

SPICe Briefing

Children and the Scottish Criminal Justice System

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This briefing is one of six covering various aspects of the Scottish criminal justice system. It outlines the way in which children who commit offences are dealt with, focussing on those under the age of 16.

The other five briefings in this series are:

- [The Scottish Criminal Justice System: Legal and Administrative Arrangements](#)
- [The Scottish Criminal Justice System: The Police](#)
- [The Scottish Criminal Justice System: The Public Prosecution System](#)
- [The Scottish Criminal Justice System: The Criminal Courts](#)
- [The Scottish Criminal Justice System: The Prison Service](#)



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EXECUTIVE SUMMARY

Youth Justice

The children's hearings system has, since it began operating in 1971, played a central role in dealing with children accused of committing offences, as well as other children who may be in need of care or protection. Its creation followed the publication of the Kilbrandon Report (1964), reflecting an ethos that children then appearing before the courts because they had committed offences, and those appearing because they required protection, had common needs.

The majority of child offenders under the age of 16 are currently, where some form of compulsory intervention is considered necessary, dealt with through the children's hearings system rather than the criminal courts. The hearings system also deals with some young people aged 16 and 17.

In recent years more emphasis has been placed on a flexible multi-agency approach to dealing with children involved in offending, which does not necessarily involve referral to the children's hearings system. Under this approach, it is intended that the focus of the hearings system should be those cases where compulsory measures of supervision are needed.

Age of Criminal Responsibility

Children under the age of eight lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children's hearings system on non-offence grounds. Children aged between eight and 12 cannot be prosecuted in the criminal courts but can be referred to the hearings system on both offence and non-offence grounds. Children aged 12 or more can be prosecuted in the criminal courts (subject to guidance of the Lord Advocate on appropriate cases) or referred to the hearings system on both offence and non-offence grounds.

Children's Hearings System

Children may be referred to the children's hearings system in relation to situations where they have been or may be harmed by others, or where their own behaviour causes concern – including situations where they are alleged to have committed offences. Thus, children may be referred on both offence and non-offence grounds. The system seeks to determine what measures may be required to address the behaviour and welfare of children.

Statutory provisions dealing with the hearings system are currently contained within the Children (Scotland) Act 1995. Relevant provisions will be replaced by those in the Children's Hearings (Scotland) Act 2011 once they are brought into force.

Criminal Courts

Since the coming into force of relevant reforms set out in the Criminal Justice and Licensing (Scotland) Act 2010, children under the age of 12 cannot be prosecuted in the criminal courts. In practice, a small number of children (mostly aged 14 or 15) are prosecuted in the courts (eg for very serious offences).

YOUTH JUSTICE

Youth Justice and the Kilbrandon Report

The children's hearings system has, since it began operating in 1971, played a central role in dealing with children who are accused of committing offences.

Prior to the establishment of the children's hearings system, child offenders who had reached the age of criminal responsibility (eight) were dealt with through the court system (which included juvenile courts).¹ Concern about how the court system affected children led, in 1961, to the appointment by the Secretary of State for Scotland of a Committee on Children and Young Persons chaired by Lord Kilbrandon to:

“consider the provisions of the law of Scotland relating to the treatment of juvenile delinquents and juveniles in need of care or protection or beyond parental control and, in particular, the constitution, powers and procedures of the courts dealing with such juveniles”. (Committee on Children and Young Persons, Scotland 1964, p 5)

The committee's ethos was that children who appeared before the courts because they had committed an offence, and those who appeared because they were in need of protection, had common needs. Its report was published in 1964 – the [Kilbrandon Report](#). The approach put forward in the report was based on:

- a focus on the needs of the child
- the adoption of a preventative and educational approach to children's problems
- an emphasis on the importance of the family in tackling children's problems
- separating the establishment of disputed facts (through the court system) from decisions on the treatment of children (through a new system of lay panels)

The general approach put forward by the committee was accepted by the UK Government and led to the abolition of juvenile courts and the establishment of the children's hearings system in Scotland.² The hearings system took over from the courts most of the responsibility for dealing with children under the age of 16 who commit offences or are in need of care or protection. However, the power to prosecute children in the criminal courts for serious offences was retained and still exists – although the minimum age for such prosecutions was recently increased to 12 (discussed below in relation to the age of criminal responsibility).

It has been argued that a holistic welfare approach to youth justice, as exemplified by the approach put forward in the Kilbrandon Report and developed in the children's hearings system, has at times been diluted by policies giving more weight to factors such as public protection (eg McAra and McVie 2010, p 68-74). This was, for instance, an issue raised during the consideration of proposals to extend the use of antisocial behaviour orders to 12-15 year olds. Some critics of the extension expressed concerns that it could lead to more children being drawn into the adult criminal justice system and undermine the ethos of the hearings system (eg see the evidence of witnesses outlined in the [stage 1 report](#) (2004, paras 72-90) of the Scottish Parliament's Communities Committee on the Antisocial Behaviour etc (Scotland) Bill).

¹ A legal presumption that children under the age of eight do not have the capacity to commit a crime was set out in the Children and Young Persons (Scotland) Act 1937 and is now contained in the Criminal Procedure (Scotland) Act 1995 (discussed below).

² Relevant statutory provisions were originally contained in the Social Work (Scotland) Act 1968 but are now set out in the Children (Scotland) Act 1995.

It is, however, clear that the children's hearings system retains strong support. Statutory provisions dealing with the children's hearings system are currently contained within the Children (Scotland) Act 1995. Relevant provisions will be replaced by those in the Children's Hearings (Scotland) Act 2011 once they are brought into force. The [policy memorandum](#) published in 2010 along with the Children's Hearings (Scotland) Bill noted that:

"The philosophy and principles of the Children's Hearings system were established over 40 years ago in the Kilbrandon Report of 1964. That philosophy and those principles remain as true today as they did when the Report was published (...).

It is these principles that make the system unique, such as the way the system considers all those who come within it, either on welfare or offending grounds, as being children in need and facing risks either from their own behaviour or the behaviour of others. The changes to the Hearings system proposed in the Bill are designed to protect those principles at the same time as modernising and strengthening the system to enable it to continue to work well both now and in the future." (paras 12-13)

The policy memorandum went on to report that:

"There has been overwhelming support from stakeholders throughout the consultation process for the welfare principle and for putting the child at the centre of the Hearings system." (para 42)

The rules governing the children's hearings system, including how the approach provided for in the Children's Hearings (Scotland) Act 2011 differs from that under the Children (Scotland) Act 1995, are outlined later in this briefing.

Preventing Offending and a Flexible Approach to Offending Behaviour

In 2008, the then minority SNP Scottish Government published [Preventing Offending by Young People: a Framework for Action](#) outlining its approach to youth justice.³ It states that:

"The debate around young people who offend is often unhelpfully polarised: needs and deeds; victim and offender; individual and community; prevention and intervention. In reality, the evidence shows the only way to prevent 'deeds' is to address needs. Individuals are often both victims and offenders: each aspect needs our attention. Offenders come from communities and usually return to them, and tackling offending needs to happen in that social context. Prevention is the most cost-effective cure, but prevention demands that we intervene to stop the cycle of offending.

In Scotland we are fortunate to have a system for tackling offending by young people – at the heart of which is the Children's Hearing System – that is based on a rejection of these polarisations. Through the voluntary interventions with children and families under the Getting it right for every child framework, and the work of the Children's Panel where compulsory measures are required, the offending behaviour of young people is considered as part of a broader picture of who they are. Interventions are designed to be early, holistic and with a presumption that children stay in their communities." (paras 3.1-3.3)

³ The framework (para 1.2) notes that it is formally owned by the Scottish Government, the Convention of Scottish Local Authorities, the Association of Chief Police Officers Scotland, the Scottish Children's Reporter Administration and the Crown Office and Procurator Fiscal Service (as key delivery agencies).

As part of the above approach, an increasing number of children involved in offending behaviour are now being dealt with by relevant agencies without referral to the children's hearings system. Under a process described as "early and effective intervention", more emphasis has been placed on agencies (eg police, social work, education and health) working together to identify appropriate support and intervention as part of a pre-referral screening process, with cases being referred to the hearings system only where it is considered that compulsory measures of supervision are needed.

Guidance produced for police officers – [A Flexible Approach to Offending Behaviour by Children and Young People](#) (Association of Chief Police Officers in Scotland 2011) – reflects this change in approach, noting that:

"Traditionally, the police referred most, if not all cases of youth offending to the Children's Reporter regardless of how minor the offence actually was. The rationale for this approach was a presumption that the Children's Reporter would coordinate service provision around the child's or young person's needs. But this is not the statutory role of the Children's Reporter; moreover, research evidence shows that introducing children and young people to formal systems such as a Children's Hearing when it is not needed can increase the likelihood of re-offending.

This guidance encompasses offending and antisocial behaviour and provides a menu of options available to police officers or police staff to utilise which ensure that such behaviour is dealt with swiftly and appropriately without the need for a formal referral to be made to the Children's Reporter unless compulsory measures need to be considered." (p 5)

The Scottish Government commissioned an evaluation of practices in a number of local authority areas to determine the impact of approaches based on early and effective intervention. The resulting report – [Early and Effective Intervention Evaluation Report](#) (Consulted Ltd 2009) – noted that:

"There was an admission in all areas that as recently as 2005 and in most cases 2006 a referral to the [Children's] Reporter⁴ was the default response when dealing with a young person who had committed an offence or was of concern on non-offending [grounds]. On offending grounds there was however a stark fact that in 2006 due to a number of factors 80% of referrals made to the Children's Reporter did not result in any formal measures of compulsion. This has been cited as one of the main drivers for change within the Hearings system". (p 12)

It went on to highlight a significant reduction between 2006 and 2008 (within the areas covered by the evaluation), in the number of children referred to the children's hearings system. It concluded that an early and effective intervention approach had been shown to deliver a range of benefits for those areas which had implemented it, including:

"More efficient and effective delivery of interventions from the perspective of operational staff

Development of genuine partnership working based on an ethos of problem solving

Realisation of efficiencies particularly in the deployment of operational staff with more police officer hours being released back to operational duties, Reporters freed to concentrate more effectively on cases of greater concern or complexity and social workers freed from what they see as artificial timescales" (p 28)

⁴ Children's Reporters have the task of considering the circumstances of children referred to the children's hearings system.

Further information on early and effective intervention is provided in a research report published by the Scottish Children's Reporter Administration – [Early and Effective Action Screening Groups](#) (2009).

Antisocial Behaviour

Other developments since devolution include provisions relating to antisocial behaviour. The Antisocial Behaviour etc (Scotland) Act 2004 extended antisocial behaviour orders (ASBOs) to children aged 12-15. ASBOs are preventative orders which are intended to protect the public from behaviour that causes, or is likely to cause, alarm or distress. They may be imposed on application to the civil courts or by the criminal courts as part of a sentence. An ASBO prohibits the person named from doing anything specified in the order. Breach of one is a criminal offence. As noted above, the proposal to extend ASBOs to children was a source of concern amongst some groups. However, it would appear that relatively few ASBOs have been granted in relation to children.

[Guidance on Antisocial Behaviour Orders](#) published by the then Scottish Executive in 2004 stated that:

“Use of ASBOs for 12-15 year olds, should complement the children's hearings system which should continue to be the primary forum for dealing with behaviour beyond parental control or offending behaviour by under 16s.” (p 10)

“ASBOs are only intended to deal with a small number of persistently antisocial young people for whom alternatives available are not working. A court-based order sends a strong message that persistent antisocial behaviour will not be tolerated. ASBOs for 12-15 year olds will be targeted at young people who persistently engage in antisocial or offending behaviour.” (p 12)

A report on the [Use of Antisocial Behaviour Orders in Scotland](#) (Scottish Government Social Research 2007) noted that:

“Since October 2004, the Courts have been empowered to grant ASBOs against persons aged 12-15 years old. The legislation lays down procedures requiring that, when relating to young people, ASBO application procedures are integrated within the Children's Hearing System.

[Local Authorities] have established special multi-agency groups and other procedures to deliberate on appropriate responses to anti-social behaviour by young people that might fall within the remit of ASBO powers. However, whereas appreciable numbers of cases are being reviewed under such arrangements, only a very small proportion have as yet led to formal ASBO applications. For the most part, it is determined that alternative approaches (eg ABCs)⁵ are preferable.” (p 42)

In addition, the above mentioned guidance for police officers on dealing with offending behaviour by children and young people (Association of Chief Police Officers in Scotland 2011) outlines a range of options for dealing with antisocial behaviour (eg informal police warnings for minor antisocial behaviour).

⁵ Acceptable behaviour contracts.

Young People Aged 16 and 17

Although this briefing focuses on children under the age of 16, it may be noted that approaches to dealing with offending by such children sometimes include young people aged 16 and 17. For example:

- although the children's hearings system deals mainly with children under the age of 16, some young people aged 16 and 17 may also be dealt with through the hearings system (eg where they are still subject to supervision requirements imposed by a children's hearing)
- the above mentioned guidance for police officers on dealing with offending behaviour by children and young people (Association of Chief Police Officers in Scotland 2011) extends to those aged 16 and 17

In addition, it is worth noting the Scottish Government has indicated that it will review how offending behaviour by young people is dealt with. It's website says (under the heading of ["young people who offend in Scotland"](#)) that:

"The Scottish Government and their partners are looking to reduce reoffending by young people (under 18) through the Young People Who Offend project, particularly those aged 16 & 17, a group that has often been forgotten about in the past.

This project will review the current systems, processes and practices in place for dealing with the offending behaviour of young people under the age of 18 who are dealt with in the courts or are presenting a risk of serious harm to themselves or their communities.

By working with all stakeholders and delivery partners including Community Justice Authorities and Community Planning Partnerships we aim to reduce the flow of young people entering into the adult criminal justice system."

Information about youth courts – aimed primarily at persistent young offenders aged 16 to 17 – is provided later in this briefing when considering the role of the criminal courts.

AGE OF CRIMINAL RESPONSIBILITY

Law and Practice

The age of criminal responsibility in Scotland, in the sense of the age below which a child is deemed to lack the capacity to commit a crime, is eight. Section 41 of the Criminal Procedure (Scotland) Act 1995 provides that:

"It shall be conclusively presumed that no child under the age of eight years can be guilty of an offence."

There are, however, further restrictions on when a child may be subject to the adult system of prosecution and punishment. The Criminal Justice and Licensing (Scotland) Act 2010 inserted a new section 41A into the Criminal Procedure (Scotland) Act 1995 providing that no child under the age of 12 may be prosecuted for an offence. It also provides that an older person may not be prosecuted for an offence committed whilst under the age of 12.

In addition, section 42(1) of the Criminal Procedure (Scotland) Act 1995 states that:

“A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate; and no court other than the High Court and the sheriff court shall have jurisdiction over such a child for an offence.”⁶

The Crown Office and Procurator Fiscal Service has published a [Prosecution Code](#) (2001) setting out general criteria for prosecution decision making. It notes that the United Nations Convention on the Rights of the Child (considered below) recognises certain rights which are relevant to cases involving children accused of crime, and states that the youth of an accused may (depending on other circumstances) be a factor which influences a prosecutor in favour of action other than prosecution. The code also notes that prosecutors retain the discretion to refer cases involving children to the children’s hearings system where such action is considered to meet the public interest. Further information is set out in:

- [guidance for the police](#) on offences which should be jointly reported to the procurator fiscal for possible prosecution in the criminal courts and to the children’s hearings system (Crown Office and Procurator Fiscal Service 2010a)
- an [agreement between the Crown Office and Procurator Fiscal Service and the Scottish Children’s Reporter Administration](#) in relation to the cases of children which are jointly reported (Crown Office and Procurator Fiscal Service 2010b)

The above mentioned guidance for the police notes that the categories of case where a child under 16 will be considered for prosecution include:

- very serious offences – those which must be prosecuted under solemn procedure or which are so serious as normally to give rise to solemn proceedings⁷
- road traffic offences – those alleged to have been committed by children aged 15 which in the event of conviction oblige or permit a court to order disqualification from driving

In broad terms, children may be referred to the children’s hearings system in relation to situations where they have been or may be harmed by others (eg where there is a lack of parental care), or where their own behaviour causes concern (eg where they have committed an offence or misused alcohol). The system seeks to ensure that such children receive appropriate care, protection and supervision. Various specific grounds of referral are set out in statute. Most of these are non-offence grounds. There is a single offence ground – that the child has committed an offence. The welfare based approach of the system applies irrespective of whether children are referred on offence or non-offence grounds (or both). However, a number of particular considerations apply in relation to referrals on offence grounds. These include the fact that they can only be made in relation to children who had the capacity to commit a criminal offence (ie those aged at least eight).⁸

⁶ The Lord Advocate does not have to specifically authorise each prosecution of a child, but can instead give general instructions on the classes of cases in which children are to be prosecuted.

⁷ Criminal cases are prosecuted under either summary or solemn procedure, with the latter being used in relation to more serious offences.

⁸ The fact that offence grounds cannot be used in relation to children under the age of criminal responsibility was decided by the Inner House of the Court of Session in the case of Merrin v S (1986). It is possible that circumstances which would justify a child of eight or more being referred to the children’s hearings system on offence grounds might justify a younger child being referred on non-offence grounds.

In summary:

- children under the age of eight – lack the legal capacity to commit an offence, cannot be prosecuted in the criminal courts and can only be referred to the children’s hearings system on non-offence grounds
- children aged between eight and 12 – cannot be prosecuted in the criminal courts but can be referred to the children’s hearings system on both offence and non-offence grounds
- children aged 12 or more – can be prosecuted in the criminal courts (subject to the guidance of the Lord Advocate) or referred to the children’s hearings system on both offence and non-offence grounds

Whilst some children are prosecuted in the criminal courts, many more alleged child offenders under the age of 16 are in practice dealt with through the children’s hearings system. During 2009-10:⁹

- a total of 10,012 children were referred to the children’s hearings system on offence grounds (around 90% of these children were aged 12 or more)¹⁰
- a decision was taken to arrange a children’s hearing, dealing with offence grounds, in relation to 1,397 children (reasons for not arranging a hearing include an assessment that there is no need for compulsory measures of care, that suitable measures are already in place or that there is insufficient evidence to proceed)
- 104 children under the age of 16 (mainly 14 and 15 year olds) were prosecuted in the criminal courts
- no children under the age of 12 were prosecuted in the criminal courts (section 41A of the Criminal Procedure (Scotland) Act 1995 prohibits any such prosecutions from 28 March 2011)¹¹

Debate on Appropriate Age

The change made by the Criminal Justice and Licensing (Scotland) Act 2010, providing for a minimum age for prosecution of 12, was intended to address concerns that the age of criminal responsibility in Scotland was too low. The [policy memorandum](#) published along with the Criminal Justice and Licensing (Scotland) Bill (introduced March 2009), noted that the law as it then stood allowed children from the age of eight to be prosecuted in the criminal courts and that:

“This is considered by many to be contrary to international standards and the United Nations Convention on the Rights of the Child (article 40(3)(a)) which suggests that 12 is the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings.” (para 190)

⁹ The figures for the children’s hearings system are taken from the 2009-10 annual report of the Scottish Children’s Reporter Administration (2010, p 16 and 19). The information on prosecutions was obtained from Scottish Government officials.

¹⁰ The 90% figure is an estimate based on statistics provided by officials within the Scottish Children’s Reporter Administration indicating that the proportions of children referred on offence grounds during 2009-10 were: 9% aged 8-11; 84% aged 12-15; and 7% aged 16+. However, the statistics broken down by age include an element of double counting (the same child is counted twice if referred more than once during the year and the child is a year older by the time of the subsequent referral) which is not present in the total figure of 10,012.

¹¹ During the five years 2005-06 to 2009-10, there was one criminal prosecution involving an accused under the age of 12 (in 2008-09).

Article 40 of the United Nations (1989) [Convention on the Rights of the Child](#) includes provisions requiring states to seek to promote “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”.¹² The article does not specify a minimum age, but the United Nations Committee on the Rights of the Child (2007) has recommended 12 as an absolute minimum and stated that:

“Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below [the minimum age of criminal responsibility] the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests”. (para 31)

The question of whether relevant reforms to Scots law should go further was considered during the passage of the Criminal Justice and Licensing (Scotland) Bill (e.g. see [Criminal Justice and Licensing \(Scotland\) Bill: Stage 3](#) (McCallum 2010, p 23-25)). However, following consideration of various possibilities, the Scottish Parliament approved the approach set out in the Bill as introduced. Options for further reform include:

- raising the age below which a child is deemed to lack the capacity to commit a crime from the current age of eight to 12 (or higher) – with the consequence that such children could only be dealt with through the children’s hearings system on non-offence grounds
- raising the minimum age for prosecution through the criminal courts beyond 12 (eg to 14 or 16)

CHILDREN’S HEARINGS SYSTEM

Introduction

The purpose of the children’s hearings system is to determine what measures may be required to address the behaviour and welfare of children. It seeks to ensure that appropriate care, protection and supervision is in place.

Children may be referred to the hearings system in relation to situations where they have been or may be harmed by others, or where their own behaviour causes concern – including situations where it is alleged that they have committed an offence. The majority of child offenders under the age of 16 are, where some form of compulsory intervention is considered necessary, dealt with through the hearings system rather than the criminal courts. This briefing, being concerned with criminal justice, focuses on referrals on offence grounds. It should, however, be emphasised that the hearings system also deals with children referred on non-offence grounds and that most referrals are on such grounds. Children may only be referred on offence grounds where they had the legal capacity to commit the alleged offence (ie where they were aged eight or more at the time).

The children’s hearings system mainly deals with children under the age of 16. However, some young people aged 16 and 17 are also dealt with through the hearings system. This may happen where they are still subject to supervision requirements imposed by a children’s

¹² The United Nations Convention on the Rights of the Child, although binding on contracting states under international law, is not binding under domestic Scots law (unlike the European Convention on Human Rights).

hearing, or where their case is remitted to the hearings system for disposal following conviction by a court.

Structure

The current structure of the children's hearings system, as provided for in the Children (Scotland) Act 1995, includes the following elements:

- children's reporters – officials employed by the Scottish Children's Reporter Administration to consider the circumstances of children referred to the hearings system. Most referrals are made by the police although other agencies (eg social work) and members of the general public may also make referrals. On receipt of a referral, the local children's reporter will undertake initial investigations before deciding what action, if any, is necessary in the child's interests. The children's reporter will consider whether there is sufficient evidence supporting the ground(s) of referral and, if so, whether compulsory measures of supervision are needed. Where the answer to both questions is yes, the children's reporter will arrange a children's hearing. In other cases the child may be referred to the local authority so that advice, guidance and assistance can be given on an informal and voluntary basis (often involving support from a social worker)
- children's panels – each local authority has a children's panel made up of unpaid trained volunteers who sit on children's hearings on a rota basis. Panel members are appointed by the Scottish Ministers on the advice of a children's panel advisory committee for the relevant local authority. Appointments are for an initial period of three years and may be renewed. There are around 2,500 panel members across Scotland
- children's hearings – a hearing is a lay tribunal consisting of three children's panel members. It considers and makes decisions on what measures may be required for the welfare of the child, taking into account all of the circumstances including any offending behaviour. A children's hearing does not, however, determine the facts. Thus, where the grounds of referral are not accepted, or the child does not understand the grounds, the case is referred to the sheriff court to decide whether the grounds are established. Local authorities are responsible for implementing the decisions of children's hearings

The [Scottish Children's Reporter Administration](#) is a non-departmental public body with responsibilities including facilitating the work of children's reporters, providing suitable accommodation for children's hearings and disseminating information on the hearings system.

As noted earlier in this briefing, provisions of the Children (Scotland) Act 1995 dealing with the children's hearings system will be replaced by those in the Children's Hearings (Scotland) Act 2011 once the main provisions of the 2011 Act are brought into force.¹³ The new act restates much of the existing law with the main changes concerning how the children's hearings system is administered.¹⁴ These include:

- the establishment of a new non-departmental public body (Children's Hearings Scotland) to take on the functions of children's panel advisory committees, local authority functions relating to local training and paying expenses, and functions of the Scottish Ministers in relation to recruitment, appointment and national training of panel members¹⁵

¹³ In January 2011, the Scottish Government announced that it was seeking to implement some key provisions of the Children's Hearings (Scotland) Act 2011 by December 2011 – those relating to structural change of the system. It is intended that other provisions will be implemented during the course of 2012.

¹⁴ Some other changes set out in the Children's Hearings (Scotland) Act 2011 are considered later in this briefing.

¹⁵ The new non-departmental public body will not replace the Scottish Children's Reporter Administration.

- the replacement of separate children’s panels for each local authority with a single national panel

Referrals and Hearings

A total of 10,012 children were referred to the children’s hearings system on offence grounds during 2009-10. Some children are referred more than once during a year and thus there were a total of 22,585 offence referrals in 2009-10.¹⁶

A referral will not necessarily lead to a children’s hearing. In 2009-10, children’s reporters decided to arrange hearings on fresh offence grounds in relation to 1,397 children.¹⁷ In other cases, children’s reporters decided not to arrange a hearing for the following reasons:

- no indication of a need for compulsory measures
- relevant measures already in place
- diversion to other measures
- referral to local authority
- insufficient evidence to proceed
- family have taken action

Where a children’s hearing is held and finds that compulsory measures of supervision are required, the child may be dealt with under an existing supervision requirement (if any) or a new supervision requirement. The Scottish Government’s [children’s hearings website](#) notes that:

“The hearing has wide scope to insert conditions in the supervision requirement, and the local authority is responsible for ensuring it is carried out. In most cases the child will continue to live at home but will be under the supervision of a social worker. In some cases the hearing will decide that the child should live away from home with relatives or other carers such as foster parents, or in one of several establishments managed by the local authority or voluntary organisations, such as children’s homes, residential schools or secure accommodation. It may also decide who the child may have contact with, and when.

The Antisocial Behaviour etc (Scotland) Act 2004 also gave hearings the power to restrict a child or young person’s movement. This involves intensive support and monitoring services (monitoring is facilitated by an electronic ‘tag’) where the young person is restricted to, or away from, a particular place. The electronic tag must be supported by a full package of intensive measures to help the young person change their behaviour.

There is however no element of punishment in a hearing decision, so it does not for example have the power to fine the child/young person or the parents. All decisions made by hearings are binding on that child/young person. A Supervision Requirement can be terminated when a hearing decides that compulsory measures of supervision are no longer necessary.”

Recent Legislative Developments

¹⁶ See Scottish Children’s Reporter Administration 2010, p 16-17.

¹⁷ See Scottish Children’s Reporter Administration 2010, p 19.

In addition to the provisions of the Children's Hearings (Scotland) Act 2011 setting out changes to how the children's hearings system is administered (noted above under the subheading of "structure"), other recent reforms include:

- Criminal Justice and Licensing (Scotland) Act 2010 – changes in relation to the retention of fingerprint and DNA data of children referred to a children's hearing
- Children's Hearings (Scotland) Act 2011 – changes in relation to criminal record information and legal aid

The Criminal Justice and Licensing (Scotland) Act 2010 includes a number of provisions extending existing police powers in relation to the retention of fingerprint and DNA data taken from people suspected of committing a crime. In relation to children, the previous position was that such data had to be destroyed and deleted from databases where there was a decision to deal with a case through the children's hearings system rather than the criminal courts. However, in certain circumstances, section 80 of the 2010 Act (in force since April 2011) allows the retention of such data where a child is dealt with by a children's hearing on offence grounds. Retention is only allowed where the offence is one of a number of specified sexual or violent offences and the ground of referral is either accepted or established by the sheriff court.¹⁸ Where retention is allowed, this is for an initial period of three years which can be extended on court application by the police satisfying a sheriff that there are reasonable grounds for doing so.

The acceptance or establishment of an offence ground as part of the children's hearings process is not equivalent to a criminal conviction. However, the existence of an offence dealt with by a children's hearing may be disclosed during the future life of the child. This may, for example, happen where the former child is the subject of a disclosure check when applying for a job. Section 188 of the Children's Hearings (Scotland) Act 2011 (not yet in force) seeks to limit the circumstances in which an offence may be disclosed in the future to more serious offences. (General information on the disclosure system is set out on the website of [Disclosure Scotland](#).)

The Children's Hearings (Scotland) Act 2011 also contains measures on legal aid and advice. Section 191 of the 2011 Act (not yet in force) provides for a reformed permanent scheme of state funded legal representation in relation to the children's hearings system (replacing an interim scheme first introduced in 2002).

Scrutiny of the above reforms, during the passage of the two bills, included the consideration of ongoing debates in relation to:

- the extent to which the children's hearings system should give rise to consequences which are more generally associated with a criminal prosecution
- how the children's hearings system should balance the desire for retaining a relatively informal approach to proceedings (compared to the more legalistic adversarial approach generally associated with court proceedings) with the need to protect the legal rights of those involved

In relation to the first bullet point, the reforms on the retention of fingerprint and DNA data (in the 2010 Act) and the disclosure of offence information (in the 2011 Act) reflect a process of trying to achieve an appropriate balance between public protection and protecting the rights of children. Although these goals are not contradictory, they may sometimes suggest different courses of action (eg a focus on public protection might lead to an approach under which the

¹⁸ The relevant sexual and violent offences are listed in the Retention of Samples etc (Children's Hearings) (Scotland) Order 2011 (SSI 2011/197).

consequences of children’s hearings are brought more into line with those following upon criminal convictions in the courts).

In relation to the second bullet point, the [stage 1 report](#) (2010) of the Scottish Parliament’s Education, Lifelong Learning and Culture Committee on the Children’s Hearings (Scotland) Bill noted, in relation to provisions on legal aid and advice, that:

“The Committee notes the concerns expressed by some witnesses that hearings may become more adversarial as a result of the provisions contained in the Bill. The Committee, however, recognises that European Convention on Human Rights (ECHR) considerations require that children and relevant persons must be given the opportunity to participate effectively.

The Committee also notes that many of the children and relevant persons who attend hearings are often the most vulnerable in society and least able to articulate their interests.

It is the Committee’s view that [it] is unlikely that extending legal aid to hearings will alter radically the nature of the hearings system in Scotland. However, this will depend on panel chairs being effectively trained to manage legal representatives’ participation within the hearing and on family lawyers being appropriately trained in the ethos and aims of the children’s hearings system. The Committee considers it essential that measures be put in place to ensure that such training takes place.” (paras 168-170)

CRIMINAL COURTS

Criminal Proceedings and Outcomes

As noted above, Scots law provides that children under the age of eight do not have the capacity to commit a crime and, since the coming into force of relevant reforms set out in the Criminal Justice and Licensing (Scotland) Act 2010, children under the age of 12 cannot be prosecuted in the criminal courts. Table 1 provides information on the number of cases against children (under the age of 16) in the criminal courts.¹⁹

Table 1: Proceedings against children in the criminal courts

Age	Year				
	2005-06	2006-07	2007-08	2008-09	2009-10
8-11	0	0	0	1	0
12	0	1	1	0	2
13	4	1	9	1	4
14	25	16	21	31	25
15	143	129	159	119	100
Total	172	147	190	152	131

Source: Scottish Government

The fact that a child has been prosecuted in the criminal courts does not mean that the child will be treated in the same way as an adult following any conviction. For example, a court may remit a case involving a convicted child to a children’s hearing for disposal. Table 2 provides information on the outcomes of cases against children under the age of 16 in the criminal courts.

¹⁹ The number of cases against children (eg 131 in 2009-10) may exceed the number of children prosecuted (eg 104 in 2009-10) due to the fact that one child may be involved in more than one case.

Table 2: Outcomes of proceedings against children in the criminal courts

Outcome	Year				
	2005-06	2006-07	2007-08	2008-09	2009-10
charge not proved	31	17	31	27	27
remit to children's hearing	57	45	56	59	42
custodial sentence	24	24	26	21	21
other sentence/disposal	60	61	77	45	41
Total	172	147	190	152	131

Source: Scottish Government

Disposals

In addition to what it says about establishing a minimum age of criminal responsibility (discussed above), article 40 of the United Nations (1989) Convention on the Rights of the Child includes provisions relevant to the treatment of children who are convicted of committing an offence:

“A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.”

As well as the possibility of remitting a case to a children's hearing for disposal, a court may seek advice from a hearing on the treatment of a child. Sentencing options open to a court dealing with a child include:

- fines
- community payback orders
- detention in secure accommodation (not part of the prison system)

The Criminal Justice and Licensing (Scotland) Act 2010 established community payback orders in place of a number of existing community sentences, including probation and community service. Such orders may include a range of requirements, including ones involving the supervision of an offender for the purpose of promoting rehabilitation. In relation to adults, they may include a requirement for the offender to carry out unpaid work. Such a requirement cannot, however, be imposed in relation to children under the age of 16.

Youth Courts

Two youth courts were established on a pilot basis in 2003 and 2004 – at Hamilton and Airdrie sheriff courts. Although aimed primarily at persistent young offenders aged 16 to 17, they were also given the flexibility to deal with children aged 15 who would otherwise have been dealt with in the sheriff courts under summary criminal procedure.

The Scottish Government's [youth courts website](#) states that:

“Youth courts can be regarded as transitional courts between the Children's Hearings system and the full adult criminal justice system and combine fast track arrangements with a wider range of community based support interventions for those who receive a community disposal.”

An [Evaluation of the Airdrie and Hamilton Youth Court Pilots](#) (Scottish Executive Social Research 2006) found that 15 year-olds made up only a small proportion of those prosecuted in the youth courts:

“The vast majority of young people prosecuted in the Youth Courts (91% in Hamilton and 88% in Airdrie) were male and were 16 or 17 years of age (76% in Hamilton and 87% in Airdrie). Seven young people in Hamilton (2%) and 6 (2%) in Airdrie were 15 years of age. Eighty-eight people in Hamilton (22%) and 40 in Airdrie (12%) were 18 years of age or older. The latter appeared in the Youth Court as co-defendants of young people in the target age range.” (para 3.22)

Although the above evaluation of the pilot youth courts was largely positive, others were more critical.²⁰ The response to a parliamentary question submitted in 2010 ([S3W-33309](#)) indicated that the Scottish Government intended to fund both courts until at least March 2012 but that it did not, at that time, have any plans to fund additional youth courts.

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