

**EVIDENCE FOR THE SCOTTISH PARLIAMENT EQUALITIES AND HUMAN RIGHTS
COMMITTEE ON THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY BILL**

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The Age of Criminal Responsibility (Scotland) Bill proposes to raise the minimum age of criminal responsibility (MACR) in Scotland from age 8 to age 12. According to the Policy Memorandum to the Bill, the rationale for this change is that the MACR will be aligned with the current minimum age of criminal prosecution and will 'reflect Scotland's progressive commitment to international human rights standards'.

A key challenge in this process is whether the proposed change takes full account of the capacity of young people to take responsibility for their actions, based on current knowledge on the behaviour and development of children, and avoids a justice approach that increases the risk of negative long-term consequences for young people. In addition, consideration should be given to whether this change meets with international standards for juvenile justice (especially those set out in the 1989 Convention on the rights of the Child) and where it places Scotland in comparison to its European neighbours. The way in which these issues are addressed will provide a true reflection of whether the Bill represents a 'progressive commitment'.

What explains offending behaviour in childhood and adolescence?

Evidence from developmental criminology suggests that offending in childhood is explained by a great many risk factors including: low self-control (including impulsive personality and tendency to take risks), poor social control (both informal such as parental supervision and formal such as policing), poor parental care and nurturing, adverse childhood experiences (abuse, neglect, bereavement, etc.), living in poverty, association with other offenders (including peers, parents or siblings), poor housing/structural factors, living in a deprived or high crime neighbourhood, growing up within an environment in which deviance is considered the 'norm', experience of living in care (being looked after), and so on.

The general consensus is that there are multiple 'pathways' into (and out of) offending behaviour, although the higher the number of 'risk factors' present, the earlier a young person is likely to start offending and the more frequent and enduring their criminal career is likely to last. Typically, a child who started offending before the age of 12 would be considered an 'early onset' offender. Importantly, the research evidence confirms that the most serious and persistent child offenders are amongst the most vulnerable and least nurtured of all youngsters. They suffer disproportionately high levels of adversity (including poverty, family crises and school exclusion), which results in a particularly difficult paradox: those young people who are expected by the justice system (and hence

society) to take responsibility for their behaviour are the ones with the least capacity and agency to do so.

Does system contact between age 12 and 15 have a significant impact on outcomes?

The stated focus of the MACR Bill is to protect children, reduce stigma and ensure better future life chances. However, what is the evidence that setting MACR at 12 will have the desired effect?

The existence of the 'age crime curve' has been an enduring feature of the criminal careers literature for over 100 years. It suggests that involvement in offending typically starts in late childhood/early adolescence and increases to a peak in mid-adolescence before falling again during late adolescence/early adulthood. Research evidence on the exact timing of the age crime curve varies according to different time periods, across countries and by different research data. In Scotland, evidence from the Edinburgh Study of Youth Transitions and Crime (a prospective longitudinal study carried out between 1998 and 2003) found that involvement in offending behaviour peaked around 14-15 years of age and that most people had desisted or were desisting by age 17. This is typical of many other studies conducted around the same time period (including the Offending Crime and Justice Survey in England and Wales). There is some evidence that the age crime curve may have significantly altered in recent years and that the peak age of offending has increased. This would have significant implications for the decision to change the MACR, and may indicate that age 12 is too low; however, there is insufficient data on the offending behaviour of Scottish children to verify this claim.

The Edinburgh Study found that the nature of a young person's offending behaviour during the teenage years does have a bearing on their justice system intervention (McAra and McVie 2007, 2010). Generally speaking, those who get involved in the most serious and enduring offending behaviour are the most likely to have early contact with the justice system (i.e. police and children's hearings) and to end up with a long-term pattern of criminal conviction. However, this relationship is not a straightforward one. Some young people who have early system contact go on to have a chronic pattern of conviction while others do not. The evidence suggests that a chronic pattern of criminal conviction is largely explained by an increase between age 12 and 15 in the use of school exclusion, police charges, and youth justice intervention (and is not explained by patterns of serious offending behaviour). This transitional period in the early teenage years, therefore, appears to be a critical period of change for young people and what happens to them in terms of justice (and other) system intervention can have long-term damaging consequences.

The authors of the Edinburgh Study concluded that:

"Taken together, our findings indicate that the key to reducing offending may lie in minimal intervention and maximum diversion: doing less rather than more in individual cases may mitigate the potential for damage that system contact brings. More significantly, our findings provide some support for the international

longitudinal research - in particular, 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 - such findings are supportive of a maximum diversion approach.” (McAra and McVie, 2007)

How effective are justice-based responses to child offenders?

International evidence suggests that punitive and justice-based responses to child offenders (especially those that occur earlier in the life-course) typically have no effect or result in negative outcomes. Responses that are based on more welfare-based principles (such as the Scottish model which has dominated since the Kilbrandon reforms of the 1960s) tend to be more successful in terms of reducing further offending; however, even these can have unintended negative consequences. Experimental analysis of the Edinburgh Study data found that those who were diverted away from formal measures at age 14 were less likely to offend a year later than those who received formal justice measures (McAra and McVie 2013). Those who received a police warning had no different outcomes to matched children who were not, but those who proceeded farthest into the youth justice system were more likely to be offending a year later, and their average frequency of offending was far higher than other similar children. In other words, even welfare-based juvenile justice system contact appeared to worsen offending behaviour, or limit the normal process of desistance, amongst adolescents.

How does Scotland compare to other countries on the MACR?

Standards for juvenile justice are set by a number of international instruments. Most significant is the 1989 UN Convention on the Rights of the Child, a binding international treaty ratified by all European states. It stipulates that the principal aim of youth justice should be to act in the ‘best interests of the child’, where a child is defined as a person under age 18.

Unfortunately, there is **no harmonization of the age of criminal responsibility in Europe**. Indeed, the 2008 European rules for juvenile offenders who are subject to sanctions or measures do not recommend a particular age and only specify that a particular age should be specified by law and that it “shall not be too low” (rule 4). It is worth noting, however, that the MACR in most countries across Europe and beyond has been on an upward trend and continues to increase in line with emerging evidence about the social, developmental and neurological status of children.

At 8, **Scotland has the lowest MACR in Europe** – this is 10 years below Belgium which is the highest in Europe at age 18. According to a review by Murray (2018), raising the MACR to 12 would place Scotland ahead of three jurisdictions (Switzerland, England and Wales, Northern Ireland) and in line with a small group of European countries (Hungary, Ireland, Turkey and the Netherlands) and some Latin American countries (Peru, Ecuador, and Nicaragua). The most common MACR in

Europe is age 14, to which the Netherlands is considering raising its MACR. Some other more socially progressive Nordic countries (Finland, Sweden, Norway, Iceland, Denmark) have set the MACR at 15 years.

However, Murray warns that comparisons with other countries should be viewed with caution as many countries do not have MACR policies that are in line with international standards. Some jurisdictions have opted to define 'age-specific' offences or allow exceptions to the MACR. Others permit children below the MACR to be subject to retributive or punitive measures (including deprivation of liberty). Some countries have a specific age threshold below which they only impose educational sanctions (e.g. Switzerland, France and Greece). Some restrict the use of imprisonment to young people of a certain age (e.g. Croatia, Kosovo, Serbia, and Slovenia). Other countries have a notional MACR at age 16 but allow the prosecution of 'serious offenses' at age 14 (e.g. Lithuania and Russia). According to Dunkel (2015) "this type of graduated age of criminal responsibility has been criticized for being against the basic philosophy of juvenile justice that sanctions should refer to the individual development of maturity or other personality concepts rather than to the seriousness of the offense".

This evidence suggests that raising the MACR in and of itself does not protect the rights of children within the justice context and that other rights-based child protection policies would need to be in place as well (which would include GIRFEC and the Whole Systems Approach). However, juvenile justice policy continues to be vulnerable to the whims of media and political critique, especially in the aftermath of particularly heinous crimes (such as the death of Jamie Bulger in 1993). The extensive changes to youth justice policy that were witnessed in the UK during the late 1990s and early 2000s were characterised by a punitive rhetoric that promised to get 'tough on crime, tough on the causes of crime'. Other countries have also experienced this 'tough on crime' policy drive and, in the case of Denmark, this resulted in a lowering of the MACR from 15 to 14 in 2010. Danish researchers studied the effect of the reform and found that it did not deter 14-year-olds from committing crime (Damm et al 2017). Moreover, (compared to similar young people in previous years) 14 year olds who were affected by the lower minimum age of criminal responsibility were more likely to reoffend in the 12-18 months after the first offence, and they had lower educational attainment or were less likely to stay on at school. The authors of the study concluded that the results were consistent with an increase in labelling effects as a result of earlier processing in the criminal justice system. Two years after implementing the change, the MACR in Denmark was raised to 15 again.

What will be the likely effect of raising the MACR to age 12 in Scotland?

It is likely that raising the age of MACR to 12 will have little or no impact on children in Scotland. This is for 4 main reasons:

- (1) The Criminal Justice and Licensing (Scotland) Act 2010 introduced a presumption of no prosecution of a child under the age of 12; therefore,

since that has been in operation, the *de facto* age of criminal responsibility has been 12.

- (2) The offending profile of children and young people has changed dramatically across Scotland, the wider UK and many other countries over the last decade. Evidence from the SCRA suggests that the prevalence of offending amongst children under the age of 12 is very low (and serious crimes are even rarer) and so this Bill will affect very few children (Henderson et al 2016).
- (3) The Policy Memorandum to the Bill states that "the Bill is focussed on protecting children, reducing stigma and ensuring better life chances" and reflects "Scotland's progressive commitment to international human rights standards". However, existing evidence suggests that children who are involved in the youth justice system under the age of 16 are: more likely to end up as victims of crime; more likely to be stigmatized and labelled by agencies of social control (including schools, police, youth justice, etc); more likely to be convicted in the adult criminal justice system; more likely to reoffend; and more likely to suffer other long term negative consequences (such as unemployment, lack of education or training, mental and physical health problems, and early mortality). Therefore, in the absence of any other changes, this is likely to be the case.
- (4) Retaining an age of criminal responsibility at 12 means that older children who are referred on offence grounds to the children's hearings system and who disclose offences will continue to have this on their criminal record for an indeterminate amount of time and this is likely to impact on their later life (in terms of limiting job prospects, preventing study at college/university, or restricting ability to do voluntary work).

What arguments exist for increasing the MACR further than 12?

The United Nations Convention on the Rights of the Child (article 40(3)(a)) states that **12 is the minimum acceptable age at which children should be held accountable for their actions**. The Council of Europe (Recommendation 20, 2003) advised member states to include young adults in the juvenile justice system in accordance with the personal development of the offender (in other words, take account of their level of maturity). In addition, Recommendation 17 (2008) stated that young adults under the age of 21 should be treated in a comparable way to juveniles and subject to the same interventions. There is a clear international steer, therefore, that the MACR should be higher rather than lower.

It is clearly stated that the MACR Bill is not intended to take account of when an individual child has the capacity to understand their actions or the consequences that could result from those actions. However, Dunkel (2018) notes that it is worth reflecting on the issue of capacity and what current evidence from the sociological, developmental and neuroscience fields suggest about a young person's ability to take responsibility for their behaviour. In particular, there is increasing evidence that young adults are not fully mature and integrated into adult life until the mid to late 20s, as noted below:

- The sociological literature suggests that the period of transition into adolescence has extended. For example, Moffitt (2018) has studied groups of offenders over decades and has observed that the 'maturity gap' for offenders that she defines as 'adolescence limited offenders' has increased. This is accompanied by an increase in the age at which young people become fully integrated into the labour market, start to have a family, or have their first child.
- Advances in developmental psychology and neuroscience show that full brain maturity is reached at around the age of 25 due to protracted development of the prefrontal cortex (Sawyer et al 2018).
- And, as noted above, criminological evidence suggests that the age-crime curve has increased from adolescence into the mid to late-twenties (McAra and McVie 2018, Matthews and Minton 2017).

Conclusion

The question of whether the MACR in Scotland should be increased is undoubtedly a rhetorical one; however, the question of whether an increase to age 12 goes far enough is debatable. The research evidence from Scotland, and internationally, indicates that system contact (even that which is welfarist in orientation) during the early teenage years can have a profound and long lasting iatrogenic effect on the lives of young people. In particular, early police adversarial contact begets repeated youth justice contact, which in turn begets a pattern of criminal conviction. Based on existing research, age 12 to 15 appears to be a particularly transitional period during which minimal intervention and maximum diversion is likely to result in the most positive long-term outcomes (across a range of domains). In addition, the apparent extension of adolescence into the mid 20s (according to sociological, neurological and criminological evidence) suggests that a MACR of age 12 is way out of kilter with maturational development that impacts on the capacity of individuals to control or constrain their problematic behaviour. It continues to place Scotland at the very lowest extreme according to European and international norms, and it is questionable whether it can truly be said to reflect a 'progressive commitment to international human rights standards'.

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