Scottish Government Consultation on the Minimum Age of Criminal Responsibility


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Contact details:

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1. Do you think that the support needs of, and risks posed by, children aged 8-11 years demonstrating harmful behaviour can be met through the extension of the National Child Protection Guidance?
   If yes, what adjustments do you anticipate might be required and why?
   N/A

2. Do you think that a multi-agency scoping study of training and skills would be helpful?
   Please provide reasons for your answer.
   N/A

3. Should the age of criminal responsibility be raised to 12, do you think that it will be possible to deal with the harmful behaviour of 8-11 year olds via existing care and protection (welfare) grounds through the Children’s Hearings System?

   In principle, the Commission is supportive of dealing with harmful behaviour of 8 – 11 year olds via existing care and protection/welfare grounds through the Children’s Hearings System. This approach would be consistent with the UN Convention on the Rights of the Child.

   The Committee on the Rights of the Child has stated that; “states parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children’s human rights and legal safeguards are thereby fully respected and protected.” [General Comment 10 at para 26 addressing Article 40 UNCRC]

   However, we submit that this issue is closely linked to that of disclosure of non-conviction information later in life. This is because serious allegations would consequently either be admitted by the child (potentially without fully understanding the implications for his or her adult life) or established at the Sheriff Court on the lower standard of proof; ‘on the balance of probabilities.’ Furthermore, hearsay evidence would be permitted.

   Whilst the introduction of hearsay evidence is of benefit to child witnesses, it would nonetheless be important that this reduction in standard of proof and evidence is borne in mind and reflected in decisions about disclosure of Compulsory Supervision Order and other information later in life (see response to Question 7). Put simply, if it has not been established that serious conduct
happened ‘beyond reasonable doubt,’ it may not be appropriate that such information could follow the child into adulthood and hamper life chances.

4. **Should the age of criminal responsibility be raised to 12, do you agree with the assessment of the Advisory Group that some police powers should be retained in relation to children under 12?**

The Commission has particular concerns over the proposal to obtain forensic samples from 8-11 years olds despite them being exempt from criminal responsibility.

It is noted that the proposal is not limited to DNA swabbing, but could include a warrant to take blood, urine or carry out an intimate body search on a child [Consultation p33].

Given the significant and potentially traumatising intrusion into the privacy of a child, such powers should only be used when necessary, with the most rigorous of safeguards and with regard to the principle enshrined in Article 40 of the UNCRC, which provides: “all children alleged as, accused of, or recognized as having infringed the penal law are to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.”

It is also suggested that samples may be taken and a warrant may be granted for further samples in the ‘most serious cases’ however, the report does not appear to contain a definition of what constitutes a serious case. Therefore, it is not possible to consider whether the taking of samples is appropriate in the circumstances.

5. **In relation to forensic samples, should the Police ever be able to retain samples taken from children aged under 12?**

The Commission is concerned about the proposal to retain samples taken from children under 12, below the age of criminal responsibility.

It is noted that Scotland has strict requirements for the retention of physical data and samples for unconvicted persons charged with violent or sexual offences and only then under time limits [S. 18A and 18 E Criminal Procedure (Scotland) Act 1995].

The Grand Chamber decision in *S and Marper v UK* (2008) 48 EHRR 1169 noted that DNA profiles contain substantial amounts
of unique personal data such as familial links, ethnic origins etc and as such their retention must be regarded as an interference with private life in terms of Article 8 (1). In order to justify retention of DNA samples, there must be suitably precise domestic legislation regulating its use. The Court accepted that such legislation may be in pursuit of the legitimate aim of prevention of disorder or crime but in order to be a necessary and proportionate response, the margin of appreciation is narrow. Any retention in a form which allows for individual identification must be stored for no longer than is required for the purpose for which the data are stored. There must be safeguards to prevent misuse and abuse.

The Grand Chamber in S and Marper v UK noted that the retention of unconvicted persons data may be especially harmful in the case of minors, given their special situation and the importance of their development and integration in society (para 124). In light of this, the Commission would have concerns about the justification and proportionality of this intrusion into the private lives of minors.

6. What safeguards should be put in place for children aged under 12 in relation to the use of these powers?

In relation to collection and retention of samples, further clarification on how long the samples will be retained, what they will be used for and whether they will be kept to identify any potential future criminal conduct would be expected. We would also wish to see debated what safeguards will be in place to prevent misuse and abuse and how the samples will be collected in a manner which protects the dignity of the child.

The Commission further notes the proposal for a power to allow for the interview of a child with appropriate safeguards. We again refer to General Comment No. 10 and in particular paragraph 58 which specifies that a child being questioned must have access to specific safeguards. Although a child under 12 would not be facing criminal charges, we would expect a number of these safeguards to be in place including, independent scrutiny of methods of interviewing, presence of parents, limits on the length of the interview and appropriate training of interviewing officers.

We note from research by Henderson, Kurlus and McNiven, March 2016 [Footnote 2 CRWIA] that of the 100 referrals to the Children’s Reporter on offence grounds in 2013 – 14, as many as 39 were recorded as having a disability. Six out of nine of those charged
with offences had mental health issues. We would question how different age groups of children as well as children with disabilities would be supported through any interview and children’s referral process.

7. **Do you think that there should be a strong presumption against the release of information about a child’s harmful behaviour when an incident occurred before the age of 12?**

The Commission notes that the Advisory Group agreed that, should the age of criminal responsibility be raised to 12, there should be a strong presumption against the Police including non-conviction information on disclosures about conduct that occurred under the age of 12. The Commission is in favour of this presumption and the recognition of the need to maximise the life chances of children and young people, balanced against robust risk management procedures.

The retention and sharing of non-conviction information in enhanced disclosure checks also gives rise to potential for a breach of an individual’s right to respect for his or her private life. This aspect of privacy concerns a person’s right to informational self-determination – to be "master of all those facts about his own identity": per Laws LJ in *Wood v. Commissioner of Police for the Metropolis* [2010] 1 WLR 123 at [21].

Sharing of such sensitive historical adverse information about the individual in an enhanced disclosure may have the effect of continuing the societal stigma of offending behaviour in under 12s which the legislation is attempting to address. In practical terms it may deter an employer even if the information has no relevance to the individual’s current circumstances or the role in question. Such information will have been established to the lower standard of proof, as noted above.

The Commission notes the decision of the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, which concerned disclosure of cautions, warnings and spent convictions of minors which could have a significant impact on their education and career prospects. The Court held that any such disclosure would amount to an interference with private life, engaging Article 8 (1) and that for any such interference to be justified, rules must not be general, automatic or indiscriminate. There must be clear legislative framework for the collection and storage of data, clarity as to the scope, extent and restrictions of the powers of the police to
retain and disclose such data, and a mechanism for independent review of a decision to retain or disclose data.

The Commission agrees with the report, that there should be a strong presumption against the police including non-conviction information on disclosures about conduct that occurred under the age of 12.

It is also important to have regard to the impact of continued disclosure on children aged 12 and over who will also be affected in terms of restrictions on their ability to undertake certain courses and jobs if they have to disclose offences that occurred in childhood well in adulthood. As such, the Commission queries why the principles applied to disclosure for children under 12 should not apply to children under 16. This may assist to resolve the discrepancy between looked-after children and non-looked-after children as current data shows that a looked-after child is more likely to come into contact with the police.

8. Should individuals who may have obtained a criminal record based on behaviour when they were aged 8 to 11 prior to any change in the age of criminal responsibility no longer have to disclose convictions from that time?

The Commission supports the proposal to end the disclosure requirement for all offences committed between ages 8-11 to remove the impact on adults who are currently still having to disclose offences despite them occurring prior to any new amendment coming into force.

The Committee on the Rights of the Child recommends, that States parties introduce rules that would allow for an automatic removal from criminal records of the name of a child who committed an offence upon reaching the age of 18 [GC 10 para 67], with an extension permissible for serious offences, with safeguards.

9. Where it is felt necessary to release information about an incident occurring before the age of 12 (e.g. in the interests of public safety), do you agree with the Advisory Group’s recommendation that this process should be subject to independent ratification? Please provide reasons for your answer and any views on the most appropriate independent authority.
The importance of a mechanism for independent review of storage and disclosure of data is noted in *R (T) v CCGMP (above)* at para 119. The Commission has no view on the most appropriate independent authority, other than to emphasise that in order to comply with Article 6 (1), such a body must be established by law, must be impartial and independent and have full jurisdiction to examine questions of facts and law, with prompt execution of a binding decision.

10. **Should an incident of serious harmful behaviour that took place under the age of 12 continue to be disclosed when that person reaches the age of 18?**

We note that the UN Committee on the Rights of the Child issued Concluding Observations on the Fifth periodic report on 3rd June 2016. We refer to paragraph 78 (b) which recommends that the State Party: “ensures that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18, and that diversion measures do not appear in children’s criminal records.”

According to paragraph 23 of General Comment 10, diversion measures ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence committed. These include care, guidance, supervision, counselling, probation, foster care, education and training programmes and other alternatives to institutional care.

Accordingly, we have concerns, for the reasons highlighted in our response to questions seven and eight, about disclosure of incidents of serious harmful behaviour which took place under the age of 12.

11. **Do you have comments on wider issues in respect of disclosure for all under 18s?**

See response to questions seven and eight.

12. **Do you have comments on arrangements to provide appropriate and effective support available to victims affected by harmful behaviour, where that behaviour involves children under the age of criminal responsibility?**
The Commission agrees that it is appropriate to consider the rights of victims affected by harmful behaviour.

13. **Do you have any comments on the circumstances in which it might be appropriate to share information with victim where harmful behaviour involves a child under 12?**

As above, the Commission agrees that it is appropriate to consider the rights of victims affected by harmful behaviour. Article 3 of the ECHR which prohibits torture, inhuman or degrading treatment or punishment, includes positive obligations on the State to investigate acts of ill-treatment, both by the state (Assenov and others v Bulgaria) as well as by private individuals (MC v Bulgaria). It has been held that the right to an effective remedy for a victim in terms of Article 13 of the Convention includes “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure” (Askoy v Turkey).

Any process for provision of access to information about the investigatory procedure must balance the rights of the child to privacy in terms of Article 8 of the Convention as well as Articles 16 and 40 of the UNCRC. There is some guidance on this in General Comment 10 at paragraph 66 which emphasises that all professionals involved should keep information that may result in the identification of the child confidential in all external contacts.

14. **Do you agree with the Advisory Group’s recommendation that the age of criminal responsibility in Scotland should be raised from 8 to 12 years of age?**

The Commission strongly supports an increase in the current age of criminal responsibility and notes that age 12 was chosen as it meets the ‘minimum international expectation from the UN’, it is the age identified in the Criminal Justice and Licensing (Scotland) Act 2010 and 12 year olds are deemed to have capacity to instruct a solicitor and consent to adoption proceedings.

UNCRC General Comment 10 on Children’s Rights in Juvenile Justice states at paragraph 32- 33: “States parties are encouraged to increase their lower MACR (minimum age of criminal responsibility) to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. ....At the same
time, the Committee urges States parties not to lower their MACR to the age of 12. 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 CRC, 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.”

It is noted that the UN has been critical of countries such as Denmark (Concluding Observations 2011), for lowering their MACR from 15 to 14 and that Denmark responded by raising it to 15 again.

We would point out that many neighbouring countries have a higher minimum age. For example, the minimum age for criminal responsibility is 15 across Scandinavia. The average in Europe is 14 [see Child Rights International Network research available at www.crin.org]

The consultation paper states that offending amongst 8-11 year olds was rare and provided data to that effect. The Commission queries what research has been carried out on 12 year olds and other groups under 18 and how that correlates to a requirement for the minimum age of criminal responsibility to be set at 12 years old. Scotland leads on many human rights and equality issues and the Government may therefore want to consider setting a higher MACR to clearly reflect best practice in this area.

15. While arrangements are already being made to consult with groups of children and young people, please tell us about the groups of children and young people you believe should be consulted as part of this consultation process and how they should be consulted.

In terms of consultation, the Commission notes that the Advisory Group states that children and young people will be supported to participate in the development of the proposal. The Commission would suggest that adults who have been affected by the current system, in terms of having to disclose criminal offences from childhood, should also be consulted.

Conclusion

The Commission is grateful for the opportunity to comment on the proposals. While the Commission supports an increase in age, in conjunction with our comments above we would remind the
Scottish Government that any changes should be carried out in line with the UN Convention on the Rights of the Child.

Coinciding with our comments above, we would question why the Advisory Group’s terms of reference were restricted to considering an increase to age 12 as being the minimum age for criminal responsibility and would welcome further consideration of a higher age being set.

Further, we would ask that further consideration is given to definitions in relation to the suggested police powers and taking of samples as well as appropriate safeguards.

We hope this response is useful. If you have any questions, please do not hesitate to contact us.