

Scottish Government submission of 7 December 2023

PE2064/A: Ensure that under 16s charged with rape are treated as adults in the criminal justice system

Please find a response to petition PE2064 relating to under 16s charged with rape, calling on the Scottish Parliament to urge the Scottish Government to ensure that under 16s charged with rape are treated as adults in the Criminal Justice System. The petition highlights that the petitioner has been in contact with the Crown Office and Procurator Fiscal Service (COPFS) and the Lord Advocate and also had communication with the Ministry of Defence over the last 3 years. The petitioner is enquiring about the rights of victims, and states their view that under 16s charged with rape should be added to the sex offenders' register.

We recognise the devastating impact of sexual crimes on victims, their families and wider society. However, I must advise that neither Scottish Ministers or officials are able to comment on, or intervene in, independent prosecutorial decision making by the COPFS. In particular, section 48(5) of the Scotland Act 1998 provides that any decision taken by the Lord Advocate as head of our system of prosecution in Scotland shall be taken by her independently of any other person.

Decisions around whether to prosecute a child are taken by COPFS. Where children's offence cases are jointly reported to COPFS and the Principal Reporter, COPFS will make the ultimate decision – having considered a range of factors such as, for example, the seriousness of the alleged offence and prior pattern of offending. The Lord Advocate has [instructed a review](#) of prosecutors' current approach to the prosecution of a range of cases, including children accused of rape.

It may be helpful to outline the Scottish Government policy position around the issues contained within the petition. The more general policy position is to keep children out of the Criminal Justice System, wherever possible and appropriate, ensuring that they receive the right support via an age-appropriate mechanism, to address their behaviour, as well as to attend to their underlying needs and any risks they may present to others. This is in line with our obligations under the UN Convention on

the Rights of the Child and our commitment to keeping the Promise. We are also conscious of the need to strike a balance between supporting children who come into conflict with the law and ensuring that our communities are safe and that victims are supported.

Operating as part of our wider Whole System Approach to youth justice, Scotland's children's hearings system is a long-established forum for addressing concerns about children and young people, including where they may have committed a serious offence and the COPFS have decided to remit the case to the Principal Reporter. This is a welfare based system that treats offending and harmful behaviour by children in different ways from the criminal justice system.

The Children (Care and Justice) (Scotland) Bill currently progressing through Parliament includes provisions which will enable more children to have access to the hearings system on offence grounds, but only where COPFS consider that it is appropriate in an individual case. This Bill also includes new provisions around support and information for victims, balancing the rights of those who have been harmed with children who have caused harm. The Bill gives the children's hearings system more scope to protect victims with regards to information sharing notification, measures to specify that a victim or place is not to be approached, and widening of the cases that can be dealt with by the application of movement restriction conditions. Intensive support and monitoring can be put in place to support a child to stay away from a specified person and/or place.

For those involved in offending behaviour, such as sexual offending, then multi-agency public protection arrangements, known as 'MAPPA', are in place. These are partnership arrangements to assess and manage the risk posed by that type of offending. Implementation of MAPPA with under 18s is strengthened through integration of the framework of risk assessment, management and evaluation (FRAME) guidance for children aged 12-17 and care and risk management (CaRM) processes. This approach is followed by partners across Scotland working with children where their behaviour may cause, or has caused, serious harm.

With regard to the points made in the petition relating to the sex offenders' register, if a child is over the age of criminal responsibility (12 years) but aged under 16 (or 18) and they are prosecuted for rape and convicted, the notification requirements of the Sexual Offences Act 2003 (the 2003 Act) will apply. Section 82(2) makes specific reference to

situations where the offender is under 18 and reduces the length of the notification period. Section 89 of the 2003 Act makes specific provision in relation to young offenders aged under 16 (18 elsewhere in the UK) allowing the court to impose the requirement to notify a parent rather than the young person.

Where an offence has a sexual component, as in the category of cases of concern to the Petitioner, a court can choose to add them to notification arrangements. Under section 80, the notification requirements apply where the person is convicted of an offence which is listed in schedule 3. Paragraph 60 of schedule 3 (which is the final paragraph for Scottish offences) lists “An offence in Scotland other than is mentioned....[above]....if the court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual element to the offender’s behaviour in committing the offence”.

Turning to questions of the disclosure of childhood offending and protection of vulnerable groups, section 3 of the Rehabilitation of Offenders Act 1974 (‘the 1974 Act’) provides that where a child is referred to a children’s hearing on grounds that the child committed an offence, the acceptance or establishment of that ground is a conviction for the purposes of the 1974 Act and the disposal by the hearing represents a ‘sentence’.

The purpose of section 3 is to ensure disposals from a children’s hearing are given protection under the 1974 Act. The Management of Offenders (Scotland) Act 2019 set the disclosure period for all children’s hearings disposals at zero, which means they are spent immediately. This means that they will not appear on a basic disclosure issued by Disclosure Scotland.

However, different rules apply when it comes to higher level disclosure regime – the standard disclosure or enhanced disclosure under the Police Act 1997 (the 1997 Act) and PVG scheme record under the Protection of Vulnerable Groups (Scotland) Act 2007. These disclosures are sought in relation to roles which involve a particular level of trust, for example, working with vulnerable people or having access to sensitive assets. Higher level disclosures can therefore contain certain ‘spent’ convictions. Schedule 8A of the 1997 Act contains offences which will continue to be disclosed indefinitely unless a sheriff orders otherwise, and it includes the statutory and common law offence of rape. This

applies regardless of whether the offence is dealt with in a criminal court or at a children's hearing.

Other Relevant Information (ORI) is also important for public protection. It allows for the disclosure of non-conviction information and is a direct response to past tragic cases where information/intelligence was known about serious offenders but not disclosed. However, a statutory test must be applied before this information can be disclosed. If a police force holds information about a disclosure applicant, the chief constable must decide whether they reasonably believe that it is relevant to the purpose of the disclosure request and whether it ought to be disclosed. Any disclosure of ORI in respect of conduct below the age of criminal responsibility (pre 12) will be subject to review by the Independent Reviewer – that function introduced in 2021 for under 12s' conduct under the Age of Criminal Responsibility (Scotland) Act 2019.

I hope the Committee finds the foregoing information helpful.

Children and Families Directorate