe that the use of police powers for children under 12 will only be necessary in extreme cases, in order to establish facts and ensure protection and support can be put in place for children. We strongly agree that, as new powers could theoretically be used to investigate very young children, the importance of ensuring they are used in a proportionate, justifiable, and child centred manner is emphasised.¹¹ The safeguards established within the Bill recognise this, such as requiring statutory powers/court orders before taking forensic samples (as opposed to only the basis of consent); destruction of forensic samples as soon as possible following the conclusion of the specific investigation for which they were obtained; clear rights-based procedures for interviewing children; and absolute minimum timescales for keeping children in an appropriate 'place of safety' if absolutely necessary.

Further discussion relating to powers of search are required, as the Bill proposes changes in relation to these powers yet this was not an area over which the Advisory Group reported or made any recommendation. The preservation of existing powers of search (and extension of these in relation to all children under the age of criminal responsibility) have clear implications for children's rights, and require full, public discussion.

6. Please tell us about any other comments you feel are relevant to the Bill.

Children who undertake harmful behaviour are almost always children who have been subject to harm themselves. Often these are children who are looked after by local authorities, or live on the edges of statutory intervention. These are children in need of care and protection, rather than criminalisation. Care experienced children and young people are also structurally disadvantaged due to their involvement with formal systems, leaving them more likely than other children to have contact with the police, and be involved in formal processes which lead to recording of behaviour which can have consequences later in life. Due to the level of need and vulnerability of these children and young people, and the state's responsibilities to safeguard their rights and promote their wellbeing, [Part 9: Corporate Parenting](#) of the Children and Young People (Scotland) Act 2014 requires Scottish Ministers and a range of other public sector bodies to uphold particular responsibilities across all areas of their work. Corporate parents must be alert to matters which adversely impact on looked after children and care leavers, promote their interests, and enable them to make use of supports and services they provide. As such, particular attention

must be paid to these individual's needs and views when considering such relevant areas as the minimum age of criminal responsibility in Scotland.

About CELCIS

CELCIS is Scotland's centre of excellence for children's care and protection, based at the University of Strathclyde. We work to ensure the best international evidence is reflected in policy and practice, strengthening the skills and capacities of people who care for children and young people. CELCIS is part of the Institute for Inspiring Children's Futures, working together to build brighter futures for children in need of care and protection around the world.

¹ The Howard League of Penal Reform (2016) *Criminal Care*. London: The Howard League of Penal Reform.

² United Nations Committee on the Rights of the Child (2007) [GENERAL COMMENT No. 10 \(2007\) Children's rights in juvenile justice](#). Geneva: United Nations, para 32

³ Scottish Government (2016) [The Report of the Advisory Group on the Minimum Age of Criminal Responsibility](#), Edinburgh: Scottish Government

⁴ Henderson G, Kurlus I, McNiven G, (2016) [Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending](#), Stirling: SCRA

⁵ Papadodoimitraki, Y. (2016) [Minimum Age of Criminal Responsibility \(MACR\) – Comparative Analysis – International Profile: Germany](#). Glasgow: Centre for Youth and Criminal Justice

⁶ Arthur, R. (2012) "Rethinking the Criminal Responsibility of Young People in England and Wales", *European Journal of Crime, Criminal Law and Criminal Justice*, vol 20, pp13-29

⁷ Henderson G, Kurlus I, McNiven G, (2016) [Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending](#), Stirling: SCRA; Norrie, K. (2010)

"Criminalising Children" *The Journal of the Law Society*, Vol. 55, No. 7, pp22-23

⁸ Scottish Government (2016) [The Report of the Advisory Group on the Minimum Age of Criminal Responsibility](#), Edinburgh: Scottish Government

⁹ Who Cares? Scotland (2018) [Consultation on the Minimum Age of Criminal Responsibility](#). Glasgow: Who Cares? Scotland

¹⁰ *ibid*

¹¹ Scottish Parliament (2018) [Age of Criminal Responsibility \(Scotland\) Bill Policy Memorandum](#). Edinburgh: Scottish Parliament