Briefing: The Age of Criminal Responsibility in Scotland

Scotland’s current age of criminal responsibility is 8 years old. Whilst children cannot be prosecuted under the age of 12, those between 8-11 years old can still gain a criminal record by accepting or having offence grounds established by a Children’s Hearing. If we label children as criminals at a young age, we are harming them and their chances of success in the future.

The United Nations Committee on the Rights of the Child regularly calls on the Scottish Government to raise the age of criminal responsibility. In June 2016, it acknowledged that the Scottish Government was ‘open to raising the minimum age of criminal responsibility’ and that an advisory group had been set up to explore this and develop recommendations. The Committee also urged the UK as a whole to raise the minimum age of criminal responsibility in accordance with acceptable international standards.

In its General Comment 10, the Committee stated that a minimum age of criminal responsibility (MACR) below the age of 12 years was not internationally acceptable. It encouraged States parties to increase their lower MACR to the age of 12 as the absolute minimum age and to continue to increase it to a higher age level.

Advisory Group on the Age of Criminal Responsibility

In November 2015, the Scottish Government made a commitment to set up an advisory group on the age of criminal responsibility. The remit of the group was to:

- consider the policy, legislative and procedural implications of raising the minimum age of criminal responsibility from 8 to 12 and provide proposals for consultation, taking account of the implications of change.
- address underlying issues around grounds for referral, 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 Hearings System and UNCRC compliance.
- provide advice and recommendations on consequential changes that should be made if the minimum age of criminal responsibility is raised from 8 to 12.

The group comprised professionals with a range of expertise, including those working with children and child victims, the police, the Crown Office and the Procurator Fiscal
Service and our office. This briefing is shaped in part by the recommendations of that advisory group and our response to the subsequent Scottish Government consultation.

What age should the age of criminal responsibility be set at?

Scotland currently has the youngest age of criminal responsibility in Europe. We feel that this should be set at an age higher than 12, but that moving to 12 years old is an important first step. Many European states use 14 or 16 as their minimum age of criminal responsibility. We feel that Scotland should work incrementally towards this.

Link between harmful behaviour and harm to a child

Research produced by the Scottish Children’s Reporter Administration shows that most of the children referred on offence grounds are also referred on welfare grounds or subject to care and protection measures. In our consultation response, we stressed that children demonstrating harmful behaviour at an early age have often experienced multiple traumas and are in need of protection and support. Scotland already operates a welfare based approach towards youth justice—the Children’s Hearings system is held up internationally as an example of good practice.

We feel that the support needs of, and risks posed by, children aged 8-11 years demonstrating harmful behaviour can be met through expanding the National Child Protection Guidance to take into account harm caused by a child (not just harm caused to a child, as is it currently). This would ensure that appropriate support is put in place to safeguard those demonstrating harmful behaviour and those experiencing that behaviour (i.e. child victims and witnesses).

A change to the age of criminal responsibility will also require culture change across a range of professions, such as the police, the Children’s Hearings system social work, and education. A scoping study could highlight gaps in knowledge, practice and skills.

The role of the police: retention of police powers in relation to children under 12

For most of the incidents currently involving 8-11 year olds, the use of police powers is not necessary. These powers are normally only used where an incident is more serious.

If the age of criminal responsibility is raised to 12, many existing powers will no longer be available, because they mainly relate to the investigation of an ‘offence’ or ‘crime’.

In our response, we said that police powers should be retained only in exceptional circumstances when this might be helpful to a child, e.g. to establish the facts of a matter when a serious incident such as a sexual assault has taken place. Where a child is found to have been involved, this will allow them to access appropriate support so any risk they may continue to pose to themselves and others can be managed.

1 A Children’s Rights and Wellbeing Impact assessment also accompanied the report.
An exceptional use of police powers may also prevent the exploitation of children. For example, children might otherwise be used and/or blamed by adults or older children for criminal activity, safe in the knowledge that they will not be held criminally responsible. Before such powers are used, a full assessment should be done to establish whether the likely benefit to a child of using these powers outweighs any negative impacts. The powers should be used appropriately and authorised by a Senior Officer within Police Scotland.

We think it is important to examine the current safeguards available to children who come into contact with the Police, to ensure that under 12s do not inadvertently end up with lesser protection if new arrangements are put in place. For example, legal advice and assistance should be considered when a child is being interviewed in relation to an incident of harmful behaviour, as should the use of an appropriate adult. This might require examining current criteria around legal aid eligibility.

If the age of criminal responsibility is raised to 12, children (and their parents/guardians) must be made aware that even if they are not held criminally responsible, there may still be repercussions (e.g. in relation to what might appear on a Disclosure record). Without this knowledge, a child may be tempted to admit involvement in an incident believing that as they cannot be held criminally responsible.

Disclosure— non-conviction information

Currently, where a child accepts/has offence grounds established by a hearing, the child can receive a criminal record which will appear on a Disclosure certificate or PVG scheme. ‘Other relevant information’ may also appear on this. This information is provided by the Chief Constable and included non-conviction (a description of the alleged conduct and relevant background). This can stay for as long as the Chief Constable thinks is relevant and may rest indefinitely. This can damage children and young people’s life chances, e.g. when applying for college/university or seeking employment. We agreed with the advisory group that a presumption against this would help ensure that a child’s life chances are not unduly restricted by an incident taking place before the age of 12.

The release of non-conviction information also affects some groups of children more than others, such as care experienced children who are likely to have more non-conviction information recorded than their non-looked after peers. Children and young people are often unaware that the information is being recorded and may only find out long after the incident, e.g. when applying for a job. A presumption against releasing this information sends an important message about how we approach harmful behaviour in younger children, i.e. recognising that this is often rooted in trauma and that children need to be supported to move on.

If we are serious about changing our approach to harmful behaviour by younger children, we should also apply these changes retrospectively. This means that those who may have obtained a criminal record based on behaviour when they were aged 8
to 11 (prior to any change to the age of criminal responsibility) should not have to disclose convictions from that time.

Should it be deemed necessary to release information about an incident occurring before the age of 12 (e.g. for public safety reasons), this should be subject to independent ratification and only when there are significant concerns about the risk the child poses to him/herself and/or to others. Clear criteria should be developed to assist with this and a child/young person should be able to request a review of the decision at a later date, e.g. where there has been no further harmful behaviour within a set period.

An incident of serious harmful behaviour occurring under the age of 12 should only be disclosed when that person reaches the age of 18 if the child/young person is assessed as posing an ongoing risk to themselves and/or others. The release of this information should be subject to independent ratification and strict criteria.

**Victims affected by harmful behaviour, where it involves children under the age of criminal responsibility**

We believe that raising the age of criminal responsibility provides an excellent opportunity to improve the support available to child victims and witnesses. We would like to see the recommendations of the 2011 research report *Young Victims of Crime* produced by Victim Support Scotland and the Scottish Government, fully implemented. This recommends that child victims/witnesses should have a range of supports available to them, including peer support, individual counselling and online support.

If the age of criminal responsibility is raised, child victims/witnesses must be assured that the harm caused to them is recognised and taken seriously and that they are believed when another child is no longer regarded as criminally responsible. It may be appropriate to let a child victim/witness know that the facts of a case have been established and that the child demonstrating harmful behaviour is being supported to address that behaviour, and prevent it from re-occurring.

If there is an ongoing risk to a child victim/witness some limited information may need to be shared for safety planning purposes. There is a delicate balance to be struck between the needs of the victim and the privacy of the child demonstrating harmful behaviour (who may also be a victim of harm).

**Retention of forensic samples**

We support the taking of forensic samples from children aged under 12 in a very narrow set of circumstances (e.g. to rule a child out of an inquiry, or when a very serious incident has occurred). We do not feel that it is appropriate to retain that sample beyond the immediate incident.

The Advisory Group suggested that if a child is found to have been involved in a serious incident of harmful behaviour they should be supported to address the root causes of that behaviour. Support should help the child to modify their behaviour and
avoid it from re-occurring. We agree with this approach: the purpose of taking forensic samples should be to identify whether a child has had involvement in an incident and, if so, to ensure that appropriate support is provided and any associated risk is managed.