OFFICIAL REPORT
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Equalities and Human Rights Committee

Thursday 17 January 2019

Session 5

The Scottish Parliament
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Thursday 17 January 2019

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EQUALITIES AND HUMAN RIGHTS COMMITTEE
2nd Meeting 2019, Session 5

CONVENER

*Ruth Maguire (Cunninghame South) (SNP)

DEPUTY CONVENER

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

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Bruce Adamson (Children and Young People's Commissioner Scotland)
The Solicitor General for Scotland (Alison Di Rollo)
Anthony McGeehan (Crown Office and Procurator Fiscal Service)
Professor Ann Skelton (United Nations Committee on the Rights of the Child)
The Lord Advocate (Rt Hon James Wolffe QC)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Equalities and Human Rights Committee

Thursday 17 January 2019

[The Convener opened the meeting at 09:15]

Age of Criminal Responsibility (Scotland) Bill: Stage 2

The Convener (Ruth Maguire): Good morning, everybody, and welcome to the second meeting of the committee in 2019. I ask everyone to ensure that mobile devices are switched to silent.

Item 1 is the Age of Criminal Responsibility (Scotland) Bill. I welcome our first panel, the Lord Advocate, the Solicitor General for Scotland and Anthony McGeehan, head of policy at the Crown Office and Procurator Fiscal Service. I invite the Lord Advocate to make an opening statement of up to five minutes, please.

The Lord Advocate (Rt Hon James Wolffe): Thank you, convener. Since I was appointed Lord Advocate, I have spoken from time to time about the fundamental rights that underpin the investigation and prosecution of crime, so it is a particular pleasure for me to make my first appearance before your committee.

All legal systems have to address the challenges that arise from harmful behaviour by children. In addressing those issues, the state needs to put in place and to maintain an effective system for investigating and prosecuting crime—that is a human rights requirement, an obligation under articles 2, 3, 4 and 8 of the European convention on human rights—while also fulfilling its obligations under the United Nations Convention on the Rights of the Child.

I welcome the balance that is struck in the bill that you have under consideration. It was the outcome of careful and detailed consideration and consultation over a long period, including in particular the work of the advisory group on the age of criminal responsibility. That work provides a solid foundation for raising the age of criminal responsibility to 12. Any decision on a further increase in the age of criminal responsibility will ultimately be a matter for Parliament, but I hope that I can provide some context by reference to the practice and experience of prosecutors in cases involving children aged between 12 and 15.

It is perhaps worth reminding the committee of the role of prosecutors in our current, rather sophisticated youth justice system for cases involving children over the age of 12. Only the most serious cases involving children under 16 are reported to the Crown as well as to the reporter. For those cases that are reported to the Crown, prosecutors apply a presumption that the case should be dealt with by the reporter. Under those arrangements, the great majority of cases involving offending by children under 16 are dealt with by the reporter, either because they are never reported to the Crown or because the prosecutor refers the case to the reporter. But in those cases where the circumstances require it, a prosecution may be brought, and where there is a prosecution, the courts are subject to special rules that apply to the trial process and in relation to sentencing, that recognise the fact that the accused is a child.

This is a system that enables professional judgment to be applied with a view to dealing with each individual case in the appropriate way. We have two options: the children's hearings system, which is appropriate for most cases, and for those cases that cannot be dealt with in the hearings system appropriately, prosecution within a criminal justice system that is modified to recognise that the accused is a child. I should say that both the Solicitor General and I, and for that matter Anthony McGeehan, have direct personal experience of considering cases where children have committed serious crimes. I can certainly testify to the anxious consideration that is applied to such cases.

Prosecutorial experience would support two propositions: first, that even in the 12 to 14 cohort we see children who commit very serious offences, often but not exclusively against other children; and, secondly, that the number of such cases increases with the age of the child. That experience is supported by data from the Crown Office database. I should say that that is an operational database, not one maintained for statistical purposes but, even subject to that caveat, it provides some useful information. Since 2011-12, 1,285 persons who were aged 12 or 13 at the date of report have been reported to the Crown. Of those, 1,139 were jointly reported and were ultimately dealt with by the reporter. There were 27 cases, involving 29 accused, in which criminal proceedings were commenced where one or more of the accused was aged 12 or 13 at the time of report. Six cases were prosecuted in the High Court and five before a sheriff and jury. I can give the committee more detail about those cases if that would be helpful, but they include a charge of murder that resulted in a conviction for culpable homicide, an attempted murder, serious assaults, wilful fire raising and rape of younger children.

In the same time period, almost 19,000 charges were reported to the Crown against individuals who were 14 or 15 years old at the time of the report. The great majority were jointly reported and

ultimately dealt with by the reporter, but almost 3,000 of those charges were called in court. Within that cohort, my officials have looked more closely at cases where the accused was 14 or 15 years old at the date of report and was still 14 or 15 at the date of disposal: 47 such cases were dealt with at solemn level—High Court or sheriff and jury—and of those, 26 resulted in a custodial sentence. The headline offences included serious assaults, robbery, wilful fire raising, rape, attempted murder and culpable homicide.

The absolute numbers of solemn cases in those cohorts may be relatively small, but each one is a serious case. In the context of the basic responsibility of the state, to which I referred at the outset, our youth justice system needs to be able to deal appropriately and confidently with every one of those cases. That certainly does not mean that we should set our face against a further increase in the age of criminal responsibility, but it does suggest that before we could decide to remove the ability to bring a criminal prosecution in relation to such cases, we would need to address with some care how we would equip our system to deal with them appropriately, confidently and indeed fairly.

The Convener: Thank you. Can I ask for some examples of the process used in deciding whether to take the prosecution of a younger person to an adult court?

The Lord Advocate: The Solicitor General may want to answer that question.

The Solicitor General for Scotland (Alison Di Rollo): In relation to a child under 16, a number of instruments would be applied, including the Lord Advocate's guidelines that provide for the cases to be reported in the first place. First, we would apply the prosecution code—the general principles that govern our decisions to prosecute in the public interest—taking account of a range of factors, including the gravity of the offence, the impact on the victim and so on. I am glad that you asked your question. We were discussing the issue just before we came in.

In relation to young offenders, we are increasingly aware of the vital need to take into account the circumstances of the child himself or herself. That is the product of a direction of travel to reduce the numbers of children prosecuted in the criminal courts—a journey that we have been on and which I referenced in my recent speech at the Kilbrandon event at the University of Edinburgh. We recognise that criminal court prosecution is an adverse childhood experience and we recognise fully the consequences and implications for that child's future, in addition to the circumstances of the offence, which may be grave and heinous and have really significant impact on victims—you can understand the conversations that we have with victims and next of kin in such circumstances. To take the right decision, however, it is abundantly clear that we are required to understand more about the child's circumstances and background and, from that, assess what the right disposal is to address those needs and prevent further offending, as well as mark the criminality. The decision-making process in relation to children is complex.

We very much want to reduce the numbers of children who are prosecuted under any circumstances. That is why one of the first things that I did on my appointment as Solicitor General was, with the then Cabinet Secretary for Justice, to set up an expert advisory group to look particularly at reducing sexual offending by children against other children, of which there has been a significant increase in the last few years. We have a sophisticated system. It is acutely aware of the obligations under various international human rights instruments, the UNCRC principally. The answer to your question as to how we go about making these decisions is that we take into account a range of factors, the prosecution code and also the interests of the children.

The Lord Advocate: I wonder whether I might add a couple of observations. One of the virtues of our system is that it does not have sharp cut-offs based on chronological age. In relation to those cases that can be jointly reported and those cases that are jointly reported, the agreement between the Crown Office and the Scottish Children's Reporter Administration, as well as the guidelines that the Lord Advocate lays down, support discussion between the prosecutor and the reporter and the exercise of professional judgment, looking at the whole circumstances of the case and of the child concerned, in order to reach the right decision about the way in which that particular case and that child should be dealt with.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Your opening statement and opening answer to the convener have given a good overview of how the system operates when a child is charged with a serious offence. Could you elaborate on what you said about a case being jointly reported? How do the conversations between you and the reporter operate and who has the final say? Is it you or is it the reporter?

The Lord Advocate: The starting point, of course, is that we are dealing only with the cases that are jointly reported and, under the Lord Advocate's guidelines, as you will appreciate, it is only the serious cases that are jointly reported. All other cases simply go to the reporter. In relation to those serious cases that are jointly reported, it is ultimately the prosecutor who decides whether to

retain the case for prosecution or to release the case to the reporter. That is as it should be. It is ultimately the responsibility of the prosecutor to decide independently, in the public interest, whether a case should or should not be prosecuted. Under the Lord Advocate's guidelines and directions, prosecutors are enjoined to discuss with the reporter the appropriate course and to obtain information from the reporter that will be relevant to that ultimate decision: information about the circumstances of the child as far as known to the reporter and also about how the reporter and the hearings system might approach the particular case. The ultimate decision is for the prosecutor, but the prosecutor applies the presumption set out in the directions that the Lord Advocate lays down—that I lay down—which is a presumption for the case to go to the reporter unless the public interest requires that it be prosecuted.

Anthony McGeehan is probably best placed to speak directly to the kind of discussion that would happen between the procurator fiscal and the reporter; he may wish to add something.

Anthony McGeehan (Crown Office and Procurator Fiscal Service): Such conversations take place daily between prosecutors and reporters. As the Lord Advocate said, that discussion takes place in the particular context of the national agreement between the COPFS and the SCRA in relation to the way in which cases that are jointly reported will be dealt with. Under that agreement, there is a presumption that children under the age of 16 who are jointly reported to the SCRA and the COPFS will be dealt with by the reporter, but that presumption can be rebutted or overcome and a variety of factors are specified that should be considered when deciding which organisation should take the individual accused. The factors that are specified are the gravity of the offence,

"whether there is a pattern of serious offending ... whether there are services within the Children's Hearings System that are currently working with the child ... whether there is likely to be an adverse effect on the victim if the child were to be prosecuted ... any health or development issues ... that may indicate that the child's needs and behaviour would be best addressed within the Children's Hearings System"

and whether "a disqualification from driving" is a likely disposal.

09:30

Those considerations are in turn echoed within our published "Crown Office and Procurator Fiscal Service Prosecution Code", as indicated by the Solicitor General. In the prosecution code, factors are identified as relevant to that discussion and those include

"the nature and gravity of the offence ... the impact of the offence on the victim and other witnesses"

and

"the age, background and personal circumstances of the accused".

In particular, the code states that

"The youth ... of the accused may, depending on the other circumstances, be a factor which influences the prosecutor in favour of action other than prosecution",

that is, that the matter is dealt with by the reporter to the children's panel. We also consider the effect of the prosecution on the accused, and in particular the code states that

"In some cases prosecution may have the potential to affect the accused in a way or to an extent which is wholly disproportionate to the gravity of the alleged offence."

Those are the types of factors that we routinely fold into our conversations with reporters day in, day out, and that lead us to a decision as to whether the case should be dealt with by the prosecutor or by the reporter, but remembering that the starting position is that only the more serious cases will be reported jointly to the SCRA and the COPFS. The less serious cases are reported to the reporter only.

Fulton MacGregor: I would like to go back to an earlier stage of the process. The Lord Advocate gave an overview of what would be considered serious offences, but I assume that those are jointly reported by the police. Are there quite strict guidelines for the police about what constitutes a serious offence?

Anthony McGeehan: Yes. The Lord Advocate has published guidelines to the Chief Constable regarding the reporting of children's cases to the procurator fiscal. There are three categories of offence that are required to be jointly reported. The first is:

"Offences which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instruction of the Lord Advocate."

Fulton MacGregor: Thank you. That is really helpful and between your answers and the opening statement, you have covered a lot of what I would be looking at.

Is there ever a circumstance in which, although under the rules and guidelines the offence would not be considered to be serious enough to be jointly reported, a child could nonetheless be jointly reported because they have past behaviours or an accumulation of previous offences or charges? How would a situation like that be dealt with? For example, a child is reported on an assault charge that perhaps would not meet the criteria to be jointly reported, but they were

previously jointly reported on a serious assault charge. How would that be dealt with?

Anthony McGeehan: If a serious assault charge had been dealt with by, for example, the reporter under that scenario and we were dealing with a freestanding assault charge that would not merit solemn proceedings and the child was, for example, 12 or 13 years old, the presumption is that that case would be dealt with by the reporter. If we look at the considerations that are specified, I would anticipate that that case would continue to be dealt with by the reporter.

You have given a very specific example of a previous serious offence, but the Inspectorate of Prosecution in Scotland recently conducted a thematic report on the prosecution of young persons and that report identified situations where the police reported young persons to the COPFS in error, the police perhaps having inappropriately identified the case as a serious case. The inspectorate identified 11 cases, and in all but one case the prosecutor referred the matter to the reporter—so the prosecutor acts as a gatekeeper to the adult criminal justice system. The prosecutor discussed the matter with the reporter and referred the cases to the reporter as appropriate. There was one case in which proceedings were initiated but thereafter discontinued by the COPFS. The inspectorate has recommended that we, as a system, guard against any inadvertent net widening and that is a recommendation that we have accepted and that we are taking forward with Police Scotland.

Fulton MacGregor: That is very helpful.

The Solicitor General: Repeat offending and escalation of offending is just the type of matter that will be discussed one to one between the procurator fiscal and the reporter, so that the reporter can give his or her view on progress that the child is making under the supervision requirements and whether they want to keep the child to continue that good work, notwithstanding further offending.

There will be cases, however—I think that the Lord Advocate has had personal experience of one such case, albeit historical—in which notwithstanding the work that the hearings system is doing with a child, offending is nevertheless increasing, and risk of harm to that person and to victims is increasing. We have a responsibility in the public interest to have those close and detailed conversations, but where that risk is escalating to a point at which the children's hearings system cannot adequately address that behaviour, a judgment has to be made about whether the time has come for an adult criminal justice response. There are cases, sadly, as the Lord Advocate referenced in his opening remarks, of serious and escalating and very worrying risky behaviour, which we need to discuss and do the right thing by.

Oliver Mundell (Dumfriesshire) (Con): Lord Advocate, do you still believe that it is in the public interest to prosecute 12, 13, 14 and 15-year-olds for those serious offences that you and the other panellists have outlined? I want to be absolutely clear about that.

The Lord Advocate: In the cases that we prosecute in which the children are of that age, my view is that it is in the public interest that we prosecute those cases within the system that we currently have. As I said in my opening remarks, nothing in the information that we have given suggests that we should set our face against looking at increasing the age. However, it suggests that before we could decide to remove the capacity to prosecute those cases, we would need to address with some care how we equip our system as a whole to deal with each of those cases appropriately and confidently—and fairly, because we must always keep that in our minds as well.

Oliver Mundell: Would your advice to the committee and the Parliament, when we are looking at the amendments that propose increasing the age to 14 or 16, be that it is more important to do that work first than to blindly agree to those amendments? Is that what you are saying?

The Lord Advocate: I would never suggest that the Parliament act blindly, but my view is that the work needs to be done first. We must remember the substantial work that was done across a number of agencies in order to equip us to produce the bill that is before the committee. I support the bill because of the work that has been done to give us the confidence that the system as a whole is equipped to accommodate and deal with the general principles that have been agreed in relation to the bill.

It is important that we address the range of issues that will need to be considered before we decide to increase the age of criminal responsibility or, indeed, to remove the opportunity to prosecute the kind of cases that I, and the Solicitor General and Anthony McGeehan, have referred to.

Oliver Mundell: I probably know the answer to this question, but I want to put it on the record. Are you fully confident that our current system with the proposed bill will comply with all our international obligations?

The Lord Advocate: I am satisfied that it does so.

Oliver Mundell: How do you respond to the recent comments from the United Nations that

have been highlighted to the committee and the Government?

The Lord Advocate: Those comments were brought forward in the context of the United Nations Committee on the Rights of the Child's draft "General Comment No 24: Children's Rights in Juvenile Justice", which recommends—it is important to look at the wording, if I can find it—that consideration be given to raising the age to 14.

Draft general comment 24 states:

"States parties are encouraged to increase their minimum age to at least 14 years of age."

Our international obligations are set out in the UNCRC itself. The precise legal status of general comments is a matter of some debate, although I would certainly encourage the committee to take seriously and to take fully into account anything that is said in a general comment that has been approved. The current general comment, of course, recommends 12 years of age but the draft general comment recommends, or encourages, an increase in the minimum age to at least 14. It is important to keep in mind that the general comments are not focused on any particular legal system.

Ultimately, it is the responsibility of this Parliament and the Government to ensure that we implement all our international obligations, including our obligations on the effective investigation and prosecution of crime and our obligations on the rights of victims, as well as respecting our obligations under the UNCRC. It is precisely because it is ultimately for this Parliament to fulfil those obligations, or to secure a fulfilment for those obligations in our system, with all its very particular features, that I would support the work that will be necessary to consider whether we can raise the age to 14.

It is absolutely right that that work should be done, not least because of the encouragement that is given by the draft general comment, assuming that it is adopted. It is right that that work be done, but it seems to me correct that it should be done and carefully considered in the light of the way our system operates and that we look carefully at what adjustments we might need to make in different parts of our system before we—the people who are responsible for implementing human rights within our system, as parliamentarians, as prosecutors and as the Government—make that decision.

Oliver Mundell: Other members may have further questions on that, but I have a final question on something slightly different. It is about offence grounds, where cases are being referred, and the burden of proof. We have heard from a few witnesses and in a few submissions that there is concern, particularly for more serious offences, about the difference between cases being considered on the balance of probabilities and their being beyond reasonable doubt. If things go out to the children's reporter, would it concern you that there might be young people who are not necessarily picking up a criminal record but who could be being accused of quite serious offences without having the same legal protection?

The Lord Advocate: It is inherent in removing the offence ground that the activity is no longer considered to be a crime, and that then has consequences that have to be thought through. That is part of the context in which the bill contains provisions, as the committee appreciates, to deal with the investigation of such behaviour. The behaviour is no longer regarded as criminal and cannot be investigated as a crime; therefore, the police have to have appropriate investigative powers to ensure that harmful behaviour can be appropriately addressed.

It is a feature of our current system that there is a burden or standard of proof before a criminal offence can be established and that, of course, is a protection for the accused.

09:45

Oliver Mundell: If it was established as a matter of fact, for example, that a young person had killed someone, are you comfortable that that decision could be taken by an official Government-approved process just on the balance of probabilities? Would that create further concern, particularly as the age creeps upwards?

The Lord Advocate: Again, it comes back first to the consequences of that finding. If we are dealing with a child who is below the age at which we consider that a child has the capacity to commit a criminal offence and the outcome of such a finding has no criminal consequences for that child, it may be acceptable for that to be established on the balance of probabilities so that the child's behaviour can be appropriately addressed. That is really the essence of the proposal. It is undoubtedly the case that as the age of criminal responsibility goes up and we are dealing with older cohorts, anyone with experience of children will appreciate that not only does the incidence of harmful behaviour increase—our statistics show that—but the meaning of what has been done changes.

Mary Fee (West Scotland) (Lab): My question, which concerns capacity, follows on quite nicely from the line of questioning that Oliver Mundell opened up. I am interested in how the criminal justice system assesses a young person's capacity to understand the consequences of what they have done. We have heard a lot of evidence

that young people develop differently, and young people can be in their 20s before they fully understand the consequences of their actions. I accept that young people can understand the difference between right and wrong, but understanding the consequences of their actions is a completely different thing.

What tests and assessments are done to help the courts to determine whether a young person fully understands the consequences of their actions? What impact does that have on how the young person is dealt with?

The Lord Advocate: You make an important point. It is a feature of our current system that, because we have options in relation to the cohort of children who are between the age of criminal responsibility and the upper point at which the hearings system can deal with them, there is the opportunity for professional judgment to be exercised by prosecutors informing themselves through discussions of the sort that Anthony McGeehan described about not only the circumstance of the offence but all the factors that the code outlines, including the circumstances of the child. That happens at the stage of deciding the system through which the case should be dealt with. A number of statutory modifications can be made to the court process or to the normal rules that apply, which at least permit the courts to take into account the fact that the accused is a child. For example, we have special measures when a child gives evidence and special measures can apply to a child accused as well as to a child witness.

The court has the power—probably an inherent power, regardless of statute—to make appropriate modifications for the actual trial process. That will be informed by the defence lawyers, who can communicate to the court particular issues in relation to the child. When it comes to a conviction and disposal, the court will have information from social work reports and elsewhere about the child. Disposal options are available, which include the option for the court to refer the matter to be disposed of through the hearings system. Even in the most serious cases, ultimately the court may send the child to be dealt with through the hearings system and there is a particular statutory provision that states that the court may impose custody on a child only if it is satisfied that no other disposal would be appropriate. There is a range of adjustments that are made to the system.

If we are looking at raising the age of criminal responsibility, it may be that that is a side of the equation that needs to be looked at as well as the question whether it is right to deal with such cases through the hearings system. That is to anticipate the kind of work that I think would be needed in order properly to address whether our system will be equipped to deal with this cohort of cases appropriately and confidently.

The Solicitor General: The Scottish Sentencing Council is engaged in a piece of work on sentencing practice in relation to children and young offenders. I am aware that that is very much driven by UNCRC considerations, as well as broader public interest considerations. I do not know whether Mary Fee may have been getting at whether, in deciding whether to prosecute in the first place, we take into account the fact that a child did not realise, or took no account of, the consequences. That is another good and interesting question, because the capacity to understand that one is committing a criminal offence is slightly different from and sits alongside a recklessness or an ignorance of the consequences or a lack of capacity to understand the consequences. That would not necessarily mean that we would not prosecute.

Mary Fee: But how do you determine that? What do you take into account?

The Solicitor General: If the child has been in contact with the hearings system, we would have the conversation that Anthony McGeehan was talking about. I have had a long meeting with one of our lead prosecutors who does this work on a daily basis, so I am confident that those discussions are full and detailed. We get whatever information we can from whatever public agency has dealt with that child before, whether it is the hearings system, or through the police, the family, the schools, teachers and so on. In appropriate cases, we would have a psychological examination carried out.

Mary Fee: Can you explain what you mean by “in appropriate cases”? I take it that a psychological assessment is not routinely done of a young person who has committed a crime.

The Solicitor General: There is not a specific psychological report on every child who is reported to us jointly in relation to a criminal offence.

Mary Fee: Given the wealth of evidence there is that children develop differently and that young people’s ability to understand the consequences can sometimes, as I said earlier, come in their late teens or early 20s, why is a psychological test not a routine part of the assessment process?

The Solicitor General: You made the point that children are different and need to be looked at as individuals, in individual circumstances. It depends on the background, the circumstances and the child. There is no need for a universal test of that kind before the kind of decisions that we make in consultation with the reporter, the police and so on.

The Lord Advocate: It is important that we factor in all the circumstances, which must include factors such as the gravity, seriousness and nature of the crime. For example, in the cohort of cases that I referred to in my opening remarks, we had an individual aged 13 who pled guilty to five charges of assault and robbery or attempted robbery and a theft by housebreaking. It is an interesting question whether one would need to have a psychological assessment to determine whether that is a case that should or should not stay in the criminal justice system.

We had another case in which a 13-year-old was involved in a three-accused premeditated robbery, with knives, of commercial premises. We have an exceptionally serious case involving a 13-year-old who was charged with murder and pled guilty to culpable homicide; there had been a multiple stabbing of the child's foster parent. In that case, the court took the view—given that there is a statutory provision on custodial disposals, it is a view that will have been reached after, I am sure, careful consideration—that the appropriate disposal was a 12-year extended sentence with a seven-year custodial element.

That is quite an important example, because it illustrates that even in that 12-to-14 cohort the appropriate disposal may include measures that extend beyond the child's 18th birthday. As the committee will be aware, the hearings system can impose measures or make orders that last only until the child's 18th birthday. That is one of the issues that I think ought to be looked at carefully as we consider a further increase in the age of criminal responsibility.

Mary Fee: We are now more aware of the impact of adverse childhood experiences, but I am struggling to understand why a child who has committed a crime but who has particularly adverse childhood experiences would still be prosecuted. Who would determine whether a child with significant ACEs would have a psychological assessment? In the adult courts, the defence of diminished responsibility can still be used in certain cases. Young people may not have exactly that defence of diminished responsibility, but is there anything that takes into account the extent to which ACEs have impacted on their understanding and development that would mean that, instead of being prosecuted, they would be diverted somewhere else?

The Lord Advocate: I suppose the point that I have been at pains to emphasise is that our current system is one that supports careful and considered professional judgment and in which the overwhelming bulk of children under 16 who commit offences are dealt with through the hearings system entirely appropriately. I strongly support that system, which has the welfare of the child as the paramount consideration for the hearing.

10:00

I think that what is key about our current system is that it supports informed, careful and considered professional judgment that seeks to do the right thing for each individual case. I say "case" for a reason. In these most serious cases, there is a child who is accused of the crime, and that is in everyone's mind who deals with the case, but there are also victims of the crime and there is a wider public interest. That is one of the reasons why there has to be very careful consideration. As the age goes up, there is a question as to whether a system that treats the welfare of the child as the paramount consideration and excludes all other considerations is appropriate for dealing with such cases. It is for others to make policy on or to consider the policy of that question, but it is a serious question. Indeed, there is a serious set of questions about whether the powers of disposal in the hearings system are adequate to deal with that particular cohort of cases. Again, that is ultimately for others to consider, but it needs to be considered, along with what happens at the age of 18. There is a range of issues that need to be looked at with the same thoroughness with which we have looked at the question of raising the age to 12 before we can safely take that decision and be confident that in doing so we will be meeting all our obligations, not only to the accused child who is at the heart of the case but to victims of crime and the wider public interest.

The Convener: Annie Wells has some questions about victims.

Annie Wells (Glasgow) (Con): The Lord Advocate has answered the question regarding the public interest and age. More thought has to go into that.

Alex Cole-Hamilton (Edinburgh Western) (LD): Good morning, panel. Thank you very much for taking the time to come and see us today.

Lord Advocate, the note of caution that you have sounded today about going further than 12 is one that we have heard before. I think that there is broad support across the majority of stakeholders to see us go further than 12, with the caveat that we do the work first. That is why we have a sunrise clause amendment that would bring in 14 after 12. Gail Ross will ask about that later. On the work that is required, the one step that we have taken on this journey involved lifting the age of criminal prosecution to 12 a number of years ago. What preparatory work was needed for that, and were there any unforeseen consequences after it came in?

The Lord Advocate: I am not familiar with the history of raising the age of prosecution to 12 and the work that was done to prepare for that, but I can certainly look into that if it would be of interest.

Alex Cole-Hamilton: Have there been any cases in which the judiciary have felt, "Goodness, that person should have been tried in a criminal court"? Have there been cases in which the system failed because we lifted the age of criminal prosecution to 12?

The Lord Advocate: Such cases would not come to the attention of the judiciary because it is in the nature of the decision to raise the age of non-prosecution to 12 that all those cases go into the hearings system. I do not know whether any of my colleagues are aware of such cases, but the important point that the data supports is that the incidence of cases of a seriousness that they are jointly reported increases with the age cohort. That is perhaps not a particularly surprising observation. Within these cohorts, the number of cases that are prosecuted changes as the age of the cohort goes up. In the 12 to 14 cohort, a very small number of cases are prosecuted, but they are prosecuted for a good reason and, as I have sought to emphasise, after the most careful consideration. We have to be confident going forward that each of those cases can be dealt with confidently and appropriately within whatever landscape or system we have in place.

The Solicitor General: Anthony McGeehan may be able to correct me or supplement this, but we will continue to receive reports of serious offending by 11-year-olds, particularly in the context of serious sexual offending. As a result of the change to the age of criminal prosecution and the forthcoming change to the age of criminal responsibility, we have to view those reports through a different lens in terms of what we can do with them. I am talking particularly in the context of serious sexual offending that persists for years but started at a very early age and, as the Lord Advocate has already mentioned, is against very young children.

In terms of the incidence of such cases, there has always been and continues to be a limited amount of reporting of serious offending by very young children. We have dealt with those cases within the legal framework and we now are able to lead evidence of that offending without charging those children formally and seeking a conviction. I just mention that to put on the record that such offending is still reported to us.

Alex Cole-Hamilton: That is very useful. Thank you.

I go back to the work that would be required to consider a further uplift in the age of criminal responsibility. There may be a range of factors that we need to consider, but one factor that you have consistently mentioned in this session is what happens when a child commits a crime that is so severe that the nature of the disposal lasts for many years and takes them beyond their 18th birthday. That question has been raised before by stakeholders, and we might need to deal with it by further empowering the children's hearings system or whatever. What solutions would solve that problem?

The Lord Advocate: It would be premature for me to try to formulate answers to that particular question on the hoof. The issue is not straightforward: it envisages a disposal of some sort that is made by a hearings system but which lasts well into what we would regard as adulthood. As the age of criminal responsibility increases, the closer to 18 years of age it gets, the more acute the problem becomes. However, even in the young age group of 12 to 14 that we are discussing, I have been given a couple of examples of cases in which the disposal went beyond the 18th birthday. I am afraid that I will not be able to give you a neat solution. It strikes me as a quite difficult question in policy terms.

However, I do not want to lose sight of two important questions. One is that, in the context of the cases that we are discussing, there is some thinking to be done about what would be required to equip the children's hearings system to deal with the most extreme end of that offending. I use the word "equip" in its broadest sense. What would be required for the hearings system to do that, if that was where we felt that those cases should be dealt with? It may not be simply a matter of formal powers, but does it have the powers that would be necessary to deal appropriately with such offending? The hearings system, of course, has the power to include a secure accommodation authorisation in a compulsory supervision order, but it cannot require that the child be kept in secure accommodation. Lying behind that is the more fundamental issue of principle, which I mentioned in answer to one of Mary Fee's questions, which is whether it is correct—and I raise this simply as a question; I do not propose an answer—that we deal with the cases of the sort that I have described with the welfare of the child as, effectively, the sole consideration, subject only to public protection. There is a very important discussion about that question for us to have collectively as a society.

Alex Cole-Hamilton: I understand that. Forgive me for putting you on the spot, but from what you have said, the problem is not insurmountable. There is a lot of work to be done, but hopefully we will get there.

I know that the convener wants to bring in Gail Ross, but I have a quick question for Anthony

McGeehan about costs. If we shift the workload that is currently dealt with through the criminal courts and the Crown Office and Procurator Fiscal Service entirely to the Scottish Children's Reporter Administration and the children's hearings system, we have heard that there would be a burden of cost on the hearings system. You might not have the figures available right now, but what revenue does your organisation direct at dealing with cases that are jointly referred to both the COPFS and the SCRA?

Anthony McGeehan: I do not have specific figures today. We can work on the cost for individual cases by forum, but there is a challenge in the figures that are available to us. As the Lord Advocate has already indicated, since 2011-12, 1,285 accused persons have been reported who were children aged 12 or 13 at the time of reporting, with only 27 cases raised or proceedings commenced before the courts. However, the COPFS will have invested time and resources not only in the 27 cases in which proceedings were initiated but in our consideration and dialogue with the reporter in relation to the most appropriate outcome in the remaining cases. It may be quite a difficult figure to confidently state, but we have the data for the numbers of cases that were reported to us and the numbers of cases that we commenced proceedings on. We could work on some broad figures, as we would do for any other change.

Alex Cole-Hamilton: That would be very helpful in terms of the preparation of the financial memorandum. It would be great if you could provide any clarity on that.

Gail Ross (Caithness, Sutherland and Ross) (SNP): As usual when you go last, I will sweep up a couple of points. I thank the panel for their evidence. We can read about the issues on paper, but your evidence has given a real-life angle, which is always extremely important for us.

I want to go back to the point about the victims in serious cases. How do we deal with the public perception? If we raise the age beyond 12 to 14 or 16, how can we reassure the public that serious cases will still be dealt with in the manner that they are dealt with at the moment?

The Lord Advocate: That is an important point. I will make two observations in answer to it. First, there is the issue of the broad public perception of the system and confidence in it. It is, of course, immensely important that public confidence in the system as a whole is supported and maintained. That is one reason why it seems to me that it is really important to do the spade work before taking a decision on the issue. One of the reasons that the Scottish Law Commission gave for retaining the right to prosecute children is that that enhances confidence in both parts of the system. Lord Kilbrandon also recommended that that should be retained.

There is the general question of maintaining public confidence in the system. Ultimately, I am not an expert on how to maintain public confidence—that is a matter that you will no doubt want to consider—but from my perspective the important thing is to do the work and put the mechanisms, powers and structures in place to ensure that, however we configure the system, if it requires to be reconfigured for the cohort that we are talking about, the public can have confidence that every case, including the most serious, will be dealt with appropriately.

Secondly, it is also important not to lose sight of the individual victims of crimes. Because prosecutors have to have conversations with the victims of crime about the way in which cases are dealt with, in contemplating raising the age of criminal responsibility, we are acutely conscious that, if one is dealing with a serious assault or a rape, one is contemplating saying to the victim, "What happened to you was not a crime and it's going to be dealt with in another way." Ultimately, we have to make decisions that are in the public interest but, when thinking about the public confidence in the system, one has to consider the responsibility that we have to victims to have a system in which what has been done to them can be explained to them in an appropriate way.

I do not know whether Alison Di Rollo or Anthony McGeehan wants to add anything.

10:15

The Solicitor General: It is a really important point. We have come a long way as a society and we now have a real appreciation of adverse childhood experiences, which Mary Fee asked about, as well as the need to prevent offending in the first place and to get it right for every child. However, the Lord Advocate is absolutely right that, when a life has been taken, a child has been raped or somebody has been left with life-changing injuries, it is difficult to tell the person who has lived the experience of that assault, "He is a child—he didn't know what he was doing or he didn't appreciate the consequences." It is very difficult to convey that message and to set the scene and explain why certain actions are being taken short of the victim's expectations.

Nevertheless, I have to say—again, from personal experience—that, equally, victims understand the need for action to be taken so that nobody else has to go through what they went through. Victims can have an intelligent understanding of what we need to do in response to that offending in the wider public interest. We need to get across the message that dealing with

a child in a welfare system addresses those needs and has a better chance of preventing reoffending. That is one part of the narrative that could usefully be developed.

The Lord Advocate: I have another important point to add to that. In other parts of our system, crimes are committed and the perpetrator cannot be held responsible. If the perpetrator is incapable through mental illness, he or she will not be held responsible for the crime, but it remains a crime. Equally, with cases where the child is below 12, we cannot prosecute. It is characterised as a crime that cannot be prosecuted through the criminal courts. We are familiar with the idea of crimes being committed where, for good reasons, the perpetrator cannot be held responsible.

One consequence of raising the age of criminal responsibility is that, for good reason, in relation to the children under 12 to whom the bill relates, we proceed on the basis that the child is incapable of committing a crime. Essentially, it is not a crime, which is why we have the investigative powers in the bill so that the police can still investigate the matter, even though we do not think of it as a crime.

As the Solicitor General says, we may need to think carefully about how we characterise harmful behaviour in relation to different age cohorts and develop a strong narrative about the response to that behaviour that is most effective and most appropriate for dealing with the case but that continues to command confidence in the way that I would like to think our system currently does.

Gail Ross: On the sunrise clause amendment that Alex Cole-Hamilton mentioned, if we were to go straight to increasing the age to 14, there would need to be a timescale to do the work. Under that clause, we would increase the age to 12 now, because the work on that has been done and it is extremely in depth and took a lot of time. Should there be a timescale for moving to a higher age, whether it is 14 or 16, depending on what the research bears out? Would that concentrate minds or would it be an unnecessary burden? Given that research has already been done on increasing the age to 12, would the same amount of research have to be done to increase it further, or would you be able to draw on some of the existing evidence?

The Lord Advocate: It would not be right for me to try to be prescriptive about the nature, scope and scale of the work that will be needed. I can identify some of the questions that would need to be thought about. I am afraid that it is for others—particularly, ministers with direct policy responsibility—to help the committee on the process that would be required and possible timescales for it.

The Solicitor General: To follow on from Malcolm Schaffer's evidence to the committee last week, we can certainly commit to working co-operatively and to providing whatever data is needed and further insights from professional prosecutors.

There are different issues with 12 and 13-year-olds compared to the issues with 11-year-olds, and there are still more different issues in relation to 14 and 15-year-olds, relating to numbers, character and legal issues. Therefore, it is not necessarily about just a little bit of supplementary work to the work that the advisory group did on younger people. As the Lord Advocate said, as the age gets closer to the age up to which the children's hearings system can deal with people, the issues get knottier and there are more of them.

We were discussing this issue before we came in to the meeting. For all sorts of reasons, the bill is part of a direction of travel that we as prosecutors are committed to taking to reduce the number of children in the criminal justice system. Gail Ross asked about getting the work done. From my experience of working in the area, there is a sense of urgency, so I think that there would be a will to do the work quickly but thoroughly.

The Convener: That brings our questions to the first panel to a close, so I thank our witnesses very much for their evidence. I suspend the meeting briefly to allow the witnesses to change over.

10:22

Meeting suspended.

10:26

On resuming—

The Convener: I welcome Bruce Adamson, Children and Young People's Commissioner Scotland, and invite the commissioner to make an opening statement of up to five minutes.

Bruce Adamson (Children and Young People's Commissioner Scotland): Thank you, convener, and happy new year to the committee.

This year is an important one in children's rights terms. It is the 30th anniversary of the UN Convention on the Rights of the Child, which is the international commitment that we made to all children to create a legal framework so that they could all grow up in an environment of happiness, love and understanding.

That speaks very importantly to the work that this committee has been doing on the age of criminal responsibility. Our commitment to children and young people is to keep them all safe, to support them and to keep them from harm, but also, when they conduct harmful behaviour, to

make sure that they are treated as children. In particular, article 40 of the UN Convention on the Rights of the Child calls on all states to treat children who are in conflict with the law in a manner consistent with the child's rights and respect for the child's sense of dignity and worth, and which reinforces their respect for the human rights and fundamental freedoms of others, taking into account their age and the desirability of promoting their reintegration and their assuming a constructive role in society.

The age of criminal responsibility is an essential part of that. When we are talking about the harmful behaviour of children and young people, we should see that primarily as a failure of the state; things have gone wrong with the support that the child has had. It concerns me that we sometimes seem to suggest that such harmful behaviour should be an individual responsibility and that the child should be held accountable as if that behaviour was not part of a broader failure. As a number of committee members have said, our growing understanding of adverse childhood experiences and the complexity of some children's lives means that our focus should be very much on what has happened in the child's life and treating them as a child.

This is something that the international community has been particularly focused on over the past 30 years. We have spoken about the draft general comment that is currently being considered in Geneva, but it is much broader than that. At the United Nations level, the Human Rights Council—the charter side of the United Nations made up of other member states—has consistently challenged the position in Scotland and the United Kingdom about our very low age of criminal responsibility. The UN Committee on the Rights of the Child has consistently condemned the fact that Scotland and the UK have an age of criminal responsibility of eight. This committee will take evidence later today from Ann Skelton, a very distinguished human rights defender and member of the UN committee, about that committee's work.

Over a decade ago, the UN Committee on the Rights of the Child developed general comment 10, where it said that, taking into account all of the considerable international evidence, 12 was the absolute minimum and that, based on that strong evidence, the UN committee's consideration of global trends and our growing understanding of children and young people, 14 or 16 was delivering better results in keeping people safe, reducing crime and treating children and young people as children.

10:30

We have known for a long time about the revision of the general comment, which Ann Skelton will speak to this afternoon. The UN committee was very concerned that states were misinterpreting the general comments to mean that 12 was a target. It was never intended to be so, and the UN committee will be very clear that 14 is the minimum standard for all states parties to the UN Convention on the Rights of the Child.

The UN committee is meeting in Geneva as we speak, and it is expected that it will approve that general comment revision, either in this session or, at the latest, in the next session. All of the evidence that has gone into that is available on the UN's website.

At the Council of Europe level, the Parliamentary Assembly of the Council of Europe was very clear that for European countries and the 47 members of the Council of Europe, 14 was the standard in 2014, so for European countries, including the UK, that was the standard. As the committee is aware, the Council of Europe's Commissioner for Human Rights, Dunja Mijatović, has directly engaged both with ministers and this committee to express her concern that Scotland is not following the Council of Europe's standard, which has been 14 since at least 2014. The international community could not have been clearer that 14 was the minimum standard, based on all of the international evidence, and that we should look to go further, because the evidence supports that.

The domestic evidence is strong. The additional information that the committee has received from a number of distinguished bodies across civil society and academia in Scotland strongly supports raising the age of criminal responsibility beyond what is currently in the bill. I think that 14 is where we should be, with a view to looking to 16.

The Edinburgh study shows that the global evidence that the UN and the Council of Europe looked at is true in Scotland, so we have domestic evidence. The committee has also heard directly from children and young people, and adults who entered the criminal justice system as young people. All of that speaks very strongly to consideration being given to moving further than the current proposal of 12.

Alex Cole-Hamilton: In this second tranche of evidence that we have taken, there has been broad support from stakeholders to go further than 12, as you have described. The one note of caution that has been sounded, which was repeated in the session that you have just heard from the Lord Advocate, is about the requirement to do some work. There was anxiety among parties that the first original advisory group that got us prepared for 12 took a number of years to do that work. You were not personally involved in the parameters of that original advisory group, but

your office was, and I am sure that the organisational memory comes with you. Was the group told to stop at 12? Did it take that long because it was told that it did not have to rush and that it was required to report back within the next two or three years? Was it because the work was very intense? Or was it because its members were just very busy people? Why did it take so long to do that prep work?

Bruce Adamson: It was an issue of regret that the Government framed the advisory group's remit in such a way as to restrict its consideration to 12. I think that that was a mistake and, to some extent, that mistake has led us to where we are now.

My understanding is that the timeframe was not that long for the actual work of the advisory group. Although the work of the group was able to be done reasonably quickly, the follow-up response—drafting and introducing the bill—took a period of time.

I have reflected on that institutional memory in my office, but I have also spoken to a number of the advisory group members, many of whom supported raising the age of criminal responsibility higher than 12 and kept that in mind. The advisory group was breaking new ground. It was a long time since we had looked at what it would practically mean to raise the age of criminal responsibility, so the group was starting to unpick that, to look at what some of the unforeseen consequences might be and to set up the framework for what a change in the age would mean. All of those things apply equally to a higher age of criminal responsibility.

Where the additional work needs to be done, in my view, is in looking at the resources that need to be provided. We would need to consider the types of cases, the prevalence of cases and what would need to be put in place to support children and young people.

The previous panel made a comment that has been made consistently by civil society organisations, which is that prevention is the key here, and that we need to support children and young people, and their families and communities, to ensure that children and young people do not go on to conduct harmful behaviour. That is how we keep everybody safe. We need to do more work—more work is already being done—on how we do that.

By the time we get to the type of harmful behaviour that we classify as criminal behaviour, something has already gone horribly wrong. We need to look at how to address that. Malcolm Schaffer from the Scottish Children's Reporter Administration spoke last week about the work that needs to be done, which involves looking at the numbers of such cases. That is key. Malcolm suggested that that work would take a period of months, depending on what we were looking at, and he very much focused on the additional resources that would be needed for the SCRA.

There is some work to be done on disposals that relate to children after they are no longer children, and the challenge that we have, in relation perhaps to older children, if the age of criminal responsibility was raised significantly. Older children very quickly move beyond 18 and outwith any disposal available to the children's hearings system. However, that work needs to be set within the context of questions about the purpose of the criminal justice system and of addressing children's harmful behaviour. If the key thing is to ensure that that behaviour is addressed, we know from the evidence that a criminal justice approach does not work as well as a welfare-based approach. The additional work needs to be focused on the welfare-based things that we need to put in.

I accept that there is more work to be done, particularly if we are looking for a significant raise in the age of criminal responsibility beyond 14. That might take longer, particularly in respect of strengthening the powers and resources for addressing that harmful behaviour. I would not see a move from 12 to 14 as creating an insurmountable barrier to moving this forward. Fourteen is the minimum international standard, and the international community has been very clear that there is no excuse for having an age of criminal responsibility below 14. It is not compatible with international law. To some extent, it could be seen as showing contempt for international law to pass a law that says that our age of criminal responsibility is 12, when the international community has been so clear that 14 is the lowest that would be acceptable and has engaged Scotland specifically on that.

I think that the move to 14 is necessary and immediate, but I accept that additional work may need to be done to look at an age higher than 14. The timeframe talked about in relation to the amendments, in terms of a sunrise clause, would be sufficient to allow for that to happen.

The Convener: I will briefly interrupt. I want to make it clear that our children's hearings system is not a criminal justice forum but is for rehabilitation and treatment of young people: Malcolm Schaffer was very clear last week that it is not about punishment and retribution, but about treatment and rehabilitation, so we do not want to speak about it as if it was a criminal justice forum.

Bruce Adamson: Absolutely. The European Court of Human Rights has made the point very clearly that although the children's hearings system has some characteristics of a criminal

system, it is a civil system that is based on the welfare of the child being paramount. I think that we should be very proud of it. I was a panel member for 13 years and am very proud of what the children's hearings system does.

I intended to say that we should think more holistically about children who display harmful behaviour. We are talking about children whose harmful behaviour is a product of our failure to give them the support that they need. We should therefore use a welfarist approach, which the evidence shows is most effective. It is right not only in human rights terms to treat the child as a child; the evidence also shows that that is the most effective thing in terms of changing their behaviour.

If we take a criminal justice approach, even as applied by a respectful prosecutorial service such as we have in Scotland—which has presented strong evidence today about the sensitive approach that it takes to prosecution of children—we would still be prosecuting children. A criminal justice approach is contrary to children's human rights, especially those of younger children, and will not deliver the results that we need. A welfare approach delivers better results: the evidence from a number of domestic bodies is very strong on that.

Alex Cole-Hamilton: Thank you. Further to my first question, are you content that the original advisory group, perhaps with the addition of the procurator fiscal, is sufficient to consider the extra work? Given the joint referrals that a higher age would bring, would the group be sufficiently equipped to deal with the deep dive into the issues, or should a new group with a different membership and remit be established?

Bruce Adamson: I do not have a firm view on that, to be honest. The duty bearers—the agencies that have the information and would need to do the work—should be, and have usefully been, doing that right now, anyway

How best to shape the advisory group to advise the Government is probably a matter for Government. The advisory group as previously formed included exceptional expertise and approached the process with diligence. As I said earlier, it is a matter of significant regret that its remit was as restricted as it was. That was problematic.

Others also have expertise. The key things for me are that we avoid unintended consequences and that we consider all the things that the committee has been asking witnesses about: what would happen in particular for older children; consideration of victims, which always has to be at the forefront of our minds; and the children's needs in securing an effective remedy. Most of that work has been done at conceptual level and is contained within the report, so if we are talking about the move to age 14 or 16—the additional things—I do not think that the barriers are insurmountable.

Alex Cole-Hamilton: Great.

You referred to the letter from the Commissioner for Human Rights of the Council of Europe that the committee received at the weekend. It references an exchange on this subject between the commissioner and the minister. The minister replied to the commissioner stating that we have a unique situation in Scotland: that our children's hearings system is well regarded around the world and that we have a lot to be proud of. The commissioner replied that there are unique examples in every country and that our system does not really make us particularly special and does not give us a pass. Do you agree with that assessment? Should our unique children's hearings system, for all its positive aspects, give us a pass that absolves us of responsibility for meeting the international minimum standard?

Bruce Adamson: No. The Council of Europe commissioner's letter to the committee was very clear that the point of international minimum standards is that they apply to everyone—nobody gets an exemption. It is important that we give weight to the UN framework, which Ann Skelton will speak to this afternoon. It is absolutely clear that minimum standards apply regardless of the other good things that you should be doing; it is not the case that if you are doing some good things you are allowed to do bad things, as well. Minimum standards apply across the board. You should be doing the other things as well to ensure that all children who are in conflict with the law are treated as children, and that a welfarist approach is taken.

Many of the things that we have talked about—not just the children's hearings system, but how we approach prosecution—are very strong in children's rights terms and have been recognised as such, but all 47 member states of the Council of Europe and all 193 members of the United Nations have strengths and weaknesses and all have unique systems. Some have fantastic welfare systems for child justice. All of those positive things should be commended, but they do not allow countries then to say that because they have those strengths they are allowed to go below the minimum standard.

We have to be very clear: age 14 is the minimum standard. To use it is not human rights leadership and it is not progressive. It is the minimum standard of the Council of Europe and will very soon be the minimum standard globally. Everyone will have to use it, no matter what else they are doing.

10:45

There is a lot to be proud of in Scotland, but we run a risk that we have seen in other cases in relation to criminal justice. For example, in Cadder v Her Majesty's Advocate it was said that because of other protections that are built into our criminal justice system we did not have to provide the minimum standard of legal representation for a person who was in police custody. The court was very clear that that is not the case. We cannot say just because we are very strong in some protections that the totality allows us to go below a minimum standard.

Fulton MacGregor: I will pick up on Alex Cole-Hamilton's point. As part of my other committee work, the Justice Committee went to Norway to see the barnahus model. One of the questions that came up was about Norway's age of criminal responsibility, which is 15. I was, however, struck to note that Norway has provision within its laws to deal with serious offences criminally, but through the barnahus model. In following on from Alex Cole-Hamilton's point, I wonder whether the Scottish system, the Norwegian system, and probably all systems are essentially at the same place, but the focus is specifically on age rather than on the welfare of the child, which we all want, ultimately. You and I probably share a similar value base on that. Is that something to think about: that the Norwegian system has the same safeguards in place, although the age there is 15?

Bruce Adamson: There are a lot of important points in that. The barnahus system that Scotland is considering is prevalent across the Nordic countries, which generally have a higher age of criminal responsibility. That model is an effective way of addressing serious behaviour, both in terms of supporting victims and of considering the children who display harmful behaviour. In the Icelandic model, which it came from, the age of criminal responsibility is 15. A lot has been written about the challenges in respect of those who are above the age of criminal responsibility having to be treated differently within the system because of the welfarist approach. It is actually harder to work with them because of the risk of criminalisation.

Some countries have a higher age of criminal responsibility, but with exceptions built in. The Government and others have commented on that in their responses, and have said that even although Scotland has a low age of criminal responsibility, we do not generally prosecute because we have the children's hearings system. Some states have a very high age of criminal responsibility, but have lots of exceptions, so in practice the situation is the same.

The United Nations Committee on the Rights of the Child has also condemned such countries strongly. Exceptions should not, in practice, allow a reduction in the age of criminal responsibility. That is equally wrong, especially if the exceptions go below the minimum standard of 12—which will soon be 14 in UN terms, and is already 14 in Council of Europe terms. I also stress that it would be equally wrong to raise the age of criminal responsibility and then put in place a number of exceptions for serious harmful behaviour.

The key is to ensure that children are prevented from conducting harmful behaviour in the first place and, if they do, to ensure that they get the support that will ensure that their behaviour changes in the long term. A welfarist approach is the best way to do that.

Alex Cole-Hamilton: On the work that will be required, which a number of stakeholders have mentioned and to which you have referred, I lodged amendments yesterday for the age being 14 then 16 on a phased-implementation basis. The amendments would answer Malcolm Schaffer's concern that we should not delay in lifting to age 12, and would create a sunrise clause that would lift us to age 14 then 16, 18 months after royal assent. That would give us two years to do the work, with the understanding that there would be a moratorium on imposition of longitudinal criminal records for anyone in the age bracket that we agreed. Would that answer the Council of Europe's concern and meet the urgency with which it has told us to lift to 14? Would that provide whatever working group was established with sufficient time to answer the questions that you have identified?

Bruce Adamson: I suppose that that would depend on which amendments you are talking about. You have lodged a number of amendments. For those that set the age at 12 with a sunrise to 14 in the future, the answer is no. Age 12 is a minimum standard that is more than 10 years old. The idea is that the absolute minimum is 12 years old and that countries should move it upwards. The UN committee is very clear that even 14 should not be the target and that countries should look beyond it.

At Council of Europe level, the commissioner could not have been clearer that age 14 should be implemented immediately—as in now. Anything less than that would be below the standard that is expected by the Council of Europe.

The amendments that Alex Cole-Hamilton lodged would set the age at 14 first, with a view to raising it. That type of progressive and reasonable approach to making sure that the work gets done makes sense, but we think that anything that would delay raising the age of criminal responsibility to 14 is problematic: passing legislation that would endorse the age of 12 would fly directly in the face of all of the international community's engagement.

We should not underestimate the seriousness of international bodies like the UN committee and the Council commissioner engaging directly and publicly. A lot of the work goes on behind the scenes in advance, as in this case. A public letter on the Council of Europe website is a very serious level of intervention. Although the language is diplomatic, we should not underestimate just how much concern there is in the international community about an approach that would lead us to legislation that stated age 12 as the age of criminal responsibility, even if it was to be increased in a few years. For all the reasons that I have set out and have been discussed at length, it is not the right approach. It does not respect children's rights. Also, the message that it would send to 12-year-old children would be really powerful.

Oliver Mundell: You talked about a lot of work going on behind the scenes. When did you first became aware that the UN was planning to issue a new comment? Were you aware that it was looking at age 14 as an absolute minimum?

Bruce Adamson: It has been understood for many years that "General Comment No 10 (2007): Children's rights in juvenile justice" was going to be reviewed. Serious concern was expressed over many years about misinterpretation of current general comment 10, in that some states were not reading the sentence that mentions age 12 in the correct context, which is that it is the absolute minimum right now, that states need to move beyond it, and that no one should move down to age 12. There was concern that some states had sought to reduce their age of criminal responsibility to 12, although most reversed that decision very quickly when they saw that it was not effective.

It has long been understood that the revision was coming and that it would happen this year. I have had conversations with ministers and senior civil servants alerting them to the fact, and I have spoken to members of this committee. We knew that it was coming. What we did not know was the exact timing and that it would pin the age at 14. We knew that the age would be higher than 12. The draft was released at about the same time as Parliament was considering the bill at stage 1, and the actual text was available only to state parties and was made publicly available shortly after that. I did not receive an advance copy. However, we knew that it was coming and we knew the general tenor of it.

At the day of general discussion in Geneva last year, a number of members of the UN committee, including Ann Skelton, Amal Aldoseri and Mikiko Otani, who came to Scotland, had a number of meetings with Scottish ministers, some of which have been made public. It has been very clear for a long time that the change was coming. The timing and the specifics were less clear, but did not come as a surprise. It is very important that we have, as a Council of Europe member state, signed up to the standard. The UN standard is the standard to which 192 of the 193 countries have signed up. We had to focus on that. UN standards are often lower than European ones, based on the nature of membership. We have known for a number of years that age 14 was the Council of Europe standard.

Oliver Mundell: If you gave warnings and if those meetings took place, why did the bill end up being introduced with an age of 12 in a year when there was going to be a revision that was widely known about?

Bruce Adamson: I cannot speak to that and I would not like to speculate, but it has been a source of frustration. When I took up my post just over 18 months ago, the issue was one of the first things that I spoke about. I had serious concerns that we were taking the wrong approach to the long-standing concerns about the age of criminal responsibility and physical punishment of children. I have been public about that and I have raised it in every meeting that I have had with Scottish ministers.

It is a huge frustration to me that we are where we are, that the advisory group's remit was restricted in the way that it was and that we have ended up with a bill that proposes something that is below the international standard. However, I cannot speak to why that has happened. Discussions in this place about what is possible, and the realpolitik of what is acceptable and popular, sometimes come into conflict with human rights standards.

Oliver Mundell: What is your advice to the committee on that? The Lord Advocate talked this morning about public confidence in the system and leaving at least the option of prosecution open, and I felt that he was pretty clear that that was important to the public. What do you say to members of Parliament, who have to balance public interest tests and how the population as a whole feel? Are the views of people who live in Scotland less important than the views of people who sit on UN committees?

Bruce Adamson: I will take your last question separately and answer the broader question first. The Lord Advocate, the Solicitor General and the Crown Office and Procurator Fiscal Service gave important and powerful evidence from a prosecutorial point of view. I started my career as a prosecutor in New Zealand and I think that criminal prosecution certainly has a role, but we are talking about children.

The public discussion and the political discussion that need to be had are about what the purpose is of using the criminal law to address someone's behaviour. If, as I believe and have heard strongly from victims, the purpose is to change children's behaviour, criminal prosecution will not work. The Edinburgh study of youth transitions and crime showed that clearly, and all the international evidence shows that.

The evidence-based view is that a welfare-based approach to dealing with children's behaviour is more effective in dealing with justice, as one of the points of justice is to ensure non-repetition—to ensure that something will not happen to the victim again or to other people and that someone's behaviour will change. That is a fundamental principle of justice. We know that prosecuting a child does not work; it makes recidivism more likely.

That must be part of the discussion. It is not about avoiding responsibility or not addressing the behaviour; it is about the most effective way of changing behaviour. We need to discuss what the criminal justice system adds. We know all the negatives of involving children too early in the criminal justice system. The committee has heard testimony from adults and children who have been affected by lifelong stigmatisation and the impact that that has had. We know the negatives of criminal justice. What does criminalising children add? There is less on that side of the balance.

I agree with some of what the Lord Advocate and the Solicitor General said about needing to address very harmful behaviour that is of serious concern. However, I do not agree that there needs to be a punitive element of retribution, which the criminal justice system delivers and a welfare-based system does not. It is not appropriate or useful to treat children in that way, but there is a job to do in ensuring that we all feel safe.

Children and young people are much more likely to be victims of crime and victims of harm than they are to harm others. Children are often the victims of harmful behaviour by other children. As a most important concern, we need to ensure that children feel safe, that adults feel safe and that we feel confident that we have a system that will address such behaviour. However, I am concerned about the punishment element.

11:00

The right to an effective remedy—the Lord Advocate spoke to that in his opening statement and I spoke to it when I previously gave evidence to the committee—is an important human rights principle that applies to children who are victims, too. That means that we need to have clear powers to ensure that harm and rights breaches are properly investigated and that victims get the support, care and treatment that they need—we need to invest much more heavily in those things. We also need to guarantee non-repetition—it is fundamental that we put in place things that ensure non-repetition. We need to speak about and focus on those things.

In relation to your point about the views of people in Scotland as opposed to the views of the international community, I want to be clear that we are part of the international community and that we were involved in the development of the standards. We have world-leading academics and powerful civil society organisations that have not only been directly involved in the formulation of the UN Convention on the Rights of the Child but engaged in the general comments. That is not foreign to us; we are part of it and proudly so. The experts on the UN Committee on the Rights of the Child—this committee is to hear from Ann Skelton—give the authoritative view on how to interpret the convention. That is based on their comparative experience of looking at lots of countries, which is useful.

I strongly refute the idea that something is being imposed on us. We have been actively engaged in such work. However, a tension sometimes arises in relation to human rights principles, which are inherently not populist. The point of creating a human rights system for children—who do not have the same political power or economic power as adults and who, because of their age and stage of development, are particularly vulnerable to rights abuses—is that, although it is often not the popular thing to do, we need to do it as a society to ensure children's proper development.

The Convener: I will ask a bit about child victims. You were right to point out that children are more likely to be victims of crime than perpetrators of it. Our hearings system bases decisions on the needs of the child who is referred—the child who perpetrated the harmful behaviour. The only means that the reporter has of assuring victims that action has been taken is through the victim information scheme. In your written evidence, you said that you do not think that it is appropriate for the scheme to share even basic information with victims about what action has been taken against the perpetrator. What are your reflections on how well we would represent child victims if we took that position? What do you propose that we should do?

If we think not about punishment or retribution but about the safety of our communities and of children and young people, is it ever appropriate to securely accommodate someone who has engaged in repeated harmful behaviour? I am mindful that the Solicitor General spoke about young people or children committing repeated

sexual offences against other young children. I care about all children deeply and absolutely want such things to be prevented from happening, but we do not have a magic wand that we can wave and have a cut-off point. We need to deal with the reality of what children experience. I am interested to hear your reflections on those points.

Bruce Adamson: Both points are important. A lot of work has been done on the experience of child victims—not least some of the work that has been done on historical abuse and the human rights framework that the Scottish Human Rights Commission created, which looks at the experience of being a victim, working with survivors and what needs to be put in place. That is a complex thing that involves lots of aspects, but it is strongly focused on non-repetition being understood.

One of the things that we need to do to support victims—particularly children's victims—is listen to them. When we listen to them, they say strongly that they do not get enough support—we do not have in place support systems—and they talk about needing the guarantees that they will get what they need to move forward and that they can have confidence that we are addressing the behaviour. The voice of victims is important.

The Convener: I will jump in. You said that it is important for children to have confidence that we are addressing the behaviour that has been exacted on them. I want to push you to be a bit more specific. I do not disagree with anything that you have said, but if we are not sharing information with child victims through our existing victim information scheme, how do we do that? How can a child who has been the victim of a rape or a serious assault have confidence that the person who has subjected them to that behaviour—

Bruce Adamson: What is really important is that general information is available that says, "This is how the issue will be approached, and this is how we will ensure your safety," and that there is a focus on the victim that involves saying to them, "These are the things that we'll do to make sure that you're safe". A lot of that work is done outwith the children's hearings system.

On your other point, I have some concerns about the sharing of information. Again, the issue is addressed in the UN's general comment and by the Council of Europe; it is a case of ensuring that a child who has contact with the criminal justice system is not further stigmatised. Strong protections need to be put in place around media reporting and ensuring that there will not be community-based reprisals. That information needs to be highly restricted, because the consequences can be—

The Convener: Forgive me, but it sounds as though that is all about the perpetrators of the harmful behaviour. I care about them, but I am asking you about the victims of that behaviour.

Bruce Adamson: More work might need to be done on what is useful for the victim to know and how they feel about knowing exactly what has happened to the perpetrator. It probably depends on the victim but, at a societal level, a careful balance needs to be struck between their knowing exactly what has happened, as opposed to their knowing that action has been taken and protections have been put in place—I am talking about the general versus the specific.

The Convener: Have you done any consultation with victims about the specific information that they would want that you can point to?

Bruce Adamson: Extensive consultation was done throughout the SHRC's work on a framework in relation to historic abuse. Extensive work has been done both at international level and through that work on the experiences of victims.

The Convener: Was that with adults?

Bruce Adamson: That was with adults who had been victims of abuse as children.

Work has been done by a number of the bodies that have made submissions on their work with victims. Victims organisations can speak to that, as well. The balance that the Parliament needs to strike is between ensuring that victims have the right to an effective remedy, which includes assurances about what has happened, that there has been proper investigation and that action has been taken, and making sure that the right to respect for private and family life and the right to be treated as a child for children who have conducted harmful behaviour are respected. There is a balance to be struck there.

The Convener: Could you address my point about community safety and securely accommodating repeat perpetrators, bearing in mind the impact on victims?

Bruce Adamson: Could you remind me of the question?

The Convener: I do not know whether I will be able to remember my exact words. We have talked a lot about welfare and rehabilitation. As the children's commissioner and children's champion, do you believe that there is ever a case for protecting community safety by dealing with younger people by securely accommodating them?

Bruce Adamson: Yes, there is, but the decision to secure a young person needs to be based on their welfare. There are some cases in which, if a

young person is at risk of harming themselves or others and no community-based approach is going to work—we have some very good intensive support and monitoring work—as an absolute last resort, the only way of ensuring their safety and the safety of others is to put them into a welfare-based supportive environment that is secure. It is absolutely key that it is secure accommodation, as we have in the children's hearings system, but it must be secure from the point of view of their welfare, to ensure that they do not harm themselves or others, rather than being based on a criminal justice model.

I do not want to stray into other areas, but there are significant concerns about children ending up in prisons. There are discussions going on in other committees and in the Parliament and more broadly about the deep concerns that exist about children ending up in Polmont and the devastating consequences of youth suicide and the harm that is caused by children ending up in a criminal justice setting, which is not appropriate. A secure setting that is based on looking after their welfare by ensuring that they get the support and the treatment that they need absolutely is appropriate, as a last resort.

The Convener: Thank you. Mary Fee is next.

Forgive me—because I asked a question and was listening to the answer, I was not convening properly and did not notice that Annie Wells had a supplementary.

Annie Wells: In response to our second request for evidence, Victim Support Scotland said that it believes that having an age of criminal responsibility of 12 strikes the right balance. If we are to bring the public along with us and we want to be victim centred, do you think that more work needs to be done with victims on the information that will be provided and what they will get from it?

Bruce Adamson: Support for victims more generally and for child victims is absolutely essential, because we are not getting that right in Scotland. I do not think that that is necessarily linked exclusively to the age of criminal responsibility. More generally, those who suffer harm need more support. We are not doing as well as we should on that, so we need to put more resource into supporting victims. There is some work to do in following up on the understanding of the welfare-based approach being more effective and the limits of the criminal justice system. I think that victims—this is certainly the case with the ones I have spoken to and worked with—are very attuned to that. The punishment element that the criminal justice system provides is often less of a concern of most of the victims I have spoken to than the idea of ensuring non-repetition.

We certainly need more investment in victim services. We must make sure that victims' voices are strongly heard, but the same is true in all other countries. That is well understood and is spoken to in the international work that has been done. The way forward is to ensure that such work is done directly with victims and with Victim Support Scotland and the other organisations that do such a great job in supporting them. It is a case of investing more in direct support for victims and ensuring the right to an effective remedy that they are guaranteed.

Mary Fee: I wanted to ask you about capacity and understanding and the use of psychological assessments. You will have heard the responses that the members of the first panel gave to those questions. When Malcolm Schaffer gave evidence last week, I asked him the same question about the use of psychological assessments. His answer was:

"The honest answer is that I do not believe that such assessments are done sufficiently at present, and the approach can vary very much".—[*Official Report, Equalities and Human Rights Committee,* 10 January 2019; c 9.]

What is your view on the use of psychological assessments and the benefits that they can bring? If psychological assessments were more routinely carried out to determine capacity and understanding, would that alter the way in which young people are treated? Would it help to strengthen the GIRFEC and welfare-based approach that we have?

11:15

Bruce Adamson: The fact that our understanding of child and adolescent development has grown a lot over recent decades is really important. Our understanding is much better than the one that we had 10 years ago, and it is certainly much better than the one that we had 20 or 30 years ago. The more we can do to help understand a child and their developing capacity, the better.

One point that has come through strongly and consistently in the discussions that I have had with children across Scotland—as you have heard me say before, I have the best job in the world, because I get to spend a great deal of time with children and young people across the country—not just in relation to criminal justice, is that we are failing children in mental health terms, because children are not getting the mental health support that they need. That flows through from the general level right through to the specific when we talk about acute mental illness and child and adolescent mental health services, but also in relation to criminal justice. We need to do much better in understanding what is happening with

children and young people and providing support at an earlier stage and building up understanding.

The specific assessments that you are talking about are very useful and underutilised, but I think that they might be part of a broader package. When we make decisions about how to support a child or a young person who has conducted harmful behaviour, we need all the evidence that is available. There should be more focus on looking at their development and the link to ACEs that was mentioned earlier, and understanding the child holistically. That is what the UN convention talks so strongly about in the preamble; it talks about the idea of the child growing up in an environment of "happiness, love and understanding". That "understanding" bit is really important. When we make decisions about children, we need to do it from the premise that we understand them, and the failures of the state that lead up to children conducting harmful behaviour need to be set within that context.

The more that we can do to help those decision makers who are tasked with supporting a child to not undertake further harmful behaviour and to address other serious issues, the better. It is probably not just psychological assessments that are required; they should be part of a broader suite of information to help us to understand children and young people.

Mary Fee: But when it comes to young people in the context of the criminal justice system, do you think that the carrying out of a psychological assessment should be compulsory in helping to determine the approach that should be taken, or should it be discretionary and left to the prosecutors?

Bruce Adamson: When the Lord Advocate answered the question earlier, he said that such an assessment would not be needed for a case of breaking and entering. What is important is that we have all the information that is necessary. My view is that we should not be prosecuting such children—the criminal justice system is not the right place for them—but if we continue to put children into the criminal justice system, we absolutely need to have an understanding of them as children to support prosecutorial decisions.

I have a huge deal of respect for the prosecution service that we have in Scotland. I met the Lord Advocate and the Solicitor General just before Christmas, and there has been a recent inspection report on the prosecution of children. I would certainly not want anything that I say to be seen as a criticism of prosecutorial services, which I think are very good in Scotland; I just do not think that we should be putting children into that system.

Would a compulsory requirement to have a psychological assessment carried out help to inform that decision? I think that it probably would, but I would cede to the experience of Scottish prosecutors in saying that they do not think that that would work. In human rights terms, the important thing is treating children as children. If having compulsory reports would help us to do that better, that makes sense to me, but I probably do not have enough knowledge of the specifics of when prosecutors would not use one at the moment or of whether creating an additional burden to produce such reports might not be suitable.

I am sorry; I have not really answered your question, but that is because I probably lack the knowledge of the previous panel.

Mary Fee: That is fine. Thank you.

Fulton MacGregor: I have a very brief supplementary on Mary Fee's point. I would like to elaborate on what you said. Psychological assessments do not come without risks; they are not non-intrusive in nature. Although I agree with the general thrust of Mary Fee's argument, I would not suspect that a universal approach is the best way forward, because such assessments could inflict trauma. Do you agree that they would need to be managed carefully?

Bruce Adamson: Yes—I think that there would be general agreement on that. Earlier, you referenced the barnahus approach, which we are learning a lot from in recognising that children who are victims—but also those who offend, who come into the criminal justice system—are results of multiple failures by the state to give them the right support. By the nature of that type of behaviour, something has gone wrong; we have failed. We need to get the information that we need to investigate properly, for the sake of the victim and to avoid repetition. We also need to get it to assess how best to address that behaviour, but we need to do so in a very sensitive way. There are highly skilled practitioners out there, and things such as the barnahus model, which addresses not just victims but offenders, are very useful.

I will refer to my previous answer by saying that, as far as universalism is concerned, there might be cases where psychological assessment is not appropriate, but I do not have the knowledge to give an informed answer on that.

Gail Ross: Thank you for your evidence so far. We are looking at increasing the age of criminal responsibility to 12. An amendment has been lodged that would increase it to 12 right away and raise it higher—to 14 or 16—within a certain period. Last week, we heard from Malcolm Schaffer that the best thing to do is to raise it to 12 now, do the work and raise it further later on.

In your evidence this morning, you have said that additional work and resources are needed in

order to speak to victims and learn what they feel and what they want to be put in place, that there needs to be better mental health provision, that we need to work on a welfare-based approach, that there needs to be more work in the community to ensure community safety and that support systems need to be put in place. Is it not right and proper that we raise the age of criminal responsibility to 12 and do all of that work with a view to raising it higher?

Bruce Adamson: All of that work should be done anyway, even if we were not having this discussion. It is more general work that needs to be done. My clear view, based on the international evidence and the strong and consistent view of all the international bodies that are experts in the area, is that nothing below 14 is acceptable. It would be very concerning if this Parliament passed a piece of law that set an age that was below the international minimum, and particularly below the European minimum. The Council of Europe's commissioner is very clear in her letter to the committee on the matter.

On a commitment to raise the age higher in future, my view is that there is enough time to have that work done before implementation of the provisions in the bill. Parliament should be confident that in particular the age of 14, which is the absolute minimum, could be set now and the work done in time for implementation. The bill will still take some time to get through Parliament, but a lot of that broader work is already happening.

I would be very concerned about this Parliament sending a statement that increasing the age to 12 is all that we can do in Scotland at present, because that is below the international standard. The amendments that have been lodged to increase the age to 16 bear further consideration. I would not support increasing the age to 12 on implementation with a sunrise clause to increase it to 14. I would support increasing it to 14 on implementation with a sunrise clause to increase it to 16.

Gail Ross: Would you say that the evidence from the children's reporter, the Crown Office and Procurator Fiscal Service, the Lord Advocate and the Solicitor General—the people who deal with the cases on the ground—is wrong in what it says about increasing the age to 12 now and then raising it further?

Bruce Adamson: I am not saying that they are wrong in saying that the work needs to be done within the timeframe. However, even if the committee takes a decision at stage 2, there will still be time before stage 3 and the implementation date that will be set at some stage in the future. I think that that will allow sufficient time.

Where I possibly take a different view, but with great respect to Malcolm Schaffer, is on the idea that the best way to immediately address the issue of those aged up to 12 is to put that age in place now and secure it before going further. I think that there is enough time before implementation. I would be very concerned if we set the age at 12 now, even with delayed implementation of 14, because that would send out the wrong message.

The international community has been clear, the rights principles are clear and the reasons for changing the age are clear. If we are talking about needing to put some practice things in place, we just need to get on with that.

I want to be really clear that the intention behind doing that additional work is to make sure that the change works in practice. It is not to inform a decision about whether to change the age, so I think that we can put in the resources to make sure that all those broader things are done.

Particularly at 14, we are talking about very small numbers. We are talking about some serious and concerning harmful behaviour, but the numbers are quite small at 14. They are higher at 16. The evidence has been consistent that a move to 14 is easier than a move to 16, but my firm view is that 14 is the European standard and will soon be the international standard. If this Parliament was to pass a piece of law that said that Scotland and its representatives think that 12 is the right age, even if that was time limited, I would have real concerns about that.

This is not something new. This is not a new standard that has just been developed. This has been around for a long time, and this debate has been around for a long time. I have looked back at some of the early debates that took place 20 years ago, and this debate has been live since the reopening of the Scottish Parliament. In the year 2000, members expressed concern that we were in breach of our human rights obligations. That has been a consistent message, and I am hugely concerned that, if the result is that we come in below the minimum standard, even for two years, that will not serve Scotland's children.

Oliver Mundell: You referenced the debate from 20 years ago. I asked you a similar question when you previously appeared before the committee, but is it not the case that, if we push too hard, we will end up not taking the issue forward at all? We have heard several times, including today, how much work has gone in to get us to increasing the age to 12. Is all of that to be discounted in the hope of getting to 14 or 16? Does 12 not represent an improvement and should we not state that up front?

Bruce Adamson: It is not to reject the important and hard work that has been done. It is to reflect

the fact that that work applies equally to a higher age. My job as the children's commissioner is to promote and safeguard the rights of children and young people. Other people have different roles. It would be remiss of me in my role if I recommended to this Parliament an age of criminal responsibility that was below the international standard.

We should bear in mind—I know that I am at risk of repeating myself—that the international standard is an absolute minimum. We are not discussing something that is incredibly progressive. Fourteen is the absolute minimum. In my view, the case for it is incredibly strong, both internationally and domestically. I appreciate that others have different roles and that getting the bill passed is important as well, but my role as the children's commissioner is to advise you on what children's human rights demand, and 14 is the absolute minimum.

The Convener: Thank you for your evidence this morning, commissioner.

The committee has already agreed to consider the evidence in private, so we will move into private session. I ask for the public gallery to be cleared. After our consideration of the evidence, the committee will reconvene not before 1.15 pm in committee room 1, where it will take evidence via videoconference from Professor Ann Skelton of the United Nations Committee on the Rights of the Child.

11:28

Meeting continued in private.

11:33

Meeting suspended.

13:17

On resuming—

The Convener: Good afternoon, everyone, and welcome back to the second meeting in 2019 of the Equalities and Human Rights Committee. I remind everyone to switch their mobile devices to silent, and I ask members to introduce themselves when they speak, as their nameplates may not be visible.

I welcome Professor Ann Skelton, who will give evidence to our committee. Thank you for joining us this afternoon. I invite you to make an opening statement.

Professor Ann Skelton (United Nations Committee on the Rights of the Child): Thank you very much for the opportunity to address the committee. I am representing the United Nations Committee on the Rights of the Child today, to provide information about the revision of general comment 10, which deals with juvenile justice. I am a professor of law so, although I might from time to time refer to developmental psychology or brain science, I am not an expert in that regard. However, I have spent most of my career dealing with child justice reform.

In 2010, the United Nations Committee on the Rights of the Child decided to issue a general comment on juvenile justice. General comments are issued from time to time by the committee as interpretations of articles of the United Nations Convention on the Rights of the Child. One of the provisions that is relevant to your hearings deals with the minimum age of criminal responsibility.

The committee said that it had observed from the reports that were made to it that there was "a wide range" of different ages and approaches when it came to states parties setting minimum ages. The committee frequently responded to that by saying that all countries that had a minimum age below 12 were, in its view, in breach of international obligations. It said:

> "From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged 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."

The committee went on to say:

> "At the same time, the Committee urges States parties not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40 (3) (b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected."

Over the intervening years since 2007, when general comment 10 was issued, the committee has monitored how states parties have responded to it. Many states parties have increased their minimum age of criminal responsibility. However, there were a few instances of states parties resting on their laurels, believing that 12 was now an acceptable minimum age and that they therefore did not need to increase it, which meant that they were not reading on beyond the sentence that dealt with the age of 12. In some unfortunate instances, states parties even moved to reduce their minimum age of criminal responsibility.

Those were among the reasons why the committee decided to review the minimum age of criminal responsibility within a broader review of general comment 10. I believe that you have seen that the committee proposes in the new revision that 14 should be considered the minimum age and that states that go higher than that, with 15 or

16 as the minimum age of criminal responsibility, are commended by the committee.

I welcome any questions or comments about my opening remarks.

The Convener: Thank you very much, Professor Skelton. What do you think Scotland would need to put in place or consider before raising the age of criminal responsibility? Do you accept that considerable work will probably be needed to get our institutions ready for that?

Professor Skelton: What one does with regard to children below the minimum age of criminal responsibility is certainly important. States parties sometimes make the error of thinking that increasing the age means that they can stop worrying about children below that age. We still need to be concerned about them and to make provision for them.

However, within the context of Scotland's children's hearings system, you already have what might be described as a hybrid welfare-justice model, in which a broad range of options is available. That puts you in an advantageous position vis-à-vis other countries that might still have to develop a strong set of options for children who do not have criminal responsibility. Because you already have a system in which children could be referred to your hearings system on the basis of welfare or offending issues, you have already determined those options.

I suppose that raising the age would mean that an increased number of children would be referred to other services rather than go through the offender route. You will know better than I do what the numbers are, but I imagine that they are relatively small because the cohort of children in that age group who commit crimes tends to be relatively small.

The Convener: Thank you. I open the session up to the committee.

Mary Fee: I have a couple of questions, the first of which is on our international obligations. There has been an exchange of correspondence between the Council of Europe Commissioner for Human Rights and the Scottish Government specifically on the age of criminal responsibility. The Scottish Government highlighted in its response that Scotland has "a unique system". In your previous answer, you referred to the hybrid system that we have in Scotland. The letter from the Government says that, in our children's hearings system, we take a wider approach to young people and crime. Does our unique system give us a pass not to uphold international obligations?

Professor Skelton: No, I do not think so. Although Scotland is to be commended for holding on to its welfarist approach when everyone else has abandoned it—some countries are returning to it—that does not mean that you are not obliged to take note of and comply with international or regional standards. After all, that is what standard setting is for: it is to ensure that nobody considers themselves so exceptional that they can deviate from the standards. I am afraid that, if that were the case, a great many countries would consider themselves too exceptional to conform to standards. To complete its well-respected system, Scotland should ensure that it conforms with international standards.

Mary Fee: My second question is about a young person's capacity to understand the consequences of their actions. I am interested in your views on the benefits of carrying out a psychological assessment to determine whether a young person fully understands the consequences, allowing that psychological assessment to be built into the approach that we take, and whether it should be taken down a criminal justice route or a welfare route. It would allow us to take a more nuanced approach to young people and crime. Would that be a beneficial approach?

Professor Skelton: There are many facets to your question, and there are two legs to the issue. One leg is the child's capacity to understand their actions and whether they are lawful or not and to act in accordance with that knowledge at the time and in the circumstances. The other leg is their ability to understand criminal proceedings. Very young children in the age group that we are talking about—let us take the 12 and 13-year-olds—are at a double disadvantage. On the one hand, their frontal cortex is still very undeveloped, and we would not expect them to have a very good understanding of the law or of why things are lawful or unlawful. They may have a basic understanding of right and wrong by that age, but they are unlikely to be able to resist impulses.

Through the wealth of developmental psychology and brain science information—which I am sure has been brought to your attention—we are increasingly understanding that adolescent brains go through a phase of plasticity and even instability, in which impulse control becomes at heightened risk. Children of that age not only have insufficient knowledge of the world; they are moving into adolescence. They therefore struggle with the fact that they are more likely to be influenced by peers and to be triggered by social cues than younger children even and, of course, adults. In a sense, 12 and 13-year-olds might be doubly disadvantaged because they are still so young, so their frontal cortexes are still at a very early developmental stage, and they have all the difficulties that the adolescent brain introduces.

I am sorry; will you remind me of the second part of your question, please?

Mary Fee: The second part of my question was about whether a psychological assessment should be done whenever the question whether a young person should be taken down a welfare or a criminal justice route is being considered and whether that would allow us to take a more nuanced approach. I was going to ask a further question about adverse childhood experiences, because there is much more understanding of their impact on the way that a young person acts and behaves. Extending our knowledge of adverse childhood experiences and building in a psychological assessment in considering the approach to a young person may completely alter the way in which we deal with them.

13:30

Professor Skelton: Thank you for the reminder.

Age setting is, by its very nature, quite arbitrary, but it is the kind of thing that lawyers like to do, because we like to have a standard so that we can say that we want to treat everyone in a similar way. We want to set an age so that we can have certainty in the law and so that officials, such as the police, know what they need to do when they confront a child who is below or above a certain age. However, psychosocial specialists always prefer to look at individuals as individuals and to try to assess their level.

A combination of the two might be ideal. We need to set standards because we need to align with the standards that are in place and we need a certain amount of certainty. If we allow individual assessments to take priority, we might face a situation in which we can say that a particular child is so advanced in certain ways that, even though he is only 11, he could still be held criminally responsible. If we relied only on the individual assessment, that would result in unfairness.

A balance would be to say that we will not prosecute below a certain age, but we should carry out individual assessments within a certain age range. There is some very good literature on that. I recommend Enys Delmage, who wrote "The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective". I would be very happy to provide the references to the committee clerks after the meeting so that you can read the articles for yourselves. Enys Delmage proposes a minimum age of 14 and assessment of 14 to 16-year-olds in order to make determinations on a case-by-case basis, as well as possibly extending the onus to the offender for 16 and 17-year-olds, but still allowing assessment and medico-psychosocial assessments to be brought into the question of mens rea. There is literature that supports the approach that you are taking.

The UN Committee on the Rights of the Child has always indicated that it prefers clarity and standard setting rather than allowing different ages to be applied for different offences, for example. However, I know that that is not what the Scottish Parliament is talking about. You are talking about an individualised approach using assessment. If the country is able to do that and has the resources to do it, I would say yes to that, but against a backdrop of having a clear minimum age below which it will not prosecute.

Mary Fee: Thank you for that very helpful response. I would be grateful if you could provide the links for the documents that you mentioned.

Alex Cole-Hamilton: Thank you for making time to talk to us. I am a Liberal Democrat MSP and, for the record, I remind members of my entry in the register of members' interests as a former convener of the Scottish Alliance for Children's Rights.

The UN has been on a journey in relation to this issue, starting with general comment 10 and the revision that we are now considering, which is general comment 24. General comment 24 will set the new floor at 14. Do you anticipate that being the last word or do you think that, in the future, when all states parties have achieved that floor of 14, the UN committee will say, "Come on guys, let's go further," and set the new expected limit at 16, or something similar?

Professor Skelton: From the outset, with general comment 10, the UN committee was already asking states to continually consider increasing the minimum age.

The UN committee deals with a wide range of different countries with very different experiences and legal systems and so on. We therefore have to ensure that our guidance to states allows them to progress as quickly as they can along their own trajectories. We encourage progress from all states individually, as they appear before us, by asking them, for example, whether they would consider raising the age again and whether they are monitoring their system to see what is happening and what the trends are.

However, I do not want to be understood as saying that we encourage states simply to continue to extend and extend unreasonably. There is a point at which states say that they have found what they believe to be the right age for their country.

Nonetheless, the UN committee commends states that set minimum ages of 15 or 16 and encourages states to set the minimum age at at least 14.

Alex Cole-Hamilton: One of the reasons that the Scottish Parliament is undertaking this legislative process is that, for many years, Scotland has suffered international rebuke because its age of criminal responsibility is demonstrably lower than the expected international minimum. I am glad that we are making progress on the issue.

Are we an outlier or are we in the majority? Do member states usually ignore the international minimums or are such states few and far between?

Professor Skelton: That depends on whether you look at Scotland against the world or against Europe. Against Europe, you are a strong outlier, with a minimum age of eight. Against the world, it often depends on the history of each country. In Africa, for example, countries that were colonised by the French or the Portuguese tend to have higher minimum ages of criminal responsibility, of around 13 or 14. However, countries that were colonised by the British tend to have lower minimum ages, of around seven or eight, often with the doli incapax presumption, which most colonies did not jettison when the United Kingdom got rid of them.

To some extent, therefore, what we see is a legacy of colonisation. However, I am glad to tell you that many countries in Africa—including all those that have recently reviewed their juvenile justice legislation—have increased their minimum age of criminal responsibility, some to the age of 12 and some to the age of 14.

Alex Cole-Hamilton: That is great to hear. Thank you.

The issue of the age of criminal responsibility is on a journey through the processes of this Parliament. However, the machinery of Parliament does not fixate on one issue for long. The Parliament tends to pass legislation and then move on to something else. It has been 80 years since we as a country last reviewed the age of criminal responsibility and I am anxious that it may be some time before we review it again. The age that we fix it at now is therefore important.

The Equalities and Human Rights Committee has heard from stakeholders in the children's hearings system strata—and indeed from the Lord Advocate this morning—that additional work will need to be done to ready our institutions. That is why I lodged amendments that would provide for an initial uplift in the age of criminal responsibility to 12 on royal assent—as was in the original bill—but with a sunrise clause that would lift it to either 14 or 16 after a period of 18 months.

Would it satisfy the concerns of the international community if we raised the minimum age in that staggered process, to allow us to do the work?

Professor Skelton: I understand your concern. When a country makes a decision as big as this, it wants to ensure that it sets the age at the right place. Clearly, it is better if that can be done all in one go. However, doing it in staggered phases is not unfamiliar to me, because other countries have chosen to do it in that way.

If Scotland decides to raise the age in a staggered way, it is really important that that is included in the legislation and that time frames are set, as opposed to just saying, "Well, we will reconvene in a few years' time and see." If the staggered process is to allow you to collect data or ready yourselves and your institutions, it is important to know what has to be done within those time frames.

Annie Wells: The Equalities and Human Rights Committee heard from the Lord Advocate this morning about the serious harmful behaviour that is committed by children who are over the age of 12, including cases such as culpable homicide and rape.

On the age of criminal responsibility, we also have to ensure that we get the correct balance in relation to the rights of victims. How do we take public opinion with us on that journey and what impact could raising the age higher than 12 have on public confidence?

Professor Skelton: I understand what you are saying, but I think that even if you delay your decision by 18 months or two years, the reality out there will not change. At some point, it requires the courage to say, "We must do what is right when it is right." Obviously, one has to bring the public along and explain it to them, but those kinds of issues come into the mix, and I know that all politicians would be worried about public concern about that.

The fact of the matter is that wherever you draw the line, there is the possibility that the day after you pass the law, a crime might be committed by someone in that age cohort, which will not then be prosecuted. If it is the right thing to do, it is the right thing to do, even if it may be difficult to explain it to the public if such a thing happens. What would help to ameliorate that kind of possible negative response is as much preparation as possible of the public beforehand, and as much information as possible about the reasons why this is being done.

Annie Wells: The Lord Advocate spoke about the case of a young person who had been raped by an older person of 13 years old. He asked how we would say to that young person that what happened to them is not a crime, and what information we should give to the victims of such serious harmful behaviour. That stuck with me, and I think that it would stick with the general

public. People might agree that we should put the child first, until something happens to them or their loved ones. There is a public safety issue around that.

Professor Skelton: Although it is very important from a victim's point of view that their experience is validated, that does not necessarily have to happen within the discourse of crime. Victims need acknowledgement that what happened to them was wrong, and they should be provided with all of the requisite support, but it is not necessarily essential for that victim to see this in terms of whether what has happened to them is handled as a crime. We need to find more restorative justice mechanisms to help victims to recover from the impact of crimes; we do not necessarily have to stick with the discourse of crime in order to redress harm.

Gail Ross: Right at the start, we touched on the Scottish children's hearings system. Are there examples of other countries that operate a similar system? How does that relate to the minimum age of criminal responsibility in those countries?

Professor Skelton: To some extent, the New Zealand system might be comparable, in the sense that it is seen as a last resort there to take children through the criminal justice system. Instead, a series of restorative justice interventions are usually used. However, the welfare system and the criminal justice system in New Zealand are not one and the same, although they are dealt with in the same act. New Zealand's minimum age of criminal responsibility is 14.

Gail Ross: When we were talking about going to a minimum age of 12 now in order to get things ready to move to a minimum age of 14 at a specified date, you said that other countries had done this in a staggered way, too. Can you give us some examples?

13:45

Professor Skelton: Yes. I can give the example of my country—South Africa. The South African Parliament has recently passed a law increasing the minimum age of criminal responsibility from 10 to 12. It includes a clause on reconsidering the age, with a view to increasing it—to what age is not specified—within five years of the act coming into operation.

The Convener: I am Ruth Maguire, the convener of the committee. Could you expand on your concerns about police involvement with children who are over the age of criminal responsibility? What specific practices do you feel need to be addressed?

Professor Skelton: I mentioned the police because, as they are the first point of contact in any system, it is very important for them to know and understand what the rules are relating to children who are above or below the minimum age of criminal responsibility. Their first-line response must be guided by what the rules are relating to children of that age. Any changes to the law must go hand in hand with very good training of police officers and any other front-line officials who come into contact with children as they come into contact with the system.

The Convener: Do you agree that there should be a duty on the police to safeguard and promote the wellbeing of children, first and foremost?

Professor Skelton: Yes. In most instances, the child's contact with the police is the first contact that they will have with the system, so it is clear that the child's experience will be affected by the way in which they are dealt with by the police.

The Convener: Alex Cole-Hamilton has a supplementary question.

Alex Cole-Hamilton: In your answer to Gail Ross's request for examples of countries that have taken a staggered approach to meeting the international minimum standards, you referenced South Africa, which has passed legislation to lift the age to 12, with a mandatory requirement to consider lifting it still further in five years. Is that an acceptable place for a member state to land?

Professor Skelton: I am rather disappointed with the outcome of the hearings. I was among the group of people who pushed for the age of criminal responsibility to be set at 14 in South Africa. However, I think that South Africa has a few more complex issues to deal with as regards provisioning for children below the age of 14, because it does not have something akin to the hearings system, which means that probation services and alternative services for children below the minimum age will need to be developed. Therefore, there might be more reason for time to be taken in South Africa, but I would still say that five years is too long.

Although the minimum age in South Africa is 10, it goes together with the doli incapax presumption, which means that all children under the age of 14 are presumed to lack criminal capacity. South Africa retained the upper limit of criminal capacity at 14, so those children still have protection under the law. That protection has not been done away with. The South African Parliament resisted the move that some people were pushing for to lower the age to 12 from the level of the doli incapax presumption. The decision was taken not to do that and to retain the doli incapax presumption, which remains in place for 12 and 13-year-olds. Scotland does not have that advantage. In the meantime, there is no protection for your 12 and 13-year-olds. Under the South African legislation,

there is protection for 12 and 13-year-olds, in whose favour a presumption operates, whereby the state would have to prove criminal capacity. That provides a mantle of protection for those children. Such important nuances must be kept in mind when comparisons are made across different jurisdictions.

Alex Cole-Hamilton: So, by extension, it would not be acceptable to the UN committee—for all the reasons that you have outlined—for Scotland to mirror in the Age of Criminal Responsibility (Scotland) Bill what South Africa has done by raising the age to 12 now and imposing an obligation on Parliament to consider going further in the future. In fact, 14 is the floor that the UN has established.

Professor Skelton: Exactly. The UN committee would certainly not approve of South Africa's manner of dealing with the issue, even though South Africa would probably try to explain it on the basis of the doli incapax presumption. The UN committee prefers there to be one age rather than two ages, with the possibility of prosecution for certain children in between those two ages.

You are quite right. The position of the UN committee would be that Scotland should move to 14 immediately, particularly as there is no provision for the protection of children of such an age between now and—if you decide to go down that route—the future date at which you decide to protect the rights of those children.

Alex Cole-Hamilton: Thank you.

The Convener: Thank you very much for your evidence, Professor Skelton; it has been very helpful.

The next meeting of our committee will be on Thursday 31 January, when we intend to begin the consideration of amendments at stage 2 of the Age of Criminal Responsibility (Scotland) Bill.

Meeting closed at 13:50.

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