

<b>CRWIA front sheet</b>	
<b>Policy/measure</b>	To raise the minimum age of criminal responsibility from 8 to 12 having given full consideration to the implications and benefits of a change.
<b>Project initiation document</b>	A working group to examine the potential implications of the proposal was first convened in November 2015.  The terms of reference for the Minimum Age of Criminal Responsibility Advisory Group are available at:  <a href="http://www.gov.scot/Topics/Justice/policies/young-offending/MACR">http://www.gov.scot/Topics/Justice/policies/young-offending/MACR</a>
<b>Initiators</b>	The Advisory Group on Raising the Minimum Age of Criminal Responsibility commissioned members of the Group to prepare CRWIA. This is a co-produced CRWIA developed in collaboration between the Children and Young People's Commissioner Scotland, Together – Scottish Alliance for Children's Rights, the Centre for Youth and Criminal Justice and the Scottish Government.
<b>Policy aims</b>	This proposal aims to ensure that no child under the age of 12 in Scotland can be held criminally responsible for their actions.  At present, children under the age of 12 cannot be prosecuted for their actions. However, they can still accept/have offence grounds established via the Children's Hearings system. This can have lasting implications for 8-11 year olds, who can find these offence grounds appearing on their Disclosure certificates for many years after an incident has occurred. This may severely restrict their life chances, including, for example, their educational and career choices. This proposal seeks to ensure that the age of criminal responsibility in Scotland is raised to 12, in line with the current minimum age of prosecution.  This proposal will involve taking a rights based approach towards youth justice, grounded in the UN Convention on the Rights of the Child. It seeks to ensure that children are not unduly criminalised or stigmatised as a result of behaviour in early childhood, but rather supported to address that behaviour and to rehabilitate. At the same time, the proposal recognises the need to ensure public protection, and to validate the harm caused to others by a child's behaviour. It also recognises the fact that those affected by a child's harmful or worrying behaviour, may also be children, and that they may require support to recover from that harm.  This proposal aims to give further effect to the UN Convention on the Rights of the Child in Scotland and to address concerns raised by the UN Committee on the Rights of the Child that Scotland's current age of criminal responsibility, at 8 years of age, is the lowest in Europe.
<b>Timetable</b>	The Advisory Group will produce a report and recommendations for consultation by March 2016. The Scottish Government intends to commence a public consultation shortly after the report is received.  The Scottish Government intends to carry out separate consultation with specific groups of children and young people, likely to be impacted by the proposal. Separate consultation materials will be developed for children and young people.  Public consultation with a view to primary legislation in the early part of the next Parliamentary term would be subject to approval of Cabinet.  This CRWIA is the initial assessment developed during the course of the Advisory Group's work. A further version of the assessment will be created to accompany any legislative proposals. This new version will take account of the findings of the consultation process, including any additional issues highlighted by children and young people and other consultees.
<b>Date</b>	March 2016

## **CRWIA Stage 1**

### **Screening - key questions**

#### **1. What aspects of the policy/measure will affect children and young people up to the age of 18?**

Raising the age of criminal responsibility to 12, has the potential to impact upon:

- children aged 8-11 years old, whose behaviour will no longer be regarded as criminal
- children who are the victims of crimes
- child witnesses
- children and young people who previously accepted/had an offence ground established via the Children's Hearings system for behaviour that took place between the ages of 8-11 years old.

Currently, children in Scotland are subject to an irrefutable presumption that they cannot be held criminally responsible for something that they do under the age of 8. This proposal seeks to extend that presumption to children under the age of 12.

#### **2. What likely impact - direct or indirect - will the policy/measure have on children and young people?**

Whilst the age of criminal prosecution was raised to 12 in 2010<sup>1</sup>, the age of criminal responsibility has remained at 8 years old. This is currently the lowest age of criminal responsibility in Europe.

For a child aged 8-11 years committing an offence, the only route through which this can be dealt with is via an offence ground at a Children's Hearing (i.e. it cannot be prosecuted through the courts). This affects a relatively small number of children<sup>2</sup>. However, the potential impact of the proposal on those children is high. Whilst the child cannot be prosecuted, the key impact of this proposal from a children's rights perspective is that information about an offence ground accepted/established via a Children's Hearing can continue to appear on a child's Disclosure Certificate or Protection of Vulnerable Groups scheme record well into adulthood.

Whilst this may not be of immediate concern to the child, it can cause difficulties for them when they later apply for educational courses or attempt to pursue certain career paths. Children may also be unaware of the long-term implications of accepting/having an offence ground established at the time of the original incident.

Information about an offence ground on a Disclosure Certificate can also be accompanied by what is termed 'Other Relevant Information' (ORI), that is, information supplied by the Chief Constable of Police Scotland which relates to the child's behaviour. This information provides non-conviction information about an incident. This information can potentially appear indefinitely, although Police Scotland have processes in place to review this information to ensure that its continued release is both relevant and proportionate. One further factor to note is there is currently no recourse to an independent appeal process for this information. Again, the appearance of this ORI on a Disclosure Certificate has the potential to restrict a child's life chances.

Research has shown that for the majority of children currently being brought before a

<sup>1</sup> Scottish Government (2010) Criminal Justice and Licensing (Scotland) Act 2010 (Part 3; Section 52). <http://www.legislation.gov.uk/asp/2010/13/contents>

<sup>2</sup> In 2014-15, 215 children aged 8 to 11 years old were referred for offending which is 7.4% of all children and young people with offence referrals. See: Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

Children's Hearing on offence grounds, for offences committed between the ages of 8 and 11, these children will not go on re-offend<sup>3</sup>. It therefore appears disproportionate for them to have to reveal this incident in early childhood many years later.

For those committing more serious offences, research by the Scottish Children's Reporter Administration (SCRA) suggests that these are rare<sup>4</sup>. Where they do take place, however, it is often in the context of the child experiencing a range of difficulties in their home lives, such as a bereavement, parental neglect, parental substance misuse or parental imprisonment. Where the child is supported to move past these difficulties, there is every chance that the child can go on to have a life free of offending. For those requiring intensive and long-term support, this proposal still allows for this to be provided.

The impact of this proposal on children who may have been the victim of a child's harmful behaviour also requires to be considered. There is a need to ensure that these children fully understand the way in which the other child's behaviour will be treated by the Children's Hearings System (i.e. the welfare-based approach) and how measures will be taken to ensure the behaviour is not repeated. This must be done in such a way as to avoid diminishing their experience, or the harm that may have been caused to them. There is also a need to think carefully about the terminology used to describe these children, who will no longer be accurately described as the victims of a crime (as a crime has not been committed), but who may regard themselves as such, and for whom any harm is not diminished by the lack of criminality.

Particular consideration should be made of the support needs of these children, and those others who may have witnessed an incident. Whilst there are some mechanisms in place to support child victims/witnesses at present, research carried out in 2012 by Victim Support Scotland and the Scottish Government, found that there were significant gaps in tailored support currently available to children and young people. The research identified the need for specialist professional support for traumatised children and young people, online support, one-to-one discussions with an adult supporter, group support with other children and young people and opportunities to participate in social/recreational activities with peers<sup>5</sup>. Whilst this research focused on the experiences of children aged 12 years and older, it is reasonable to suggest that these measures could have similar benefits for younger children, including those aged 8-11 years.

It should also be noted that, should there be a shift from offence grounds, to non offence (i.e. care and protection) grounds, then this will allow for the introduction of hearsay evidence. This may mean that on most occasions a child, who had witnessed an incident involving another child, may not have to give direct evidence in any proceedings arising out of Children's Hearings.

In terms of a broader impact, this proposal has the potential to bring about a cultural shift in how the behaviour of younger children is viewed in Scotland. It reinforces the principle inherent in the Scottish Government's Getting It Right for Every Child (GIRFEC) approach, which puts the needs and wellbeing of children at the centre of decision-making processes. It also recognises that children's cognitive ability develops over time<sup>6</sup> and that child aged

<sup>3</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>4</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>5</sup> Victim Support Scotland & the Scottish Government (2011). *Young Victims of Crime Project: Scoping a national service model for supporting young victims of crime in Scotland* (Page 2). <http://www.victimsupportsco.org.uk/wp-content/uploads/2015/11/YoungVictimsOfCrimeProjectFinalReport.pdf>

<sup>6</sup> Claire Bryan-Hancock & Sharon Casey (2011) *Young People and the Justice System: Consideration of Maturity in Criminal Responsibility, Psychiatry, Psychology and Law*, 18:1, 69-78, DOI: 10.1080/13218711003739086

between 8 and 11 years of age may not truly understand the full impact of their actions on others, or indeed on themselves.

**3. Are there particular groups of children and young people who are more likely to be affected than others?**

This proposal focuses on the behaviour of 8-11 year olds, but has a potential impact on children up to the age of 18.

Children from any background can become involved in offending behaviour. However, children who have more complex needs and/or who may not be benefiting from consistent parental support and engagement may be more likely to need compulsory measures of intervention<sup>7</sup>. As stated previously, this might include children with parents in prison, children experiencing neglect, children experiencing abuse and children affected by parental substance abuse. Alternatively, this behaviour might be linked to a one-off traumatic event, such as a child losing a parent, grandparent or sibling.

This can mean that children who are already disadvantaged in some way may inadvertently have their life chances further impacted by an approach towards harmful behaviour which has consequences beyond their 18<sup>th</sup> birthday.

Children with some hidden disabilities can also find themselves in contact with the Police for behaviour which is linked to their disability, rather than any intention to cause harm<sup>8</sup>. Police Scotland has developed an Interim Vulnerable Persons Database (IVPD), designed to help record information about a person's vulnerabilities and ensure that any behaviour that is related to a hidden disability is approached as such.

Similarly, the way in which some incidents are dealt with by staff in residential units (i.e. by calling the Police), can inadvertently lead to more looked after children being referred on offence grounds, than their non looked-after peers<sup>9</sup>.

The Scottish Children's Hearings System is already founded on welfare-based principles and recognises that harmful behaviour demonstrated by a child is often linked to other circumstances in their lives. This proposal seeks to build upon that approach, by ensuring that any behaviour below the age of 12 is no longer regarded as criminal. Whilst any harmful behaviour will still require to be addressed, for example via multi-agency intervention, it will be done so in a way that addresses the causes of the harmful behaviour, is non-stigmatising and allows the child to move beyond an incident in early childhood. It is important to recognise, however, that not all root causes of a child's behaviour can be tackled easily or quickly, for example, where a child's behaviour is linked to parental substance misuse or neglect. In those cases, long-term and intensive support may need to be available to allow a child to move away from certain behaviours.

The UN Committee on the Rights of the Child has consistently called for the minimum age of criminal responsibility to be raised in Scotland, most recently in their 2008 Concluding Observations<sup>10</sup>. The Committee has indicated via their General Comment no. 10<sup>11</sup> that 12

<sup>7</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>8</sup> Enable Scotland, Response to Scottish Government Consultation on Stop and Search 2015, <http://www.gov.scot/Resource/0048/00482787>

<sup>9</sup> [http://www.celcis.org/files/1514/3878/4145/SJRC81\\_police\\_involvement.pdf](http://www.celcis.org/files/1514/3878/4145/SJRC81_police_involvement.pdf)

<sup>10</sup> Office of the High Commissioner for Human Rights (2008). *UN Committee on the Rights of the Child: Concluding observations: United Kingdom of Great Britain and Northern Ireland (Para. 78 (a))*. <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

<sup>11</sup> UN Committee on the Rights of the Child (2007). General Comment No. 10: *Children's rights in juvenile justice*. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRICAqhKb7yhsqIkirKQZLK2M58R>

years of age should be seen as the absolute minimum internationally acceptable age of criminal responsibility.

**4. Who else have you involved in your deliberations?**

This CRWIA is being developed in collaboration with Children and Young People's Commissioner Scotland, Together – Scottish Alliance for Children's Rights, the Centre for Youth and Criminal Justice as well as being informed by the Advisory Group on Minimum Age of Criminal Responsibility. The Scottish Government's Children's Rights policy team have been involved and provided advice.

**5. Will this require a CRWIA?**

Yes. The policy directly relates to children's rights and the UNCRC.

**CRWIA Declaration**

Tick relevant section, and complete the form.

CRWIA required	CRWIA not required
Yes	

**Authorisation**

Policy leads	Date
Pauline McIntyre, Children and Young People's Commissioner Scotland.	1 March, 2016
Juliet Harris, Together (Scottish Alliance for Children's Rights)	
Claire Lightowler, Centre for Youth and Criminal Justice	
David Doris, Scottish Government	

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## **CRWIA Stage 2**

### **Scoping - key questions**

#### **1. What children's rights are likely to be affected by the policy/measure?**

List all relevant Articles of the UNCRC and Optional Protocols (see Annex 1). All UNCRC rights are underpinned by the four general principles: non-discrimination; the best interests of the child; the right to life; survival and development; and the right to have children's views given due weight.

#### **UN Convention on the Rights of the Child (UNCRC)<sup>12</sup>**

##### **General principles:**

**Article 2 - non-discrimination:** Children should not be discriminated against in the enjoyment of their rights. No child should be discriminated against because of the situation or status of their parent/carer(s)

**Article 3 - best interests of the child:** Every decision and action taken relating to a child must be in their best interests. Governments must take all appropriate legislative and administrative measures to ensure that children have the protection and care necessary for their wellbeing - and that the institutions, services and facilities responsible for their care and protection conform with established standards.

**Article 6 - life, survival and development:** Every child has a right to life and to develop to their full potential.

**Article 12 - respect for the views of the child:** Every child has a right to express their views and have them given due weight in accordance with their age and maturity. Children should be provided with the opportunity to be heard, either directly or through a representative or appropriate body.

##### **Other key articles:**

**Article 4 – protection of rights:** Governments should undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the UNCRC. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of the available resources.

**Article 37(b-d) - Inhumane treatment and detention:** No child should be deprived of their liberty unlawfully or arbitrarily. Any arrest, detention or imprisonment of a child should be a measure of last resort and for the shortest possible time. Every child deprived of their liberty must be treated with humanity, and in a manner which takes into account their needs. Children should be kept separate from adult prisoners, and have the right to maintain contact with their family. Every child deprived of their liberty has a right to prompt legal and other appropriate assistance,

<sup>12</sup> <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

and to challenge the legality of his detention.

**Article 39 - recovery and rehabilitation of child victims:** Children who have been the victim of any form of exploitation must receive the help they need to recover their health, dignity and self-respect, and reintegrate into society.

**Article 40 - juvenile justice:** Governments must establish a minimum age of criminal responsibility. Wherever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings should be used (providing that human rights are fully respected). A child accused or convicted of breaking the law must be treated with dignity and respect, in a manner which takes into account the aim of promoting the child's reintegration into society. They have the right to legal assistance and a fair trial that takes account of their age or situation. Governments must ensure that the child's privacy is fully respected at all times.

### **Other relevant articles**

**Article 16 – No** child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

**Article 19 –** States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitations, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

**Article 20 –** A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

**Article 23 –** States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

### **UN General Comment no 10**

The rights issues associated with this proposal are explored in greater detail in the UN Committee on the Rights of the Child's General Comment no. 10 – Children's Rights in Juvenile Justice (2007), available here:  
[\(http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf\)](http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf)

Section 32 of the General Comment is particularly relevant:

In line with this rule the Committee has recommended States parties not to set a MACR<sup>13</sup> at a too low level and to increase the existing low MACR to an internationally acceptable level. From these recommendations, it can be concluded

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<sup>13</sup> MACR = Minimum Age of Criminal Responsibility

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.

### **UN Concluding Observations**

Key recommendations from the UN in relation to the age of criminal responsibility are outlined below.

#### **UN Committee on the Rights of the Child**

In 2008, the UN Committee on the Rights of the Child released their Concluding Observations<sup>14</sup>, following the State Examination of the UK. The relevant Concluding Observations to this proposal are:

“27. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of *criminal justice and immigration*.”

“78. The Committee recommends that (...) the State party:

(a) Raise the minimum age of criminal responsibility in accordance with the Committee’s general comment No. 10, and notably its *paragraphs 32 and 33*;”

The UK is next due to be examined by the UN Committee on the Rights of the Child in May 2016. As part of the reporting process, the Committee released a List of Issues in November 2015, outlining the areas in which they would like further evidence from the UK Governments. Progress in reviewing the age of criminal responsibility was one of the areas in which the Committee requested further information. This provides an indication that should this proposal not be accepted and the age of criminal responsibility remains at 8 years of age, then a further Concluding Observation will be issued by the Committee later in 2016.

#### **UN Committee on Economic, Social and Cultural Rights**

More recently, the issue of the age of criminal responsibility has been raised when the UK was examined in relation to the Covenant on Economic, Social and Cultural Rights<sup>15</sup>. The Committee’s Concluding Observations outlined that Scotland’s low age of criminal responsibility remained a cause for concern:

<sup>14</sup> Office of the High Commissioner for Human Rights (2008). *UN Committee on the Rights of the Child: Concluding observations: United Kingdom of Great Britain and Northern Ireland*.

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

<sup>15</sup> UN Human Rights Committee (2015). *Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland*.

[http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20\(1\).pdf](http://www.equalityhumanrights.com/sites/default/files/uploads/documents/humanrights/UN/CCPRC%20GB%20concluding%20observations%20(1).pdf)

## **“Administration of juvenile justice**

23. The Committee is concerned that the age of criminal responsibility is set at 8 years of age in Scotland (and at 12 years for criminal prosecution) and at 10 years in England, Wales and Northern Ireland, which is not in accordance with international standards.”

**The State party should:**

- (a) raise the minimum age of criminal responsibility in accordance with international standards and ensure the full implementation of international standards for juvenile justice;**
- (b) step up its efforts with a view to further reducing the number of children in the juvenile justice system;”**

## **Other international instruments:**

A series of other international instruments in relation to children in the criminal justice system must be considered, aside from the UNCRC. These include the UN Standard Minimum Rules for the Administration of Juvenile ('The Beijing Rules')<sup>16</sup> and the UN Rules for the Protection of Juveniles Deprived of their Liberty ('The JDLs')<sup>17</sup>. The Beijing Rules ask states to ensure that the age of criminal responsibility is not set too low and that emotional, mental and intellectual maturity are taken into account.

## **Longstanding calls from National Human Rights Institutions and Non-Governmental Organisations:**

There have been longstanding calls from the Children and Young People's Commissioner for Scotland, the Scottish Human Rights Commission and non-governmental organisations across Scotland for an increase in the minimum age of criminal responsibility in line with international standards<sup>18 19</sup>. These calls have most recently been echoed to the UN Committee on the Rights of the Child as part of the UK's reporting process on the implementation of the UNCRC<sup>20 21</sup>.

<sup>16</sup> UN General Assembly (1985). UN Minimum Rules for the Administration of Juvenile Justice: the 'Beijing Rules'. <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

<sup>17</sup> UN General Assembly (1990). UN Rules for the Protection of Juveniles Deprived of their Liberty: the 'JDLs'. <http://www.un.org/documents/ga/res/45/a45r113.htm>

<sup>18</sup> See, among others, Together (2014) State of Children's rights in Scotland (Page 98). <http://www.togetherscotland.org.uk/pdfs/SOCRRTTogetherReport2014.pdf>

<sup>19</sup> Scottish Parliament Justice Committee (2014). Stage 1 Report on the Criminal Justice (Scotland) Bill (Para. 202). [http://www.scottish.parliament.uk/S4\\_JusticeCommittee/Reports/juR-14-03w.pdf](http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/juR-14-03w.pdf)

<sup>20</sup> UK Children's Commissioners (2015). Report of the UK Children's Commissioners (Page 42). <http://www.cypcs.org.uk/ufiles/UKreport.pdf>

<sup>21</sup> Together (Scottish Alliance for Children's Rights) (2015). NGO Alternative Report to the UN Committee on the Rights of the Child: Scotland (Page 40). [http://www.togetherscotland.org.uk/pdfs/UNCRC\\_Scotland\\_NGO\\_Alternative\\_Report\\_2015.pdf](http://www.togetherscotland.org.uk/pdfs/UNCRC_Scotland_NGO_Alternative_Report_2015.pdf)

## **Legislative Considerations**

Part 1 (1) of the Children and Young People (Scotland) Act 2014 states that Scottish Ministers must: '(a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and (b) if they consider it appropriate to do so, take any of the steps identified by that consideration'. Furthermore, in undertaking this duty, Scottish Ministers must 'take such account as they consider appropriate of any relevant views of children of which the Scottish Ministers are aware.'<sup>22</sup>

## **Scottish Government Commitments**

In the Scottish Government's 'Do the Right Thing Progress Report' of 2012<sup>23</sup>, published in response to the 2008 Concluding Observations, there was a commitment to give 'fresh consideration to raising the age of criminal responsibility from 8 to 12 with a view to bringing forward any legislative change in the lifetime of this Parliament'.

The commitment was repeated in the UK state party report to the UN Committee on the Rights of the Child in 2013<sup>24</sup>. In 2014, the Scottish Parliament's Justice Committee welcomed the then Cabinet Secretary for Justice, Kenny MacAskill's, undertaking to give consideration to raising the minimum age of criminal responsibility<sup>25</sup>. More recently, the Scottish Government reiterated the commitment in the Preventing Offending Strategy, published in June 2015. This notes that the minimum age of criminal responsibility "remains under active consideration."

This proposal seeks to make these longstanding commitments a reality.

Cabinet Secretary for Justice, Michael Matheson, in response to an amendment tabled by Alison McInnes, MSP, at Stage 2 of the Criminal Justice (Scotland) Bill (now Act) seeking to raise the age of criminal responsibility to 12, stated that 'there are significant underlying issues on the disclosure of criminal records, use of forensic samples, police investigatory powers and the rights of victims'<sup>26</sup>. He went on to say: 'I can therefore advise the committee that an independent advisory group is being established. The group will address the underlying issues in respect of disclosure of criminal records, forensic samples, police investigatory powers, victims and community confidence taking account of the minimum age of prosecution, the role of the children's hearings system, and UNCRC compliance. The group is expected to meet in the next six weeks and will bring forward recommendations for consultation by early 2016.'

<sup>22</sup> Scottish Government (2014). *Children and Young People (Scotland) Act 2014*. <http://www.legislation.gov.uk/asp/2014/8/section/1>

<sup>23</sup> Scottish Government (2012). *Do the Right Thing: Progress Report*.

<http://www.gov.scot/Resource/0039/00392997.pdf>

<sup>24</sup> UK Government (2013). *Fifth Periodic Report to the UN Committee on the Rights of the Child*.

[http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/CRC\\_C\\_GBR\\_5\\_6749\\_E.docx](http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/GBR/CRC_C_GBR_5_6749_E.docx)

<sup>25</sup> Scottish Parliament Justice Committee (2014) Stage 1 Report on the Criminal Justice Scotland Bill

[http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72893.aspx#\\_ftnref211](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/72893.aspx#_ftnref211)

<sup>26</sup> Scottish Parliament Justice Committee (2015), Official Report. Tuesday 8<sup>th</sup> September 2015.

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10071&mode=pdf>

As a result of this commitment, an advisory group was convened in November 2015.

The membership of this group and the group's terms of reference can be viewed online here: <http://www.gov.scot/Topics/Justice/policies/young-offending/MACR>.

## **2. How will the policy/measure affect children's wellbeing as defined by the wellbeing indicators?**

*List all wellbeing indicators relevant to the policy/measure (see Annex 2). The indicators are: Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible and Included.*

**Safe** – this policy seeks to safeguard young children and ensure that a one-off offence/incident in early childhood does not continue to impact on their life chances into adulthood. This policy does not ignore behaviour that might be harmful or concerning, but rather supports the child in addressing the root causes of that behaviour in a non-stigmatising way. This might include multi-agency interventions over the short to longer-term, depending on the child's individual circumstances.

Alongside this, it is also recognised that the child's behaviour may have also impacted on others, including other children. In order for these children to feel safe, it is important for them to have confidence that what has happened has been investigated and appropriate action taken to prevent that behaviour re-occurring. In order to feel safe in future, these children may also require support to recover from an incident.

**Healthy** – this policy is likely to bring positive benefits to the health and well-being of children and young people involved in harmful behaviour, particularly those who might otherwise have been prevented from pursuing their career of choice by details of something they may be embarrassed or ashamed about appearing on a Disclosure many years after an incident took place. At the same time, it should be acknowledged that there is potential for harm to child victims, should insufficient safeguards be built into any new processes designed to tackle children's harmful behaviour.

**Achieving** – similarly, children and young people will be able to achieve more – by being able to pursue their choice of college/university courses or follow a career path.

**Nurtured** – this policy seeks to ensure that 8-11 year olds are treated in the same way as under-8s in respect to criminal responsibility. This recognises their child status and is consistent with the UN Committee on the Rights of the Child's General Comment no 10, which states that the age of 12 should be seen as an absolute minimum, in relation to the age of criminal responsibility. This proposal also reinforces Scotland's GIRFEC approach by seeking to recognise the child at the centre, and the fact that 'offending' behaviour by younger children is often closely linked to family difficulties and the socio-economic circumstances of the child.

**Respected** – this policy seeks to ensure that the rights of children are respected, in line with the UNCRC and the Scottish Government's GIRFEC approach.

**Responsible** – by treating children and young people with respect, and by allowing

them to learn from early mistakes rather than being repeatedly punished for them, this proposal has the potential to teach children and young people how to behave respectfully and responsibly towards others. This policy change recognises that wider social, community or family factors have a significant impact on the behaviour of young children, and therefore responsibility for harm caused by a child needs to be shared.

**Included** – this policy will avoid the stigmatisation of children, particularly those who are most vulnerable and victimised, who might otherwise feel isolated from their peers as a result of an incident that may have occurred in early childhood.

### **3. How many children and young people are likely to be affected by the policy or measure?**

*List potential sources of official and other data, or note the need to locate this information. Are there different levels of impact for different groups of children?*

No child under the age of 12 can currently be prosecuted for their actions.<sup>27</sup> The current age of criminal responsibility, however, remains 8 years of age. This means that children in Scotland aged between 8 and 11 years of age can be held criminally responsible for their actions. Their actions are normally dealt with via the acceptance or establishment of an offence ground through the Children's Hearings system. Where there has been Police involvement in the incident, a record of this is also held on the Criminal History System held by Police Scotland, in addition to local crime recording systems. Should the age of criminal responsibility be raised to 12 years, then there will need to be consideration of how best to store information relating to a child's harmful behaviour, for what purpose it will be stored and for how long such information should be kept.

In 2014-15, 215 children aged 8-11 years old were referred to the Children's Reporter on offence grounds. The number of 8-11 year olds referred for offending has declined by 73% over the last 5 years.<sup>28</sup>.

This proposal has the potential to affect all of these children and young people. If this proposal is applied retrospectively, it will also have the potential to impact positively on many young people and adults who committed offences whilst a child.

The immediate benefit of this proposal to these children will be that their behaviour will no longer be regarded as 'criminal', both by them and by society as a whole. The approach towards youth justice in Scotland has, since Kilbrandon and the creation of the Children's Hearings System, been welfare-based. From a child's perspective being brought before a Children's Hearing on offence grounds, however, is likely to lead to a perception that they will be punished for their actions. This proposal seeks to make it explicit to children that any behaviour under the age of 12 will not be dealt with in such a way. Rather support will be provided in order to help the child move on, and rehabilitate from, an incident in early childhood.

<sup>27</sup> Scottish Government (2010) Criminal Justice and Licensing (Scotland) Act 2010.

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

<sup>28</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending.* [To be published].

By raising the age of criminal responsibility, this proposal seeks to recognise that such behaviour in young children is indicative of a need for support rather than punishment. This is consistent with the UN Committee on the Rights of the Child's General Comment no 10<sup>29</sup>, which states that 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.'<sup>30</sup>

Research carried out by SCRA into the nature of these offence grounds, and the family situations of these children, found that many children reaching the Children's Hearing system on offence grounds were already dealing with a range of other difficulties in their lives.<sup>31</sup> These issues included, but were not limited to, parental imprisonment, parental substance misuse, neglect, living in residential care or bereavement.

In terms of a direct impact on children, this proposal is likely to reinforce this welfare-based approach to children aged 8-11 years. It will focus on how to support them and avoid the behaviour being repeated in future. It will impact positively on their life chances, including educational attainment. It has the potential to allow a child to put an incident, or series of incidents, in early childhood behind them and have the opportunity to pursue an educational/career path of their choice.

It is important to state that this proposal seeks to cover a wide range of harmful behaviours currently dealt with via a Children's Hearings System offence ground. This includes very serious behaviours for which decisions will have to be made about whether or not a child should be subject to compulsory measures, such as being placed in secure care. Where consideration is being given as to how the harmful behaviour of under 12s will be dealt with under any new arrangements, care must be taken to ensure that such measures are capable of dealing with the full range of behaviours likely to be demonstrated.

Evidence would suggest that for the vast majority of 8-11 year olds accepting/having offence grounds established, behaviour is not repeated<sup>32</sup>. For others, their behaviour may involve a number of incidents at a particular point in their lives. For these children, this proposal offers the opportunity to rehabilitate and be supported to move away from troublesome behaviour.

However, for a very small minority of these children, early behaviour may be indicative of the beginning of a pattern of behaviour that is carried into later life. This proposal acknowledges that measures will need to be put in place to mitigate that risk. As such, the issue of risk management is examined in more detail at Stage 4 of

<sup>29</sup> UN Committee on the Rights of the Child (2007). General Comment No. 10: Children's rights in juvenile justice. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAghKb7yhsqkirkQZLK2M58RF%2f5F0vEZ%2bo3pfhJYL%2b%2fo2i7lJgP6EjqSGKnB2CPSr6g7ed2MDC7U6XaO%2bk%2bCMqBL7tXPezbwrl1FJAw0dKz6C%2bJHaD>

<sup>30</sup> UN Committee on the Rights of the Child (2007). General Comment No. 10: Children's rights in juvenile justice. <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAghKb7yhsqkirkQZLK2M58RF%2f5F0vEZ%2bo3pfhJYL%2b%2fo2i7lJgP6EjqSGKnB2CPSr6g7ed2MDC7U6XaO%2bk%2bCMqBL7tXPezbwrl1FJAw0dKz6C%2bJHaD>

<sup>31</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>32</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

this CRWIA.

Whilst recognising the positive impacts for some children in taking this approach, there is a risk that those experiencing harmful behaviour, including other children, may feel that, should the other child's actions not be regarded as criminal, then what has happened to them has not been taken seriously or has been minimised in some way. This proposal seeks to ensure that where an incident does occur that negatively impacts upon another child, that measures are put in place to ensure that the incident is fully investigated and measures put in place to avoid any reoccurrence.

Consideration will need to be made of how to reassure the child that action has been taken to address another child's behaviour, in a way that both validates their experience and protects the privacy of them and the other child.

Consideration will also need to be made of the support needs of these children, given that they will no longer be classified as the victims of and/or witnesses to a crime (as the behaviour of children aged 8-11 years old will no longer be treated as criminal). Even where it is established that existing systems (e.g. the Victim Information Scheme currently operated by the Children's Hearings System) may still be capable of being used under any new arrangements, it is acknowledged that there are gaps currently in this area and so further consideration should be made of how best to provide a system which meets these children's needs (as well as the needs of all children and young people who are victims of or witnesses to crime).<sup>33</sup>

The Young Victims of Crime Project found that there was strong evidence to suggest that 'many young people who commit crimes have, before they became offenders, been victims themselves'.<sup>34</sup> This would suggest that there would be dual benefits in improving the support provided to victims and witnesses, in that they would feel that their experiences were acknowledged and support needs met. At the same time, this would also be likely to decrease the risk of child victims demonstrating harmful behaviour themselves.

There is a need to carry out further analysis of the groups of children with protected characteristics most likely to be affected by this proposal. However, early analysis of data from the Children's Hearings System would suggest that those most likely to find themselves currently accepting or having offence grounds established between the ages of 8 and 11 are likely to be our most vulnerable children, whose behaviour is indicative a range of other difficulties in their lives.

A 2014 study carried out by the Scottish Prison Service into 'Prisoners Who Have Been in Care as 'Looked After Children' found that over a third of young offenders

<sup>33</sup> Victim Support Scotland & the Scottish Government (2011). *Young Victims of Crime Project: Scoping a national service model for supporting young victims of crime in Scotland* (Page 2).

<http://www.victimsupportscotland.org.uk/wp-content/uploads/2015/11/YoungVictimsofCrimeProjectFinalReport.pdf>

<sup>34</sup> Victim Support Scotland & the Scottish Government (2011). *Young Victims of Crime Project: Scoping a national service model for supporting young victims of crime in Scotland* (Page 5).

<http://www.victimsupportscotland.org.uk/wp-content/uploads/2015/11/YoungVictimsofCrimeProjectFinalReport.pdf>

and quarter of prisoners in adult prisons interviewed for the study had been in care at some point in childhood.<sup>35</sup> The study also found a higher prevalence of literacy/numeracy difficulties, as well as a link with poorer mental health for this group.<sup>36</sup> The report also looked at whether prisoners had witnessed violence between their parents/carers and found that more than two-thirds of prisoners with care experience had done so, compared to a third of those without care experience.<sup>37</sup>

Whilst a direct link cannot be drawn between this research and the need for an increase in the age of criminal responsibility, the data would appear to suggest that children and young people who are looked after are disproportionately represented in the criminal justice system as they get older. The ongoing existence of key support needs whilst in YOIs or adult prisons would also appear to suggest that opportunities are being missed to support looked after children at an early stage and potentially divert them from the criminal justice system entirely. As such, any proposal to remove children from the criminal justice system when they first demonstrate harmful behaviour, coupled with the provision of appropriate support at that stage, and potentially longer-term support, may contribute to a decrease in the number of young people coming into contact with the criminal justice system at a later stage.

Finally, consideration should be made of how this proposal may impact on the perception of young children more generally.

Any messaging about this proposal will need to be carefully managed, in order to ensure that it is not portrayed as offering 8-11 year olds a licence to behave in any way as they see fit and without consequences. It may be helpful to draw upon evidence of the cognitive development of children, including any research which looks at a child's ability to recognise the likely consequences of their actions. Consideration will need to be made in how best to publicise a change in the age of criminal responsibility, as well as the audiences this information should be designed to reach.

#### **4. What research evidence is available?**

*Preliminary identification of the research base for this policy/measure*

Whilst the number of children aged 8-11 years accepting/having offence grounds established is currently low, there is clear evidence to suggest that for those appearing before a Children's Hearing, their behaviour is very often associated with other disruption and/or trauma in the child's life<sup>38</sup>.

Whilst the key driver behind this proposal to raise the age of criminal responsibility is to ensure that younger children will no longer be criminalised for their actions, it is

<sup>35</sup> Broderick, R, McCoard, S & Carnie, J. (January 2014). Prisoners who have been in care as 'looked after children' 2013: 14th Survey Bulletin: Scottish Prison Service (Page 3 & 5).

[http://www.sps.gov.uk/hmsruntime/saveasdialog.aspx?fileName=14th\\_PRISONER\\_SURVEY\\_2013 - Looked\\_after\\_Children.pdf](http://www.sps.gov.uk/hmsruntime/saveasdialog.aspx?fileName=14th_PRISONER_SURVEY_2013 - Looked_after_Children.pdf)

<sup>36</sup> Ibid. (Page 13).

<sup>37</sup> Ibid. (Page 14).

<sup>38</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending. [To be published].

possible that a further positive impact of this proposal will be to prevent offending in later life.

Research into the familial backgrounds of Young Offenders and Prisoners may shed further light on the link between early trauma and certain behaviours:

- There is a well evidenced link between offending and bereavement. Vaswani undertook research with 33 young men in Polmont YOI and found that almost all (91%) had experienced at least one bereavement, with more than three-quarters experiencing traumatic bereavements (for example, loss through murder or suicide) and two-thirds suffering from substantial bereavements (four or more) (Vaswani,2014) -  
<http://onlinelibrary.wiley.com/doi/10.1111/hojo.12064/epdf>
- A study by the Scottish Prison Service entitled 'Prisoners Who Have Been in Care as Looked After Children' in 2013 found that many young offenders (34% of those participating in the study) and prisoners in adult prisons (27%) were care experienced. The study also found links to poorer mental health, poorer literacy and numeracy skills and increased exposure to familial violence than their non care experienced peers.  
<http://www.sps.gov.uk/Corporate/PrisonerSurvey2013LookedAfterChildren.aspx>
- Katherine Auty's research on the intergenerational transmission of criminal offending reveals that convictions are highly concentrated in families. The father's drug use increased the likelihood of transmission of criminal behaviour between the father and son; and problems with housing and harsh discipline increased the transmission between fathers and daughters.  
[http://www.crim.cam.ac.uk/people/academic\\_research/katherine\\_auty/](http://www.crim.cam.ac.uk/people/academic_research/katherine_auty/)
- Several studies have shown that parental/caregiver criminality is linked to violent behaviour among youth.<sup>39 40</sup>
- Compared to non-firesetters, fire-setting young people experience higher levels of drug-use, depression and suicidal behaviour. Adolescents who set fires have more severe psychopathology and lower self-image.<sup>41</sup>
- The impacts of trauma can include anxiety and depression through to post-traumatic stress e.g. flashbacks; nightmares; 'hyper arousal' leading to a heightened 'fight or flight' response to certain situations or people; interpersonal problems and self-endangering behaviours such as self-harm, substance abuse, risk taking and aggression (Briere and Lanktree, 2013).<sup>42</sup>

<sup>39</sup> Beaver, Kevin M. (2013). *The Familial Concentration and Transmission of Crime*, *Criminal Justice and Behavior*. Vol.40 (2), pp.139-155.

<sup>40</sup> Grogan, H. J. & Grogan, R. C. (1968). *The Criminogenic Family: Does Chronic Tension Trigger Delinquency?* *Crime & Delinquency*. Vol.14 (3), pp.220-225.

<sup>41</sup> Martin , G., Bergen, H. A., Richardson, A. S., Roeger, L., and Allison S. (2004). *Correlates of firesetting in a community sample of young adolescents*. *The Australian and New Zealand Journal of Psychiatry*, 38, pp. 148-154.

<sup>42</sup> Briere, J. and Lanktree, C. (2013). *Integrative Treatment of Complex Trauma for Adolescents (ITCT-A)* *Treatment Guide: 2nd Edition*.

- Repeated trauma is associated with an extremely problematic combination of having difficulties in controlling emotions and reactions; impaired information processing; self-critical and aggression-endorsing attitudes, and seeking out peer relationships that model and reinforce disinhibition and aggressive antisocial and delinquent behaviour. (Divir et al. 2015).<sup>43</sup>
- Recent research carried out by the Scottish Children's Reporter Administration (SCRA) explores the backgrounds of children under 12 years old referred to the Children's Reporter for offending, in order to understand the factors that influenced their behaviour and the outcomes for them up to 12 months following the offending behaviour. This research found that the number of children aged 8-11 years referred to the Reporter on offence grounds has declined by 73% over the last 5 years. For referrals for children aged 8-11 years old, 1 in 4 children were found to have experienced abuse<sup>44</sup>.
- McAra and McVie<sup>45</sup> suggest that 'Systems need to address four key facts about youth crime: serious offending is linked to a broad range of vulnerabilities and social adversity; early identification of at-risk children is not an exact science and runs the risk of labelling and stigmatizing; pathways out of offending are facilitated or impeded by critical moments in the early teenage years, in particular school exclusion; and diversionary strategies facilitate the desistance process'.

This research, whilst not exclusively focused on children aged 8-11 years, appears to indicate that for many children exhibiting harmful and/or worrying behaviour at a young age, there are potentially some significant unmet support needs. Should these support needs be addressed, acknowledging that some may require intensive and long-term support, then there is the potential for these children to be diverted from further offending.

- The Young Victims of Crime Project, a scoping initiative designed to look at a national service model for supporting young victims of crime in Scotland, was produced jointly by Victim Support Scotland and the Scottish Government. It outlines the key support requirements of children and young people who are victims of or witnesses to crime. Available here:  
<http://www.gov.scot/Resource/Doc/254429/0121321.pdf>.

#### Further Research Relevant to this Proposal

- The Centre for Youth & Criminal Justice (CYCJ) has prepared papers which examine the age of criminal responsibility in Scotland in comparison to other

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<http://keck.usc.edu/~media/KSOM/Education/Academic%20Department%20and%20Divisions/attc/ITCT-A-TreatmentGuide-2ndEdition-rev20131106.pdf>

<sup>43</sup> Dvir, Y. et al. (2014). *Childhood Maltreatment, Emotional Dysregulation, and Psychiatric Comorbidities*. *Psychiatry*. May-Jun, 22 (3), pp. 149–161. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4091823/>

<sup>44</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>45</sup> McAra, L. and McVie, S. (2010). *Youth Crime And Justice: Key Messages From The Edinburgh Study Of Youth Transitions And Crime*. *Criminology and Criminal Justice*, 10, pp. 211-230  
<http://cri.sagepub.com/content/10/2/179.abstract>

European countries.

- The Child Rights International Network's (CRIN) policy work on the minimum age of criminal responsibility monitors the ages around the world.
- Edinburgh Study of Youth Transitions and Crime ([http://www.law.ed.ac.uk/research/making\\_a\\_difference/esytc](http://www.law.ed.ac.uk/research/making_a_difference/esytc))
- A key message from young people and the wider public in a review on preventing antisocial behaviour is more effort needs to put into promoting community safety and cohesion and less on directly tackling the behaviour itself. This echoes the ethos of this proposal in that effective intervention should focus on prevention rather than punitive measures<sup>46</sup>.
- The Scottish Law Commission conducted an in-depth report into the age of criminal responsibility in 2002, resulting in a recommendation that any rule on the age at which children cannot be found guilty should be abolished, subject to an amendment that ensured that children under the age of 12 could not be prosecuted. It posed that the age of criminal responsibility is better conceptualised as relating to immunity to prosecution. The report' deliberations are of relevance to this proposal<sup>47</sup>.

#### Other Information

- UNCRC General Comment 10, Children's Rights in Juvenile Justice, UN Committee on the Rights of the Child (2007):  
<http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>

#### **5. Has there been any public or stakeholder consultations on the policy/measure?**

Stakeholders include children and young people, parents/carers, children's workforce and NGOs

#### Scottish Government Advisory Group

An Advisory Group on Minimum Age of Criminal Responsibility was convened in November 2015 to examine the potential impacts of raising the age of criminal responsibility in Scotland from 8 to 12 years old. The group was comprised of representatives from a wide range of bodies, including the Scottish Government, NGOs, Police Scotland, Children and Young People's Commissioner Scotland, Disclosure Scotland, Centre for Youth and Criminal Justice and COSLA.. The Group has focused their work on 4 key areas:

- 1) The Role of the Police
- 2) Disclosure – including issues around weeding and retention
- 3) Children's Hearings System

<sup>46</sup> Scottish Government (2009). *Promoting Positive Outcomes: Working Together to Prevent Antisocial Behaviour in Scotland - Volume 2: Evidence - The research, analysis and public consultation that informed the review of national antisocial behaviour policy.* <http://www.scotland.gov.uk/Publications/2009/03/18112339/0>

<sup>47</sup> Scottish Law Commission (2002). *Report on the Age of Criminal Responsibility.* <http://www.scotlawcom.gov.uk/files/5312/7989/6663/rep185.pdf>

#### 4) Care, Protection and Risk Management

The Advisory Group was tasked with creating a report to help inform a wider consultation of stakeholders, due to take place from March, 2016 onwards.

##### Consultation with Children and Young People on this Proposal

Given the potential impact of this proposal on different groups of children and young people, it would be helpful for there to be separate, tailored consultation with children and young people. Adequate time should be allowed for this to be carried out. This is likely to require a period of several months, in order to allow for the identification of groups to be consulted with, the development of child-friendly materials, analysis of data and the production of a report.

Any consultation should be conducted in line with Golden Rules of Participation principles created by the Children and Young People's Commissioner Scotland<sup>48</sup>, in order to ensure that children and young people's views are sought in a meaningful and constructive way.

As a first step, there should be a consideration of what information could be most usefully be gleaned from a children and young people's consultation, rather than an assumption that the consultation created for adults should simply be translated into more child-friendly language. For example, hearing the impact of having to declare an incident in childhood at a college/university interview, may be more helpful than a quantitative figure suggesting the majority of children and young people are in favour of/against the proposal.

Consideration should be made of the groups of children and young people it would be most helpful to consult with. These include children generally, children and young people who have accepted/had offence grounds established at a Children's Hearing whilst aged 8-11 years, looked after children, children with disabilities, child victims and witnesses.

A process for feeding back the results of the consultation to children and young people, including any action taken as a direct result of it, should also be built into the consultation process.

##### Children and young people's views on youth justice

A range of broader consultations with children and young people on youth justice issues have already provided some useful insight in relation to this proposal:

A small in-depth study with 14 children and young people at the edge of social exclusion or already involved in the criminal justice system concluded that the link between young people presenting with offending behaviour and children growing up in challenging social circumstances is clear. The study's recommendations focussed

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<sup>48</sup> Children and Young People's Commissioner Scotland (2013). 7 Golden Rules for Participation. <http://www.cypcs.org.uk/ufiles/7-Golden-Rules.pdf>

on the importance of early intervention, listening to the voice of the child and building the resilience of children and young people at risk of social exclusion<sup>49</sup>.

These findings have been echoed in other studies that have concluded that ‘the most effective youth justice interventions were considered to be those that take account of the individual, social and economic contexts in which antisocial behaviour and crime take place. The most valued interventions were those that allowed respectful interactions with youth justice professionals to be developed<sup>50</sup>.’ and emphasised the importance that children and young people place on respectful and friendly interactions with youth justice professionals<sup>51</sup>.

Whilst this research focuses on young people more broadly, rather than exclusively on the younger age group this proposal is geared towards, it suggests that taking an early interventions-based approach that is focused exclusively on the support required by a child, rather than labelling their behaviour as criminal, is likely to ensure that children feel less alienated and potentially more likely to engage with processes that are designed to help them and divert them from any further harmful behaviour or future offending.

### Community Views

As previously stated, the number of incidents of harmful behaviour involving children aged 8-11 years is currently very low. However, it is likely that public perceptions of the level of ‘offending’ by this age group will be that this figure is much higher. Similarly, there may be a belief that the behaviour of this group of children is likely to deteriorate when it is believed that there will no longer be any consequences to their actions. When consulting with stakeholders in this group, it will be crucial to ensure that the actual level of incidents is reflected, as will the likely consequences of such behaviour, should the age of criminal responsibility be raised to 12 years.

### **6. Has there been any estimate of the resource implications of the policy/measure?**

*Capital costs, expenditure, recruitment and training costs for the workforce etc.*

A formal estimate of costs associated with this proposal has not yet been produced. However, it is possible to anticipate some areas of potential expenditure associated with implementing the proposal. For example, there are likely to be costs associated with:

- Training and Development
- General Publicity/Information
- Provision of Intensive Support Services
- The Management of Risk

<sup>49</sup> Newman, G. (2011). Challenging or Challenged? Views of Young People at the Edge of Exclusion. [http://www.highlandchildrensforum.org/userfiles/file/hcf\\_reports/Challenging-or-Challenged\\_-2011.pdf](http://www.highlandchildrensforum.org/userfiles/file/hcf_reports/Challenging-or-Challenged_-2011.pdf)

<sup>50</sup> Elsley, S. et al. (2013). Children and young people’s experiences of, and views on, issues relating to the implementation of the United Nations Convention on the Rights of the Child (Para. 9.3). <http://www.gov.scot/Publications/2013/07/1108/9>

<sup>51</sup> Children’s Parliament (2010). Lothian & Borders Police Youth Strategy: Hearing the views of children. <http://www.childrensparliament.org.uk/new-assets/police-youth/cp-police-report.pdf>

To put these into context, in 2010/11 the Scottish Government spent an estimated £128 million on services and activities aimed specifically at reducing reoffending, and £254 million on restricting the liberty of offenders. The average cost per week of a bed for a child or a young person in secure accommodation during 2013-14 was £5,328<sup>52</sup>. The Scottish Government estimates that the total economic and social costs of reoffending are around £3 billion a year.

Further research carried out by the Scottish Government estimated the total cost of reoffending by a single cohort of offenders who had three or more previous convictions over a ten-year period was £5.4 billion. This is an under-estimate as it does not include all the costs incurred by bodies outside the criminal justice system.<sup>53</sup>

This proposal seeks to ensure that fewer children become involved in the youth justice system, by providing early intervention and support to enable them to deal with issues in their lives and allow them to move past an incident of harmful behaviour in early childhood.

Depending on the new model adopted, there may be some costs associated with adapting some existing support services to work with a younger age group, or extending existing child protection services, there may also be broader training costs associated with this proposal, linked to working with children aged 8-11 years. This might include training for those in the Children's Hearings system, Disclosure Scotland staff, teachers (including Named Persons), social workers, Police officers and health professionals. The options for supporting children aged 8-11 years demonstrating harmful behaviour are discussed in more detail at Stage 4 of the CRWIA.

When considering any resource implications, it will be crucial to consider any gaps to existing services. For example, consideration should be made of the support needs of child victims and witnesses, and whether this proposal could provide an opportunity to offer additional resources and improved services to this group of children.

It would also be helpful to ensure that children and young people more generally are aware of any changes brought about by the proposal and that this information is presented in a way that demonstrates why any change has been taken from a children's rights perspective. This might require a more wide-spread awareness-raising approach (e.g. through schools, existing youth groups etc.).

There may be further resources required in order to ensure broader awareness of any changes. For example, if this proposal is applied retrospectively, then there will be an impact on those admitting or having offence grounds established aged 8-11 years, who may now be young adults.

52 Scottish Government (2015). *Children's Social Work Statistics Scotland, 2013-14*. <http://www.gov.scot/Resource/0047/00474429.pdf>

53 Audit Scotland (2012). *Reducing reoffending in Scotland*. [http://www.audit-scotland.gov.uk/docs/central/2012/nr\\_121107\\_reducing\\_reoffending.pdf](http://www.audit-scotland.gov.uk/docs/central/2012/nr_121107_reducing_reoffending.pdf)

Finally, consideration will also need to be made of how to present any changes to the wider public. Again, this might require an awareness-raising campaign, in order to ensure that any messaging around a change in the age of criminal responsibility is handled sensitively and in a way that accurately reflects the reasoning behind it.

## **CRWIA Stage 3**

### ***Data Collection, Evidence Gathering, Involvement of/Consultation with Stakeholder Groups - key questions***

#### ***1. What does the evidence tell you?***

*The evidence base may include demographic information, academic research, service monitoring/inspection reports, service evaluation reports, user surveys etc. Identify any gaps in the evidence base. In particular, look at what the evidence tells you about children and young people's views and experiences of the relevant service(s); and/or what it tells you about children and young people's views of the policy proposal*

Scotland has the lowest age (8 years) of criminal responsibility in Europe and is subject to regular criticism from UN Treaty bodies and stakeholders, in particular children's organisations. This is partly due to the criminal consequences faced by children including through criminal records, disclosure and forensic sampling. There is also concern about the stigmatisation of children as offenders at a young age.

It's acknowledged that Early and Effective intervention, as part of the Whole Systems Approach, has made a significant difference in the way that the harmful behaviour of young children aged 8-11 years in Scotland is managed. As such, many children are no longer being referred to the Children's Hearings system on offence grounds. However, for the children who are still being referred, there can be lasting consequences.

Scotland has a long-standing association with welfare-based approaches, which put the child's needs and best interests at the centre of decision-making processes. Scotland's Children's Hearings System is internationally acknowledged as providing a child-centred, welfarist approach towards managing a child's harmful behaviour. However, in having an age of criminal responsibility that sits at 8 years of age, a small number of children acquire a criminal record which will remain with them into adulthood. For many children, and their parents, they may not be fully aware of the long-term consequences of this until they reach a key milestone (e.g. applying for a college course).

Evidence would suggest that between the ages of 8 and 11 years, a child is going through a period of intense cognitive development.<sup>54</sup> For looked after children, who may have been subject to trauma and/or neglect, this development can be impaired or delayed further<sup>55</sup>. As such, an approach towards tackling the harmful behaviour of younger children that takes account of the fact that children are still learning about impulse control and the consequences of their actions, would appear to be sensible.

<sup>54</sup> Claire Bryan-Hancock & Sharon Casey (2011) *Young People and the Justice System: Consideration of Maturity in Criminal Responsibility, Psychiatry, Psychology and Law*, 18:1, 69-78, DOI: 10.1080/13218711003739086.

<sup>55</sup> <https://www.celcis.org/files/5214/4542/6216/Response-Independent%20Advisory%20Group%20on%20Stop%20and%20Search.pdf>

Research around ‘offending’ behaviour in Scotland has tended to look primarily at the experiences of children aged over 12 years. However, recent research by the Scottish Children’s Reporters Administration<sup>56</sup> has provided specific information about the 8-11 year old age group. This research is likely to prove particularly helpful in testing out any new models for dealing with harmful behaviour.

In terms of children and young people’s views, the Young People Explore Youth in Justice report, produced by the Centre for Youth and Criminal Justice in 2015<sup>57</sup> found that, despite a welfare-based approach currently adopted in Scotland, a feeling of being judged pervades many of the young people’s experiences with youth justice services. This can be due to:

- 1) the format of the interaction:

*“Well, I was in this panel and there were just three of them sat there judging me, talking about who I was and what would happen to me as if I wasn’t even there”*

- 2) The way it is conducted:

*“Obviously right, stuff happened with my family, but this social worker I’d never met before came in and sat down and just started asking me all these questions. It felt dead weird and I didn’t understand why they were asking them. She basically wouldn’t talk to me unless it was answering her questions.”*

- 3) Who conducts/is involved in the interaction

*“Why is it that , when you’re going through panels or the courts, or anything where decisions are getting made about you, your life, you’re never listened to...and they don’t seem to talk to people who know you well and actually work with you every week. Why can’t a responsible adult, from a service – like Johnny and Julie – why can’t they be the one who talks about your character and stuff?”*

This would appear to suggest that children value a non-stigmatising, child-friendly approach which allows for their views to be listened to and respected, as well as taking into accounts the circumstances they currently find themselves in.

Evidence would suggest that where a child demonstrates harmful behaviour at a young age, then this is almost always linked to difficulties they are experiencing in their own lives.

Recent research looking at the effects of physical punishment on children has shown a longitudinal link between the use of physical punishment on a child, and the child’s own behaviour.<sup>58</sup>

<sup>56</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children’s Reporter for offending*. [To be published].

<sup>57</sup> Centre for Youth and Criminal Justice (2015). *Young People explore Youth in Justice*.

[http://www.cycj.org.uk/cycj\\_tags/space-unlimited/](http://www.cycj.org.uk/cycj_tags/space-unlimited/)

<sup>58</sup> Heilmann, A., Kelly, Y. and Watt, R.G. (2015) *Equally protected?: a review of the evidence on the physical punishment of children*. London: NSPCC. <https://www.nspcc.org.uk/globalassets/documents/research-reports/equally-protected.pdf>

A recent survey carried out by the Scottish Prison Service has shown that over a third of young offenders, and approximately a quarter of prisoners have been looked after in the past<sup>59</sup>. These prisoners also reported that they struggled with literacy and numeracy skills, had a higher than average incidence of mental health difficulties and had been exposed to violence in the home<sup>60</sup>.

## **2. What further data or evidence is required?**

*Is the evidence up to date, robust and reliable, sufficiently relevant to what is being proposed, or do you need to commission new research?*

Research carried out by Henderson, Kurlus and McNiven on behalf of the Scottish Children's Reporter Administration<sup>61</sup> provides an up to date picture of the experiences and backgrounds of 8-11 year olds being referred to the Children's Reporter for offending.

It covers the exact demographic potentially affected by this proposal, provides an analysis of the nature of current offences and trends. As such, it is immensely helpful in informing consideration of this proposal from a children's rights perspective.

However, a report carried out in 2013 into children and young people's experiences of, and views on, issues relation to the implementation of the United Nations Committee on the Rights of the Child<sup>62</sup> identified that there were gaps in knowledge in relation to the views of children and young people on the age of criminal responsibility in Scotland. As such, it would be helpful to speak to children about this topic in more detail.

Much of the current research around youth justice focuses on the 12 years + age group and therefore it would be helpful for there to be a more in depth analysis of the key issues affecting this younger age group.

One further piece of research that may be useful to commission concerns how the current arrangements for dealing with 8-11 year olds impact on young people at key points throughout young adulthood. For example, where an offence ground has prevented a young person pursuing a particular college/university course or has caused employment difficulties.

In relation to victims of harmful behaviour, it will be important to establish which routes of support are currently open to them, and whether these might be altered in any way by a change to the minimum age of criminal responsibility. This work could build on the findings of the research carried out by the Young Victims of Crime Project in 2012<sup>63</sup> which found that there were significant gaps in the support available to young victims. Young victims went on to say that support could most

<sup>59</sup> Broderick, R; McCoard, S and Carnie, J (2014), *Prisoners Who Have Been in Care as 'Looked After Children'*

<sup>60</sup> Broderick, R; McCoard, S and Carnie, J (2014), *Prisoners Who Have Been in Care as 'Looked After Children'*

<sup>61</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>62</sup> Elsley, S. et al. (2013). *Children and young people's experiences of, and views on, issues relation to the implementation of the United Nations Committee on the Rights of the Child*. Edinburgh: Scottish Government.

<http://www.gov.scot/Resource/0042/00427287.pdf>

<sup>63</sup> Victim Support Scotland & the Scottish Government (2011). *Young Victims of Crime Project: Scoping a national service model for supporting young victims of crime in Scotland*. <http://www.victimsupportscot.org.uk/wp-content/uploads/2015/11/YoungVictimsofCrimeProjectFinalReport.pdf>

helpfully be provided to them via online support, one to one peer support and group support. From a children's rights perspective, it will be important to establish that children who are the victims of other children's harmful behaviour will not suffer any detriment as a result of an increase in the age of criminal responsibility.

Formerly looked after children and young people comprise a significant proportion of Young Offenders' Institutions and Prison populations<sup>64</sup>. Further research into the lives of these young adults, and in particular, their early experiences with the Youth Justice system is likely to prove valuable in considering the ways in which harmful behaviours will be dealt with in future, should the age of criminal responsibility rise to 12 years old. Other research could look at the influence of cultural factors in a child gaining a criminal record at a young age. For example, are staff in residential units expected to call the Police for incidents that might be dealt with differently in a family home environment?

**3. Has there been any consultation on the development of the proposal(s)?**

*Public or targeted consultation with children and young people, their parents/carers, the children's workforce - is there enough information on the views of the children and young people who will be affected by the policy/measure?*

To date, there has been no specific consultation on the proposal to raise the age of criminal responsibility in Scotland from 8 to 12 years.

This CRWIA, and the report produced by the expert advisory group convened in November 2015, are designed to inform a wider stakeholder consultation, including specific consultation with children and young people, on the proposal due to take place from March 2016 onwards.

For more information about how this consultation with Children and Young people should be conducted, please refer to Q5, Stage 2.

**4. Should children and young people be further involved in the development of this policy? Are there particular groups of children and young people whose views should be sought?**

*Specify how - outline the purpose, format, timetable and the questions you want to ask*

Yes – but consultation needs to be tailored to children and young people's needs/knowledge. For further information of how this should be carried out, please see Q5 of Stage 2.

It is important that children and young people's involvement is not restricted to the consultation process itself. Rather, they should be seen as stakeholders able to contribute to policy development on an ongoing basis. For example, where information is being developed to let children and young people know about any changes to the age of criminal responsibility, then they should be involved in the design of these materials and consulted to ensure that materials are readily understandable. Consideration should be made of the need to provide such materials in a wide range of formats, including BSL, Braille and Easy Read.

<sup>64</sup> Broderick, R; McCoard, S and Carnie, J (2014), *Prisoners Who Have Been in Care as 'Looked After Children'*

**5. Should other stakeholders and experts be further involved in the development of this policy?**

*Specify how - outline the purpose, format, timetable and the questions you want to ask*

The Advisory Group convened by the Scottish Government in November 2015 comprised a wide range of experts working with the children and young people likely to be affected by this proposal.

Consideration should be made of how this group could continue an input, once the consultation with adult stakeholders and children and young people is complete. It would seem sensible to revisit the membership of the group at this stage, or to consider forming sub-groups to take forward specific pieces of work.

## **CRWIA Stage 4**

### **Assessing the Impact and Presenting Options - key questions**

#### **1. What likely impact will the policy have on children's rights?**

Negative/positive/neutral. For those assessed as having a negative impact, list options for modification or mitigation of the policy/measure, or suggested alternatives to the policy/measure

#### **Context**

Consideration has been made of raising the age of criminal responsibility in Scotland previously. However, legislative change in 2010, via the Criminal Justice and Licensing (Scotland) Act 2010, went only part-way towards this, raising the age of criminal prosecution to 12. This meant that no child could be prosecuted through the courts for a crime/offence committed whilst they were aged under 12. 8-11 year olds, could continue to be held criminally responsible, however, by accepting or having an offence ground established via a Children's Hearing. The Children and Young People (Scotland) Act 2014 introduced a requirement on Scottish Ministers to keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and, if they consider it appropriate to do so, take any of the steps identified by that consideration. In undertaking this duty, Ministers must take account as they consider appropriate of any relevant views of children of which they are aware.

In UNCRC terms, the minimum age of criminal responsibility is the age at which children can be held responsible in a penal law procedure. However, the UN Committee on the Rights of the Child has continued to express concern that children are held criminally responsible for their actions at the age of 8, albeit without them being subject to prosecution<sup>65</sup>. The Convention also recognises (in General Comment 10) that even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below MACR the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. The intention of this policy is to ensure that 8-11 year olds in Scotland will also be subject to this irrefutable assumption. This will require a cultural shift, not only by those currently dealing with the offending behaviour of younger children, but also by the wider public.

From a children's rights perspective, the key difficulty for 8-11 year olds has been that offence grounds that have been accepted/established, and any information associated with an incident recorded by Police Scotland, could continue to appear on Disclosure certificates until adulthood. Prior to 2015, this could mean an offence ground accepted/established in early childhood could appear on a higher level disclosure until the age of 40 (or longer for some serious/sexual offences). For some

<sup>65</sup> Office of the High Commissioner for Human Rights (2008). UN Committee on the Rights of the Child: Concluding observations: United Kingdom of Great Britain and Northern Ireland.  
<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

children and young people, this has severely restricted their life chances – including limiting access to certain course choices at college/university and some career paths.

The issue was re-visited as part of the consideration of the Children's Hearings (Scotland) Act 2011. Sections 187 and 188 of the Act, which sought to amend the Rehabilitation of Offenders Act 1974 and bring about changes in the way in which information about incidents was weeded from the Police Scotland Criminal History System, remain to be commenced.

Changes brought in by the Police Act 1997 and Protection of Vulnerable Groups 2007 Remedial Order 2015 have increased protections and reduced the length of time for which some offences committed as a child will have to be declared/appear on a Disclosure certificate.

Calls to the Children and Young People's Commissioner's Enquiries Line would suggest that children and young people may be unaware of the long-term impact of admitting offence grounds at a Children's Hearing (or having those grounds established), until they reach key milestones e.g. applying for university. The realization that something they had left in the past is still going to cause them difficulties for many years to come can negatively impact on a child/young person's well-being and serve to severely restrict their life chances.

It is acknowledged that the public consultation, and the separate consultation with children and young people, will add further insight to these findings and therefore this analysis should be approached as a starting point for discussion, rather than a definitive position. Should a decision be taken to progress this proposal, then a revised Children's Rights and Wellbeing Impact Assessment will be issued to accompany any draft legislation.

### **Implications for the Children's Hearings System**

In examining the potential implications of raising the age of criminal responsibility in Scotland, there is a need to examine how the Children's Hearing System might be affected, given that any offences currently committed by 8-11 year olds will be dealt with via the Children's Hearings System, rather than through the Courts.

Recognising that the behaviours currently classed as 'offences' will still occur, but the way in which they are dealt with will alter, then there is a need to examine how this would impact on referral practice for both the Police and SCRA (the Scottish Children's Reporter Administration). Specifically, there is a need to look at whether there is a need for an additional ground for referral to be created (or whether existing care and protection grounds would suffice).

At present, if a child aged 8-11 years is suspected of committing an offence, then this will usually result in a referral to the Children's Hearings System by the Police (although it will be for the Children's Reporter to decide whether the child is likely to be in need of compulsory supervision measures and whether a Children's Hearing is held).

There is no evidence to suggest that an increase in the minimum age of criminal responsibility would result in an increase to the numbers of referrals to the Children's Hearings system, should offence grounds for these children be removed. As such, the impact of the proposal, in relation to the volume of cases being dealt with by the Children's Hearings system, is likely to be neutral. There may, however, be an impact in relation to training and development for Children's Hearing's staff and Children's Panel Members.

Scotland already operates a welfare-based approach to youth justice. This proposal appears to be consistent with this approach. However, it is important to consider the impact this proposal may have on the perceptions of children referred to the Children's Hearings system.

Regardless of the fact that the current system is non-punitive, it is likely that a child attending a Children's Hearing on offence grounds will feel that they have been brought before Panel Members to receive a punishment. Where a child feels that their behaviour is labelled as 'criminal' at a young age, it is likely to lead to feelings of low self-worth and may create a self-fulfilling prophecy, whereby the child ends up being involved in further harmful behaviour. By removing the label of criminality for all incidents under the age of 12, and instead referring a child to a Children's Hearing on care and protection grounds, then the proposal has the potential to bring extensive benefits to this age group.

Recent SCRA research suggests that for the 8-11 year olds reaching the Children's Hearings system on offence grounds each year, a high proportion will also already been known to the Hearing or be referred on care and protection grounds at the same time<sup>66</sup>. The link between trauma and chaotic family circumstances and harmful behaviour is well acknowledged<sup>67</sup>. As such, an approach that seeks to remove offending or harmful behaviour from the equation is likely to be beneficial to these children. It is important to stress, however, that the root causes of a child's behaviour will still require to be addressed. This may require intervention beyond the child his/herself (e.g. substance misuse treatment for the child's parents).

The nature of harmful behaviours currently demonstrated by 8-11 year olds should be carefully examined, in order to ensure that the most serious of these can continue to be effectively managed, should the age of criminal responsibility be raised. For example, consideration should be made of whether a Children's Hearing would be able to require a child to live in secure accommodation, where that was appropriate and in the child's best interests (whilst acknowledging that this is a rare occurrence for this age group at present). Where any risk is managed, and the child is supported to move away from harmful behaviours, then again the impact on children is likely to be neutral. This is provided that there is no diminution in powers available to the Children's Hearing and that the support available to child victims remains unchanged.

<sup>66</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>67</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

There are currently 17 grounds for referral to the Children's Hearings System in existence<sup>68</sup>. Of these, two would appear to offer the flexibility required to deal with behaviours that are currently dealt with under offence grounds. Ground 'm' allows for a referral of a child to a Children's Hearing, where 'the child's conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person'. Ground '(n)' allows a child to be referred to a Hearing where they are 'beyond the control of a relevant person'. Were a new ground to be created, care would need to be taken to ensure that it was not perceived to be a 'replacement offence ground', thereby undermining the policy intention of raising the age of criminal responsibility. By using existing offence grounds, there is scope to ensure that the child's whole circumstances are taken into account, and that appropriate support is provided, without the stigmatisation of an offence ground.

One other issue to consider is that when offence grounds are currently being considered via the Children's Hearings system, the burden of proof is that the offence should be proved 'beyond all reasonable doubt'. If there is a move away from criminalising children and instead any behaviour is dealt with under care and protection grounds, then the burden of proof will shift to the civil standards, that is, that a matter needs only be proved 'on the balance of probability'. This has implications in relation to establishing the truth of a matter, as it may mean that a child is thought to be responsible for harmful behaviour, when the criminal standard of proof may have led to them being exonerated.

It is also important to acknowledge that children may also be the victims of other children's harmful behaviour<sup>69</sup>. Careful consideration will need to be made of how to ensure that children who are the victims of other children's harmful behaviour continue to have their experiences validated, and that they do not feel that the harm caused to them has been minimised by a welfare-based approach.

Given the potential for an increase in the age of criminal responsibility to negatively impact upon these children, it is important to ensure that any existing support continues to be available to victims even where a child is no longer held criminally responsible for their harmful behaviour. For example, the Victim Information Scheme<sup>70</sup> currently operated by the Scottish Children's Reporter Administration provides (limited) information to victims about the outcome of cases, where a child has been referred on offence grounds. Consideration will need to be given as to how to ensure that a child affected by another child's behaviour (or indeed an adult) is made aware that the behaviour had been addressed. From a children's rights perspective, it is crucial that this happens without compromising the other child's right to privacy. This is true for children of all ages, not just for cases involving 8-11 year olds. If this negative impact is mitigated, however, (e.g. by ensuring adequate support is still available), then the impact of this proposal on this group of children will be neutral. However, if appropriate support is not provided (particularly in relation to children who have experienced or witnessed the harmful behaviour of another child), then the impact on these children is likely to be negative.

<sup>68</sup> Scottish Government (2011). Children's Hearings (Scotland) Act 2011.

<http://www.legislation.gov.uk/asp/2011/1/contents>

<sup>69</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>70</sup> [http://www.scra.gov.uk/victim\\_information/services\\_for\\_victims.cfm](http://www.scra.gov.uk/victim_information/services_for_victims.cfm)

## **Disclosure**

The current approach towards 8-11 year olds demonstrating harmful behaviour can cause lasting difficulties for them into adulthood. Specifically, an offence ground that is accepted or established via the Children's Hearings system will lead to a criminal record for that child.

This can cause difficulties at a later stage in the child's life (e.g. when the child is older and attempting to access a college or university course or pursue a particular career), as this offence ground will continue to appear on a higher level Disclosure certificate. At present, there is little opportunity to leave such an incident in the past. It is likely that children are unaware of the full implications of accepting or having an offence ground established via the Children's Hearings System at the time of an offence.

Recent changes to legislation, most recently the Police Act 1997 and Protection of Vulnerable Groups 2007 Remedial Order 2015 have reduced the length of time some offences can appear on higher level Disclosure certificates, following a recent UK Supreme Court judgment, which found that to release all offences on a higher level Disclosure certificate did not allow a person to rehabilitate and also interfered with their right to privacy and family life<sup>71</sup>. Whilst the UK Supreme Court judgment related to England and Wales, the Scottish Government took measures to implemented its findings in Scotland (i.e. the 2015 Remedial Order).

It is important to note that the 2015 Remedial Order allows for some offences to be removed from a Disclosure Certificate 7½ years after an offence ground was accepted or established. Other, more serious offences will remain indefinitely. Whilst 7½ years is a significant reduction in the previous length of time offences could remain on a child's record it can still represent a considerable period of time in a child's life and impinge into adulthood.

In examining the key children's rights implications of the proposal in respect of Disclosure, it is important to also consider the weeding and retention of what is termed 'other relevant information' (ORI) held on Police Scotland's Criminal History System (CHS).

This ORI is information supplied to Disclosure Scotland by the Chief Constable of Police Scotland. Unlike general information relating specifically to offences, this information can be included at the discretion of the Chief Constable subject to Police Scotland's Quality Assurance Framework. As such, there is the potential for this information to be held indefinitely.

From a children's rights perspective, the key difficulties with Other Relevant Information are that the child has no control over what information is released and

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<sup>71</sup> *R (on the application of T and another) (FC) (Respondents) v Secretary of State for the Home Department and another (Appellants)* [2014] UKSC 35, the United Kingdom Supreme Court

there is no recourse to an independent appeals process should they disagree with the information provided<sup>72</sup>.

The information may also be presented on a Disclosure form without context, so it is left for the person to explain to a college/university/potential employer the details of a particular incident. This is particularly problematic where an offence was traumatic to the child/young person.

In relation to a spectrum offence, which might encompass behaviour of a relatively minor to a very serious nature, there are further difficulties in that a fairly minor event in childhood can lead to a young adult having the label of offender.

There are further concerns in that the inclusion of this Other Relevant Information on a Disclosure Certificate is not subject to a risk assessment process. That is, there is no scope to take into account whether a child is likely to re-offend or whether they have been rehabilitated.

Both offence grounds and Other Relevant Information are currently taken into account when decisions are being made in relation to the Protection of Vulnerable Groups. That is, when deciding whether or not a person should be banned from working with children, protected adults or both groups. Consideration will need to be made of the impact any changes made might have on the POVG scheme.

It should be noted that the issue of offence grounds appearing on higher level Disclosure Certificates and the weeding and retention of Other Relevant Information was considered in some detail as the Children's Hearings (Scotland) Act 2011 was progressing through the Scottish Parliament. Sections 187 and 188 of the Act sought to address some of the key difficulties, but these sections were superseded by the 2015 Remedial Order and are now unlikely to be commenced. It would be helpful therefore to analyse where the Remedial Order has provided additional safeguards to children in this respect. Equally, there should be some analysis of areas where there is scope for further improvements still be made.

Given the implications for children's privacy in retaining Other Relevant Information potentially indefinitely if not removed by Police Scotland via its process of reviewing the continued relevance and proportionality of disclosed non-conviction information, without recourse to an independent appeal process against its inclusion on a higher level Disclosure certificate, then a privacy impact assessment of the proposal would assist in identifying any outstanding privacy issues for children and young people. Such an assessment could look at both the status quo and any suggested arrangements to be put in place, should the proposal to raise the age of criminal responsibility be implemented.

Should the age of criminal responsibility be raised to 12 and changes made to the Disclosure/Other Relevant Information schemes to allow a child to leave an incident in childhood, then the benefits of this proposal are likely to be largely positive.

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<sup>72</sup> Under Data Protection law, there is the ability to apply to the Chief Constable of Police Scotland for the information to be removed under Section 10 of the Act if the inclusion of the information causes distress. However, the Chief Constable would have the ability to say the release of this information was reasonable and proportionate depending on the individual circumstances.

Again, consideration should also be made of the likely impact of such a change on child victims, in order to ensure that in a change benefiting one group of children, another is not disadvantaged.

Retaining the existing system is likely to mean that the negative impacts currently experienced by children in relation to Disclosure and Other Relevant Information will continue.

### **Care and Risk Management**

When considering the implications of an increase in the age of criminal responsibility, and a move away from criminalising children aged 8-11 years, then it is important to consider the full range of scenarios in which the behaviour of 8-11 year olds might require more intensive support and intervention. Given the nature of the offences carried out by this age group at present, it is reasonable to assume that the vast majority of 8-11 year olds will not require a high level of intervention<sup>73</sup>. However, for the small number that will, there is a need to consider which existing processes will continue to operate without criminality. Equally, it will be important to identify any gaps and look at how those gaps might best be filled.

### **Existing Risk Assessment Process**

A Social Background Report or equivalent (e.g. an Integrated Assessment Framework) is currently used by the Children's Hearings System to evaluate the need for statutory measures or significant intervention.

There is nothing to indicate that, should all harmful behaviour by 8-11 year olds be dealt with under care and protection grounds rather than offence grounds, that there would be a need for a lesser standard of assessment. From a children's rights perspective, it is crucial that any decisions being made about children in this situation continue to be based on the best available evidence of risk and needs. As such, it would appear sensible to maintain existing practice in this area, thereby ensuring a neutral impact on these children. Notwithstanding this, an increase in the age of criminal responsibility may offer an opportunity to establish if the current Social Background report allows for adequate consideration of a child's current and future support needs. Where it does not, then any change in the age of criminal responsibility would offer an opportunity to revisit the effectiveness of the form. This is likely to bring a positive impact to this group of children (and potentially to older children involved in the Children's Hearings System too).

It is important to state the necessity that everyone involved in a child's care should be aware of the importance of this continued high level of assessment, should the harmful behaviour of 8-11 year olds no longer be regarded as criminal. Otherwise, there is a risk that a lesser form of assessment becomes acceptable. Given the

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<sup>73</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

stated vulnerabilities of the children in this age group currently being referred on offence grounds<sup>74</sup>, any lesser assessment is highly likely to lead to a negative impact on these children.

Currently, where compulsory measures are thought to be required (e.g. a supervision requirement), then any child who poses a significant risk to themselves or others will usually be subject to multi-agency measures to ensure that their needs and any risk they might pose are addressed. Should the age of criminal responsibility be raised to 12 and the actions of 8-11 year olds dealt with through care and protection grounds, then it is crucial that the ability to take such measures is retained.

This proposal appears to be based on the premise that should the age of criminal responsibility increase, then the behaviours currently demonstrated by a very small number of 8-11 year olds will continue to occur. It will be important therefore from the perspective of the child, and of those affected by the child's behaviour, that there is an assessment of how that risk might be managed under any new arrangements.

The Framework for Risk Assessment, Management and Evaluation for under-18s (FRAME)<sup>75</sup> provides guidance to support multi-agency practice for children involved in offending, setting out a broad framework for risk management practice. Consideration should be made of whether the FRAME framework could be adapted to meet the specific needs of children aged 8-11 years old being referred on care and protection grounds for their harmful behaviour, or whether another approach might be better suited to this particular age group, for example, an extension of existing National Child Protection Guidance.

The care and risk management (CARM) guidance appears as an appendix to FRAME<sup>76</sup>.

Whilst the principles of CARM could potentially be applied to small number of children in the 8-11 year old age group requiring that level of risk assessment and support, consideration should also be made of whether it would be preferable for 8-11 year olds to be supported and managed through existing child care and protection arrangements. It is acknowledged that many children who are involved in harmful behaviour, are also in need of protection (e.g. from neglect, parental substance abuse etc). Taking a child protection approach would also serve to reinforce the message that younger children should be supported in a holistic way to address any harmful behaviour. As such, this approach is likely to bring a positive impact for these children.

Child protection processes could include social work co-ordinating multi-agency risk assessments, arranging child protection case conferences, maintaining the Child Protection Register and supervising children on behalf of the Children's Hearings system. Should this child protection route be taken, it is important to stress the need for a process to be put in place, so that when a child turns 12, there is a smooth

<sup>74</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

<sup>75</sup> <http://www.gov.scot/Publications/2014/12/6560>

<sup>76</sup> <http://www.gov.scot/Publications/2014/12/6560>

transition to CARM (where this intervention is deemed still to be required).

Current practice would suggest that most 8-11 year olds who display harmful behaviour, even of a serious nature, can be managed with appropriate supports in the community. There will be, however, a small number for whom this is not appropriate or possible. As part of any risk assessment process, there will need to be consideration about whether the young person requires to be away from their home environment (e.g. in foster or residential care).

Although it would be rare for this age group, consideration should also be made of whether, under any new arrangements, children aged 8-11 years could still be subject to secure care, an MRC (Movement and Restriction Condition), an Intensive Support and Monitoring Service (ISMS) order or a service such as intensive fostering.

Alongside looking at any risks a child demonstrating harmful behaviour, there should be a full analysis of any risks that might be posed to the child by others should the age of criminal responsibility be raised to 12 years.

For example, would there be a risk to a child that they could be blamed for an incident by an adult or older sibling, or coerced into admitting something they did not do, in the knowledge that the child's involvement would no longer be regarded as criminal. Consideration should also be made of the potential for some children to be exploited by organised crime gangs and of the measures that could be put in place to mitigate that risk. It should be acknowledged that there is scope for this to happen already under existing legislation, but this risk is likely to increase under any new arrangements. Ensuring some methods of ruling a child into, or out of, an investigation on the basis of facts (and in the most serious of cases, via forensic sampling) are still available to the Police may be one way of doing so.

Given that existing mechanisms are already in place to manage the existence of harmful behaviours, and any associated risk to the child and others, then as long as measures are put in place to guard against the exploitation of children, then it would appear that raising the age of criminal responsibility is likely to have a neutral impact in respect of risk management.

### Training/Skills Development

In Scotland, the 'Common Core'<sup>77</sup> sets out the key skills, knowledge, understanding and values for the children's workforce.

In considering raising the age of criminal responsibility, it will be important to look at any associated workforce training requirements. This might include training for Police officers, teachers, social workers, residential care workers, foster carers and health professionals (although this is not an exhaustive list).

The creation of the Named Person role in each local authority area,<sup>78</sup> will ensure that all children will have a single point of contact, whose role it will be to identify any

<sup>77</sup> <http://www.gov.scot/Publications/2012/06/5565>

support needs and to put the required support in place.

For children aged 8-11 years old, the Named Person is likely to be the Head Teacher of their Primary School. Consideration should therefore be made of whether any specific training is likely to be required for Named Persons, including in relation to the support needs of children who have experienced other children's harmful behaviour and/or are required to act as a witness.

As a minimum requirement, a change to the age of criminal responsibility will require everyone working with, and making decisions about, children to understand this policy change and the reasons behind it. Specifically, there is a need to ensure that professionals understand the link between harmful behaviour and the child's own experiences and/or family circumstances. Professionals should also recognise the link between early intervention and support, and the opportunities it offers in terms of the potential to steer some children away from harmful behaviour for the rest of their lives.

For some professionals, any change in the law with regards to the age of criminal responsibility may also require an attitudinal shift away from an assumption that children who demonstrate harmful behaviour at a young age are inherently bad or destined for a life of offending. This might include a consideration of the language used to describe both children and their behaviour (for example, when meeting with children or writing reports). For some professionals, this may present a challenge, whilst for others this will be a simple shift in existing practice.

If considering an increase in the age of criminal responsibility in Scotland, it may also be helpful to consider any wider inequalities that may exist in how offending behaviour is currently dealt with in Scotland. That is, will the harmful behaviour demonstrated by children from stable home backgrounds lead to the same outcomes as the behaviour of a child in residential child care or foster care? Whilst it is acknowledged that a child in residential child care may require additional support to deal with any harmful behaviour, from a children's rights perspective, it is important that the provision of such support does not lead to any long-term disadvantage on their part.

There is currently limited support available for professionals assessing and managing risk for children who cause serious harm to others. The IVY service<sup>78</sup>, however, provides specialist support for risk assessment, formulation, management, assessment and treatment for children who present a serious risk to others. This is currently funded on a pilot basis and only available to children over the age of 12. Should the minimum age of criminal responsibility be raised to 12, consideration should be made of whether the remit of the IVY service could be extended to include those working with children aged 8-11 years or whether an alternative approach would be more suitable.

Improving workforce knowledge around the reasons behind harmful behaviour demonstrated by younger children, as well as the need to provide appropriate

<sup>78</sup> Scottish Government (2014). Children and Young People (Scotland) Act 2014 (Part 4).

<http://www.legislation.gov.uk/asp/2014/8/section/1>

<sup>79</sup> <http://www.cycj.org.uk/about-us/what-we-offer/interventions-for-vulnerable-youth-ivy-project/>

support to avoid any reoccurrence is likely to have a positive impact on these children.

Whilst there may be some initial costs associated with this approach (see Stage 2 (6)), the benefits in ensuring staff are more confident in their risk-based decision-making is likely to ensure children were better supported and that the risk to other children being harmed is significantly reduced.

### Information-sharing Protocols

In considering an increase in the age of criminal responsibility to 12, any impact on current information-sharing protocols needs to be fully considered.

The Children and Young People (Scotland) Act 2014 and draft Statutory Guidance for parts 4, 5 and 18 of the Act clearly outline the roles, responsibility and duties on the Named Person and Lead Professional in relation to information-sharing and the initiation of a Child's Plan.

From a children's rights perspective, there is often a delicate balance to be struck between sharing appropriate information for the purposes of protecting the child (or others) from harm and the over-sharing of information. Rather than sharing information on a 'need to know' basis, information is shared indiscriminately, leading the child to feel that they have lost control over what information is shared and discussed with whom.

The guidance accompanying the Children and Young People (Scotland) Act 2014 clearly states that any information-sharing should be in line with the principles of data protection, that is any information shared should only be shared where it is necessary, proportionate, relevant, accurate, timely and secure.<sup>80</sup>

From a children's rights perspective, it is important not only that guidance is in place, but that its application is regularly monitored to ensure that children aged 8-11 years demonstrating harmful behaviour are not negatively impacted by any information-sharing that may take place. Consideration should also be made of how to share information about the support needs of those who have experienced harmful behaviour or who may have witnessed an incident. Care and sensitivity will be required in order to ensure that the child is not further traumatised by this process.

### Information Gathering, Police Investigations & Assessment

In considering an increase in the age of criminal responsibility, it is important to examine any changes that might be required to the way in which the Police currently deal with any harmful behaviour demonstrated by this age group.

Should the proposal to raise the age of criminal responsibility be implemented, then 8-11 year olds could no longer be held criminally responsible for their actions. They would be treated in the same way as children under the age of 8 are now.

<sup>80</sup> Information Commissioner's Office (2016). The Guide to Data Protection. <https://ico.org.uk/media/for-organisations/guide-to-data-protection-2-3.pdf>

In Scots law, many of Police Scotland's current powers (e.g. the ability to detain a suspect, be interviewed under caution, taking forensic samples etc.) are framed in relation to criminal behaviour. Police Scotland also has a victim-focused approach towards crime recording. That is, a matter will be recorded as a crime, regardless of whether a person can be held criminally responsible for it.

At the same time, it is important to note that Police Scotland also has a key role in safeguarding children and young people in Scotland. Indeed, the Police currently provide the highest number of referrals to the Children's Hearings System (both on offence and care and protection grounds), although this number has been decreasing in recent years due to Early and Effective Intervention<sup>81</sup>. The recording of incidents in a victim-focused way does not therefore detract from the fact that Police officers are often very familiar with the complex reasons why younger children may demonstrate harmful behaviour.

It is important to emphasise that the current Police powers of investigation are used rarely with the 8-11 years old age group and only in cases where there is a risk of serious harm, either to the child or others. From a children's rights perspective, it is therefore important that any new model considered for 8-11 year olds in relation to Police powers, should continue to be based on the premise that these powers will only be used when it is both proportionate and necessary.

Equally, care should be taken to ensure that a 'dual system' is not created, whereby the behaviour by 8-11 year olds treated differently to that of under 8s, whilst acknowledging that some types of harmful behaviour may only be demonstrated by the 8-11 year old age group (e.g. some sexual offences, which are unlikely to occur before puberty).

If the age of criminal responsibility is raised to 12, then care should be taken to ensure any systems designed to address the harmful behaviour of children aged 8-11 years should be on a par with those currently available to under 8s. Alternatively, where it is felt necessary, consideration may need to be made of whether some Police powers should be made available in relation to all children under the age of 12. Safeguards (e.g. authorisation by a Sheriff) may be required to ensure that these powers are used only where completely necessary, and in the best interests of the child.

### Early and Effective Intervention (EEI)

When considering any changes that might be required from a Police perspective in relation to an increase in the age of criminal responsibility, it is important to stress that the Police already operates within a system of Early and Effective Intervention. This means that for most incidents involving 8-11 year olds, the approach is already based around providing support for children, either via parents or via a range of agencies such as social work, education, health and/or third sectors projects working with vulnerable children and young people. This approach has contributed to a decrease in the number of cases requiring a referral to the Children's Hearings system for compulsory measures (e.g. a Compulsory Supervision Order).

<sup>81</sup> Henderson, G., Kurlus, I. & McNiven, G. (2016). *Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending*. [To be published].

## Balancing the Rights of Different Groups of Children

Before any new Police powers model is created, however, it will be worth considering the potential impact it may have on different groups of children and young people.

For example, for a child who has been the victim of harmful behaviour demonstrated by another child, it will be important for them to know that the harm caused to them will still be recognised. They will also need to know that because there is no longer any criminality associated with an incident, this does not lessen the Police's interest in finding out exactly what has happened.

Equally, for the child believed to have caused that harm, an investigation may prove, or rule out, their involvement. Where it was established that a child did have involvement in an incident, then appropriate support could be provided to prevent that behaviour reoccurring. Where a child is no longer suspected of any involvement, then this would allow the Police to continue to look for the person responsible.

Any new model will need to strike a balance between the needs of these groups.

It is important to note that from a children's rights perspective, any benefits in establishing the 'truth of the matter' would have to be balanced against any potential negative impacts on the child.

For example, in the Police carrying out enquiries, even where there is no suggestion of criminality, is there a risk that the child may feel intimidated and admit to something in order to escape from a situation that makes them uncomfortable?

Equally, is there a risk that, in taking forensic samples, the child feels that they are being treated as a criminal, even where it is made explicit that the samples would not be used to criminalise them?

## Safeguards

It is also important to consider whether any safeguards that currently exist for this group of children will be removed, where any civil powers are created to fill any gaps in existing powers, should the age of criminal responsibility be raised. For example, where a child would previously have had access to a solicitor or a right to advocacy support is there still scope for this to be provided? This is likely to be important in situations where a younger child is being coerced into taking the blame for an incident carried out by someone over the age of criminal responsibility. This may also be true where a younger child might be concerned about incriminating an older sibling. Access to appropriate advice and support will be key to ensuring that the child is not harmed in any way.

## Information-sharing

One area requiring further consideration is any information-sharing that might be carried out by the Police in relation to harmful behaviour demonstrated by a child

aged 8-11 years. As previously stated, there is a need to ensure that any information sharing relating to a child and their behaviour is proportionate, relevant and necessary. The child retains the right to privacy and that any information shared about them should only be done so to protect them and/or others from harm.

As outlined in the Disclosure section of this CRWIA, information about offence grounds, and accompanying Other Relevant Information, can currently appear on a child's Disclosure certificate in to adulthood.

Should the age of criminal responsibility be raised to 12, then consideration will need to be made of whether there is a need to store any information linking a child aged 8-11 years to an incident that has occurred.

If the proposal to raise the age of criminal responsibility is designed to remove children under 12 from the criminal justice system, there is a question about whether it should ever be necessary to record information about their actions on Police systems. However, where no information is stored, then the child's support needs may not be fully met or it may be more difficult for a pattern of behaviour to be recognised, and risks to others to be managed. Should the proposal be implemented, then consideration will need to be made of the best way to store information about a child's actions under the age of 12.

The Police currently have an Interim Vulnerable Persons Database (IVPD), which is designed to allow a police officer to record concerns about vulnerable people, of any age, in their communities. This currently includes information about where a child has committed an offence. However, non-offence wellbeing concerns about children are also recorded on the database. The database will be used to provide Police input to the Named Person, when the scheme is rolled out to all local authorities later this year.<sup>82</sup> This Interim Vulnerable Persons Database may offer the opportunity to store some information about an incident, from the perspective of child protection, rather than of any criminality.

Where a decision is made to store information, though, then careful consideration will need to be made of which information should be stored, who can access that information, how long it might be retained for, who can share that information and for what purpose. Any sharing of information relating to a child would need to be in line with the Data Protection Act 1998.

### Existing Child Protection Procedures

There are already systems in place to deal with child protection concerns and investigate circumstances of concern. It is worth considering whether the Joint Investigative Interview approach adopted in child protection cases (that is, a joint interview carried out by both the Police and Social Work) could be adapted to cover any harmful behaviour demonstrated by children aged 8-11 years old. Again, care will need to be taken to ensure that the child is aware that such an interview is for the purposes of child protection, rather than the investigation of any criminality.

<sup>82</sup> Scottish Government (2014). Children and Young People (Scotland) Act 2014 (Part 4). <http://www.legislation.gov.uk/asp/2014/8/section/1>

## Forensic Samples

For children below the age of 12 years, the taking and retention of forensic samples is currently only authorised if the child has been charged with a ‘relevant offence’ under section 80 of the Criminal Justice and Licensing (Scotland) Act 2010. This allows for the retention of samples for certain serious sexual and violent offences when the case has been accepted or established by a Children’s Hearing.

Should the age of criminal responsibility be raised to 12, then the Police would no longer be able to take forensic samples from children aged under 12 years.

In considering this from a children’s rights perspective, it’s important to consider how the removal of such a power might positively or negatively impact upon children aged 8-11 years.

Currently, children who are under the age of criminal responsibility (i.e. under 8s) cannot have their DNA sampled or stored. To create a system whereby 8-11 year olds could have their DNA sampled and retained, albeit in a very narrow set of circumstances, runs the risk of creating a different set of rules for one group of children than another.

However, children in the 8-11 year age bracket may be more likely to be suspected of a sexual offence (as they move towards puberty). As such, it may be helpful for them for the Police to retain such a power, in order to rule them out of an inquiry and remove any suspicion of their involvement. Where any doubt remains over a child’s involvement in an incident of harmful behaviour, there is a risk that this will stay with them for years to come.

Where DNA evidence proves the involvement of an 8-11 year old in an incident, then there is much evidence to suggest that many children demonstrating sexually harmful behaviour at a young age will not go on to do so in adulthood<sup>83</sup>. This is dependent on the appropriate help and support being provided to help them address this behaviour. A definitive decision about a child’s involvement in an incident is also likely to help inform any risk management measures that may be required.

In order to make a decision about whether the Police should have a means of taking and retaining samples from children aged 8-11 years, careful consideration will need to be made of these competing rights elements, in order to ensure that the best possible solution is found.

## Child Victims and Witnesses

In considering the powers that may be available to the Police should the age of criminal responsibility be raised, it is important to consider the needs of children who may have experienced another child’s harmful behaviour, or who may have witnessed it.

In particular, consideration should be made of how to ensure that the child victim or

<sup>83</sup> <http://www.gov.scot/Resource/Doc/205908/0054732.pdf>

witness does not feel that their experience is treated any less seriously by Police, where the other child is under the age of criminal responsibility.

Consideration should also be made of how best to build in appropriate supports for child victims and witnesses, who may have been severely traumatised by the actions of another child, and who may need to be reassured that the behaviour will not be repeated.

## **2 How will the policy/measure contribute to the wellbeing of children and young people?**

Provide any additional assessment using the wellbeing indicators framework.

In summary, raising the age of criminal responsibility is likely to bring the following benefits to children and young people's well-being:

- Children and young people would not be stigmatised at a young age or their behaviour labelled as 'criminal' at a stage where their cognitive abilities are still developing.
- Children and young people would have the ability to move beyond an incident in early childhood and to be rehabilitated
- Children and young people would have certainty about what they needed to disclose and when in relation to college/university/employers.
- Early intervention and support will ensure that the child is less likely to become involved in certain behaviours in future.
- Children's welfare needs would be recognised and dealt with at an early stage, in line with the current Whole Systems Approach.
- Children will feel supported by adults to work through their behaviour, and the reasons for it, rather than feeling punished.
- Children's health could be improved by not having to repeatedly talk about an incident in childhood of which they may feel ashamed or embarrassed.

Further consideration of the well-being needs of children should be made in relation to:

- Children who are victims of or witnesses to the harmful behaviour of another child.

## **3. Are some children and young people more likely to be affected than others?**

Which groups of children and young people will be affected by the policy/measure?

Are there competing interests between different groups of children and young people, or between children and other groups? List options for modification or mitigation of the proposal.

The groups of children most likely to be affected by this proposal are discussed at Stage 1 (Question 3).

## **4. Resource implications of policy modification or mitigation**

If recommending any changes to the policy/measure, include estimates of cost implications

There is no suggestion that the policy should be modified and therefore there are no cost implications to be considered in relation to policy modification or mitigation.

**5. How does the policy/measure promote or impede the implementation of the UNCRC and other relevant human rights standards?**

An analysis of how this proposal and its implications in terms of key children's rights is provided at Stage 2 of this CRWIA.

The policy is intended to give further effect to the UN Convention on the Rights of the Child and address the Concluding Observations of the UN Committee on the Rights of the Child relating to the age of criminal responsibility, namely:

**'27. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated in all legislation and policies which have an impact on children, including in the area of *criminal justice and immigration*.'**

**'78. The Committee recommends that the State party.....raise the minimum age of criminal responsibility in accordance with the Committee's general comment No. 10, and notably its paragraphs 32 and 33;'**

## **CRWIA Stage 5**

### **Recommendations, Monitoring and Review - key points**

#### **1. Record your overall conclusions from the CRWIA**

- The appearance of an offence ground and 'Other Relevant Information' on a Disclosure certificate or PVG scheme record can cause problems for a child well into adulthood, specifically in relation to choosing a further/higher education course or pursuing a career path. Under any new arrangements, it should be possible to ensure that this behaviour no longer appears, or appears only for a short period. This would have the potential to allow a child to move on from harmful behaviour in childhood.
- Scotland currently has the lowest age of criminal responsibility in Europe. This proposal, if implemented, will mean that Scotland will have an age of criminal responsibility of 12 years of age. This is consistent with the United Nations Committee on the Rights of the Child's stated minimum internationally acceptable age of criminal responsibility.
- The proposal to raise the age of criminal responsibility to 12 is consistent with a range of current policy initiatives, including GIRFEC (Getting It Right for Every Child) and the Early and Effective Intervention approach.
- There is scope to extend or adapt existing risk management systems to ensure that any serious risk posed by a child to themselves, or others, can continue to be managed effectively.
- It is likely that existing Children's Hearings care and protection grounds can be used in place of an offence ground. There should be no need to create a new ground specifically for 8-11 year olds demonstrating harmful behaviour.
- It may be helpful to retain some Police powers, should the age of criminal responsibility be raised to 12.

#### **2. Recommendations**

*List recommendations on how/whether to proceed with the proposal, referring to your assessment of impact, list of options, and evidence from previous stages of the CRWIA. Justify your recommendations*

- Consideration should be made of the types of Police power that may (or may not) be required to exist should the age of criminal responsibility be raised. Care should be taken to ensure that any powers should be used rarely and subject to independent scrutiny. The likely benefits of having such powers should be weighed carefully against any likely harm that could be caused to both children demonstrating harmful behaviour and those experiencing that harm (i.e. victims).
- In relation to Police powers, consideration should be made of the safeguards available to children under current arrangements (e.g. access to legal advice and assistance) and whether these safeguards will change, should the age of criminal responsibility be raised to 12. Where it is established that children will have lesser protection, measures should be put in place to mitigate this.
- Consideration should be made of the needs of child victims, and specifically the need for child victims to continue to have information about how a case has been dealt with provided to them (taking into account the privacy of both

parties) as well as details of what measures have been put in place to prevent an incident reoccurring. This should include an assessment of whether the types of support currently available to child victims are sufficient.

- Consideration should be made of how best to ensure that all professionals are fully familiar with the link between a child's harmful behaviour and their own family circumstances, including through the provision of practice materials and specialist training/support (e.g. as provided by the IVY project).
- The issue of non-conviction information appearing as 'Other Relevant Information' on a higher level Disclosure certificate or Protection of Vulnerable Groups Scheme Record should be fully explored. Where benefits can be applied to children over the age of 12, then consideration should be made of whether it might be possible (or desirable) to do this.
- The sharing of information about a child by professionals should be carefully managed in order to ensure that it is shared proportionately, on a need-to-know basis and only when strictly necessary to safeguard their wellbeing.
- Children and young people should be widely consulted on this proposal in a way that is meaningful to them and allows their informed and full participation. Children and young people should continue to be involved as the proposal is further developed. This consultation and ongoing involvement should include a wide range of children and young people, including those directly and indirectly affected by the proposal.

**3. How will the policy/measure be monitored? Date and agreed process for monitoring and review**

*Responsible official, timetable, methodology, involvement of stakeholders including children and young people*

This initial CRWIA will be revisited and revised, once public consultation on the proposal and analysis of its findings is complete. It is recommended that, should a decision be taken to proceed with the proposal, that this revised CRWIA should be published in full alongside any associated draft legislation.

**4. Date and agreed process for Child Rights and Wellbeing Impact Evaluation**

Please see answer to Q3.