

# **Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2064](#): Ensure that under 16s charged with rape are treated as adults in the criminal justice system, lodged by Julie Mitchell**

## **Brief overview of issues raised by the petition**

The petition calls for 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.

It raises the issue of the rights of child victims in these cases, and that those under 16 charged with rape should be added to the sex offenders register.

## **Current legal position**

Currently, the Lord Advocate has to authorise the prosecution of all children who are over the age of criminal responsibility (age 12) and under the age of 16.

The [Lord Advocate's Guidelines: Offences committed by children](#) (updated October 2021) set out which offences must be jointly reported by the police to both the Children's Reporter and the Procurator Fiscal (PF). Category 1 in the Guidelines refers to:

“Offences which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest.”

This would cover the crime of rape.

Currently, there is also a requirement under these Guidelines to jointly report offences committed by those aged 16 and 17 years old and subject to a [Compulsory Supervision Order](#) (CSO), or within the children's hearings system awaiting a decision on whether compulsory measures are required.

Following such joint reporting, a discussion between the PF and the Children's Reporter will take place, with the PF making the final decision on whether they will proceed with a prosecution within the adult justice system. If a child is remitted to the children's hearings system, the Children's Reporter will then decide on the grounds of referral and whether to take these to a children's hearing.

One outcome of a children's hearing can be that a [CSO is made](#). This “requires a child to comply with specified conditions and requires the local authority to perform duties in relation to the child's needs”. The conditions can include that the child resides in a particular place, placing a restriction on the child's liberty including a movement restriction order, or requiring the child is

placed in secure accommodation (if specific conditions are met). A children's hearing cannot place a child's name on the sex offenders register.

Where a case proceeds within the adult criminal justice system and results in a conviction for rape, the notification requirements of the Sexual Offences Act 2003 apply regardless of the age of the individual. The length of the notification period is, however, reduced for those aged under 18.

## **Children (Care and Justice) (Scotland) Bill**

The [Children \(Care and Justice\) \(Scotland\) Bill](#) ("the Bill") was introduced in the Parliament on 13 December 2022. Stage 2 of the scrutiny process was completed on 7 February 2024. At this stage, MSPs can propose changes to the Bill, and these are considered and decided on by a committee. The lead Committee for this Bill is the [Education, Children and Young People Committee](#).

### *Prosecution of children (under the age of 18)*

Section 10 of the Bill will amend [Section 42 of the Criminal Procedure \(Scotland\) Act 1995](#) so that the Lord Advocate would now have to authorise the prosecution of all those aged over 12 and under 18, rather than the current upper age limit of 16.

Part 1 of the Bill makes changes to the children's hearings system. It means that all children under the age of 18 will be able to be referred to the Children's Reporter.

The Lord Advocate's Guidelines: Offences committed by children are currently being reviewed due to the proposed changes in the Bill.

Amendments were lodged at Stage 2 of the Bill scrutiny process that would require that indictable (serious) offences for 16 and 17 year olds must be dealt with by the adult criminal justice system. These were then withdrawn.

### *Victims' rights*

In terms of victims' rights, this Bill means that the [Scottish Children's Reporter Administration](#) (SCRA) must inform victims of their right to receive information.

Amendments which were accepted at Stage 2 of the Bill mean that information victims can receive will include:

- Where the decision at a hearing is to make, terminate, vary or continue a CSO.
- Measures which have been included on the CSO around there being no contact or communication with the victim. (The Bill includes specific provisions meaning that a CSO may contain measures that prevent a child from approaching or communicating with someone or entering a specific place.)

- If a secure accommodation authorisation has been included in a CSO, and when a child is released from secure accommodation or transferred to an adult prison.
- Details of how a referral has been discharged in all circumstances.

Further amendments to this Bill that were agreed at Stage 2 mean that:

- Support services will be provided for victims involved in cases dealt with by the children's hearings system.
- In cases where a court would be entitled to make a non-harassment order following a plea or finding of guilt, they can still do this even if the case is remitted to be dealt with by the children's hearings system.

## **Review of diversion from prosecution for sexual offences**

The Lord Advocate announced a [review of diversion from prosecution for sexual offences](#) in July 2023. Diversion from prosecution is one of a range of community justice interventions that prosecutors can consider. It involves an offender being referred to social work services or a partner agency for support, treatment or other action to address the underlying causes of the alleged offending rather than the case being taken through the criminal justice system. This review will look at whether diversion is being used appropriately for sexual offences.

The review was [subsequently expanded](#) to include an examination of those aged between 12 and 15 who are accused of rape and dealt with through the children's hearings system.

## **Scottish Government response**

The [Scottish Government responded to this petition](#) on 7 December 2023.

In their response, they highlight the independence of the Lord Advocate in making prosecutorial decisions, indicating that the Crown Office and Procurator Fiscal Service will always make the final decision on whether a child is prosecuted in the adult court system.

They also outline their general policy position, in line with their obligations under the United Nations Convention on the Rights of the Child and their commitment to The Promise, stating this is to "keep children out of the criminal justice system, wherever possible and appropriate".

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**Senior Researcher**  
7 February 2024

The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content
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