



## Age of Criminal Responsibility (Scotland) Bill (2018)

### EQUALITIES AND HUMAN RIGHTS COMMITTEE

#### AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL

**Scottish Children's Reporter Administration (SCRA) response in relation to the Age of Criminal Responsibility (Scotland) Bill 2018.**

#### Background

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. Among its fundamental principles are:

- the needs of children or young people in trouble should be met through a single holistic and integrated system, whether concerns relate to their welfare or behaviour
- a preventative approach is essential, involving early identification and diagnosis of problems
- the welfare of the child remains at the centre of all decision making and the child's best interests are paramount throughout
- the child's engagement and participation is crucial to good decision making

SCRA (the Scottish Children's Reporter Administration) operates the Reporter service which sits at the heart of the system. SCRA employs Children's Reporters who are located throughout Scotland, working in close partnership with panel members and other professionals such as social work, education, the police, the health service and the courts system. SCRA's vision is that vulnerable children and young people in Scotland are safe, protected and offered positive futures. We will seek to achieve this by adhering to the following key values:

- The voice of the child must be heard
- Our hopes and dreams for the children of Scotland are what unite us
- Children and young people's experiences and opinions guide us
- We are approachable and open
- We bring the best of the past with us into the future to meet new challenges.

**SCRA is pleased to answer the following questions on the Age of Criminal Responsibility Bill asked by the Committee.**





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

SCRA is in full support of the move to change the age of criminal responsibility from the outdated and indefensible age of 8 years.

We also recognise that in practice Scotland has been unable to prosecute children under 12 since the Criminal Justice and Licensing Act (Scotland) 2010<sup>1</sup> section 52 and that the numbers of children who are currently involved in offending under the age of 12 across Scotland are low. SCRA's published statistics for 01/04/2016 to 31/03/2017 show that of the 2978 children and young people referred on an offence ground of referral to the Children's Reporter during the year a total of 210 were under 12 (aged 8 – 11 and individual children may be counted more than once) - followed by increasing numbers at ages 12 / 13 / 14 / 15 (at age 15 the numbers peak at 1100, although some children may be counted more than once) with a decrease for the children / young people aged 16 and over (364)<sup>2</sup>. The statistics show that the numbers of children involved in offending behaviours rise between the ages of 12 and 15 and this gives a clear evidence base in relation to establishing a minimum age of 12.

SCRA's research **Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending**<sup>3</sup>, March 2016, also discussed raising the age of criminal responsibility and commented specifically that "most offences by children under 12 are of low gravity" and "Reporter decisions on most offence referrals for 8 – 11 years old are that compulsory measures are not required." In the study, of the 1543 children under 12 with offence referrals between 2010/2011 and 2013/2014 a Children's Hearing was arranged for 90 children and 46 of those children had a Compulsory Supervision Order made. Further, most of the 1543 children had no further incidents of offending – 60% of the children had an isolated incident of offending which was not repeated – and it could be argued that under the Whole Systems Approach<sup>4</sup> an Effective Early Intervention (EEI) would be a more appropriate course of action than a referral to the reporter. Indeed, since the 2011 introduction of WSA across Scottish local authorities it may be that further study of this group of young people would show a shift in the national approach to working effectively with them. Consequently, it may be that further research work would be needed in order to establish an evidence base in relation to a higher minimum age.

SCRA recognises that if a child can be subject to a Children's Hearing intervention by the age of 12 then there are a number of key teenage years during which effective and productive work with the child and family can be done in order to minimise future offending behaviour and the personal and societal harm that offending behaviour can cause. However, a child can only be subject to a Compulsory Supervision Order and the work required as part of that order, until they turn 18. If the age of criminal responsibility were to be higher than 12 then it may follow that intervention to address that behaviour would need to extend beyond the current age of 18 and currently there is no statutory basis for this to happen.

<sup>1</sup> <http://www.legislation.gov.uk/asp/2010/13/contents>

<sup>2</sup> SCRA Online Statistics 2016/ 2017 tables 1d (p9) and 1f (p11) <https://www.scra.gov.uk/wp-content/uploads/2017/08/SCRA-Online-Statistics-2016-17.pdf>

<sup>3</sup> <https://www.scra.gov.uk/wp-content/uploads/2016/03/Backgrounds-and-outcomes-for-children-aged-8-11-years-old-who-have-been-referred-for-offending.pdf>

<sup>4</sup> <https://beta.gov.scot/policies/youth-justice/whole-system-approach/>





The Children's Hearings System is the system which deals with the majority of the offending behaviour of children and young people in Scotland and SCRA believes this is the right system to deal with the behaviours; and the right approach to take to the behaviours in providing a holistic and individualised child-centred intervention. SCRA believes that the grounds for referral to the Children's Hearing as set out in the Children's Hearings (Scotland) Act 2011, Section 67 (2) currently allow serious and significant behaviours to be captured and articulated as the presenting concern for the young person to the Children's Hearing, and that this framework continues to be strong enough to capture the under 12 behaviours which will require to be addressed when the age of criminal responsibility is changed. Indeed, since the Criminal Justice and Licensing (Scotland) Act 2010 section 52 it has not been possible to prosecute children under 12 in the criminal court, and the Children's Hearings System has dealt with all the behaviours where offending formed part of the presenting concerns.

SCRA believes that a minimum age of 12 allows the intervention of the Children's Hearings System time to make a real and lasting difference for young people.

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

The proposals of the Bill mean that children under 12 will no longer be able to commit an offence. This immediately makes it difficult to find the appropriate language to use in order to describe this behaviour, but it is important to find the right language and to use it consistently – in order to support the approach that is being taken. It is also important to find a consistent and transparent way to risk assess the children or the incidents; to capture this assessed risk and to explain the potential consequences of behaviours to children and their families. This will always be a difficult balance to get right.

SCRA would want a system which ensures no legacy is attached to the childhood behaviour of people who present no on-going risk as adults. However, this determination of risk is difficult and affected by numerous variables, and at the same time there are a small number of children whose behaviour is so serious or significant that the likelihood of them continuing to present a risk into adulthood maybe increased. There will continue to be children under the age of 12 whose behaviour is, for example, dangerous, challenging and harmful to other people or themselves and which would be categorised as an offence if it was committed by a child over 12. There will also be children under the age of 12 who are involved in incidents with other children aged 12 or over, and those other children may be charged with an offence. There will also be circumstances where an investigation takes place over the period of time when a child turns 12.

The Children's Hearings System is a distinct and discreet system for dealing with the needs and the deeds of children and young people aged 0 -18 which has operated in Scotland since 1971. To date we have not recognised the distinct and discreet nature of the Children's Hearing system within the ways in which we deal with the consequences of offending, and have 'bolted on' provisions related primarily to adult offending behaviour to provide some protection to children in relation to their requirements to disclose aspects of their childhood when they become adults. This





'bolt on' approach has never been consistent with the ethos and aims of the Children's Hearings System and is increasingly contrary to what Children's Hearings are trying to do with the children who are subject to Compulsory Supervision Orders.

SCRA is pleased that there is currently a national focus in Scotland on the ways in which we deal with offending and that this includes changes to the Rehabilitation of Offenders Act 1974 in the proposed Management of Offenders Bill<sup>5</sup> currently being considered by the Justice Committee and changes to the adult disclosure of youth offending within the current PVG review<sup>6</sup>.

However, SCRA would like to see this wider system reform fully and consciously embrace the established ethos of the Children's Hearings System – a system which does not punish young people, but which identifies their needs and seeks to put in place supports which encourage young people to become healthy, fully functioning and contributing adult members of society.

SCRA also recognises that, on occasion, the nature of a child's offending behaviour, its seriousness, significance or impact may result in the need for the risk posed by that child to be assessed, agreed and reviewed. It may also be necessary for childhood behaviour to be disclosed when a child becomes an adult, preventing a young adult from certain types of work (for example) and providing the public with consistent, clear protection. SCRA believes that behaviour which presents this risk is not limited to any arbitrary age distinction and that it should be possible to flag behaviour by any children if it fits into a certain category as determined by clear, consistently applied assessment of risk.

SCRA would ask that consideration is given to the ways in which the children who present this risk are identified and to the ways in which the risk they present is assessed and reviewed. SCRA believes that the new 'Independent Reviewer' could have a significant role to play in this process, but there is still work to be done in order for the role of the Independent Reviewer to have maximum impact in Scotland. We recognise that information about what happened prior to a child's 12th birthday may need to be flagged as a result of the risk the child could present and that an Independent Reviewer is an appropriate person to make this decision.

However, SCRA believes that further practical thought needs to be given to how and when this should occur. The clearest approach would be to develop a definite 'seriousness threshold' for behaviours which could be included as ORI, so that, from the outset, families and children are aware whether or not there is a possibility that the conduct may be captured in ORI; and if information has been retained what that information is – so that a child and family are always aware of what may be contained in ORI in the future, should it require to be written.

This approach would also need to include a mechanism to take account of meaningful work carried out by a person in order to mitigate the risk they are deemed to present, and as previously indicated would need to be more fully developed. However, the Independent Reviewer could take a lead in assessing the original presenting risk alongside the work / interventions which have occurred with the express purpose of mitigating this risk. We welcome the involvement of the Independent Reviewer in the gathering and communication of ORI and think that this will, in itself, lend consistency of content and application of the rules in relation to ORI.

<sup>5</sup> [http://www.parliament.scot/Management%20of%20Offenders%20\(Scotland\)%20Bill/SPBill27S052018.pdf](http://www.parliament.scot/Management%20of%20Offenders%20(Scotland)%20Bill/SPBill27S052018.pdf)

<sup>6</sup> <https://beta.gov.scot/publications/protecting-vulnerable-groups-scheme-review-terms-reference/>





We think that the rules / guidelines / framework for ORI should be publically available and consistently applied and that this will make the process more transparent. These guidelines should be in place for everyone tasked with producing ORI so that the content and expression of the information is consistent. There should also be clear and transparent rules / guidelines / an operating framework for the provision of information in relation to any aspect of Disclosure (a certificate or PVG scheme membership).

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

SCRA supports the provision of advocacy worker support for children who are involved in a Police investigative process in relation to their behaviour. We agree that an advocacy worker could help children understand the process and what is happening and why. We do have some concern that an advocacy worker is likely to be a stranger to the child, and that the introduction of another adult in the process may not be helpful for all children. More ‘familiar’ adults may not have the detailed understanding of the process in order to explain what is happening and there may need to be a way for ‘familiar’ adults to get up to speed quickly with what is happening for a child, in order to explain things to them.

SCRA continues to be concerned about the prescriptive nature of the Police Investigative Interview as outlined in Part (4) of the Bill and we are concerned that the Investigative Interview may not be significantly different in look to an interview which would be carried out with a suspect in a criminal investigation. Consequently it may be that for a child experiencing it, the Investigative Interview may not feel any different to a criminal investigation interview. This Bill offers a real opportunity for Scotland to make some fundamental shifts in the ways we deal with, depict, speak about and respond to the behaviours of young people. The associated Policy memorandum for the Bill aligns the ACR Investigative Interview more closely with the JII – and we are pleased that this has been done. We would like Part (4) of the Bill to communicate this alignment more clearly and definitively.

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

SCRA recognises that people will continue to be affected by the behaviour of children and 12 and that these victims will have needs which should be identified and fully addressed. Communication to victims about what is happening and why will need to be clear and will need to direct people to supports which could help them, without providing detailed information in relation to individuals and what has happened for them. In addition, many of the victims of children under 12 are likely to be other children so this will require communications and materials to be carefully considered and tailored to them. In 2016 information compiled by the SCRA Victim Information Service<sup>7</sup> that there were 50 victims of young people aged 8-11 who opted in or chose to receive information about the case they were involved in. Of those 50 people 26 of the victims were aged 7 – 12; 23 of the victims were aged 13 – 85 (with 4 victims aged 12 – 16) and 1 victim had no recorded age.

<sup>7</sup> Figures not publically released.





SCRA agree with the clear legislative basis for the Victim Information Service (VIS) across the Children's Hearings System, but we have some questions in relation to the threshold tests which will be applied within the VIS which we will discuss with the other threshold tests under any other comments or questions at the end of this paper.

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

SCRA fully supports the spirit of the provisions in Part 4 of the Bill in relation to Police powers of investigation – in that Police Scotland requires a continuing ability to gather evidence in relation to the behaviour of children under 12; and to pass that evidence onto the public bodies best placed to intervene or provide support. We agree the police should only have additional powers (mostly exercisable only under a court order) when the child's alleged conduct is particularly serious – in order to fully protect the rights of the individual children concerned.

In order to progress matters within the Children's Hearing SCRA needs to be able to evidence the statements of fact in relation to the grounds for referral to the Children's Hearing (whatever they may be) and Police Scotland continue to be the most appropriate evidence gatherers in relation to this. SCRA recognises that Police Scotland may well be dealing with the most serious of behaviours (regardless of the way in which it is badged) and evidence in relation to that behaviour needs to be robust, thorough and of a quality which enables it to be used and to stand up within a civil court process (should that become necessary). Police Scotland has a developed understanding of rights and has the resources in order to facilitate this evidence gathering.

However, there will require to be a significant cultural shift in the way in which Police Scotland manages these cases. The adjustment to dealing with the behaviour of under 12's in a way which does not criminalise or label the behaviours will be difficult. In many ways it could be easy to take a criminal justice approach to the investigation so that for the child involved it looks and feels no different to what would happen if they had committed an offence. We are concerned that there may be some over-regulation in relation to the Police Investigative Powers and the Child Interview Order / Child Investigative Interview such that it will still be perceived by a child and their family as a criminal investigation.

In relation to the specific 'powers' outlined in the Bill:

#### **1) Power to take child under 12 to place of safety S 23**

In providing this protection the effect for a child could potentially be no different to 24 hours in custody. There are no consequences of this '24 hours in a place of safety' and a real concern that the place of safety, by default, could be the Police Station. It is crucial that a best practice approach is developed and implemented in relation to the place of safety power and we welcome the fact that the ACR Delivery group is working on this.





The Bill could make a stronger statement that being kept in a police station is to be the exception and for the shortest possible time.

## 2) Search of children under 12

SCRA accepts that the Police will, on occasion, require powers to search children under the age of 12; and that on occasion the Police will require to question children under 12. SCRA agrees that there requires to be a clear explanation of the stop and search powers in relation to a child under 12 and that the Stop and Search Code of Practice<sup>8</sup> should be adapted to reflect this. SCRA also recognises that on occasion there may be a legitimate requirement to search more widely – within a child’s home or other location for example, and a Court order is the most appropriate authorisation for this.

SCRA also asks that consideration is given to whether the principle recipient of a s28 order should be the child’s parent – rather than the child (s 29).

## 3) Limits on questioning of certain children

SCRA can see why the behaviours outlined in s31 (2) (b) (i & ii) of the Bill have been given special consideration. We fully accept that behaviours of children under 12 which are violent / dangerous and risk causing serious physical harm and behaviours which are sexually violent or sexually coercive and risk causing harm are the most serious types of childhood behaviour which a change to the age of criminal responsibility would affect.

We see that the new Child Interview Order would demonstrate that there is a recognition of the seriousness of the behaviour, and of the way in which the behaviour is being addressed – and would also hopefully have the effect of the Child Interview Order only being used when absolutely necessary and in the most serious of circumstances.

## 4) The taking of forensic samples

SCRA agrees that any intimate forensic sample gathering would need to be agreed by a Court.

We understand that evidence may be required in order to determine what may have happened and where responsibility may lie during the course of an investigation. We remain concerned about the collection, recording and retention of forensic information and are pleased that the Bill is clear about the destruction of samples taken under s52.

## 6. Please tell us about any other comments you feel are relevant to the Bill.

In order to establish robust and definitive grounds for referral in relation to the behaviour of any child (or adult) SCRA require evidence that can be demonstrated to be part of an evidence ‘chain’ and which will stand up to judicial scrutiny. We are pleased that the Bill recognises that there requires to be a robust approach to this.

<sup>8</sup> <https://beta.gov.scot/publications/code-practice-exercise-constables-power-stop-search-person-scotland/documents/00512924.pdf?inline=true>





SCRA feels strongly that children under 12 should no longer feel like they are involved in a criminal process, and that, if as a child aged over 12 they do come into contact with the Police as a result of an incident of offending behaviour then they should be able to see and feel a difference in what happens. We are pleased that the Policy Memorandum for the Bill aligns the Investigative Interview with the Joint Investigative Interview – we think that this requires to be specified in clear Interview guidelines.

SCRA is clear that if a child’s behaviour under the age of 12 is of such concern that a compulsory intervention is required in the life of the child then the grounds for referral to the Children’s Hearing as currently specified in Section 67 (2) of the Children’s Hearings (Scotland) Act 2011 are sufficient to allow this to happen.

We have mentioned already that we have some questions about the threshold tests included within the Bill – in order to pose the questions we will set out the threshold tests as currently envisaged first.

<b>Interview Order / Search / Taking Samples</b>	<b>Other Relevant Information (ORI) Disclosure of information relating to when a child is under 12 –</b>	<b>Victim Information Service S179A 2(a) and (b)</b>
<p>(i) by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or</p> <p>(ii) by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person).</p>	<p>In the chief constable’s opinion, the information ought to be included in an enhanced criminal record certificate or a PVG scheme record</p>	<p>Behaviour falls within this category if it –</p> <p>a) is –</p> <ul style="list-style-type: none"> <li>i) Physically violent;</li> <li>ii) Sexually violent or sexually coercive, or</li> <li>iii) Dangerous, threatening or abusive, and</li> </ul> <p>b) causes harm to another person.</p>
	<p>In relation to ORI there is no clear test on the face of the bill and therefore no clarity about what type of conduct may be included and no certainty for the child and family about whether there is a possibility that it might be included in ORI in the future (as previously discussed).</p>	<p>In relation to victim information, the test is lower than that for the Interview / Search / Samples. It refers to harm and not serious harm - even though the policy memorandum (at paragraph 107) says that the policy objective is to ensure that where a child under the ACR engages in conduct which causes serious harm to a victim, the current rights of that victim should not be diminished.</p>





In order to make things clear we think that the threshold for both ORI and victim information should be the same as the test for the interview / search / sample order. In relation to ORI this would implement the Advisory Group's recommendation that only in "exceptional circumstances" "involving the gravest of harm" (see page 13) would information be submitted by the police for disclosure subject to independent review. By having the same threshold for all of these powers, it provides a clear message that it's only when a child's conduct meets that level of seriousness that exceptional measures apply: the police have certain powers and can apply for certain orders, victims can be provided with information and the conduct may be included as ORI.

**SCRA Practice & Policy Team 2018**

