

**Barnardo's Scotland response to Scottish Government consultation on  
Minimum Age of Criminal Responsibility**

**Care Protection & Risk**

- 1. Do you think that the support needs of, and risks posed by, children aged 8-11 years demonstrating harmful behaviour can be met through the extension of the National Child Protection Guidance? Yes**

**If yes, what adjustments do you anticipate might be required and why?:**

One of the consequences of increasing the age of criminal responsibility from 8 to 12 would be that the behaviour and actions of children under 12 can no longer be seen as criminal. This is something we welcome, but a theme which runs through the Advisory Group report is that this change must not mean that children under 12 are moved out of processes designed to help and protect them. There is a need to ensure that the risk to themselves, and to others, posed by children who engage in harmful behaviour is managed and dealt with appropriately.

Bearing this in mind we agree that the National Child Protection Guidance provides a useful framework for dealing with children under the age of 12 who engage in harmful or risky behaviour which would otherwise be deemed criminal. Child protection is certainly the frame in which we would want these children to be viewed rather than that of criminality.

As it stands, and as noted by the Advisory Group, the NCPG currently focuses largely on the risks posed 'to' children and not necessarily risks posed 'by' and 'to other' children. This notion is fundamental to shifting the debate and culture around children under 12 who commit 'offences' into the realms of child protection and acknowledging that many young children who exhibit harmful or dangerous behaviour have been victims themselves or experienced abuse, trauma, neglect, bereavement etc.

The National Child Protection Guidance is therefore the right place for this to sit as it acknowledges that children under 12 who 'offend' are in need of protection themselves. This would provide a synergy between the recommendations relating to Children's Hearings referral grounds, in that children under 12 who 'offend' are always referred on care and protection and not offence grounds.

Any refresh of the Guidance should reflect current knowledge and learning around bereavement, trauma and loss; child development; as well as family factors which can contribute to harmful and risky behaviour.

- 2. Do you think that a multi-agency scoping study of training and skills would be helpful? Yes**

**Please provide reasons for your answer:**

Children who display harmful behaviour towards others or themselves often have multiple vulnerabilities and disadvantages. With the removal of any offence grounds for

children being referred to the Reporter under the age of 12, the underlying issues behind a child's harmful (previously deemed offending) behaviour will hopefully be flagged up through alternative welfare based grounds.

Barnardo's Scotland is one of the key service providers for work with children and young people who display problematic and harmful sexual behaviours in Scotland. Our services regularly work with children aged between 5 and 12 involved with behaviours that would be termed 'sexual offending' if they were displayed by adolescents or adults. Many of these children have had extensive histories of abuse & victimisation themselves and are deeply troubled; the majority have experienced sexual abuse as well as other forms of maltreatment.

We therefore understand the need to ensure our workforce is equipped with the necessary skills and knowledge to enable them to respond effectively to this risk and harm, the risk that children may pose to themselves and the risks they pose to others. Where good practice exists this should be shared and disseminated across the workforce to develop the capacity of professionals to respond effectively to these complex and challenging cases.

### **Children's Hearings System**

**3. Should the age of criminal responsibility be raised to 12, do you think that it will be possible to deal with the harmful behaviour of 8-11 year olds via existing care and protection (welfare) grounds through the Children's Hearings System?** Yes

#### **Please provide reasons for your answer:**

We are persuaded by the views of the Advisory Group and the research undertaken by SCRA that the current care and protection grounds for referral are sufficient should the minimum age of criminal responsibility be raised to 12. The Children's Hearings (Scotland) Act 2011 introduced a new ground for referral, ground (m). This ground is somewhat of a catch all stating that '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', alongside ground (n) 'the child is beyond the control of a relevant person' there seems no reason why a child under 12 displaying harmful, or otherwise criminal behaviour could not be referred to the Reporter and receive the same level of intervention and support, without the label of criminalisation attached, an offence label is not essential to identifying and tackling this behaviour.

Our services are aware of children as young as 9 being referred on offence grounds for sexual offences. Our experience is that such responses label and stigmatise young children, have long lasting implications that cannot be undone (e.g. such offences will appear on PVG and disclosure checks for children when they reach adulthood), and are never child centred, often leading to risk management that does not foreground the child's needs or safety. They also provide a further barrier to parents who may be concerned about their child's behaviour but are also worried about their child becoming criminalised or labelled a sexual offender if they reach out for help from services.

The SCRA evidence (Henderson, Kurlus and McNiven 2016) shows that the majority of children referred on offence grounds also have other grounds attached to the referral relating to care and protection. This chimes with our own experience of working with vulnerable young people; offending behaviour should not be seen in a vacuum, there is almost always something else going on; wellbeing concerns that need to be addressed. The offending behaviour should form part of the narrative for intervention; their offending behaviour should be viewed in the context of their own protection as well as others. We believe this should be and can be done via care and protection grounds alone for children under 12.

## **Role of the Police**

### **4. Should the age of criminal responsibility be raised to 12, do you agree with the assessment of the Advisory Group that some police powers should be retained in relation to children under 12? Yes**

#### **Please provide reasons for your answer:**

We agree with the recommendations of the Advisory Group, there may be circumstances where Police will need to retain certain powers to ensure that children who may have been involved in or engaged in serious, harmful behaviour are protected and safeguarded at the point of the incident. This may involve being taken to a place of safety for their own immediate protection or the protection of the victim. Children under 12 may also need to be eliminated from any potential Police investigation. If Police do not have the power to do this there is a danger they may be 'blamed' for actions they did not commit and be unable to challenge this assertion fairly and with evidence. This was highlighted by the Advisory Group in relation to the power to collect forensic samples, who stated that 'particularly in sexual offences, when such samples would have the ability to substantiate or refute a child's alleged involvement in an incident'. It is also important for any professionals providing interventions with that child that they have an established view of the facts in order to work with the child and enable them to move on.

The principles and framework of GIRFEC should always be the central focus for Police when seeking to use any of these powers, children's wellbeing and best interests should be paramount, in line with Article 3 of the UNCRC. As noted, this will involve multi-agency working between Police and Social Work and be based on the principles of Joint Investigative Interviews and Child Protection Procedures in relation to the severity of the behaviour.

Further consultation on exactly what current and additional powers are necessary may be needed to ensure that the appropriate safeguards are put in place and powers are being used proportionately in the way they were intended.

### **5. In relation to forensic samples, should the Police ever be able to retain samples taken from children aged under 12? Don't know**

#### **Please provide reasons for your answer:**

Retention of this forensic data for any period of time has the potential to pre-empt the criminalisation of a child after they reach the age of 12 as their forensic samples remain on file. There is potential for targeting of perceived 'troublesome children' so that offences committed by them once they reach 12 can be cleared up quickly. This goes against the grain of what raising the age of criminal responsibility sets out to do i.e. prevent any behaviour of children under 12 being deemed as criminal and prevent this behaviour from impacting on their future life chances.

However we are encouraged by the fact that the Police have never applied to a Sheriff for an extension of the current 3 year retention period for a 'relevant offence' committed by a child and would hope this practice would continue.

This particular power has the potential to impact on the future of children under 12 and a further and more in depth consultation may be necessary to determine whether this is necessary and proportionate. Any decision should be based on the rights of the child, be subject to a full Child Rights and Wellbeing Impact Assessment and address questions such as 'why does this sample need to be retained? 'Is it being retained because it could help protect and safeguard this child in the future? 'Does the retention of this sample have the potential to criminalise this child in the future?

**6. What safeguards should be put in place for children aged under 12 in relation to the use of these powers?**

**Please explain:**

Children under 12 who are involved in serious, harmful behaviour are vulnerable and must be treated as such. This should include access to advocacy services such as our Hear 4 U service to allow the child's voice to be heard.

As mentioned above, a full Child Rights and Wellbeing Impact Assessment should be completed in relation to which Police powers will be necessary if the age of criminal responsibility is raised to 12 and what the potential impact of this could be. Police would need to be fully trained on the principles and framework of GIRFEC to ensure that when they do use these powers, and this shouldn't be all the time, they are using them in a child centred way.

**Disclosure and Protection of Valuable Groups**

**7. Do you think that there should be a strong presumption against the release of information about a child's harmful behaviour when an incident occurred before the age of 12? Yes**

**Please provide reasons for your answer:**

As noted by the Advisory Group, disclosure is one of the key barriers for children and young people in later life. Children can often accept offence grounds at a Children's Hearing without being fully aware of the consequences in terms of disclosure. They may not even become aware of these consequences until they apply for a job or a University course and find themselves barred for something they did when they were 10.

We agree with the Advisory Group that there should be a strong presumption against Police releasing information to Disclosure Scotland about a child under the age of 12. If absolutely necessary for public protection (which should not be a regular occurrence) there should be clear, compelling and exceptional reasons for doing so and the decision should be subject to independent ratification.

**8. Should individuals who may have obtained a criminal record based on behaviour when they were aged 8 to 11 prior to any change in the age of criminal responsibility no longer have to disclose convictions from that time? Yes**

**Please provide reasons for your answer:**

As above, the requirement to disclose a range of 'other relevant information' to Disclosure Scotland, even non-conviction information, can seriously impact on a child in later life. It can have serious negative and often unforeseen consequences on their future education, employment and life chances. If the age of criminal responsibility is raised to 12 it would seem appropriate to apply rules around disclosure retrospectively so all children are put on an equal footing and are not disadvantaged by the date in which their 'offence' took place.

**9. Where it is felt necessary to release information about an incident occurring before the age of 12 (e.g. in the interests of public safety), do you agree with the Advisory Group's recommendation that this process should be subject to independent ratification? Yes**

**Please provide reasons for your answer and any views on the most appropriate independent authority:**

We do not have any views at this point on who may be the most appropriate independent authority.

**10. Should an incident of serious harmful behaviour that took place under the age of 12 continue to be disclosed when that person reaches the age of 18? No**

**Please provide reasons for your answer:**

Raising the age of criminal responsibility, effectively moves the behaviour of under 12's out of the realms of criminality and into the context of child protection procedures. We therefore do not see the disclosure system as the right mechanism for information to be stored or shared for behaviour that is not criminal.

We have already mentioned the barriers children and young people can face due to disclosure but child development also needs to be factored in. Children and young people can and do change, there are key transitions in their lives which will affect their behaviour at different times, as highlighted by the Edinburgh Study of Youth Transitions and Crime (McAra & McVie). Young people go through many emotional, social, physical and mental changes as they move into adulthood and this needs to be taken into account when looking at behaviours and incidences that happened in very early childhood, and at very early stages of their development.

In our experience, young children involved in serious harmful behaviour tend to be victims of crime themselves or have suffered abuse, trauma, neglect etc. they can be both perpetrator and victim simultaneously. We see no benefit in any incidences perpetrated by them under the age of 12 following them into adulthood.

Rather we would agree with the Advisory Group that the new provisions in the Children and Young People (Scotland) Act 2014 should provide the mechanism and vehicle for sharing information about 8-11 year olds who are involved in behaviour which causes serious harm to themselves and others. These provisions apply up to the age of 18 and include the Named Person Service as well as the Child's Plan which should support multi-agency working in sharing and dealing with any live issues relating to risk management and safeguarding of children.

**11. Do you have comments on wider issues in respect of disclosure for all under 18s?**

**Please explain:**

We would just reiterate that the current disclosure system is not designed around the particular needs of children and young people. Should Disclosure still be used as the mechanism for tracking and retaining information relating to young people under 12, we would like to see the development of a bespoke system for children and young people.

Disclosure of behaviour from childhood into adulthood can have wide ranging implications for, often very vulnerable, children and young people. If information does need to be shared there must be a very rigorous process for establishing why this is necessary and proportionate, and in the first instance there should be a presumption against this happening.

**Victims and Witnesses**

**12. Do you have comments on arrangements to provide appropriate and effective support available to victims affected by harmful behaviour, where that behaviour involves children under the age of criminal responsibility? Yes**

**Please explain:**

Raising the age of criminal responsibility must not have the unintended consequence of removing access to support services for victims. Even though the behaviour or the offence would not be deemed a crime, the response must remain the same. As

previously mentioned, children are often victims and perpetrators so it would make sense for both to be dealt with via care and protection grounds through the Hearings System and have access to the same support, recovery, services and interventions as necessary. This sits wholly within the principles of Kilbrandon that children in trouble should be dealt with in the same way.

The impact on victims must not be minimised, however, very serious and harmful behaviour can be escalated up to the very highest level of intervention without necessarily needing to label it as criminal.

In relation to the Victim Information Scheme we are persuaded by the Advisory Group and our own experience that these occurrences are very rare.

**13. Do you have any comments on the circumstances in which it might be appropriate to share information with victim where harmful behaviour involves a child under 12?** No

**Please explain:**

However we would be happy to be involved in further dialogue on this issue, potentially around whether there are any provisions within the Children and Young People (Scotland) Act 2014 which would allow for information sharing in this manner, if relevant and proportionate and in the child's best interests.

**Age of Criminal Responsibility**

**14 Do you agree with the Advisory Group's recommendation that the age of criminal responsibility in Scotland should be raised from 8 to 12 years of age?** Yes

**Please provide reasons for your answer. Please make clear if you support the principle of an increase in the age of criminal responsibility even if you recommend the age is set at a different level:**

This is an issue Barnardo's Scotland has been campaigning on for many years. We welcomed provisions in the Criminal Justice and Licensing (Scotland) Act 2010 which set the age of criminal prosecution at 10 but believe that the discrepancy between the age of prosecution and the age of criminal responsibility remains a loophole which needs to be closed in order to provide children with the best chance in life.

Laws on capacity are varied and don't sit together neatly, legal capacity is usually 16, the age of criminal responsibility is essentially a policy decision and there is no definitive answer to what the 'correct' age should be. There is however definitive evidence on how we can prevent children from engaging in further criminal activity; how we enable children to move into adulthood without stigmatising them; and how we protect and support, instead of criminalising them. All these can be worked towards by raising the age of criminal responsibility to 12, as per the recommendations of the UN Committee on the Rights of the Child.

Bearing this in mind we would welcome further discussion about whether the age of criminal responsibility could and should be raised further, in the future. The Edinburgh Study of Youth Transitions and Crime is longitudinal, robust and Scotland specific. It shows that children tend to desist from offending on their own, and even these offences tend to be minor. Any interaction with formal criminal justice processes increases their likelihood of offending. We therefore think there are reasonable grounds to revisit the age of criminal responsibility in the context of this on-going and compelling evidence about children's involvement in crime and what works to prevent it.

**15 While arrangements are already being made to consult with groups of children and young people, please tell us about the groups of children and young people you believe should be consulted as part of this consultation process and how they should be consulted.**

**Please explain:**

It would be very useful to gather the views of children who have been through the Children's Hearings System on offence grounds and collate the lived experience of how this affected them. This could be useful for a range of ages and may be best facilitated through focus groups set up by agencies working with and supporting children and young people.

**For more information contact:**

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