



## **Equalities and Human Rights Committee: Call for Evidence Age of Criminal Responsibility (Scotland) Bill**

Giving all children in Scotland an equal chance to flourish is at the heart of everything we do. By bringing together a network of people working with and for children, alongside children and young people themselves, we offer a broad, balanced and independent voice. We create solutions, provide support and develop positive change across all areas affecting children in Scotland. We do this by listening, gathering evidence, and applying and sharing our learning, while always working to uphold children's rights. Our range of knowledge and expertise means we can provide trusted support on issues as diverse as the people we work with and the varied lives of children and families in Scotland.

We welcome the opportunity to contribute to the discussion around the Bill, which we believe to be a significant positive step for further implementing child rights in Scots Law.

### **Q1. The UN Committee on the Rights of the Child recommends that the age of criminal responsibility is a minimum of 12 years old, which the Bill adheres to. What are your views on the appropriate age of criminal responsibility in Scotland?**

The newly launched National Performance Framework enshrines the commitment to "respect, protect and fulfil human rights"<sup>1</sup> and the Scottish Government has consistently declared its intention for Scotland to be 'the best place to grow up'.<sup>2</sup> While progress has been made in this regard, Scotland has been consistently lagging behind the rest of Europe with our minimum age of criminal responsibility. For example, the age of criminal responsibility in the Czech Republic and Norway is 15, in Portugal 16, and in Poland the age is set at 17 save for specific exceptions.<sup>3</sup>

The United Nations Convention on the Rights of the Child (UNCRC)<sup>4</sup> does not state what the minimum age of criminal responsibility should be but merely states that an

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<sup>1</sup> Outcome 9, National Performance Framework. Available at <http://nationalperformance.gov.scot>

<sup>2</sup> <http://www.gov.scot/About/Performance/scotPerforms/outcome/childfamilies>

<sup>3</sup> <https://www.crin.org/en/home/ages/europe>

<sup>4</sup> [https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC\\_united\\_nations\\_convention\\_on\\_the\\_rights\\_of\\_the\\_child.pdf?\\_ga=2.247513860.2069744976.1530691491-1848195324.1526897895](https://downloads.unicef.org.uk/wp-content/uploads/2010/05/UNCRC_united_nations_convention_on_the_rights_of_the_child.pdf?_ga=2.247513860.2069744976.1530691491-1848195324.1526897895)

age be identified, causing significant variance across States. In April 2007 the United Nations Committee on the Rights of the Child expanded on this position highlighting that some states have 'a very low level of age 7 or 8'<sup>5</sup> while others had set a minimum age at the 'commendably high level of 14 or 16'. It went on to state that "a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable" and encouraged States "to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level."

While we are pleased to see the Bill which will achieve welcomed progress, it is still disappointing that the Bill only seeks to implement the minimum age possible. We echo the call made by the Committee to increase this further.

Article 3 of the UNCRC dictates that the best interests of children must be the primary concern when states make decisions that impact children, while Article 4 compels state parties to take all available measures to make sure children's rights are respected, protected and fulfilled. We do not consider it to be in a child's best interests to be able to acquire a criminal record at age 8, or indeed at age 12.

It is a cornerstone of Scots law that "Actus non facit reum nisi mens sit rea"; which translates to "an act does not make a person guilty unless mind is also guilty". Child development must therefore be taken into account, and we would signpost the Committee to the response from Who Cares? Scotland<sup>6</sup>, which is informed by the views and experience of care experienced young people, one of whom summarised "Don't let their past, stop their future."

As is enshrined in Article 12 of the UNCRC, children have the right to participate in decisions which affect them. We welcome the Committee's intention to work with children and young people to have their say on the Bill, and recommend that any questions on an appropriate age of criminal responsibility are accessible for all children and young people.

We strongly recommend looking at raising the minimum age further, learning from other nations, and crucially from the experiences of young people themselves to bring Scotland more in line with our international obligations and national ambitions.

**Q2. The Bill makes a number of changes relating to the disclosure of offences and provides that any conduct by a child below the age of 12 (should the ACR be increased) that would previously have been recorded as a conviction will no longer**

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<sup>5</sup> CRC/C/GC/10, 25 April 2007

<sup>6</sup> <https://www.whocarescotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf>

**be recorded as such. The Bill does however, allow for disclosure of ‘other relevant information’ held by the police about pre-12 behaviour. The Committee would welcome views on whether the Bill strikes the right balance in terms of addressing offending behaviour by young children under 12 and the disclosure of such information.**

Getting It Right for Every Child<sup>7</sup> (GIRFEC) seeks to put the child at the centre and make structures, systems and decisions reflect their best interests. However, currently there is a fundamental disparity over the autonomy of children and of adults.<sup>8</sup> Often, decisions such as whether to disclose ‘relevant information’ gives discretion to adults in a system in which there is already a significant imbalance of power. There must therefore be a consistent policy in order to ensure fairness and give autonomy to children and young people wherever possible. We therefore welcome the role of the independent reviewer, but would urge that the guidance on what ought to be disclosed be developed with a range of stakeholders, including children and young people. We would also signpost the Committee to concerns raised in Together’s response<sup>9</sup> which we believe need to be addressed.

With regards to a s15 appeal, children and young people ought to be advised of how to do this, and that they are able to instruct counsel. In cases where the child would be deemed to lack capacity, further guidance would be welcomed here to ensure clarity and consistency, and ensure all children’s rights are protected.

Further, it is essential that recognition is given to the fact that many children become known to the criminal justice system largely due to significant issues faced at home. This is in line with the landmark Kilbrandon report<sup>10</sup>, which inspired the creation of the Children’s Hearing System and has pioneered a child-centred approach to what has historically been a very formal and often exclusionary process of court proceedings. It also importantly recognised that support rather than punishment was not only more in line with a rights-based approach but also improved outcomes for those involved.

**Q3. The Bill provides that children under 12 who are subject to a police interview will have the right to have an advocacy worker present during the interview. What will the impact be on your organisation or on the children you work with who might access the advocacy service?**

While we do not work directly with children through providing services, through our research we are aware of discrepancies in the provision of advocacy services. We

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<sup>7</sup> <http://www.gov.scot/Topics/People/Young-People/gettingitright/what-is-girfec>

<sup>8</sup> See Aoife Daly, “Children, Autonomy and the Courts; Beyond the Right to be Heard”

<sup>9</sup> [http://www.togetherscotland.org.uk/pdfs/Response\\_MACR\\_03-07-2018\\_FINAL.pdf](http://www.togetherscotland.org.uk/pdfs/Response_MACR_03-07-2018_FINAL.pdf)

<sup>10</sup> <http://www.gov.scot/Resource/Doc/47049/0023863.pdf>

welcome the move to have an advocacy worker available for children under 12, but believe that this should be available to all young people, including those over 12. We feel this is particularly necessary due to the ongoing implications for young people if they acquire a criminal record, but is also in keeping with children's Article 12 right to have a say in decisions which affect them. This is only possible where a child or young person is informed and empowered to participate and supported to do so. Advocacy workers are therefore a safeguard regarding children and young people's right to a fair trial through their understanding, and in line with international obligations which this Bill seeks to incorporate through raising the age of criminal responsibility.

**Q4. Raising the age of criminal responsibility would necessitate a number of changes in relation to information which can be provided to victims. Again, the Committee would welcome views on whether an appropriate balance in this area has been achieved.**

Proportionality is a core feature of any system based in human rights, and we agree that it is important that victims are aware of the outcome of their case, provided that this does not create further harm. We agree that there should be strict safeguards in place, and would defer to Minimum Age of Criminal Responsibility Advisory Group's report<sup>11</sup> which examines this issue more thoroughly than is possible within the scope of this consultation.

**Q5. Part 4 of the Bill relates to police powers and provides a package of powers designed to ensure that serious behaviour by any child under the age of 12 can be investigated but that such investigations are carried out in a child-centred way. The Bill restricts the application of most of these powers so that they are only available to the police in the most serious of cases. The Committee would welcome views on the approach taken to police powers in the Bill.**

This question requires significant expertise and we would signpost to other organisations such as Clan Childlaw which possess a wealth of specialised knowledge in the field of child friendly justice.

We would however take this opportunity to highlight the Barnahus model<sup>12</sup> which originated in Iceland, and encompasses a child-friendly approach to police interviews with children and young people. Efforts are taken to ensure the environment is welcoming, a multi-disciplinary team are available and the child or young person only has to be interviewed once. While these interviews are

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<sup>11</sup> [https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting\\_documents/00497071.pdf](https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/00497071.pdf)

<sup>12</sup> <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/Barnahus-Improving-the-response-to-child-sexual-abuse-in-England.pdf>

traditionally carried out in relation to child protection cases, we feel that there would be useful learning and experience for conducting sensitive interviews.