

The Report of the Advisory Group on the Minimum Age of Criminal Responsibility

**To Michael Matheson, MSP, Cabinet
Secretary for Justice and Angela Constance,
MSP, Cabinet Secretary for Education and
Lifelong Learning**

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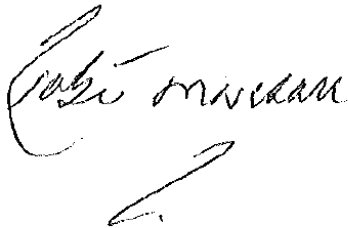
Foreword

"The age of criminal responsibility has been laid down for purely legalistic reasons" it being "largely a meaningless term". So said the Kilbrandon Committee's own Report in 1964. This Advisory Group has taken its lead from that Report in setting out the issues around the age of criminal responsibility in order to frame a debate going forward about the future of our system.

In submitting this Report to Ministers, I wish to acknowledge the enormous talent, goodwill and collective desire to provide Ministers (as well as the wider public), with a compelling basis for that debate.

A great deal of work has been done and within an extraordinarily short timescale. My thanks go to all those on the Group for the generosity with which they gave their time and experience, as well as to the organisations from which they were borrowed. Whilst invidious to single any one person out, I must however thank Iain Fitheridge, our Secretary, who quietly and calmly co-ordinated the mass of activity that has brought this Report to completion.

It was a privilege to chair. I commend the Report to you.

A handwritten signature in black ink, appearing to read 'Robert Marshall', with a large, stylized flourish below the name.

Robert Marshall

1. Introduction

Background

1.1 Scotland's age of criminal responsibility, at 8 years of age, is the lowest in Europe.

1.2 There have long been calls for the age of criminal responsibility in Scotland to be raised, notwithstanding the increase to the minimum age of prosecution to 12 years in 2011. These calls have come both from the United Nations and from children's organisations and others closer to home.

The Advisory Group

1.3 In September 2015, the Cabinet Secretary for Justice, Michael Matheson MSP, committed to the creation of an expert Advisory Group to examine the potential implications of raising the age of criminal responsibility from 8 to 12 years of age. In November 2015 the Advisory Group was convened for the first time. It was tasked with looking at four key areas, including the management of risk in relation to children's harmful behaviour; changes that may be required to the Children's Hearings System; Police powers and issues in relation to Disclosure certificates and the weeding and retention of non-conviction information.

1.4 The Group was made up of senior professionals from a wide range of disciplines, including those working with children, child victims, the Police and the Crown Office and Procurator Fiscal Service. It is therefore important to note that the opinions expressed in this report are those of the Advisory Group, and not those of the Scottish Government. Where there has not been unanimous agreement by the Group, or where it was felt further insight or development work was required, then this has been clearly indicated throughout the report.

Expectations and Challenges

1.5 All members of the Advisory Group were committed to ensuring that Scotland's children should have the best possible outcomes. The clear settled view was that if the minimum age of criminal responsibility were to be raised to 12, then no harmful behaviour demonstrated by 8-11 year olds should ever be regarded, or responded to, as 'criminal', no matter how serious.

1.6 The Group recognised, however, that this would not mean that harmful behaviours currently demonstrated by the 8-11 year olds would disappear. Neither would the impact of those behaviours on others. The Group were therefore conscious of the need to ensure that the full range of harmful behaviours currently demonstrated by this age group could be safely addressed under any new arrangements, whilst recognising that the incidence of more serious harmful behaviours in this age group was very rare.

1.7 The Group were also conscious of some of the challenges that would exist in terms of shifting public thinking towards supporting a higher age of criminal responsibility, particularly for those very rare cases where serious harm is caused.

They acknowledged that for some, this would be a challenging transition, but concluded that any difficulties would be surmountable.

Impact of Raising the Age of Criminal Responsibility

1.8 Although the main focus of the Advisory Group's work was on how an increase in the age of criminal responsibility would affect children aged 8-11 years, the Advisory Group also looked at the impact of such a change on all children and young people in Scotland. The Group regarded a child/young person as someone under the age of 18, in line with the definition used in the UN Convention on the Rights of the Child. In doing so, the Group was conscious of the fact that the definition of a child currently varies quite considerably across legislation in Scotland. For the purposes of some legislation, adulthood begins at 16 and for others at 18.

1.9 The Group's principal task was to look at the detail of what might be needed to support a change to the age of 12, to highlight issues that would need to be addressed to accommodate such a move, as well as to frame an approach to wider public consultation.

1.10 All Group members understood that children should not be criminalised or stigmatised into adulthood as a result of behaviour in early childhood. The Group equally understood that raising the minimum age must not hinder appropriate action to address the root causes of serious harmful behaviour, whilst also protecting the interests of those harmed.

Risk Management

1.11 On the rare occasion that children of this age do get involved in serious harmful behaviour, it is often in the context of the child experiencing a range of difficulties in their home lives, such as abuse, bereavement, or parental neglect, substance misuse or imprisonment. Where the child is supported to move past these difficulties, there is every chance that the child can go on to have a life free of offending.

1.12 The Group were unanimous that proportionate and effective interventions must be available to prevent and manage serious and harmful behaviour.

1.13 In that context, the Group shared the view that applying the label of 'criminality' to harmful behaviour by young children was not useful. More importantly, it was not the best way of responding to such childhood behaviour in a proportionate, cogent, serious manner.

Getting it Right for Every Child

1.14 The Getting It Right For Every Child model (GIRFEC) already gives us the tools to understand and respond to the needs of Scotland's children. The proposal to raise the age of criminal responsibility to 12 reinforces this principle, recognising that children's cognitive ability develops over time and that a child aged between 8 and 11 years of age may not truly understand the full impact of their actions on others, or indeed on themselves.

1.15 In recent years there has been a clear shift in Scotland via the GIRFEC approach towards ensuring that where policy or legislation affects children and

young people, then its provisions are firmly grounded in securing both their best interests and wellbeing. This approach is integral to the education, health and social care sectors. This is also true of the justice sector, where the value of early intervention, support and diversion has increasingly been recognised.

Children's Hearings System

1.16 The roots of this approach go back much further, to the time of Kilbrandon and the establishment of the Children's Hearings System itself. In Scotland we are internationally recognised as taking a progressive, welfare-based approach towards children and young people in trouble, at risk or in need. The Children's Hearings System in Scotland looks at a child's actions in the context of their support needs and an understanding of why that behaviour may have occurred.

1.17 However, our current approach to 8-11 year olds accepting or having offence grounds established via the Children's Hearings System is arguably inconsistent with this principle. If we are committed to ensuring these children are treated fairly and supported to move away from harmful behaviour, then we cannot then insist on that same child having to disclose details of an incident – on the basis of criminality - into adulthood.

Key Principles

1.18 In considering the underlying issues and implications arising from a potential change, there has been consensus around a number of key principles which have shaped the conclusions and recommendations of the Group. These are:

- Any changes should give better effect to the UN Convention on the Rights of the Child (UNCRC),
- GIRFEC principles apply for all children – including children demonstrating harmful behaviour and children who are victims of that behaviour.

1.19 The evidence would suggest that for the majority of children who are brought before a Children's Hearing on offence grounds this will be their first and last offence¹. For those going through a period of offending, the link between trauma in their lives and their behaviour is also well acknowledged. Rarely does a child demonstrate harmful behaviour, without first having been harmed themselves.

1.20 Yet for the small number of children aged 8-11 years old who are currently referred to the Children's Hearing System on offence grounds each year, the impact of an incident – or series of incidents - in early childhood on their whole life chances can be devastating.

1.21 Where the child accepts or has offence grounds established, they will acquire a criminal record which may stay with them into adulthood. This has the potential to severely restrict their ability to undertake some college/university courses or to follow their chosen career path. In practical terms, it will require them to revisit, and explain, an incident they may not fully understand or may be ashamed of for many

¹ 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

years to come. It is important to emphasise that these children are few in number, but the impact on them is significant.

Children's Rights and Wellbeing

1.22 Given the wide-ranging implications of a change to the age of criminal responsibility, Advisory Group members were keen to ensure that the children's rights implications of an increase in the age of criminal responsibility were fully explored. Therefore a Children's Rights and Wellbeing Impact Assessment, or CRWIA, was commissioned and carried out in tandem with the work of the Advisory Group.

1.23 The role of this CRWIA was to examine the rights implications of the proposal to raise the age of criminal responsibility, to identify an evidence base and to consider any positive, negative or neutral effects the proposal may have on children, and on particular groups of children. Where there were negative impacts, then the CRWIA explored how these might be mitigated. The CRWIA findings fed directly into this report.

1.24 Whilst ensuring that behaviour below the age of 12 is no longer regarded, and responded to, as criminal, the Group's proposal still ensures that harmful behaviour continues to be addressed. However, this will be done in a manner which addresses its root causes, is non-stigmatising and allows the child to move beyond an incident in early childhood.

1.25 The Group were also conscious of the need to 'future-proof' their work and to ensure that any proposed changes, and the associated planned safeguards, would be rigorous enough to withstand a possible further increase in future.

Methodology

1.26 At its initial meeting on 16 November 2015 the Advisory Group agreed that in order to meet its terms of reference (see Annex A) the best way forward would be to split the issues and at this early stage 4 workstreams were established along with groups to consider the detail, along with groups to consider the detail, as follows:

- Care, Protection and Risk
- Children's Hearings
- The Role of the Police
- Disclosure - including Police Weeding & Retention

1.27 The Advisory Group had 3 subsequent meetings on 16 December 2015, 13 January and 11 February 2016. In between the Advisory Group meetings, the workstream groups met as required.

1.28 Supportive documentation and research which has been published alongside this report include:

- Children's Rights and Wellbeing Impact Assessment (Advisory Group)

- SCRA Research which details backgrounds and outcomes for children aged 8-11 years old who have been referred to the Children's Reporter for offending (Scottish Children's Reporter Administration)
- International comparative analysis which looked at five varying structures across Europe (Centre for Youth and Criminal Justice)
- Case studies detailing how harmful behaviours demonstrated by under 12s would currently be dealt with, and would be dealt with under the proposed new arrangements. To explore and demonstrate the rigour of the proposed approach a high tariff incident is described in one of the case studies. It is acknowledged, however, that incidents of this nature involving under 12s are extremely rare. (Advisory Group).

1.29 A Secretariat was established from the outset to support the work of the Advisory Group as well as co-ordinate and manage workstream activity. Whilst workstreams developed their own thoughts, the Group as a whole (at full meetings and via the Secretariat) maintained oversight of the whole Report as it emerged.

Executive Summary

1. The Advisory Group was tasked by Scottish Ministers with considering the policy, legislative and procedural implications of raising the minimum age of criminal responsibility from 8 to 12 years. The Advisory Group² met 4 times between November 2015 and February 2016.
2. The United Nations Committee on the Rights of the Child has suggested that 12 years old should be regarded as the minimum internationally acceptable age of criminal responsibility³. Scotland has been criticised for having an age of criminal responsibility which is the lowest in Europe⁴.
3. As such, the Advisory Group approached an increase in the age of criminal responsibility to 12 years old not from the perspective of *if* it should happen, but rather *how and when* it should happen. The Advisory Group also concerned itself with how to deliver change in a sustainable, responsible manner.
4. Advisory Group members focused on 4 key areas: that is, how any risk posed by the harmful behaviour of a child under 12 could be successfully managed; the implications of an increase in the age of criminal responsibility on the Children's Hearings System; the impact such a change might have on Police powers and their ability to investigate an incident and the implications for information that could be included on a higher level Disclosure or Protection of Vulnerable Groups (PVG) scheme record.
5. In Scotland, a child currently cannot be prosecuted for their actions if an incident took place under the age of 12. However, 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 by a Children's Hearing or Sheriff at connected proof, then they can acquire a criminal record, which will appear on a higher level Disclosure certificate or Protection of Vulnerable Groups scheme record. As a result, they may have to declare an incident that occurred in childhood well into adulthood. This can severely restrict their life chances, including their ability to pursue some college or university courses, or follow a career path.
6. The Advisory Group recognised that one of the key difficulties for children and young people was the provision of 'other relevant information' which could then be included on an enhanced disclosure or a PVG scheme record. This information is provided to Disclosure Scotland by the Chief Constable of Police Scotland and includes non-conviction information, typically a narrative description of alleged conduct and any relevant background factors. It 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.

² A full list of Advisory Group participants can be found in Annex A of this report.

³ <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

⁴ <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

7. 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. This should be subject to independent ratification by a party other than the Chief Constable, before the disclosure takes place. The Advisory Group felt that the same approach should be adopted for retrospective cases, where convictions related to behaviour that took place under the age of 12.

8. Research carried out by SCRA (Scottish Children's Reporter Administration)⁵ in 2015 helped inform the Advisory Group's work. The research found that offending amongst this group of children was rare and serious offending even rarer. The overall number of children referred to the Children's Reporter for offending has declined by 63% over the last 5 years. This is due to the impact of the Whole System Approach, which incorporates Early and Effective Intervention policies and processes⁶.

9. The SCRA research 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.

10. Advisory Group members wanted to create an approach that would recognise this link and ensure that children should not be criminalised or stigmatised as a result of behaviour in early childhood. In recommending the age of criminal 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.

11. Equally, the harm caused to victims, who may also be children, would not be diminished by the fact that such behaviour was no longer regarded as criminal.

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

⁵ 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

⁶ <http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>

13. The Advisory Group also recognised that there was a need to ensure that any risks posed by a child to themselves or to others could be appropriately managed, should the age of criminal responsibility be raised. Group members considered whether existing frameworks, such as FRAME and CARM could be adapted to meet the needs of children aged 8-11 years⁷. The Advisory Group felt that existing child protection procedures could continue to provide a structured framework to consider care, protection and risk management including the possible need for an urgent response, both in relation to the protection of the child him or herself and others.

14. Group members felt that training and development should be provided to professionals to allow them to assess and manage the risks posed by this age group. There should be a multi-agency scoping study carried out to identify key gaps, and there should be a resourced plan to address those gaps.

15. Group members recognised that for the vast majority of incidents currently involving 8-11 year olds the use of Police powers was not necessary in order 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 Group found that many existing Police powers would no longer be available, because existing powers mainly relate to the investigation of an 'offence' or 'crime'.

16. Group members considered whether there was a need to retain or replace any of these powers. For example, could they be used to prove a child's innocence? After careful consideration, the Advisory Group members determined that some powers should be retained to be used in some circumstances (e.g. 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 obtain 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 never be retained.

17. A Children's Rights and Wellbeing Impact Assessment was commissioned by the Group and has been created to accompany this report. This sets out the key children's rights implications associated with raising the age of criminal responsibility to 12 years old.

18. The full list of Advisory Group recommendations immediately follows this Executive Summary.

⁷ <http://www.gov.scot/Publications/2011/09/28084932/1>

Recommendations

The Advisory Group Key Recommendations

That the Scottish Government and Scottish Parliament take early action to raise the age of criminal responsibility to 12 years.

That this reform should mark a clear departure from the involvement of young children under 12 in criminal procedures or in disclosure systems.

That there is appropriate and effective support available to those victims affected by harmful behaviour.

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

Care, Protection and Risk

- National Child Protection Guidance should be revisited to ensure that it acknowledges these recommendations, and that it reflects good practice principles for working with children who have harmed others or pose a risk to others, building on the FRAME and the CARM guidance. *(Para 2.8)*
- Professionals should be supported to ensure that information reflects not just the behaviour which raised the initial concerns but also any work undertaken subsequently, its impact and an assessment of current risk. *(Para 2.11)*
- Multi-agency information resources should be developed, and learning and development opportunities provided, to improve knowledge about the age of criminal responsibility, the context of harm caused by young children, and to strengthen risk assessment and management skills. *(Para 2.15)*
- A multi-agency scoping study should be commissioned to determine whether changing the age of criminal responsibility will create any particular skills or knowledge gaps across those working with, or making decisions about, children displaying harmful behaviours. A plan should be developed, supported with the requisite resources, to address any gaps. *(Para 2.15)*

Children's Hearings

- No change is required to the Children's Hearings grounds for referral in anticipation of any minimum age of criminal responsibility change, because one or more of the other existing grounds could be applied. *(Para 3.19)*

The Role of the Police

- 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. *(Para 4.16 (iii))*
- 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 Children Protection Procedures and Joint Investigative Interviews. *(Para 4.16 (iv))*
- In the most serious circumstances, including where the support of the parent or carer is not forthcoming, a power should be created to allow for forensic samples to be obtained. *(Para 4.16 (v))*
- A power should be created to allow a warrant to be craved in order to allow further samples to be obtained in the most serious of cases, including where the support of a parent or carer is not forthcoming. *(Para 4.16 (vi))*
- Wider consultation is required to establish whether it is appropriate, under any circumstances, to retain forensic samples for children below the minimum age of criminal responsibility. If it is agreed that samples can be retained it will also be necessary to agree the retention periods for such samples, including whether they should still be held when the person in question is no longer a child. *(Para 4.16 (vii))*
- A power similar to a Child Assessment Order should be created, in exceptional circumstances, in order to take a child to a place of safety; interview; obtain and potentially retain forensic samples; and crave a warrant to obtain further forensic samples. This should be rooted in Child Protection Procedure and only be available in exceptional circumstances. Any future power should be based on the principle that the disciplines of both the Police and social work would need to be combined to identify all the impact factors which are relevant to consider the action necessary. This partnership approach should underpin any decision that the need for such powers are both proportionate and necessary. *(Para 4.20)*

Disclosure – including Police Weeding & Retention

- That any non-conviction information relating to children under 12 at the time of an incident, which is in exceptional circumstances⁸ then submitted by the Police or other government bodies for inclusion on an Enhanced Disclosure or PVG Scheme Record should undergo independent ratification before release. (*Para 5.14*)
- That any person who accrued a conviction or proven offence ground under the age of 12 under current legislation should no longer have that disclosed unless in exceptional circumstances disclosure via Police 'Other Relevant Information' (ORI) and is independently ratified as being absolutely necessary. (*Para 5.15*)
- That consideration is given to ceasing the disclosure of convictions accrued under the age of 18, with a provision to disclose details of such conduct as Police ORI following independent ratification. (*Para 5.17*)

⁸ The Advisory Group would define exceptional circumstances as those 'involving the gravest of harm'

2. Care, Protection and Risk

2.1 There is a wealth of evidence about children in Scotland who display harmful behaviours highlighting the links between vulnerability, victimisation and offending⁹. Many children who display harmful behaviours are highly vulnerable and may have experienced trauma and crime in their own lives¹⁰. 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 childhood¹¹.

2.2 The recommendation in this report, that children under the age of 12 should not be held criminally responsible for their actions, does not change the fact that children, under 12, can and sometimes do cause harm to themselves and others. There was unanimity that children involved in harmful behaviours should receive appropriate support to address this. Changing the age of criminal responsibility will not itself change the risk that children pose to either themselves and/or others. Their need to be assessed and, where necessary, measures put in place to manage this risk will not alter either. Rather, what is being recommended is an approach for children who display harmful behaviour that prioritises their wellbeing, care and protection as the most effective and enduring mechanism through which to address the risk they pose to themselves and/or others. This approach is in alignment with our international obligations, as set out in Article 3 of the UNCRC, which places a requirement on all agencies to ensure that the best interests of the child are a primary consideration in all actions concerning them.

2.3 What do we currently know about children, under 12, who cause harm to others? Over the three years between 2011/12 and 2013/14, there were 873 referrals to the Children's Reporter on offence grounds for children aged 8-11 years old¹². From these referrals, the Children's Reporter arranged 51 hearings of which 25 resulted in supervision requirements or Compulsory Supervision Orders being made by Children's Hearings¹³. 10% of the referrals on offence grounds for children under the age of 12 were classed by Reporters, on initial assessment, as 'high gravity'¹⁴. There are, therefore, a small number of children under the age of 12 who require statutory measures as a consequence of offending, but whilst it is rare, the impact of their offending can be serious.

⁹ Including the [Edinburgh Study on Youth Transitions and Crime](#) and the [Kilbrandon Report](#) (1964) which highlighted the central importance of responding to the needs and welfare of a child displaying harmful behaviour.

¹⁰ [Mental Health Difficulties in the Youth Justice Population: Learning from the first six months of the IVY project](#), and [The Ripples of Death](#)

¹¹ See the [Edinburgh Study on Youth Transitions and Crime](#)

¹² Data provided by SCRA

¹³ The Criminal Justice and Licensing (Scotland) 2010 Act changed the age of prosecution, so no child under the age of 12 is dealt with through the courts.

¹⁴ SCRA data, previously unpublished.

2.4 At present, when it is considered that children require statutory measures, or significant intervention on a voluntary basis to meet their particular needs, protect them and address any risk they pose to themselves and/or others, a Social Background Report or equivalent (e.g. Integrated Assessment Framework) evaluates this for consideration within the Children’s Hearing. Children are currently referred to the Children’s Reporter on either offence, or non-offence grounds (or both). If the age of criminal responsibility is increased to 12, children under this age will *always* be referred to the Children’s Reporter on non-offence grounds. The Children’s Hearing will *still* be provided with an assessment outlining whether compulsory measures are required, based on the best available evidence about risk and needs, and for robust action plans based on this assessment to be brought forward and implemented accordingly.

2.5 The child who poses a significant risk to themselves or others will usually be subject to multi-agency measures to ensure that needs and risk are properly addressed, alongside a consideration of whether compulsion is required. Work with children who pose a serious risk of harm to others should be undertaken within the principles and ethos of the [Getting it Right for Every Child \(GIRFEC\) approach](#). The Children and Young People (Scotland) Act 2014 and draft Statutory Guidance for Parts 4, 5 and 18 of the Act clearly outline roles, responsibility and duties of the Named Person and the Lead Professional in relation to information sharing and initiation of a Child’s Plan. This provides the framework for the management of the child’s care, protection and risk as well as a single point of contact for raising concern. Current procedures are that the Named Person, and where applicable, Lead Professional, will be notified of children who pose a serious risk of harm to others and this will be addressed as part of the Child’s Plan, or through initiation of assessment of needs under the [National Practice Model](#). Should the child be perceived to be at risk of significant harm, protective actions should also be taken in accordance with the Children (Scotland) Act 1995 and the Children’s Hearings (Scotland) Act 2011. Existing child protection procedures will continue to provide a structured framework to consider care, protection and risk management including the possible need for an urgent response, both in relation to the protection of the child itself and others. The Child’s Plan is informed by specialist risk assessment tools, as and where necessary. Although structural tools, particularly actuarial scales, can be helpful as a means of predicting risk, they should only be used as part of a multi-modal approach as actuarial tools are limited in this context - they do not take into account child development theories¹⁵. Applying a multi-modal and integrated approach through the Children’s Hearing System should provide a robust basis for working and managing young children under the age of 12 that pose a significant risk to themselves and others.

2.6 The Framework for Risk Assessment, Management and Evaluation for children under the age of 18 (FRAME)¹⁶ provides guidance to support multi-agency practice for children involved in offending, setting out a broad framework for risk management practice. FRAME highlights good practice standards for risk assessment, management and evaluation. Those activities should be proportionate

¹⁵ [Assessing and Managing Risk in Getting it Right for Every Child](#)

¹⁶ <http://www.gov.scot/Resource/0046/00466882.pdf>

and appropriate to the age and stage of the individual child being assessed, and to the specific circumstances and the individual child's needs and strengths. The Group propose that the good practice principles as set out in FRAME continue to inform practice for children.

2.7 For children over the age of 12, the care and risk management (CARM) guidance, which appears as the appendix to FRAME¹⁷ recommends that a local care and risk management planning process is put in place which is founded on GIRFEC principles and which informs the Child's Plan. The local care and risk management process assists in the early identification, assessment and management of children who display harmful behaviours, and comprises a transparent, proportionate and rights based approach which places the child at the centre of decision-making and considers risks and needs holistically. The Group therefore explored whether the CARM guidance and processes should be extended to those under 12 and agreed that the principles of CARM apply and should inform work with those under the age of 12 displaying harmful behaviours. However, we did not think that the process, as set out in CARM, should be adopted. Rather, we would recommend that children under the age of 12, who pose a risk to others, would be best supported and managed through existing child care and protection arrangements. This is because approaches with children who are involved in harmful behaviour will often go hand in hand with protective work, as stated earlier, many children and young people who display harmful behaviours are also highly vulnerable and may have experienced trauma and crime in their own lives¹⁸. The Group was clear that the opportunity should be taken to develop a more coherent, integrated, Kilbrandon-centred approach to these concerns. Child protection processes include key responsibilities for social work regarding the coordination of multi-agency risk assessments, arranging child protection case conferences, maintaining the Child Protection Register and implementing compulsory measures of supervision made by the Children's Hearing. That said, we would recommend that local areas ensure a seamless transition between child protection and CARM processes, facilitated for example by the lead professional attending the first CARM meeting when a child turns 12.

2.8 This workstream has highlighted the importance of guidance in providing support for those assessing and managing the care, protection and risks posed by children under the age of 12. It is particularly important to any consideration of risk assessment and management that there is an assessment of the child's vulnerability, as well as the risk of harm they may present to others. This is highlighted in the *National Risk Framework to Support the Assessment of Children and Young People*¹⁹. To ensure good practice guidance should be regularly reviewed and informed by up to date evidence on the importance of family systems, trauma informed approaches and criminogenic risks and needs, strengths and protective factors. We identified the importance of the *National Child Protection Guidance Scotland* (2014)²⁰, particularly given our recommendation that children under the age of criminal responsibility, who pose a risk to others, are best managed under

¹⁷ <http://www.gov.scot/Resource/0046/00466882.pdf>

¹⁸ See FRAME, <http://www.gov.scot/Publications/2014/12/6560/4>

¹⁹ <http://www.gov.scot/Publications/2012/11/7143/0>

²⁰ <http://www.gov.scot/Resource/0045/00450733.pdf>

current child protection arrangements. The *National Child Protection Guidance Scotland* (2014) focuses on the risks posed to children and pays limited attention to those children that both need care and protection, and pose a risk to others²¹. We therefore recommend that this guidance is updated to ensure it reflects good practice principles for working with young people who pose a risk to others, as set out in FRAME, the CARM Guidance and the *National Risk Framework to Support the Assessment of Children and Young People*²².

Recommendation

- National Child Protection Guidance should be revisited to ensure that it acknowledges these recommendations, and that it reflects good practice principles for working with children who have harmed others or pose a risk to others, building on the FRAME and the CARM guidance.

2.9 The Group also recognised the crucial importance of information and information sharing between and within agencies assessing, managing and evaluating risk. For children under the age of 12, information sharing guidance within Child Protection procedures should be followed.²³ As set out in the *National Guidance for Child Protection* (2014), the wellbeing of a child is of central importance when making decisions about what information to share, how to share it, in what circumstances and for what purpose. The Police hold important information about children who are at risk of, and who cause, harm, and will share this information and intelligence with other organisations when required to protect children, or help other agencies intervene in response to concerns about wellbeing. Information sharing between agencies working with children requiring care and protection will be further guided by the Children and Young People (Scotland) Act 2014, and the introduction of the Named Person/Lead Professional model. We consider that this will offer an appropriate mechanism for information sharing for children aged 8-11 year olds who commit serious harm.

2.10 Whilst mechanisms are in place to support information sharing, where agencies are supporting the child under 12, we identified issues for older children/adults in relation to sharing 'old' information about behaviours and risks posed when they were 8-11 year olds. Children can and do change. Indeed, that is fundamental to the Scottish concept of 'social education' and our re-integrative, therapeutic model. We therefore need a system which reflects that²⁴. Retaining information about behaviour undertaken by a young child can have a negative impact when reaching adulthood, in terms of a requirement to disclosure for education or work opportunities²⁵. Caution also needs to be exercised in using such

²¹ There is a short section in the guidance on [Children and young people who display harmful or problematic sexual behaviour](#), see p.127-129. There is a short section in the guidance on [Children and young people who display harmful or problematic sexual behaviour](#), see p.127-129

²² <http://www.gov.scot/Publications/2012/11/7143/0>

²³ <http://www.gov.scot/Resource/0045/00450733.pdf>

²⁴ Overall the evidence suggests that prospective prediction is poor but retrospective prediction is good, i.e. most children who are involved in offending do not become continue offending as adults, but most adults who are involved in offending were involved in offending as children (See Farrington, D (2007) 'Childhood Risk Factors and Risk-Focussed Prevention' in Maguire M., Morgan R., and Reiner R. (eds) *The Oxford Handbook of Criminology*).

²⁵ See [Living it: Children, Young People and Justice](#), p.16-18

information to make judgements about more recent or future behaviour, given that in raising the age of criminal responsibility we are confirming that children aged 8-11 years old should not be held solely responsible for their actions. This needs to be balanced against a need to retain information where necessary and proportionate, to inform Police operations, help the Crown Office and Procurator Fiscal Service (COPFS) consider how to respond and to assist decision making by a range of agencies. We recognise this is complex, and so professional judgement needs to be exercised with care in order to make informed decisions about information sharing.

2.11 Whilst recognising there can be a need for agencies to retain intelligence and the need to keep records, in line with the Data Protection Act 1998, information which is held about behaviours and risk posed by a child under 12 should not be retained unless there is a clear, compelling, exceptional reason for doing so i.e. this might include the rare case where professionals have live concerns about a young person's outlook and conduct. The draft guidance accompanying the Children and Young People (Scotland) Act 2014 clearly states that any information-sharing should be in line with the principles of data protection, that is, any information shared should only be shared where it is lawful, necessary, proportionate, relevant, accurate, timely and secure. Given that there is already extensive legislation and guidance in this area, the Group felt that no further action on this was required. There is often a delicate balance to be struck between sharing appropriate information for the purposes of protecting the child (or others) from harm and the over-sharing of information, which runs the risk of being out of date or open to misinterpretation to the detriment of the child. Rather than sharing information on a 'need to know' basis, information may be shared indiscriminately, leading the child to feel that they have lost control over what information is shared and discussed with whom. The Group was particularly concerned that where retention of information is considered necessary and proportionate, information should reflect work undertaken with the child/family, and an up-to-date assessment of risk. The Group identified that this will need careful definition, including consideration of the seriousness, duration and persistence of harm caused. The Group wonders, therefore, whether professionals could be better equipped to make these difficult judgements about information sharing and risk by further developing professional skills and knowledge on these issues.

Recommendation

- Professionals should be supported to ensure that information reflects not just the behaviour which raised the initial concerns but also any work undertaken subsequently, its impact and an assessment of current risk.

2.12 Most 8-11 year olds who display harmful behaviour, even of a serious nature, can be supported with appropriate provisions in the community, but there will be a small number for whom this is neither appropriate nor possible. As part of the risk assessment process there will be a need to be consideration whether the child requires to be removed from their home environment to foster, kinship, residential or even secure care. Although it is likely to be rare for a child under the age of 12, a view may be needed about whether or not a child should be subject to a more

intensive resource²⁶ - Secure Care, a Movement and Restriction Condition (MRC), an Intensive Support and Monitoring Service (ISMS) order, or a service such as intensive fostering. There is some evidence to suggest that a tailored, personalised approach which responds to a child's specific characteristics and needs will be most effective²⁷. There are also circumstances where a specific intervention targeted at a particular offending profile, risk and relational complexities may be required, for instance, in responding to sibling abuse²⁸. However, Group members do not consider that there is anything related to increasing the age of criminal responsibility to 12 which requires additional, or amended measures to be available informally, or through the Children's Hearing System.

2.13 While it is proposed that children under 12 are not held criminally responsible, their actions will, on occasion, result in harm being caused to others. It is therefore important that this harm is recognised and acknowledged, and that those harmed are given support regardless of the age of the person causing the harm.

2.14 Those working with children who pose a serious risk to themselves and/or others require a specialist skill set and knowledge to support their care, protection and manage the risks the child presents. The 'Common Core' sets out the key skills, knowledge, understanding and values for the children's workforce, informed by the views of children and families²⁹. Raising the age of criminal responsibility does not fundamentally change the skills and knowledge required of the workforce. However, we do need to ensure that everyone working with, and making decisions about, children understands a policy change of the type proposed, and its implications.

2.15 The Group also emphasised the need to ensure that all agencies have a good understanding about the context of harmful behaviour, particularly the role of trauma, child development and attachment. Group members identified the need for improved training and development in relation to the assessment and management of risk and the appropriate sharing of information about risk. They also recognised that there is a balance to be achieved between the skill set required for those working with children who pose a serious risk to others and the very specialist skills required to support children with rare presentations and psychopathologies. It was acknowledged that there is currently limited support available for professionals assessing and managing risk for children who cause serious harm to others, and this is an area of work that would benefit from additional resourcing and support.

Recommendation

- Multi-agency information resources should be developed, and learning and development opportunities provided, to improve knowledge about the age of criminal responsibility, the context of harm caused by young children, and to strengthen risk assessment and management skills.

²⁶ The Scottish Government estimate that during the two years between 2012 and 2014 there were two children under the age of 12 in secure care, data previously unpublished.

²⁷ [Engaging young people who offend](#)

²⁸ [Treating Sibling Abuse Families](#)

²⁹ <http://www.gov.scot/Resource/0039/00395179.pdf>

Recommendation

- A multi-agency scoping study should be commissioned to determine whether changing the age of criminal responsibility will create any particular skills or knowledge gaps across those working with, or making decisions about, children displaying harmful behaviours. A plan should be developed, supported with the requisite resources, to address any gaps.

3. Children's Hearings

Key Issues

3.1 Any harmful behaviour demonstrated by a child aged 8-11 years in Scotland is currently dealt with through the Children's Hearings System. A child may be referred to the Reporter where it is believed that they are in need of protection, guidance, treatment, or control and they may be in need of compulsory measures of supervision.

3.2 Children's Hearings legislation³⁰ provides 17 different grounds upon which a child may be referred to a children's hearing, including where the child has committed an offence³¹. Currently the offence ground³² can apply to any child over the age of 8.

3.3 As it stands, a ground alleging that a child has committed an offence must be proved 'beyond all reasonable doubt' i.e. the criminal standard of proof whereas all other grounds for referral are covered by the civil standard of proof i.e. 'on the balance of probabilities'.

3.4 The Group was encouraged to note that the number of children referred to the Reporter for offending has declined by 63% over the five year period of 2010/11 to 2014/15³³, especially because of the impact of the Whole System Approach which incorporates Early and Effective Intervention policies and processes³⁴.

3.5 In 2014/15, there were 215 children aged 8 to 11 years old referred to the Reporter on offence grounds. The most common offence types referred are shown in the table below (some children were referred for more than 1 type of offence)³⁵.

Offence type	Number of children
Assault	75
Assault to injury	13
Criminal Justice Licencing (Scotland) Act 2010 s38(1) threatening or abusive behaviour	55
Criminal Law Consolidation Act 1995 s50a(1)(b) & (5) cause distress/alarm racial	28
Criminal Law Consolidation Act 1995 s52(1) & (3) vandalism	50
Theft	15
Theft by shoplifting	14

³⁰ Section 67(2) of the Children's Hearings (Scotland) Act 2011

³¹ Section 67(2)(j)

³² section 41 of the Criminal Procedure(Scotland) Act 1995

³³ This does include a 5% increase in 2014/15

³⁴ <http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>

³⁵ Data produced by SCRA from its Data Warehouse (previously unpublished)

3.6 SCRA has published research³⁶ looking at the circumstances and outcomes of 100 of the children aged 8-11 referred for offending in the year 2013/14. The research found that in only 6 cases was the child referred to a Children's Hearing by the Reporter. In four of those other grounds of a non-offence nature (i.e. care and protection grounds) were also engaged. Of the remaining two, in one the child denied the offence which was referred to the sheriff court for proof and not found established. There was, therefore, only one child in a sample of 100 referred in 2013/14 where the referral of the child and the consideration of compulsory supervision was dependent on the use of the offence ground.

3.7 The research also showed that 75% of the children reviewed had been known previously to agencies including 26% who were already on supervision for care and protection reasons. Whilst the number of children aged 8-11 years accepting/having offence grounds established is currently low, there is clear evidence to suggest that for those appearing before a Children's Hearing, their behaviour is very often associated with other disruption and/or trauma in the child's life.

3.8 A potential consequence of raising the minimum age could be that there would be an impact on victims, who may themselves be children. Currently, the Reporter is able to contact the victims of those referred on offence grounds (or the parents/ carers of child victims) via the Victim Information Service to let them know basic information about how a case has been disposed of. Raising the age of criminal responsibility, and removing the offence ground from children aged 8-11 years, would mean that this information would no longer be available to victims. However, as outlined in 4.7, this is already a rare occurrence, given the very small number of 8-11 year olds being referred to a Children's Hearing on offence grounds.

Purpose of Referral and Intervention

3.9 The purpose of referring a child to the Children's Hearings System is not punitive but is to secure the authority of an independent tribunal for the state to apply measures of protection, guidance treatment or control, where that is required on a compulsory basis. That tribunal is the Children's Hearing comprising three members of the children's panel focused on making a decision that is based on the best interests of the child, with specific derogations from that where there are significant risks to the child or others. The Advisory Group has examined whether as a consequence of raising the age of criminal responsibility children who currently receive protection through compulsory measures would no longer be able to receive such. The evidence of the SCRA research suggests this is unlikely. The Group is further reassured by examination of alternative grounds available to refer a child to a children's hearing to require action to be taken to protect, guide, treat or control them.

3.10 If the main issue relates to a child's behaviour, then an offence label is not essential to identifying and tackling this behaviour. The Children's Hearing has a

³⁶ 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

wide range of measures at its disposal, including providing specific measures under a supervision order allowing the child to reside at home through to making an order with condition of secure accommodation, regardless of the ground upon which a child has been referred, provided that the ground has been accepted or established and the intervention of the hearing is justified and proportionate.

3.11 From a child's perspective being brought before a Children's Hearing on offence grounds is likely to lead to a perception that they will be punished for their actions. Raising the age of criminal responsibility seeks to make it explicit to children that any behaviour under the age of 12 will not be dealt with in such a way. Rather support will be provided in order to help the child move on, and rehabilitate from, an incident in early childhood.

3.12 One of the Hearing grounds³⁷ allows a child to be referred where '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'. While this places a high threshold of 'seriousness' in relation to the impact of the child's behaviour, it may allow an isolated incident of serious conduct to be referred to a hearing, or indeed a pattern of conduct.

3.13 A further ground³⁸ allows a child to be referred where 'beyond the control of a relevant person'. This may be more applicable to a pattern of behaviour by a child rather than a particular incident.

3.14 All grounds which do not refer to a child offending (i.e. care and protection grounds) are provable on the civil standard. That is 'on the balance of probabilities'. The Group considered whether a move away from the criminal standard of proof, 'beyond all reasonable doubt', for behaviours currently dealt with under offence grounds would cause any detriment to children and young people. The Group felt that it was possible to put safeguards in place to ensure that, should the age of criminal responsibility be raised to 12, it could still be clearly established whether a child under the age of 12 had, or had not, had involvement in an incident of harmful behaviour. What measures are necessary to establish, or rule out, a child's involvement in an incident are examined in more detail in Chapter 5 of this report.

3.15 It is important to state that whilst it is anticipated that the two grounds specified in 3.12 and 3.13 could be used for the vast majority of behaviour dealt with under offence grounds at present, should the age of criminal responsibility move to 12, then the Reporter would continue to have the ability to look at other grounds which may reflect the causes of how the child presents, For example, that the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care³⁹.

3.16 This allows referral where the child is not receiving adequate care or supervision from his/her parents and this will often be linked to, or manifested in, the child's behaviour. In taking such an approach, the Group felt that there would be a

³⁷ Children's Hearings (Scotland) Act 2011 - Section 67(2)(m)

³⁸ Children's Hearings (Scotland) Act 2011 - Section 67(2)(n)

³⁹ Children's Hearings (Scotland) Act 2011 - Section 67(2)(a)

particularly positive impact on 8-11 year olds, who would no longer believe they were going to a Children's Hearing for the purpose of punishment, but rather to be supported.

3.17 Other grounds which may be applicable include where the child has been the victim of a Schedule 1 offence. The research by SCRA indicates that in a quarter of the cases sampled of 8-11 year olds referred on offence grounds, the child had been a victim of or had a close connection with a person who has committed a Schedule 1 offence.

3.18 The Group gave consideration to whether the creation of an additional ground of referral was necessary to ensure that all children received the protection they required. As the policy intention behind the proposal is to ensure that 8 to 11 year olds are no longer criminalised for their behaviour, and that there should be a move towards a more welfare-based approach for this age group, then it was felt that the existing welfare-based grounds would be sufficient.

3.19 The Group did note that under section 67(4) of the Children's Hearings (Scotland) Act 2011 changes to grounds may be made by Ministers by Order (e.g. through secondary legislation, should this be felt necessary at a later date.

Recommendation

- No change is required to the Children's Hearings grounds for referral in anticipation of any minimum age of criminal responsibility change, because one or more of the other existing grounds could be applied.

4. The Role of the Police

Introduction

4.1 In considering an increase in the age of criminal responsibility, Group members were conscious of the need to examine the current role of the Police in dealing with children's harmful behaviour and look at how this role might change were the age of criminal responsibility to be raised to 12. This included identifying any gaps that might arise as a result of such a change.

4.2 It is important to acknowledge that when the Police are currently dealing with any incidents involving 8-11 year olds in this type of difficulty, they will normally do so without the need to bring a child into Police custody or to carry out related procedures, such as a formal interview or the taking of forensic samples.

4.3 For the vast majority of children aged 8-11 years old such procedures are not currently necessary in order to assess and meet their needs.

4.4 Police officers are likely to use these powers only where the reported offence is more serious and/or it is considered that the child may have to be the subject of a report to the Children's Reporter. This is considered on a case by case basis, taking into account the specific needs of the child.

4.5 Group members discussed at some length the consequences that a change to the minimum age of criminal responsibility would have for the ability of the Police to investigate an incident. At the same time, they recognised that there would be circumstances where there had been a serious incident and 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.

4.6 This would allow the Police, for example, to either rule a child in – or out – of their investigations. This would be particularly important where a younger child had not, in fact, had any involvement in an incident, and another person may then be found to be responsible. It was also recognised that for the victims, including other children, there was a need to demonstrate that what had happened had been taken seriously, had been fully investigated and that measures had been considered to try and ensure that the behaviour was not repeated.

4.7 As they considered this issue, the Group were conscious not to assume that a power would continue to be required, simply because it existed at present. Equally, they did not want to inadvertently create a system whereby powers would exist in relation to 8-11 year olds and not in relation to children under 8 (the current age of criminal responsibility). The Group also thought creatively about whether other processes (e.g. child protection) could be adapted to fill any gaps that might be created as a result of a shift in the age of criminal responsibility. Finally, the Group considered the safeguards currently in place to protect children involved in harmful behaviour. They wanted to ensure that any safeguards (for example, the right to seek legal advice in certain circumstances) were not removed without careful

consideration of if/how they should be retained, adapted or replaced. This consideration of safeguards extended to both children aged 8-11 years implicated in an incident of harmful behaviour, and to those who might be the victim of that behaviour.

Wider Context

4.8 In recent years, Early and Effective Intervention (EEI) has been introduced as part of the Whole System Approach⁴⁰. This, in conjunction with the introduction of the Scottish Government's GIRFEC approach⁴¹, has seen a significant shift in Police practice. This has considerably reduced the number of reports submitted to the Scottish Children's Reporter Administration (SCRA) on offence grounds. Those less serious behaviours are now referred to local partners, and increasingly the Named Person Service⁴², to consider the needs of the child and provide appropriate support. When the Police consider that the needs of the child can be best met by such a referral, it is less likely that they will use powers when undertaking their enquiries.

Interim Vulnerable Person Database (IVPD)

4.9 As part of this shift in practice, in April 2014 Police Scotland introduced a national Interim Vulnerable Person Database (IVPD) system which allows a constable to record any concerns they have about vulnerable people, of any age, in their communities. There are a number of reasons to record concerns, one of those being where a child commits a crime. Since the introduction of the IVPD officers are required to record a concern report on every occasion that a child, aged 8 to 17 years inclusive, is charged with an offence. It is important to note, however, that non-offence wellbeing concerns about children are also recorded on the database (e.g. when a child goes missing from home).

4.10 The purpose of the concern report is to outline any wellbeing concerns they have identified about the child. Those concerns are articulated using the Scottish Government's SHANARRI⁴³ wellbeing indicators to outline the nature of their concerns.

4.11 The Police can now use their concern reports and the IVPD to inform and support the Named Person and local partners in the assessment of a child's needs through the Child's Plan. This system will be a vital part in the Police contribution to the Named Person Service as part of their duties under the Children and Young People (Scotland) Act 2014.

4.12 Should the minimum age of criminal responsibility be raised to 12, then the IVPD can continue to play a key role in recording concerns, in this broader context of

⁴⁰ Under the changes introduced in the Criminal Justice and Licensing (Scotland) Act 2010, no child under 12 years of age can be criminally prosecuted. When the Police consider that a statutory report is required, this can only be submitted to the Children's Reporter to consider the needs of the child.

⁴¹ Getting It Right For Every Child - <http://www.gov.scot/Topics/People/Young-People/gettingitright>

⁴² Children and Young People (Scotland) Act 2014.

⁴³ Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included – see the weblink at footnote 41 above to the Scottish Government GIRFEC page.

a child's behaviour and needs, and how these relate to other risk or protective factors in their life.

Existing Powers and Future Arrangements

4.13 The Group felt it was important to understand both the existing powers that underpin a Police investigation as well as the safeguards within current practice. This was true both of children demonstrating harmful behaviour and for any victims of that behaviour, some of whom may also be children.

4.14 The Group looked at the powers and processes that might be required from the point that an incident occurred, acknowledging that the Police are able to use their discretion to decide whether it is necessary and proportionate to use the powers available to them⁴⁴ when carrying out enquiries that involve young children. As such, it is important to note that they are rarely used for 8-11 year olds at present. The Group then moved on to consider how these powers might change in light of any increase in the age of criminal responsibility to 12.

4.15 It should also be noted that the terminology and analytical approach used in this chapter differs from that used elsewhere in this report. This is because Police powers are necessarily framed in relation to 'crime'. Elsewhere in this report, the Group has been conscious of the need to move away from language that suggests the actions of 8-11 year olds would be treated as 'criminal', should the age of the criminal responsibility be raised to 12. The Group felt it was important to highlight this, in order that this could be borne in mind when considering any existing Police powers, and any powers that might be required under any new arrangements.

4.16 The Group established that an investigation by the Police can broadly be broken down into twelve separate elements:

(i) Record the incident as a crime

Having received a report of a crime, a crime report will currently be raised which identifies the victim, the offence and the known information about what has happened and who may have committed that crime. This applies to all crimes, including those incidents involving children under the current age of criminal responsibility, and regardless of whether there is an identified suspect. Crime recording in Scotland acknowledges the harm that has been caused to the victim, the impact on the community and on services. This is true even where the person who may have caused the harm cannot be held responsible for their actions and where the person responsible has not been identified or traced.

The Group discussions highlighted the importance of language in balancing the need for matters to be suitably recorded and for a victim centred approach to be integral to the procedures. References to 'crime' or 'crime recording' where the harm caused was the responsibility of a person under the minimum age of criminal responsibility may no longer be appropriate.

⁴⁴ This includes Police policies.

One proposal is to maintain the current approach outlined in the Scottish Crime Recording Standards (SCRS)⁴⁵, i.e. to record crimes where the person responsible for the harm is below the minimum age of criminal responsibility, and another option is to avoid the SCRS and record matters in a different way. The Group expressed the view that in any proposal the victim centred approach to recording concerns and offering support and information should not be compromised.

(ii) The investigation of the circumstances

At present, the Police are able to investigate the circumstances surrounding an incident in order to establish what has happened and identify who might be responsible⁴⁶. This function is carried out in relation to all reported crime and is not unique to those incidents involving children and young people. Often the Police do not know who is responsible for a crime when it is reported to them. This may become clear through the course of the investigation or the information gathered as part of that investigation will identify someone who is suspected of being responsible.

Again the Group considers that, as a general principle, there should be no change to this procedure with an increase in the age of criminal responsibility. The Police should continue to be able to investigate an incident and establish the truth of a matter.

Group members were conscious of the need, however, to look at the powers sitting underneath this broader power of investigation, some of which might be altered or removed, should the age of criminal responsibility be raised to 12. These are considered in more detail below.

(iii) Detain the child⁴⁷

Currently, when a child aged 8 or over is suspected of being responsible for a reported crime, then the Police can detain the child if they have reasonable grounds to do so⁴⁸. It is important to note that these powers are not routinely used for children aged 8-11 years and are only employed where it is appropriate to do so. The child can be detained for up to 12 hours in a Police office (extended to 24 hours in certain circumstances) to enable further enquiries. When a child is detained by the Police they have certain rights, including the right to access legal advice.^{49 50 51}

⁴⁵ The rules for recording crimes are contained in the Scottish Crime Recording Standards - <http://www.gov.scot/Resource/0048/00484546.pdf>

⁴⁶ Powers are mainly contained in the Criminal Procedure (Scotland) Act 1995 and captured by standard Police procedures.

⁴⁷ This power is not unique to children and can be used for any person suspected of committing a crime.

⁴⁸ These powers are contained in Section 14 of the Criminal Procedure (Scotland) Act 1995.

⁴⁹ Section 15 of the Criminal Procedure (Scotland) Act 1995 - This includes intimation to a solicitor and to one other person reasonably named by them. In the case of children (under 16 years of age) the other person notified must be the child's parent or guardian. The child's parent or guardian also has the right of access to the child unless specific reasons apply where this may not be appropriate.

If, after the Police have carried out their enquiries, there is sufficient evidence to charge the child, the child will be arrested, cautioned and charged with the offence. A child under 12 years of age cannot be held in police custody to appear at court, no matter how serious the offence they have been charged with⁵².

The Group recognised that most cases which currently involve children under 12 are examined without the need for detention or arrest, although a very small proportion of enquiries, of a serious nature, currently utilise such powers of detention.

Should the age of criminal responsibility be raised it will no longer be possible for the Police to detain a child under the age of 12, in the same way as those under the current age of criminal responsibility (i.e. children aged under 8 years).

The Group considered whether there would be any circumstances in which it would be necessary or expedient for this power of detention to be retained. Group members were clear that such a power should be based upon an assessment of the child's own needs (e.g. where it was felt that the child posed a risk to themselves or others).

The Group believed that such a power should also be available where the child's parents or carers were not willing to cooperate with necessary enquiries by the Police or Social Work. It is envisaged that in the majority of cases, parents and carers will cooperate and therefore any power would require to be used only very rarely.

The Group considered that it would be helpful, in exceptional circumstances, to have the power to take the child to a place of safety in order to talk to the child and establish why an incident has occurred. This would also allow for an assessment of the appropriate level of support required by the child to be carried out. In making this recommendation, Group members were conscious that it may be possible to adapt or extend existing child protection procedures to allow for such a scenario.

In such cases another person will be contacted to support the child at the Police office e.g. a representative from the local Social Work Department.

⁵⁰ For children under 16 (and those under supervision orders) who are to be interviewed at Police stations, the Lord Advocate has directed that they must be provided with access to a solicitor prior to interview. They should not be allowed to waive this right, regardless of the position of the suspect's parent or responsible adult.
(http://www.scotland.police.uk/assets/pdf/151934/184779/psos_solicitor_access_guidance_document_ver_1.00.pdf?view=Standard)

⁵¹ Section 33 Criminal Justice (Scotland) Act 2016

⁵² Under Section 43 of the Criminal Procedure (Scotland) Act 1995 children can be held in custody, in a place of safety, until they appear at court. Children under 12 cannot be criminally prosecuted, hence the powers under Section 43 do not apply to them.

Group members considered whether the Child Assessment Order, currently provided for by the Children's Hearings (Scotland) Act 2011⁵³ would provide a suitable model for adaptation. This Order provides for an application to a Sheriff, by an officer of the local authority, for powers to require any person in a position to do so to produce a child to an authorised officer of the local authority. This allows them to carry out an assessment of the child's health or development or the way in which the child has been or is being treated or neglected. It provides for an approach offering the following benefits:

- Rights–proofed - independent judicial scrutiny;
- Flexibility - the duration of the assessment order to be fixed by the Sheriff;
- Specificity - the order to authorise specific measures for the assessment of the child and for these to be determined by the Sheriff;
- Proportionality - the criteria for granting the order to set a high threshold;
- Necessity Test - the order to be judged necessary if there was cooperation from the family.

Whilst the purpose of the power envisaged by Group members will be different, the principles of a civil power, which is rooted in child protection methodology may provide a potential future model for extension or adaptation.

The power in the above example rests with an authorised officer of the local authority, e.g. a social worker. If the age of criminal responsibility is raised to 12 and the proposal for a new, child protection based procedure is introduced, consideration should be given to where any powers should sit, and who should be authorised by the Sheriff to act.

Group members were also clear that any such power should apply to all children under the age of 12, rather than just to 8-11 year olds. This would avoid creating separate processes for under 8s and 8-11 year olds.

In suggesting that such a procedure should apply to all children, Group members recognised that its use for very young children would be exceptional.

Recommendation

- In the most serious circumstance 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.

(iv) Interview the child

Currently, where a child aged 8-11 years is suspected of a low level offence, then the Police may interview a child at home voluntarily in the presence of a parent or carer, without a solicitor. Anything the child says cannot be used as evidence in any proof hearing in relation to the offence. However, it may

⁵³ Section 35, Children's Hearings (Scotland) Act 2011

inform decisions about a child's wellbeing needs. The Police will carry out such interviews in cases where they do not intend to report the matter to the Children's Reporter but rather refer the child to the Named Person Service (or local EEI Multi-agency Groups) for consideration of any support the child may need. Any interviews with a child which are currently conducted out with a police office in relation to an offence are not evidential. They are carried out to try and establish the facts, allow the child to provide their account of events, and identify any wellbeing needs.

For more serious matters a child aged 8 or over can currently be detained by the Police and interviewed in a police office under caution. In these circumstances, the child has the right to have a solicitor informed and has a right to a private consultation with a solicitor⁵⁴. The right of access to a solicitor also applies when a person is not detained but attends voluntarily at a police office for the purpose of an interview under caution.

Should the age of criminal responsibility be raised to 12 and no power be available to detain or arrest a child under that age, then the procedures to interview under caution a child aged 8-11 years at a police office, with the safeguards of a consultation with a solicitor, would also fall.

The Group considered whether there would be any circumstances under which it would be helpful to ensure such an interview, with relevant safeguards, could still take place.

The Group recognised that this was likely to be a rare occurrence, but that the processes needed to be robust, fair and child-centred. As such, they looked to existing child protection processes to see if they could be adapted for this purpose.

The Group recognised that the principles set out in the Scottish Government Guidance on Joint Investigative Interviewing of Child Witnesses in Scotland⁵⁵ could, for example, provide a framework for such interactions.

The following extract from the Guidance demonstrates how such an approach towards witnesses could equally be applied to those demonstrating harmful behaviour, should the age of criminal responsibility be raised to 12:

'From the outset, every decision made about interviewing the child must be made on the basis that the paramount consideration is the best interests of the child. Care must be taken that children do not suffer any undue distress

⁵⁴ Section 15A of the Criminal Procedure (Scotland) Act 1995 sets out the right of suspects to have access to a solicitor. It is current Police procedure not to allow children to waive these rights, they must be provided access to a solicitor (Section 33 of the Criminal Justice (Scotland) Act 2016 refers regarding the forthcoming duties to provide access to a Solicitor – there are differing provisions for those under 16 years of age or 16 and 17 year olds who are subject to compulsory measures of supervision from those other children aged 16 and 17 years of age who have a greater degree of self-determination).

⁵⁵ <http://www.gov.scot/Resource/Doc/365398/0124263.pdf>

during investigations into allegations or reported information. Agencies should also endeavour to treat children as individuals, and where possible, involve them in making decisions. These principles are founded on the United Nations Convention on the Rights of the Child 1989, and the Children (Scotland) Act 1995.'

The Group considered that, should the age of criminal responsibility be raised, there should be a clearly understood method by which authorities can secure - and speak with - a child. This should be framed in the context of protecting the needs of the child and providing appropriate support, rather than in terms of criminal procedure. Any use of such a power should be regarded as exceptional.

Recommendation

- 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 Children Protection Procedures and Joint Investigative Interviews.

(v) Taking forensic samples

Currently, if a child is in police custody then 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 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 that 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 Police with a forensic sample, which they might normally associate with the detection of crime e.g. fingerprints.

Again, Group members were keen to ensure that their deliberations were grounded in the needs of the child, taking into account the concerns expressed about the effect of taking forensic samples from younger children, in circumstances where those children were no longer going to be held criminally responsible for their actions.

There can be circumstances, for example, 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.

Recommendation

- In the most serious circumstances, including where the support of the parent or carer is not forthcoming, a power should be created to allow for samples to be obtained.

(vi) Seek a warrant to obtain further samples

At present, the Police can also apply to court for a warrant to take blood, urine or carry out an intimate body search (this power applies to all people in police custody and is not specific to children). A Doctor will attend to carry out these examinations. Again, such samples can be analysed to help ascertain if the child has or has not been responsible for an incident. This option is normally reserved for circumstances where consent is not given (including when in police custody).

If the minimum age of criminal responsibility was raised, then the Police would no longer be able to seek authority from a Sheriff to take samples from a child below that age.

The Group consider that there may be a very small number of occasions when such samples should be authorised and that the involvement of a Sheriff would assist in testing the proportionality of such a request. As such, the Group felt consideration should be given to creating a new power, should the age of criminal responsibility be raised to 12.

Recommendation

- A power should be created to allow a warrant to be craved in order to allow further samples to be obtained in the most serious of cases, including where the support of a parent or carer is not forthcoming.

(vii) Retain forensic samples obtained

Currently, the retention of forensic samples from 8-11 year olds is only authorised if the child has been charged with a 'relevant offence'. This refers to certain serious sexual and violent offences when the grounds have been accepted at a children's hearing or established at court in a proof hearing. The police can only exercise this power in these circumstances.

The reason for taking the sample is to establish what has happened and gather relevant information that will inform the assessment of the child's needs. The retention of the sample is to allow for a comparison to be made between that child's forensic samples, in the future, with forensic evidence gathered from the investigation of a subsequent unsolved crime.

The current legislation⁵⁶ allows for the retention of a sample for a 'relevant offence' for a period of three years. Any further retention of the sample must be by application from the Chief Constable and with the authority of a Sheriff, with periodic reviews at prescribed dates thereafter. This then, in theory, provides for ongoing retention, however, since these provisions were introduced the Police have made no applications to retain such samples.

Raising the age of criminal responsibility would mean that samples from children under the age of 12 would no longer be retained.

The Group considered that the central ethos behind the proposal to raise the age of criminal responsibility was that, a child would not be criminally responsible for the behaviour which gave rise to the taking of the sample. As such, the Group felt that it may not be legitimate to retain that same sample for use in 'risk management' or in a future criminal investigation. It can be argued that it should only be used at the time to establish – or rule out – a child's involvement in an incident of harmful behaviour.

At the same time, Group members considered that the retention of a sample could provide an opportunity to identify an emerging pattern of behaviour at an early stage, and to intervene before further behaviour escalates.

It should be noted, however, that, in the model envisaged by the Advisory Group, forensic samples will not be the only indication of the emergence of such a pattern, given that welfare concerns about the child are likely to be recorded on the IVPD.

Group members did not form a definitive view as to whether it would ever be appropriate to retain samples taken from a child under the age of criminal

⁵⁶ Criminal Justice and Licensing (Scotland) Act 2010

responsibility. Group members felt that this issue should be widely consulted upon, in order to fully comprehend the impact and rights implications, of such a course of action.

The Group felt that, were a view to be taken that such a power was necessary, then any retention period for those samples would need to be carefully considered.

Recommendation

- Wider consultation is required to establish whether it is appropriate, under any circumstances, to retain forensic samples for children below the minimum age of criminal responsibility. If it is agreed that samples can be retained it will also be necessary to agree the retention periods for such samples, including whether they should still be held when the person in question is no longer a child.

(viii) Record the child on the Criminal History System (CHS)

The CHS is a computer system which assists the police with crime detection, prevention and administration. It provides the police and partners with conviction, antecedent and pending case information. When a child is currently charged with an offence, they have a pending case added to the CHS. If the case is accepted or established at a Children's Hearing it is currently recorded as a conviction⁵⁷.

If the minimum age of criminal responsibility is raised it will no longer be appropriate to record details of the child on the CHS. However, the information about the child's needs could still be recorded on the Police IVPD and shared with partners. This still provides relevant information about the child, the circumstances and, most importantly, their needs.

(ix) Share wellbeing concerns with other agencies

The Police already identify wellbeing concerns using the Scottish Government's SHANARRI wellbeing indicators⁵⁸. They will prepare a Concern Report which will be shared with the Named Person Service and relevant local partners to identify and support the needs of the child. This currently happens every time a child is charged with an offence. This process is also used where the Police attend an incident involving adults, and there is a concern for the child (e.g. where the child may have witnessed domestic abuse or be experiencing neglect).

If the minimum age of criminal responsibility is raised the Group considered the recording and sharing of such concerns will continue to be appropriate, necessary and a legal duty through the Children and Young People (Scotland) Act 2014 supporting the Named Person Service. It is important to note that the sharing of any information about a child should be consistent with the Data Protection Act 1998.

⁵⁷ There are changes pending in Sections 187 and 188 of the Children's Hearing (Scotland) Act 2011 which will change how Children's Hearings decisions are recorded.

⁵⁸ <http://www.gov.scot/Topics/People/Young-People/gettingitright/wellbeing>

(x) Refer child to the Children’s Reporter

Currently, if the Police or the local authority considers a Compulsory Supervision Order (CSO) might be necessary for a child, they have a duty to refer the child to the Children’s Reporter⁵⁹.

Should the age of criminal responsibility move to 12 years of age, then the duty on the Police to refer a child for consideration of grounds for compulsory measures will still apply. However, instead of the referral being on ‘offence’ grounds, the new arrangements would require the Police to make a referral on non-offence ‘care and protection’ grounds.

Group members felt that this change was both appropriate and necessary.

(xi) Inform the victim of the outcome of the police investigation

The Victims and Witnesses (Scotland) Act 2014 and the Victim’s Rights (Scotland) Regulations 2015 were introduced in 2015. Both pieces of legislation have created clear rights for the victims of crime. Protective measures, which may currently be used for victims during criminal investigations, have now been placed in statute⁶⁰.

Currently, it is considered best practice that where a suspect or an accused person is released from police custody, detention or otherwise, that the victim must be updated as soon as is reasonably practicable by the investigating officer. In all cases, the victim should be updated with the outcome of the enquiry.

The Group considered that, should the age of criminal responsibility be raised to 12, then there should still be scope for the victim of a child’s harmful behaviour to be informed as to what action has been taken to address that behaviour, with the right supporting context about the limits to what can be shared. The information that is provided to victims would have to be very carefully considered, in order to protect both the child and the needs of the victim.

⁵⁹ Section 61 of the Children’s Hearing (Scotland) Act 2011.

⁶⁰ For example, during a criminal investigation into an offence, officers must ensure:

- statements are taken without undue delay;
- the number of relevant interviews to take a statement are kept to a minimum;
- statement taking is only carried out where strictly necessary, for the purposes of the criminal investigation;
- victims are permitted to be accompanied by their chosen legal representative and a person of their choice, unless a reasoned decision to the contrary is made;
- medical examinations of the victim are kept to a minimum and are carried out only where strictly necessary for the purposes of the investigation.

(xii) Refer the victim to services to provide support to the victim

All victims are now provided with a Victim's Care Card. This records the basic elements of the crime or offence reported as well as a consistent provision of information.

The Group considered that this procedure should still be available and will include duties under the Children and Young People (Scotland) Act 2014 when the person harmed is also a child.

Conclusion

4.17 The consideration of these issues provided some considerable challenges for Group members.

4.18 They were committed to ensuring that, should the age of criminal responsibility be raised to 12, then the behaviour of a child under that age should never be regarded as criminal. With this in mind, it would have been easy for Group members to apply a blanket approach towards Police powers. That is, where a power was removed by an increase in the age of criminal responsibility, then it would not be replaced. The Group recognised that to do so would bring consistency with the existing approach towards children who are under the current age of criminal responsibility (i.e. under 8 years old).

4.19 Group members were also conscious that were some powers to be removed, the safeguards accompanying them for children aged 8-11 years old would also be removed. This would include the right to access legal advice. What might replace these safeguards remains to be fully explored.

4.20 At the same time, Group members recognised that, in a very specific set of circumstances, it could be helpful for younger children if existing Police powers were to be retained or replaced. This would include, for example, a scenario where these powers could be used to prove a child's innocence and exclude them from an inquiry. Group members were clear that any replacement powers or processes should be grounded in a child's wellbeing and consistent with their rights, rather than based around any suggestion of criminality. The creation of any new powers also needed to be balanced against the possible harm that could be caused to children in exercising them.

Recommendation

- A power similar to a Child Assessment Order should be created, in exceptional circumstances, in order to take a child to a place of safety; interview; obtain and potentially retain forensic samples; and crave a warrant to obtain further forensic samples. This should be rooted in Child Protection Procedure and only be available in exceptional circumstances. Any future power should be based on the principle that the disciplines of both the police and social work would need to be combined to identify all the impact factors which are relevant to consider the action necessary. This partnership approach should underpin any decision that the need for such powers are both proportionate and necessary.

4.21 In approaching the topic of Police powers, the Group was conscious that the behaviour of one child could cause significant harm to another child or adult. That harm would not be lessened by the fact that it was no longer treated as criminal behaviour. In suggesting the child-centred and welfare-based approach they have outlined in their recommendations, Group members were keen to ensure that the rights of the victims of that child's behaviour were similarly protected.

4.22 The recommendations in this section are just that. Group members wanted to highlight areas of potential concern, and specific areas where the benefits of having a power would need to be carefully balanced against any potential disadvantages to children. The recommendations relating to the role of the Police take into account that a range of models could be employed, and that wider consultation is required in order to fully explore which would work best for children under the age of 12.

Will additional safeguards for the child's rights be required?

4.23 The future model described above provides for some important safeguards for the child. They include:

- A process which is no longer criminal but rooted in current good practice in child protection procedures, amended where necessary to consider the risks that the child poses themselves and others;
- The provision of such powers, only when certain circumstances arise and, potentially, only through a power granted by a Sheriff, including the consideration of obtaining samples from the child;
- Joint Investigative Interview trained staff from both police and social work carrying out such interviews, using the same rigour applied to the use of Joint Investigative Interviews (JII's).

4.24 The question of whether the safeguards inherent in the principles of the Joint Investigative Interview provide sufficient reassurance remains a real one. This is now being asked in the context of the child's actions, rather than the actions of others, as is the case currently. It should be remembered that the principle of no longer considering the information provided by the child in a criminal context is important. Keeping this in mind, the question remains, if the information they may provide during such an interview is any different to the disclosures that can be made in other scenarios of risk?

4.25 If the answer to this question is 'yes' there is a need for further safeguards owing to the nature of the disclosures a child might make, this raises the further question of what those safeguards should be and who should provide them? The current model, in a criminal context, provides the safeguard of a solicitor. It may be necessary to consider if a solicitor has the necessary child-centred training to support the holistic needs of the child. As has been explained, the central ethos of the proposed new model is rooted in Child Protection Procedures, then it follows that the decisions taken and the advice offered should be predicated on the child's best interests.

4.26 As part of those considerations it is also necessary to be clear about the purpose of such an interview. Is the information gathered only to inform the

assessment of the child's needs or does it go further than that and form part of the potential grounds for compulsory measures of supervision? If it is the latter, this raises the need to ensure that such interviews are deemed admissible for consideration at a proof hearing.

5. Disclosure including Police Weeding & Retention

Context

5.1 Disclosure Scotland operates, on behalf of Scottish Ministers, a system whereby those seeking to work with children, protected adults or both groups in 'regulated work' may join the Protecting Vulnerable Groups (PVG) Scheme. When an individual is asked by a regulated work employer to join the PVG scheme they receive a disclosure of any criminal convictions, both spent⁶¹ and unspent, and there is the possibility that the police may add to the disclosure any non-conviction information that they reasonably believe to be relevant to the individual's suitability for regulated work; and which ought to be included in the individual's scheme record. This could describe allegations that did not progress to formal proceedings or provide more detail about conduct that lay behind matters that do appear on the criminal record. When a person joins the PVG Scheme their criminal history is monitored thereafter by Disclosure Scotland. Any conviction or police information present at the application stage, or which is added to the person's record at a later stage, will be examined by Disclosure Scotland and, when appropriate, the individual will be placed under consideration for barring.

5.2 Other types of disclosures exist, ranging from the Basic Disclosure which is available to any applicant on demand and which contains only unspent criminal convictions through to the Standard and Enhanced Disclosures which contain information about spent convictions and, in the case of the Enhanced Disclosure, has the potential to contain police non-conviction information. Standard Disclosures do not have the potential to include police non-conviction information. Standard and Enhanced Disclosures are available for certain specialist roles in finance or other sensitive work and where there is a need for a higher level disclosure but not the ongoing monitoring associated with PVG, for example for newly adoptive parents. Collectively, PVG Scheme Records, Standard Disclosures and Enhanced Disclosures are known as 'higher level disclosures'.

5.3 Disclosure Scotland carries out its functions within a strict legal framework. The information that appears on a disclosure is not subject to any discretion or choice exercised by the Agency. Criminal records are disclosed verbatim from police systems, the Scottish Criminal History System (CHS), the Police National Computer (PNC) and Northern Ireland's Criminal Record Database. Police Scotland operates a 'weeding' system for CHS which serves to remove very aged convictions, again subject to the application of rules regarding the magnitude and seriousness of the conviction.

⁶¹ The term 'spent conviction' refers to any conviction considered so after the Rehabilitation of Offenders Act 1974 (ROA) provisions are applied to it as they exist in Scotland. The ROA takes into account factors such as the age of the offender, the time since the conviction, the sentence imposed and the good conduct of the individual since the last conviction to apply periods after which the individual need not disclose the conviction.

5.4 The central issue regarding the disclosure of conduct that took place before the age of 12, and indeed under the age of 16, is the relevance of that conduct to an individual who applies for a disclosure when they have attained the status of an adult.

5.5 In 2010 the Criminal Justice and Licensing (Scotland) Act raised the age of criminal prosecution to 12. This meant that no child could be prosecuted through the courts for a crime/offence committed whilst they were aged under 12 but they may be referred to the Children's Hearing on offence grounds. The resulting difference between the ages for criminal responsibility and for prosecution means that 8-11 year olds with offence grounds established by the Children's Hearing can find those matters included on higher level disclosures into adulthood. For some children and young people this has severely restricted their life chances – including limiting access to certain course choices at college/university and closing off some career paths.

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

5.7 This change was brought about as a result of a UK Supreme Court judgment⁶² and was designed to ensure that the Scottish system complied fully with the provisions in article 8 of the ECHR, the right to private life. Specifically, the UKSC ruled that the blanket disclosure of minor or irrelevant past convictions on higher level disclosures had the potential to interfere unlawfully with this right. These changes have already increased the proportionality of the disclosure regime; fewer spent matters are disclosed. For spent convictions that are subject to disclosure following rules, those convicted under age 18 have the period of the extended disclosure halved when compared to adults (7.5 years compared to 15 years). The Group acknowledged that children between 12 and 15 years may commit some of the more serious offences specified in the 2015 Order. Whilst the halving for those convicted under age 18 of the disclosure period for the offences subject to rules was a helpful change, there remains the potential for childhood criminal behaviour to be disclosed into adulthood. Such a disclosure might not be justified as the individual concerned may have become a mature and law abiding adult when that disclosure is made.

5.8 The 2015 Order was an urgent process to correct any potential for ECHR non-compliance in the Scottish disclosure system. Parliament had already made provisions about the disclosure of information about children involved in criminal behaviour via sections 187 and 188 of the Children's Hearings (Scotland) Act 2011.

⁶² R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants) [2014] UKSC 35, the United Kingdom Supreme Court

Scottish Ministers considered that it would be inappropriate to commence these provisions until such times as the impact of the 2015 Order on the overall policy position could be assessed.

5.9 The Group recognised that even with the provisions of the 2015 Order there remained some outstanding disclosure issues for children and young people in Scotland, specifically in relation to the 'other relevant information' that can be included on an enhanced disclosure or a PVG scheme record. This information is provided to Disclosure Scotland by the Chief Constable of Police Scotland and includes non-conviction information. Unlike offence grounds, most of which will be removed when 'spent' or after a set time period, other relevant information typically contains a narrative description of alleged conduct and any relevant background factors. It can be included for as long as the chief constable reasonably believes that it is relevant and ought to be there. The police administer a process of quality assurance, relevance and proportionality checking before including non-conviction information on a disclosure. Whilst such information has the potential to remain disclosable on a PVG Scheme Record indefinitely, Police Scotland does seek to keep such information under review to ensure that it remains current.

5.10 The Group considered the following key factors:

- How best to ensure that the disclosure system in Scotland best supports the policy intention in raising the minimum age of criminal responsibility to 12.
- The acute and long term aspects of disclosure policy on children and on adults who have information on their criminal record dating from their childhood years, including non-conviction information.
- The safeguarding implications that inevitably accompany any decision to withhold or restrict the amount or type of information that may be included on a disclosure.

5.11 Raising the minimum age of criminal responsibility to 12 will mean that it is no longer possible to refer a child under that age to a children's hearing on the ground that they have committed an offence. The minimum age for criminal prosecution is already 12 so there is already no possibility of court conviction for a child under 12. This means that the only way information could be disclosed about a child's conduct when aged below 12 is through non-conviction information included by the Chief Constable on an enhanced disclosure or a PVG Scheme Record (this type of information cannot be included on a Standard Disclosure). Whilst it is possible that such a disclosure might occur whilst the individual was still a child, it is more likely that it would occur at a later stage, e.g. when the individual was applying for a college/university course or seeking a disclosure for employment purposes.

5.12 The Group considered that the present potential for a child under the age of 16 to request and obtain a disclosure from Disclosure Scotland or to join the PVG Scheme should be reviewed. If the wider ambition is to remove children from the criminal justice system in all but the most serious cases it may be considered contradictory to simultaneously provide them with access to a system that is predicated on the records held by that system. The Group recognised that there may be some instances where a disclosure should be available to a child and was interested to hear the views of those consulted on this matter.

5.13 The Group agreed on the principle that there should be a strong presumption against the Police including non-conviction information on disclosures about conduct that occurred under the age of 12. Members considered that if the minimum age of criminal responsibility rises to 12 then society must also accept the consequences of that decision with regard to how behaviour under that age is construed, moving away from a criminal perspective. 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 and should be subject to independent ratification by a party other than the Chief Constable before disclosure takes place. This will place an even higher hurdle for disclosure of non-conviction information about children, augmenting the already rigorous processes that the police operate to ensure proportionality and relevance in such disclosures.

5.14 Group members felt that this ratification or endorsement process should take account of the risk management implications of disclosing the information and also a contextual view of the specific circumstances of the individual. Members felt that a party with expertise or knowledge in risk management should ratify a decision by a Chief Constable to include non-conviction information. It will also be important that children and young people should find accessible the means to challenge the inclusion of 'other relevant information'.

Recommendation

- That any non-conviction information relating to children under 12 at the time of an incident, which is in exceptional circumstances then submitted by the police or other government bodies for inclusion on an Enhanced Disclosure or PVG Scheme Record should undergo independent ratification before release.

5.15 The Group further considered retrospective aspects to this policy; there will be many individuals who in the past, aged under 12, accrued convictions and findings of offence grounds proved. When raising the minimum age of criminal responsibility for today's children, it is equally important to have regard to the impact of continued disclosure on this group. The Group therefore considered that any convictions previously accrued by persons under the age of 12, as well as any non-conviction information that the chief constable intends to include, should also be subject to the independent ratification process described above with a strong presumption that no such matters will routinely be disclosed, convictions and non-conviction information alike.

Recommendation

- That any person who accrued a conviction or proven offence ground under the age of 12 under current legislation should no longer have that disclosed unless in exceptional circumstances disclosure via police 'Other Relevant Information' (ORI) and is independently ratified as being absolutely necessary.

5.16 The Group considered the types of conduct that may lead to the authorisation of a disclosure of non-conviction information related to conduct by those under the age of 12. Members felt that there would require to be a high risk of harm at the time the disclosure was sought. Factors that might be taken into account would include

the risk of future of offending, for example, whether the person had been involved in similar behaviour since the original incident took place and whether there were other considerations (e.g. that the child at the time was experiencing abuse/being neglected/being bullied/experiencing a bereavement). They considered how this determination might be made, for example via the multi-agency context within which young people or adults displaying sexually harmful behaviour are managed. Members strongly recognised that the presumption against disclosure must always be tempered by the ability to make a disclosure when that is strongly in the public interest for safeguarding purposes. However, this would be very much the exception, rather than the rule.

5.17 Whilst the main focus of the Group was on the implications of raising the minimum age of criminal responsibility to 12, the Group also considered the disclosure of conviction information for those aged under 18. If the proposal to raise the Minimum Age of Criminal Responsibility is designed to allow individuals to move beyond mistakes made in early childhood, and to provide support instead of punishment, the Group wanted to consider whether the benefits of any changes to the way in which higher level disclosures/other relevant information were handled could be extended to the 12-18 year old age group.

Recommendation

- That consideration is given to ceasing the disclosure of convictions accrued under the age of 18, with a provision to disclose details of such conduct as police ORI following independent ratification.

5.18 Members recognised that the law already takes account of age when determining periods applicable under the Rehabilitation of Offenders Act 1974. It is generally accepted that conduct by those aged 12–18 takes place against a backcloth of adolescence and developing maturity and that all criminal conduct in this phase of life should be viewed with this in mind. The purpose of disclosure is to allow employers and the state the means to take into account information relevant to a decision in the present day, for example to employ someone or to consider them for barring from work with vulnerable groups. Members acknowledged that conduct by a 15 year old is qualitatively different than conduct by a 10 year old, but the conduct of both may be of equally minimal relevance in the context of a person who has now attained adulthood and is living a law abiding life. The Group considered that it is consistent with the principles underpinning Scotland's historical approach to supporting children that young people should be able to leave behind behaviour that was associated with their youth and lack of maturity.

5.19 The Group were also conscious that some groups of children and young people are currently much more likely to come into contact with the Police and the Children's Hearings System on offence grounds e.g. looked after children. This contact could often be due to the way in which an incident was handled by the adults caring for them (e.g. a worker calling the Police in a residential unit, rather than a parent dealing with behaviour). The Group felt it was important that any changes ensured that all children and young people should have an equal right to rehabilitation. The Group saw no reason why the principles that it applied to disclosure for children under 12 ought not to apply to conduct under the age of 16,

again with the protection of the police being able to include non-conviction information subject to the independent ratification of that decision.

6. CONCLUSION

Conclusion

In Scotland our relationship to children and young people is changing.

Even a decade ago, the idea of legislating for an increase in the age of criminal responsibility would, to many, have been unthinkable.

Now, however, thinking has moved on. In Scotland we have always been proud of our welfare-based approach to youth justice. Our Children's Hearings System is held up internationally as an example of best practice. It is founded on the premise that harmful behaviour rarely occurs without other difficulties or disruption in a child's life. By helping a child deal with those difficulties, then the risk of a child being involved in further trouble will be reduced.

For professionals working in a wide range of fields, putting a child, their views and their best interests at the centre of decision-making is now an expectation of every day practice. The language of children's rights is becoming ever more present and familiar.

With that progressive approach, however, comes a realisation that some areas of current policy and legislation are now out of step. We no longer prosecute children under the age of 12, but we do still allow them to acquire a criminal record via the Children's Hearings System. In doing so, we restrict their life chances, allowing an incident in childhood to influence the opportunities available to them well into adulthood.

With this in mind, Advisory Group members were tasked with looking at the policy, legislative and procedural implications of raising the age of criminal responsibility to 12.

Of the Advisory Group members, each brought a different perspective to the table, and a different area of expertise. This was important, as they were quick to realise that there was often a very delicate balance to be struck between allowing all children to move on from harmful behaviour, and ensuring that any risk children posed, to themselves and to others, could continue to be properly assessed and managed.

The Advisory Group also acknowledged that, were an increase in the age of criminal responsibility to be seriously contemplated, then it would require not just political will, but also buy-in from a wide range of key stakeholders, including the Scottish Children's Reporter Administration (SCRA), Police Scotland, the Crown Office Procurator Fiscal Service, youth justice bodies, children's organisations and victims' groups. All of these groups were represented on the Advisory Group.

Advisory Group members acknowledged that serious incidents involving children aged 8-11 years old were rare. At the same time, they were conscious that should the age of criminal responsibility be raised to 12, any harmful behaviour demonstrated by these children would not disappear, and neither would the impact of that behaviour on others.

From the outset, Advisory Group members were committed to finding a way to ensure that the behaviour of all under 12s could no longer be regarded as criminal, and that any information about incidents occurring before the age of 12 would no longer appear on Disclosure certificates or Protection of Vulnerable Groups scheme records, save for in the most exceptional of circumstances.

As such, the Advisory Group took an evidence-based approach to their work. Group members were clear that any recommendations they made should be made based on both a realistic appraisal of the types of harmful behaviours currently demonstrated by this age group and the likelihood that once a child had demonstrated these behaviours that they would reoccur. In this respect, the research carried out by SCRA proved invaluable to Advisory Group members, as it provided both statistical information about children being referred to a Children's Hearing on offence grounds, as well as the context behind these referrals. This allowed Group Members to take a proportionate approach towards risk.

One of the most challenging areas examined by the Advisory Group was that of the role of the Police. As previously stated, an increase in the age of criminal responsibility will not alter the fact that incidents involving younger children do occur, and will continue to do so under any new arrangements. As such, the Advisory Group carefully considered the gaps in Police powers that would be created by an increase in the age of criminal responsibility.

They concluded that there was a need to retain some of these powers, or create new powers, in order to allow for the investigation of the most serious incidents, and to establish the truth of the matter. They did not do so lightly. They were aware that there was a danger that, on the one hand they would be recommending that a child under 12 should no longer be regarded as criminally responsible, but on the other, they would create powers to detain, interview or require forensic samples from children under 12, processes that are traditionally associated with the detection of crime.

The Advisory Group felt on balance, however, that the value of being able to rule a child in, or out, of an investigation was likely to outweigh any concerns, as long as suitable safeguards that could be put in place to ensure that these powers would only be used rarely.

Whilst there was agreement on the need for some powers, for others, such as the power to retain forensic samples from 8-11 year olds, the Advisory Group felt it was necessary to have input from a wider range of stakeholders. As such, they did not reach a firm recommendation and suggested that the full implications of such a power should be further explored.

Advisory Group members were clear that increasing the age of criminal responsibility will require a shift in policy and legislation, as well as a clear cultural shift. To ensure that children are given the very best start in life, and to remain true to the aim that Scotland should be the best place in the world for children to grow up, Advisory Group members felt it was crucial that the behaviour of children aged 8-11 years old should, in future, be regarded in the same way as that of children under the current age of criminal responsibility (i.e. under 8 years old).

Such a shift will require a range of measures to be put in place. This will include the creation public information and tailored training and development opportunities for professionals working with children in this age group. Advisory Group members felt a multi-agency scoping study would be helpful in identifying any skills gaps.

The Advisory Group, having fully examined the policy, legislative and procedural implications, concluded that the age of criminal responsibility in Scotland can and should be raised to 12 years old, and that any change should happen at the earliest opportunity.

7. Suggested Consultation Questions

Age of Criminal Responsibility

Do you agree with the Advisory Group's recommendation that the age of criminal responsibility in Scotland should be raised from 8 to 12 years of age?

Yes No

Please provide reasons for your answer.

Care Protection & Risk

Child Protection Guidance

Do you agree that the support needs of, and risks posed by, children aged 8-11 years demonstrating harmful behaviour can be met through the extension of the National Child Protection Guidance?

If yes, what adjustments do you anticipate might be required and why?
If no, what other framework would you use instead and why?

Support & Training Materials

Do you agree that a multi-agency scoping study of training and skills would be helpful? Please provide reasons for your answer.

Who do you think should be involved in such a study (e.g. social workers, education professionals, Named Persons etc)? Please provide reasons for your answer.

Information Provision

How should the Scottish Government best publicise a change in the minimum age of criminal responsibility?

Please include details of the audiences you think publicity and/or information materials should reach.

Children's Hearings System

Should the age of criminal responsibility be raised to 12, do you agree that it will be possible to deal with the harmful behaviour of 8-11 year olds via existing care and protection grounds? Please provide reasons for your answer.

Role of the Police

Police Powers

Should the age of criminal responsibility be raised to 12, do you agree with the assessment of the Advisory Group that some Police Powers should be retained? Please provide reasons for your answer.

In relation to forensic samples, should the Police ever be able to retain samples taken from children aged 8-11 years? Please provide reasons for your answer.

Safeguards

What safeguards should be put in place for children aged under 12 in relation to the use of these powers?

Disclosure and Protection of Vulnerable Groups

Do you agree that there should be a strong presumption against the release of information about a child's harmful behaviour when an incident occurred before the age of 12? Please provide reasons for your answer.

Should this strong presumption also apply to cases retrospectively? Please provide reasons for your answer.

Where it is felt necessary to release information about an incident occurring before the age of 12 (e.g. in the interests of public safety), do you agree that this process should be subject to independent ratification? Please provide reasons for your answer.

Do you agree that information about an incident of harmful behaviour that took place in childhood should continue to be disclosed when that person reaches the age of 18? Please provide reasons for your answer.

Victims and Witnesses

Should the age of criminal responsibility be raised to 12, will this lead to any gaps in the support and information available to victims of a child's harmful behaviour, including other children? Please provide reasons for your answer.

Other

Consultation with Children and Young People

Please tell us about the groups of children and young people you believe should be consulted as part of this consultation process.

ADVISORY GROUP TERMS OF REFERENCE AND MEMBERSHIP

Scotland has a proud record of taking a holistic approach to the needs of children and young people. Where children are involved in or at risk of offending, evidence and experience tells us that we must remain committed to an integrated approach – tackling deeds while taking account of wider needs.

We know that as far as possible children and young people should be kept out of the Criminal Justice System. Where offending does take place, effective and timely interventions are needed to address that behaviour and its causes.

We take a child centred, preventative approach focused on the following outcomes:

- that individuals who were involved in criminal conduct, who have evidently desisted from such conduct as adults, must be able to live as if they had never been in trouble unless justifiable cause is shown otherwise.
- that effective and age appropriate interventions are in place to address harmful behaviour by children and young people so that victims and the public are assured that issues are dealt with without the need for criminalisation.
- helping ensure communities are safe from crime and disorder, and particularly from the most harmful types of offences.
- improving life chances for children and young people involved in or at risk of offending.
- enabling all children and young people to be confident individuals, effective contributors, successful learners and responsible citizens.

The Group is asked to consider the policy, legislative and procedural implications of raising the minimum age of criminal responsibility from 8 to 12 and provide proposals for consultation taking account of the implications of change.

The Group will seek to address underlying issues in respect of grounds for referral, disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the Children's Hearings System and UNCRC compliance.

The Group will provide advice and recommendations on any consequential changes that should be made if the minimum age of criminal responsibility is raised from 8 to 12. These will include advice on:

- Police Scotland's continued ability to thoroughly investigate allegations of offending behaviour, in the interests of children involved and victims of crime.
- Which Police powers continue to be needed in relation to 8-11 year olds and how best to provide for them.
- Many Police powers hinge on an 'offence' being investigated and the Police may no longer have those powers in relation to children under 12 if a change

is made. Advice will be needed on which powers continue to be needed and how best to provide for them.

- This includes the power to take and retain samples which can be necessary to investigate to establish the facts and protect children who may be accused of a serious crime and to protect potential victims of future crime – including children and vulnerable groups.
- Potential impact on grounds for referral to the Children’s Hearings System if offence grounds are not applicable.
- What approach should be taken regarding the keeping of records of Police intelligence and the weeding and retention of those records in relation to 8-11 year olds whose behaviour has been investigated by the Police.
- Whether there is a need for a proportionate disclosure regime which takes account of the presenting risks when ‘offending’ 8-11 year olds grow to adulthood, and the need for information in respect of serious and harmful behaviour to be disclosable to potential employers and other agencies.

In taking this work forward, the Group will balance the rights of children who have committed offending behaviour and the rights of the public, including other children who have been, or may yet be, harmed by a child’s behaviour.

Membership of the Minimum Age of Criminal Responsibility Advisory Group

Organisation	Representative
Scottish Government Care & Justice Division (Chair)	Robert Marshall
Action for Children	Paul Carberry
Centre for Youth and Criminal Justice	Claire Lightowler
Children and Young People’s Commissioner Scotland	Pauline McIntyre
Convention of Scottish Local Authorities	Mike Callaghan
Crown Office & Procurator Fiscal Service	Catriona Dalrymple
Disclosure Scotland	Gerry Hart
Includem	Lynsey Smith
NHS Forth Valley	Dr Lorraine Johnstone
National Youth Justice Advisory Group (NYJAG)	Chris Wright
Police Scotland	Paul Main
Scottish Children’s Reporter Administration	Malcolm Schaffer
Social Work Scotland	Bruce Milne
Together	Juliet Harris
Victim Support Scotland	Susan Gallagher
Scottish Government Youth Justice Team (Secretary)	Iain Fitheridge



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