Age of Criminal Responsibility (Scotland) Bill Consultation Response – July 2018

About Together (Scottish Alliance for Children's Rights)

Together (Scottish Alliance for Children's Rights) is an alliance that works to improve the awareness, understanding and implementation of the UN Convention on the Rights of the Child (UNCRC) and other international human rights treaties across Scotland. We have over 380 members ranging from large international and national non-governmental organisations (NGOs) through to small volunteer-led after school clubs. Our activities include collating an annual *State of Children's Rights* report to set out the progress made to implement the UNCRC in Scotland. Together was a member of the Advisory Group on the Age of Criminal Responsibility and provided support and expertise to the Child Rights and Wellbeing Impact Assessment conducted on the group's final report and recommendations. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of every one of our member organisations.

1. Minimum Age of Criminal Responsibility

A children's rights approach

Together welcomes the introduction of a Bill to raise the minimum age of criminal responsibility (MACR). In order to reflect a "progressive commitment to international human rights standards"[1], the Bill should raise the MACR far higher than 12 years old, with an aim of eventually removing all children from the scope of the criminal justice system.

The UN Committee on the Rights of the Child is clear that the MACR must not be set "too low" and has criticised eight years as "very low".[2] The Committee calls on States to increase their MACRs to an "internationally acceptable level" with a MACR of 12 being the *absolute minimum* age that will be considered acceptable. However, the Committee encourages states to raise their MACR higher,[3] noting that a MACR of 14 or 16 is "commendable".[4]

Accordingly, whilst an improvement, the current Bill is not a "progressive reform"[5] but merely brings Scotland into line with the absolute minimum requirements set by the Committee. These requirements were set down over a decade ago and expectations and standards have increased over time. Accordingly, it could be argued that the Committee would now consider a MACR of 12 as too low. In any event, if the intention is for Scotland to take a truly progressive approach to juvenile justice, then this would require raising the age of criminal responsibility higher than 12.

Currently, Scotland has the lowest MACR in Europe. As the Policy Memorandum notes, this "tarnishes Scotland's reputation internationally".[6] Out of the 28 EU Member States, 23 have a MACR of 14 or

[1] Para: 58. Scottish Government (2018) Age of Criminal Responsibility (Scotland) Bill Policy Memorandum. Edinburgh: SPCB
[2] CRC/C/GC/10: Para: 13; see also CRC/C/GBR/CO/5: Para: 79(a).
[3] CRC/C/GC/10: Para: 32.
[4] CRC/C/GC/10: Para: 30.
[5] As described in the Policy Memorandum accompanying the Bill at Para 65.
[6] Policy Memorandum, Para: 74.

above. Countries including Finland, Norway, Sweden and Iceland all have a MACR of 15 years old.[7] The Centre for Youth and Criminal Justice has conducted a detailed case study of how the Swedish approach works in practice and has found an emphasis on rehabilitation and support in which imprisonment is rare for anyone under the age of 21 years old.[8] If Scotland is to keep pace with standards in the rest of the EU, then this requires raising the minimum age of criminal responsibility to an absolute minimum of 14 years old.

The need to increase MACRs beyond 12 is a position shared by child rights experts internationally. The Parliamentary Assembly of the Council of Europe, for example, supports the introduction of high MACRs. Its Resolution 2010 (2014) called on member states to set their MACRs at at least 14 years of age.[9] It argued that raising the MACR and focusing on diversionary methods were crucial elements to improve the protection of children's rights.[10]

At state level, a recent advisory report by the Netherlands' Council for the Administration of Criminal Justice and Protection of Juveniles recommended the Dutch MACR be raised from 12 to 14 based on the directions of the UN Committee (above) and supported by several additional factors.[11] The first of these factors was scientific and developmental evidence. From a development perspective, the culpability of a child or young person depends on their stage of development and the extent to which they are able to appreciate the consequences of their actions. The Council found that this research supports a high MACR, however, it does not pinpoint an exact age at which this should be set. The next factor was a child's right to participate in proceedings and their right to a fair trial. The MACR should reflect the age at which a child or young person understands what is happening during the proceedings and what the potential repercussions are. To involve individuals in proceedings which they do not understand could potentially infringe their fair trial rights under Article 40 UNCRC and Article 6 of the European Convention on Human Rights.[12]

Several bodies consider that the MACR should be raised to 18 and accordingly all children be excluded from criminal justice systems. The European Network of Ombudspersons for Children (ENOC) proposes that MACRs be set "as high as possible, up to the age of 18".[13] Furthermore, Thomas Hammarberg, the Council of Europe Commissioner for Human Rights said in 2009 that he would "like to move the debate on from fixing an arbitrary age for criminal responsibility. Governments should now look for a holistic solution to juvenile offending which does not criminalise children for their conduct."[14] This approach is articulated in the Rome Statute on the International Criminal Court which excludes all people under 18 from its jurisdiction. Article 26 of the Rome State states "the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime".

Raising the MACR is supported by children and young people themselves. A consultation of children aged 8-13 years by the Children's Parliament found that the overwhelming majority viewed a MACR of

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[7] The Minimum Age of Criminal Responsibility (2018) Child Rights Information Network https://deprivation-liberty.crin.org/minimum-ages

[8] Minimum Age of Criminal Responsibility - Comparative Analysis (2016) Centre for Youth and Criminal Justice http://www.cycj.org.uk/wp-content/uploads/2016/03/AllInternationalProfilesFINAL.pdf

[9] Resolution 2010 (2014) on Child-friendly juvenile justice: from rhetoric to reality: Recommendation 6.2.

[10] Resolution 2010 (2014) on Child-friendly juvenile justice: from rhetoric to reality: Recommendation 4.

[11] For discussion see: Lourijsen, M. & Liefaard, T. (2018). 'Raising the minimum age of criminal responsibility and the importance of proper youth care' Leiden Law Blog. http://leidenlawblog.nl/articles/outline-on-raising-the-minimum-age-of-criminal-responsibility [Date accessed: 20.06.18]

[12] Ibid.

[13] 2012 Position Statement

[14] see discussion in Child Rights International Network (2013), 'Stop Making Children Criminals'. https://www.crin.org/en/library/publications/juvenile-justice-stop-making-children-criminals [Date accessed: 20.06.18]

eight as too young.[15] When asked if they thought the MACR should be raised to 12, 90% of these children agreed. However, care-experienced young people consulted by Who Cares? Scotland, believed that 12 was not old enough and felt the MACR should be higher than 12.[16]

Public Safety and Reducing Reoffending

Taking a rights-based approach to raise the MACR beyond 12 brings benefits to public safety by reducing reoffending.[17] The 2016 Report of the Advisory Group recognised a clear link between vulnerability and harmful behaviour in children. Raising the MACR to 12 would be part of an approach that prioritised these children's wellbeing, care and protection as the "most effective and enduring mechanism through which to tackle their harmful behaviour".[18] This wellbeing-focused approach is in line with Article 3 UNCRC (best interests) and seeks to tackle the root causes of children's harmful behaviour rather than consider their conduct in isolation.

This position was also recognised in the 2016 Child Rights and Wellbeing Impact Assessment (CRWIA), which stated that "taking an early intervention-based approach that is focused exclusively on the support required by a child, rather than labelling their behaviour as criminal, is likely to ensure that children feel less alienated and potentially more likely to engage with processes that are designed to help them and divert them from any further harmful behaviour or future offending."[19] The CRWIA also recognised that if a child feels their behaviour is labelled as "criminal" at a young age, this could lead to feelings of low self-worth which may lead the child to be involved in further harmful behaviour.[20] This is particularly important, given that a low MACR can make it difficult for children to move on and take positive steps later in life. The current low age of criminal responsibility means that a child can get a criminal record as young as eight which can have a negative impact when the child is later applying for educational courses or trying to follow a particular career path.[21] Raising the MACR will prevent young people from having their future chances limited by an incident in early childhood. It will break what may otherwise have led to a downwards spiral of stigmatisation and isolation, leading to further offending.

Consultation work by our members has shown that young people doubt whether criminalised approaches help prevent them from reoffending.[22] Similar concerns were expressed by outgoing Chief Inspector of Prisons, David Strang, in May 2018. In the context of imprisonment, he argued that diversionary practices were more likely to encourage individuals to reintegrate into society and make positive contributions later in life.[23] The argument that criminalised approaches to children are

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[15] Children's Parliament (2016), 'Minimum Age of Criminal Responsibility: Children's Parliament Consultation Final Report'. https://www.childrensparliament.org.uk/wp-content/uploads/Minimum-age-of-Criminal-Responsibility-CP-Final-Report-2016.pdf [Date accessed: 20.06.18]

[16] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]

[17] See for example the research of McAra, L. & McVie, S. (2007), 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending', European Journal of Criminology 4 (3) 315

[18] Advisory Group Report (2016), p. 12.

[19] CRWIA (2016), p.20

[20] CRWIA (2016), p.30

[21] see discussion in Policy Memorandum, p.3.

[22] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]

[23] See coverage in BBC News (2018), 'Chief inspector asks 'what next for Scotland's jails?''. https://www.bbc.co.uk/news/uk-scotland-scotland-politics-44303866 [Date accessed: 21.06.18]

counterproductive has been accepted internationally, by the Council of Europe Parliamentary Assembly,[24] as well as by Scottish academics.[25]

Conclusion

Raising the MACR *higher* than 12 would help ensure that children's rights compliance is improved and reoffending reduced. The Children and Young People (Scotland) Act 2014 places a duty on Scottish Ministers to keep under consideration whether there are any steps which they could take which might secure better or give further effect to the UNCRC, and to take these steps if considered appropriate. It is clear from the arguments above that raising the MACR beyond 12, to 14 or higher, would give better effect to the UNCRC, rather than achieving only *basic compliance* with the absolute minimum requirements set down by the UN Committee.

2. Disclosure

Whilst welcoming that pre-12 behaviour may no longer result in a conviction, Together members have expressed concerns over the recording and disclosure of pre-12 behaviour as "other relevant information" (ORI). If the proposed system is to allow the disclosure of ORI for pre-12 behaviour, then several considerations need to be addressed to ensure that such disclosure is necessary and proportionate.

The first concern relates to procedure. Under the Bill, pre-12s engaging in harmful behaviour may only be referred to the Reporter on care and protection grounds. Accordingly, a child's involvement in a particular incident falls to be determined "on the balance of probabilities" rather than "beyond reasonable doubt". Other safeguards which would have been present in relation to an offence ground will also be absent, such as the rules against hearsay and the requirement of corroboration. Whilst Together supports that pre-12s may no longer be referred on offence grounds, we are concerned that cases may arise in which a child is deemed to have engaged in harmful behaviour (thus potentially giving rise to ORI) where this may not have been the case had their involvement required to have be proven "beyond reasonable doubt". As the Equalities and Human Rights Commission (EHRC) noted in their response to the 2016 consultation, "if it has not been established that serious conduct happened "beyond reasonable doubt", it may not be appropriate that such information could follow the child into adulthood and hamper life chances".

ORI has the potential to remain disclosable indefinitely, whereas the majority of convictions currently obtained by 8-11s cease to appear on all levels of disclosure and PVG scheme records once they have become spent.[26] Accordingly, the reliance on ORI could result in information remaining on a child's record for longer than would have been possible for a conviction, albeit that its inclusion is only possible on enhanced disclosures and PVG scheme records. Not only does this give rise to acute concerns regarding a child's right to privacy (Article 16 UNCRC, Article 8 ECHR), it also has serious implications for the ability of the individual to move on from an incident in early childhood. This appears to run counter

[24] Resolution 2010 (2014) on Child-friendly juvenile justice: from rhetoric to reality: Recommendation 4: in addition to improving children's rights and juvenile justice practices, having a high MACR (plus diversionary methods) is "also less costly and more likely to ensure public safety and help young people to reach their potential"

[25] McAra, L. & McVie, S. (2007), 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending', European Journal of Criminology 4 (3) 315-345: "our findings indicate that the key to reducing offending may lie in minimal intervention and maximum diversion…they confirm that repeated and more intensive forms of contact with agencies of youth justice may be damaging to young people in the longer term".

[26] This is due to the fact that most convictions currently obtained by 8-11s are minor in nature. However, certain more serious convictions remain disclosable on higher level disclosures even if they are "spent" for 7.5 years if the individual was under 18 at the time of the conviction. The most serious convictions must always be disclosed unless a Sheriff orders otherwise. See discussion at Policy Memorandum (2016): Para

to the underlying policy objectives of the Bill. Statistical data shows that the majority of 8-11s currently referred to the Reporter on offence grounds do not reoffend.[27] Accordingly, the ability to disclose ORI indefinitely is disproportionate. As such Together would like the introduction of this Bill to prompt a commitment to review of the length of time that children's information is kept on police systems, and the introduction of guidance to 'weed' hearings disposals after 3 years in all but the most exceptional of cases.

Whilst welcoming the fact that disclosure of ORI for pre-12 conduct will no longer be automatic, Together has concerns over how the independent review provisions will operate in practice. The independent reviewer must decide whether the information which the police wish to disclose is "relevant" and whether it "ought" to be disclosed.[28] However, the Bill provides no direction on the factors that the independent reviewer must take into account in reaching a decision,[29] instead leaving this to future ministerial guidance. Together considers that a duty to conduct a risk assessment should be placed on the face of the Bill. This would require the independent reviewer to consider whether there is a risk of the individual reoffending or whether they are now rehabilitated. Although in the majority of cases when disclosure of ORI is sought the individual will now be over 18, it is possible that cases will arise where the individual is still a child. In such cases the independent reviewer must be required to consider the best interests of the child as a primary consideration when reaching a decision. In accordance with the Advisory Group's recommendations, the Bill should reflect that ORI relating to pre-12 behaviour should only be disclosed in the most exceptional circumstances. Accompanying guidance should be put in place to ensure that the independent reviewer and the police operate to clear and publicly available standards which defines the tests used to reach a decision.

Together welcomes the inclusion of the right of an individual to make representations to the independent reviewer and the right to appeal the resulting decision. However, it is crucial that if the individual is still under 18 at the time of the review, that they have access to the necessary information and support to enable them to participate effectively in these procedures. In such cases, it is also essential that any determination and appeals procedure occurs expeditiously, this is partly due to the differing perception of time held by children and young people involved in formal procedures.[30]

Overall, Together hopes that the system of independent review for ORI may be extended in future to include conduct by children older than 12. This would support the implementation of a recommendation made by the UN Committee in 2016 to "ensure that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18, and that diversion measures do not appear in children's criminal records".[31] It would give greater effect to the Bill's policy aim of helping children move beyond incidents in childhood and reduce the barriers to accessing certain courses and career paths, encouraging positive outcomes.

Finally, our members emphasise the importance of consulting with young people when planning and drafting ministerial guidance under Section 17 and regulations under Section 18. This will ensure that the resulting documents are founded upon the lived experience of children most likely to be affected and ensure that these documents embed a child rights-based approach.

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[27] see Policy Memorandum: Para. 99

[28] Age of Criminal Responsibility (Scotland) Bill, Section 13(1)

[29] in contrast to the provisions on police powers, which set out the various factors which the Sheriff needs to take into account when deciding whether or not to grant an order – see s.28(2)-(3) for factors to be taken into account re. orders authorising search powers; see s.34(2)-(3) for factors in relation to Child Interview Orders.

[30] Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, https://rm.coe.int/16804b2cf3: Para. 118.

[31] CRC/C/GBR/CO/5: Paras: 79(b).

3. Advocacy Support

Together is unable to comment on the impact that this provision may have on our organisation. However, we would like to provide the following general comments.

It is essential that children subject to police interview are given adequate information and support to allow them to participate effectively in the procedure and know their rights.[32] Whilst interviews will never result in a child receiving a criminal conviction for pre-12 conduct, other consequences may arise which have a clear impact on a child's rights. For example, the child might be referred to the Reporter on non-offence grounds or information volunteered by the child may result in the incident being recorded (and later disclosed) as ORI. We recognise a risk that, without adequate advice, a child may volunteer information in an interview without fully appreciating the implications for his or her adult life. These factors make it crucial that children are given support and information to understand the potential consequences of an interview and are aware that they have a right not to answer questions.

Accordingly, in principal we welcome the provisions of the Bill setting out a child's right to have an advocacy worker present during interview. It appears from the Policy Memorandum that an advocacy worker must be legally qualified.[33] Some of our members have expressed concerns over how the provisions on this new category of legally qualified advocacy workers will work in practice. It is unclear how this individual could act as a lawyer for the child, but not as the lawyer for the child. It is unclear how these provisions would operate in cases where the child already has a solicitor who has represented them in earlier proceedings, including proceedings under Part 4 of the Bill,[34] and with whom a child has built a relationship of trust. These issues must be addressed so that the Bill is not the source of any uncertainty for these children.

It is also important that the scheme for advocacy support does not too closely resemble the provision of a defence solicitor. If the system is too similar to the current criminal duty scheme this may result in the child feeling that their conduct is being investigated as criminal. The framing of these professionals as "advocacy workers" goes some way to address these concerns. However, it is crucial that the welfare-focused nature of their role is made clear to the child in practice. All advocacy workers under the Bill must be provided with comprehensive, child rights-focused training to ensure consistency in the quality of provision, this is particularly necessary if advocacy workers are to come from a legal background and not necessarily a child welfare one.

4. Information for Victims

Together recognises the need to protect the rights of both child victims and of children who have engaged in harmful behaviour. We appreciate the important role that information can play for victims (particularly child victims) in having their experiences validated and knowing that harmful behaviour by another child has been taken seriously. Existing support for child victims should be enhanced rather than diminished in order to promote the best interests of the child victim under Article 3 UNCRC. From the perspective of the child who engaged in harmful behaviour, the provision of information to victims has clear implications for the right to privacy under Article 16 UNCRC (and Article 8 ECHR). Accordingly, it is crucial that careful consideration is given to the type of information which may be provided to victims and the level of detail it may contain.

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[32] The vital nature of this requirement is made clear in: Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, https://rm.coe.int/16804b2cf3: Part IV. A1

[33] Policy Memorandum: Para. 169

[34] For example a solicitor who represented the child in proceedings before the Sheriff when a Child Interview Order was sought by police under Sections 32-34 of the Bill.

In line with the Council of Europe Guidelines on Child-friendly Justice, Together recognise the important role that information and support plays for all children, both victims and those engaged in the harmful behaviour.[35] Accordingly, we support the provision of general information to child victims in all cases, not just the most serious cases. This would set out basic information about what happens when a child under 12 engages in harmful behaviour and what steps can be taken to address this. Although the provision of such information is not included on the face of the Bill, Together welcomes the positive remarks made in the accompanying Policy Memorandum in this respect.[36] It must be emphasised, however, that any information intended for child victims is delivered in child-friendly language which the reader will be capable of understanding.[37]

In contrast to general information, specific information relating to a particular incident must only be disclosed in serious cases and only when necessary and proportionate. In this context, Together welcomes that the provision of such information under the Bill is not automatic but is only released subject to a request being approved by the Principal Reporter and only in relation to more serious incidents.[38] Together welcomes that the Bill provides that such information may only be shared if the Principal Reporter is satisfied that this would not be detrimental to the best interests of the child to whom the information relates (or any other child) and if the information is appropriate in all circumstances of the case, considering in particular the age of the child, the seriousness of the offence and the impact on the victim. The question of appropriateness should be interpreted in light of Article 8 ECHR (private and family life) which requires that the sharing of information must be both necessary and proportionate. In assessing best interests, the Council of Europe Guidelines on Child Friendly Justice are clear that the best interests of the child engaging in harmful behaviour and the best interests of the child victim must be separately assessed before being balanced with a view to reconciling possible conflicting interests of the children.[39] The Guidelines also emphasise that the best interests of the child must always be considered in combination with other children's rights such as the right to be heard. Accordingly, Together would welcome the possibility for the Reporter to seek representations from the child who has engaged in harmful behaviour as part of the Reporter's assessment of whether sharing particular information is "appropriate".

It is positive that the Bill provides that the information provided must not be too detailed. It may not include details of the reasoning behind a decision of the Children's Hearing nor details of the particular measures of supervision put in place. It is also welcomed that the Principal Reporter is under a duty not to provide any more information than is "necessary".

Accordingly, Together is of the view that the Bill strikes and appropriate balance between the rights of child victims and the rights of the child who engaged in the harmful behaviour. However, the Bill would benefit from clearer provision requiring that any information provided to child victims is written in a child-friendly manner.[40]

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[35] Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, https://rm.coe.int/16804b2cf3: Para. 50 - "in every individual case…all relevant and necessary information should be given to the child. This right applies equally to children as victims, alleged perpetrators…or as any involved or affected party"

[36] Policy Memorandum: Para. 128.

[37] Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, https://rm.coe.int/16804b2cf3: Part IV. A1, Guideline 2; see also Para. 53 of the Explanatory Memorandum accompanying the Guidelines

[38] Section 22 of the Bill limits this to cases where a child under 12 has caused harm to another through behaviour which was physically violence, sexually violent, sexually coercive, or dangerous, threatening or abusive.

[39] Council of Europe (2010). Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice, https://rm.coe.int/16804b2cf3: Part III. B, Guideline 3.

[40] The provisions on victim information do not state that the information must be delivered in a manner appropriate to the age and maturity of the child. This can be contrasted with other provisions relating to the provision of information to the child who has engaged in the harmful conduct, for example Section 29(3) (search authorised by Sheriff) and Section 35(2)(a)(ii) (Child Interview Order), which require information to be explained in a manner appropriate to the child's age and maturity.

5. Police Powers

Together accepts that police powers play an important role in investigating incidents and ensuring public safety. In cases involving children, we appreciate that police powers may prove that a child was not involved in an incident and that an older individual was the perpetrator. However, any involvement with the police can be traumatic for a child, regardless of the number of safeguards in place.[41] Accordingly, Together supports the use of police powers for under 12s only in the most serious cases. Together is keen to highlight the Advisory Group finding that for the vast majority of children aged 8-11 police powers are not currently necessary in order to assess their needs.[42] We strongly believe that this should continue to be the case following the MACR being raised. New powers created by the Bill for under 12s (including under 8s) must not be used in such a way that draws more children into contact with the police than would previously have been the case. It is essential that the exercise of police powers fully respects the rights of the child. The potential for the powers to be used on very young children (albeit that serious offences by young children are exceptionally rare) means it is crucial that the powers are proportionate and rooted in a child welfare approach.

In general terms, it is essential that in using these powers, it is clear to the child that they are not subject to a "criminal" investigation. Some of our members are concerned that the police powers in the Bill may give rise to a perception of criminality. From the viewpoint of a child, being removed to a place of safety, searched, questioned and having samples taken may feel like they are being investigated as a potential criminal. Much depends on how the powers under the Bill are exercised in *practice.* Police officers and other relevant individuals must be given full training, supported by guidance, on the use of these powers which emphasises the need to explain to the child, in a manner that they understand, that these powers are being used solely to get to the truth of the matter and identify any welfare concerns.

Together has the following comments to make in relation to specific police powers under the Bill:

Place of Safety

Together accepts that in the most serious cases, it may be necessary to remove a child to a place of safety to allow enquiries to be made in relation to the child's needs and ensure the safety of the child and the public. The removal of a child does, however, raise issues in relation to the child's right to liberty (Article 37(b) UNCRC and Article 5 ECHR). Accordingly, removal to a place of safety must only be used as a measure of last resort, in relation to an immediate risk of significant harm and must be for the shortest possible period of time. If these safeguards are not adhered to, then the child's right to liberty is at risk of being infringed.

The Bill provides that a place of safety may be a police station but it sets out that a police station should be used only where there is no reasonable alternative. Whilst this presumption is a positive first step, Together would welcome a stronger provision stating that the use of a police station as a place of safety should only be a "measure of last resort".[43] The Bill should specify that children are not to be held in police cells, but in a non-custodial and child-friendly environment within the station. Furthermore, children should be given the opportunity to express a view on their preferred place of safety and have this taken into account by police officers.[44]

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[41] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]

[42] Advisory Group Report (2016), Para. 4.3

[43] An exception being where intimate samples are sought – on this point Together accepts that the use of a police station is justified in the interests of ensuring a forensically secure environment, see Policy Memorandum at Para 78.

[44] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]

Together notes that whilst several of the police powers under the Bill include a duty to provide the child with information in a manner appropriate to their age and maturity,[45] there is no such duty in relation to taking the child to a place of safety. We support the introduction of a provision on the face of the Bill to ensure that the child is aware that the purpose of their removal to a place of safety is welfare-based and not an investigation of criminality.

Search

The Bill creates a system where searches can be used for all under 12s (including under 8s) in the most serious cases. Together notes that this involves extending certain search powers (such as the power to search for knives) which previously only applied to children aged over eight.[46] Whilst we appreciate the intention is not to create a three-tiered system under which under 8s, 8-11s and over 12s are subject to different systems, we would emphasise that there must be a very strong presumption against the use of such new search powers on under 8s, with this power only available in the most serious cases under authorisation by the Sheriff. We note the Policy Memorandum's statement that police searches of under 12s are currently very rare and we strongly believe that this must remain the case despite the changes to police search powers under the Bill.

The Bill does provide that in certain cases, searches will require authorisation by the Sheriff. In these cases, the Sheriff may only grant the order where satisfied that it is appropriate to do so in all circumstances of the case. Such orders must be explained to the child in a manner appropriate to their age and maturity. This information should draw from Police Scotland's Stop and Search Guide for children and young people which sets out the framework for stop and searches in a child-friendly manner.[47] It is essential that information is provided in a manner sensitive to any disabilities or additional support needs a child may have. This is particularly important given that research from SCRA showed that out of 100 children aged 8-11 referred on offence grounds in 2013-14, 39% had disabilities and physical and/or mental health problems.[48]

A decision on whether or not to search a child must be rooted in the need to safeguard the child's welfare. Searches must be conducted in such a way as minimise distress to the child. Consultation work with young people found that they would prefer that searches did not take place on the street, as this was embarrassing for them, rather they wished to be able to suggest to the police a location where they would rather be searched.[49] Additionally, some of our members argue that under 12s should always be able to have a trusted adult present when searched. In all cases, children must be informed of the grounds on which they are being searched.

Questioning

Together agrees with the Advisory Group that in the most serious circumstances, it is important to provide the child with an opportunity to give their account of events.[50] This is helpful for identifying all relevant risks and needs relating to the child. Furthermore, Article 12(2) UNCRC requires that a child is provided with an opportunity to be heard in any administrative or judicial proceedings affecting them. Nevertheless, Together note that the information gathered from an interview may have consequences and these may give rise to issues under Article 40 UNCRC and Article 6 ECHR on the right to procedural fairness. Although no longer criminal, an admission by a child in interview may result in referral to a Children's Hearing on care and protection grounds (a "civil proceeding" within the meaning of Article 6 ECHR) or the inclusion of ORI on the child's record. Accordingly, it is essential that questioning is subject

[45] For example Section 29(3) (search authorised by Sheriff) and Section 35(2)(a)(ii) (Child Interview Order).
[46] See Section 25
[47] See Police Scotland (2017), 'Stop and Search in Scotland: What you need to know: A guide for Children and Young People".
[48] See Policy Memorandum (2016): Para 56.
[49] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]
[50] Advisory Group Report (2016), p.32.

to sufficient safeguards and that interviews are conducted fairly so that children's rights are protected. On this point please also note our answer to part 3, above, in relation to advocacy workers.

Together welcomes the general prohibition against questioning of under 16s in relation to conduct occurring before they were 12. The Bill includes exceptions whereby such questioning is possible in the most serious cases under a court order (s.34) or in an emergency situation when authorised by a superintendent or higher (s.44). A Sheriff may only grant an order when satisfied this is necessary to fully investigate the incident, taking into account the seriousness of the behaviour, and when the making of an order is appropriate (taking into account the child's age).

It is crucial that it is made clear to the child that they are not being interviewed as a criminal "suspect" and the conduct of the interview must not feel criminalising. Together welcomes that a duty to provide the child with information in a manner appropriate to their age and maturity is attached to the provision on search under a court order. Together also welcomes the commitment in the Policy Memorandum to involve young people in the planning of the information to be provided.[51] However, it is noted that for emergency questioning under s.44 there is merely a duty to inform the child that the questioning has been authorised and that they have a right not to answer questions.[52] This falls short of a provision requiring the police officer to explain to the child what is happening in a manner appropriate to their age and maturity. We note that Bill provides that Scottish Ministers are under a duty to issue guidance on questioning and that this "may" (not must) include guidance on the creation of an environment for questioning where the child's wellbeing is safeguarded and promoted. Together would welcome this duty being elevated onto the Bill itself, not left to guidance to which police are only a duty to "have regard" to. One way of ensuring such an environment would be to introduce a stronger provision on the duty to provide child-friendly information to pre-12s subject to emergency questioning under s.44.

Samples and Prints

Samples and prints may be taken from pre-12s either under a court order or in an emergency situation under the authorisation of a superintendent or higher. It is essential that the emergency procedure is not used more widely than is provided for on the face of the Bill.

Together is concerned that the provision on emergency samples under s.57 does not include a duty to explain to the child what is happening in a manner appropriate to their age and maturity. This duty must be introduced onto the face of the Bill. Together does, however, welcome the provision that intimate samples may not be taken under the emergency procedure and can only be taken once an order has been granted by the Sheriff.

Together welcomes that samples taken from pre-12s may not be retained beyond the immediate investigation of the incident.[53] Indefinite retention would have posed serious issues for children's rights to privacy[54] and conflicted with the Bill's core principles that children under 12 cannot commit crime, should not be criminalised and should not feel that they are part of a criminal investigation.

General provisions: wellbeing and use of reasonable force

Together welcomes the inclusion of a general duty to consider the wellbeing of the child as a primary consideration in exercising the powers under this section of the Bill. It is essential that this provision is accompanied by full training for all persons involved such as police officers, sheriffs, social workers and advocacy workers.

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[51] Policy Memorandum: Para 169.
[52] Section 45(2).
[53] See discussion at Policy Memorandum (2016): Paras 190-191.
[54] See ECtHR, S and Marper v UK (2008) at para 124 in which the Grand Chamber of the European Court of Human Rights held that retention of unconvicted people's data may be especially harmful to minors, given their special situation and the importance of their development and integration in society.

The provision on the use of reasonable force has clear implications for a child's right to be free from inhuman and degrading treatment under Art 37(a) UNCRC and Article 3 ECHR. Careless practices here could result in the right being violated. Whilst the Bill does set out various safeguards, some of our members have expressed concerns that these are not set out in greater detail. They are concerned that a provision with such potentially far-reaching effects is given relatively little coverage. The Bill states that the use of force may be used only as a measure of last resort and only after all reasonable steps have first been taken to try to obtain the child's cooperation. Thereafter, the police officer must use "no more force than is absolutely necessary" and must explain to the child why the officer considers force must be used.

The duty to explain is qualified in that it is only a duty to explain "in so far as is reasonable practicable". Together has concerns that this may weaken the duty in practice and notes that this qualifier is absent from certain other sections of the Bill such as the duty to provide information to the child under s.29(3) in relation to searches authorised by a court order.[55] Secondly, there is no duty on the face of the Bill to ensure that the information is provided in a manner appropriate to the age and maturity of the child. These are concerning issues particularly in light of views expressed by young people. In Who Cares? Scotland's consultation, "a strong theme in discussions around improvements was about the need to communicate properly with young people, especially when force is used by police."[56] Accordingly, Together believes that the duty to inform the child must be strict and the Bill must require that information be explained to the child in a manner appropriate to their age and level of maturity.

For further information, please contact:

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[55] The qualified does, however, appear in s.35(2)(ii) on the information to be provided to the child when a Child Interview Order has been granted.
[56] Who Cares? Scotland (2018), 'Consultation on the Minimum Age of Criminal Responsibility'. https://www.whocaresscotland.org/wp-content/uploads/2018/05/WCS-Consultation-on-MACR-April-18.pdf [Date accessed: 20.06.18]