

Age of Criminal Responsibility (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Age of Criminal Responsibility (Scotland) Bill introduced in the Scottish Parliament on 13 March 2018.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 29-EN);
 - a Financial Memorandum (SP Bill 29-FM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 29-LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

Background

General

4. Scotland's current age of criminal responsibility (ACR), at age eight, is the lowest in Europe. With this Bill, all children in Scotland under 12 will know that they cannot be treated as a "criminal" who has committed an offence. They will no longer be left with a criminal record for any behaviour under that age.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

5. We know that the number of incidents involving under-12s currently reported as offending is small and reducing. We know that most of this behaviour is minor to moderate in nature and impact. We know that a disproportionate number of the under-12s currently dealt with for offending concerns 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.

6. We know 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 response.

7. Taken together, these considerations have informed the development of this Bill, and all key interests should take confidence that this Bill seeks to respect their rights.

8. Victims will know that incidents will be fully investigated to find out what happened, that they will still have rights to information and support and that the right agencies will take the necessary steps to address a child's behaviour and to minimise the risk of recurrence.

9. All of us in Scotland can be reassured that the whole system approach to youth justice, working in tandem with the children's hearings system, is proven and effective. There is an appropriate continuum of responses to harm, and the most serious incidents will be responded to as seriously as they need to be.

10. If things go wrong, and children under 12 are involved in harmful behaviour, they will have the chance to work through what happened, to understand its impact, to make that better where appropriate and to move on without it unnecessarily affecting the rest of their lives. Children will know that they have a stake in their own future and that they will not be responded to with punitive measures or stigmatising labels, if they can take the opportunities and support offered to them as they grow up.

11. The Bill recognises that children under 12 can be involved in behaviour which causes harm. For the most harmful cases, the Bill ensures the police can fully investigate what happened, protect others, help victims and consider the disclosure of information about a child's behaviour at a later date, where

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

that is justified in an individual case. All harmful behaviour involving children under 12 will continue to be addressed, but only in the most harmful of incidents, for a very small proportion of children under 12 who are currently charged with an offence, will additional investigative and other measures apply.

12. For all children under 12 who would currently be charged with an offence, this Bill will not impact on the current ability of services to address both the child's behaviour and the needs underlying it, nor on the ability of the whole system approach to turn around harmful behaviour and its causes, or on the children's hearings system's wide powers to put in place compulsory measures of supervision where required.

The age of criminal responsibility in Scotland

13. The ACR in Scotland is the age at which a child can be charged with having committed an offence, referred to the Principal Reporter, and potentially to a children's hearing on that basis. The children's hearings system, discussed further below, considers in the same system whether compulsory supervision is required for children and young people who commit offences and children and young people who may need care and protection – as they are often the same children and young people.

14. In Scotland, the current ACR is not the age from which children can be subject to the criminal justice system. While the ACR in Scotland is eight, the age of prosecution is 12; that is the age from which children can be prosecuted in court in respect of criminal offences. Children over 12 but under 16 can only be prosecuted in court on the instructions or instance of the Lord Advocate.

15. While children aged under 12 cannot be prosecuted in court in Scotland, a child can be held responsible for a crime from the age of eight. Notwithstanding the welfare focus of the children's hearings system, eight is considered to be an unacceptably low ACR and has been the subject of criticism by the United Nations Committee on the Rights of the Child. The acceptance or establishment that an offence has been committed by a child aged eight or over is later disclosable as a conviction – potentially affecting the child's life chances in the years thereafter. This may have a negative effect on the child's ability to achieve positive destinations in later adolescence and adulthood, and therefore a negative effect on society as a whole.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

16. The policy of the Bill is to better protect children from the harmful effects of early criminalisation, while ensuring that incidents of harmful behaviour by those aged under 12 can continue to be effectively investigated and responded to appropriately. Action to address the child's behaviour will remain based on what is needed, commensurate with their age and stage of development, notwithstanding the removal of the criminal label.

17. The Bill aims to make clear that harmful behaviour involving children under 12, most of whom will be in primary school, should continue to be fully investigated to find the truth of what happened and to ensure that victims and others affected by that behaviour continue to be protected and responded to with respect and compassion. The Bill therefore puts in place appropriate additional measures to deal with consequences of the change – including investigative measures for the most serious cases, protections for victims' rights and interests, and the required changes to the disclosure system.

18. The ages of criminal responsibility in European Union Member States are as follows:

Member state	Age	Member state	Age
Austria	14	Italy	14
Belgium	12	Latvia	14
Bulgaria	14	Lithuania	16
Croatia	14	Luxembourg	16
Rep of Cyprus	14	Malta	14
Czech Rep	15	Netherlands	12
Denmark	15	Poland	15
Estonia	14	Portugal	16
Finland	15	Romania	14
France	13	Slovakia	14
Germany	14	Slovenia	14
Greece	14	Spain	14
Hungary	14	Sweden	15
Ireland	12	United Kingdom	10 (England, Wales & Northern Ireland) 8 (Scotland)

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

19. The ACR in Scotland is the age from which the police will respond to a child as an “offender”, investigate offending behaviour, charge a child with a criminal offence and potentially submit a report on the offence to the Principal Reporter (the chief officer of the Scottish Children’s Reporter Administration (SCRA)). Young people and children aged eight and older who are involved in offending behaviour can be referred to the Principal Reporter where it is considered that they are in need of protection, guidance, treatment or control, and where compulsory measures might be necessary. Where the Principal Reporter considers that the child may require to be made subject to a compulsory supervision order and one of the grounds for referring a child applies, the Principal Reporter will arrange a children’s hearing. One of the grounds on which a hearing may be arranged is that the child has committed an offence. Currently this includes children aged between eight and 11.

20. The children’s hearings system considers all children referred in the same forum whether they are at risk themselves because of the acts or omissions of others, or they are alleged to have committed an offence. In all cases, including where a child is referred to a children’s hearing on the grounds that they have committed an offence, there is a general requirement to treat the welfare of that child as the paramount consideration. Punishment of the child is not a factor. The majority of offending behaviour by children of all ages in Scotland requiring formal intervention is dealt with in this welfare-based, non-adversarial system.

21. The response in Scotland to harmful behaviour of children should be seen in the context of Getting it Right for Every Child (GIRFEC) – including the Whole System Approach (WSA) to youth justice, which encompasses “early and effective intervention” (EEI).

22. GIRFEC is the national approach in Scotland to improving outcomes and supporting the wellbeing of children and young people by offering the right help at the right time from the right people. It supports them and their parents and carers to work together with the services that can help them. It puts the rights and wellbeing of children and young people at the heart of the services that support them, including early years services and schools to ensure that everyone works together to improve outcomes for a child or young person.

23. The WSA, introduced in 2008 and updated in 2011, aims to reduce offending by young people and addresses their needs by emphasising a multi-agency, multi-disciplinary approach to provide tailored support and

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

management of the child. This ensures that practitioners work together to support families, and take action at the first signs of difficulty. A key element of the approach is to emphasise timely and effective intervention to minimise the number of children in criminal justice systems and formal processes. This is known as EEI and includes action with the child, family and other significant interests to prevent offending, by diverting children into early non-compulsory action without the need for referral to the children's hearings system.

24. EEI is a national framework for working with young people aged eight to 17 years who have been involved in offending behaviour. It aims to divert these young people away from statutory measures, where appropriate, and respond to concerns in a timely manner. This means that many children and young people who have committed offences will be diverted from referral to the Principal Reporter and referred to the EEI process where other interventions are appropriate and proportionate.

25. The importance of the GIRFEC approach, the use of EEI, the potential referral to the Principal Reporter and the child focussed nature of the children's hearings system provides an escalating scale of potential action in response to children involved in harmful behaviour. The overall aim of this approach is to respond to concerns in a proportionate and effective manner, commensurate with the child's age and capacity and the seriousness of the concern – using formal systems only when required. This proportionate, tiered approach will continue when the ACR is raised. While the child under 12 will no longer be treated as an offender, the harmful nature of their behaviour and their underlying needs, as well as the harm caused to victims, will still be recognised, and interventions will continue to be tailored to address the behaviour of the child, taking into account their circumstances.

26. All children under 12 are therefore currently responded to using systems which take decisions focussed on their welfare. Nevertheless, children aged between eight and 11 are still treated as "offenders" by the police and other agencies. Those children can currently be referred to formal legal systems on the basis that they have committed a criminal offence and they can accrue disclosable convictions via those systems. The Bill seeks to address these issues.

Preparation for reform

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

27. On 31 October 2000 the Scottish Law Commission was given the following terms of reference from Scottish Ministers:

“To identify the legal issues which are involved in rules fixing an age of criminal responsibility; to consider in the light of contemporary legal doctrines and principles the rule contained in section 41 of the Criminal Procedure (Scotland) Act 1995 that it shall be conclusively presumed that no child under the age of eight can be guilty of any offence; to identify the legal implications of any change to that rule; and to make recommendations for reform.”

28. The Commission’s report which was published in January 2002 included the following recommendations:

“1. Any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished. (Paragraph 3.5)

2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted. (Paragraph 3.20)”

29. The second recommendation was implemented by the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) which amended the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) to prohibit the prosecution of any child under the age of 12. This approach was intended to address concerns raised in the UN Committee on the Rights of the Child’s (UNCRC) General Comment No. 10 (see below) and to set 12 as the minimum age in Scotland at which the criminal justice system and criminal sanctions could apply. Raising the age of **prosecution** rather than the age of **criminal responsibility** was also intended to ensure continuity of the police’s ability to take and retain forensic samples and record and make future use of information about offending behaviour in which eight to 11 year olds may have been involved.

30. The first recommendation, which would have removed the statutory provision setting the age of responsibility from the 1995 Act¹ and relied on a minimum age of prosecution at age 12 as the only rule relating to when a child can become subject to the criminal justice system, was not taken forward at that time. Should the ACR provision have been removed in the absence of

¹ Section 41 of the Criminal Procedure (Scotland) Act 1995.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

additional reform, children of all ages (including those under age eight) would have potentially been considered responsible for criminal activity, investigated as such, subject to the full suite of police powers, and charged with criminal offences, albeit not prosecuted if under age 12. The age of prosecution would have remained as the effective age of responsibility and the point at which criminalising responses were considered appropriate.

31. The United Nations Committee on the Rights of the Child's (UNCRC) General Comment No. 10 – Children's Rights in Juvenile Justice (2007)² explored the issue of the age of criminal responsibility in some detail. Paragraph 31 of the General Comment states:

“Article 40 (3) of the CRC (Convention on the Rights of the Child) requires States parties to seek to promote, inter alia, the establishment of a age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific age in this regard. The committee understands this provision as an obligation for States parties to set a minimum age of criminal responsibility (MACR). This minimum age means the following:

- Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests.
- Children at or above the MACR at the time of the commission of an offence (or: infringement of the penal law) but younger than 18 years can be formally charged and subject to penal law procedures. But these procedures, including the final outcome, must be in full compliance with the principles and provisions of CRC as elaborated in the present general comment.
- In line with this rule the Committee has recommended States parties not to set a MACR at too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties

² <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.”

32. In the 2012 update report to “Do the Right Thing”, the Scottish Government made a commitment “to give fresh consideration to raising the age of criminal responsibility from eight to 12 with a view to bringing forward any legislative change in the lifetime of this parliament”.

33. In 2013, the Parliament’s Justice Committee was asked during evidence at Stage 1 of the (then) Criminal Justice (Scotland) Bill to consider including the age of criminal responsibility within the legislation. Those giving evidence, including human rights and children’s rights experts and children’s representative organisations, had differing views on whether the issue should be taken forward or if that Bill was the right vehicle. The Convener commented on 8 October 2013 that “It is doubtful whether, at this stage, we and the Government would have the mechanism or the time to test the proposition thoroughly so we could get it right, so I am not sure it would be appropriate to insert it at this stage.”³

34. Amendments to raise the age of criminal responsibility were lodged at Stage 2 and Stage 3 of the Criminal Justice (Scotland) Bill (now the 2016 Act) in 2015. The amendments at Stage 3 would have raised the age to 12 and set implementation at 18 months after Royal Assent of the 2016 Act. The amendments were not agreed to.

35. During Stage 2, the Cabinet Secretary for Justice, Michael Matheson MSP, committed to the creation of an expert Advisory Group to look at the issues accompanying an increase in the ACR to 12 years. The Advisory Group on the Minimum Age of Criminal Responsibility was set up in autumn 2015 and was tasked by Scottish Ministers with considering the policy, legislative and procedural implications. The Advisory Group approached an

³ Official Report of the Scottish Parliament, Justice Committee meeting of 8 October 2013, at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9025>

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

increase in the ACR to 12 years old not from the perspective of if it should happen, but rather how and when it should happen.⁴

36. The issue of the ACR was raised when the UK was examined in relation to the United Nations Committee on the Rights of the Child in June 2016. The Committee's Concluding Observations were:

"The Committee notes that the Government of Scotland is open to raising the minimum age of criminal responsibility and that an advisory group was established in 2016 to explore these issues and develop recommendations for consultation [...] However, the Committee is concerned that [...] The minimum age of criminal responsibility remains 8 years of age in Scotland and Turks and Caicos Islands and 10 years for the rest of the State party; [...] In particular, the Committee recommends that the State party [...] Raise the minimum age of criminal responsibility in accordance with acceptable international standards."⁵

37. The Advisory Group [report](#) published in March 2016 recommended that the Scottish Government and Scottish Parliament take action to raise the age of criminal responsibility to 12 years. In addition to detailed recommendations in respect of the role of the police, children's hearings, disclosure, and on care, protection and risk and a proposed package of "safeguards" preserving and introducing certain additional measures, the Advisory Group's Key Recommendations were:

- that the Scottish Government and Scottish Parliament take early action to raise the age of criminal responsibility to 12 years;
- that this reform should mark a clear departure from the involvement of young children under 12 in criminal procedures or in disclosure systems;
- that there should be appropriate and effective support available to those victims affected by harmful behaviour;

⁴ Official Report of the Scottish Parliament, Justice Committee meeting of 8 September 2015, Stage 2 proceedings (Day 1) for the Criminal Justice (Scotland) Bill, at <http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10071&mode=pdf>

⁵ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

- that children and young people should be supported to participate in the development of this proposal, including ensuring their meaningful involvement in any consultation. Particular care should be taken to ensure that the views of children and young people most likely to be affected by this proposal are sought and taken into account.

38. Those recommendations have informed the development of the Bill. The [Scottish Government's Programme for Government 2016](#) indicated (at page 26) that consideration would be given to the case for raising the ACR from eight to 12 years. In consequence, the former Minister for Childcare and Early Years made a statement in the Scottish Parliament Chamber on 1 December 2016 announcing that “we will raise the minimum age of criminal responsibility in Scotland from eight years to 12 and we will introduce a Bill in this session to do so.”⁶ The [Scottish Government's Programme for Government 2017-18](#) confirmed (at page 14) that a Bill would be introduced to raise the ACR from eight to 12.

The current legal framework

39. As outlined above, Scotland has two rules which relate to the age at which a child can be held criminally responsible. The first is the age below which a child is deemed to lack the capacity to commit a crime. This age is currently eight by virtue of the rule contained in section 41 of the 1995 Act which states that it “shall be conclusively presumed that no child under the age of eight years can be guilty of an offence”. The second is the age of prosecution. This is currently age 12, although children below the age of 16 can be prosecuted only on the instructions of the Lord Advocate or at his instance, by virtue of sections 41A and 42(1) of the 1995 Act. As a result of these two rules:

- children under the age of eight are presumed conclusively not to be guilty of any offence by way of section 41 of the 1995 Act. In the case of *Merrin v S* 1987 (SLT 193) the Inner House of the Court of Session held that the offence ground of referral could not be used when the child was under the ACR at the time of the offence, because the effect of the provision was that a child under eight did not have the capacity to commit the offence.

⁶ Scottish Parliament, Official Report 1 December 2016, <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10663>

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

- children under the age of 12 (but aged eight and over) cannot be prosecuted following section 41A of the 1995 Act, but their offending behaviour can be dealt with through the children's hearings system should compulsory measures be required for the child. Should compulsory measures not be necessary, the principles of GIRFEC and the application of EEI ensure that children are kept out of formal systems when possible, where interventions other than formal action are suitable. This means that many children will not be referred to the Principal Reporter, but will still be worked with to address concerns regarding their behaviour.
- children between the ages of 12 and 15 can be prosecuted, but in terms of the Lord Advocate's Guidelines⁷, should only be reported to the Procurator Fiscal for consideration if the offence is sufficiently serious (e.g. murder, rape) to be dealt with on indictment, otherwise they will be dealt with by the children's hearings system. The number of young people (12 to 17) prosecuted in Scotland's courts has fallen by 78% – from 9813 in 2006-07 to 2203 in 2015-16.
- children aged 16 or 17 who remain subject to compulsory supervision through the children's hearings system can continue to be managed in this system or can be prosecuted (the decision to be made by the Procurator Fiscal following discussion with the Principal Reporter). The court can also chose to remit such a child back to the children's hearings system for disposal (section 49 of the 1995 Act).

40. The majority of children of all ages involved in suspected offending behaviour are responded to outwith the criminal justice system, either by Early Effective Intervention or referral to the Principal Reporter for possible referral to a children's hearing. Offences of a serious nature involving children over 12 can be referred to the Procurator Fiscal for consideration for prosecution.

41. Where a child is referred to a children's hearing on the ground that they have committed an offence, in any resulting proof proceedings in the Sheriff Court the standard of proof is the same as the test that applies in criminal proceedings: beyond reasonable doubt. For all the other (non-offence) grounds set out in section 67 of the 2011 Act, the standard of proof is that of

⁷ Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children, March 2014.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

civil proceedings: the balance of probability. The rules of evidence are also different, with the civil rules of evidence under the Civil Evidence (Scotland) Act 1988 applicable in children's hearings' proof for non-offence grounds. There is therefore no requirement for corroboration in proof proceedings in relation to non-offence grounds, and hearsay evidence is always admissible in such proceedings. Where an offence ground is the basis for a referral, hearsay is only admissible in very limited circumstances.

The role of the children's hearings system

42. The children's hearings system is Scotland's unique care and justice system for children and young people. As recommended by the Advisory Group, the Bill does not amend the grounds of referral to a children's hearing, because one or more of the other existing grounds could be applied. The children's hearings system aims to ensure the safety and wellbeing of vulnerable children and young people through a lay tribunal. The children's hearing makes decisions about whether compulsory measures of supervision are necessary to support the child or young person. Decisions are made with the welfare of a child as the paramount consideration⁸. In preparation for this Bill, consideration was given to whether reform of the grounds for referral to the children's hearings system was required to ensure the system will continue to respond effectively to incidents of concerning behaviour by under-12s, given that the offence ground will no longer apply in relation to children age eight to 11. The Bill therefore does not amend the referral grounds.

43. One of the fundamental principles of the children's hearings system is that children and young people who commit offences, and children and young people who are otherwise in need of care and protection (e.g. children who have been neglected), are dealt with in the same system and in the same way. Children most at risk of being involved in harmful behaviour may also be at risk, or have experienced harm themselves. Children subject to the offence ground of referral are often the same children and young people referred on other grounds. Currently, any child aged eight to 16 (and a 16 and 17 year old subject to compulsory supervision) who commits an offence may be referred to the Principal Reporter, where the police consider it might be

⁸ Except in cases where a decision is necessary for the purpose of protecting members of the public from serious harm. In such cases, the child's welfare is instead a primary consideration.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

necessary for a compulsory supervision order to be made in relation to the child.

44. The Principal Reporter considers all referrals and decides whether to arrange a children's hearing for the child. At a children's hearing, if the grounds for referral are accepted or have been established, the lay independent tribunal – the children's panel members – will consider making the child subject to a compulsory supervision order. Where a case is not referred to a children's hearing, the Principal Reporter may refer the child to the local authority for them to work with the child on a voluntary basis or may take no further action. A fundamental principle of the children's hearings system is that the hearing will consider the individual circumstances of each child, and will make no order in respect of the child, unless to do so is better for the child.

45. It is not the role of a children's hearing to sentence a child or impose a retributive penalty in respect of an offence committed by a young person, no matter how serious. Looking at the child's whole circumstances and the child's potential need for compulsory protection, guidance, treatment or control, the hearing has to decide whether compulsory measures of supervision are needed and, if so, what these should be. They only depart from the paramountcy of the child's welfare when absolutely necessary to protect the public from serious harm, although the child's best interests remain a primary consideration. The focus of the hearing's discussion and decision is to identify the child's risks and needs. The hearing considers how these needs, including preventing further offending behaviour, should be addressed in the context of the child's whole life circumstances.

46. The measures a children's hearing may impose in a compulsory supervision order are wide. They range from requiring contact with social workers or other professionals to referral to a specialist intervention. The measures could require removal of the child from home and placement in kinship care, foster care or residential accommodation, including secure care. Where the hearing considers that the child poses a risk to themselves through self-harming or is at risk of injuring another person, or the child has previously absconded and may do so again putting themselves at risk, the hearing may be able to include a Secure Accommodation Authorisation (SAA) in a compulsory supervision order. This would authorise the child being placed in secure accommodation, which is accommodation that can restrict the liberty of the child. In such cases it is for the Chief Social Work Officer of the relevant local authority, with the agreement of the head of the secure unit, to decide

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

whether to implement the SAA. A compulsory supervision order is subject to regular review and can be continued for up to 12 months at a time if the hearing continues to believe that action is needed, but any such order still in effect when a child turns 18 is terminated at that point. This would apply to all children referred to a children's hearing irrespective of whether they had been referred on an offence ground or a care and protection ground in section 67 of the 2011 Act.

47. When deciding whether to refer a child to a children's hearing on the offence ground, the Principal Reporter considers other factors as well as the sufficiency of evidence relating to the offence. The children's hearings system is designed to consider each child as an individual and so consideration of whether a children's hearing needs to be convened for a child will be based on a variety of factors including:

- the extent of concern regarding the child's welfare (taking into account the child's development, parenting and family and environmental factors);
- the history of co-operation with any previous intervention and the impact of any previous intervention;
- the current motivation to change and willingness to co-operate with any intervention.

48. This means that it is possible for two children to commit the same offence or be involved in the same concerning behaviour, with the same availability of evidence, but for one child to go to a hearing and the other to be dealt with via voluntary measures.

49. Regardless of the seriousness of the offence with which a child has been charged, since the age of prosecution was raised to 12 by the 2010 Act, it is only through the children's hearings system that a child under the age of 12 who commits an offence can be made subject to compulsory measures.

50. Consideration was given to extending the offence ground in section 67(2)(j) of the 2011 Act by adding the words "and, in respect of a child under twelve years of age, has committed an act which would have been an offence but for the age of the child", or other words to the same effect.

51. It was concluded that the amendment was unnecessary as other section 67 grounds are sufficient to consider incidents of harmful behaviour

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

involving children under 12. In particular, it is anticipated that the grounds set out in sections 67(2)(m) and (n) of the 2011 Act (i.e. “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” and “the child is beyond the control of a relevant person” respectively) will be sufficient to cover behaviour dealt with under the offence ground at present where that circumstances of the child would require compulsory supervision. The Principal Reporter will also be able to consider other grounds which may better reflect the factors affecting the child and the reasons why compulsory supervision would be required. For example the ground at section 67(2)(a) of the 2011 Act (i.e. the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired due to a lack of parental control) allows referral where the child is not receiving adequate care or supervision from his/her parents. Such a situation is often linked to, or manifested in, the child’s behaviour.

52. The vast majority of responses to the public consultation exercise which followed the report of the Advisory Group supported the proposition that it would be possible to deal with harmful behaviour of eight to 11 year olds via the existing care and protection (or welfare) grounds (62 yes (86.2%), 5 no (6.9%) and 5 don’t know (6.9%).

Statistical data and research

53. There is considerable [evidence](#) about children in Scotland who display harmful behaviours highlighting the links between vulnerability, victimisation and offending. Many children who display early harmful behaviours are themselves highly vulnerable and may have experienced trauma, neglect, abuse and other adverse childhood experiences in their own lives. Negative early life experiences can leave some children extremely vulnerable to environmental pressures and this can, in turn, contribute to the emergence of violence and/or other forms of harmful or anti-social behaviours in childhood.

54. The number of children aged eight to 11 referred on offence grounds to the Principal Reporter has dropped significantly in recent years – from 798 in 2010-11, 496 in 2011-12, 255 in 2012-13, 209 in 2013-14, 215 in 2014-15, 210 in 2015-16 and 205 in 2016-17. The annual numbers have dropped considerably (by around 74%) over this period. The use of EEI, including the diversion of children from formal systems, may have contributed to this trend. These statistics reflect the wider reduction in offence referrals to the Principal

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

Reporter in respect of all children under 18 over the same period. In relation to the under 12 cohort, only a small minority of these referrals result in children's hearings being arranged to consider compulsion, and an even smaller proportion of referrals result in compulsory supervision.

55. SCRA published [research](#) in March 2016 which looked at the circumstances and outcomes of 100 children aged eight to 11 referred for offending in 2013-14. The research found that in only six cases was the child referred to a children's hearing by the Reporter. In four of those, the Reporter also referred the child on other grounds of a non-offence nature (i.e. care and protection grounds). Of the remaining two, in one the child denied the offence, which was subsequently referred to the Sheriff court for proof and was not found established. There was, therefore, only one child in a sample of 100 referred in 2013-14 where the referral of the child and the consideration of compulsory supervision were dependent on the use of the offence ground.

56. The research also showed that 75% of the children reviewed had been known previously to agencies including 26% who were already on compulsory supervision for non-offence reasons. In addition, 39% had disabilities and physical and/or mental health problems, 53% of the children had recorded concerns about their educational achievement, attendance or behaviour in school and 25% had been victims of physical and/or sexual abuse; most by family members or associates of their parents. Therefore, while the number of eight to 11 year olds accepting/having offence grounds established is currently low, there is clear evidence to suggest that for those children appearing before a children's hearing, their behaviour is very often associated with other preceding disruption, disadvantage or trauma in their life. It is clear from this that eight to 11 year olds who offend are mainly vulnerable for other reasons – the "criminal" label does not help the system to deal with them effectively and it is neither the test for intervention nor the focus of any work with these children.

Policy objectives of the Bill

Overview

57. The policy of the Bill is focussed on protecting children, reducing stigma and ensuring better future life chances, rather than reflecting a particular understanding of when an individual child in fact has the capacity to

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

understand their actions, or the consequences that could result from those actions – either for them or for the people they may have harmed.

58. The main purpose of the Bill is to raise the ACR in Scotland from eight to 12, to align it with the current minimum age of criminal prosecution, and reflect Scotland’s progressive commitment to international human rights standards so that:

- children under the ACR are not stigmatised by being criminalised at a young age due to being labelled an “offender”;
- children under the ACR are not disadvantaged by having convictions for the purposes of disclosure, which can adversely affect them later in life;
- the new ACR aligns with longstanding presumptions around maturity, rights, and participation. The age of 12 also has other existing significance in Scots law (see below); and
- the Bill aims to improve the position of children with care experience (especially children looked after away from home) whose behaviours are more likely to have been reported to police – and therefore to attract a criminalising state response – than Scotland’s child population in general.

59. In consequence of the change to the ACR, the Bill also provides for a number of measures (referred to as “safeguards” by the Advisory Group) to ensure that action can still be taken by the police and other authorities when children under the age of 12 are involved in serious incidents of harmful behaviour, to protect the child’s rights and best interests and the interests and rights of anyone harmed. While these measures include specific investigatory powers for the police, the Bill also makes provision for a victim of a serious incident to receive information and a right for a child under the ACR thought to be responsible for a serious incident to have access to a supporter and to an advocacy worker during a formal police interview. The Bill also makes changes to the disclosure system, removing the automatic disclosure of convictions for the behaviour of under-12s and putting in place independent consideration of information to be included in response to a disclosure check, when that check may disclose non-conviction, but potentially adverse, information dating back to when the applicant was under the ACR.

Key information

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

60. The approach towards youth justice in Scotland has, since the Kilbrandon Report of 1964 and the subsequent creation of the children's hearings system through the Social Work (Scotland) Act 1968, been welfare-based. In essence, this means putting the child's needs and best interests at the centre of both decision making processes and any interventions. Scotland's children's hearings system is internationally acknowledged as providing a child-centred, welfare focussed approach towards managing a child's harmful behaviour, promoting "social education" and reintegration for the child by attending to their needs along with their deeds. The children's hearings system has the same decision making powers whether a child is referred on offence or non-offence grounds.

61. While retribution forms no part of the approach of the children's hearings system, from a child's perspective, being brought before a children's hearing on offence grounds can lead to a perception that they will be punished for their actions. In addition, in their response to an offence, the police will have treated the child as an "offender" using the criminal justice powers available to them in the investigation of crime, and will have charged the child with an offence. Where a child feels that their behaviour is labelled as "criminal" at a young age, it can reinforce feelings of low self-esteem and may create or intensify a self-fulfilling negative cycle whereby the child ends up being involved in further harmful behaviour.

62. The internationally-renowned longitudinal Edinburgh Study of Youth Transitions and Crime⁹ 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. It found that "Taken together, our findings indicate that the key to reducing offending may lie in minimal intervention and maximum diversion: doing less rather than more in individual cases may mitigate the potential for damage that system contact brings ... More significantly, our findings provide some support for the international longitudinal research ... In particular, they confirm that repeated and more intensive forms of contact with agencies of youth justice may be damaging to young people in the longer term ... Such findings are supportive of a maximum diversion approach".(McAra and McVie, 2007¹⁰).

⁹ <http://www.esytc.ed.ac.uk/>

¹⁰ 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.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

63. Raising the ACR seeks to make it explicit to children that while any behaviour under the age of 12 will be fully investigated, they will not be responded to by providing a stigmatising label or involving them in a process which re-creates adversarial criminal procedure. Rather, if the concerns about harmful behaviour are accepted or established, support will be provided in order to help the child understand and acknowledge the harm they have done, and to attend to their wider individual and environmental welfare needs, before supporting them to move on and rehabilitate from an incident in childhood. The Bill will also reinforce Scotland's long-established welfarist approach to children aged eight to 11 and focus on how to support them and avoid harmful behaviour being repeated in future.

64. Raising the ACR may also have a broader impact in that it has the potential to bring about a positive cultural shift in how the harmful behaviour of younger children, and the issues that lead to it, is viewed and understood in Scotland.

65. Increasing the ACR represents a proportionate, progressive reform based on clear evidence, including research from SCRA (see paragraphs 55 and 56 above) and will also deliver alignment with the age of prosecution.

66. Raising the ACR complements Government ambitions to tackle inequalities and to improve life chances for children, young people and families at risk. An approach based on welfare would help tackle inequality for looked after children, especially those accommodated away from home, for whom the responses to harmful behaviour may be more likely to lead to involvement in formal systems than other children.

67. It would also advance Scotland's position in relation to international treaties and other obligations.

68. Statistics and research show that children in the eight to 11 age group tend to commit minor to moderate "offences", in small and reducing numbers, and that of those referred to formal systems, eight out of 10 of these children had previously faced multiple significant disadvantages that may have contributed to their behaviour.

69. Evidence shows that, on average, three eight to 11 year olds each month are referred to the Principal Reporter for more serious offending concerns. When the ACR is raised, the conduct of children under 11 will not

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

change as a direct result. What will change is that their conduct will not be considered a criminal offence and they will not be treated as an “offender” or “criminal”. Importantly, the full current range of powers, disposals and interventions available to the children’s hearings system will remain in place. The non-availability of the offence ground for that age group will not prevent robust intervention by the children’s hearings system, as an offence-specific ground is not necessary to promote protection, guidance, treatment and control. If there are concerns about a child’s behaviour and the Principal Reporter considers that it is necessary for the child to be subject to a compulsory supervision order, the Principal Reporter can refer the child on a non-offence ground. The most likely grounds are those in section 67(2)(m) and (n) of the 2011 Act¹¹. The disposals available to a hearing in those circumstances will be the same as they are currently (up to and including authorising the child’s placement in secure care).

70. Section 1 of the Bill therefore substitutes a new section 41 into the 1995 Act in order to change the age of criminal responsibility from eight to 12, by providing that a child under the age of 12 cannot commit an offence. Together with sections 2 and 3, it ensures that no child will be prosecuted, or referred to a children’s hearing on the basis of the offence ground, in relation to behaviour that took place before they were 12. The remaining sections of the Bill take forward and develop the other principal recommendations of the Advisory Group which require primary legislation in the following areas:

- disclosure
- victim information
- police powers

Consultation

71. A public consultation on the Advisory Group’s recommendations ran from 18 March to 17 June 2016 and generated 76 responses – from 47 organisations and 29 individuals. 95% of respondents supported an increase of the age of criminal responsibility to age 12 or older (88% supported an increase to 12 and a further 7% who responded “no” to an increase to 12

¹¹ Children’s Hearings Scotland Act 2011 – section 67: (m) 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; (n) the child is beyond the control of a relevant person.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

suggested a higher ACR). Many respondents referenced the UNCRC recommended age of criminal responsibility, as well as how Scotland is perceived across Europe. Respondents considered that the current age of eight fails to take into account the established relationship between adverse childhood experiences and poor outcomes for children, including their involvement in problematic or harmful behaviour. Some respondents saw a low age as tending to reflect a continuing punitive approach to children in general as those children in greatest social need are disproportionately swept up by the youth justice system, and the more disadvantaged young people are more likely to accrue a criminal record.

72. The public consultation was followed by engagement with over 200 young people who have had negative life experiences from contact with the criminal justice system from an early age either as perpetrators or as victims. While those young people had a mixed understanding of the law surrounding criminal responsibility, overwhelming support was expressed for raising the ACR.

Alternative approaches

73. One alternative would be to maintain the status quo. The benefit of this would be that agencies are clear about the current position. Also, Scotland is in a unique position because the children's hearings system, together with the bar against prosecuting children under age 12¹², ensures that children under 12 are not subject to the criminal justice system and are dealt with humanely, appropriately and effectively. As children under 12 cannot be prosecuted, they are not held responsible in a "penal" law procedure. Instead, they are dealt with in the children's hearings system which is internationally recognised for its child-centred, needs-based and non-retributive, confidential approach to children in conflict with the law. The children's hearings system is not a penal procedure and can provide the "special protective measures" referred to in UNCRC terms. However, as young children can have a criminal record when the offence grounds are accepted or established, the low ACR has continued to be criticised; and maintaining the status quo is undesirable.

¹² As a result of the Criminal Justice and Licensing (Scotland) Act 2010, which introduced the separate age of prosecution to Scots law. No child under 12 has been prosecuted in Scotland since 2011.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

74. Having the lowest ACR in Europe tarnishes Scotland's reputation internationally, and is out of step with the Scottish Government's approach to Getting It Right For Every Child, and the aspiration to improve the life experience and life chances of all our children and young people. Without a change to the ACR, criticism from UN Treaty bodies, human rights and children's organisations will continue. In addition, section 1 of the Children and Young People (Scotland) Act 2014 places duties on Scottish Ministers to keep under consideration whether there are any steps which they could take which might secure better or further effect in Scotland of the UNCRC and to take any steps they believe appropriate in consequence of that consideration.

75. Another alternative would have been to move to a higher ACR, potentially 14. No child under 12 is currently responded to in the adversarial criminal justice system, or subject to punitive sanctions. Instead, they are responded to using a welfare based approach in the children's hearings system. Additionally, the age of 12 already has significance in Scots law. Children aged 12 and over can make a will, and consent to or veto their own adoption¹³. Children aged twelve or over are also presumed to have sufficient understanding to express views on such matters as the future arrangements for their own care in private law proceedings, to form a view to express at a children's hearing, and to instruct a solicitor. It is considered that reform to raise the age to 12 is the most appropriate at this stage.

76. While no children under 12 can be prosecuted in court, even for those aged over 12, the predominant use of the children's hearings system means that only in the most serious cases is a criminal justice response considered to address harmful behaviour by children, and only on the instruction of the Lord Advocate.

77. This means that serious incidents can be met with a proportionate and effective response, addressing the needs of children, families, victims and the wider community. The children's hearings system currently has jurisdiction only over children up to the age of 18. At that age, compulsory measures come to an end. While this provides up to 6 years of compulsory measures for children aged 12, should a future decision be taken to raise the age further, it would be necessary to consider whether the current scope and operation of

¹³ Section 32 of the Adoption and Children (Scotland) Act 2007 provides that an adoption of a child aged 12 or over cannot take place unless the child consents to it, except where the court decides that the child is incapable of consenting to the adoption order.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

interventions under the children's hearings system would provide sufficient opportunity to address the most harmful behaviour and underlying factors for older adolescents, or whether the further raising of the age would require additional reform, for example in providing that interventions under the hearings system could continue beyond the child's 18th birthday. Further consideration would be required of the impact on the children's hearings system, investigating authorities, and intervention systems in order to build sufficient professional and public confidence and support.

78. This Bill should be seen in the broader context of on-going consideration of how best to respond to harmful behaviour by children and wider reform of the criminal justice system, including the work of the Evidence and Procedure Review, the consequences of the on-going independent Care Review, and the planned review of the Protection of Vulnerable Groups (PVG) scheme, each of which have an impact on matters within this Bill.

79. At higher ages, there is an increase in the volume of offending by children, as shown in increased offence based referrals to the children's hearings system. Suitably robust and effective responses may also require to be different in tenor, focus and scale. Prior to any further reform, the potential impact on investigating authorities and intervention systems requires to be fully understood.

Disclosure (sections 4 to 21)

80. Policy in this area balances the rights of ex-offenders (or those who have committed harmful acts as children) where their behaviour was not so serious that it must be disclosed forever to have their past consciously moved into the private realm after the passage of an appropriate time period, with the essential requirement that the police, employers and other safeguarding organisations continue to have the information necessary to keep Scotland's people – particularly the vulnerable – safe from harm.

81. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") as it applies in Scotland provides for a series of protections for persons who have a conviction but who are rehabilitated. A person is rehabilitated when their conviction is spent. The effect of the 1974 Act is that if an employer asks about previous convictions, a person with a spent conviction can, unless the circumstances discussed below apply, treat the question as not applying to the spent conviction, and so they don't have to mention that spent conviction

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

in their answer. The disclosure system provides a further system to confirm the individual's position.

82. The general premise of the 1974 Act is that a person is not required to disclose any convictions or alternatives to prosecution, such as a Fiscal Fine, which have become "spent". However, it recognises that in certain circumstances a different balance needs to be struck for particular sectors. In these circumstances the public interest in the knowledge of previous convictions is considered to outweigh the interest in allowing an offender to live down their past (for example, positions involving the care of children or adults at risk). These circumstances are listed in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 ("the 2013 Order").

83. Similarly, the disclosure system permits the disclosure of unspent convictions on all types of disclosure but when a conviction becomes spent it can only be included on certain types of disclosure. These are commonly called "higher level disclosures". However, even in a higher level disclosure there are provisions to make sure only certain spent convictions are included. The vast majority of spent convictions are relatively minor and will not be disclosed on higher level disclosures. Some are for more serious offences and will be disclosed for a period of 15 years after conviction even when otherwise spent and some are for such serious offences that they must always be disclosed.

84. The disclosure system is governed by the Police Act 1997 ("the 1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act"). Disclosure Scotland discharges Scottish Ministers' functions under the 1997 Act and the 2007 Act by carrying out criminal record checks for recruitment and other purposes. Under the 1997 Act the criminal conviction certificate, criminal record certificate and enhanced criminal record certificates are available. These certificates are commonly referred to as basic, standard and enhanced disclosures. Under the 2007 Act, which established the PVG Scheme in Scotland, a scheme record, a short scheme record and a scheme record membership statement are available. Collectively, PVG scheme records, standard disclosures and enhanced disclosures are known as "higher level disclosures".

85. A basic disclosure is available to any applicant, for any purpose and contains only unspent convictions – it will not list convictions that are spent under the 1974 Act. It tends to be used for general employment purposes but

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

not for jobs with access to high value assets or contact with vulnerable groups.

86. The standard disclosure can also be used where there is an expectation of integrity, for example in the security industry. A standard disclosure can list certain spent convictions, unspent convictions and also say whether the individual is subject to registration as a sex offender. The enhanced disclosure is typically used where there is a high degree of sensitivity in the role the person is being considered for, for example for prospective adoptive parents, employment in the Crown Office or to obtain a gambling licence. The enhanced disclosure lists certain spent convictions, unspent convictions, states if the person is a registered sex offender, and has the possibility that the police will include text on the disclosure detailing non-conviction information referred to as other relevant information (“ORI”). An example of this might be if the police credibly suspected the individual had committed offences relevant to the post they were applying for but had not been convicted. If the police provide this information Disclosure Scotland must include it; Disclosure Scotland has no discretion to remove or alter any text provided by the police as ORI.

87. Disclosures made under the 2007 Act are: statement of scheme membership, this contains no vetting information; a short scheme record, this contains no vetting information; or a scheme record. A scheme record discloses vetting information, that is, any unspent convictions and certain spent convictions, will say if the person is a registered sex offender and has the potential to contain ORI (as described above).

88. The basic purpose of the PVG Scheme was to provide for a system of disclosures for individuals doing “regulated work” (which can be paid or unpaid) with children or with vulnerable adults (as defined in the 2007 Act). Previously, such individuals would have been entitled to enhanced disclosures under the 1997 Act. So, in effect, the 2007 Act set up a separate system of disclosures for persons doing regulated work with children or protected adults and removed them from the scope of the 1997 Act provisions.

89. When an individual applies to join the PVG Scheme, Disclosure Scotland must check police criminal history systems, and check if the person is barred from working with children or protected adults anywhere in the UK. A barred person cannot join the PVG Scheme to do regulated work with the

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

vulnerable group they are barred from working with – that may be children, protected adults or both groups.

90. As noted earlier, the information contained on a PVG scheme record is similar to that in an enhanced disclosure. The major difference between 1997 Act disclosures and the PVG Scheme is that after someone first applies for PVG scheme membership, Disclosure Scotland will continuously update and monitor their scheme record for as long as they remain a member. If new information is added to the scheme record, including convictions, Disclosure Scotland knows about this and can consider whether the new information means that it may be appropriate to bar the person from working with children, protected adults or both groups depending on who they are a member with. As with the 1997 Act disclosures, PVG disclosures are made only when eligibility rules are met to ensure that citizens' rights to private life and to have their data protected are strictly upheld.

91. As detailed above, until 2011 it was possible for a child over the age of eight years to be prosecuted in a Scottish court. Since then, it has remained possible for a child aged eight to 11 to be referred to a children's hearing on the offence ground, as detailed above. Where an offence ground referral is accepted or established, this constitutes a conviction and will be retained on police systems, and therefore potentially disclosed (depending on the type of offence), for many years into adulthood or even forever.

92. The ACR Bill does allow disclosure of information held by the police about pre-12 behaviour, subject to an independent review which includes the possibility of the subject of disclosure having a right to make representations before any disclosure to a third party takes place. If disclosure is to occur it will be in the form of ORI, and can only appear on an enhanced disclosure or PVG scheme record. The Scottish Government will set out statutory guidance for the independent reviewer to describe the factors to be considered in cases where such information might be disclosed, balancing public protection requirements against the rights of the individual for this information to remain private.

Policy objectives

93. When the ACR changes to 12 any conduct by a child below the age of 12 that would previously have been recorded as a conviction will no longer be recorded as such. The ACR Bill does not interfere with the retention of

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

information on harmful behaviour for police purposes but it does mean that such matters, when they occurred under age 12, can never be disclosed automatically on any form of state disclosure.

94. However, it may prove vital for public protection reasons, following review of the information by an independent reviewer, to disclose information about behaviour that occurred while an individual was below the ACR. The ACR Bill does allow for the disclosure of information held by the police about pre-12 behaviour, subject to an independent review which includes the possibility of the subject of disclosure having a right to make representations before disclosure to a third party takes place. If disclosure is to occur it will be in the form of ORI and can appear only on an enhanced disclosure or PVG scheme record.

95. The Bill seeks to achieve these objectives by:

- (i) removing from the definition of conviction under the 1997 Act any conviction imposed when the applicant was under 12;
- (ii) allowing the police to provide ORI to Disclosure Scotland for inclusion on an enhanced disclosure or PVG Scheme Record, relating to a time when the applicant was under 12 but only if the independent reviewer agrees that this information ought to be disclosed;
- (iii) establishing a new office of an independent reviewer to review information provided by the police, and requiring the police to pass any ORI to the independent reviewer for review before disclosure;
- (iv) allowing Scottish Ministers to add to the functions of the independent reviewer as set out in the Bill;
- (v) giving the independent reviewer the power to gather information from relevant sources including the applicant, the police, the Principal Reporter, local authorities or any other person they consider appropriate;
- (vi) requiring Scottish Ministers to provide guidance to the independent reviewer on the exercise of their functions; and
- (vii) providing the individual and the police with a right to appeal the independent reviewer's decision to a sheriff, on a point of law only.

96. The independent reviewer's principal function is to review whether the information which the police propose to disclose as ORI is relevant to the purpose for which the enhanced disclosure is required and if the information

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

ought to be disclosed. Where the individual is a PVG scheme member, the independent reviewer will review whether the proposed ORI is relevant to the type of regulated work which the applicant will be involved in and whether the ORI ought to be disclosed. As ORI can fall within the scope of a person's private life, Article 8 of the European Convention on Human Rights is engaged. This means that in carrying out the review, the independent reviewer will balance the right to respect for private life, against the interests of public safety.

97. The independent reviewer will have the benefit of being able to gather additional information from the applicant for the enhanced disclosure, or PVG scheme member as the case may be, from the police, and certain public bodies in Scotland. As well as the ORI itself, and the representations received, in assessing relevance the independent reviewer will also take account of the work to which to application relates, the gravity of the information and whether it is recurring, the applicant's age at the time of the behaviour, and the time that has elapsed since the incident(s).

Key information

98. Conduct by children in the eight to 11 age group that would formerly have been criminal is typically of a minor to moderate severity. Very serious and harmful behaviour is comparatively rare. Data collected by the Scottish Children's Reporter Administration shows that during 2014-15, 75 children were referred to the Principal Reporter as result of being charged with an assault, 55 for threatening or abusive behaviour, 50 for vandalism, 28 for distress/racial alarm), 15 for theft by shoplifting, 14 for theft and 13 for assault to injury. During the 4 year period 2011-12 to 2014-15, 150 referrals were made to the Principal Reporter for offences of a serious violent or serious sexual nature (e.g. serious assault, fire-raising or sexual assaults on young children).

99. Statistical data and research shows that the majority of children currently brought before a children's hearing on offence grounds, for offences committed between the ages of eight and 11, do not go on to re-offend in later childhood. It therefore seems disproportionate in most cases that children should continue to have incidents in early childhood routinely disclosed for many years by the state.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

100. The Scottish Parliament made reforms to the legislation underpinning the higher level disclosure system in September 2015¹⁴ and February 2018¹⁵. These reforms improved the general position for children and young people who might be disclosure applicants because they limited what can be disclosed and also provided remedies to allow individuals to appeal the disclosure of convictions on higher level disclosures. The Advisory Group recognised that, even with the reforms made to the system of higher level disclosure in, there remained outstanding disclosure issues for children and young people in Scotland. Specifically, in relation to the ORI that can be included on an enhanced disclosure or a PVG scheme record. Unlike convictions following a referral to the children’s hearing on offence grounds, most of which will be removed when “spent” or after a set time period, ORI is a narrative description of alleged conduct and any relevant background factors. It can be included for as long as the police reasonably believe that it is relevant and ought to be there.

101. Whilst it is possible that a disclosure of ORI might occur whilst the individual is still a child, it is more likely that it would happen at a later stage, e.g. when the individual (likely now a young adult) was applying for a college or university course, or seeking a disclosure for employment purposes. The police do administer a strict process of quality assurance, relevance and proportionality checking before including non-conviction information on a disclosure. However, such information has the potential to remain disclosable indefinitely.

¹⁴ In September 2015 the Scottish Government amended the disclosure system for higher level disclosures via the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No.2) Order 2015 (“the 2015 Order”). The 2015 Order ensures that very minor convictions that are spent will no longer be disclosable on higher level disclosures. More serious spent convictions will be disclosable for an extended period subject to applying standard rules.

¹⁵ In February 2018 the Scottish Government amended the higher level disclosure system by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018 (“the 2018 Order”). The 2018 Order provides the most serious and harmful spent convictions must be disclosed on higher level disclosures unless, on application to a sheriff after the passage of specified time period from the date of conviction, the sheriff orders otherwise.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

102. The Advisory Group considered that the disclosure of ORI about behaviour occurring before a child reached the ACR should only occur when absolutely necessary for public protection and should be subject to independent review before any disclosure can take place.

Consultation

103. While the vast majority of respondents felt 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 (62 "yes" (88.6%) seven "no" (10%), one "don't know" (1.4%)), there was a recognition that there will be circumstances where disclosure is required and there should, in such circumstances, be an independent review process. Such circumstances were likely to relate to the seriousness of the earlier behaviour and the current presenting risk, years later, to the public or individuals.

104. A significant majority of respondents supported the view that any new provisions relating to disclosure should apply to convictions which occurred prior to the change in the ACR, so far as reasonably possible, as any failure to apply the Bill's provisions in that manner would be counter-productive to the improved life chances that an increase in the ACR is trying to achieve.

Alternative approaches

105. In developing these Bill provisions consideration has been given to a number of alternative approaches regarding the disclosure of behaviour from before age 12 as ORI. Consideration was given to making no change to the ORI provisions, meaning the police could disclose behaviour from before age 12 as ORI without any independent review. However, this approach does not take into account the Advisory Group's recommendation that disclosure of ORI about behaviour occurring before a child reached the ACR should only occur when absolutely necessary for public protection, and should be subject to independent review before any disclosure can take place. Prohibiting the disclosure of any behaviour from before age 12 as ORI was also considered. However, it was recognised that there may be exceptional circumstances where seriously concerning behaviour ought to be disclosable for public protection reasons. Consideration was given to providing no right to the individual and the police to appeal the independent reviewer's decision, to only providing an appeal to the individual and to how the appeal could be made.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

106. During the PVG Review in 2018, further consideration and engagement will take place around the disclosure of information relating to acts committed in childhood, including in the years between 12 and 17.

Victim information (section 22)

Policy objectives

107. The Advisory Group acknowledged that, without specific provision, a potential consequence of raising the ACR could be impact on the current rights of victims, who may themselves be children. The policy objective is therefore to ensure that where a child under the ACR engages in conduct which causes serious harm to a victim, the current rights of that victim should not be diminished. There should continue to be appropriate information and support provision for victims of the harmful conduct of children under the ACR.

108. The EU Victims Directive (2012/29/EU) and the Victims and Witnesses (Scotland) Act 2014 provide the legislative basis for victims' rights in Scotland, placing a range of obligations on the criminal justice authorities which includes the provision of a Victim's Care Card, access to information and support, and rights to compensation. These rights apply to victims of alleged crime, irrespective of the age of the alleged perpetrator. The Criminal Justice (Scotland) Act 2003 also includes provisions for victims to receive information where a case is referred to the Principal Reporter.

109. Currently, the Principal Reporter is able to contact the victims of those referred on offence grounds (or the parents/carers of child victims) to let them know basic information about how a case has been disposed of via the children's hearings system. In practice, the Scottish Children's Reporter Administration (SCRA) delivers this through its Victim Information Service (VIS). The Principal Reporter may provide basic information about the Reporter's decision (i.e. whether or not to bring the child to a hearing) and whether or not the Hearing has made a Compulsory Supervision Order (CSO). The identity of the child perpetrator is not revealed nor confirmed. If the child was referred on multiple grounds then the victim would only be entitled to know about the specific ground in which they are identified as the victim. For example, if the Reporter brings the child to a hearing on multiple offence grounds, the victim would only be told the decision in relation to "their" ground.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

110. Under existing legislation, this service is not available to victims of harmful behaviour by children under the ACR as it only applies to cases where the Principal Reporter receives information about a case in which it appears that a child has committed an offence. Consequently, raising the ACR and thereby providing that a child under 12 cannot commit an offence, will mean that the VIS will no longer be available to victims of the harmful behaviour of children aged eight to 11. These cases are likely to be few in number, as data provided by SCRA suggests that 254 victims were written to in 2017 in relation to offences alleged to have been committed by eight to 11 year olds. This is from a total of 3688 victims written to in that year. 53 of those 254 victims opted in to the Victim Information Service, representing an opt-in rate of approximately 21%, compared to a figure of approximately 19% opt-in rate across the board.

111. While this is a relatively rare occurrence given the very small number of eight to 11 year olds being referred on offence grounds and the small numbers opting in to the service, the policy objective is to ensure that victims of seriously harmful behaviour by those children are still able to receive support and information in future.

Key information

112. As discussed above, under Section 53 of the Criminal Justice (Scotland) Act 2003, the Principal Reporter has the power to tell victims of offences committed by children certain limited information about the case's disposal. The Reporter may only provide information to victims, relevant persons (where the victim is a child) and other persons prescribed by order of the Scottish Ministers. This information can only be provided where:

- the information is requested;
- the Principal Reporter considers disclosure is appropriate in the circumstances; and
- the Principal Reporter considers that disclosure would not be detrimental to any child involved in the case.

113. Currently, these rights are engaged only where the Principal Reporter receives information about a case where it appears that a child has committed an offence. Raising the ACR would therefore remove victims of harmful behaviour by children aged eight to 11 from the scope of these provisions and those victims would no longer be able to receive information.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

114. Section 22 of the Bill therefore creates new powers which mean a victim of seriously harmful behaviour by a child under the ACR may receive information about the Reporter's decision or children's hearing's disposal connected to that behaviour.

115. Section 53 of the Criminal Justice (Scotland) Act 2003 is to be repealed by section 22 and a new statutory framework for the VIS will be created in the Children's Hearings (Scotland) Act 2011. The powers which allow the Principal Reporter to disclose information to victims of offences by children aged 12 and over and harmful behaviour by children under the ACR will be set out under a single piece of legislation. Section 22 therefore provides a modernised and consistent framework for the disclosure of information to victims and ensures that information currently provided to victims of offences by children over 12 will largely remain the same.

116. Section 22 creates new sections 179A to 179C of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act"). Section 179A sets out the criteria under which certain persons may request information from the Principal Reporter. Section 179B sets out what information can be requested from, and thereafter disclosed by, the Principal Reporter. Section 179C sets out the rules under which the Principal Reporter may grant a request made under section 179A. This regime will continue to be delivered by SCRA under the VIS. Consistent with the existing legislation, the Bill ensures that where the Principal Reporter has received information that a child may have committed an offence, a victim of that offence may request and receive information about the disposal of that case. In addition, the Bill sets out new powers to allow the Principal Reporter to provide information to victims of the most harmful behaviour by children under the ACR. To ensure information that is shared about a child under ACR is proportionate and justified, the Bill makes these powers available to the Principal Reporter only in serious cases, that is, where the Principal Reporter has received information which suggests that a child under ACR has caused harm to another person by engaging in behaviour which is:

- physically violent;
- sexually violent or sexually coercive; or
- dangerous, threatening or abusive.

117. For example, if a child under 12 is responsible for a serious physical injury of another person and is referred to the children's hearings system as

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

a result of that behaviour, the Principal Reporter may inform the person harmed about the disposal of the case. Where a child under 12 has damaged or stolen property and no-one has been injured, the Principal Reporter would be unable to disclose information to for example, the owner of the property, even if that case is referred to the children's hearings system. Upon receipt of information that a child has engaged in seriously harmful behaviour, the Principal Reporter will have discretion to determine when disclosure of information to a victim is appropriate and proportionate in accordance with the new powers provided by the Bill.

118. Section 22 adds new section 179C to the 2011 Act which introduces additional requirements for the Principal Reporter to pay particular regard to the seriousness of the child's conduct, the circumstances in which the incident took place, the age of the child involved in that conduct and the effect on the victim. Consistent with the existing powers to allow the Principal Reporter to share information with victims of offences, the Principal Reporter can only disclose information under new section 179B of the 2011 Act where the Principal Reporter considers that disclosure would not be detrimental to any child involved in the case and disclosure would not otherwise be inappropriate. These criteria apply to the conduct, criminal or otherwise, of children of all ages.

119. New section 179A(5) of the 2011 Act allows the Principal Reporter to contact an individual to inform them that information has been received about a case they are involved in and that they may request information about that case.

120. New section 179B of the 2011 Act clarifies what information can be disclosed by the Reporter, namely: (1) whether or not a children's hearing is to be arranged; (2) if no hearing is to be arranged, what determination was made under section 66(2) of the 2011 Act and what other action has been taken; (3) if a hearing is to be arranged, whether a compulsory supervision order has been made, terminated, continued or varied or how the referral was otherwise discharged.

121. The Bill seeks to balance the best interests of victims (including child victims) and the best interests of the child responsible for the harm, who remains the focus of the referral to the children's hearings system. The Bill will ensure only basic information is to be disclosed to victims and a restrictive test is provided (discussed above), to determine when the disclosure regime applies where the case relates to a child under the ACR, thereby ensuring

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

that information is only disclosed in cases where it is merited. The Principal Reporter will continue to have discretion to disclose and will be able to refuse to share that information where it would be inappropriate to do so. This enables the Principal Reporter to ensure that any decision to disclose under the statutory provisions balances the needs of the victim and the interests of the child involved.

Consultation

122. Most responses from the public consultation in 2016 highlighted the importance of balancing the rights and support needs of the victim with those of the child thought to have carried out the harmful behaviours. Respondents welcomed the ACR Advisory Group's principled position that any change to the ACR should not adversely affect current victims' rights and that existing support and structures continue to be available even when the child is not held criminally responsible. There was also strong recognition that often those "offending" children are also often themselves victims of harm and that often the people they harm are other children.

123. Additional engagement with the Scottish Children's Reporter Administration and victim support organisations during the development of these Bill provisions has disclosed support for the changes, whilst highlighting a need for improvements to general information for victims. The Scottish Government will continue to work with key stakeholders on the Victims' Policy Delivery Group to further develop information and support for victims, and those working with victims, to ensure wider community confidence.

Alternative approaches

124. In developing the Bill provisions, consideration has been given to a range of alternative options which would enable the Principal Reporter to disclose information about the behaviour of children under ACR. Extending existing legislation to cover the conduct of children under 12 which would be criminal but for their age would be a straightforward approach but was not consistent with ethos of the Bill which is to avoid using any terminology that links the behaviour of young children with criminality.

125. Consideration was also given to the creation of a single test for the disclosure of information which would apply to the behaviour of children of all ages. Under this approach, the reference to "offence" would have been

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

removed and disclosure would have been permitted where the Principal Reporter received information about the conduct of a child (of any age) which had an adverse effect on a victim. That approach would have created an element of subjectivity which could have detracted from the legal certainty of the provisions for the purposes of ECHR Article 8. The Bill ensures that the new provisions retain the reference to offending behaviour by children aged 12 and over, while providing a clear definition of when the disclosure powers will apply to the behaviour of children aged under 12.

126. The underlying policy of section 22 of the Bill is to ensure that by raising the ACR, appropriate support and information remains available to victims and their families. The policy intention is to allow victims of seriously harmful behaviour by a child under the ACR to be able to receive information about the state's response to that behaviour where the child has been referred to the children's hearings system. The existing SCRA Victims Information Service is well placed to continue the operation of the information disclosure regime. The new scheme will not be restricted to harmful behaviour by children aged eight to 11, but will instead be applied to seriously harmful behaviour of all children under the ACR. It is therefore intended that the provision of information to victims will have to be carefully considered, in order to protect both the interests of the child referred and the needs of the victim.

127. The requirement that this policy should apply in relation to the most harmful behaviour will ensure that the information shared is justified and proportionate in relation to the behaviour of a child under the ACR. Victims who would currently be entitled to limited information as a result of a minor offence by a child aged eight to 11 which resulted in minor or no injury, will no longer be able to receive information if such behaviour occurred after the ACR is changed.

128. In addition to section 22 of the Bill, more focus has been placed on the benefit of access to wider general information to improve the understanding of the full range of interventions for the harmful behaviour of children. This general information would be provided outwith the powers in the new sections 179A to 179C of the 2011 Act and will ensure that victims are informed about the general powers and duties of the Principal Reporter upon receiving information about the conduct of a child of any age.

129. Alongside the powers provided by the Bill, updated information will also be provided for victims regarding eligibility for compensation for victims of harmful behaviour by children under the ACR. Under the Criminal Injuries

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

Compensation Scheme eligible applicants must be victims of a crime of violence. However, a victim of harmful behaviour by a child under ACR may qualify as “victim of a crime of violence” as an exceptional case. Victims of harmful behaviour by children aged eight to 11 will still be eligible for compensation, albeit under additional eligibility criteria. Whilst no legislative changes are proposed, the Scottish Government will work with the Criminal Injuries Compensation Authority to update guidance and embed the change to the ACR in future working practices in time for implementation.

Police powers (sections 23 to 63)

Policy objectives

130. As highlighted above, the number of children under 12 who carry out the most serious acts is very small. However, where such incidents do occur the police, who have a statutory duty to maintain order, protect life and property and detect and prevent crime, must still be able to investigate them. The ACR Advisory Group recognised that it was essential that the police have powers available to them to be able to investigate the most serious incidents thoroughly, so that all necessary steps can be taken to keep the child and others safe.

131. Many existing police investigative powers can only be used when the person being investigated is suspected of committing an offence. This means that they currently may not be used to investigate behaviour by children under eight (because these children are not legally capable of committing an offence), and once the ACR has been raised to 12 the powers would not be available to the police to investigate any child under 12. The Advisory Group was clear that, in raising the age of criminal responsibility to 12, we should not create a three-tiered system, in which some police powers applied to children over the age of 12, other powers to children aged between eight and 11, but no powers applied to children under eight. The policy intention was therefore for the police powers that the Bill creates to apply to all children under the ACR consistently. Seriously harmful behaviour by children under eight is exceptionally rare and is otherwise handled on a welfare basis, but the fact that new powers could theoretically be used to investigate very young children emphasises the importance of ensuring powers are proportionate, justifiable, and rooted in safeguarding the child’s welfare, while avoiding processes and experiences that look, feel and sound to the child and others like a criminal investigation.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

132. Accordingly, Part 4 of the Bill creates 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 that is in keeping with the ethos of removing young children from criminal justice processes. This package of powers is based on the recommendations made by the Advisory Group.

Key information

133. To ensure that the new police powers are justifiable and proportionate, the Bill restricts the application of most of these powers, so that they are only available to the police in the most serious cases – that is, where it is thought that a child has caused (or risked causing) death or serious injury by acting in a violent or dangerous way, or that the child has harmed (or risked harming) someone with sexually violent or sexually coercive behaviour.

134. Section 59 of the Bill requires all persons carrying out powers or duties under these provisions in this Part – including the police, sheriffs, social workers and advocacy workers – to treat the need to safeguard and promote the child’s wellbeing as a primary consideration.

Power to take a child under 12 to a place of safety

135. The Advisory Group recommended that “In the most serious circumstances a power should be created to take a child to a place of safety, to allow enquiries to be made in relation to the child’s needs, including where the support of a parent or carer is not forthcoming”. (Advisory Group report, Para 4.16 (iii))

136. The police will often be the first responders to an incident, and that may involve finding a child at the scene who appears likely to harm someone else. Section 23 of the Bill therefore gives the police a power that will allow them to take a child to a safe place, where they believe that is necessary to manage an immediate risk of significant harm. This could arise if, for example, the police encounter a child who appears intent on harming another person, and it is not possible to arrange with the child’s parents or carers for the child to be safely returned to their home. This may be because their carers cannot be contacted, or because the child is thought to pose a risk that cannot be managed in their home or other usual care setting.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

137. Taking the child to a place of safety will allow the police to then determine how best to proceed. Depending on the circumstances this may often involve liaising with local authority social work to agree appropriate next steps. The child should be kept in the place of safety for as short a time as possible – no longer than is needed to put in place suitable arrangements for the child’s care and protection¹⁶, and an absolute maximum of 24 hours. If it becomes apparent that the child needs to be kept in a safe place for longer (for instance, because they would not be safe at home), then that would need to be taken forward through existing child protection measures.

138. Occasionally the police may consider that they need to take an intimate forensic sample from a child who has been taken to a place of safety under this power. This would arise if the child was thought to have carried out a serious harmful act that could only be properly investigated if an intimate sample was taken and analysed (for example, if the child was thought to have been sexually violent to another child, an intimate swab might be needed to help establish the facts). Under the Bill, intimate samples may only be taken from a child under 12 if they are first authorised by a sheriff. The nature of some samples is such that the material could be lost, destroyed or deteriorate if the samples aren’t taken as soon as possible, and if the individual doesn’t stay in a forensically controlled environment until they are taken. Subsection (4)(a)(ii) of section 23 therefore allows the police to keep a child in a place of safety in these circumstances while they apply for authorisation from a sheriff to take an intimate sample. They may keep the child there for no longer than it takes to obtain the order – if the sheriff does not authorise the sample, it cannot be taken. The process and limitations around taking samples from children are covered in more detail in the discussion on Chapter 4 of the Bill.

139. For the purposes of the emergency place of safety power, the Bill uses the same definition of “a place of safety” as the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”). The 2011 Act lists the following as being possible places of safety:

- a) a residential or other establishment provided by a local authority,
- b) a community home within the meaning of section 53 of the Children Act 1989 (c.41),
- c) a police station,

¹⁶ Or, if the police are seeking authorisation to take an intimate forensic sample from the child, for no longer than is needed to seek that order.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

- d) a hospital or surgery, the person or body of persons responsible for the management of which is willing temporarily to receive the child,
- e) the dwelling-house of a suitable person who is so willing, or
- f) any other suitable place the occupier of which is so willing.

140. Using a police station as a place of safety is to be avoided if possible in favour of more child-appropriate environments, particularly for children of this young age. The Bill therefore stipulates that a police station may only be used as a place of safety if there is no reasonable alternative. This is consistent with the 2011 Act. This approach still recognises that there may not be an immediately available viable alternative to a police station, particularly in urgent or out of hours situations, or in remote locations.

Alternative approaches

141. Consideration was given to not creating a new power. Under section 56 of the 2011 Act, the police already have a power to remove a child to a place of safety for up to 24 hours if the child is at risk of significant harm and it is not practicable to obtain a Child Protection Order. However, there are certain limitations on that power – for example, it cannot be used if the child is already subject to a CPO. It is also restricted to circumstances where the child is at risk of harm, and does not cover situations where the child is thought to pose an immediate risk to others. Therefore the creation of a new power – as recommended by the Advisory Group – ensures that the police have statutory authority to respond to situations of immediate risk by taking a child to a safe place, whether the child is thought to be at risk themselves or to present a risk to others.

142. Consideration was also given to creating a power with a wider scope, that would let the police keep a child who was thought to have carried out a serious act in a safe place while they began to carry out their investigations (for example, applying to a sheriff for authorisation to interview the child, and proceeding if they had that authorisation). That would have allowed investigations about the most serious incidents to proceed as quickly as possible. However, this approach would have effectively meant that the power would become a power of detention. Indeed, it could have put young children who are not capable of committing an offence in a worse position than older children or adults (an older child or adult may normally not be kept in custody without being charged with an offence for longer than 12 hours). Such an approach was therefore not felt to be appropriate: the central aim of the power

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

is to make sure the police can act to safeguard a child in situations of immediate risk, rather than to serve as an investigative tool.

Powers of search

143. The police currently have statutory powers to stop and search children under 12, and in certain cases to confiscate items they find. Where those search powers hinge on suspicion that someone is committing an offence they would no longer be available to the police unless this Bill makes explicit provision. This is not an issue on which the Advisory Group made a recommendation, but it does arise as a direct consequence of raising the ACR.

144. In practice, the police very rarely stop and search a child under 12: Police Scotland figures show that in the year to April 2017 only 10 searches of children under 12 took place (and those children were all aged 10 or 11). However, even though they are not frequently used with young children, the powers to search for and remove dangerous items are considered crucial to maintaining the safety of children and those around them. It is therefore important that these powers remain available to the police.

145. It is also important that police can still search children under 12 (as they currently can) as conditions of entry or attendance at events, in the wider interests of public safety, and that if necessary they can seek authorisation to search private premises for items that may constitute important evidence as part of their investigation of a serious incident believed to have been carried out by a child under 12.

146. Chapter 2 of Part 4 of this Bill therefore preserves existing powers of search to ensure that, when necessary and proportionate, these powers can still be used in relation to children under 12. In doing so it creates a consistent position for all children under 12, in contrast to the current position which is that some powers (such as the power to search for knives) do not apply to children under eight, while others apply to all children.

147. Section 25 preserves existing search powers that do not require a warrant. It makes clear that the police can use these search powers with children under 12 as they can use them with people 12 and older. This includes searches of a person (often known as “stop and search”), and existing circumstances in which the police may search a vehicle or premises

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

connected with a person without a warrant. Where existing search powers allow the police to arrest someone, or make it an offence to obstruct the search, these aspects will not apply to children under 12, who will not be capable of committing an offence.

148. It is important to remember that any searches of children under section 25 will still need to be carried out in accordance with sections 65 and 68 of the Criminal Justice (Scotland) Act 2016, and the Code of Practice on Stop and Search, which provide a range of important safeguards (including some specific to children and young people). These safeguards include:

- only lawful searches may be carried out – in other words, a police officer may only search a child if expressly permitted by a statutory power or authorised by warrant.
- any search must be necessary and proportionate.
- a police officer may only search someone if they have reasonable grounds to believe that they are likely to find the item they are searching for.
- when deciding whether to search a child (under 18), the police's primary consideration must be the need to safeguard and promote the child's wellbeing. If the police officer believes that carrying out the search would be more harmful to the child than not, the search should not proceed and other measures to safeguard the child should be considered.
- searches should be carried out in such a way as to minimise distress to a child.
- the police officer should explain at each stage of a search what they are doing and why. If the child appears to lack the capacity to understand why the search may be needed or what it entails, the presumption is that the search should not proceed and other approaches to safeguarding the child should be considered.

149. Sections 26, 27, 28, 29 and 30 of the Bill cover situations in which the police wish to search a private premises or a vehicle as part of an investigation into a serious act that they suspect has been carried out by a child under the ACR, but do not have an automatic statutory power to do so. (In other words, the search is not covered by section 25.) The police must

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

apply to a sheriff¹⁷ for a search order, setting out the grounds for seeking the order, including their reasons for suspecting that relevant evidence for their investigation may be found if the search goes ahead. Sections 27 and 28 cover the process and the criteria that the sheriff must apply when considering an application. Section 27 provides that the sheriff has flexibility in where to consider the application: they do not need to be in court; they may also be in chambers. The sheriff may consider the application on the papers alone, but they must consider whether key people with an interest in the application (including the child, their parent and the police officer making the application) should be given the opportunity to make their voices heard. However, when a sheriff is considering an application for a search order the likeliest scenario is probably that they will do so on papers alone, because notifying the child or their parent of the prospective search could jeopardise the investigation.

150. If the order is granted, it is valid for 7 days. The child (and, if possible, their parent) must be given a copy of the order. The order may authorise the seizure of relevant items. If the police need to break in to a premises or vehicle to carry out the search, then they are required to secure the premises afterwards.

Alternative approaches

151. If the Bill made no provision on search powers, then some powers would no longer be available for any child under 12 – for example, the police would not be able to search a child under 12 if they believed they were carrying an offensive weapon or a knife. This could clearly hamper the police's ability to protect children and to promote public safety.

152. Doing nothing (and therefore allowing some search powers to fall) would also create loopholes that could be exploited by adults or older children: if children under 12 were exempt from search, older people might be incentivised to pass illicit or dangerous items to under-12s to carry in the knowledge that the child could not be searched. That would both circumvent

¹⁷ Note that (under section 65) the Bill provides that a summary sheriff may do anything a sheriff is able to do under the Bill in relation to police powers. In other words, a summary sheriff may grant a search order, a child interview order or an interview authorising the taking of forensic samples.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

justice and – in using a child for criminal ends – be damaging to the child’s best interests.

153. Another possible approach would have been to retain only some of the search powers currently available in relation to under-12s. The Advisory Group was clear in their view that the Government should not assume that all previously available powers would still be needed for children under 12. We therefore considered disapplying a selection of existing search powers that appear to be never (or extremely seldom) used with children in practice. However, robust stop and search records have only been compiled and published since June 2015, so it would be premature to conclude that certain specific search powers are never needed. The Code of Practice on Stop and Search already requires searches to be carried out only when necessary and proportionate. This was felt to provide a more effective and coherent framework for limiting searches to those that are appropriate than barring individual search powers from ever being used would have been.

Investigative interviews of children

154. The Advisory Group report recommended, “In the most serious circumstances it is important to provide the child with the opportunity to provide their account of events and identify all relevant risks and needs. A power should be created to allow for the interview of children, with appropriate safeguards, including where the support of a parent or carer is not forthcoming. Those safeguards should be based on the principles of Child Protection Procedures and Joint Investigative Interviews.” (Para 4.16 (iv))

155. Chapter 3 of Part 4 therefore creates a new bespoke process for interviews investigating whether a child under 12 has carried out a seriously harmful act. The purpose of these interviews is both to help the police to establish what has happened, and to help identify any additional support or protection needs that the child may have. The child is not being interviewed as a criminal suspect, and the process should not feel criminalising. However, the interview could have consequences for the child or for other people: material gathered at the interview could lead to the child being referred to the Principal Reporter on non-offence grounds, or to a criminal investigation into another person, or form part of a subsequent provision of “other relevant information” on a disclosure check. This means it is important that the interview process is not only rooted in a welfarist approach but is also robust and transparent, so that any evidence arising from it has integrity. The

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

process therefore builds in independent judicial oversight (a sheriff must normally agree that it is necessary to interview the child); requires the interviewers to follow statutory guidance when planning and carrying out the interviews; and provides safeguards for the child who is being interviewed. The police and social work will collaborate to plan and potentially carry out the interviews, with social work involvement being proportionate to the nature of the case and the extent and acuteness of the child's individual needs.

156. In line with the Advisory Group recommendation, the Bill only creates the power for the police and social work to interview children in the most serious cases, and so the approach to interviews described here only relates to those most serious cases. For more information on interviewing children about less serious behaviour, see paragraph 168 in the "Alternative Approaches" section.

157. Section 31 provides that, if the police wish to interview a child because they suspect the child has carried out a seriously harmful act when under the ACR, they may only do so if:

- a) they have obtained a "child interview order" from a sheriff, or
- b) the situation is so urgent (because life is at risk) that there is not time to obtain the interview order before asking the child questions.

158. For the purposes of this Part of the Bill, a child is anyone under 16, or a 16 or 17 year old who is subject to a compulsory supervision order. This means that the interview provisions don't only apply when the police wish to interview a child who is under the ACR; they also apply when the police wish to interview a child who is now over the ACR about an act they may have carried out when under the ACR. This could arise, for example, if the child was 11 when the act took place, but had turned 12 by the time the police applied to interview them. The reason for extending these provisions to cover older children being interviewed is both to ensure that the police can still interview children about the most serious acts (otherwise, they would have no power to interview a child once they were 12, unless the child consented), and to ensure that when children are interviewed in these circumstances they

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

have the same statutory rights and protections as a younger child being interviewed.¹⁸

Child interview orders

159. Section 32 sets out the information the police must provide when they apply to the sheriff for an order to interview a child. This includes the reasons for seeking an interview and their provisional plans for interviewing the child. The plans may include, for example, how many interviews they propose holding, where they will take place and who they will be conducted by. If possible, the police must consult local authority social work before making the application, so that they can input to the provisional plans. (Note that at this stage these plans are purely to give the sheriff an indication of how the interview might be approached: the final plans for the interview must be drawn up collaboratively between the police and local authority social work.)

160. Sections 33 and 34 cover the process and the criteria that the sheriff must apply when considering an application. Section 33 provides that the sheriff has flexibility in where to consider the application: they do not need to be in court; they may also be in chambers. The sheriff may consider the application on the papers alone (and this may be necessary to avoid delay in some cases). However, they must consider whether to give the key people with an interest in the application the opportunity to make their voices heard: the child, their parent, the police officer making the application, or another person the sheriff thinks has a relevant interest (this could be the child's social worker, for example).

161. Section 34 provides that, to grant the child interview order, the sheriff must be satisfied that there are reasonable grounds to suspect the child carried out the act being investigated; that it is necessary to interview the child

¹⁸ Note that the Bill does not give the police the power to compel an adult to take part in an interview about behaviour they are thought to have carried out when under the ACR. This is an extension of the existing position, as the police cannot currently compel someone to give an interview about an act carried out when they were under eight. By the time the person is in adult, any possible consequences of the interview for them within the Children's Hearings System will no longer be relevant, as they would be too old to be referred. However, the police will still be able to interview an adult if the adult consents.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

in order to properly investigate the incident; and that an investigative interview is appropriate given the child's age and circumstances.

162. Interviews authorised by the order may take place over a period of no longer than seven days (the order may specify a shorter time period in any individual case). It may sometimes be necessary or beneficial to hold more than one interview with a child about an incident – for example, in order to help the interviewers build a rapport with the child and to avoid overwhelming the child with an extended, arduous or complex interview. The seven day time cap is intended to avoid having the prospect of interviews hanging over a child for an indeterminate time. The order will specify when the 7 day period begins.

163. The order may require the child's parent, carer or other relevant responsible adult to make the child available for the interview, and may authorise the transporting of the child to and from the interview. The sheriff may also stipulate any additional requirements for the interview that they feel are necessary, including actions to safeguard and promote the child's wellbeing.

164. Section 35 requires the police to provide a copy of the order to the child (and their parent, if possible) as soon as they can, and to explain the order to the child. Copies must also be given to the people who will act as the child's supporter and advocacy worker, once they are known.

165. Section 43 provides that the child can appeal the decision to grant a child interview order. A Sheriff needs to agree to the appeal, which would then go to the Sheriff Appeal Court.

166. When an order has been granted, the interview must be planned by the police in collaboration with the local authority. Section 36 sets out the information the plan must contain, which includes the number, dates, duration and location of each meeting that will take place as part of the interview, and who will be carrying out the interview. In planning (and later in conducting) interviews, the police and local authority must have regard to statutory guidance on investigative interviews issued by the Scottish Ministers – this is covered in more detail in paragraphs 176 to 178, below. The child and their parent (if possible) must be given a copy of the interview plans as soon as practicable – copies must also be given to the people who will act as the child's supporter and advocacy worker, once they are known. The plans must be explained to the child in a way that is appropriate for their age and level of understanding, as far as is practicable.

Alternative approaches

167. The Bill could have allowed the police to interview children about the most serious behaviour by consent, without the need to obtain authorisation from a sheriff. However, taking into account the serious nature of the behaviour subject to investigation, and the young age and limited capacity of the children affected, it is considered by the Scottish Government and Police Scotland that additional safeguards are required. Independent judicial oversight removes any potential ambiguity about whether a child under 12 can be deemed to freely and meaningfully consent to a police process.

168. Another approach would have been for the Bill to legislate for all interviews of children under the ACR, not just those about the most serious behaviour. However, it was felt that creating a statutory framework for interviews with children about less serious incidents would risk subjecting young children involved in more minor concerns to a formalised and potentially “criminal feeling” process, and reduce the ability of the police to approach interviews flexibly depending on the child’s individual circumstances. The Bill therefore does not make any new provision about interviewing children about less serious behaviour: the police will be able to engage with children as they currently do (often speaking to them informally at home with a parent present). The Scottish Government also understands that when the police speak to a child in this informal way, even when it relates to the alleged commission of an offence by a child over the ACR, the Principal Reporter will not seek to lead evidence of anything said by the child in any resulting proof proceedings relating to the child’s conduct. Given the lack of any potential consequences for the child, the age of the children involved, and the “lower order” of the behaviour involved for most children under the ACR, it is considered proportionate not to legislate for all interviews of children under the ACR.

Advice and support for children being interviewed

169. Whenever a child is interviewed under a child interview order, the Bill gives the child the following rights:

- the right to have a supporter (section 39). A supporter is a responsible adult whose presence can help to reassure the child. The supporter might not necessarily stay with the child throughout the interview, but they should be able to access the child at any point should they wish. The interview may not begin unless the supporter

is on the premises. The Scottish Government recognises the important role of a parent (or someone acting on behalf of the child in the role of a carer or responsible person) in protecting a child's rights and providing moral support during investigation and it may often be the child's parent who supports them during interview, although it does not have to be. Wherever possible the interviewer(s) should take into account the child's own views on who they would like to have with them as a supporter. Sometimes the interviewer(s) may decide that a nominated supporter might not be an appropriate person to be with the child during the interview (for example, somebody who was themselves suspected of being involved in carrying out or suborning the child's involvement in the incident being investigated, or somebody who appeared to be intimidating the child, would not be a suitable supporter).

Additionally, if during the interview the presence of the agreed supporter is causing the child distress or is impeding the interview, the interviewers may ask the supporter to leave the interview (this would need to be agreed by a police officer of the rank of sergeant or above who has not been involved in the investigation and by a local authority social worker).

- the right to support and assistance from a suitably qualified and experienced advocacy worker independent of the local authority (section 40). In this context, advocacy workers are people who are specially trained to support and represent children when they are taking part in a children's hearing¹⁹, and the Bill extends that current definition to make clear that their role also covers supporting children in these investigative interviews. Their role is to help the child understand the purpose of the interview, their rights, and what the possible consequences of the interview could be; help the child communicate with the interviewers; and make sure that the interview is conducted fairly, in a way that promotes the child's wellbeing. This might involve reminding the child that they don't need to answer questions if they don't want to; raising concerns with the interviewers if they feel the interview is being conducted unfairly; or suggesting that the interview be paused if the child needs a break. We wish to ensure suitable qualification of those fulfilling this new role to protect the child's rights and interests. In implementing the Bill we intend to

¹⁹ The advocacy service is provided for in the Children's Hearings (Scotland) Act 2011. The service has not yet been commenced, but its commencement is being aligned with the implementation of this Bill.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

bring forward regulations to prescribe that, in the case of advocacy workers who provide support and assistance at interviews conducted under a child interview order, the advocacy workers must be legally qualified. This will be subject to consultation. The child will have the right to talk to the advocacy worker privately before (or at any time during) the interview. As with the supporter, the advocacy worker might not necessarily stay with the child throughout the interview, but the advocacy worker should always be able to access the child if they wish, and the interview may not begin unless the advocacy worker is on the premises.

- section 41 provides that a child may not be interviewed when they are alone: either the advocacy worker or the supporter (or both) must be in the room when the child is being interviewed.
- the right not to answer questions (section 38).
- the right to be given information about the interview and their rights in an easy-to-understand form that is appropriate for their age and stage of development, and to have that information explained to them (section 42). The information about a child's rights at interview will be designed and developed in collaboration with stakeholders – including young people – as part of the planning for the Bill's implementation.

Alternative approaches

170. Arguably, the proposed safeguard of an advocacy worker for children under 12 being interviewed is not necessary, because these interviews will not have any criminal consequences for the children attending them. However, the consequences of the interviews could still have a significant impact on a child's rights: for example, if they were subsequently referred to a children's hearing where a compulsory supervision order were put in place on non-offence grounds or if material from the interview became the subject of future disclosure via the ORI. Additionally, when a child is being interviewed because they are thought to have taken part in a seriously harmful event, there may be more of a risk that the child may feel intimidated and may admit to something simply in order to stop feeling uncomfortable. We therefore believe it is in the child's best interests, and in the interests of the investigation, for the child to be supported at an interview by a skilled practitioner independent of the interviewers who can help make sure the child

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

understands what is happening, and that the interview is both fair to the child and conducted appropriately.

171. We gave careful consideration to what kind of person would be best-placed to assist and support a child in this context. One alternative option would have been solicitors – and indeed, in their response to the consultation the Law Society of Scotland called for children to be provided with legal advice from solicitors when being interviewed. However, we were concerned that having a state-funded duty solicitor present would replicate criminal procedure too closely, and could give the child the perception that they are in trouble and being treated as if they have committed a criminal offence.

172. By contrast, advocacy workers in this context will not only be legally qualified but will specialise in supporting children in giving their views and providing assistance to children in a range of settings to ensure that their rights and interests are secured and advanced. Giving children access to an advocacy worker therefore ensures they are provided with professional independent support, but in a welfarist and child-centred manner that is appropriate for the young age of the children concerned and the non-criminal context of the interview.

Guidance on interviews

173. Section 46 requires the Scottish Ministers to issue guidance covering applications for child interview orders, and the collaborative planning and conduct of investigative interviews with children and the questioning of children in urgent situations under section 44 (discussed below). Interviewers (that is, the police and local authority social workers) will have to plan and conduct investigative interviews in accordance with this guidance. Other persons involved in the interview will also be required to take part in accordance with the guidance. The Advisory Group recommended that any interview with a child under ACR should follow the principles of the established Joint Investigative Interview process.

174. Work is already underway to review Joint Investigative Interview (JII) procedures, which are used for obtaining evidence from child victims and witnesses, where there are also welfare concerns. A joint project led by Police Scotland and Social Work Scotland will create a revised model for JII; develop a training programme for the revised model which recognises the depth of knowledge and skills required for this interview process and align the training

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

with national standards for police and social workers. The project will also design national standards for quality assuring JIIs, and develop key principles for the revised statutory JII guidance. A second phase of this project will build on these outputs to take forward the policy provided by this Bill to create a model for ACR investigative interviews and develop additional training modules and key principles for the statutory guidance. Once that phase is complete, guidance will be developed: first for JIIs and then for ACR investigative interviews. This approach will ensure that the guidance for all investigative interviews with children – whatever capacity the child is being interviewed in – builds on the same general principles, and is as consistent as possible (while the detail may differ in some regards, there will be significant overlap).

175. The guidance is expected to cover key principles of the ACR investigative interview process including the planning, content, structure and delivery of the interview, as well as the roles of supporters and advocacy workers. The guidance is also intended to cover any additional support needs, for example arising from disabilities or speech disorders or translation requirements. The guidance may also consider practical and technological arrangements on where interviews take place and how they are recorded. The Bill provides that before publishing the guidance, Ministers will have to consult the Chief Constable, local authorities, and anyone else they consider appropriate.

Alternative approaches

176. The Bill could have required Ministers to publish guidance in relation to all interviews with a child under the ACR – in other words, not only for investigative interviews under court order but also for interviews carried out informally about less serious incidents. However, as the Bill developed, it became increasingly clear that creating a new legislative framework for interviews with children about less serious incidents would run contrary to the more proportionate and child-focused approach found in existing multiagency GIRFEC practice. Where possible, the policy is to avoid unduly formalised or potentially “criminal feeling” experiences and processes for young children, especially in respect of less serious matters where potential state interventions would likely be less intrusive and therefore the children’s rights concerns less acute. In practice, the guidance will cross-refer to approaches taken in less serious cases. The Bill therefore does not make any new provisions about how the police deal with such matters. This approach is consistent with the recommendations made by the Advisory Group, which

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

only recommended legislating for the most serious cases. A review is currently being undertaken with regards to informal police interviews with children who have been accused, which is expected to develop good practice principles for such interviews.

Interviewing a child in urgent situations

177. In exceptional circumstances, the police may need to ask a child questions about a serious incident more urgently than following the procedures explained above would allow for. This could arise if, for example, another young child had been abducted and was believed to be in danger, and the police needed to ask questions to establish their location. Sections 44 and 45 are designed to cover these exceptional situations. They provide that the police may interview a child they have reasonable grounds to suspect has carried out a very serious act without first obtaining a child interview order, if delay could put someone's life at risk. The decision to interview must be authorised by a Superintendent (or more senior officer), and that officer must satisfy themselves that the same criteria that a sheriff would need to satisfy himself of if an order had been applied for had been met. The police officer carrying out the interview must let the child's parents (if possible) and the advocacy worker know that the interview is taking place, and must explain to the child what is happening, and that they do not have to answer questions. The child may only be questioned in so far as necessary to mitigate the risk of loss of life (in other words, this is not a full investigative interview; its scope is limited to responding to the immediate risk-to-life concern that justifies this departure from the normal procedure). The police must also apply for a retrospective child interview order as soon as possible.

178. Under section 46, Scottish Ministers must publish guidance on questioning a child in these situations of urgency.

Powers to take forensic samples

179. The Advisory Group recommended that "In the most serious circumstances, including where the support of the parent or carer is not forthcoming, a power should be created to allow for forensic samples to be obtained". (Para 4.16 (v)).

180. Given the intrusive nature of taking samples, especially from young children and given the ethical sensitivities about the taking and use of

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

personal information, the Bill only allows samples²⁰ to be taken from children under 12²¹ when the police have a statutory power or court authority to take them. In other words, it will not be possible to take samples from a young child only on the basis of consent. This is because of the child's presumed lack of capacity to give informed consent, even if the child and their parents are cooperating fully with the investigation. Samples may only be taken when it is reasonable to believe that a child may have carried out an exceptionally serious act, i.e. behaviour that caused (or was reasonably likely to cause) death or serious injury, or behaviour that was sexually violent or coercive.

181. Under the Bill, a sample may be taken only if²²:

- a) a sheriff has authorised it in advance; or
- b) the police have reasonable grounds to believe that a child has carried out seriously harmful behaviour and that evidence vital to investigating the incident could be destroyed if samples are not taken as a matter of urgency (in other words, the sample needs to be taken more quickly than the process of obtaining judicial authorisation would allow). The Bill does not allow intimate samples to be taken in this way – they must always be authorised by a sheriff in advance. This is because intimate samples are by their nature more invasive, and a greater encroachment on a child's rights.

182. When a sample is to be taken without prior authorisation by a sheriff in a situation of urgency (under section 57), that step must be authorised by an

²⁰ Although "samples" is used here as a short hand, note that the Bill provides for both forensic samples (for example hair samples, saliva or other bodily fluids) and physical data (for example fingerprints, dental impressions or photographs) to be taken. A full list of the samples and physical data that may be taken is set out in section 49 of the Bill.

²¹ Note that section 48 covers situations in which samples may need to be taken from a child 12 or older, to investigate behaviour they are suspected of carrying out when they were under 12. The police can either seek an order (which, if granted, would require the child to give a sample) or the older child could provide the sample voluntarily.

²² The one exception to this is samples from children who are over 12 but giving samples in relation to behaviour that happened when they were under 12. Section 48 provides that in these cases the police can either seek an order (which, if granted, would require the child to give a sample) or the older child could provide the sample voluntarily.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

officer at or above the rank of Superintendent who has not been involved in the investigation. Once the sample has been taken the police must obtain authorisation from a sheriff before they may proceed to process and analyse the sample. The sample may be recorded and stored so that it does not deteriorate, but no further steps may be taken with it (i.e. forensic testing) and neither the sample nor any record or information derived from it may be used for investigative purposes unless and until authorisation has been obtained. This ensures that whenever a sample is taken from a child (whichever of the circumstances outlined above it is taken in), there is judicial oversight.

183. Section 50 sets out the information the police must provide when they apply to the sheriff for an order to take a sample (whether in advance or retrospectively). This includes the reasons for seeking a sample and the detail of what kind of sample they are seeking authority to take. The police must include enough information to enable the sheriff to determine whether to grant the application.

184. Sections 51 and 52 cover the process and the criteria that the sheriff must apply when considering an application. Section 51 provides that the sheriff has flexibility in where to consider the application: they do not need to be in court; they may also be in chambers. The sheriff may consider the application on the papers alone (and this may be important to avoid delay in some cases – for example, if delay could increase the likelihood of key evidence being lost). The sheriff must consider whether to give the key people with an interest in the application the opportunity to make their voices heard. If an order is granted it authorises the taking and the analysis of the specified sample, and the time period within which the sample must be taken. The default time period is 7 days, but the sheriff may authorise a longer window where necessary (for example, if taking a hair sample for toxicology testing we understand that two samples would need to be taken several weeks apart). The order also authorises the child being taken to the place where samples are to be taken, and being kept there while samples are taken. Section 53 requires that the police must give the child (and, if possible, their parent) a copy of the order as soon as practicable, and explain the order to them.

185. Section 54 covers the taking of intimate samples, such as blood, semen, or a dental impression, when an order has been granted. It stipulates that dental impressions must always be taken by a registered dentist, and other intimate samples must always be taken by a registered doctor or health

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

care professional. This is consistent with the current practice when taking intimate samples.

186. Under section 57, any sample(s) obtained may only be used for the purposes of the specific investigation at hand and any subsequent proceedings in the children's hearings system. Samples, and any records derived from them, must be destroyed as soon as possible once the investigation they were taken for has closed and any subsequent proceedings have concluded. If for any reason the police take a sample in an urgent situation but then do not proceed to seek authorisation to use the sample, the sample and any record of it must be destroyed.

Alternative approaches

187. There are clear ethical sensitivities around taking samples from young children who are not capable of committing a crime, and the Bill could have prohibited the taking of samples in any circumstances. However, samples can offer significant benefits: if a sample confirms a child's involvement in a particular incident, this provides valuable information to help understand and manage any risk they may pose to themselves or to others, and to identify what support they might need. Using a sample to confirm a child's involvement may also help the victim to achieve closure. Of course, a sample also has the potential to conclusively prove that a child was not involved in a serious harmful event. That would then allow the investigation to stop focussing on the child.

188. The Bill could have allowed for intimate samples to be taken from a child without prior authorisation from a sheriff, if it seemed likely that important forensic evidence could be destroyed if the intimate sample was not taken urgently. This would have been consistent with the position for non-intimate samples. However, we felt that allowing intimate samples to be taken from children without prior authorisation would have meant underage children were at a disadvantage when compared to older children or adults. This is because case law has shown that in order to take an intimate sample from a person over the ACR who has been arrested, either the person must consent or the police must obtain a warrant. As explained above, our position is that forensic samples cannot be taken from a child under the ACR on the basis of consent. To ensure that there are not fewer safeguards for children under the ACR than there are for those over the ACR, we therefore decided that intimate samples should always be authorised by a sheriff in advance.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

189. The Bill could have allowed for samples taken from children to be retained for a set period of time, so that they could be compared against samples obtained in any subsequent cases and potentially enable to police to rule the child in or out of future investigations.

190. The Advisory Group did not reach an agreed view on whether it would ever be appropriate to allow forensic samples to be retained for future purposes. Instead, they recommended that there should be a wider consultation on the issue. Public consultation results were divided in 2016: 35.9% said that the police **should** be able to retain samples taken from children under 12 in certain circumstances. However, 43.2% said the police should never be able to retain samples. Those strongly opposed to retention included children's organisations, human rights organisations and the Law Society, with ethical and ECHR concerns being recurring themes. Police Scotland's response was the most notable voice in support of retaining samples – they argued that retention would be purely to eliminate the child from involvement in offences in the future, and that allowing for a risk-based decision on whether to retain a sample would enable a balance to be struck between the best interests of the child and the safety of the wider community.

191. Following careful consideration, the Scottish Government has decided that this Bill should not include provision to allow samples taken from children under 12 to be retained beyond the immediate investigation and any children's hearing proceedings flowing from it. The Scottish Government is not aware of any other jurisdiction in which samples taken from a child under the ACR can be retained, and a policy of non-retention is consistent with the Bill's core principle that children under 12 cannot commit a crime and should not be criminalised, or feel that they are part of a criminal investigation.

Legal aid

192. Section 60 provides a power that would allow Scottish Ministers to make children's legal aid available in relation to legal advice and representation at hearings or appeals about court orders for interview, search or the taking of forensic samples.

Additional powers and duties of a constable

193. Although it will be rare that the police need to compel a child to comply with the exercise of these new powers, there are circumstances in which it

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

may be absolutely necessary – for example, where a child is lashing out and needs to be restrained to keep them and others safe, or where a child’s refusal to cooperate with the police means that it would not be possible for the police to investigate an extremely serious incident without the ability to enforce the powers in the Bill. Section 61 of the Bill therefore authorises the police to use force when exercising the powers in the Bill, but makes clear that there is a strong presumption against any use of force against a child under the ACR. It stipulates that the police should always seek the child’s cooperation, and may use force only as a last resort. If force is essential, the police may use only the minimum amount of force necessary to exercise the power, and (in so far as practicable) must explain to the child what they are doing and why.²³ Any potential use of force is set within the context that all decisions made must, under section 59, have the child’s wellbeing as a primary consideration.

Offence of obstructing an investigation

194. Section 62 provides that it is an offence to intentionally obstruct a police investigation into a serious act that is believed to have been carried out by a child under the ACR. That includes obstructing the exercise of a child interview order, order authorising forensic samples, or search order. It could also include attempting to frustrate an investigation by, for example, destroying evidence. The offence of obstruction can of course only be committed by a person who is over the ACR. If a person is found guilty of the offence, they may be liable for a fine of up to level 3 on the standard scale. (This is consistent with the penalties for obstructing CPOs and other child protection measures under the 2011 Act.)

²³ Note that the explicit limitations on use of force in subsections (4), (5) and (6) in section 61 apply in relation to use of force against a child under 12. It is possible that the police might need to use force against an older child or an adult when exercising their powers under the Bill (for example, if an adult was attempting to physically obstruct the police). It is important to remember that the use of force against a person of any age is only justifiable and ECHR-compliant if it is necessary and proportionate in the circumstances. Police Scotland’s own Standard Operating Procedure on use of force emphasises that only the minimum force necessary to accomplish the lawful objective may be used, and that any use of force must be proportionate, legal, accountable, necessary and ethical.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

Consultation

195. There was an overwhelmingly positive response in 2016 to the suggested principle of retaining police powers in some form for children under the age of 12 provided those powers were supported by the safeguards recommended by the Advisory Group. Some 80% of respondents were in favour of retaining police powers, especially for exceptional and serious cases.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

196. An Equality Impact Assessment (EQIA) has been carried out and will be published on the Scottish Government website following the Bill's introduction.

197. The Scottish Government believes that the Bill does not discriminate on the basis of maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation.

198. As a measure designed to draw a distinction between children of different ages, the Bill discriminates between children aged under 12 and children aged 12 and over. For the reasons set out throughout this Memorandum, 12 is considered to be an appropriate age to place the ACR in Scotland.

Human rights

Part 1: Age of criminal responsibility

199. The European Convention on Human Convention ("the Convention") does not require a particular age of criminal responsibility to be set by member states. Raising the ACR is considered to be beneficial for children and does not itself raise any issues under the Convention.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

200. The Scottish Government considers the current age of criminal responsibility, alongside the minimum age of prosecution, to be compliant with the requirements of the United Nations Convention on the Rights of the Child (“the UNCRC”). However, raising the age of criminal responsibility to 12 will give clearer effect to the UNCRC and responds positively to criticisms from the UN Committee on the Rights of the Child.

201. The behaviour of children aged under 12 will continue, where appropriate, to be addressed in the children’s hearings system. However, a child aged eight to 11 will no longer be able to be referred to that system on the grounds that they committed an offence. Other than this change, the Bill does not make any substantive changes to children’s hearings. The children’s hearings system is considered to be compliant with the Convention and, in particular, Article 6 (right to a fair hearing). The Bill does not change that position.

Part 2: Disclosure of convictions and other information relating to time when person under 12

202. The disclosure on an enhanced disclosure or PVG scheme record of non-conviction information by the police and, as part of the review of that information by the independent reviewer, the disclosure of information by various bodies such as the police and the Scottish Children’s Reporters Administration, may constitute an interference with an individual’s Article 8 rights under the Convention (right to respect for private and family life). It is considered that any interference meets the requirements of Article 8. Information will be shared in accordance with the provisions in the Bill and with the requirements of data protection legislation as appropriate. The information sharing provisions are accessible and the circumstances in which information may be disclosed and what that information would be is foreseeable. The Bill introduces a requirement that information relating to a time when an individual was under the age of 12 must be reviewed by an independent reviewer before it can be disclosed on an enhanced disclosure or PVG scheme record. It is considered that this is a proportionate means of achieving the legitimate aim of ensuring public safety and is accompanied by appropriate safeguards.

Part 3: Victim information

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

203. Section 22 of the Bill provides a power for the Principal Reporter to disclose certain information about the reporter's response to certain behaviours on the part of a child. This disclosure of information may constitute an interference with the child's Article 8 rights. The Scottish Government considers that any such interference is justified in terms of legal certainty, purpose and proportionality.

204. Section 22 provides a robust statutory regime which clearly explains when disclosure can take place thereby ensuring the legal certainty of any interference with Article 8 rights. The purpose of the interference is to protect the interests of victims of the offending or harmful behaviour of children – ensuring that victims of certain forms of behaviour are informed of the state's response to that behaviour.

205. The provisions ensure the interference is proportionate by balancing the interests of the victim in the disclosure of information against the interests of the child in maintaining privacy. This is achieved by the creation of numerous safeguards which will protect against the arbitrary disclosure of information about the behaviour of a child. These safeguards place restrictions on:

- the group of persons who can access the information (this is restricted to victims, relevant persons and persons specified by the Scottish Ministers via subordinate legislation);
- the information which can be disclosed (this is restricted to information about the decision whether or not to arrange a children's hearing and the outcome of that hearing, no reasons for these decisions will be disclosed);
- the circumstances in which information can be disclosed (this is restricted so that disclosure cannot take place where the Principal Reporter considers that it would be detrimental to any child involved or would otherwise be inappropriate).

206. Accordingly, as the provisions in section 22 provide legal certainty, are for a legitimate purpose and represent a proportionate interference with the Article 8 rights of the child, the Scottish Government considers that section 22 is compatible with Convention rights.

Part 4: Police investigatory and other powers

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

207. The Scottish Government has considered the police powers in Part 4 in connection with Article 5 of the Convention (right to liberty and security). To the extent that the emergency place of safety power and powers to search, question and take forensic samples may result in a temporary deprivation of the child's liberty, the Scottish Government considers this is necessary to enable the police to investigate serious incidents where someone has been harmed or there was a risk of harm. The measures in the Bill will be "in order to secure the fulfilment of an obligation prescribed by law", and compatible with Article 5.

208. Police powers of search, questioning and to take forensic samples may be considered to engage Article 8. Article 8(1) is a qualified right and may be interfered with for the public interest reasons set out in Article 8(2), which include public safety and the prevention of disorder or crime, both of which are relevant here. The proportionality of any interference must be assessed taking into account such matters as the nature and degree of the interference and any procedural safeguards in place, and the law must be precise, accessible and foreseeable. The police powers in Part 4 apply only in cases where a child is suspected of seriously harmful behaviour. For the most part, the use of the powers must be authorised either by a sheriff or by a senior police officer unconnected with the investigation. There is an overarching "wellbeing of the child" consideration and various other factors must be taken into account before a power can be used. The Scottish Government considers these provisions are compatible with Article 8.

209. The interview of a child under Part 4 powers has been considered in light of Article 6(1), which guarantees procedural fairness. The questioning of a child under Part 4 may result in referral to a children's hearing, which is considered to be civil proceedings for the purposes of Article 6. Although the child is no longer criminally responsible, an admission about a serious incident during interview under Part 4 could have significant consequences for the child. The Bill therefore includes sufficient safeguards to ensure that interviews are conducted fairly and that a child's rights are safeguarded at the point of investigation – the child has a right not to answer questions and will have support at interview, including the assistance of an adult supporter and a legally qualified advocacy worker. Interviews will be planned and conducted collaboratively by the police and local authority social workers. The Scottish Government considers these provisions are compatible with Article 6(1).

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

Island communities

210. The Bill has no differential impact on island communities. The provisions will apply equally to all parts of Scotland.

Local government

211. The Scottish Government is satisfied that the Bill has minimal direct impact on local authorities. Any impact on the business of local authorities has been captured in the Financial Memorandum.

Sustainable development

212. The Bill will have no negative impact on sustainable development.

213. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has minimal or no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is therefore exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

This document relates to the Age of Criminal Responsibility (Scotland) Bill (SP Bill 29) as introduced in the Scottish Parliament on 13 March 2018

Age of Criminal Responsibility (Scotland) Bill

Policy Memorandum

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