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Age of Criminal Responsibility (Scotland) Bill

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The main purpose of this Bill is to raise the age of criminal responsibility in Scotland from eight to 12, to align it with the current minimum age of prosecution, and reflect Scotland's progressive commitment to international human rights standards. The Bill was introduced on 13 March 2018 by the Deputy First Minister, John Swinney MSP.
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SB18-49

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Executive Summary

The Age of Criminal Responsibility (Scotland) Bill has been introduced following consultation and the recommendations of an advisory group [3] which was established in 2015 to examine the implications of raising the age of criminal responsibility from eight to 12 years.

The Policy Memorandum to the Bill [4] states that "the Bill is focussed on protecting children, reducing stigma and ensuring better life chances, rather than reflecting a particular understanding of when an individual child in fact has the capacity to understand their actions, or the consequences that could result from those actions - either for them or for the people they may have harmed".

The Bill is in five parts:

- Part 1 deals with raising the age of criminal responsibility
- Part 2 relates to disclosure of convictions and other information
- Part 3 deals with the provision of information to victims
- Part 4 relates to the investigatory and other powers of the police
- Part 5 includes final provisions

The Policy Memorandum to the Bill includes extensive information on the operation of the Children's Hearings System and key information on all parts of the Bill. This briefing provides background information on the development of the Bill and an overview of its key provisions.

Background

The age of criminal responsibility in Scotland, in the sense of the age below which a child is deemed to lack the capacity to commit a crime, is eight. Section 41 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") provides that:

> "It shall be conclusively presumed that no child under the age of eight years can be guilty of an offence".

There are, however, further restrictions on when a child may be subject to the adult system of prosecution and punishment. The Criminal Justice and Licensing (Scotland) Act 2010 inserted a new section 41A into the 1995 Act providing that no child under the age of 12 may be prosecuted for an offence. It also provides that an older person may not be prosecuted for an offence committed whilst under the age of 12.

In addition, section 42(1) of the 1995 Act states that:

> "A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate; and no court other than the High Court and the sheriff court shall have jurisdiction over such a child for an offence"[i].

The Lord Advocate does not have to specifically authorise each prosecution of a child, but instead gives general instructions on the classes of cases in which children are to be prosecuted. These instructions are set out in the Lord Advocate's Guidelines for Reporting to Procurators Fiscal of offences alleged to have been committed by children, which state that a child can only be prosecuted in serious cases which could be prosecuted on indictment.

In summary:

- children under the age of eight - lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds
- children aged between eight and 11 - cannot be prosecuted in the criminal courts but can be referred to the children's hearings system on both offence and non-offence grounds
- children aged between 12 and 16 can be prosecuted in the criminal courts (subject to the guidance of the Lord Advocate) or referred to the children's hearings system on both offence and non-offence grounds

Proposals for further reform

The change made by the Criminal Justice and Licensing (Scotland) Act 2010, providing for a minimum age for prosecution of 12, was intended to address concerns that the age of criminal responsibility in Scotland was too low. The policy memorandum published along with the Criminal Justice and Licensing (Scotland) Bill noted that the law as it then stood allowed children from the age of eight to be prosecuted in the criminal courts and that:

i The Lord Advocate does not have to specifically authorise each prosecution of a child, but can instead give general instructions on the classes of cases in which children are to be prosecuted.

> "This is considered by many to be contrary to international standards and the United Nations Convention on the Rights of the Child (article 40(3)(a)) which suggests that 12 is the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings".”

Article 40 of the United Nations Convention on the Rights of the Child (1989) includes provisions requiring states to seek to promote the establishment of "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law"[ii]. The article does not specify a minimum age, but the United Nations Committee on the Rights of the Child has recommended 12 as an absolute minimum and stated that:

> "Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below [the minimum age of criminal responsibility], the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests". (General Comment No 10 (2007) Children's Rights in Juvenile Justice, para 31)”

The question of whether relevant reforms to Scots law should go further with regard to the age of criminal responsibility has remained a live issue.

Advisory group on minimum age of criminal responsibility

In 2015, the Scottish Government established the Advisory Group on the Minimum Age of Criminal Responsibility to examine the implications of raising the age of criminal responsibility from eight to 12 years. The Advisory Group was tasked with considering the policy, legislative and procedural implications of raising the minimum age of criminal responsibility from 8 to 12 years.

The group focussed on the impact such an increase might have in relation to:

- the management of any risk posed by the harmful behaviour of a child under 12
- the children's hearings system
- the ability of the police to investigate incidents involving children under 12
- the retention and disclosure of non-conviction information relating to harmful behaviour of children under 12

The following information is taken from the Advisory Group's report which was published in March 2016.

Disclosure

The Advisory Group reiterated the point that a child currently cannot be prosecuted for their actions if an incident took place while the child was under the age of 12, but pointed out that children aged 8-11 years old can still be referred to the Children's Hearings System on offence grounds. Where the child admits or has an offence ground established, then they can acquire a criminal conviction which can appear on a Police Act Disclosure certificate or Protection of Vulnerable Groups (PVG) scheme record. As a result, they may

ii The United Nations Convention on the Rights of the Child, although binding on contracting states under international law, is not binding under domestic Scots law (unlike the European Convention on Human Rights).

have to declare an incident that occurred in childhood well into adulthood which may severely restrict their life chances, including their ability to pursue some college or university courses, or follow a particular career path.

The Advisory Group recognised that one of the key difficulties for children and young people was the provision of "other relevant information" (ORI) which could be included on an enhanced disclosure or PVG scheme record (discussed further below). Such information is provided to Disclosure Scotland by the Chief Constable and includes non-conviction information, typically a narrative description of alleged conduct and any relevant background factors. The information can be included for as long as the Chief Constable reasonably believes that it is relevant and ought to be there, which may be for an indefinite period.

Given the potential for such information to restrict the life chances of some children at a later stage in life, the Advisory Group agreed that, should the age of criminal responsibility be raised to 12, there should be a strong presumption against the police including non-conviction information on disclosures about conduct that occurred under the age of 12. Advisory group members considered that the inclusion of non-conviction information relating to conduct from when the individual was under the age of 12 ought to occur only when absolutely necessary for public protection. The Advisory Group recommended that this should be subject to independent ratification by a party other than the Chief Constable before the disclosure takes place.

Offending by young children

The Advisory Group's work was informed by research carried out by the Scottish Children's Reporter Administration (SCRA) [5] [iii].

The research found that offending amongst children aged 8-11 was rare and serious offending even rarer. The research also found that, for those children aged 8-11 years referred to a Children's Hearing on offence grounds in 2013/14, the majority were also referred on care and protection grounds, or already had compulsory supervision measures in place. The Advisory Group recognised therefore, that there was a strong link between harmful behaviour and other disruption or trauma occurring in a child's life. To that end, the Advisory Group wanted to create an approach that would recognise this link and ensure that children would not be criminalised or stigmatised as a result of behaviour in early childhood.

There is also evidence about children in Scotland who display harmful behaviours highlighting the links between vulnerability, victimisation and offending. The Policy Memorandum to the Bill states that evidence shows that many children who display early harmful behaviours are themselves highly vulnerable and may have experienced trauma, neglect, abuse and other adverse childhood experiences in their own lives. Negative early life experiences can leave some children extremely vulnerable to environmental pressures and this can, in turn, contribute to the emergence of violence and/or other forms of harmful or anti-social behaviours in childhood.

In recommending the age of criminal age of responsibility be raised to 12, group members were conscious that appropriate action would still need to be taken to address the root causes of serious harmful behaviour. Equally, the harm caused to victims, who may also

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iii Henderson G, Kurlus I, McNiven G, *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. SCRA, March 2016.

be children, would not be diminished by the fact that such behaviour was no longer regarded as criminal.

Children's Hearings and child protection

Children aged 8 or over can currently be referred to the Children's Reporter on offence or non-offence grounds. If the age of criminal responsibility is increased to 12, children under this age will only be referred on non-offence grounds. The Advisory Group believed that the care and protection grounds currently available to the Reporter and/or a Children's Hearing would be sufficient to deal with any harmful behaviour exhibited by 8-11 year olds under any new arrangements. The Advisory Group concluded that, should the offence ground no longer be available for that age group, there was no need to create a new ground to replace it.

Police powers

The Advisory Group recognised that, for the vast majority of incidents involving 8-11 year olds, the use of police powers was not necessary to assess and meet a child's needs. These powers would usually only be employed where an incident was more serious in nature and likely to result in a referral to the Children's Reporter. If the age of criminal responsibility is raised to 12, then the Advisory Group found that many existing police powers would no longer be available in cases involving children under 12 because existing powers relate mainly to the investigation of an 'offence' or a 'crime'.

Members of the Group considered whether there was a need to retain or replace any of these powers.

After careful consideration, the Advisory Group members concluded that, in response to a serious incident, it would be important for the police to be able to identify "the truth of the matter" and to establish exactly how and why an incident had occurred. They recommended that some powers should be retained to be used in certain circumstances (for example, where serious harm had occurred). These included police powers to take a child to a place of safety, interview a child, take forensic samples and seek a warrant to take further forensic samples should they need to be taken and retained, but not for routine use. Group members had a range of positions and could not reach a settled view on the principled debate about whether forensic samples from this age group should be retained.

Key recommendations

The Advisory Group made a number of recommendations which included:

- That the Scottish Government and Scottish Parliament should take early action to raise the age of criminal responsibility to 12 years
- That this reform should mark a clear departure from the involvement of young children under 12 in criminal procedures or in disclosure systems
- That there is appropriate and effective support available to those victims affected by harmful behaviour
- That any non-conviction information relating to children under 12 at the time of an incident, which is in exceptional circumstances[iv]. Where the release of such

information is considered necessary, then this decision should be subject to independent ratification

- In the most serious circumstances, a power should be created to allow the police to take a child to a place of safety, to allow enquiries to be made in relation to the child's needs, including where the support of a parent or carer is not forthcoming
- In the most serious circumstances, a power should be created to allow for the interview of children, with appropriate safeguards, including where the support of a parent or carer is not forthcoming. Those safeguards should be based on the principles of Child Protection Procedures and Joint Investigative Interviews
- That a power should be created to allow for forensic samples to be obtained in exceptional circumstances and to establish "the truth of the matter". This would allow a child to either prove their innocence or enable support to be put in place to prevent such harmful behaviour being repeated.

Consultation

A public consultation on the Advisory Group‘s recommendations ran from 18 March to 17 June 2016 and generated 76 responses – from 47 organisations and 29 individuals. Ninety five per cent of respondents supported an increase of the age of criminal responsibility to age 12 or older (88% supported an increase to 12 and a further 7% who responded "no" to an increase to 12 suggested a higher ACR).

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

iv The Advisory Group defined exceptional circumstances as those "involving the gravest harm".

The Bill

The Policy Memorandum to the Bill states that the main purpose of the Bill is to raise the age of criminal responsibility (ACR) in Scotland from eight to 12, to align it with the current minimum age of criminal prosecution and to reflect Scotland's progressive commitment to international human rights standards.

It goes on to state that the Bill will achieve this by ensuring, amongst other things, that children under the ACR are not stigmatised by being criminalised at a young age by being labelled an "offender" and are not disadvantaged by having convictions for the purposes of disclosure, which can adversely affect them later in life.

The following paragraphs summarise the key provisions in the Bill.

Age of criminal responsibility

At eight, Scotland currently has the lowest age of criminal responsibility amongst European Member States. The age of criminal responsibility in other Member States ranges from 10 (in England, Wales and Northern Ireland) to 16 (Lithuania, Luxembourg and Portugal).

The approach to youth justice in Scotland has, for many years, been welfare-based. The Children's Hearings System, which was created following the recommendations of the Kilbrandon Report in 1964, puts the needs and the best interests of the child at the centre of decision-making. It recognises that if a child becomes involved in harmful behaviour, they are also likely to be dealing with other difficulties in their lives e.g. neglect, domestic abuse, bereavement. As such, any interventions by the children's hearings system are designed to support the child to move beyond any harmful behaviour, rather than being punitive.

From a child's perspective however, the current system may lead to a (mistaken) perception that a children's hearing is there to punish them for their actions. This perception could be reinforced by the child's interactions with the police who may have treated the child as an "offender" using the criminal justice powers available to them to investigate an incident.

Consequently, where a child feels that their behaviour is labelled as "criminal" at a young age, it can reinforce feelings of low self-esteem which creates a self-fulfilling negative cycle whereby the child ends up being involved in further harmful behaviour. The Policy Memorandum to the Bill refers to research which supports this view.

The longitudinal study, Edinburgh Study of Youth Transitions and Crime, points out that:

> “ Taken together, our findings indicate that the key to reducing offending may lie in minimal intervention and maximum diversion: doing less rather than more in individual cases may mitigate the potential for damage that system contact brings. More significantly, our findings provide some support for the international longitudinal research - in particular, they confirm that repeated and more intensive forms of contact with agencies of youth justice may be damaging to young people in the longer term - such findings are supportive of a maximum diversion approach[v]. (McAra and McVie, 2007) ”

Wider policy context

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

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

The WSA, introduced in 2008 and updated in 2011, aims to reduce offending by young people and addresses their needs by emphasising a multi-agency, multi-disciplinary approach to provide tailored support and management of the child. This ensures that practitioners work together to support families, and take action at the first signs of difficulty. A key element of the approach is to emphasise timely and effective intervention to minimise the number of children in the criminal justice system and formal processes.

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

The Policy Memorandum to the Bill points out that:

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

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

These statistics reflect the wider reduction in offence referrals to the Principal Reporter in respect of all children under 18 over the same period. In relation to the under 12 cohort,

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v McAra, L., and McVie, S., (2007), "Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending". European Journal of Criminology 4 (3) 315-345.

only a small minority of these referrals result in children's hearings being arranged to consider compulsion, and an even smaller proportion of referrals result in compulsory supervision.

Raising the ACR to 12 seeks to make it explicit to children that while any behaviour under the age of 12 will still be fully investigated, they will not be stigmatised or involved in any process which re-creates adversarial criminal procedure. Instead, children will be provided with the necessary support to help them to understand and acknowledge the harm they have done; their individual and environmental welfare needs will be addressed; and they will be given support to move on from an incident which occurred in childhood.

The Policy Memorandum states that evidence shows that, on average, three eight to 11 year olds each month are referred to the Principal Reporter for more serious offending behaviour.

It's acknowledged that changing the ACR to 12 will not directly affect the conduct of children under 11. However, what will change is that such conduct will not be considered to be criminal and children will not be treated as an "offender" or as a "criminal".

Importantly, the full current range of powers, disposals and interventions available to the children‘s hearings system will remain in place. The non-availability of the offence ground for that age group will not prevent robust intervention by the children‘s hearings system, as an offence-specific ground is not necessary to promote protection, guidance, treatment and control.

If there are concerns about a child's behaviour and the Principal Reporter considers that it is necessary for the child to be subject to a compulsory supervision order, the Principal Reporter can refer the child on a non-offence ground. The most likely grounds are those in section 67(2)(m) and (n) of the Children's Hearings (Scotland) Act 2011 - i.e. the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person; or the child is beyond the control of a relevant person. The disposals available to a hearing in those circumstances will be the same as they are currently (up to and including authorising the child's placement in secure care).

The means by which the Bill seeks to change the ACR from eight to 12, is by providing that a child under the age of 12 cannot commit an offence. The Bill will also ensure that no child will be referred to a children's hearing on offence grounds in relation to behaviour which took place before they were 12.

As pointed out above, a significant majority of respondents to the consultation supported an increase in the age of criminal responsibility to 12.

Disclosure

As outlined above, one of the policy intentions behind the Bill is that children under the ACR should not be disadvantaged or adversely affected by having offences which occurred in childhood automatically disclosed in later life. To that end, the Bill seeks to make changes to the current disclosure scheme to ensure that such information cannot be disclosed automatically. The following paragraphs summarise the current system of disclosure and the policy objectives of the Bill in this area.

Rehabilitation of Offenders Act 1974

Currently in Scotland, the Rehabilitation of Offenders Act 1974 ("the 1974 Act") includes a number of protections for individuals who have a conviction but who are considered to be rehabilitated. For the purposes of the 1974 Act, the meaning of conviction includes cases where a child has been referred to a children's hearing on offence grounds, and an offence ground is admitted or established.

The 1974 Act provides that anyone who has been convicted of a criminal offence and either sentenced to a non-custodial penalty or sentenced to prison can be regarded as rehabilitated' after a specified period of time, (the rehabilitation period), provided he or she receives no further convictions. A person can also become 'rehabilitated' after receiving an alternative to prosecution, such as a fiscal warning or a fiscal fine. After the specified rehabilitation period has passed, the original conviction or alternative to prosecution is considered to be 'spent' and no longer needs to be disclosed.

The general rule is that, once a conviction or alternative to prosecution is spent, an individual does not have to reveal it and cannot be prejudiced by it. For example, if an individual whose convictions or alternatives to prosecution are all spent is asked on a job application form or at a job interview whether they have any criminal convictions, they do not have to disclose these and employers cannot refuse to employ that person on the basis of spent convictions.

However, there are some categories of employment and proceedings to which the normal rules under the 1974 Act do not apply. These are positions involving a particular level of trust, such as work in the childcare, healthcare and the financial sectors, which are treated differently from the normal application of the 1974 Act. This is to ensure that there is adequate protection for children and vulnerable people, in particular, by allowing employers to be informed about relevant previous convictions of potential/actual employees. In these circumstances,[vi] the public interest in the knowledge of previous convictions is considered to outweigh the interest in allowing an offender to live down their past.

The disclosure system

The disclosure system also permits the disclosure of unspent convictions on all types of disclosure. However, once a conviction becomes spent, it can only be disclosed on certain types of disclosure - these are known as "higher level disclosures". However, there are provisions to ensure that only certain spent convictions are included in higher level disclosures.

The disclosure system is governed by the Police Act 1997 ("the 1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 ("the 2007 Act"). Disclosure Scotland discharges Scottish Ministers' functions under the 1997 and 2007 Acts by carrying out criminal record checks for recruitment and other purposes.

Under the 1997 Act, the criminal conviction certificate, criminal record certificate and enhanced criminal record certificates are available. These certificates are commonly referred to as basic, standard and enhanced disclosures. Under the 2007 Act, which established the PVG Scheme in Scotland, a scheme record, a short scheme record and a scheme record membership statement are available. Collectively, PVG scheme records, standard disclosures and enhanced disclosures are known as "higher level disclosures".

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vi See the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013.

(The mygov.scot website provides further information on the various types of disclosure which are available).

The enhanced disclosure lists certain spent convictions, unspent convictions, states if the person is a registered sex offender, and may include information from the police detailing non-conviction information, referred to as other relevant information ("ORI"). An example of this might be where the police had a credible suspicion that the individual had committed offences relevant to the post they were applying for but had not been convicted. The decision to release ORI rests with the Chief Constable. If the police provide this information, Disclosure Scotland must include it; Disclosure Scotland has no discretion to remove or alter any text provided by the police as ORI.

Disclosures made under the 2007 Act are: statement of scheme membership, this contains no vetting information; a short scheme record which contains no vetting information; or a scheme record. A scheme record discloses vetting information, that is any unspent convictions and certain spent convictions; will state if the person is a registered sex offender; and also has the potential to contain other relevant information.

As outlined above, until 2011 it was possible for a child over the age of eight to be prosecuted in a Scottish court. Since then, it has remained possible for a child aged eight to 11 to be referred to a children's hearing on the offence ground. Where a child admits or has an offence ground established, they can acquire a criminal conviction which may appear on a higher level disclosure certificate or PVG scheme record. Whether that conviction appears on the certificate will depend on a variety of factors, including the type of certificate and the type of offence. As a result, they may have to declare an incident that occurred in childhood well into adulthood which may severely restrict their life chances, including their ability to pursue some educational courses, or follow a particular career path.

The Policy Memorandum to the Bill states that conduct by children in the eight to 11 age group that would formerly have been criminal (should the ACR be raised) is typically of a minor to moderate severity and that very serious and harmful behaviour by children in that age group is comparatively rare:

> “ Data collected by the Scottish Children‘s Reporter Administration shows that during 2014-15, 75 children were referred to the Principal Reporter as result of being charged with an assault, 55 for threatening or abusive behaviour, 50 for vandalism, 28 for distress/racial alarm), 15 for theft by shoplifting, 14 for theft and 13 for assault to injury. During the 4 year period 2011-12 to 2014-15, 150 referrals were made to the Principal Reporter for offences of a serious violent or serious sexual nature (e.g. serious assault, fire-raising or sexual assaults on young children). ”

The Policy Memorandum goes on to say that statistical data and research shows that the majority of children currently brought before a children‘s hearing on offence grounds, for offences committed between the ages of eight and 11, do not go on to re-offend in later childhood. As such, it would therefore seem disproportionate in most cases that children should continue to have incidents from their early childhood routinely disclosed by the state for years to come.

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

Independent reviewer

The Bill does provide for disclosure of information held by the police about behaviour which occurred when a child was under the age of 12. However, this will no longer be automatic and will be subject to an independent review which includes the possibility of the subject of the potential disclosure having a right to make representations before disclosure to a third party takes place. If disclosure is to occur, it will be in the form of other relevant information and can only appear on an enhanced disclosure or PVG scheme record.

The Bill seeks to achieve these objectives by:

- amending the 1997 Act to remove from the definition of conviction, any conviction imposed when the applicant was under 12;
- by allowing the police to provide other relevant information to Disclosure Scotland for inclusion on an enhanced disclosure or PVG scheme record, relating to a time when the applicant was under 12, but only in exceptional circumstances and if the newly established independent reviewer agrees to the information being disclosed;
- giving the independent reviewer the power to gather information from relevant sources including the applicant, the police, the Principal Reporter, local authorities or any other person they consider appropriate; and
- providing the individual and the police with a right to appeal the independent reviewer's decision to a sheriff, on a point of law only

The Scottish Ministers will appoint the independent reviewer and will also set out statutory guidance for the reviewer to describe the factors to be considered in cases where such information might be disclosed. This will balance public protection requirements against the rights of the individual for this information to remain private.

Victim information

Currently, the EU Victims Directive (2012/29/EU) and the Victims and Witnesses (Scotland) Act 2014 provide the legislative basis for victims' rights in Scotland. These rights include access to information and support and apply to victims of alleged crime, irrespective of the age of the alleged perpetrator. The Criminal Justice (Scotland) Act 2003 also includes provisions for victims to receive information where a case is referred to the Principal Reporter - the Reporter’s primary function is to receive referrals for children and young people who are believed to require compulsory measures of supervision. The Reporter then decides whether the child or young person should be referred to a Children’s Hearing.

Currently, the Principal Reporter is able to contact the victims of those children referred on offence grounds (or the parents/carers of child victims) to inform them about how a case has been disposed of by the hearings system. In practice, the Scottish Children‘s Reporter Administration (SCRA) delivers this information through its Victim Information Service (VIS).

The Principal Reporter can provide basic information about the Reporter‘s decision (i.e. whether or not to bring the child to a hearing) and whether or not the hearing has made a Compulsory Supervision Order (CSO). The identity of the child perpetrator is not revealed nor confirmed. If a child is referred on multiple grounds then the victim would only be entitled to know about the specific ground in which they are identified as the victim. For

example, if the Reporter brings the child to a hearing on multiple offence grounds, the victim would only be told the decision in relation to their ground. In making a decision about which information (if any) to release, the Reporter must balance the rights of the child causing harm to privacy.

Under existing legislation, this service is not available to victims of harmful behaviour by children under the ACR (i.e. under 8s) as it only applies to cases where the Principal Reporter receives information about a case in which it appears that a child has committed an offence. Consequently, raising the ACR, and thereby providing that a child under 12 cannot commit an offence, will mean that the VIS will no longer be available to victims of the harmful behaviour of children aged eight to 11.

The Policy Memorandum points out that these cases are likely to be few in number, as data provided by SCRA suggests that 254 victims were written to in 2017 in relation to offences alleged to have been committed by eight to 11 year olds. This is from a total of 3,688 victims written to in that year. Fifty three of those 254 victims opted in to the Victim Information Service, representing an opt-in rate of approximately 21%, compared to a figure of approximately 19% opt-in rate across the board. While this is a relatively rare occurrence given the very small number of eight to 11 year olds being referred on offence grounds and the small numbers opting in to the service, the policy objective is to ensure that victims of seriously harmful behaviour by those children will still be able to receive support and information in future.

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

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

Changes to victim information in the Bill

Currently, the rights outlined above only come into play when the Principal Reporter receives information about a case where it appears that a child has committed an offence. Raising the ACR would therefore remove victims of harmful behaviour by children aged eight to 11 from the scope of these provisions and those victims would no longer be able to receive information. The Bill is seeking to remedy this by creating new powers which mean a victim of seriously harmful behaviour by a child under the ACR may receive information about the Reporter's decision or children's hearings disposal connected to that behaviour. As currently drafted, the relevant provisions in the Bill will lead to harmful behaviour of all under 12s potentially falling under the Victim Information Service (i.e. that under 8s who would not have previously been covered will now fall under these provisions). This is something which the Advisory Group recognised as a potential difficulty but decided that having one approach for all children under the age of criminal responsibility was preferable to having a two-tier approach (i.e. one where under 8s and those children aged 8-11 would be treated differently).

The Bill makes these powers available to the Principal Reporter only in serious cases, that is, where the Principal Reporter has received information which suggests that a child under ACR has caused harm to another person by engaging in behaviour which is:

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

The Policy Memorandum provides the following example. If a child under 12 is responsible for a serious physical injury of another person and is referred to the children's hearings system as a result of that behaviour, the Principal Reporter may inform the person harmed about the disposal of the case. Where a child under 12 has damaged or stolen property, and no-one has been injured, the Principal Reporter would be unable to disclose information to for example, the owner of the property, even if that case is referred to the children's hearings system. If the Bill is passed in its current form, where the Principal Reporter receives information that a child has engaged in seriously harmful behaviour, he or she will have discretion to determine when disclosure of information to a victim is appropriate and proportionate in accordance with the new powers provided by the Bill.

The Bill also sets out additional requirements for the Principal Reporter to consider when determining whether information about an incident should be disclosed. These include the seriousness of the child's conduct; the circumstances in which the incident took place; the age of the child involved in that conduct; and the effect on the victim.

Police powers

The Bill provides for a number of police powers. To ensure that these powers are justifiable and proportionate, the Bill restricts their application so that the majority are only available in the most serious cases i.e. where it is thought that a child has caused (or risked causing) death or serious injury by acting in a violent or dangerous way, or that the child has harmed (or risked harming) someone with sexually violent or sexually coercive behaviour.

As outlined above, the Advisory Group recommended that powers should be available to the police including powers to take a child to a place of safety, to interview a child, to take forensic samples and to seek a warrant to take further forensic samples should they need to be taken and retained, but not for routine use. Again, it is important to emphasise that the Advisory Group's view was that these powers should only be available in exceptional circumstances and for establishing the truth of the matter in hand.

Place of safety

The Advisory Group recommended that, in the most serious circumstances, a power should be created to take a child to a place of safety to allow enquiries to be made in relation to the child's needs, including where the support of a parent or carer is not forthcoming.

The Bill provides a power for the police to take a child to a place of safety where they believe that it is necessary to manage an immediate risk of harm. The Policy Memorandum to the Bill states that this could arise where the police encounter a child who appears intent on harming another person and it is not possible to arrange with the child's

parents or carers for the child to be safely returned to their home. Taking the child to a place of safety will allow the police to then determine how to proceed.

The child should be kept in the place of safety for as short a time as possible – no longer than is needed to put in place suitable arrangements for the child's care and protection, and an absolute maximum of 24 hours. If it becomes apparent that the child needs to be kept in a safe place for longer (for instance, because they would not be safe at home), that would need to be taken forward through existing child protection measures.

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

- a residential or other establishment provided by a local authority
- a community home within the meaning of section 53 of the Children Act 1989
- a police station
- a hospital or surgery, the person or body of persons responsible for the management of which is willing temporarily to receive the child
- the dwelling-house of a suitable person who is so willing or
- any other suitable place the occupier of which is so willing

The Policy Memorandum to the Bill states that using a police station as a place of safety is to be avoided if possible and should only be used if there is no other reasonable alternative.

Powers of search

The police currently have a range of statutory powers to search children under 12. Where those search powers hinge on suspicion that someone is committing an offence they would no longer be available to the police unless the Bill made explicit provision. Currently, the police can also search children under 12 as conditions of entry to events, in the wider interests of public safety.

The Bill seeks to replicate existing statutory powers of search to ensure that, when necessary and proportionate, the powers can still be used in relation to children under 12. By doing so, it creates a consistent position for all children under 12.

Section 25 of the Bill seeks to replicate existing statutory search powers that do not require a warrant. It makes clear that the police can use these search powers with children under 12 as they can use them with people 12 and older. This includes searches of a person (i.e. "stop and search"), and existing circumstances in which the police may search a vehicle or premises connected with a person without a warrant. However, where existing search powers allow the police to arrest someone, or make it an offence to obstruct the search, these aspects will not apply to children under 12, who, once the age of criminal responsibility has been raised, will not be legally capable of committing an offence.

The Policy Memorandum points out that any searches of children under the provisions at section 25 of the Bill will still need to be carried out in accordance with sections 65 and 68 of the Criminal Justice (Scotland) Act 2016, and the Code of Practice on Stop and Search,

which provide a range of important safeguards (including some specific to children and young people). These safeguards include:

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

The Bill also covers circumstances in which the police wish to search private premises or a vehicle where they suspect that a child under 12 has carried out a serious act and they do not have the statutory power to do so (i.e. the search would not be covered by the provisions at section 25 - see above).

In these circumstances, the police must apply to a sheriff for a search order, setting out the grounds for seeking the order, including their reasons for suspecting that relevant evidence for their investigation may be found if the search goes ahead.

Investigative interviews of children

In its report, the Advisory Group recommended that:

> " In the most serious circumstances it is important to provide the child with the opportunity to provide their account of events and identify all relevant risks and needs. A power should be created to allow for the interview of children, with appropriate safeguards, including where the support of a parent or carer is not forthcoming. Those safeguards should be based on the principles of Child Protection Procedures and Joint Investigative Interviews. "

In line with the Advisory Group's recommendation, the Bill creates a new bespoke process for interviews investigating whether a child under 12 has carried out a seriously harmful act. (The Bill does not make any new provision about interviewing children about less serious behaviour and the police will be able to engage with children as they currently do).

The purpose of these interviews is both to help the police to establish what has happened, and to help identify any additional support or protection needs that the child may have. It is important to remember that the child is not being interviewed as a criminal suspect, and that the process should not feel criminalising.

However, an interview could have consequences for the child or for other people: material gathered at the interview could lead to the child being referred to the Principal Reporter on non-offence grounds, or to a criminal investigation into another person, or form part of a subsequent provision of "other relevant information" on a disclosure check (see section on disclosure above). The Policy Memorandum to the Bill points out that this means it is important that the interview process is not only rooted in a welfarist approach but is also robust and transparent, so that any evidence arising from it has integrity. The process, therefore, builds in independent judicial oversight (a sheriff must normally agree that it is necessary to interview the child); requires the interviewers to follow statutory guidance when planning and carrying out the interviews; and provides safeguards for the child who is being interviewed. The police and social work will collaborate to plan and potentially carry out the interviews, with social work involvement being proportionate to the nature of the case and the extent and acuteness of the child‘s individual needs.

The Bill provides that, if the police wish to interview a child because they suspect the child has carried out a seriously harmful act when under the ACR, they may only do so if they have obtained a "child interview order" from a sheriff, or the situation is so urgent (because life is at risk) that there is no time to obtain the interview order before asking the child questions.

When applying to a sheriff for a child interview order the police must provide certain information - i.e. the reasons for seeking an interview and provisional plans for interviewing a child. Plans might include how many interviews are to be held, where they will take place and who they will be conducted by. Final plans for interviews must be drawn up collaboratively by police and relevant local authority social work staff.

When considering an application for a child interview order, a sheriff must, amongst other things, consider whether to give the key people involved an opportunity to make representations about the application - this includes the police, the child who is the subject of the application, and their parent(s), and any other person who the sheriff considers has an interest in the application.

In order to grant an application, the sheriff must be satisfied that there are reasonable grounds to suspect that the child carried out the act being investigated; that it is necessary to interview the child in order to properly investigate the incident; and that an investigative interview is appropriate given the child's age and circumstances.

The Bill provides certain rights for a child who is to be interviewed under a child interview order. This includes a right to have a supporter present during the interview. A supporter could of course, be a parent although it does not have to be.

A child who is to be interviewed is also afforded the right to receive support and advice from a suitably qualified advocacy worker who may also be present during the interview process. Amongst other things, the advocacy workers role is to help a child understand the purpose of the interview, their rights (including reminding the child that they don't need to answer questions if they don't want to - this is provided for at section 38 of the Bill) and what the possible consequences of the interview might be. The Scottish Government wants to ensure that those fulfilling this new role to protect the child‘s rights and interests are suitably qualified. To that end, the Government intends to bring forward regulations to prescribe that, in the case of advocacy workers who provide support and assistance at interviews conducted under a child interview order, the advocacy workers must be legally qualified. This will be subject to consultation.

Importantly, the Bill provides that children cannot be interviewed alone under a child interview order and an interview cannot continue when both their supporter and advocacy worker are absent from the room where the interview is being conducted.

Interviewing a child in urgent situations

The Bill recognises that there may be situations where the police would be required to interview a child about a serious incident without obtaining a child interview order as outlined above. For example, where another young child has been abducted and was believed to be in danger, and the police needed to ask questions immediately in order to establish their location.

While such circumstances may be exceptional, the Bill provides that the police may interview a child they have reasonable grounds to suspect has carried out a very serious , harmful act without first obtaining a child interview order, if delay could put someone‘s life at risk.

The decision to interview must be authorised by a Superintendent (or more senior officer). That officer must satisfy themselves that the same criteria that a sheriff would need to consider if an order had been applied for had been met. The police officer carrying out the interview must let the child‘s parents (if possible) and the advocacy service know that the interview is taking place, and must explain to the child what is happening, and that they do not have to answer questions. The child may only be questioned in so far as necessary to mitigate the risk of loss of life (in other words, this would not be a full investigative interview; its scope would be limited to responding to the immediate risk-to-life concern that justifies this departure from the normal procedure). The police must also apply for a retrospective child interview order as soon as possible.

Power to take forensic samples

Currently, if a child is in police custody the police can take certain samples from the child, including fingerprints, palm prints, DNA and photographs. Such samples can be analysed to help ascertain if the child has or has not been responsible for an offence. Again, this power applies to all people in police custody and is not specific to children. Children can also voluntarily provide samples (with the permission of a parent or carer). Again, this can be without the safeguards that would be available if the person was in police custody (e.g. access to legal advice).

Should the minimum age of criminal responsibility be raised, and no power be available to detain or arrest a child under that age, then the power to take samples from a child under 12 would no longer exist. The Advisory Group considered under which circumstances, if any, that such a power would be required for a child aged under 12.

Group members were conscious that there was a potential for this type of practice and procedure to be seen to criminalise children even when they are below the minimum age of criminal responsibility, and they were anxious not to diminish the ongoing importance of focusing on the needs of the child. The collection of forensic samples also has the potential to create confusion for a younger child who, on the one hand is being told that they are not being held criminally responsible for their actions, yet on the other hand are being asked to provide the police with a forensic sample, which they might normally associate with the detection of crime e.g. fingerprints.

However, the Advisory Group acknowledged that there can be circumstances, particularly in sexual offences, when such samples would have the ability to substantiate or refute a

child's alleged involvement in an incident. The Group agreed that such a power should therefore continue to be made available because it will assist in the assessment of information about the child's actions and inform decisions regarding the child's welfare and any risks they may pose to themselves or others. Where a sample proves a child's involvement, this will also allow a sense of closure for the victim, and allow for the most appropriate support to be provided. It will also allow for support to be provided to the child demonstrating the harmful behaviour and for any future risks posed by them to be assessed and managed.

On balance, the Group felt it was important to create a replacement power, should the age of criminal responsibility be raised to 12. This would ensure that, in a narrowly defined set of circumstances, the police would be able to continue to take forensic samples from children under the age of 12. The Advisory Group recommended that "in the most serious circumstances, including where the support of the parent or care is not forthcoming, a power should be created to allow for forensic samples to be obtained".

The Bill only allows forensic samples to be taken from children under 12 when the police have a statutory power or court authority to take them. This is in recognition of the intrusive nature of taking samples, especially from young children, and the ethical sensitivities surrounding the taking and use of personal information. It will not be possible to take samples from a young child simply on the basis of consent. Similarly, samples will only be able to be taken where it is reasonable to believe that a child may have carried out an exceptionally serious harmful act - that is, behaviour that caused or risked causing serious physical harm to another person or where a child behaved in a sexually violent or sexually coercive way which caused or risked causing harm (whether physical or not) to another person.

The Bill provides that a sample may be taken only if:

a) a sheriff has authorised it in advance; or

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

Where a sample is taken without prior authorisation by a sheriff in a situation of urgency (under section 57), that step must be authorised by an officer at or above the rank of Superintendent who has not been involved in the investigation. Once the sample has been taken the police must obtain authorisation from a sheriff before they may proceed to process and analyse the sample. The sample can be recorded and stored so that it does not deteriorate, but no further steps may be taken with it (i.e. forensic testing) and neither the sample nor any record or information derived from it may be used for investigative purposes unless and until authorisation has been obtained. This ensures that, whenever a sample is taken from a child (in whichever of the circumstances outlined above it is taken), there will be judicial oversight.

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vii Section 49 of the Bill sets out the different types of samples which may be taken.

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