



FACULTY OF ADVOCATES

FACULTY RESPONSE
TO THE
REPORT OF THE ADVISORY GROUP
ON

THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

The Faculty of Advocates is the independent bar in Scotland. It is committed to human rights and to equal opportunities for all. Its members include advocates with expertise in all fields of law. The Faculty welcomes the opportunity to offer comment in relation to The Minimum Age Of Criminal Responsibility. The Faculty does not express views on matters of social policy. The comments which the Faculty makes are on technical and legal features of the report.

Care Protection & Risk

Child Protection guidance

Q1. 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

No

Don't know

Q1(a) If yes, what adjustments do you anticipate might be required and why?

If no, what other framework would you use instead and why?

Bodies involved in supporting the needs of children may be better placed to assist on this issue.

Support & Training Materials

Q2. Do you think that a multi-agency scoping study of training and skills would be helpful?

Yes

No

Don't know

Please provide reasons for your answer.

Bodies involved in supporting the needs of children may be better placed to assist on this issue.

Children's Hearings System

Q3. 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

No

Don't know

Please provide reasons for your answer.

For the reasons set out in the Report of the Advisory Group, the Faculty believes that the harmful behaviour of 8-11 year olds can be dealt with via existing care and protection grounds within the Children's Hearing System.

Role of the Police

Police Powers

Q4. 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

No

Don't know

Please provide reasons for your answer.

The Faculty agrees with the assessment that some police powers should be retained in order to investigate the alleged harmful behaviour and to establish the identity of the person responsible for that behaviour. Even if the behaviour is to be dealt with as demonstrating that a child is in need of care and protection, the factual basis for that proposition may be disputed and evidence of what has occurred will be necessary to establish the grounds for intervention. In addition, police investigation may show that a child, initially suspected of having engaged in harmful behaviour, has not, in fact, engaged in that harmful behaviour. The Faculty believes, however, that forensic samples such as fingerprints and DNA samples should not routinely be taken from children aged 8-11 years.

Q5. In relation to forensic samples, should the Police ever be able to retain samples taken from children aged under 12?

- Yes
- No
- Don't know

As stated in the previous answer, the Faculty believes that forensic samples should not routinely be taken from children aged 8-11 years. If samples were taken, then the justification for their retention would very much depend on the reasons for taking the samples in the first place and the reasons for retention. The Faculty has answered the question in the affirmative only because it is not convinced that it will never be necessary for such retention to occur.

Q6. What safeguards should be put in place for children aged under 12 in relation to the use of these powers?

Please explain.

It may be that samples cannot be taken without exercise of associated powers authorising interference with liberty. In respect of a power of detention in respect of children aged between 8 and 11 years of age, the Faculty seeks clarification of what this power would be, when it would be used and what safeguards would apply, particularly in relation to Article 5 ECHR. The Faculty believes that samples should not be taken routinely from children aged under 12 years and that a child under the age of 12 should have the right to legal advice. In relation to questions 5 and 6, the Faculty considers that further thought will require to be given to the rights of children aged 8-11 to private life in terms of Article 8 ECHR. In particular, if samples are permitted to be taken, it may be appropriate to limit the circumstances in which this is permissible to investigations into, for example, serious sexual or violent behaviour causing harm. If samples are permitted to be taken, consideration will also need to be given to the length of time for which such samples might be retained.

Disclosure and Protection of Vulnerable Groups

Q7. 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

No

Don't know

Please provide reasons for your answer.

The Faculty agrees with this proposition, although the mechanics of creating a 'strong' presumption are more likely to depend on the formulation of situations in which it will not apply. Any exceptions to the presumption should be necessary, appropriate and clearly defined. Without such clarity, merely asserting that something is a 'strong' presumption may have little practical effect.

Q8. 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

No

Don't know

Please provide reasons for your answer.

There seems no reason in principle why the presumption should not apply retrospectively.

Q9. 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?

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

Yes

No

Don't know

This would be an important safeguard. Given the very limited number of cases, it may be unnecessary to set up an independent body. In the Faculty's view, the obvious candidate to provide independent ratification is the sheriff.

Q10. 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?

Yes

No

Don't know

Please provide reasons for your answer.

The Faculty's view is that, given that more than six years will have passed since the incident in question, and the effect of the passage of that time on the maturity of the young person, it would be preferable not to disclose such information.

Victims and Witnesses

Q12. 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

No

Don't know

Please explain.

Q13. 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?

Yes

No

Don't know

Please explain.

Bodies involved in supporting the needs of children and those representing victims' interests may be better placed to assist on these issues.

Other

Consultation with Children and Young People

Q14. 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

No

Don't know

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.

Raising the age of criminal responsibility from 8 to 12 years of age would mean that children in Scotland would not be treated as offenders in respect of harmful behaviour in which they engaged when under the age of 12 years, at a time when their behaviour is unlikely to have been the result of free and informed choice. As observed in the report of the Advisory Group, it would also cohere with the observations made by the UN Committee on the Rights of the Child.

Q15. 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.

The Faculty of Advocates has no comment to make on this point.