

**EQUALITIES AND HUMAN RIGHTS COMMITTEE****AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL****SUBMISSION FROM – Police Scotland****Question 1**

***The UN Committee on the Rights of the Child recommends that the age of criminal responsibility is a minimum of 12 years old, which the Bill adheres to. What are your views on the appropriate age of criminal responsibility in Scotland?***

Police Scotland welcomes the Age of Criminal Responsibility (Scotland) Bill 2018 (the 2018 Bill), following on from our active participation in the previous Advisory Group whose work was the precursor to the 2018 Bill being developed. We welcome the opportunity to comment on the 2018 Bill and continue the positive work, alongside the Scottish Parliament and our partners, to ensure that we support all our children in Scotland.

Police Scotland is supportive of the Scottish Government position that the Age of Criminal Responsibility should be set at 12 years. We welcome the retention of police powers to allow for enquiries to be made in response to the most serious cases. However, this may not be easy to achieve and will have financial implications. Police Scotland is unique in this process as we have statutory responsibility to establish the circumstances when a victim reports a crime.

Investigations are dynamic and it is not unusual for limited information to be available at the outset of such an enquiry. The circumstances and facts are usually only established by the exercise of our powers to establish the substance of the matter. The agencies who will ultimately respond in the longer term to the needs of the child will only be able to do so insofar as the investigation has been able to establish the facts of the matter.

The current draft of the provisions is narrow and prescriptive. The effect of such a narrow framework is to remove most of the discretion with which such enquiries would otherwise be conducted. They become more time consuming, operationally demanding and thereby resource intensive. We have explained this further in our response to question 5.

Whilst we understand the debate regarding setting the age of criminal responsibility at a higher age, we are mindful that the nature of children's actions and the prevalence of that behaviour changes as the age group increases to 12 and above. Police Scotland has always agreed that prevalence should not frame the discussions on this subject. In the case of the most serious behaviour it is essential that there is a model which keeps everyone safe, whether that is in relation to one child or many. The safety and wellbeing of that child must be central to protecting them from the harm they may cause themselves and others. It is, however, essential that the duties on all agencies are practical and workable in real life situations. In this context prevalence is relevant.

OFFICIAL: NONE

Were the current provisions applied to an older age group, this would not be the case. From the analysis so far undertaken, the demand profile will change and thereby the resource implications will increase markedly. In their current form, this would be challenging for Police Scotland to deliver. We believe this has potential implications not only for policing but also for colleagues in social work and the advocacy service described in the 2018 Bill. Police Scotland believe further detailed consideration would be required should the age range be subject to review either now or at some future date.

There is nothing Police Scotland would like better than to never use the powers set out in the 2018 Bill. That would mean that no child has ever been responsible for such harmful behaviour. Thankfully, the numbers of young children who are responsible for serious harmful behaviour is very low; however, that fact recognises that there are occasions when such children can cause serious harm. We agree that the justice system is not the right response when this happens.

Policing has played a central role over the last 10 years in changing the model to respond to offending by children. Over those years the focus has moved towards a needs based response to offending by children. We remain fully committed to continue this work with local partnerships across the country. Our primary role in this model is to signpost to the services that can most appropriately respond to the needs of children, their families and carers.

It is essential that the right services are available to respond effectively to the needs of children. This is particularly vital when children are responsible for seriously harmful behaviour. Our experience is that those children need intensive support and often have complex needs.

We have a concern that the provisions, as drafted, may have the unintended consequence of bringing young children into a formal process when it is not necessary. The provisions require that an Order is applied for on all occasions that an investigation is necessary for the most serious circumstances. This takes no account of the views of the child and their family.

We would welcome the ability and discretion to conduct an investigation, only insofar as this is necessary (see our comments under question 5), with the cooperation of the child and their family. We are mindful that the safeguards still remain important and would only wish to see such powers implemented in conjunction with the conditions for the use of those powers, in particular the provision of advocacy services. This would provide a more child centred process and further ensure that the voice of the child can be heard and the needs of both them and their families are met in a timely manner.

Having taken the time to examine the 2018 Bill in detail, Police Scotland are clear that there will, at the very least, be a need for tiered training for all our staff. This will require greater investment in those who will be responsible for carrying out the specialist investigations

required through the duties in the 2018 Bill. However, there will also be a need to train all officers to ensure they understand the important distinctions that must be made when dealing with children below the proposed age of criminal responsibility.

Appropriate environments for obtaining relevant samples, along with identifying appropriate interview settings, which are not Police offices, also remains to be established, as do the manner of conducting and recording the information gathered from these investigative processes. All of these points carry an, as yet, undefined resource implication. It is important that those resourcing questions are answered alongside the other questions raised by the 2018 Bill. There will also be implications for our IT systems to ensure we can properly record information in a way that is compliant with the terms of the 2018 Bill. Only by properly resourcing both the infrastructure and training for all agencies will we collectively be able to ensure we design and delivery the best model possible for our children and society as a whole.

## **Question 2**

***The Bill makes a number of changes relating to the disclosure of offences and provides that any conduct by a child below the age of 12 (should the ACR be increased) that would previously have been recorded as a conviction will no longer be recorded as such. The Bill does however, allow for disclosure of 'other relevant information' held by the police about pre-12 behaviour. The Committee would welcome views on whether the Bill strikes the right balance in terms of addressing offending behaviour by young children under 12 and the disclosure of such information.***

The proposed amendments to the Police Act 1997 effectively remove the reference to conviction in Section 112 & 113A of the existing Act. The 2018 Bill proposes that the definition of 'conviction' is amended to 'but not a conviction of an offence committed when the applicant was under 12 years of age'. In terms of disclosure, Police Scotland believes that the Chief Constable must be able to reserve the right to submit Other Relevant Information (ORI) as determined necessary and proportionate.

The Bill proposes the appointment of an Independent Reviewer (IR); it should be noted that Police Scotland's analysis has revealed that there have been no disclosures or cases for those under 12. We do, however, see the read across to the ongoing PVG consultation where again the role of the IR is proposed. This review describes a far wider role for an IR which appears to be based on the role of the Independent Monitor (IM), a post long established in England and Wales, and now covering Northern Ireland. However, in the 2018 Bill, the IR will intervene before disclosure of any information to the applicant where the IM only intervenes after the disclosure. This will impact on the independence of the Chief Constable to submit ORI.

Police Scotland also has a responsibility to process requests under the terms of the Safeguarding of Vulnerable Groups legislation processed by the Disclosure and Barring Service (DBS). In this respect, Police Scotland has highlighted the proposed changes to the Age of Criminal Responsibility as, for England and Wales, the current age remains at 10 years. This potentially creates an anomaly in cross border practice as we will apply a different standard in Scotland. For disclosure purposes, the 2018 Bill must be considered alongside the ongoing consultation for the review of the PVG legislation. Police Scotland would welcome a wider consideration of the potential longer term role of the IR, in line with the PVG consultation and taking full cognisance of the potential impact of cross border cases.

To summarise, it is essential that the Chief Constable is able to reserve the right to submit ORI and it is crucial that the IR is accountable with respect of any decisions made regarding editing or removing ORI disclosed by the Chief Constable.

### **Question 3**

***The Bill provides that children under 12 who are subject to a police interview will have the right to have an advocacy worker present during the interview. What will the impact be on your organisation or on the children you work with who might access the advocacy service?***

Police Scotland welcome any service which better protects the rights and interests of children and creates a process which is focussed on the identification of and response to their needs. It will, however, be necessary to fully understand their role, training and availability to better understand how we will work collaboratively to support the child.

It is important that those performing this role are available to support enquiries at a time that is convenient for the child, their family and consistent with the needs of the enquiry. This may include availability in the evening and at weekends. Having flexibility in the provision of this service would further support our proposal that the investigation could be conducted with the cooperation of the child and their family and ensure any consent was provided appropriately and with the best interests of the child.

Whilst advocacy could be an important part of that process, we are also mindful that we will be dealing with very young children in a situation which is already stressful and anxious. As outlined in the response to Police Powers below, our central concern is that there is a risk that the effort to provide safeguards becomes too prescriptive.

Police Scotland believe that it is vital all those involved in supporting children through this process create an environment where the child can be open and honest about their own actions and the things that gave rise to any disclosed behaviour. There is, however, a crucial issue at the heart of this, the rights of the child. The question of balancing a child's right to silence with the need to establish the harm that they pose themselves and others

will always be a complex one. We believe the advocacy service will have a crucial role to play in supporting the child (and their adult supporter) to properly understand these principles.

We do, however, note an apparent anomaly in the drafting of section 45 (Procedure following authorisation of questioning under section 44 (Questioning of child in urgent cases)). Section 45(5) states that a constable must notify an advocacy worker about the authorisation under section 44, however, the Bill does not state when this should be done. Section 44 envisages the most serious and rare of circumstances, in which urgency is imperative. We anticipate that the notification to the advocacy worker is actually carried out in conjunction with section 45(6), as soon as reasonably practicable applying for a child interview order. Police Scotland would welcome clarification on this point.

#### **Question 4**

***Raising the age of criminal responsibility would necessitate a number of changes in relation to information which can be provided to victims. The Bill seeks to balance the best interests of victims (including child victims) and the best interests of the child responsible for any harm caused. Again, the Committee would welcome views on whether an appropriate balance in this area has been achieved.***

Police Scotland does not believe that the 2018 Bill will impact on the rights of victims or those who are permitted to exercise their rights under the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) as long as it remains the case that it is recognised a crime has taken place and is recorded as such.

In respect of information provided by Police Scotland to a victim or witness under Section 6 of the 2014 Act, our response is catered around the needs of the person requesting the information and the application is not age specific but applicant specific. Police Scotland have published our [Standards of Service for Victims and Witnesses](#) which sets out the commitments we have made, consistent with the 2014 Act.

Police Scotland will however, in implementing any changes, be required to ensure that the organisational response to victims of crimes is not diluted and the impact is fully recognised and dealt with appropriately, irrespective of the level of seriousness.

There needs to be a fine balance between the rights of the child and the rights of the victim, so that victims can have peace of mind officers are well equipped to deal with such situations. There is a risk of further victimisation to victims of such incidents if the balance is not right.

#### **Question 5**

***Part 4 of the Bill relates to police powers and provides 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. Those powers include, amongst other things, the taking of forensic samples, removing a child to a***

***place of safety and the power to search children. The Bill restricts the application of most of these powers so that they are only available to the police in the most serious of cases. The Committee would welcome views on the approach taken to police powers in the Bill.***

Police Scotland welcome the retention of police powers to allow for enquiries to be made in response to the most serious cases. However, this may not be easy to achieve and will have financial implications. Before considering the draft provisions in Part 4 in more detail, it is important to remember a distinction in the role of the police from all other agencies.

Police Scotland is invariably the agency with statutory responsibility at the earliest stages of establishing the circumstances when a victim reports a crime. It is normal for only limited facts to be available at the outset of such an enquiry. The circumstances and facts of the matter are only usually established by the exercise of our powers to establish the substance of the matter. The agencies who will ultimately respond in the longer term to the needs of the child will only be able to do so insofar as the investigation has been able to establish the facts of the matter.

It is essential that the provisions provide authority for enquiries to substantiate whether the child has demonstrated seriously harmful behaviour. No two sets of circumstance are ever exactly the same so a degree of flexibility allows for a more nuanced response. As previously stated, at the heart of that process must be the rights of the child but set within a framework to respond effectively to their needs. By framing the process in this way, the focus will rightly move away from any sense of a criminal justice process and become entirely a needs based process.

As investigatory powers are predicated on the serious nature of the reported offence, this does mean there will be no formal power to intervene for less serious reports. It is possible that there will be circumstances reported which fall out with the scope of the Investigative Orders but which give cause for concern about the harmful nature of a child's behaviour.

It will only be possible to investigate such reports with the support and permission of the child's parent/carer. Where that is not provided we believe it will still be possible to make appropriate referrals, however, this may significantly limit our ability to establish information about the nature and extent of the child's needs. It will also be necessary to consider the manner and nature of information shared to ensure we comply with data protection duties.

### Section 23

Police Scotland generally welcomes the intention of the provisions set out in the section 23. Experience tells us that it is vital there is an ability to respond to immediate risk, this is vital to protect both the child and the wider community. That said the drafting of section 23 only

permits response where there is an immediate risk of significant harm or further such harm to any other person. This is very narrow and does not appear to confer any power to respond to the immediate aftermath of an incident.

Whilst rare, Police Scotland can envisage circumstances where we receive a report that a young child is suspected of causing significant harm. The harm has already been caused and the circumstances do not give rise to the suspicion that there is a risk of further harm. The 2018 Bill makes no reference to such circumstances, nor is there a cross-reference to the powers in the Police and Fire Reform (Scotland) Act 2012 (the 2012 Act).

Equally, there may be occasions where a lawful search of a child finds a weapon which increases our concerns about the wellbeing of that child and would be a matter we would wish to bring to the attention of the child's parent/carer. Police Scotland would welcome clarification of the intended future response to such circumstances to ensure that there remains an ability to respond to the needs of both children and the wider community to ensure we can keep everyone safe.

### Place of Safety

A police station is not the best environment to meet the needs of a child in these circumstances. We would welcome confirmation of how the alternative resources necessary across Scotland will be put in place. This must ensure there is a suitable setting for a child to be taken and used, where necessary, for obtaining relevant samples and or for facilitating investigative interviews. This is reinforced by the findings of HM Inspector of Constabulary in Scotland in their report, [Strategic Overview of Provision of Forensic Medical Services to Victims of Sexual Crime](#). In this report they make specific reference to the need for such provisions within Standard 5 (page 48) and Recommendation 10 (page 52). It is clear that our estate should only be considered as a last resort and should be the exception, not the rule.

The nature of the powers in section 23, in relation to a place of safety, appear initially to be closely aligned to the existing child protection powers outlined in section 56 of the Children's Hearing (Scotland) Act 2011. There are important differences, however, between the drafting of those sections. Section 56 requires that the police notify the Principal Reporter, however, that power is not replicated here. We would welcome the views of Social Work Scotland about whether the current drafting of section 23(4)(a)(i) is sufficiently robust to allow them to take action to protect the child when they receive such a report from Police Scotland.

### Search Powers

It is noted that the power to search without a warrant in other enactments is carried over into this Bill through the provisions in section 25. However, as already stated under section 23, it does not appear to confer a power to take action immediately after an incident or in circumstances where the risk might be difficult to quantify.

### Investigative Orders

Police Scotland would welcome confirmation that when an investigation results in the need for more than one form of Order e.g. investigative interview and samples that this may be sought through one single application rather than making multiple applications.

The challenging balance between a child's rights and meeting their needs through the delivery of those rights is further highlighted by the provisions in respect of Investigatory Orders. The current draft effectively creates a requirement for the investigating officer to establish if the request for such an Order is *necessary* to investigate the matter. This is the test that the Sheriff will apply on receipt of the officer's application. However, the burden of proof for any subsequent referral to the Principal Reporter is the civil test – "balance of probabilities", not the current criminal test – "beyond all reasonable doubt". If the civil test has been met without the request for an Order (e.g. witness statements), it appears from the current draft that the Order would no longer be 'necessary'. This question would still need to be answered if, as we have suggested previously, there is an ability to carry out a 'necessary' investigation with the cooperation of the child and their family, rather than under an Order.

This may result in the child's voice not being heard during the investigatory phase, or for that matter, the potential for further evidence to be sought through the powers of search or samples. This seems to be contrary to the policy intent for the Bill as outlined in paragraph 154 of the Policy Memorandum which quotes the previous Advisory Group report "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." It is possible that this opportunity will be lost if we are merely establishing sufficient information to submit a report to the Principal Reporter.

Equally, one of our core statutory functions is the full investigation of reported crime to the criminal standard of proof. There is a possibility that the 2018 Bill will create a contradiction with the 2012 Act as officers will only carry out 'necessary' investigations, not necessarily a full investigation. Police Scotland will require clarity of which duty will take precedence.

The provisions in respect of an Order also carry time critical monitoring of their use and associated notifications. There is currently no system within Police Scotland to facilitate such a function. One will have to be designed to ensure these duties can be complied with. This will be a further resource demand unique to Police Scotland.

### Investigative Interview



Police Scotland is extremely concerned by the use of the word “unlawful” in section 31(1). This appears to make any questioning out with the terms of an Order “unlawful”. As previously stated, our agency is unique in this process in that we are charged with establishing the facts. We are not aware of any other enactment which would place our officers in the position that they were acting out with the law by asking questions when they initially attend an incident to establish what has happened. We will often only have very limited information at the start of an investigation. Only by asking questions of those who are either witnesses or who have potentially caused harm will we be able to establish those initial facts.

It is essential that those officers who first respond to such reports are able to ask pertinent questions to establish what may have happened. Police Scotland does not believe these provisions are operationally viable as currently drafted. That said it is equally important that questioning does not extend beyond those initial enquiries. When suspicion has crystallised on a young child, it is essential that relevant safeguards are put in place to support the child before any further questioning takes place.

All professionals who work in child protection know how vital it is to create a supportive and safe environment for children who have suffered significant harm or are at risk of significant harm. Police Scotland believes it is possible to fully investigate the reported crime which would be the catalyst for such an enquiry without criminalising the child, if the nature of the investigation is properly designed. This requires two distinct facets to the enquiry, namely, the needs of victims who have been harmed and the needs of children who may have caused harm. We have already offered comment in relation to victims’ rights/needs.

Child protection procedures have been widely discussed in the context of the 2018 Bill. The interview of a child in such protection enquiries carries some similarities to the model envisaged here; however, there are also some distinct differences. An investigative interview will establish information about what happened in the context of the child’s own actions. However, child protection enquiries and joint investigative interviews are witness interviews to establish what a child knows, or has suffered as a result of the actions of another person. It is an important distinction that this interview will be about establishing the harm that both the child and any other person may be exposed to by the actions of the child.

In the most serious cases this can be extremely complex. The child may be traumatised by those events, including their own actions. It is also possible that their behaviour is a symptom of other harm which they are suffering. It is essential that those factors are at the heart of the investigative interview.

Police Scotland wants to create an environment where the child is supported to be honest and disclose anything that can help tailor the support they receive and address their needs, whilst also protecting their wider rights (including the right to silence). The skills of those conducting such interviews will be crucial to ensure that such an environment is created. We welcome the opportunity to work with partners and the Scottish Government to design

the guidance that will support those professionals in conducting such interviews in the most serious cases.

In conjunction with the above points, it is important that the model introduced does not have the unintended consequence of creating a more formal process for children, albeit a non-criminal one. As currently drafted, the duties contain specific requirements which could prove challenging in the dynamic environment of an ongoing investigation. Specifically, section 36 sets out what an interview plan must specify. It will be extremely challenging to be able to set out all of this information at the start of the investigation. Such information evolves and develops as the investigation continues and more information becomes available.

The duties also require that this information is made available to the child and their parents/carers. Police Scotland wholeheartedly endorse the principle that the child, in particular, and their parent/carer should be kept fully informed of the enquiries and the nature of the interview. However, setting all this out in writing and recording this information may not prove to be a child centred way of supporting the child.

#### Power to take Samples

Police Scotland is committed to consider the recommendations from the Report of the Independent Advisory Group on the Use of Biometric Data in Scotland. This includes recommendations in relation to obtaining and retaining biometric data from children.

The provisions in the 2018 Bill appear to be consistent with the principles set out in the report by the independent advisory group. That said the logistical and resource implications of these proposals also remain to be fully explored and understood. In particular, where such procedures would be carried out, recognising that police stations should be a last resort.

Police Scotland would, however, welcome clarification in relation to the terminology in section 55(2) which states:

***“The constable who applied for the order must ensure that all record of any data taken, all samples taken, and all information derived from any samples are destroyed as soon as possible following.....”***

This appears to replicate the provisions in section 18A of the Criminal Procedure (Scotland) Act 1995; however, there is one important omission. Section 18A refers to “....relevant physical data taken or provided.....”, however, the provisions here refer to “....all record of any data taken....”. This appears to be an important distinction. This would require all records which mentioned the sample would have to be deleted. For ethical and audit reasons, Police Scotland recording systems do not permit the deletion of text which has been entered that refers to the conduct of the investigation. This information would form part of that record. It would be necessary to develop an IT solution to allow for such entries

to be removed. This is particularly challenging as this would still need to protect the current standards for data recording to remain for all other enquiries into reported crime.

Police Scotland would like clarity about the rationale for the distinction in this Bill from the existing terminology in the Criminal Procedure (Scotland) Act 1995 as there is a potentially significant resource implication attached to this change in recording practice. This also has potential ramifications for our partners with whom we may lawfully share such information following an investigation.

Additionally, Police Scotland would welcome an explanation of the definitions of relevant and intimate samples. There appears to be some anomalies with the definitions of the two categories. Clarification will be needed on how it is envisaged that this will be implemented operationally.

### **Question 6**

**Please tell us about any other comments you feel are relevant to the Bill.**

Police Scotland remains committed to working with all relevant agencies and the Scottish Parliament in relation to the Age of Criminal Responsibility (Scotland) Bill 2018. As can be seen from the above response, there are a number of areas where further consultation and refinement of the draft Bill would potentially be beneficial, Police Scotland would also welcome the continued discussion around the financial implications of the Bill, which we believe still require further clarity upon.