



## **Age of Criminal Responsibility (Scotland) Bill**

### **Evidence to the Equalities and Human Rights Committee**

The Age of Criminal Responsibility (Scotland) Bill brings the long-awaited raising of the age of criminal responsibility from 8. However, it only proposes to raise the age to 12. While I am pleased that Scotland will no longer be the only country in Europe where an 8-year-old can be treated as a criminal, raising the age from 8 to 12 still leaves us with one of the lowest ages of criminal responsibility in the world and ignores the fact that there have been consistent calls by human rights bodies for a higher age of criminal responsibility than 12.

A low age of criminal responsibility does not keep us safer or reduce crime. If Scotland is to be the best country in the world in which to grow up, we need to raise the age of criminal responsibility beyond 12 to make sure we support children rather than treat them as criminals. If Scotland wishes to truly reflect a 'progressive commitment to international human rights standards', as stated in the Policy Memorandum, it must be bolder, aim higher, and reflect that ambition in legislative change with a much higher age of criminal responsibility, and the full incorporation of the United Nations Convention on the Rights of the Child (UNCRC).

- 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 UNCRC provides for additional protection up to the age of 18. There seems to be some confusion in the policy memorandum as to how protection rights, as opposed to participation rights, are viewed by the UN Committee.

The UN Committee on the Rights of the Child does not recommend 12 as the minimum age of responsibility (MACR). Rather, over 10 years ago, it ruled that a MACR of below 12 years is not internationally acceptable and that States should continue to increase the age above 12.<sup>1</sup> A MACR of 12 was never intended to be a progressive standard to aim for, rather an absolute minimum for those States who were worst performing in human rights terms. The UN Committee is likely to provide further clarity on this point within the next year.

Even a decade ago the UN Committee was recommending a higher MACR, for instance 14 or 16 years of age, which would help create a system which, in accordance with article 40(3)(b) of UNCRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected.<sup>2</sup>

The State has the duty to keep us safe and to ensure effective remedies for violations of human rights.<sup>3</sup> However, a low age of criminal responsibility does not help keep us safer or provide an effective remedy for those affected by the behaviour of children.

The proposal currently before Parliament is a move in the right direction, but a small one, and only to the absolute minimum international standard. Aiming only for compliance with the minimum human rights standard is not consistent with the values we have as a country. Children and young people across Scotland are expecting human rights leadership from decision makers. Leaving the MACR at 12 would be a significant missed opportunity.

**In my view the age of Criminal Responsibility should be raised to at least 16.**

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> This is the case where the State itself has violated an individual's rights and also where the State has failed to protect an individual from acts or omissions of others which amount to human rights abuses.

### ***What is the Minimum Age of Criminal Responsibility?***

The MACR is the minimum age at which a child who commits an offence is considered to have the maturity to understand their actions and be held criminally responsible for them. This means that the child can be arrested, charged with an offence, referred to the Principal Reporter and potentially to a children's hearing. If offence grounds are accepted or established, the child will acquire a criminal record. The MACR in Scotland is currently 8, one of the lowest in the world and 4 years below what is considered tenable in international law for the worst performing countries. Whilst children under 12 cannot be prosecuted in court, a child can still be held responsible for a crime from the age of 8. This can have serious ramifications in their educational and employment opportunities in later life.

The idea underpinning a MACR is that before a certain age, children will not face criminal procedures or punishment and a protective welfare approach should be taken to address harmful behaviour. For a child reaching the MACR, penal punishments are possible, although alternative procedures and measures are often available. A high MACR reflects an understanding that criminalising children at an early age and via a criminal justice system can be counterproductive. It can label them and work against desistance.

That children below a given age do not have the capacity to infringe penal law hinges on principles of:

- 1.) cognition i.e. whether a child understands what is required and not required in law and the consequences of a breach, and
- 2.) volition i.e. whether a child is competent to exercise full control over their behaviour.

In practice, capacity relates to rates of maturity and social and cultural norms. Developmental psychology and neuroscience research shows that different rates of emotional, intellectual and mental maturity can affect understanding, decision-making

ability and impulse controls.<sup>4 5 6</sup> Capacity for abstract reasoning matures through adolescence and is underdeveloped in children aged 11 to 13, compared to older teenagers. Younger teens '*have a greater propensity to take risks, prioritise short term over longer term consequences, and engage in the sorts of behaviour that would, from an adult perspective, be considered ill-judged*'.<sup>7</sup> Evidence on children's understanding of criminal justice procedure also suggests that those of 13 or younger are more likely than older teens to be impaired in their ability to understand criminal proceedings, and '*are only beginning to be capable of understanding enough of what it means to appear before a judge at around 14 or 15 years of age*'.<sup>8</sup>

There is therefore an argument that children are not capable of fully understanding the implications of their behaviour or regulating it. This is also more acute for those children who have been through trauma and who will experience a delay in their level of maturity and comprehension. There are real concerns about treating children as criminally responsible when they are not mature enough to take this responsibility.

The MACR is a longstanding legal concept. It requires a fixed age to ensure that children below that age are not held criminally responsible for their actions. Moreover '*basic tenets of criminal law and various international legal obligations hold that all countries must establish respective MACRs*'.<sup>9</sup>

### ***The Bill and proposals to raise the ACR to 12***

The Bill aims to ensure that behaviour below 12 is no longer regarded, and responded to, as criminal, while addressing harmful behaviour in a way that addresses root causes, is non-stigmatising and allows the child to move beyond an incident in early

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<sup>4</sup> Delmage, E. (2013) 'The Minimum Age of Criminal Responsibility: A Medico Legal Perspective', *Youth Justice*, 13 (2): 102-110.

<sup>5</sup> Dwyer, C., and McAlister, S. (2017) 'Raising the age of criminal responsibility: endless debate, limited progress', *ARK Feature* (3): 1-3.

<sup>6</sup> Bryan-Hancock, C. and Casey, S. (2011) Young People and the Justice System: Consideration of Maturity in Criminal Responsibility, *Psychiatry, Psychology and Law*, 18(1): 69-78.

<sup>7</sup> Bateman, T. (2013) 'Keeping up (tough) appearances: the age of criminal responsibility', *Criminal Justice Matters* (92).

<sup>8</sup> Weigers, I. (2016) 'The minimum age of criminal responsibility in continental Europe has a solid rational base', *The Northern Ireland Legal Quarterly*, January 2016.

<sup>9</sup> Cipriani, D. (2009) *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective*. Routledge.

childhood.<sup>10</sup> I strongly agree with this rationale, and I welcome the broad welfare thrust of the Bill which focuses on the adverse effects of early criminalisation. However, limiting the argument to those under 12 is wrong.

The policy is described by the Scottish Government as 'proportionate, progressive reform' reflecting Scotland's commitment to international human rights standards and advancing Scotland's position in relation to international treaties and other obligations. I disagree. A MACR of 12 was the absolute minimum that was tenable in international law over a decade ago, and was attached to a direction from the UN Committee on the Rights of the Child that States should continue to increase it to a higher age level. The Committee highlighted that a higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of UNCRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected.<sup>11</sup> I am concerned by the arguments presented around the age of 12 and its significance in Scots law or international law and existing presumptions around maturity, rights, and civic participation. I am also concerned by language around the 'robust' responses that may be required for older children. It is unclear why the benefits of avoiding criminalisation should not extend to older children and I am concerned that this suggests a slippage from welfarist to punitive or retributive principles.

**The Government presents a strong case for raising the MACR, but the rationale for setting it at the very low age of 12 is flawed.**

### ***Criminological evidence***

A further reason for raising the MACR to beyond 12 is the overwhelming evidence on the adverse effects of labelling and criminalisation. The Edinburgh Study of Youth Transitions and Crime (ESYTC)<sup>12</sup> provides a robust evidence base showing how criminal justice responses and the stigmatising effects of criminalisation can

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<sup>10</sup> Advisory Group on the Minimum Age of Criminal Responsibility (2016) *The Report of the Advisory Group on the*

*Minimum Age of Criminal Responsibility*. Edinburgh: Scottish Government (para 1.24)

<sup>11</sup> United Nations Committee on the Rights of the Child (2007) General Comment No 10 (2007) Children's rights in juvenile justice. Geneva: United Nations, paras 32 and 33.

<sup>12</sup> The ESYTC is a longitudinal study explaining young people's pathways in and out of offending. It examined self-reported offending from age 12, as well as contact with the justice system from a much earlier age.

exacerbate the complex problems and vulnerabilities associated with serious offending by children, and increase the risk of reoffending.<sup>13</sup> It found longer term outcomes for children between 2 and 11 with early Children's Reporter contact for offending were much less positive in terms of offending and subsequent criminal justice contact.<sup>14</sup> The Scottish Government draws on the ESYTC to support the Bill stating that it '*confirms that early adverse contact with justice agencies is in itself a factor likely to heighten the risk of further offending behaviour involving children and young people*' (Scottish Government, 2018 para. 62). However, the Bill does not address the study's key findings relating to children over 12 (above the proposed MACR), which show that:

- The period between 12-15 years is critical in determining whether young people with early justice system contact follow a chronic criminal conviction trajectory.
- Increased levels of police contact and juvenile justice system intervention between 12-15 years are the key factors that determine whether a child with early 'convictions' will go on to increase their future likelihood of conviction.

While most young people start to desist from offending at around 14 or 15, those furthest into the system (children's hearings), were more likely to be engaged in serious offending a year later, compared to a matched sample who had not experienced formal system intervention.<sup>15</sup> The study also shows how, by dint of Police and Reporter working cultures and labelling processes, some young people are drawn into a cycle of repeat contact with the system, with damaging consequences around desistance and youth to adult criminal justice transitions.

The ESYTC findings point towards a MACR of at the very least 15, purely based on effectiveness, with a strong message that a higher MACR is more effective in reducing crime. This chimes with a wider body of research that shows how labelling can act as a critical factor in terms of potential criminal pathways,<sup>16</sup> can adversely affect

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<sup>13</sup> McAra, L. and McVie, S. (2005) 'The usual suspects? Street-life, young people and the police', *Criminology and Criminal Justice* 5 (1): 5-36.

<sup>14</sup> McAra, L., and McVie, S., (2007) 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending'. *European Journal of Criminology* 4(3): 315-345

<sup>15</sup> McAra, L. and McVie, S. (2013) Delivering justice for children and young people: Key messages from the Edinburgh Study of Youth Transitions and Crime, Howard League for Penal Reform.

<sup>16</sup> Besemer, S., Farrington, D. and Bijleveld, C. (2017) 'Labelling and intergenerational transmission of crime: The interaction between criminal justice intervention and a convicted parent', *PLoS ONE* 12(3)

educational attainment and later life chances,<sup>17</sup> or force different choices in later life by dint of past convictions. The effects may also be cumulative, impacting disproportionately on those already socially and economically disadvantaged,<sup>18</sup> or intergenerational, whereby adverse effects are felt by those whose families are known to criminal justice agencies.<sup>19</sup>

A criminal justice response to a child's harmful behaviour does not lead to better outcomes for the child nor those affected by the child's actions. It does not improve public safety and it is damaging to the child, their victims and society as a whole.<sup>20</sup>

It can also miss complex factors underpinning these behaviours. Many of these children have undergone traumatic childhood experiences and much of their harmful behaviour in later life reflects this. Rather than criminalising them at an early age and holding them solely and fully responsible for their actions, society must shoulder some responsibility. A low MACR represents a failure to accept a share in responsibility for young people and finding effective responses to youth crime which protects victims. It also runs counter to the Scottish Government's aspirations on children's rights, its stated aims of both GIRFEC and the Whole Systems Approach, as well as the principles enshrined in Kilbrandon and the establishment of the Children's Hearing System which was intended to decriminalise children and young people.

### ***The United Nations Convention on the Rights of the Child and human rights instruments relating to youth justice***

Human rights standards provide a strong case for raising the MACR well above 12.

In each set of Concluding Observations from 1995 - 2016, the Committee on the Rights of the Child, which monitors implementation of the UNCRC, has criticised the low MACR across the UK. In 2016 it called on Scotland to raise the MACR *'in line with*

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<sup>17</sup> Bernburg, J. and Krohn, M. (2003) 'Labelling, life chances, and adult crime: The direct and indirect effects of official intervention in adolescence on crime in early adulthood', *Criminology*. 2003;41: 1287–1318

<sup>18</sup> Krohn, M., Lopes G., and Ward J. (2014) Effects of official intervention on later offending in the Rochester youth development study' in Farrington and Murray (eds.) *Labelling theory: Empirical tests (advances in criminology theory volume 18*, New Brunswick, NJ: Transaction Publishers

<sup>19</sup> Foster, H. Hagan, J. (2007) 'Incarceration and intergenerational social exclusion', *Social Problems*. 54: 399

<sup>20</sup> (McAra, L. and McVie, S. (2007) 'Youth justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology*, 4(3), 315–45).

*acceptable international standards and that children in conflict with the law are always dealt with within the juvenile justice systems up to the age of 18 and that diversion measures do not appear in children's criminal records'.<sup>21</sup>*

Article 40 of the UNCRC specifically focuses on children alleged, accused of, or recognised as having infringed the penal law and calls on countries to treat them in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Key to this is *'the establishment of a MACR below which children shall be presumed not to have the capacity to infringe the penal law'.<sup>22</sup>*

As set out above, General Comment 10 calls for a higher MACR and also states that juvenile justice rules should apply to all children under 18. It also says that accountability and responsibility should take account of the maturity of the young person and outlines children's rights in relation to their interaction with justice systems, in particular stating that *'children in conflict with the law, including child recidivists, have the right to be treated in ways that promote their reintegration and the child's assuming a constructive role in society'.<sup>23</sup>* This is important when considering the establishment of a criminal or other record of the child's behaviour and its subsequent disclosure.

The Beijing Rules (1985), the Riyadh Guidelines (1990), the Havana Rules (1990) and other international human rights instruments on youth justice also set out current thinking on human rights for young people and minimum recommended standards. They focus on the protection of the personality of those under 18 and community-based responses to their needs, such as decriminalisation and diversion. All of these instruments stress the importance of the child's wellbeing as a paramount consideration and call for an age of criminal responsibility based on maturity, and socio-educative interventions rather than punitive ones, extra-judicial (non-

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<sup>21</sup> UNCRC Concluding Observations on the UK 2016

<sup>22</sup> United Nations Convention on the Rights of the Child, Article 40 (3) (a).

<sup>23</sup> 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.

criminalising) solutions, deprivation of liberty only as a last resort, and safeguards for the use of alternatives to custody.

Other international child rights bodies support a higher MACR, including:

- The Parliamentary Assembly of the Council of Europe (PACE). Its 2014 resolution<sup>24</sup> calls for it to be set to at least 14, noting that alternative non-custodial measures and reducing the number of children in detention are key to a successful system of juvenile justice and more likely to ensure public safety and help young people to reach their potential.
- The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010)<sup>25</sup> and the European Rules on Juvenile Offenders subject to Sanctions and Measures<sup>26</sup> both recommend a high MACR.
- The European Network of Ombudspersons for Children (ENOC), which comprises 42 institutions similar to my own, in 34 countries within the Council of Europe, repeatedly calls on states to concentrate on the rehabilitation and re-integration of all children under the age of 18 in conflict with the law, rather than on criminalisation.

### ***Protection rights vs Participation rights***

The Policy Memorandum accompanying the current bill argues that a MACR of 12 would bring this legislation in line with the Age of Legal Capacity (Scotland) Act 1991. However, as set out in the table in Appendix A, children in Scotland gain only a very limited number of entitlements at 12. I am concerned that the rationale for the age of 12 may be a misunderstanding of the way in which protection rights contained within the human rights framework are intended to apply.

Child Rights International Network (CRIN) captures the arguments well in its discussion paper on minimum ages from 2016.<sup>27</sup> CRIN argues that minimum ages should, without exception, be consistent with all rights set out in the UNCRC. This means that in areas where children's protection is at risk (e.g. in the justice system),

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<sup>24</sup> Parliamentary Assembly of the Council of Europe Resolution 2010 (2014) Child-friendly juvenile justice: from rhetoric to reality.

<sup>25</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010).

<sup>26</sup> Council of Europe Committee of Ministers Recommendation CM/Rec (2008)11 on the European Rules for juvenile offenders subject to sanctions or measures.(2008)

<sup>27</sup> Child Rights International Network Discussion Paper 2016: Age is Arbitrary: Setting Minimum Ages.

all children under the age of 18 should be afforded special protection. Where minimum ages are necessary to correct for abuses of power (e.g. sexual consent), their enforcement should never run counter to children's rights. In areas where age restrictions serve no protective purpose and potentially curb children's development, freedoms, and even protection (e.g. the freedom to choose or leave a religion, access to complaints mechanisms), minimum ages should be avoided. Finally, where tensions are present between children's protection and autonomy (e.g. consent to medical treatment), children's capacity should be the deciding factor and should not be judged generally, but in relation to the issue at hand. This judgement should take into account the social and cultural norms in a given context, and the power imbalances at play in questions of consent.

Children are able to exercise participation rights in line with their evolving capacities; however, protection rights should still remain in place as long as possible. In Scotland, children are presumed to have capacity to make legal and medical decisions at an early age, but law designed to protect them such as child protection legislation applies throughout childhood. The MACR needs to be understood as a protection right.

It is interesting to contrast the late age at which we allow children to be involved in democratic decision making, which is a participation right, with the very early age at which we remove the protection from criminal prosecution.

We know that early criminalisation has a harmful effect on children and, as highlighted by the Centre for Youth and Criminal Justice in their evidence, the environment in which a child lives has a substantial impact on the likelihood that they will offend. It is therefore appropriate to consider the existence of a minimum age of criminal justice as a protection right.

The Children (Scotland) Act 1995 recognised children who engage in criminal behaviour as children in need and the Policy Memorandum accompanying the Bill acknowledges that a disproportionate number of children in conflict with the law will *'have faced significant prior disadvantage and multiple adversity in early childhood, and that better outcomes will flow from attending to those, rather than focussing on children's deeds in isolation'* and that *'responding to childhood behaviour in a criminalising, stigmatising manner serves only to promote escalation and further harm. Scotland has proven approaches to confronting and correcting this childhood*

*behaviour that do not need a criminal justice approach*.<sup>28</sup> This is just as true for children aged 12 or over as it is for under 12s.

### ***International trends***

The dominant international trend in MACRs has been upwards. Between 1989 and 2008, 41 countries raised their MACR and 23 countries proposed to. In the last decade, Georgia and Denmark have lowered, then reinstated their MACRs. In Denmark's case, a 'tough-on-crime' motivated MACR reduction from 15 to 14 saw no evidence of a deterrent event, nor an impact on recorded crime, whilst those affected by the change and processed within the criminal justice system had lower educational outcomes and higher recidivism rates than those processed in the social system.<sup>29</sup>

The Bill aims to advance Scotland's position in relation to international treaties and other obligations, but 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.<sup>30</sup> The most common MACR in Europe is 14, while for the Nordic countries the MACR is 15 years.<sup>31</sup>

A number of countries have significantly higher MACR, but while comparative data provides insights into international standards, caution is needed. Digging beneath the statutory limits, some countries set age-specific offences or exceptions below the MACR, while others allow children below the MACR to be punished, deprived of their liberty or subject to protective measures with retributive undertones. The exceptions suggest that alongside a high MACR there need to be protective, rights-based support policies to provide practical protection of children's rights. *'Making MACRs work for children's rights depends, to a large extent, upon broader national efforts towards full implementation of all children's rights, including through effective juvenile justice and child protection systems that fully respect such rights'*<sup>32</sup>.

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<sup>28</sup> Policy Memorandum paras 5-6.

<sup>29</sup> Damm, A., Larsen, B., Nielsen, H., and Simonsen, M. (2017) Lowering the minimum age of criminal responsibility.

<sup>30</sup> In 2018, an independent advisory body to the Dutch Government recommended raising the MACR to at least 14.

<sup>31</sup> See footnote 9.

<sup>32</sup> See footnote 9.

**This discussion needs to be set within the broader discussion on incorporation of the UNCRC into Scots law. The Scottish Government needs to demonstrate its commitment to children's rights by incorporating the UNCRC.**

**The Bill gives Scotland the opportunity to build on its proud welfare-based traditions. It is an opportunity to demonstrate a commitment to human rights leadership, not just meeting the absolute minimum reserved for those doing worst in human rights terms, nor just aiming to be in line with international standards. If we want to live up to the rhetoric of human rights leadership, which requires unpopular decisions to be made for the rights reasons, then we need to go much further than the absolute minimum acceptable MACR of 12. The MACR in Scotland needs to be at least 16.**

***Disclosure of Other Relevant Information (ORI)***

- 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 MACR 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.**

Part 2 of the Bill relates to the disclosure of information relating to convictions and Other Relevant Information (ORI), amending the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007. This section also introduces the role of the Independent Reviewer, to consider situations in which information is disclosed.

The legitimate purpose of a disclosure regime is to strike the appropriate balance between public protection and the right of the individual to put mistakes behind them, move on with their lives and reintegrate into society. The strong message from research is that most children will naturally desist from offending behaviour as they grow older, that only a very small number will commit serious offences, and that for

most children contact with formal legal processes works against that process of desistance. It is also the case that the vast majority of offending carried out by 8-11-year olds is minor and low level in nature.

I welcome the fact that pre-12 behaviour may no longer result in a conviction and be recorded as such, but have serious concerns about the recording and disclosure of pre-12 behaviour as ORI. I am concerned that the current wording of sections 4 and 5 of the Bill has the effect of extending the potential disclosure of ORI to all children under the age of 12, not just those aged 8-11. In rights terms, this would be a retrograde step.

If the police are able to hold or disclose information about 'behaviour', this is effectively disclosure through the back door, without many of the checks and protections that currently exist.

Moreover, the operation of the disclosure provisions in the Bill is inextricably linked with the police rules on weeding and retention. Unlike convictions, which can become spent and then protected, depending on the nature of the offence committed and the length of time which has elapsed, ORI is subject to no such limitation and can be disclosed for as long as it is held by Police Scotland. 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.

**Given the above, I do not feel that the provisions are proportionate or that the Bill as currently drafted strikes the right balance.**

I do not agree with disclosing information relating to under 12s in an enhanced disclosure or a scheme record. However, if ORI is disclosed, an independent reviewer could provide an additional safeguard. Provisions around this should include a right to appeal the independent reviewer's determination, the presumption that the individual's views will be sought and the presumption that they will have the right to make representation. Support should also be provided to make such representations, recognising that this may take place years after the event. Guidance must be available

to both police and the independent reviewer, setting out clearly what type of information would be relevant for disclosure.

### ***Police Powers***

- 3. 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.**

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. As with the sections relating to disclosure of information relating to the behaviour of children under 12, these powers have been extended to all children under 12 and not just to children aged 8-11 as at present. 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. These powers include searches, taking of prints and forensic samples and interviewing.

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. However, any retention of police powers based on a child committing an offence, and any extension of those powers to children under 8, must be clearly justified and follow a proportionate, welfare-based approach. I believe the need for these powers requires to be very carefully scrutinised, and that Parliament should be confident that there is no risk of them being used inappropriately. I note that the police are already able to respond to 'crime-like' behaviour carried out by under 8s.

### ***Information to victims***

- 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.**

The Bill introduces provisions to allow the disclosure to victims of information about certain cases involving children below the age of criminal responsibility, including how the case was disposed of. This does not currently occur.

It is important that we consider the right to a remedy for victims of children's behaviour, many of whom are also children. The State has an obligation to put in place effective systems to keep people safe and to provide an effective remedy when it fails to do so. The right to an effective remedy is included in both the International Covenant on Civil and Political Rights (Article 2(3)) and the European Convention on Human Rights (Article 13). It is important to set this in the context of State failure to provide the levels of support required for children, alongside the developing levels of responsibility that a child takes on for their actions.

International human rights law places a number of specific obligations on States to safeguard the rights of victims of crime, including investigation, prosecution and remedy. International human rights standards on the right to an effective remedy clarify that that right extends to access to justice, investigations and reparations. Reparations should include opportunities for restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.<sup>33</sup> It is important that those harmed by children have access to effective remedies notwithstanding the fact that prosecution is not appropriate.

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<sup>33</sup> UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, *'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms'*, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, forty-fifth session, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993 at 56.

It is understandable that those who are harmed by children's behaviour may wish to know what has happened to the child who has harmed them. However, my view is that this is not proportionate. 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*'. This may contravene this right to privacy. There are rare occasions where it might be appropriate and in the best interests of the child to share limited information. If so, there should be a requirement for the Reporter to consult the child/family before deciding on the release of information on best interests grounds.

I believe that the interests of those who are harmed by children in conflict with the law are best served by adequate support. Whilst I recognise that victims have a right to be reassured that the harm against them has been taken seriously and that attempts are being made to ensure such harm does not occur again, a balance must be struck.

## Appendix A – Age at which rights are gained in Scotland

13	Occasional employment by parents doing light gardening/farm work, subject to local authority byelaws Employment by other people doing light work, specified in and subject to local authority byelaws
14	Get a Saturday job (up to 5 hours), work up to 2 hours on school days or up to 25 hours in holidays Vote and stand in an election for the Scottish Youth Parliament.
15	Decide whether to give your child up for adoption. Work up to eight hours per day, and 35 hours per week during holidays. Vote in Scottish Parliament and Scottish local government elections. Get married; enter into a civil partnership; consent to lawful sexual intercourse. Leave home without your parents/guardians' consent; apply for housing through your local council Access most adult banking services (except overdrafts and credit). Buy wine, beer, cider or sherry to drink in a restaurant with a meal Leave school; get a full-time job and pay National Insurance; be legally responsible for babysitting Work as a waiter/waitress in a hotel or restaurant; Join a trade union; Earn the National Minimum Wage for 16/17-year-olds; Join the armed forces, with parental consent (and not to train as an officer)
16	Choose your GP; consent to medical treatment (under 16s can provide consent, depending on understanding) Officially change your name without parental/guardian consent; Pay full fare on buses and trains (unless you have a travel concession pass); drive a moped Buy a pet without a parent/guardian present, get a piercing without parental/guardian consent. Buy a National Lottery ticket or scratch card; buy Premium Bonds. Stand for election to become a member of a Community Council in certain areas. If adopted, get information about your natural parents. Apply for a 10-year passport without parental/guardian consent. Be sent to a young offenders' institution; be prosecuted in the Justice of the Peace, Sheriff or High Court
17	Hold a licence to drive a car, small motorcycle or tractor; hold a private pilot's licence. Train to be an officer in the Armed Forces; give blood Vote in an election for your local MP (UK Parliament) and MEP (European Parliament). Stand for election as a local councillor, MP (UK Parliament) or MSP (Scottish Parliament). Earn the National Minimum Wage rate for 18 to 21-year olds; work behind a bar Become liable to register and pay the Council Tax; hold a credit card.
18	Serve as a juror. Buy alcohol in licensed premises and consume alcohol in a bar; be licensed to serve alcohol. Buy cigarettes & tobacco; see any film/hire any video; buy or possess fireworks; place a bet; Be tattooed; hire or buy a sunbed. Hold a licence to drive a medium-sized goods vehicle; hold a basic commercial pilot's licence.