



Law Society
of Scotland



Stage 3 Briefing

Age of Criminal Responsibility (Scotland) Bill

2 May 2019



Introduction

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.

We provide the following comments regarding the Age of Criminal Responsibility (Scotland) Bill (the Bill) which we hope will assist the Parliament's scrutiny at the Stage 3 Debate scheduled for Tuesday, 7 May 2019. Our comments refer to:

- the proposed change to the age of criminal responsibility and its effect
- publication of the changes being made by the Bill
- powers to place a child in a place of safety
- child interview rights practitioner
- Legal aid

Comments

The change to the age of criminal responsibility and its effect

The Bill was introduced on 14 March 2018 where its main provision is set to raise the age of criminal responsibility in Scotland to 12 years of age. A child of eight is too young to be held as criminally responsible so there is a need for an increase to be made to the age. The reasons why we support such a change include:

- Currently that Scotland's age of criminal responsibility is set at eight years which is the lowest in Europe and out of line. Though the relevant age of criminal responsibility in European countries does vary, by increasing a minimum age, this will bring Scotland in line with many other countries.
- Responding to criticism from the UN Committee on the Rights of the Child¹ that the age of eight is not "internationally acceptable". There seems to be little justification for the current age to remain as

¹ <https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx>

it seems too to be out of step with the Scottish Government's policy of Getting it Right For Every Child that aims to provide children with all the help and support that they need.

- Removing any possible conviction for behaviour undertaken before the child reaches 12 will remove the negative implications for the child's future education and employment prospects when the child will be seen to have been involved in "criminal proceedings".

The question is to what age criminal responsibility should be raised to?

The debate over age has ranged between 12- 16. That debate over the age will continue to the Stage 3 Debate when discussing whether the increase to 12 years of age is approved.

12 years of age does have a legal significance in Scots law. At that age, a child has the legal capacity to raise court action, make a financial claim and instruct a solicitor provided that they have a general understanding of what it means so to do. They can consent to adoption under section 32 of the Adoption and Children (Scotland) Act 2007.

The Scottish Government has recently announced that a new forum² should be set up to consider whether the age of criminal responsibility should be raised higher than 12 years within three years of the Bill becoming law". It intends to work with children, young persons, victims and communities to obtain views to support any further increase or not. Justification for undertaking further work on increasing the age is based on ensuring confidence "that our laws, systems, services and professionals are prepared and supported for [in effect a further increase]." Exactly how long it is intended before the main provisions of the Bill are commenced is yet to be ascertained though there are inevitable changes that will need to be made irrespective of the final decision on the age being increased to 12 years or higher.

The effect of the change, whatever age is finally agreed, will mean that a child under that age (being set out at 12 years of age in the Bill) cannot commit an offence.

We welcome the clarity that the Bill brings about the way that children should not be treated and labelled as offenders because of actions that they did before they were 12 years old.

Information about the Bill

The Bill will make substantial changes to practices involving children who are some of our most vulnerable in society. They need to understand what the provisions of the Bill, when commenced, mean and will affect them and when they apply. That information must be made available in a fully accessible manner and in all formats for children and young persons to access. There needs to be a clear communication policy aimed at them but also towards adults, carers, guardians, social workers and the police who all have responsibilities towards them.

² <https://www.holyrood.com/articles/news/scottish-government-take-advice-raising-age-criminal-responsibility-beyond-12>

Police Investigatory and other powers

Chapter 3 of the Bill deals with the questioning of children. Any use of the powers provided in the Bill by the police with regard to children must be proportionate, justifiable and based on the child's welfare as:

“the fact that new powers could theoretically be used to investigate very young children emphasises [that] importance and [are] rooted in safeguarding the child's welfare, while avoiding processes and experiences that look, feel and sound to the child and others like a criminal investigation³”.

Section 23 of the Bill concerns the power provided to the police to take a child under the age of 12 to a place of safety where there are reasonable grounds to believe that they are behaving or is likely to behave in a way that is causing or risks causing significant harm to another person. Neither the term “significant harm” nor “risks” are defined. It may be worth ensuring that Guidance on how these provisions are to operate may consider in what circumstances this provision is to operate. That could help in ensuring that the police understand how to factor in risk assessment and obtaining the relevant information and training to allow them to make that assessment. These include the child and the parents' circumstances, the wider family background and interactions and the cultural and environmental context.

Only should a child be placed in a police station as a last resort. The experience of Lynzy Hanvidge (13)⁴ who described how social workers and police had arrived to remove her and her siblings. When she was troublesome as she did not want to leave her mother, she was handcuffed and was detained in a police station. Detention of children should not take place in the inappropriate conditions of a police station cell as it carries the risk of serious long-term repercussions for the child. There are a number of much more appropriate locations for children when a place of safety is required. A number of amendments have been tabled at Stage 3 which we support and include:

- Setting out where the places of safety should be as that provides necessary clarity
- Should the police station be required as a place of safety, it would only be on the approval of a senior officer of Inspector or above in rank which parallels with the decision-making processes regarding custody arrangements in the Criminal Justice (Scotland) Act 2016.
- Specifying information in notices to be provided to those affected such as the child and the parent. That is required in the interests of transparency and fairness.

Guidance is to be produced by Scottish Ministers under section 46 of the Bill. That guidance is to address various matters in connection with the interviewing of children. There is a duty to consult on such guidance. However, given the importance of such matters, that prior consultation seems essential. We have concerns that there is discretion for Ministers only to ‘consult such persons as they feel are appropriate.’ We would

³ paragraph 131 of the Bill's Policy Memorandum
[https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20\(Scotland\)%20Bill/SPBill29PMS052018.pdf](https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20(Scotland)%20Bill/SPBill29PMS052018.pdf)

⁴ Who Cares? Evidence to the Scottish Parliament and Equalities Committee 6 September 2018

prefer that there are more categories specified as to whom such consultation should be conducted or that there is a requirement for such guidance to be published in draft.

Section 40 of the Bill amends section 122 of the Children’s Hearing (Scotland) Act 2011 to allow for children’s advocacy services to provide support and assistance to a child in connection with or during their participation in an investigative interview, as authorised by a child interview order under the Bill.

Amendments have been tabled at Stage 3 that specify such services should be provided by a ‘a child interview rights practitioner’ who is to be:

“a person who is authorised, by virtue of being included in the register established and maintained under section (*Register of child interview rights practitioners*) to provide advice, support and assistance to children in relation to their involvement in investigative interviews authorised by virtue of section 31A(2) or by a child interview order”.

Much needed clarity has now been provided addressing our earlier concerns about exactly who would be permitted to provide advice.

Scottish Ministers are going to be required to establish and maintain a register of such persons who are authorised to provide advice, support and assistance to children in relation to their involvement in investigative interviews. That person must be a legally aid registered solicitor which is appropriate as they will have the relevant experience and qualifications to act for their clients in challenging circumstances. Children must be able to access the best of advice to support them. Solicitors are able to act in the best interests of their client.

Powers exist to make regulations regarding the establishment and maintenance of the Register as well as the payment of expenses, fees and allowances. Such regulations should address aspects such as evaluation and review of the processes now being put in place.

The inclusion for such safeguards, as offending, though minor, will have significant ramifications for children. Children facing such interviews should be supported and represented by solicitors in what are inevitably stressful times.

The introduction of such provisions should help to secure the consistency of practice regarding provision of advocacy services.

Chapter 5 General provisions

Changes to the Legal Aid (Scotland) Act 1986 are proposed. We would wish to ensure that legal aid provision for advice and assistance is reviewed to ensure that it is available for all processes and procedures being introduced with regard to children under the Bill. We would wish to ensure that legal aid is granted automatically where:

- advocacy services are required in relation to a child under 12 being interviewed regarding serious behaviour
- Any appeals in relation to the independent reviewer's decision.

For further information, please contact:

Gillian Mawdsley
Law Society of Scotland
DD: 01314768206
gillianmawdsley@lawscot.org.uk