

EQUALITIES AND HUMAN RIGHTS COMMITTEE

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL

SUBMISSION FROM

- About Clan Childlaw

Clan Childlaw improves life chances of children and young people by using our legal skills and expert knowledge to help young people take part in decisions that affect them and by making sure that children's rights are realised in Scots Law. We provide free, outreach, child-centred legal representation to children and young people, most of whom have experience of living in care. We have extensive experience gained over 10 years of representing vulnerable children and young people where child protection issues arise. We also provide information to professionals in relation to child law, deliver practice-based training on child law and contribute to policy development.

- 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?

We welcome the Bill and support raising the age of criminal responsibility to at least 12 years old. Harmful behaviours displayed by children should be treated as child protection concerns rather than criminal matters in line with the Kilbrandon principles that a child who is involved in dangerous behaviour is just as much in need of care and protection as the child against whom an offence has been committed. However, 12 is still lower than most European Union countries and we would support raising the age higher still as recommended by the UNCRC.

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

We welcome the end to automatic recording of conduct in conviction terms for under 12s and the retrospective application of this provision. There can be no quasi-criminal consequences for children whose behaviour is rightly not deemed criminal.

We are of the view that information about a child's harmful behaviour before the age of 12 should not be released. We have long-standing concerns about the recording and use by the police of 'other relevant information' (ORI) which we consider may sometimes be generated and disclosed in a way that may not be compliant with privacy rights under article 8 ECHR. However, we recognise that in exceptional circumstances it may be that such information will need to be shared where there is a current presenting risk.

We welcome the independent review process proposed under Chapter 2 of Part 2 of the Bill with the effect that ORI can only be included on an enhanced disclosure or PVG scheme record if first approved by an independent reviewer with the possibility of appeal to a sheriff on a point of law. We welcome the reference in paragraph 96 of the Policy Memorandum to the engagement of article 8 ECHR and the need for the independent reviewer to balance the right to respect for private life against the interests of public safety. It is right that the individual has the opportunity to make representations to the independent reviewer and that those must be taken into account. Also welcome is the scope for further safeguards which could be included in guidance and regulations (sections 17 and 18 of the Bill). It is essential that a clear framework for reference and decision-making, including robust risk assessment, is published.

In our view changes to the disclosure system for under 12s by virtue of this Bill should be replicated in respect of children between 12 and 18, as set out in option 2 on page 67 of the Scottish Government and Disclosure Scotland Consultation on the Protection of Vulnerable Groups and the Disclosure of Criminal Information published in April 2018. The UN Committee on the Rights of the Child's Concluding Observations on the Fifth periodic report of 3rd June 2016 recommends in paragraph 78 (b) that the State Party "ensures that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18, and that diversion measures do not appear in children's criminal records."

The same consultation is seeking views on introducing statutory guidance on ORI and we await the outcome of this to examine how ORI is handled in the future.

We remain concerned however that for the moment police enjoy considerable discretion as to the information they hold without the child having had the opportunity to challenge any allegation and which has not been proved beyond reasonable doubt. A child may be innocent of the alleged behaviour yet still have to deal with the consequences of the information being held and potentially disclosed in the future. Introducing an independent review before disclosure is an important safeguard, but does not fully resolve our wider concerns about ORI. We await the decision in the case of R (on the application of AR) v Chief Constable of Greater Manchester Police and another (UKSC 2016/0144) before the UK Supreme Court, which is concerned with disclosure of ORI.

- 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?

We provide specialist legal advice and representation to children up to the age of 18, and up to the age of 21 if they have been Looked After. We represent children in the children's hearing system on all grounds of referral including offence grounds. We do not represent children in criminal court actions.

We broadly welcome the proposal in the Bill to provide children in respect of whom a child interview order is made with support through an advocacy worker. The role of the advocacy worker described in section 40 would help the child know and vindicate their rights in relation to the interview.

It is proposed that the advocacy worker be legally qualified (paragraph 169 of the Policy Memorandum). We have real difficulty picturing this role. What will the relationship be between the advocacy worker and the child? What will the duties of the advocacy worker be in relation to the child? What will the nature of the legal qualification be? Will there be a regulatory role for the Law Society of Scotland or other body? These questions would need to be among those addressed by regulation pursuant to section 122 of the Children's Hearings (Scotland) Act 2011.

We are of the view that, in any event, there is a risk of confusion around the respective roles of a legally qualified advocacy worker and a solicitor acting for the child. Further, a child being interviewed without a solicitor where there is a risk of alleged behaviour being disclosed as ORI later in life will be placed at an unfair disadvantage compared to those who have been accused of an offence and are above the age of criminal responsibility.

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

We agree with the balance struck in this part of the Bill.

- Part 4 of the Bill relates to police powers and provides a package of powers designed to ensure that serious behaviour by any child under the age of 12 can be investigated but that such investigations are carried out in a child-centred way. Those powers include, amongst other things, the taking of forensic samples, removing a child to a place of safety and the power to search children. The Bill restricts the application of most of these powers so that they are only available to the police in the most serious of cases. The Committee would welcome views on the approach taken to police powers in the Bill.

Children whose behaviour is not deemed criminal must not face criminal consequences for their actions. While it is right that police must be able to investigate the most serious incidents in order to keep the child and others safe, such cases should be treated as child protection concerns. We would prefer the general provision in section 59 in relation to Part 4 powers to provide that "... the person or court must treat the need to safeguard and promote the wellbeing of the child as *the paramount* consideration".

We agree that police powers must be proportionate, justifiable and rooted in safeguarding the child's welfare (paragraph 131 Policy Memorandum). The purpose of their use must be made clear to the child, providing the child with child-friendly material explaining they are not being punished or treated as an offender, and police must act in compliance with the ECHR and UNCRC at all times.

We have the following particular concerns in relation to the proposed police powers:

- In relation to the power to take a child under 12 to a place of safety and the search of children under 12, there is no duty on the constable to ascertain the views of the child as to where they are taken or where they are searched. This is an important

consideration which supports the policy aim not to stigmatise a child or involve children in processes that recreate criminal procedures (cf. paragraph 63 of the Policy Memorandum).

- We do not support any proposal to take forensic samples from under 12s on the basis that this would be a disproportionate interference in the privacy rights of a child whose behaviour is not deemed criminal. Under the proposal, the consent of the child is not relevant to obtaining the order. The process of providing samples can be an extremely difficult and traumatising experience for a child.
- In relation to the urgent taking of prints and samples under section 57, there is no provision corresponding to section 53(3) to explain the basis to the child. We think there should be.
- In relation to the authorisation to use reasonable force being part of an authorisation to take a child to and keep them at a place of safety, carry out a search or an investigative interview, question a child, or take a sample (section 61), the safeguards in subsections 4 (seek and obtain the cooperation of the child), 5 (only as a last resort) and 6(a) (no more force than is absolutely necessary) are absolutely vital to ensure children's rights under ECHR and UNCRC are upheld and to ensure a positive, child protection focused relationship between the police and children. We consider that there should be a stronger duty to explain to the child why the constable considers force must be used than is currently proposed in subsection 6(b) which refers to 'in so far as is reasonably practicable'.
- Please tell us about any other comments you feel are relevant to the Bill.

Informing children of the change in the law will be imperative to ensure that they are fully aware of their rights. A complaint we often hear through our representation work is that young people (normally under 16s) are put under pressure from their older peers to commit offences. This is due to a perception that under 16's can 'get away with it' and that the 'slate is wiped clean' when they turn 16 (a common misconception). Caution must therefore be taken to ensure that this perception is not strengthened. This will mean ensuring that children and young people have the correct information about their rights and about the consequences of harmful or dangerous behaviour.

Leaflets/ booklets informing children and young people of the change in the law and how this may benefit them will be essential. These should not only be available to children under 12 but also older children who may be concerned about an offence which may currently be on their record. However, it should also be clearly explained that if their behaviour is causing concern they may still be referred to a children's hearing to get the support they need to ensure they are not putting themselves or others in danger.

For professionals working with children who may be involved in harmful behaviour, in particular social workers and the police, any information about the changes to the age of criminal responsibility should be incorporated into current guidance. Training for teachers, social workers and police may be beneficial as they are the professionals most likely to be dealing with children displaying harmful behaviour.

It will be particularly important to ensure that professionals working with looked after children are fully informed of the changes to the law. This should include advocacy workers, Children's Rights Officers, staff at residential units and social workers.