



Law Society  
of Scotland

# Scottish Parliament Call for Evidence

## Age of Criminal Responsibility (Scotland) Bill

6 July 2018



## Introduction

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The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee along with the Family Law Sub-committee welcome the opportunity to consider and respond to the Scottish Parliament's Equalities and Human Rights Committee's call for evidence on the Age of Criminal Responsibility (Scotland) Bill (ACR Bill). The committees have the following comments to put forward for consideration.

## General Comments

We fully support the proposed changes to raise the age of criminal responsibility in Scotland to 12 as outlined in the ACR Bill. This is a proposal that we have long welcomed which was recognised by Stuart Munro when the ACR Bill was introduced to Parliament:<sup>1</sup>

*"Scotland's age of criminal responsibility, at eight years of age, is currently the lowest in Europe and we are very pleased to see the Age of Criminal Responsibility (Scotland) Bill introduced to the Scottish Parliament. The UN Committee on the Rights of the Child has said that setting the age of criminal responsibility below 12 is not 'internationally acceptable' and we have argued for several years that a child of eight is too young to be held criminally responsible.*

*The interests of the child must be paramount and it is crucial that their welfare is the focus of attention, even in the difficult circumstances of offending behaviour.*

*We do not think that children under the age of 12 should have their actions recorded as criminal. There are also inconsistencies in our law in that the age of criminal responsibility is currently eight years, but the age at which a child can be prosecuted is 12. This creates confusion in people's understanding of criminal law and how it relates to children. Raising the age will bring it in line with the existing age of criminal*

<sup>1</sup> Law Society of Scotland Criminal Law Committee Member

*prosecution in Scotland, providing clarity in the law, and will ensure that children are not treated and then labelled as offenders because of things they did when they were under 12 years old.”*

We are aware that there have been earlier attempts to make such changes before during the passage of what are now the Criminal Justice and Licensing (Scotland) Act 2010 and the Criminal Justice (Scotland) Act 2016. We fully supported the proposals to raise the age of criminal responsibility at those times for similar reasons to those that we outline below. Neither of these attempts was successful.

An Advisory Group was established to give detailed consideration to the issues and implications associated with the minimum age of criminal responsibility. That Advisory Group’s Report has formed the basis of the subsequent consultation culminating in recommendation being endorsed for making the proposed change from eight to 12.

In supporting the need for change to the age of criminal responsibility, we set out briefly what the existing law in Scotland determines which states that:

- No child under the age of eight years can be guilty of an offence<sup>2</sup>.
- A child under the age of 12 may not be prosecuted for an offence<sup>3</sup>.

While a child under 12 cannot be prosecuted in court in Scotland, a child can be held responsible for a crime from the age of eight. This is the age at which the police will deal with the child as having offended, charge them with a criminal offence and submit an offence report to the Principal Reporter of the Scottish Children’s Reporter’s Administration (SCRA) (Principal Reporter).

What this means is that children:

- under the age of 12 who are alleged to have committed a criminal offence or
- 12 or over who are alleged to have committed a criminal offence while under the age of 12

may still be ‘prosecuted’ for that criminal offence within Scotland’s criminal justice system.

This involves procedures through the Children’s Hearing System and/or the Sheriff Court. What that can do ultimately is to record such matter as a conviction. That comes with all the negative implications that can be involved for the child’s future education and employment prospects if and when persons become aware of the child having been involved in what are termed ‘criminal proceedings’.

<sup>2</sup> Section 41 of the Criminal Procedure (Scotland) Act 1995.

<sup>3</sup> Section 41A of the Criminal Procedure (Scotland) Act 1995

If the ACR Bill becomes law by making this change to the minimum age, in effect, a child under the age of 12 years cannot commit an offence<sup>4</sup>.

Our reasons for supporting this important change include:

- The minimum age of criminal responsibility in Scotland is lower, at eight, than any other European Union country, though we recognise other countries' attitudes do vary as set out in the ACR Bill's Policy Memorandum. Increasing the minimum age to 12 will bring Scotland into alignment with many other countries.
- Maintaining the age at eight years was the subject of adverse comment in 2008 from the United Nations Committee on the Rights of the Child (UNCRC).<sup>5</sup> It recommended that the age of criminal responsibility in Scotland be raised. This will bring Scotland into line but not necessarily parity with other countries. There seems no continued justification to be out of line with other jurisdictions, including England, Wales and Ireland. It is also noted to be out of line with the intentions of the Scottish Government's policy Getting It Right For Every Child.
- Increasing the minimum age of criminal responsibility moves away from the labelling of adverse or so called 'negative' behaviour by children as criminal or otherwise blameworthy in the context of the current interventions via the Children's Hearing system. This is an important underlying principle of the ACR Bill. We fully accept that an approach of 'labelling' can potentially lead to the stigmatisation of children. It does little to acknowledge, far less tackle, the complex causes of such behaviours in childhood that can lead to offending in adult life.

We would observe that the age of 12 has already a legal significance for Scotland. At that age, a child has legal capacity to raise a court action, to make a financial claim and to instruct a solicitor for those purposes, if he or she '*has a general understanding of what it means to do so*'.<sup>6</sup> They also can consent to adoption<sup>7</sup>.

We are aware of discussions that propose the age should be increased beyond 12. We note that there are a number of countries that do reflect higher ages than 12.

We are also aware that there are a number of consultations and legislative proposals taking place upon during the summer period that may impact on family law and children's rights. The impact of the provisions of ACR Bill will need to should be considered and factored in.

<sup>4</sup> Section 1 of the ACR Bill

<sup>5</sup> Paragraph 78 (a) at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>

<sup>6</sup> <http://www.journalonline.co.uk/Magazine/49-8/1000168.aspx>

<sup>7</sup> Section 32 of the Adoption and Children (Scotland) Act 2007

## Part 2 Disclosure of convictions and other information relating to time when person under 12

These provisions concern sections 4 - 21 of the ACR Bill. These need to be considered in line with the current consultation in relation to the Protection of Vulnerable Groups and the Disclosure of Criminal Information<sup>8</sup>, which is considering significant changes to the current disclosure regime.

If the age of criminal responsibility is increased to 12, any conduct by a child under 12 previously recorded, will no longer be recorded as a conviction.

We support the creation of the role of the independent reviewer. For the purposes however of public protection, section 6 of the ACR Bill devises a process where an independent reviewer is to be appointed. That is expressly for the purpose of reviewing information concerning the behaviour of any person when under 12 years old to ascertain if such information can be disclosed. Such information can be disclosed:

- in relation to an enhanced criminal record certificate under the Police (Scotland) Act 1997<sup>9</sup> as other relevant information or
- under the Protection of Vulnerable Groups (Scotland) Act 2007<sup>10</sup> where other relevant information is relevant to the type of regulated work which the person to whom it applies is to carry out and if it should be disclosed.

These pose questions of balance.

A twofold test is set out in section 13 of the ACR Bill which allows the independent reviewer to determine that the information is relevant and should be disclosed. It contains a method of review of the independent reviewer's decision but only on a point of law by either the applicant or the police.

It is not clear why the right of appeal against such decisions (section 15 of the ACR Bill) is limited to a point of law only. This is not consistent with other rights of appeal in public law decision making. We would recommend that appeals should also be permitted on the grounds of procedural irregularity and *Wednesbury*<sup>11</sup> unreasonableness. This would ensure compliance with the aim of the UNCRC Article 40 of the rehabilitation of the child. It would give a level of safeguard consistent with the significance of the decision making function being exercised. Please see our later observation with regard to the provision of legal aid.

There is a time period set out for an appeal of 28 days from notification of the independent reviewer's decision. The manner of notification does need to be spelt out within the legislation or in regulations. Some of the most vulnerable in society may well be affected by these provisions of the ACR Bill. They need to

<sup>8</sup> Protection of Vulnerable Groups and the Disclosure of Criminal Information <https://consult.gov.scot/disclosure-scotland/protection-of-vulnerable/> that closes on 18 July 2018

<sup>9</sup> Section 113B

<sup>10</sup> Section 52

<sup>11</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

understand what these provisions mean and when they apply. That is about information being made available in a fully accessible form. It will be important for the Scottish Government to have a clear communication policy about ensuring the public's understanding of the changes being brought in by the ACR Bill.

We note that section 17 of the ACR Bill deals with the issue of guidance. There are no provisions for guidance to be approved by parliament in the form of secondary legislation. This might be appropriate to consider in conjunction with section 18 of the ACR Bill since it imposes no mandatory requirement. Again, the reference to section 18(2) is merely advisory with regard to what might be included if regulations were made. We would recommend consideration being given to a requirement to make regulations and that the regulations should be concerned with more than merely procedural time periods. There may well be other functions of the independent reviewer that should be set out more clearly.

Though section 16 of the ARC Bill sets out the requirement for annual reporting, we suggest that this should also contain details as to the numbers of appeals and cases suitably anonymised that have been received in the reporting year.

## Interpretation of Part 2

We note under section 21 of the ARC Bill that there appears some repetition of the definitions where there are some overlaps. (See section 4 of the ARC Bill where it refers to the Police Act 1997 and Section 64 of the ACR Bill which refers to the Children's Hearing (Scotland) Act 2011 Act (2011 Act) which is also relevant for the purposes of Part 3). It may also be confusing as each part of the ACR Bill seems to refer to a separate definition sections.

We would suggest that simplification and clarification of legislation would lend itself to one definitions clause within the ACR Bill. In the Scottish Government Drafting Matters,<sup>12</sup> we note that it is recommended that

*'where the defined term is used more than once, place the definition as prominently as is useful to the reader, for example:*

- *if detailed, in its own section*
- *if fundamental, possibly even at the start (our emphasis)*
- *ordinarily, in a definitions section towards the end'*

<sup>12</sup> <http://www.gov.scot/Publications/2016/08/6015/0>

## Part 3 Victim Information

This deals with section 22 of the ACR Bill.

The changes being made to the age of criminal responsibility may well impact on the rights of victims which could include children. There are a range of rights incumbent in existing legislation both from the Scottish and EU perspective that have been created for victims. These apply irrespective of the age of the victim. These rights which include receiving information apply where cases are currently referred to the Principal Reporter. If the age of criminal responsibility is amended, the rights in relation to victims who have been affected by harmful behaviour of children aged between 8 and 11 would be affected. It is envisaged that a new statutory framework will be created in relation to providing information through the Victim Information Service.

We are mindful of the risk of potentially removing existing, effective safeguards in the process and also of the risk of stigma that the release of information about childhood adverse conduct may have for children in later (especially their adult) life. We appreciate that the majority of the offences committed by children between the ages of 8 and 11 years are minor/moderate in nature. There is a need for safeguards where such behaviour falls into a more serious category.

What is being envisaged is an amended statutory process which changes the process currently operating under section 53 of the Criminal Justice (Scotland) Act 2003 which, as a consequence, is to be repealed.

Information may be provided by the Principal Reporter at their discretion to victims where the child's behaviour is defined as causing harm to another person and they are:

- (i) Physically violent
- (ii) Sexually violent or sexually coercive or
- (iii) Dangerous, threatening or abusive.

There are further safeguards included so that regard must be had to the age of the child, the seriousness of the offence, the circumstances in which the offence or behaviour took place, the effect of the behaviour and such other factors as the Principal Reporter considers appropriate.

We note the policy intention<sup>13</sup> refers to victims of 'seriously harmful behaviour' but there is, in effect, no definition of that term which might be appropriate or the factors that the Principal Reporter has to consider before disclosure.

There is also no recourse in the event that disclosure is allowed 'wrongly' by the Principal Reporter. Should consideration be given to some kind of appeal process? It will take time before any body of case law could develop on both what the term 'seriously harmful behaviour' means and any additional factors that the

<sup>13</sup> Paragraph 114 of the Policy Memorandum

Principal Reporter feel are appropriate to take into consideration. There needs to be greater clarity within the legislation.

We are aware that these cases will be few and far between but given the implications of disclosure, the balance must still be maintained and the circumstances of those affected, be it victim or accused, set out clearly.

## **Part 4 Police investigatory and other powers**

Sections 23- 63 of the ACR Bill refer.

We support the policy intention that the police powers which the ACR Bill creates should be consistent in relation to all children under 12 avoiding the complexity of a three tier system setting out different processes for those under eight, under 12 and over 12. We are concerned that the use of any such powers in relation to all children must be proportionate, justifiable and based on the child's welfare<sup>14</sup>.

Chapter 3 deals with the questioning of certain children.

Section 31 of the ACR Bill restricts when the police can question a child. If an interview is to proceed, we would want to ensure that it adapts Joint Investigative Interview procedures for questioning of children. We note that section 37 of the ACR Bill does not specifically state that. It could of course be included in guidelines to be issued in due course.

In relation to section 39 of the ACR Bill, we support the requirement that a child should have the right to have a 'supporter' or 'advocacy worker' present. We have a number of observations to make about how that scheme should work:

- Where section 39(8) of the ACR Bill refers to the supporter being the person considered appropriate by the person conducting the interview, we would question this. This should be similar to the provisions in the Criminal Justice (Scotland) Act 2016. Under that Act, decisions regarding interviewing are made by persons not directly involved in the interview process and usually of a higher rank than constable.
- We note where an 'advocacy worker' is to be involved, there is an intention that such a service would be provided by legally qualified individuals. A mere law qualification will in our view not suffice. They would need to have an understanding as well as experience of the practice of criminal law and of the children's hearings system, including the implications of the evidence or information provided during an interview.

<sup>14</sup> Paragraph 131 of the Policy Memorandum

- Though we note the reference under paragraph 169 of the Policy Memorandum to ‘reminding the child that they don’t need to answer questions if they don’t want to’, the child’s rights go much further as to the right to remain silent which section 38 of the ACR Bill specifically requires. That illustrates the need for more than a mere legal qualification.
- We would question how these rights will operate when considering the rights to legal advice provided under the equivalent criminal proceedings. Much of what is specified as being the role of the ‘advocacy worker’ is part and parcel of the practice of a criminal solicitor who attends police station interviews. The system of interviewing equates to criminal procedure and the ramifications from responses will be just as important. The skills of a criminal lawyer are what would be required to best serve the interests of the child. It matters not whether the conduct will ultimately be prosecuted.
- We would also refer to the implications of UNCRC Article 40<sup>15</sup> and Articles 6 (right to a fair trial) and 8 (right to private and family life) of the European Convention on Human Rights. Even where a child is being interviewed about minor offending, rights to such safeguards should be included. There is the possibility that evidence of serious harmful behaviour could arise. There needs to be a fundamental right to legal advice in all these circumstances.
- There is a need to provide access to legal advice, probably through the police station duty scheme that provides for 24/7 and 365 day access. There is a requirement for legal aid to be available for any solicitor who becomes involved. To that extent, it is necessary to work out in advance clearly what the role of any solicitor and ‘advocacy worker’ entails.
- We do not agree with the Policy Memorandum paragraph 171. The point about a state funded person supporting such a child is not that it replicates the criminal system but that there is an existing system in place that can provide legally qualified and suitably experienced people to be advocacy workers without the need to create a new role. Solicitors are governed under regulatory processes about their standard of conduct. Safeguards would also need to be put in place to regulate the ‘advocacy worker’.
- The provision of children’s advocacy service is inconsistent throughout Scotland. It will be under ever greater pressure when the relevant sections of the 2011 Act come into force.
- There is a need for a clearly defined robust and relevant scheme for the appointment, role, training, monitoring, evaluation and review of the ‘advocacy worker’ system. There needs to be adequate

<sup>15</sup> <https://www.yjlc.uk/wp-content/uploads/2015/01/UNCRC-art-40.pdf>

provision of sufficient funding to ensure consistency of the service for all such children irrespective of their postcode location.

Section 46 of the ACR Bill requires Scottish Ministers to provide guidance. Given the importance of such guidance, we do consider that such guidance should be provided in draft to allow for comment before it is issued.

Section 46(2)(g) includes provisions that guidance should include role of the supporters and advocacy workers. We would suggest clear consideration is given to their respective roles and that of a solicitor as they do seem substantially to overlap. We are also concerned to understand where a supporter and a solicitor may need to interact. Please see our comments on legal aid being made available.

## **Chapter 4 Taking of prints and samples from certain children**

Section 47- 58 of the ACR Bill refers.

We welcome that samples taken from a child should not be retained beyond the immediate investigation.

## **Chapter 5 General Provision**

Here we would seek to mention the general issue of legal aid. Though Chapter 5 of the ACR Bill refers to 'General provision', we note that changes are proposed to the Legal Aid (Scotland) Act 1986 (1986 Act) under section 60 of the ACR Bill to 'Children's legal aid for the proceedings under this part'. We suggest that this should refer to all sections of the ACR Bill. We are concerned to ensure that legal aid is available to cover all the various changes which are being proposed. We are concerned that all the relevant changes to the 1986 Act that are necessary are included to ensure legal aid will be available. For clarification purposes, we would want to ensure that:

- Where advocacy services in supporting a child under 12 being interviewed in relation to serious behaviour are to involve/include a solicitor, we consider that legal aid should be made automatically available.
- Where there are appeals in relation to the independent reviewer's decision, legal aid should be provided.
- We refer below to consideration of the creation of an additional ground of referral. We would recommend in that connection, where a child is subject to an applications for ground of referral containing the new ground that automatic legal aid should be available. Of necessity such an application will involve serious conduct. It is difficult to conceive of circumstances where a child would not require a solicitor in order to participate effectively in the process. Automatic children's

legal aid guarantees that whereas the child would only have to show that it was ‘reasonable’, they would need to meet the financial test. That would require the financial test which would consider the child’s parents’/guardian’s financial circumstances (and they may have a different view from the child, may not appreciate the significance of matters, so that the child would be left without representation or encouraged to accept the ground of referral) If there is a public interest in recognising the conduct, then children should be able to access uniform safeguards irrespective of their means and circumstances.

## Additional Comments

### Section 67 of the 2011 Act

When considering amendment to the ACR Bill, we propose a further area for legislative amendment:

Section 67 of the 2011 Act refers to the meaning of ‘section 67 ground’ in relation to a child. Section 62 of the 2011 Act indicates where a court considers that a section 67 ground may arise, the court will refer the matter to the Principal Reporter.

The current grounds would suffice with no need for a new ground for referral. However, with the re-categorisation of conduct under the ACR Bill, this will have further implications in respect of the procedural and evidential approach taken in establishing whether that conduct under the section 67 ground has/has not occurred. Where a ground is brought in terms of section 67(2)(j) of the 2011 Act, that ground uniquely retains many of the safeguards that would exist were the case to be brought in a ‘criminal’ forum. These include:

A ‘beyond reasonable doubt’ standard of proof

- requirement for corroboration
- prohibition (largely) on hearsay
- specific rights set out within article 6
- obligations upon the state regarding disclosure
- common law and other evidential safeguards specific to criminal procedure.

Insofar as minor offending is concerned, this is largely unproblematic. In these cases (e.g. public disorder offences or crimes against property), the nature of the conduct is such that the consequences of a positive finding is unlikely to have later life implications for the child. It is unlikely to be viewed as conduct that the public interest justifies the discretionary disclosure of the offending behaviour.

The position is quite different in respect of more serious offences. By way of example, if the ACR Bill was to be enacted in its present draft form, a child aged 9 charged with rape of an 11 year old could have that

allegation established on the balance of probability, based upon the hearsay evidence of a joint investigative interview of the victim. They could then be subject to having that information disclosed by Police Scotland where there is enhanced disclosure applying when the child becomes an adult. The removal of the procedural and evidential safeguards that would have existed for that child, in effect, put them in a (potentially) worse position than they were before.

In trying to strike a balance between maintaining consistency with the policy aims of the ACR Bill and retaining effective safeguards for what we recognise would be a comparatively small class of children, we would put forward consideration of introducing an additional ground of referral under section 67. We have two versions to put forward for consideration:

Version 1: Insert a new section 67(2)(r):

*“the child has behaved in a manner which had they been 12 years of age or over would have been amounted to one or more of the following criminal offences:*

- *Murder*
- *Attempted murder*
- *Culpable homicide*
- *Rape*
- *Attempted rape*
- *Abduction*
- *An offence in terms of the Sexual Offences (Scotland) Act 2009*
- *An offence in terms of Schedule 1 of the Criminal Procedural (Scotland) Act 1995*
- *Any other offence which the Crown certifies that (but for the child’s non-age) would have been prosecuted on indictment’*

Version 2: The wording of the Lord Advocate’s Guidelines to the Chief Constable on the Prosecution of Children<sup>16</sup> could be adopted so that the new section 67(2)(r) of the 2011 Act would read:

*‘the child has behaved in a manner which had they been 12 years of age or over would require by law to be prosecuted on indictment or which are so serious would normally be reported for consideration of prosecution on indictment on the instructions of the Lord Advocate in the public interest’*

We do consider that a new ground would help to ensure that very serious offences are seen to be dealt with by the system. Such children would not escape the consequences of their actions, and public safety concerns would be managed. A new ground in these terms that we have proposed would have advantages in that it would:

<sup>16</sup>[http://www.copfs.gov.uk/images/Documents/Prosecution\\_Policy\\_Guidance/Lord\\_Advocates\\_Guidelines/Lord%20Advocates%20Guidelines%20of%20fences%20committed%20by%20children.pdf](http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20of%20fences%20committed%20by%20children.pdf)

- Guarantee such children the same safeguards and procedural protection that older children or adults charged with the same offences would have. The offences which would be included are of sufficient seriousness that there is the potential for real and substantial prejudice to the child. There is in our view a need to establish the conduct with those safeguards to avoid the potential disclosure of and reliance upon that information being disclosed when they become adults.
- Provide greater certainty to the child about what information may be disclosed when as an adult under the current disclosure regime though as we note above, this is undergoing consultation at present.

From the perspective of victims and the interests of justice, while expressly not requiring the labelling of conduct as criminal, it involves the recognition and treatment of such serious conduct as distinct from other minor/moderate offending.

The Principal Reporter needs to act as a gate-keeper in selecting the relevant ground(s) of referral. This may require a clear position or understanding as to what circumstances the Principal Reporter would bring in any 'offence' grounds. This would avoid any inconsistency of approach. If there is not clear guidance from the Principal Reporter, then it would be within the Principal Reporter's ambit to bring the allegation as a different ground such as a ground under section 67(2)(m) of the 2011 Act.

We would stress that the Principal Reporter will have a key role in ensuring consistency of approach to guarantee all such children the same safeguards.

### Criminal Injuries Compensation Authority<sup>17</sup>

We would question if the provision of information should apply in relation to criminal injuries. There can be exceptional cases where acts may be perpetrated by children below the age of criminal responsibility. Raising the age as the ACR Bill provides will mean that some victims could be adversely impacted about disclosure of information when they are seeking compensation.

<sup>17</sup> <https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority>



We trust this is helpful for your purposes and would be happy to answer any further questions.

Gillian Mawdsley

Policy Executive

Law Society of Scotland

Atria One

144 Morrison Street  
Edinburgh

EH3 8EX

D: 01314768206

[gillianmawdsley@lawscot.org.uk](mailto:gillianmawdsley@lawscot.org.uk)