OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities and Human Rights Committee

Thursday 27 September 2018

Session 5

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CONTENTS

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AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL: STAGE 1 1

EQUALITIES AND HUMAN RIGHTS COMMITTEE

24th Meeting 2018, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

*Alex Cole-Hamilton (Edinburgh Western) (LD)

COMMITTEE MEMBERS

*Mary Fee (West Scotland) (Lab)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Oliver Mundell (Dumfriesshire) (Con)
*Gail Ross (Caithness, Sutherland and Ross) (SNP)
*Annie Wells (Glasgow) (Con)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Children and Young People's Commissioner Scotland)
James Docherty (Violence Reduction Unit)
Gerard Hart (Disclosure Scotland)
Chris McCully (Criminal Justice Voluntary Sector Forum)
Maggie Mellon (Howard League Scotland)
Simon Pountain (Independent Monitor for the Disclosure and Barring Service)
Professor Elaine Sutherland (University of Stirling)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 27 September 2018

[The Convener opened the meeting at 09:18]

Age of Criminal Responsibility (Scotland) Bill: Stage 1

The Convener (Ruth Maguire): Good morning, and welcome to the 24th meeting in 2018 of the Equalities and Human Rights Committee. I ask that all electronic devices be put on silent mode.

Under agenda item 1, we will continue our stage 1 oral evidence taking on the Age of Criminal Responsibility (Scotland) Bill. We have two panels of witnesses. I welcome our first panel: Simon Pountain, Independent Monitor for the Disclosure and Barring Service; Gerard Hart, director of protection services and policy at Disclosure Scotland; and Maggie Mellon, a trustee of the Howard League Scotland. You are all very welcome.

I will kick off with some general questions to give us some background. When can a child under 12 currently acquire a criminal record?

Gerard Hart (Disclosure Scotland): A child under 12 would acquire a criminal record when grounds that they had committed an offence were found proved at a children's hearing. Presently, that is the only way in which a child under 12 could acquire a criminal record, because a child under that age cannot be prosecuted in Scotland.

The Convener: What impact is a criminal record likely to have on a child's future life chances?

Gerard Hart: It is clear that any disclosure of criminal information at a future date—whether the child is still a child or has become an adult—can impact on life chances. From the work that we are doing in another domain—the Scotland works for you group—we know that there is a huge aversion among some employers to giving people with convictions employment. We are working with employers to try to change that mindset and create a much more proportionate and fair approach to the use of disclosure information. However, the evidence supports the view that many employers are still reluctant to employ people with convictions. Having a criminal record could also impact on training, education and access to courses that involve work with vulnerable groups. Therefore, there could be significant implications for a child who acquires a criminal record as they move through life, due to the stickiness of the label.

Maggie Mellon (Howard League Scotland): Acquiring a criminal record has serious consequences for a child. Scotland is well behind any international standard on the issue, given that, a long time ago, the United Nations agreed that there should be no question of a child under 12 being thought capable of committing a criminal offence. A criminal record is a millstone around a child's neck for the rest of their life, because any conviction will be disclosed under enhanced disclosure checks until they are 40. That is a real blight for someone who is starting off in life and wants to apply for a job as a care worker or to study and train to be a nurse or a doctor. I know of specific examples of those difficulties.

Gerard Hart said that a child would acquire a criminal record if grounds were proved at a children's hearing, but a child can also acquire a record if grounds are accepted. Sometimes, a parent will accept those grounds in order to get help, without having any idea of the serious consequences. The offence—it is not even an offence—is sometimes used only as a peg to get the child into a hearing because of other concerns, and I know lots of parents who say that if they had known the consequences, they would never have accepted the grounds. Personal relationships can also be affected if someone has to disclose a record to somebody very early on in a relationship. A child's chances can be stifled.

Simon Pountain (Independent Monitor for the Disclosure and Barring Service): I support what has been said. For completeness, I should say that I also carry out a role for Northern Ireland, where I am the independent reviewer of criminal record information. That involves reviewing the criminal records of people who are under the age of 18 when they commit offences, and I decide whether those offences stay on their certificates if they later apply for work with the vulnerable. In support of what Gerard Hart said, I recognise, through both my roles, that the presence of the information on a person's enhanced certificate is more likely than not to impact on their ability to find employment that involves working with the vulnerable. That is due to the stigma that is attached. It is easy for that to happen when an employer is sifting through paperwork that discloses a record or other relevant information and compares that against someone who does not have a record.

The Convener: Are there groups of children who are more likely to be affected by having a criminal record than others?

Maggie Mellon: Yes. We know—although we do not collect the statistics well enough—that

children who are taken to children's hearings are disproportionately drawn from poorer families and communities. I am sure that the committee has heard about the "Edinburgh Study of Youth Transitions and Crime" and that it will hear more about it. That study showed that misbehaviour by children or adolescents is spread across the whole population, but some children from some communities seem to suffer most heavily from the penalties.

Gerard Hart: I want to clarify some figures that the committee might find helpful. In 2016 and 2017, in the whole of Scotland, there were fewer than five cases in which conduct by children under the age of 12 was the subject of disclosure at a later date. In 2014 and 2015, the figures were 53 and 27, respectively. The reason for that drop was that the Government introduced the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015, which introduced a rules list, an always list and new protections, particularly for young people, by getting rid of minor and trivial matters from subsequent disclosure. That was a progressive development and has been a significant improvement to the disclosure regime. The Government's actions to date have significantly reduced the number of cases that are subject to disclosure, and the bill will go further by removing, in almost every case, the possibility of there being any disclosure of anything that a child does before the age of 12.

Maggie Mellon: Of course, 12 is the absolute minimum that has been set. It is not the desired level.

Simon Pountain: I want to add to what Maggie Mellon has said about the groups of people who are more likely to be involved. I know from my Northern Ireland work—I do not have statistics, so this is really just an opinion—that looked-after children are highly represented in the groups of people whose criminal records I review.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Maggie Mellon addressed well the line of questioning that I have been pursuing for the past couple of weeks about children's hearings. I want to ask Disclosure Scotland whether there is any other circumstance in which an individual would have something on their criminal record that is effectively from the civil system—something that is based on the balance of probabilities rather than being beyond all reasonable doubt—or is that the only circumstance?

Gerard Hart: Do you mean specifically in relation to children, or in the general disclosure regime?

Fulton MacGregor: I mean in the general disclosure regime, but obviously focusing on children.

Gerard Hart: The Soham murders and the Dunblane massacre led to reports that generated the need for non-conviction information to be disclosable under certain circumstances, because Ian Huntley and Thomas Hamilton had information of that type in their background, which, had it been disclosed, might have prevented their exposure to the circumstances in which they offended. In Scotland, that system is known as ORI, or other relevant information.

In essence, the chief constable makes a decision to include in a higher-level disclosure a paragraph of text that can relate to matters that never went to court and were not tested in that way but which the chief constable reasonably believes to be pertinent to the kind of work that the individual is seeking to do or the vulnerable group that the individual is seeking to work with. That could happen with an enhanced disclosure in relation to a specific post, or with a protection of vulnerable groups disclosure in relation to a whole vulnerable group—children or protected adults.

Those are the circumstances in which the chief constable could include information of the type that you describe. That is theoretically possible for conduct below the age of 12, but our records suggest and show that it has never taken place. As far as I am aware, there have been no disclosures of that type for children under the age of 12, although it is theoretically possible for that to happen.

Alex Cole-Hamilton (Edinburgh Western) (LD): My line of questioning dovetails with what has just been said, which is absolutely crucial. In the committee's recent scrutiny of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill, we looked at historical offences that are now no longer deemed to be offences, and at the whole process of disregards. There was even a letter from the First Minister saying that we were wrong to treat people in the way that we did. Should we be taking that belt-and-braces approach to children who committed offences when under the age of 12 and who have a criminal record now? Should they not only have that expunged from their record but have a letter of apology to say that we were wrong to treat them in the way that we did?

Gerard Hart: The Government's policy is that the matters for which someone has a police record for conduct below the age of 12 are not impacted by the bill. The bill is about the state disclosure of that information. The police will retain those bits of data on their systems for as long as their own weeding and retention rules provide, but the state will not disclose those convictions—those

matters—either retrospectively for an adult who applies for a disclosure now but whose criminal history contains conduct from before age 12, or for someone who is a child. That information will not be disclosed in future when the bill becomes an act. The protections offered by the bill relate to the disclosure system; they do not touch the police's ability to retain the information, which is subject to a different set of protocols and rules. It means, in effect, that children cannot have that information included on any kind of state disclosure. Does that answer your question?

Alex Cole-Hamilton: Yes—that was helpful. However, the substantive point is about evidence of a child's conviction, or of a process that lead to them being held accountable before they were 12, existing in the files of state authorities, which might follow them. I want to hear from the Howard League on that.

09:30

Maggie Mellon: It would be unfortunate and too narrow to concentrate on only children under 12, because many fewer children aged under 12 are taken to children's hearings on offence grounds. Young people between the ages of 12 and 16 are those who suffer the most, because they can acquire a criminal record before the age of 16. That sometimes happens for very minor behaviour: our welfare approach means that they are taken to children's hearings because of their needs.

For example, two boys do exactly the same thing—let us say they steal from a shop. One will go to a hearing because inquiries find social problems, and the other will not. From the Edinburgh research, and from research in other places, we know that the child we try to help and take to a hearing will have worse outcomes than the one who is allowed to get on with his life, as most people do as teenagers. There is a lot of behaviour in the teenage years that could be prosecuted, but if people are not prosecuted or involved in formal systems, they tend to have better outcomes.

We sometimes land children with a really serious lifelong problem by trying to help them in a way that results in giving them a conviction. There is a long and complicated history to how behaviour becomes an offence that leads to a criminal record. That was not the original position: as a result of the Rehabilitation of Offenders Act 1974, children retain a criminal record, so it was an unintended consequence of previous legislation. However, we have been landed with it. Young people between the ages of 12 and 16 are the ones we need to worry about, as we are landing them with serious lifelong records.

Alex Cole-Hamilton: There has been a lot of discussion in previous evidence sessions about whether 12 is the age that we should go for, or whether it should be higher. Irrespective of where the debate lands, do we need a halfway ground that recognises the impact of a criminal record on those who are between 12 and 16, and perhaps a sunset clause on the criminal record?

Maggie Mellon: We should not land anybody under the age of 16 with a criminal record. There are some serious offences for which disclosure probably needs to be retained and a watch kept, because there could be a risk to the public. However, many offences could be let go as youthful misdemeanours. That does not mean that we do not react, make the child responsible and have some measures such as restorative justice to mark disapproval of the behaviour, but a criminal record would be wrong. Retaining some disclosure might be right in some, but very few, circumstances.

The Convener: For clarity, when we talk about serious offences, what exactly are we talking about? Do we mean violent and sexual offences? If someone commits such offences, are they likely to continue to commit them?

Maggie Mellon: Evidence says that that is not necessarily the case.

It should mean very serious violent and sexual offences. I will not tell you the exact case, but I know of a 13-year-old boy whose offence was labelled as breach of the peace with sexual aggravation. He accepted that and did not ask for it to be proved. It is a terrible injustice for him to carry a criminal record until he is 40 as if he was a sex offender, because what he did was the kind of silly thing that any teenage boy might do, and it was because of other troubles in his life that he ended up at a hearing.

It should not mean all sexual offences and it should not mean all violent offences, which might include pushing another child over in the playground.

We also have to think about capacity. How we view what an adult does when they push or hurt somebody should be different from how we view a child doing the same thing.

The Convener: The other panellists want to come in on that.

Simon Pountain: I support Maggie Mellon's point. The title that we give some offences indicates that they are potentially really serious offences, but when we look into the detail, that is not necessarily the case. That often happens in my work in Northern Ireland. With some of the offences that I look at, I think that it is a sexual offence that someone might decide should go on

to a record. However, when I look at the detail behind it, it is a lot less serious. There is a point about the police reviewing those issues when they look at disclosures.

I will go back to a previous point. I make no comment on where the age of criminal responsibility is set or whether it should be increased. All that I would say is that you need to consider the effect of creating a bright line at the age of 12 without a buffer afterwards. We talk about children aged 12 to 16. If somebody commits a reasonably serious offence on the day after their 12th birthday, that will put them in a difficult position in relation to employment later on. It is up to the police to make decisions—based on guidance that is issued to them by, in my case, the Disclosure and Barring Service or AccessNI, and in your case by Disclosure Scotland—on whether the information is relevant and whether it ought to be disclosed.

Gerard Hart: It might be helpful to join up two different aspects of Government policy here. There is the bill, which is about raising the age of criminal responsibility to 12, and everything in the bill is ancillary to that endeavour. As you know, there is stuff on samples, interviews, disclosure and so on, and all of that is around the age of 12. The policy construct for that is that children under that age are simply incapable of criminality.

I think that the policy idea for the older age group is that there might be an argument for an acute holding of responsibility but a removal of the long-term consequences. Because of that, we have put into the PVG review consultation radical proposals on how we deal with the 12-plus age group. The upper age limit for that has not yet been set. It could be 16, 18 or another number—it has yet to be defined. The idea is that there might be criminal findings in relation to people in that age group but it is the stickiness of the record that really matters to life chances as people get older.

Our idea in the policy consultation that we have just concluded is that there are three options. One is the status quo. Another focuses on the cohort of very serious behaviour, and we would use the rules and always lists from the current disclosure regime to define what is very serious and what is not. The preferred option, which is perhaps the most radical, is simply for the independent reviewer to make a decision about whether anything relating to the age band of 12 to the upper limit should ever be disclosed, except as police information.

Again, we have the safeguarding response of the capability to disclose something should we wish to do so, but everything else would not be disclosed. That would be an enormous protection for young people who are moving through the difficult and turbulent time of adolescence.

The Convener: Oliver Mundell has a question. Is it a supplementary, Oliver?

Oliver Mundell (Dumfriesshire) (Con): Yes. My main line of questioning is not dissimilar, but I will come back to it at the appropriate point.

On disclosure, what does the panel think about placing the responsibility on the prosecutor or on the person who decides the punishment at the time? Could the decision be made at that point in order to ease the burden and so that people would be clear about the position that they are in, based on the characteristics of the offender or the young person at that point?

Maggie Mellon: Regardless of who makes the decision to retain, there has to be a right of appeal and review. Where a child is concerned, that would require asking the children’s panel to make the decision.

We do not have that much evidence to guide decisions about what information should and should not be retained. There should definitely be a very high threshold. The Edinburgh study gave some ideas on which children might go on to offend, which is mainly to do with how involved they are in the formal system; that involvement is likely to impel them into offending.

There should be retention only in rare circumstances, and there has to be a right of appeal. I think that such a system operates in England and in Northern Ireland on an administrative basis. It has been suggested that, in Scotland, there should be a right of appeal to the sheriff.

Oliver Mundell: Do you think that the decision should be taken up front at the time of sentencing or when punishment is being handed out, with a right of appeal?

Maggie Mellon: No.

Oliver Mundell: I wonder whether it would be useful for the victim and the young person to know exactly what position they are in, rather than having a list of offences. If, as part of the decision that was taken, they knew whether the offence was going to stay with them in later life, they would be in a clearer position. That is a point of view, but also a question.

Simon Pountain: It is often a lot later in a person’s life when they decide to work with vulnerable people, and it would be at that point the information would come out. There is precedent for the person who makes the judicial decision to do that—for example, by adding the person to the sex offenders register after sentence. However, the presence of an independent person at a later stage would add value to the system. Such a person could take a much colder look at the

information than could somebody who had been embroiled in the case to the point of sentencing.

I support what Maggie Mellon said about disclosing later, when the person decides to work with vulnerable people in the knowledge that that information may follow them into that in the future. I support that as long as the person is clear about that and—as we said earlier—does not think, as people often do, that they would not have accepted the caution conviction if they had known what it would mean in the future. If people knew that that might happen later if they were to apply to work with vulnerable people, an independent decision might work better.

Gail Ross (Caithness, Sutherland and Ross) (SNP): Good morning, panel. We have touched on the matter today, and the committee has already taken a lot of evidence about whether 12 is the right age for criminal responsibility. Everybody agrees that the age has to be increased; the difference of opinion is about to what age. We heard some very interesting evidence last week from Victim Support Scotland. There have been suggestions that the age should be set at 14 or 16, and the opinion was also put forward that 12 would be a good start, but that we should review it. Do you have an opinion on when would be a good time for review? Would it be in years 3, 5 and 10? Should it go up in increments? How would we deal with that?

Also, what would success look like and how would we measure whether the system is working for our young people?

Gerard Hart: The Government has looked at a whole-systems approach and the getting it right for every child model. It must not be forgotten that many children who get into bother, whether they are below or above the age of 12, never have offence grounds laid against them; they go to a children's hearing and are dealt with predominantly on welfare grounds.

The children's hearings system must continue; it is something of which the Government and Scottish society are very proud. If we do an international comparison with the age of criminal responsibility in other countries and the caveats that exist within those systems around circumstances in which things might be set aside and treated differently, the situation in Scotland—the age of criminal responsibility being 12, the surrounding GIRFEC model and our children's hearings system—is incredibly progressive.

Setting the age of criminal responsibility at 12 with the added protections that are already in place is the Government's policy and it is a sensible starting point. It is normal to review legislation periodically. I do not have a particular idea about how frequently the legislation should be reviewed, but it is worth drawing attention to the whole-systems approach and how we currently deal with most young people who get into adversity and are not processed through the criminal justice system.

What I say is borne out by the Scottish Children's Reporter Administration's research, of which the committee may have been given sight, about the destinations of young people who come into the panel system and how their cases are disposed of, in the final analysis.

Maggie Mellon: I point out that Scotland set the age of criminal responsibility at 8 in 1937. In 1964, Lord Kilbrandon said that there was no clinical evidence to suggest that that had made any sense at all: we were calling for the age to be higher in 1964.

In considering review, the committee should bear it in mind that it might take 100 years for evidence to come back, despite there being lots of international evidence showing different thinking about the age of childhood and youth. Whatever the committee decides now will be with us for a while: although you may have ideas about reviewing the legislation every three years, that is not likely to happen. The bill is where the important decision will be made.

09:45

Annie Wells (Glasgow) (Con): Mine is a slightly different line of questioning. Representatives of Victim Support Scotland spoke to us about child victims. Do you think that the bill strikes the right balance between the future chances of the children who have caused harm and the rights of victims, who could also be children?

Maggie Mellon: Quite often, they are the same children: children who have been offended against may also be referred for offending. I do not think that it requires a criminal justice approach to get justice in the broadest sense, in terms of reparation or apology. Northern Ireland and the Republic of Ireland have restorative justice conferencing that does not, as far as I know, require a criminal charge or record. There are other ways to serve justice without treating children as adults.

Simon Pountain: Although in the Northern Ireland model, offences on the records that have youth conference orders or youth conference programmes are recorded as non-court disposals, they appear on the front part of the certificate as criminal records. In cases that I have dealt with over there, 87 per cent of the offences that I see I delete from the criminal records.

Annie Wells: We heard from Victim Support Scotland that children as young as three or four had been victims of some very serious crimes and that, because of information sharing, people did not know what was happening to the person who had caused harm to those children. The sharing of information among bodies concerns me. What are your views on that? Should things be done differently depending on the seriousness of the crime, so that the victim can find out what has happened?

Maggie Mellon: I expect that the second panel of witnesses will have quite a lot to say on that.

I feel that sometimes people should know, but they do not need to know someone's identity or personal circumstances. The restorative justice model might mean that the parent of a child who has suffered an offence can meet the young person who has caused the harm and explain the harm that they have caused and help them to understand it. The evidence on restorative justice is that it is more effective to do that for the more serious offences than for quite minor things that might be best left alone.

When somebody has suffered serious harm, however, there are means that do not involve treating children as adults or giving them adult responsibilities. Scotland could look at some of those. We can still give children responsibility that is appropriate to their age and maturity. A child might have done serious harm to another child and not have had the capacity to understand what they did at the time, and might not have intended to cause harm. It could, however, cause that child serious harm to insist that they have responsibility for something that was really a terrible accident.

Gerard Hart: Victims' interests were fully represented at the advisory group stage and have continued to be represented at the bill delivery stage.

The bill provides for specific protections for victims in respect of what they can learn about. There is a balance to be struck. There is no contradiction—it is just another aspect of delivering the policy. There is a need to make sure that children are not stigmatised or labelled in a way that prevents their progress, causes further criminality or drives them to further inappropriate behaviour.

There is something to be said for having the twin-track approach of giving enough information to victims and—more crucially—giving them the right support. Regardless of the identity of the child who has committed the act of harm, the support and the response to the trauma are important. We can be a wee bit tunnel-visioned and think that it is all about giving information, when it is the real-world practical support that matters greatly.

I have been involved with the bill, and with the advisory group for a number of years. I can reassure the committee that I am confident and happy that victims' interests have been fully represented at every stage of the process.

Mary Fee (West Scotland) (Lab): Good morning, panel.

My question is initially for Maggie Mellon, with regard to the work that she has done with the Howard League. I want to ask about support, help, interventions and the whole GIRFEC approach, which we like to talk about. I was struck when you said earlier that parents often accept offence grounds in order to get their child to panel because of something else. Is the whole picture of a child's life properly taken into account before a decision is made about how action should be taken forward on the activity that the child was involved in?

Maggie Mellon: There has been a huge drop in the number of children who are taken to hearings on offence grounds: I think that it is fewer than one in eight, so it is a tiny number of children. Most referrals on offence grounds come from the police. Nowadays, the children's reporter does not take children to hearings on offence grounds; they tend to be dealt with outside the hearings system. Last year, only 199 young people were taken to hearings on offence grounds, out of the thousands of hearings that are called on care and protection grounds. Probably because we have become much more aware of the possibility of causing harm, there has, in the past 10 years, been a huge change in the numbers. Ten years ago, youth offending was a political issue, but youth offending is now very low and few children are brought to hearings on offence grounds. I do not know how often it happens with a child under 12, but it is rare.

We know that it is the small group of children under 16 who are taken to hearings on offence grounds who have most problems. I do not know whether we know how best to help them, because we seem often to mire them in further problems and do not solve their problems. Therefore, looked-after children are much more highly represented in the statistics for young people who go on offending. Scotland is different from England, because our adult courts kick in at 16, which is a young age to be treated as being fully adult. The issues all run together.

Mary Fee: Before I bring in the other panel members, do you have information on how many young people who are involved in antisocial activity or behaviours that might end up with them

appearing before a hearing or a panel are one-off offenders, and how many are repeat offenders?

Maggie Mellon: The evidence is that most young people desist from offending. They grow out of it, particularly minor offending, after a warning, getting caught or their parents knowing about it. They might even grow out of serious offending, because there is a process of maturing. They learn a lesson from doing something that has caused harm and they do not do it again.

The Edinburgh study was quite compelling in showing that it tends to be when we involve young people in formal and compulsory systems—when they are labelled "offender"—that they become the usual suspects when there is trouble in an area, or become the child who is taken in and charged, rather than the one about whom people say, "Oh, they have good parents and they're OK". There is a kind of labelling effect.

Mary Fee: The panel has talked about a buffer between the ages of 12 and 16—if the age of criminal responsibility is raised to 12, some kind of buffer will be needed to protect young people who are aged between 12 and 16. What additional supports and services would need to be put in place?

Gerard Hart: The PVG review consultation has just closed. A number of the proposals in it would, in effect, provide such a buffer. The proposals would free most children, most of the time, from the longitudinal consequences of disclosure of their criminal record. After the fact of the conduct having taken place, its most significant impact on them is that it can be constantly revisited through life. However, if there is no disclosure, the longitudinal consequences will not exist, which is a significant protection.

Maggie Mellon is right that most young people desist from such behaviour as part of their developmental journey. Research shows that by age 25 the human brain reaches a state of maturity in which risks and consequences are fully understood, but before that they are not so well understood. However, kids in the phase of life before they reach the period when criminal behaviour usually stops are often very prolific in that behaviour, particularly as they get towards the end of their teens and into their early 20s, so the system has to be able to respond to that and deal with it. Real harms are caused to the community and others because of that behaviour.

The fact that such behaviour will stop is great. However, before it has stopped the buffer has to balance the idea that kids are able to take responsibility for what they do when they are over the age of criminal responsibility with ensuring that the system is sensitive to the fact that they are on that journey and that, although their behaviour is a pain just now, it will not necessarily always be so. They need, in adult life, freedom from the consequences of that behaviour. It is hugely irrational to continue to disclose something that is no longer relevant in terms of the risk that a person poses.

The system has to balance those two aspects, which is why the PVG review has focused on the longitudinal consequences of conduct in adolescence and has made sure that its proposals reflect that need to free children from the consequences once they have stopped behaving in such ways. We were all once teenagers and were involved in behaviour that we would not now be proud of—but I am making no disclosures.

Mary Fee: I have a tiny follow-up.

The Convener: Okay, but we need to bring in Oliver Mundell and Fulton MacGregor. I am conscious that we still have a bit of ground to cover.

Mary Fee: Perhaps my question would be better put to the next panel of witnesses. I would be keen to see a system in which young people between 12 and 16 who are involved in destructive or harmful activity do not get to the point at which they do something that could be disclosed. There should be more support around them to prevent that and to help them to desist from the behaviour. It is probably better to keep my question for the next panel.

Oliver Mundell: I want to go back to the 12-plus age range, if we do go for 12. We have touched on much of what I was going to ask about disclosure and more generally. Does the panel see a benefit in a differential approach based on offences, so that we have that on record?

Gerard Hart: The policy options that we have put forward provide an option that would do that by allowing disclosure of matters that are in schedules 8A and 8B of The Police Act 1997 and in the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2) Order 2015. Schedule 8A lists things that will "always be disclosed" because they are considered to be very serious—

Oliver Mundell: I am sorry—I was asking in relation not to disclosure but to criminal responsibility. We have talked about some of the same issues around disclosure, but should there be differential approaches based on offences?

10:00

Maggie Mellon: The Howard League's view is that children under 16 should not be treated as having full adult capacity to commit offences and to understand the significance of their actions. If you are asking whether there should be modification, I will say that, of course, children

have levels of responsibility; in bringing up children, we expect more of a 14-year-old than we do of a 10-year-old.

As Lord Kilbrandon's panel in 1964 said, the response to a child's behaviour should be about social education, and the response should be different for each child, depending on their age and capacity. Responses can differ, but we should not treat children as adults until they are 16. Before that age—and even at 16; I am not saying that 16 is the cut-off when the person becomes an adult, because it certainly is not—we should recognise that they are children and that the response should focus on education, rehabilitation and support.

Oliver Mundell: I do not want to pre-empt the decision that the committee or Parliament will come to but, given that we will probably not raise the age to 16 in a single leap, would it be preferable to introduce a differential approach to how we treat children between 12 and 16, based on the seriousness of the offence? Is that worth considering? Are there certain offences that should be treated differently even with children below 12?

Maggie Mellon: I maintain that children do not have adult capacity so, even if a child carries out a serious offence, they should not be treated in the same way as an adult carrying out that offence. We expect adults to understand what they are doing, but a child could do something quite serious, or cause hundreds of thousands of pounds in damage, without having that understanding. For example, young children have leapt on brand new cars with no idea of the value of a car. That could be called a serious offence that caused hundreds of thousands of pounds in damage but, when a child does it, it is a different matter. That does not mean that we should not explain to a child that damaging property is bad, but the response should be educative, which is the Kilbrandon principle. Something has gone wrong in the child's social education—or something might not have gone wrong, but an educative response is needed.

The Convener: If we focus on the offence rather than the child, is there a danger of losing the child-centred approach?

Maggie Mellon: Definitely.

Simon Pountain: That fits with what I was going to say. My work in Northern Ireland does not rely on looking at one type of offence or another. There are specific rules on what is filtered but, after that, there is an independent review of whether the offences are relevant to the role that is being applied for and whether they ought to be disclosed. That fits with what Maggie Mellon said. For example, an algorithm might determine that certain offences are so serious that they need to be disclosed but, under sexual offences, there could be indecent behaviour and, although the title of that offence sounds like it should be disclosed, it could cover something as simple as urinating in the street, which might not be relevant to the work that someone is applying for. Objectively looking at the issue rather than just looking at the title of the offence could work when we consider children between different ages.

Again, I do not have any figures with me to support this, but a lot of the work in Northern Ireland involves people around the ages of 13, 14 and 15 who were in care and who were involved in a flurry of offending over a short period but who have not offended since then. When those people apply to work with the vulnerable some 10 years later, that information has stayed with them, because there was more than one offence. Having someone take a colder look at those offences and say, "Actually, that isn't relevant anymore," would give those people the chance to work with the vulnerable. The overarching consideration should be whether the removal of the information will impact on the safeguarding of vulnerable people. If it will not, the information should be removed. I appreciate that that is different from what the bill is about, but I hope that that sort of model would help with that particular question.

Oliver Mundell: Would a capacity test be a better choice in that category?

Maggie Mellon: Yes, with the proviso that the UN recognises the state of being under 18 as childhood—as not being adult—and we are signatories to the United Nations Convention on the Rights of the Child. An understanding of the child's capacity and how much they understand the significance of what they have done is really important. Whether they have the capacity to understand that at all varies for each child.

I am sure that the Children and Young People's Commissioner Scotland will be able to answer the question much more fully than I can, but children should not be assumed to have adult capacity.

Gerard Hart: The policy construct in the bill does not rely on a capacity test. The reasons for that are, first, that there may not be an easy way to agree on a test that could be scientifically validated and, secondly, that there would also be a difficulty with subjectivity, given the huge complexity of each individual child's story, their background and their behaviour. It is all very complex and interwoven.

Actually, the establishment of capacity, culpability and vulnerability is already done under the whole-systems approach in GIRFEC and the SHANARRI indicators—safe, healthy, achieving, nurtured, active, respected, responsible and

included—that are used. How would the outcome be different, given that that capacity will have been established? The child will already have been dealt with in the children's hearings system and will already be subject to those protections.

Oliver Mundell: It might well protect those aged between 12 and 16, who could still be subject to prosecution if the bill is enacted. That is really what I was asking about.

Maggie Mellon: The point has been made that the reporter takes those factors into account when they make any decision to proceed on offence grounds. Wherever the age is set, there will be some discretion about the child. For example, a child with a learning disability would not be treated in the same way as a child without a learning disability.

Oliver Mundell: Previous witnesses have mentioned the possibility of a criminal defence based on the fact that the person is still a child. Would there be any benefit in exploring that approach, again for those aged 12 to 16, or does the system already make that consideration?

Maggie Mellon: I am not sure that I understand the question.

Gerard Hart: Do you mean a special plea or something like that?

Maggie Mellon: What would the special plea be?

Oliver Mundell: Basically, it would say that the person did not have full adult capacity, and an argument could be made based on human rights grounds and others.

Maggie Mellon: The UN convention is clear that there does not need to be a special plea because children do not have adult capacity. I hope that that answers your point.

Oliver Mundell: It does—thank you.

The Convener: Before I bring in Fulton MacGregor, I note that we are getting towards the end of our time with the panel and we have some other questions to pull in. Please do not feel that everyone has to answer every question.

Fulton MacGregor: I should be quite quick, convener. I want to pick up on my previous line of questioning, because it would be useful to clarify whether children in the criminal justice system are the only people who can end up with or obtain a criminal record in this manner. In Gerard Hart's previous answer to me, he talked about non-conviction information, but my understanding is that that still comes through the prism of proof that is beyond reasonable doubt. If you or I are given a caution that could end up as a non-conviction, we can still seek a lawyer and decide whether to take the matter through the criminal process, but I want to be clear about the position for children.

I know that a lot of work has been done and that under-12s tend not to be referred on offence grounds, but children appear at children's hearings on such grounds and will accept them, as Maggie Mellon said, in order to move the case on quickly, and that has a major impact on their lives. Are children unique in that there is no other situation where somebody else will make a decision for a person on that basis and where the standard of proof is the balance of probabilities rather than beyond reasonable doubt?

Maggie Mellon: Legally, the child—or the parents, if the child is very young—accepts the grounds that are put or, if they do not, the case goes to court for proof. It is not just felt to be beyond reasonable doubt. If a child denies an offence, it goes straight to court for proof. Maybe I did not understand your point.

Fulton MacGregor: Correct me if I am wrong, but my understanding is that the court proof hearing is also based on the balance of probabilities.

Gerard Hart: The essence of your question is whether it is possible for someone to have stuff disclosed about them where proof was not established to a criminal standard. Is that correct?

Fulton MacGregor: Yes, and I understand where you were coming from with your previous answer. I should have said at the outset that I am a registered social worker and that I used to work in that field, so I know that there are certain rules about what to do with information that is provided and, as you said, non-convictions are clearly marked as such and are not for disclosure in, for example, a social inquiry report for the court. What I am trying to get at is what other situations there might be where somebody would obtain a criminal record that could affect their life chances based on a non-criminal court system where, potentially, another person could accept the guilt and responsibility for them. Could there be such a scenario?

Gerard Hart: The analogy that I would make would be with the system of non-conviction information being disclosed in higher-level disclosures. An example might be a scenario in which a teacher is questioned by the police in circumstances that they consider to be suspect, but no prosecution of the teacher takes place and there is not enough evidence to do that. If the chief constable is concerned about the circumstances that the teacher was found in, he or she can provide information to Disclosure Scotland about the event, even though the case never went to court or was not tested in any way, and decide that there are reasonable grounds for that being

on the teacher's disclosure. Currently, that will be disclosed, whether it concerns an adult or a younger person, although it is very unusual for it to be a younger person. Actually, it is also very unusual for that to happen with adults, but it happens.

If the bill passes, that is the vehicle that will be used to make any disclosure—if a disclosure were ever to be made—about a person under 12, but with the added protection of the independent reviewer, who would be able to say, "Actually, we don't think that should be disclosed—that is not appropriate." In that way, the independent reviewer could stop the disclosure. The PVG consultation contains provisions and ideas about how to do that for adults, too, so that there are extra protections and so that the individual gets to see the information before it is put on the disclosure. The individual could challenge it and, if they did not agree with the outcome of the challenge, they could go to the independent reviewer. Those are policy proposals in the PVG review consultation but, for young people under 12, the provision is that there would be disclosure, but it would be subject to a lot of checks and balances through the independent reviewer, which is similar to Simon Pountain's role in England and Wales and in Northern Ireland.

The Convener: We have expertise on the panel about the independent review process, but we have not yet had a chance to ask about that, so is it okay if we move on to that, Fulton?

Fulton MacGregor: Yes, of course.

The Convener: You can jump back in later. We are in the last few minutes of our session with the panel. It would be helpful to hear about the advantages or potential disadvantages of involving the independent reviewer in the disclosure process, and about why that review model was chosen rather than a judicial one. Please also tell us anything else that you feel would help us in our deliberations.

Simon Pountain: In Northern Ireland, the Government was going to introduce the filtering scheme, which was similar to the scheme in England and Wales at the time, but it was very much set around offence title and certain other criteria. I understand that the Attorney General for Northern Ireland was happy to introduce the scheme but felt that a disputes process with some sort of independent oversight should be introduced. The approach that now exists is that any case in which a person under the age of 18 has committed an offence for which they have received a non-court disposal or that involves a conviction that is spent and is not on the specified list of very serious offences will automatically go to the independent reviewer for consideration prior to a certificate being issued. The reviewer will look at the cases and decide whether they are relevant to the role that is being applied for.

10:15

Northern Ireland has a very specific system of disclosure that is based around particular roles, whereas the PVG scheme goes wider than that, in terms of a workforce. The Northern Ireland system is like the enhanced system here in Scotland. Consideration is given to whether a matter is relevant to the role, whether it ought to be disclosed and whether it is proportionate for the information to be disclosed. I review cases for people under the age of 18, and cases where people who offended when they were under 18 but who have not offended since then. Over the age of 18, a person can appeal to the independent reviewer and say that they do not think that the information should be disclosed, because it is old or because it is minor, and I then review those appeals.

As I said, in the past year, I reviewed 426 automatic referrals—which involve those under 18—and I removed 371, which is 87 per cent, and retained 55. I have looked at significant numbers of cases, and I have removed the ones that were very old. In some cases, people had information disclosed from 1965, when they committed an offence of theft, but they were 70 years old and applying to be a taxi driver, so the case was really of no relevance. Nevertheless, it stayed on their record, because that is what the filtering system does. I also reviewed 84 appeal cases, and again I removed 87 per cent of those.

The Convener: The bill provides that the independent reviewer will be able to gather information from a range of sources. Does the panel have an opinion on who should be included? Should the child or the victim be included?

Gerard Hart: The independent reviewer will work to statutory guidance that ministers will produce, which will set out the parameters within which the role will be discharged. It is not the intention at this point to limit or fetter the powers of the independent reviewer to get the evidence that they need to make the best decision in the interests of all parties.

You asked why we are introducing an independent reviewer as opposed to another way of doing things. In the disclosure regime, in 2015, we brought in a remedial order that provided for appeals to the sheriff court against convictions being on a person's record. We think that the independent reviewer will be a much faster way to get the matter sorted out. It will also allow us to provide guidance, which will help to make the process much clearer for everyone concerned. We also think that the independent reviewer will have

the time and ability to have a much deeper look at the matter in hand over a longer period, and I hope that the timescales will be shorter. That is why we have chosen the policy option of having an independent reviewer.

The Convener: Is having a provision in statutory guidance rather than in the bill what gives flexibility to the system?

Gerard Hart: Indeed. The current plan is that there should be a guidance document that provides a wide range of advice to the independent reviewer and clearly sets out the role. There is obviously a relationship between the chief constable and the independent reviewer that relates to whether or not information is disclosed, and that is quite a complex process, so the guidance will set out how the process works.

Simon Pountain: The list in the bill of people from whom the reviewer may request information is useful, because it includes not only the statutory partners—as happens in the parts of the country where I work—but "any other person" who is considered relevant, which could include the victim or medical teams and so on. That gives support behind the request, if the reviewer feels that it is necessary, so it is a useful addition.

The Convener: I thank all our witnesses for their evidence.

10:18

Meeting suspended.

10:23

On resuming—

The Convener: We move on to our second panel of witnesses. I welcome Bruce Adamson, the Children and Young People's Commissioner Scotland; Chris McCully, development co-ordinator at the criminal justice voluntary sector forum; Professor Elaine Sutherland, professor of child and family law at the University of Stirling; and James Docherty, from the violence reduction unit.

I will ask the first question. What are your opinions on whether raising the age of criminal responsibility to 12 fits with the current human rights framework?

Professor Elaine Sutherland (University of Stirling): I welcome the bill on the basis that it is perhaps slightly—or, rather, long—overdue, but it is a great start. One reason why it is such a great start involves the human rights perspective. The committee has heard from other witnesses a lot of detail about all the other reasons why we should be raising the age of criminal responsibility, but the issue is very important from the human rights perspective, particularly in the light of the Scottish Government's commitment to progressing children's rights and to incorporating the principles of the UN Convention on the Rights of the Child.

The convention requires there to be a minimum age of criminal responsibility, and the committee will be familiar with the fact that, for historical reasons, it did not state what that age was to be. However, the United Nations Committee on the Rights of the Child has made it abundantly clear in its general comments and in its concluding observations on the United Kingdom and other countries that 12 is the absolute minimum age that it finds acceptable, and it encourages states to keep going beyond 12 and to increase the age.

The other important provision in the convention that is relevant to this matter is article 40, which talks about how children ought to be treated when they come into contact with the criminal justice system. Article 40 emphasises the importance of reintegrating the child into society. The idea is that we have to move forward constructively with young people. By raising the age to 12 to start with, we are going in the right direction, so I would say that the bill is positive.

Bruce Adamson (Children and Young People's Commissioner Scotland): We are about to celebrate 70 years of the Universal Declaration of Human Rights, which said that childhood was entitled to special care and protection. We are 50 years on from the introduction of the children's hearings system and the Kilbrandon principles that were developed before that, which were mentioned by Maggie Mellon. It is 30 years since the development of the UN Convention on the Rights of the Child, which brought together a comprehensive set of rights for children and young people, and we are 10 years on from the general comments on the age of criminal responsibility that Elaine Sutherland has just mentioned.

When the United Nations Committee on the Rights of the Child looked at the matter in 2007, it took international evidence from all countries and came to the strong conclusion that 12 was the absolute minimum age acceptable in international law at that point. Countries immediately needed to bring that age to 12, but the committee said that they should continue to increase it to a higher age. It specifically said that no one should lower that age to 12, which was never intended as a target but the absolute minimum with immediate effect in 2007. Any country where the age was already 12 in 2007 needed to raise it progressively. Even 10 years ago, the committee said that a higher age of criminal responsibility—for instance, 14 or 16—contributes to a better juvenile justice system, which corresponds with article 40, as Elaine Sutherland just mentioned, and deals with children

in conflict with the law, putting in place the proper safeguards for their human rights.

I am very confused about why we are talking about 12. Children are children up to the age of 18 and the question should not be how to justify raising the age from eight to 12, but how we justify treating children under 18 in a criminal manner. There may well be justifications, but the starting point for our discussions needs to be 18 and we need to be looking at 14 or 16 as the norm, internationally. If Scotland wants to be a human rights leader, I am very confused as to why we are talking about 12 rather than 16 or higher.

Alex Cole-Hamilton: That was very compelling, Bruce. I thank everyone on the panel for coming to talk to us this morning.

I want to talk about the compatibility of the bill with our human rights obligations—specifically, those in the United Nations Convention on the Rights of the Child—and to address two areas of the bill. The first is the issue of the place of safety, which you may have seen that I have raised previously. I am anxious that, although the bill refers to them as a place of last resort, police stations are the only places of safety that are named in it. The provisions allude to passages in other bills that contain other places of safety, but my anxiety is that, as police stations are the only places of safety named in the bill, they might become the default.

We all know that police stations are not necessarily safe, particularly on a Friday or Saturday night. Further, there is a high chance that young people will be held with adult offenders, which is in contravention of their article 37 rights. We heard powerful testimony from Lynzy Hanvidge, who talked about being held in a police cell at the age of 13 when she kicked off after being forcibly taken into care.

Is the section in the bill on places of safety compatible with our obligations under the UNCRC?

10:30

Bruce Adamson: I share your concerns. Lynzy's evidence to this committee was incredibly powerful. I talk to children and young people around Scotland on a regular basis—it is one of the great privileges of my job—and they often say that interaction with the police and criminal justice system is never good and never has a positive impact when they are in crisis. Community policing is great and, through that, Police Scotland does an amazing job in working with children and young people in a positive way. However, when children and young people are in crisis, it is not the police who they need.

It is absolutely important that we consider the views of the child when considering children's rights with regard to places of safety, so there certainly needs to be a requirement to talk to the child about what feels safe for them.

At local authority level, we need to invest in creating other places of safety and making sure that they are appropriate for children and young people. However, I accept that we live in the real world and that there might be exceptional circumstances in which there is nowhere to take them and the police are left trying to deal with an impossible situation. We might need to allow for some provision, but that would need to be in exceptional circumstances, as a police station is never the right place for a child. We need to ensure that other places of safety are available, and I am concerned that that provision is not there at the moment.

The views of the child with regard to what feels safe for them need to be taken into account, and we need to create other safe spaces for children and young people, allowing for the difficult job that the police do.

Alex Cole-Hamilton: On creating safe spaces that make more sense than a police station for a young person in a situation of crisis, as you define it, do we need to throw our cap over the wall and increase the financial memorandum so that every local authority establishes a refuge or a Barnahus-style model to fulfil that need?

Bruce Adamson: Absolutely. There must be more resourcing not only for places of safety but for early and effective intervention. The commitments to incorporation, which Elaine Sutherland referred to, are key to this. It is essential that we incorporate the United Nations Convention on the Rights of the Child into our domestic law in this parliamentary session. That will help focus minds in terms of budgets, because of the requirements under article 4 of the convention to use available resources to the maximum possible extent. Human rights budgeting will lead us in that way, because early and effective intervention saves money. Investing in safe places where children can receive the support that they need will save us money in other parts of our budget, as well as meeting the rights of the child.

James Docherty (Violence Reduction Unit): There is no reason why any child should be in a police station. When creating the bill, at the forefront of your mind should be what you would want it to look like if it was your child. There should be no otherisation, or, "This is happening to kids over there". If it was your child, how would you shape the bill?

If you are creating something, you need to search the interior of your heart and weave it through the bill, because it needs to be relational and not clinical. I spent time in prison cells as a wee boy and I was terrified—that is the overarching feeling that I can remember of being in a police station as a wee boy. It was too clinical and full of noise. There is always accountability for children being there in the first place, but what was never taken into account was the psychological and emotional impact that it had on me. That is why I always ask people who are looking at a bill to think about what they would want it to look like for their own wean.

Chris McCully (Criminal Justice Voluntary Sector Forum): Throughout, it is important to remember that, as James Docherty said, an element of psychological damage will happen at any stage when a child is taken into a police station. It is all well and good talking about the back end of the process, such as whether they gain a conviction that will stay with them for life and how we mitigate that. However, before that, the context of arrest and being taken to a place of safety is deeply damaging for a child and we need to ensure that the appropriate support is being given to them in the right environment.

James Docherty: We should also take into account that someone is innocent until they are proven guilty. A kid should go to a place of refuge—a restorative refuge rather than a punitive place that could cause lasting harm.

Professor Sutherland: I support what James Docherty and other speakers have said in reinforcing the evidence that the committee heard, and some of us watched, from Lynzy Hanvidge at a previous meeting.

A police station is definitely not a desirable place to keep a child. That highlights the gap in provision in Scotland. We do not have a standing arrangement for children to go to nice, safe, child-friendly places when they are removed from their homes. That in itself is traumatic, but we could minimise the additional trauma by taking children to somewhere where they might feel reasonably comfortable. That is perhaps the best that we can hope for, because they will be distressed. Having identified that gap, it would be excellent if we could make appropriate changes to the bill and to the financial memorandum.

Alex Cole-Hamilton: I remind members and the panel that my entry in the register of members' interest shows that I am a former convener of the Scottish Alliance for Children's Rights.

James Docherty mentioned the idea of being innocent until proven guilty, which is enshrined under article 40 of the UNCRC. Section 2 of article 40 says that children, like adults, should

"Not ... be compelled to give testimony".

Section 38, on the right not to answer questions, is the only provision in the bill that covers that principle. Last week, the panel expressed anxiety that the provision is not as robust as the protections that are given to adults. For example, if someone is in a police station, or wherever an interview is taking place, the lead officer, or whoever is conducting the interview, could give the instruction, "Tell me what happened." That is not a question, so nothing in the bill would prevent that from happening. Does the bill need to be tighter? Do we need to extend the full right to silence to children in that regard?

James Docherty: Yes. In relation to something as simple as maturity, a kid cannot give the same responses as an adult. Therefore, they need other safety measures that are more appropriate to their stage of development. We should also take into account neuroscience and stages of development, and, as the committee will probably have discussed, the fact that a lot of children experience adverse childhood experiences. We might be dealing with kids who are traumatised. The emotional development of a 12-year-old kid could have been arrested at the stage of their trauma so, emotionally, that kid might be about seven or eight. That needs to be taken into account, so the committee needs to speak to people who specialise in childhood trauma.

Most of the kids who end up in the justice system have experienced adverse childhood experiences. A kid might arrive in a police station with an inability to contain their experience, and they could implicate or incriminate themselves when they might be innocent.

Bruce Adamson: It was interesting that Alex Cole-Hamilton mentioned the Barnahus model, because it is important to find out what has happened, and we need to do so in a safe way. With a higher age of criminal responsibility, children know that there will not be a criminal consequence to disclosing what has happened, and that is powerful in helping us to address trauma. The Barnahus system deals with children who have been subject to harm as well as children who have harmed and need psychological support.

I visited Iceland, where the age of criminal responsibility is 15, to look at the Barnahus model and some of the challenges. The people there said that it works very effectively with those who are under 15 because they can talk to them about what happened and why, and they can also get important information that will help with treatment and support for the victim. They said that that holistic approach, because there is no criminal consequence, allows for more discussion, which helps them to keep children safer.

The problem is that, if we have criminal consequences, we need to put in place all the protections. Particularly when we are talking about the power imbalance between children and adults, or between any of us and the forces of the state via the police, that is very difficult. In recent years we have done some good work in Scotland in trying to build the ability of the police to engage with children more appropriately when asking questions, but there is always going to be a power imbalance.

The problem comes about because of the criminal consequences. If we had a higher age of criminal responsibility and we did not have those criminal consequences, we would not have to worry about that. It would allow conversations to take place, as in the Barnahus model, to find out what happened, which allows for more effective treatment of the victim of the crime, as well as support for the child who has harmed another person, in order to address their behaviour and come up with a way of treating them. That is what keeps us safer. As soon as we move into having a criminal process, we have to put in place all the protections around self-incrimination and a fair hearing. A better solution is to have a system that does not criminalise children at all.

Mary Fee: Good morning. I want to explore the same issue that I raised with the previous panel, which is about help, support and interventions. In order to properly fulfil the GIRFEC model, we need to fully support and help not only our young people but also their families. Do you think that the system is currently—I suppose this is the only way to put it—failing children because it is not stepping in quickly enough to give the support, interventions and rehabilitative help that young people need?

James Docherty: The GIRFEC model should be getting it right for every family, because if we do not get it right for the mum pushing the pram, we will not get it right for the weans. There might be too much focus on the children and on adjusting their behaviour. I have discovered in working with families who are involved in the level of adversity that we see in the violence reduction unit that, when the parents adjust their behaviour, manage their stress and deal with the stuff that they need to deal with, the weans take care of themselves.

It is the strangest thing to think that, if we get the environment and the relationships right, the weans will naturally adjust accordingly. Instead of that, we put all the focus and emphasis on the weans. If we do that, and miss the environmental and relational factors that surround them, we might unwittingly be failing them.

Bruce Adamson: James Docherty eloquently, as always, summarised what the UN convention says. It starts with a premise that all children should grow up in a family environment of happiness, love and understanding, and then it puts on the state a series of obligations to support the family. The convention is about supporting the family and the community so that children can thrive. Despite the state obligations to provide those things, we are failing many children in Scotland at present. We need to do better in providing those supports for our families and communities.

When I talk to children across Scotland, we talk a lot about poverty and mental health. The services that need to go in to create strong communities and support families lead to communities where people do not harm one another, and that is really important. The powerful work that James Docherty and his colleagues at the violence reduction unit have been doing for a number of years and the important discussions that took place yesterday on adverse childhood experiences and being a trauma-informed nation should inform our policy choices and our budget choices about how we support families and parents, because that is what the UN convention requires us to do.

Mary Fee: Is the issue simply about resourcing or is it also about understanding what we need to do?

Bruce Adamson: It is probably both. There are resourcing issues to do with how we make our choices, and human rights budgeting is really important. I have seen some really interesting practice at local authority level in children's service planning and so on. Things are starting to change, but they need to change more quickly.

The incorporation of the UN Convention on the Rights of the Child is a powerful mechanism through which to focus minds on how we spend budgets, deliver training and work together more effectively. Criminal justice for children and how we support young people who harm others need to be seen as societal issues; they should not be about the blame of the individual. If a child is hurting another child, something has gone wrong in the support that we should have provided to that child, their family and their community.

10:45

James Docherty: I have been in this arena for a short time—other people here have probably been in it for a lot longer than I have—but I have discovered that although we are brilliant at strategy, policy, bills and pedagogy in Scotland, we are not very good at understanding the relationship between ourselves and the weans. When we recognise that these are our weans—and really mean it—we can shape that relationship in a different way. Understanding that relationship

is infinitely more important than any strategy, policy, bill or pedagogy, because if we do not get the relationship right, we do things to kids, not with them. Doing things to kids breeds conflict, so our approach needs to be person-centred at its core, and it should meet the needs of families and individuals rather than the needs of the system. If we can get it right for families, paradoxically, they will get it right for the weans.

That might sound dead simple, but it is that simple. I live and breathe it every day because I operate in the trenches and watch families reassemble themselves. I recognise that poverty and inequality put stress on a family unit and have an impact on the ability of parents. If a parent is stressed, their weans will be stressed, too. The biggest harm that is caused by that is emotional suppression. Kids take their orientation from their caregivers, and the last thing that kids want to do is add to the stress of their caregivers. However, to deal with that, kids will overcompensate and suppress their needs and feelings because they do not want to add to the stress of their parents. If we take the stress out of the parents' lives, the weans will adjust accordingly.

Mary Fee: Will the bill meet the hopes and aspirations that you have described? What else can be added to the bill to ensure that we take a belt-and-braces approach and support children and their families? If 12 is a starting point and we incrementally raise that age, what do we need to do to ensure that the support keeps pace with the raising of the age?

James Docherty: It needs to be relational. Feelings of blame, shame, judgment and disgrace need to be taken off the table, because parents try their best with what they know at the time. We often shape strategy and policy based on our own frame of reference of what parents should look like. However, we are trying to create a system to serve the people who experience the most adversity in our culture. It is not rocket science to understand that the most deprived wards in our country suffer the greatest adversity, because of the stress on the family unit. We need to recognise that.

We have also touched on the balance of power. If someone comes into a room like this one, the imbalance of power is massive. Even I get anxiety from coming here, and I know that I have something to contribute, so imagine how it would feel for a wean to go to a children's panel hearing. We are talking about anxiety that is a thousand-plus times worse than what someone would face when going into their worst situation. Imagine what that would feel like for the wean, and for the ma and da, who are going into a situation in which decisions will be made that might impact their children's lives. A parent's greatest fear is losing the attachment to their child, and they will do anything to maintain that attachment. They will even tell lies. We take that personally and never take into account that they are telling lies not because they are a liar or a bad parent but, usually, because they are frightened that they will lose their wean. They need to recognise that it is not happening because they are a terrible parent or do not have an ability to parent. It is about recognising that the relational dynamic has broken down.

That is why I have been a big supporter of the adverse childhood experience movement. I have recognised that trauma is intergenerational. It is no surprise that some of you are sitting here in the roles that you are in. We only need to look at your life and who you best learned from. Who was your favourite teacher? Was it the punitive, cold and calculating one? Was it the one who was judgmental and critical of your work? Absolutely not—it was the one who you were attached to and liked. We learn from people we like.

Therefore, we need to be liked and not have a cold and clinical process. People operate in a process with an imbalance of power, and they need to recognise that they have autonomy over and self-efficacy in their lives. That is what people most feel is missing.

As a young boy, I had such an aversion to any form of authority. It was not that I did not like authority, but I was scared of it, because my autonomy and self-efficacy were whipped away from me in childhood at the hands of my first authority figures—my parents, as is usually the case. If that happens to you, you will have a natural aversion to any form of authority, which is not because you do not like authority. I did not even like the lollipop man—he wore a uniform, and I wanted to decide when to cross the road, so I crossed the road before I got to him.

We can either nurture compliance or punish people into defiance. We need to recognise the imbalance of power in the processes. I hope that that makes sense.

Mary Fee: It does—thank you for that.

The Convener: Thank you. That was very powerful. The bill is what we have in front of us, and your challenge to us to think about our own children, nieces or nephews is helpful. Are you able to come in, Gail Ross, or do you need a moment?

Gail Ross: Thank you, convener. Every time I hear James Docherty talk, I am almost moved to tears. If only we could legislate for kindness and compassion.

James, we have met and talked about ACEs at the cross-party group on adverse childhood

experiences and at a conference in Glasgow yesterday. We us the phrase “trauma informed”. How do we—society, teachers and the police force—get from where we are now to where we all want to get to, as you so eloquently put it? What do we need to do?

James Docherty: We need to create two things: safe, stable environments and relationships that enable people to fulfil their potential. Everybody has the potential to get to their potential, so we need to look at what is in the way. Sometimes it is the environment, but we discount the environment when we talk about child rearing. We never look at how the environment shapes a child, yet the science is in, and it shows that the environment that someone grows up in shapes the brain and neural development. That informs choices and all choices are not created equal.

Fundamentally, it boils down to relationships, and creating safe, stable and nurturing environments. It is as simple as that. To keep our work anchored in that process, we would just need to have a buzz statement that said, “Does this bill, policy or strategy point towards safe, stable and nurturing environments that enable people to fulfil their potential? If not, stop doing it.”

Chris McCully: To pick up on a lot of what has been said, what we need to do to start this journey is to stop criminalising children. That is a large part of it. The arguments about trauma, ACEs and human rights do not suddenly stop or dissolve into thin air when young people are 12—we do not magically have healthy, functioning young people at that point. As a first step, it is very much in our power to stop criminalising children by raising the age of criminal responsibility.

Professor Sutherland: My point is rather tangential, but we must be careful about one aspect of the bill that would take rights away from children. If we assume that the bill is passed and that it goes with the age of 12, children who are under 12 will no longer be referred to children’s hearings on offence grounds. The expectation is that the small number of children who do something that is sufficiently harmful will be referred on other grounds, and their offending behaviour will most likely be slotted into grounds such as having an adverse effect on someone else or on themselves or being beyond parental control.

In all such cases, if children or the parents do not accept the grounds for referral, the case will go to the sheriff court for proof. The concern is that, for harmful behaviour that would have been criminal behaviour before the bill was passed, the standard of proof will be only the balance of probabilities. Currently, under an offence referral, precisely the same behaviour requires proof beyond reasonable doubt.

If the bill is passed, behaviour that has been treated as criminal will be seen as harmful, but the level of proof will not be at the same high standard if the child does not accept that something happened. That probably does not matter too much to the disposal, because what happens to a child is determined by consideration of their welfare—whether a child has an offence referral or a care and protection referral does not matter—but it matters for disclosure in the future. If, for harmful behaviour that is exactly the kind of stuff that could be disclosed in the future, we take away the protection that a requirement for proof beyond reasonable doubt provides, that will diminish children’s rights. I do not think that that concern has been raised with the committee, although it is in written evidence from me and from the Law Society of Scotland. I throw that in so that it is not missed out.

The Convener: That is helpful.

Oliver Mundell: This is the first time that I have heard about the issue in committee, although I know that it is in written evidence. Do you have a solution that we can suggest? Is it possible to legislate for an exception on the standard of proof? Do you have a better idea?

Professor Sutherland: It would be difficult to have a standard of proof that applied to some care and protection referrals but not others. Another way of coming at the problem—although the advisory group rejected it—is to create an additional ground of referral, which would add another to the list of 17 grounds. The Law Society’s submission provides two versions, but both concern behaviour that would be within the parameters of a serious offence if the child was older. The Law Society’s evidence puts the position better than that. The approach comes down to saying that, when someone is referred for something serious that would be an offence if they were over 12, the standard of proof needs to be beyond reasonable doubt. That would put back the protection, which is significant.

11:00

Bruce Adamson: I think that this is an important point. My approach to it is to consider how we deal with disclosure and other relevant information. If the consequence that we are trying to avoid is stigmatisation about that information being used, we need to strengthen how we deal with the disclosure of information.

In response to Gail Ross’s earlier comment, we can legislate for compassion and love and we can incorporate the UN Convention on the Rights of the Child. We need to do that immediately—within this session of Parliament.

James Docherty made the point that it is not always about the law; it is about the relationships. However, the law helps to change the culture and the important statements that the committee and the Parliament make about where we set the age of criminal responsibility will send a message to children.

The important work that the Parliament is going to do on equal protection and in relation to physical punishment will send an important statement, as will incorporating the UN Convention on the Rights of the Child. That will lead to a culture change that supports the building of relationships. The work that happens here is important; you can make laws that allow people the space to focus their minds and attention on building those relationships that James Docherty stressed are so important.

James Docherty: Another thing to take into account is that I went to many children's panels as a wee boy and denied everything and it always went to court for proof. I denied everything because, if I admitted it, I risked the wrath of my parents. I was not just risking their wrath; I was risking getting beaten physically.

That is why I always say that you will never punish a young person into a better way of being; you can only love and nurture them into a better way of being. We need to look at what is missing in their life in the first place and replicate that missing element as responsible, connected adults because it is not good enough any more to say to young people, "You are making bad choices." If there was a plant in the corner and it was not doing too well, the compassionate response would not be to say, "You are making bad choices." The compassionate response would be to ask, "What conditions are lacking in its life and how can we, as adults, enable it to fulfil its potential by providing those conditions?"

However, nobody understood the conditions that I was living under; I did not understand them and I suppressed everything. When I was at a children's panel, with all those people sitting round a table, I feared that, if I admitted that I had done something, the consequence would be violence at the hands of the people who were meant to be looking after me and who, by the way, were at the panel supposedly advocating for me even though they were the source of my trauma.

I navigated children's panels and I had post-traumatic stress and did not even know it. When I got treatment for post-traumatic stress, the specialist reckoned that I had suffered from post-traumatic stress from the age of five, which means that I went to school with an overactive stress response. My ability to regulate my emotions and my behaviour was severely limited; my ability to take in information was limited so my attainment suffered; and I carried the sense of shame and disgrace all my life until I was 27 and I got a proper diagnosis, which was a liberation, not a limitation. How I was treated before that was a limitation. It is about taking all the dynamics into account. You need to have a trauma-informed bill when you are looking at the criminal age of responsibility.

Oliver Mundell: It feels a bit disjointed after listening to that to jump back to a specific point—I do not mean to ignore what you have said at all.

James Docherty: That is all right.

Oliver Mundell: Professor Sutherland, why might the advisory group have rejected the creation of a new ground of referral?

Professor Sutherland: As I recall, the view was taken that the other grounds of referral were sufficiently broad that children could be referred on them. The advisory group was supported in that view by the evidence from the study by the Scottish Children's Reporter Administration. The study showed that, for children aged under 12 who had previously been referred on offence grounds, they had been or could have been referred on other grounds. I think that that was why they did not create a new ground of referral. I do not recall the standard of proof and the distinction between beyond reasonable doubt and balance of probabilities being discussed. It might not have occurred to anyone what the consequences of the distinction would be.

Fulton MacGregor: Before I get on to my question for Elaine Sutherland, I want to say that James Docherty's evidence has been brilliant. Well done on your work in the violence reduction unit, too, James.

Let us say that the bill is passed and becomes law. Previously, someone under 12 referred on an offence ground would go in front of a children's hearing, and if they denied the grounds, the matter would go to proof. Elaine Sutherland has just said that, in such cases, balance of probabilities would be the standard of proof, but would that still come up as a criminal conviction? Is the point of this that it would not come up as a criminal conviction?

Professor Sutherland: It will not be a criminal conviction, but it will count as other relevant information. Again, we do not escape the potential for disclosure in that respect.

Fulton MacGregor: Thank you for clarifying that, because it might well help me with my final line of questioning. It is good to have the comment on the record.

Alex Cole-Hamilton: At the top of the session, Bruce Adamson gave compelling evidence as to why we should not stop at 12—and, indeed, why 12 should never be the target age for the age of

criminal responsibility. As the Parliament has mixed views on this matter, we should perhaps look at the art of the possible. If 12 is the limit of what we can achieve at the moment, should there be a statute of limitations on offences committed by people between the ages of 12 and 18? Those offences would be expunged from a person's record at a time when the person in question was, for example, likely to be taking on employment in which a disclosure might be required. It is, if you like, a halfway house. If we cannot get the age of criminal responsibility past 12, we should put in place a buffer—or a tolerance—in the form of a sunset clause on that sort of criminal record.

Bruce Adamson: I am very clear that 12 is the wrong age. Given that my job is to promote and protect children's rights, I think that we should not accept the proposal to make the age 12.

As for ensuring that children who come into conflict with the law are properly respected and given human dignity, we should absolutely do everything that we can to stop this kind of thing creating the lifelong stigma that has been mentioned. How we deal with the disclosure and other relevant information issues is really important, but the solution is to raise the age limit above 12, not to try to find other ways of dealing with those issues.

Alex Cole-Hamilton: I agree emphatically, but I am keen to hear what the rest of the panel think.

Chris McCully: I very much agree with Bruce Adamson that the age should be raised higher than 12. The fundamental basis of human rights is not what is politically acceptable, but what is right. After all, that is why they are called rights, and if you want to take them seriously, you enforce them, regardless of the political consensus. Ideally, we should be pushing for a higher age, but if we cannot get it past 12, I want the proposed systems with regard to the disclosure of other relevant information and no offence grounds to be extended from the under-12s to the age of 18, at a minimum. That, I think, will substantially limit the difficulties that will arise if we cannot get the age above 12.

The Convener: I want to ask about different types of rights. For example, I think that 16-year-olds should have the vote, but lots of people in our communities think that they are just not old enough and do not have the capacity. The argument is that young people do not have that capacity and that they are, in effect, children until they get into their 20s. How do we balance such competing rights?

Bruce Adamson: A couple of days ago, I discussed that issue in the Welsh Parliament, which is bringing in votes at 16. I said that that is a good start but that younger children also have the capacity to be more actively involved in our democracy.

The rights in the UN Convention on the Rights of the Child and the broader framework are often grouped into rights for survival, development, participation and protection. Participation and protection rights are really important. The idea is that, from a very young age, children have the right to be involved in decisions that affect them not just directly but at a societal level. We need to do everything that we can—I know that changes are happening in this Parliament, too—to engage children from a very young age. Rights that allow people to be part of our society are important, and they kick in from birth.

Protection rights need to stay with children and young people until they are 18. The starting point is that a protection right, such as not being criminalised for actions, applies until 18, and the decision to lower that age needs justification.

The starting point differs depending on whether we are ensuring that children can engage effectively in society, in a way that is appropriate to their level of development, or on whether we are protecting them, particularly from the state and from the consequences of criminalisation. That is a useful way of conceptualising the issue.

The Convener: We have spoken about the balance that involves the fact that the victims of harmful behaviours are often children who are vulnerable, too. I absolutely recognise our role in leading things, but we have a body of work in taking communities with us so that the changes are meaningful. How do we balance that?

Professor Sutherland: Victims' rights are crucial. When I listened to previous evidence, I felt that we were looking at two separate things. A small but important component is the victim getting to hear what happened to the person who caused harm, which it is reasonable for the victim to want to know about. However, the much more important component is victim support more generally. Irrespective of what a victim is told about the person who harmed them—or even if that person is never identified—the crucial bit of the puzzle is that we have in place effective systems to support children and adults who have been victims.

What the witness from Victim Support Scotland said came back to underresourcing. We need to put more into such services. There is a lot more awareness now of the trauma-informed approach, and we constantly get information on that and many other things; we know what we should do and we just need the resources to do it, but balancing the resources is tricky.

The more we can keep children in their own families—with support if necessary—the more we will save resources in other ways. It is cheaper to

keep children in their own family than to have them in the care system, and it is cheaper to stop children engaging in harmful behaviour before they become adult offenders. It is worth devoting the resources now to produce that long-term saving.

Bruce Adamson: I strongly agree with all that. We know that children are much more likely to be victims than to harm others. From a rights perspective, paragraph 3 of article 2 of the International Covenant on Civil and Political Rights and article 13 of the European convention on human rights talk about the right to "an effective remedy" for victims of rights violations. In the assessment of what an effective remedy looks like, victims refer to all the support that they need and may refer to restitution and compensation. A point that comes through strongly from victims is the need for a guarantee of non-repetition—they want to know that what happened will not happen again, to them or to other people.

11:15

However, criminalising children does not guarantee non-repetition—in fact, it creates the risk of more harm—and that guarantee as an important part of a right to an effective remedy is best served by the kind of trauma-informed supportive approach that we have talked about. That is important to victims: it is not necessarily about punishing the person, but about ensuring that what happened does not happen again and that we learn from it at a system level.

It is hugely important that we understand what is important to victims. Indeed, you have heard some powerful evidence both through this process and in other places, but the really important point is that the guarantee of non-repetition does not require criminalisation. We have to talk about how we ensure that victims get all the wider support that they need, particularly through Barnahus and other such processes, but as I have said, an effective remedy does not require criminalisation.

The Convener: Did you want to come back on a point, Mary?

Mary Fee: Briefly, convener. Given that the age proposed in the bill is 12, would the panel support a provision to increase the age incrementally? If so, what period of time should elapse before there is such an increase?

Bruce Adamson: I do not think that 12 should be the starting point. The concept of a review process is that we might learn something by moving the age to 12 and that that would help to inform what we do, but we already know that 12 is not the right age. I am therefore not sure what the purpose of a period of review and reflection would be.

Mary Fee: What if the review process was about looking at the bill in, say, two years' time with a view to increasing the age to 13 or 14 and, over time, up to 16 or 18? Would that be a sensible addition to the bill?

Bruce Adamson: My position on this is probably pretty clear. An important point for me—it is the same for incorporation—is that we can only bind ourselves to the mandate that you have until the next election, not things that might flow into future Parliaments. The time is now, the political will is there and the information is available. You have the knowledge, and you know what you need to do to lead in human rights terms. I have huge concerns about things that stray into the next parliamentary term—now is the time to legislate.

Professor Sutherland: I entirely understand what Bruce Adamson is saying, but, assuming that 12 is all that we can get this time, I would support building a review process into the bill. I realise that I am taking a rather more pragmatic approach, but my view is better half a loaf than no loaf at all. If 12 is the best that we can do, it is at least a start.

We can ensure that we come back to the issue by building into the legislation a requirement to review the matter. That provision will save us from the possibility of the issue getting lost and falling down the list of priorities of future Parliaments and Governments, and as such, it will be really useful. In the meantime, though, more supporting research can be carried out.

I agree with the suggestion of two years. We will absolutely review things, and such a move will tie the hands of future Administrations and make them at least discuss the matter. It provides an opportunity to keep working towards that progressive realisation. Of course, it would be much nicer if we just went for 16—or perhaps 18—right now.

The Convener: On that note, I thank the witnesses for their very helpful evidence.

At our next meeting, the committee will conclude its stage 1 evidence taking on the bill by hearing from the Minister for Children and Young People, Maree Todd. The committee also expects to take evidence as part of its scrutiny of the Scottish Government's 2019-20 draft budget.

We now move into private session, and I ask that the public gallery be cleared.

11:18

Meeting continued in private until 11:36.

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Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

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