

## AGE OF CRIMINAL RESPONSIBILITY

### Evidence from Children's Hearings Scotland

#### Introduction

1. A children's hearing is a legal tribunal comprising trained lay members of the national Children's Panel (Panel members) who volunteer their time and skills to decide whether compulsory measures of supervision should be put in place for children and young people in need of care and protection, or whose behaviour puts themselves, or others, at risk of harm.
2. The children's hearings system is founded on principles and objectives established by the Kilbrandon Committee, in its report of a review of youth justice published in 1964. The Committee looked at the effectiveness of arrangements for tackling delinquency and made proposals for reform. Kilbrandon recognised that, in many cases, children and young people appearing in the juvenile courts charged with offences were themselves vulnerable and in need of care and protection. To reduce their offending and other harmful behaviour, their welfare needs required to be met. The children's hearings system was set up to provide a forum in which families, professionals and Panel members work together to identify what help children and young people need to achieve their full potential. Panel members decide whether the child needs compulsory supervision and, other than in limited circumstances, have the welfare of the child as their paramount concern. Measures to restrict a young person's liberty may be included in supervision. The intention of any restriction of liberty is not punitive, but designed to safeguard and promote the child's welfare.
3. The Children's Hearings (Scotland) Act 2011 introduced the role of National Convener of the children's hearings system to oversee appointment of the Panel members who make decisions at Children's Hearings. The Act also established Children's Hearings Scotland (CHS) as a public body to support the National Convener to deliver his statutory functions. These functions include the recruitment, selection, training and support of Panel members.
4. Our vision is of a children's hearings system where everyone works together, making sure that all children and young people are cared for and protected, and their views are heard, respected and valued. Our mission is to improve outcomes for vulnerable children and young people in Scotland by enabling Panel members to make high quality decisions about their future.
5. CHS is governed by a Board of non-executive members which is accountable to Scottish Ministers and the Scottish Parliament. Children's Hearings Scotland and the Panel members and other volunteers who support the children's hearings system work to a set of National Standards. The standards aim to ensure consistent practice across Scotland in recruiting, training and supporting Panel members. They describe the functions, roles and responsibilities of everyone involved with the national Children's Panel and set out clearly defined and measurable expectations of practice.

## **Age of Criminal Responsibility**

6. The Convention on the Rights of the Child (UNCRC) guides CHS work. Article 40 (3) of UNCRC requires States parties to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. At 8 years, Scotland's present minimum age of criminal responsibility is at the lowest end of the international spectrum. UNCRC considers that a minimum age of criminal responsibility below the age of 12 years is not internationally acceptable. UNCRC encourages states parties to continue to increase the age of criminal responsibility higher than twelve years.<sup>1</sup> UNCRC considers that designated systems of youth justice should apply to all young people until they reach 18 years. Adhering to the Convention principles means that the age of criminal responsibility in Scotland must rise. CHS consider that it would be feasible to raise the age of criminal responsibility higher than 12 years, subject to clarification of some policy and operational issues as discussed below.

7. Raising the minimum age of criminal responsibility to 12 years is likely to have limited impact on the numbers of children referred to the children's hearings system and to children's hearings for decisions about compulsory measures of supervision. Since 2010 no children under 12 have been prosecuted in the criminal courts. Children under 12 years have been dealt with in the first instance by the Children's Reporter who determines whether or not to arrange a children's hearing. Referrals into the hearing system have fluctuated, in response to demographic, policy and operational changes. Over recent years the number of offence referrals to the Children's Reporter has reduced. Nowadays, around 85% of referrals to the Children's Reporter are on grounds relating to concern about children's welfare, rather than offending behaviour.

8. In 2017-18 3,060 children and young people aged between eight and 17 years were referred to the Reporter on offence grounds. These children and young people were referred for 14,615 alleged offences on 8,548 referrals. Of these offence grounds 637 concerned non-sexual offences of violence or sexual crimes.<sup>2</sup> In around three quarters of cases referred to the children's hearings system, the Children's Reporter decides a children's hearing is not justified. These children may receive support from the local authority on a voluntary basis and subject to a Child's Plan. In a sample of referrals on offence grounds of children under 12 years old, less than 6% were referred on to a children's hearing. In those hearings, Panel members decided that a supervision order was necessary in only half of the cases.

9. In the following paragraphs we consider the questions which arise for the children's hearing system in the round as a result of raising the age of criminal responsibility, and the potential impact on Panel member decision making.

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<sup>1</sup> Committee on the Rights of the Child: General Comment No. 10 (2007) - Children's rights in Juvenile Justice

<sup>2</sup> Statistical Analysis 2017/2018, SCRA <https://www.scra.gov.uk/wp-content/uploads/2018/07/Full-statistical-analysis-2017-18.pdf>

10. The key issues are:

- Maintaining the paramountcy of the welfare principle when making decisions about the need for compulsory measures of supervision.
- The availability and nature of the services and support provided to young people whose behaviour presents significant risk and who would formerly have been prosecuted in court.
- Whether there should continue to be an element of discretion for local authorities in whether to implement a decision by a children's hearing to authorise secure accommodation.
- Whether a new ground for referral is required subject to higher standard of proof in relation to behaviour of significant concern which (i) requires measures of supervision to manage risk and (ii) justify sharing information in the future about that behaviour which is no longer offence information.
- Arrangements for continuing support or supervision for young people beyond 18 years.
- Appropriate and proportionate information and redress for victims of a young person's harmful behaviour, including how victims secure necessary compensation when behaviour is no longer classified as an offence or established to the criminal standards of proof.
- Clarity around the role and powers of the police in investigating any behaviour, which would previously have been classified as an offence but which falls short of the test for an investigative interview and child interview order in sections 31 and 34 of the Bill.

**Children and the criminal courts**

11. Section 42(1) of the Criminal Procedure (Scotland) Act 1995 provides that no child under 16 years shall be prosecuted in the courts unless criminal prosecution is authorised by the Lord Advocate. The Lord Advocate's guidelines to the police identify those offences which police should report jointly to the Children's Reporter and the Procurator Fiscal. The guidelines specify serious offences which, if committed by an adult would mean prosecution in the High Court or solemn proceedings in the Sheriff Court before a jury. These include culpable homicide, attempted murder, and assault to the danger of life, assault and robbery involving the use of firearms, attempted rape, incest and related offences. Other offences which police are required to report jointly to the Reporter and Procurator Fiscal relate to

children aged 15 or over who are charged with motor vehicle related offences, or 16 and 17 year olds who are already subject to Compulsory Supervision Orders.<sup>3</sup>

12. The decision as to whether an offence committed by a child should be considered by the Children's Reporter for referral to a children's hearing or prosecuted in the criminal court is made by the Procurator Fiscal in consultation with the Children's Reporter. There is presently a presumption that children under the age of 16 years will be referred to the Children's Reporter in relation to jointly reported offences, unless it is considered that the offence is of such gravity that it is in the public interest to prosecute the child. There is also a presumption that the Procurator Fiscal will deal with jointly reported offences committed by young people over the age of 16 years. In 2017-2018 1,191 children and young people were jointly reported to Children's Reporter and the Procurator Fiscal, of which just under half of which were for young people aged under 16.

13. Forty-one young people who were the subject of joint reports were in custody at the time of their referral. The Procurator decided to proceed with investigation and prosecution in almost two thirds of these 41 cases. Where a child or young person was not in custody at the time of the referral it was much more likely that the Children's Reporter would deal with the referral.

14. Statistical information does not break down numbers of prosecutions by age and therefore it is not possible to identify the numbers of 12- 18 year olds prosecuted in Scottish courts. In 2016 - 2017 following prosecution, 15 young men aged 16-17 years per 1000 population and 4 young women aged 16-17 years per 1000 population were convicted of an offence of any kind representing approximately 1090 convictions. 476 young men under 21 years and 54 young women under 21 years were convicted of offences involving physical violence, rape and sexual assault.<sup>4</sup> The number of additional referrals to children's hearings as a result of increasing the minimum age of criminal responsibility beyond twelve years is therefore likely to be low as a proportion of current referrals. A proportion will continue to be diverted by the Reporter to other appropriate disposals short of referral to a children's hearing.

### **Paramourcy of the child's welfare**

15. The overarching principle for the operation of the children's hearings system is that where a children's hearing or pre-hearing panel or court is coming to a decision about a matter relating to a child they are to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.<sup>5</sup> The welfare of the child as the paramount consideration can be overridden only for the purpose of

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<sup>3</sup> Crown Office and Procurator Fiscal Service. (2014) Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of Offences alleged to have been committed by Children.

<sup>4</sup> Scottish Government *Criminal proceedings in Scotland 2016-17: statistics* (Feb 2018)

<https://www.gov.scot/publications/criminal-proceedings-scotland-2016-17>

<sup>5</sup> Children's Hearings (Scotland) Act 2011, section 25

protecting the public from serious harm (whether physical or not).<sup>6</sup> In those circumstances the welfare of the child becomes a primary consideration rather than the paramount consideration. Restriction of liberty, including detention in secure accommodation, where young people have engaged in violent, sexually aggressive or other harmful behaviour is available as an option to the children's hearing in limited circumstances. The draft Bill introduces a requirement on persons and the court to treat the need to safeguard and promote the welfare of the child as a primary consideration when exercising functions under the part of the draft legislation which relates to the police investigatory and evidence gathering powers. This suggests that a children's hearing will in certain circumstances require to give priority in decision making to the need to facilitate police investigations over the paramountcy of the child's welfare, where children's behaviour is violent or dangerous.

### **Placement in secure accommodation**

16. A children's hearing can decide to authorise a young person's placement in secure accommodation. A secure authorisation may be made only if the child or young person (i) has a history of absconding and is likely to abscond again and, if so, his or her physical, mental or moral welfare would be at risk, (ii) he or she is likely to self-harm or (iii) he or she is likely to cause injury to another person and the children's hearing is satisfied that, having considered alternative options, secure accommodation is necessary.<sup>7</sup>

17. Before any authorisation by the children's hearing is implemented the local authority Chief Social Work Officer (CSWO) and the Head of the secure establishment in which it is proposed to place the young person must be satisfied that secure placement is necessary and both must consent. Detention of a young person is therefore at the discretion of the local authority and the secure establishment, rather than the children's hearing and a children's hearing's decision to authorise placement in secure accommodation can presently be overridden by the local authority. If a child is placed in secure accommodation for his own or other's protection, this is subject to review by the children's hearing within a maximum period of three months to assess whether compulsory measures of supervision remain necessary and if so whether the criteria for secure care are met and remain appropriate.

18. Effective interventions are required to protect the welfare of the child engaging in violent or dangerous behaviour, and to protect other individuals from harm as well as addressing wider interests in the control of harmful behaviour in communities. Parliament may wish to consider whether, under the welfare approach in relation to the most dangerous and harmful behaviour, the element of discretion in deciding to implement a decision to restrict a young person's liberty should be retained, and if so, who should exercise such discretion.

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<sup>6</sup> Ibid, section 26

<sup>7</sup> Children's Hearings (Scotland) Act 2011, s 83(5) and (6)

### **Grounds for referral to a children's hearing**

19. The removal of offence grounds for those below the specified age of criminal responsibility does not prevent a young person being referred to a children's hearing on existing grounds relating to concerning behaviour; "the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person" or that "the child is beyond the control of a relevant person".<sup>8</sup> The standard of proof in relation to these grounds is 'the balance of probability' rather than 'beyond reasonable doubt'.

20. Children's hearings do not test the evidence for the grounds on which young people are referred to a hearing. This is the province of the Sheriff who will, if the grounds are not agreed by the relevant parties or if the young person does not have the capacity to agree the grounds, determine the factual evidential basis for the right of a children's hearing to consider whether compulsory supervision is needed.

21. The role of the court in establishing the grounds for referral enables the children's hearing, and the professionals advising the hearing and implementing compulsory measures of supervision, to address the young person's behaviour whether or not he or she accepts their behaviour is harmful. The court, in any establishment of the grounds for referral, relies on evidence following investigation by the police and/or local authority, presented by the Children's Reporter

22. The Bill as drafted provides for police investigation of the child's behaviour and the circumstances surrounding it even though the child or young person is below the age of criminal responsibility. The Bill does not specify what use will then be made of the outcome of the police investigation. We anticipate the results of the police investigation may be put before the Sheriff to establish grounds for referral to a hearing. However there will be no offence. Non offence grounds are subject to a lower standard of proof.

23. CHS considers that where the basis for referral to a children's hearing is behaviour which includes serious physical or sexual violence which would now be subject to the criminal standard of proof 'beyond reasonable doubt', there will be a need for an equivalent high standard of proof in respect of such behaviour for the following reasons:

(i) to establish the legitimacy of interventions by the children's hearing and professionals in addressing behavioural needs, particularly in circumstances which require that the children's hearing consider the child's welfare to be the primary, rather than the paramount, consideration.

(ii) to ensure that there is proper justification for the sharing of information in circumstances where information sharing may have serious consequences for the young person's long term future

(iii) to enable rigorous risk assessment to ensure protection of the young person and others from the consequences of such behaviour.

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<sup>8</sup> Ibid, s 67(2)(m) and (n)

### **Investigation of behaviour**

24. The Bill introduces new arrangements governing searches, taking fingerprints and physical samples and investigative interviews of children under 12 by the police. The Bill introduces provision for a court-ordered interview procedure and requirements on the police to prepare a written plan for investigative interviews in consultation with local authority social workers in circumstances where a child's behaviour is physically or sexually violent. The Bill as drafted proposes to introduce these investigative arrangements in respect of young people who may not presently be subject to criminal prosecution.

25. There are presently robust arrangements for the interview and assessment of children, under joint police and social work protocols for joint investigative interviews. These presently focus on children who are victims of crime. They are already applied in gathering information from children whose behaviour indicates they may also be victims of child neglect or abuse. Joint interviews are designed to meet stringent evidential standards for the prosecution of crime and minimise the number of times child victims must tell their story to professionals. They are utilised as evidence in the prosecution of adult offences against children. Currently the police collect information and evidence about a child's behaviour to inform the Children's Reporter's decision regarding whether to refer the child to a children's hearing. This information may be used for the purposes of a Sheriff court proof to establish grounds for referral to a hearing if the offence ground is not accepted by the child and his or her parents.

26. Joint investigative interviewing arrangements could be adapted for the investigation of harmful behaviour by children and young people following the removal of offence grounds. CHS considers that any interview of the child to properly investigate behaviour should be on a multi-agency basis rather than simply police-led, with a primary focus on the welfare of the child. Formal police investigation of children's behaviour should be subsumed into existing multi-agency GIRFEC child assessment and planning processes which have a focus on welfare and reducing risk.

### **Attendance at hearings**

27. The Bill includes rights for the child to have (i) a supporter present during any investigative interview and (ii) an independent advocate in addition to a solicitor or social worker. Consultees referred to the provision for independent advocacy during investigative interview in the bill and argued that this should not replace entitlement to legal advice and the advocate should be legally qualified. Children and young people have repeatedly said that they want the numbers of people who attend children's hearings about them to be reduced. If a new 'independent advocate' is introduced into interview processes does that simply introduce another 'representative' for the child within a Children's Hearing alongside 'relevant person', 'supporter' and 'legal representative'? Will an advocate for 'investigative interviews' also be able to advocate for the child within a children's hearing?



### **Services and support**

28. Raising the age of criminal responsibility above 12 years of age will bring into the children's hearings system those cases which are presently dealt with by the criminal courts. The number of convictions of young people under 18 is around 15 per 1000 population. This suggests that the additional number of referrals as a result of raising the age of criminal responsibility is likely to be measured in the hundreds rather than thousands. Nevertheless within this group there will be a much smaller number of young people who are likely to present significant and complex needs for support, care and effective control of dangerous or damaging behaviour. To remain credible the children's hearings system must address the implications of that more serious behaviour and the requirement to reduce risk to actual and potential victims.

29. Specific measures available to the children's hearing to address welfare needs related to a child's harmful behaviour include the option to direct that the child reside at a specified place other than their home, to restrict the child's liberty in such a specified place, to include a condition to restrict the child's movements and to authorise the child's placement in secure accommodation. These measures are applied in order to address the child's needs for protection, guidance, treatment and control. At present the courts have a range of disposals including detention and community-based and financial penalties with both deterrent and punitive functions which have no place within the welfare focused hearings system. Measures of supervision available to children's hearings are specific to the child and designed to address welfare needs. The disposals available to the courts are offence specific and take limited account of the young person's personal and family circumstances other than in relation to risk.

30. Young people aged sixteen and over will be brought into the hearings system who would formerly have been supported by local authority criminal justice services, rather than children's services, in order to reduce the likelihood of further offending. Children's hearings will require access to a wider range of supports for older young people whose behaviour presents risk of harm. A significant rise in the age of criminal responsibility requires a reassessment of provision and investment and reorientation of offender services for young people with a stronger focus on early intervention and family support. Hearings should have the option to require measures of restorative justice which have found to be effective in steering young people away from harmful behaviour. Parliament must satisfy itself that the range of measures available to children's hearings are adequate to tackle the most serious harmful behaviour.

### **Post 18 transition period**

31. Currently a young person convicted of a serious offence in court may be subject to detention and supervision for a period determined by the court. Children's hearings determine only whether a young person requires compulsory measures of supervision. A Compulsory Supervision Order subsists for a maximum period of twelve months. A CSO must



be reviewed at least annually and may be renewed repeatedly for a further period of twelve months. Where a young person is placed in secure it must be reviewed at 3 month intervals when the need for compulsion is reviewed. A CSO ends when a young person reaches 18 years. Provision to have children's hearings make decisions about how to deal with serious violent and harmful behaviour which would otherwise have been dealt with by longer term disposals in the criminal courts should consider how ongoing oversight of young people over 18 years whose behaviour presents significant risk to the public should be assessed and managed when the young person reaches 18 years and falls outwith the hearings' jurisdiction. How will the welfare based approach transition into adult services and what will be the basis of continuing professional involvement when the hearings' jurisdiction ends?

### **Disclosure of information**

32. The Bill as drafted prevents subsequent disclosure by the police of what would previously have been 'offence' information if that information relates to a period when the subject was under 12 years old. It does allow disclosure of 'other recorded information' about harmful behaviour in certain circumstances if authorised by an independent reviewer. The Bill makes provision for the appointment of the office of an independent reviewer, notification of referrals and provision of information to the reviewer and for appeal to the Sheriff against the independent reviewer's decision by the subject or the chief constable. New arrangements for disclosure on the authorisation of an independent reviewer mean that information about behaviour can continue to be disclosed at a future stage. That may be necessary to ensure sound risk assessment where a young person's behaviour has caused or has the potential to harm to another person. Given the potentially serious and long term consequences of disclosure of information about behaviour carried out by a child or young person before they reach adulthood that information in CHS' view, should be subject to the rigorous testing of evidence and meet an equivalent standard of proof to that of 'beyond reasonable doubt' that offence grounds require presently. This would be addressed by the introduction of a new ground subject to the evidential standard of 'beyond reasonable doubt' as set out above.

### **Treatment of victims**

33. The impact on victims of no longer treating harmful behaviour as an offence needs to be understood and recognised. There will be no trial and no option for the victim to give information to a hearing or contribute to decision-making, as they presently do in criminal proceedings. The Bill makes provision for limited disclosure by the Children's Reporter of information to victims about the outcome of a referral to the children's hearings system.

34. This raises the issue of how victims of a young person's harmful behaviour can secure redress and compensation under existing CICB arrangements in the absence of an established offence ground or a conviction for an offence.

### **Training needs**

35. The National Convener and CHS are responsible for training and support of Panel members. Additional training will be needed to ensure Panel members are

- (i) fully informed about new primary and secondary legislation, including the arrangements for investigating harmful behaviour,
- (ii) are well equipped to make good decisions about whether or not compulsory supervision is required in respect of groups of young people who are now dealt with by the criminal courts, and
- (iii) understand how to utilise specific measures available to the hearing to tackle serious harmful behaviour.

36. We estimate that appropriate information and training to update the existing 2,500 panel members and other relevant volunteer members of Children's Panel Area Support Teams (400+) would cost CHS around £200,000 using a mixture of online and direct delivery mechanisms. Around six months lead in time would be required for design of training and development of materials for existing Panel members and integration of additional material in pre-service training for new Panel members.

37. Children's Panel recruitment currently promotes a focus on child welfare. Upcoming campaigns may need to be recalibrated to make clear that the hearings system is also the primary vehicle for making decisions to tackle children's harmful behaviour, including that which is presently deemed so significant that the public interest demands criminal prosecution. In effect this returns the hearings system to its roots in Kilbrandon's analysis of what is needed to prevent delinquency and the damage this does to children's futures as well as to families and communities. That will also require recalibration of public perceptions regarding the public interest.

### **Conclusion**

38. CHS strongly believes that the age of criminal responsibility should rise and notes that a rise to 14 or 16 years is strongly recommended by UNCRC. CHS and the volunteer community of Panel members and its volunteer support structures are confident that the hearing' system can effectively implement whatever age of criminal responsibility the Parliament determines is appropriate for the Scottish context.

39. Operationally, the effect on the children's hearings of raising the age of criminal responsibility to 12 years is likely to be nominal in terms of the need to provide suitably trained Panel members to sit on hearings. Raising the age to fourteen, fifteen or sixteen will bring in larger numbers of children referred to children's hearings, and we might predict that somewhere between a quarter and a third of these young people may be subject to compulsory supervision orders thereafter, requiring intervention by the local authority. We

anticipate that the increase may be in the order of hundreds of referrals, but these will include young people presently convicted of very serious offences in the courts and whose behaviour and needs are amongst the most complex requiring skilled and sound intervention by decision-makers in the hearings system.

40. Understanding the consequences and implications of the changes and the nature and range of measures will be critical to ensuring effective high quality decisions. Children's Hearings Scotland considers that there is a need for a new ground for referral subject to a higher standard of proof than present non offence grounds, reflecting references in the Bill to behaviour which warrants police investigation and which is (i) violent or dangerous, or (ii) sexually violent or sexually coercive, and (iii) has caused or risks causing harm (whether physical or not) to another person.<sup>9</sup> This would enable children's hearings to legitimately include measures in a Compulsory Supervision Order to address such behaviour and monitor progress in tackling behaviour and reducing risk to others from the child's behaviour.

41. We consider an incremental approach to raising the minimum age of criminal responsibility beyond sixteen years is both practical and necessary to ensure that the children's hearings system is properly equipped with appropriate legal measures, and support services are put in place to meet children's welfare needs and address dangerous, destructive or harmful behaviour in a way that manages risk to the young person, their family, victims and members of the public.

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January 2019

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<sup>9</sup> Age of Criminal Responsibility (Scotland) Bill, s34