

SUBMITTING EVIDENCE TO A SCOTTISH PARLIAMENT COMMITTEE
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Date:	07.01.19
Organisation: (if required)	Who Cares? Scotland
Topic of submission:	Age of Criminal Responsibility (Scotland) Bill - Stage 2

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EQUALITIES AND HUMAN RIGHTS COMMITTEE**AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL****SUBMISSION FROM**

Please do not add any organisation logos

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Who Cares? Scotland [WC?S] is an independent advocacy and influencing organisation working with people who have experience of the care system. We provide direct advocacy to children and young people with care experience, as well as opportunities for local and national participation. WC?S aims to provide care experienced people in Scotland with knowledge of their rights. We strive to empower them to positively participate in the formal structures and processes they are often subject to solely because of their care experience. At WC?S we ensure the voice of the care experienced population of Scotland informs everything we do as an organisation.

Whether you are supportive of increasing the age of criminal responsibility/prosecution to 14 or 16; please explain the reasons for your views:

Who Cares? Scotland fully supports increasing the age of criminal responsibility and prosecution to 16 years old. This will ensure that the Age of Criminal Responsibility Bill (the Bill) is utilised as an opportunity to ensure Scotland fully adheres to the UNCRC and is world-leading in transforming the lives of children, whilst making our communities safer. The state has a legal and moral responsibility to be a good parent, and a corporate parent to those with care experience. Scotland's justice system must be child-centred, needs-focused and non-criminalising, all of which are found in rights-based policy making.

From our work as an organisation on this area over the past 5 years, through the advocacy relationships we hold with young people in care and from the voices of our care experienced members, we know that the current response to young people's harmful behaviour by our justice system does not always work in ensuring positive outcomes. Our care experienced members have told us that it is vital to address harmful behaviour from an unmet wellbeing needs perspective and every effort should be made to ensure the child is not criminalised or labelled. We know that harmful behaviour towards the self or others is most often a reaction to harm that others have caused the individual.

A higher age for both responsibility and prosecution will help create a lifetime of equality, love and respect for care experienced people, because currently, care experienced people are overrepresented in the criminal justice system in Scotland. Statistics show that although those who have been in care only make up an estimated 0.5% of the general population, they make up 33% of Scotland's youth offender population and 31% Scottish adult prisons.¹ In 2014, 50% of prisoners in Scotland identified as having been in care at some point in their life.² Unfortunately, many people do not recognise that they are care experienced or in many cases, they wish to disassociate with their care experience. This coupled with the fact these statistics rely on self-reporting of care status, means that even these statistics may diminish the problem.

¹ Scottish Prison Service (2016), *Prisoner's Survey 2015 – Young People in Custody*; Scottish Prison Service (2013), *14th Survey Bulletin*.

² Broderick, R, McCoard, S & Carnie, J (2014), *Prisoners who have been in care as 'looked after children'*.

The overrepresentation of people with care experience in the prison population, is in part caused by the fact that there are unfair levels of criminalisation for young people when they are care experienced for a multitude of reasons, which we have heard first-hand from our members. The reasons for this are rooted in the lived experiences of being in care and includes:

- Over-involvement with, and sometimes stigmatisation by the Police. Individuals with care experience can feel targeted by police practice, for example there is a continuing perception that if a young person is in care, they will automatically be targeted with stop and search procedures and this is perceived as the only reason the person is stopped.
- Harmful behaviour of children and young people can be viewed differently in care placements, with increased scrutiny by professionals. This can then lead to an entirely different response to one which may occur within a family environment, for example police being called for damage of property. For example, the Howard League have recently published research about increased criminalisation of care experienced children living in residential placements.³
- Responses to police from people who are care experienced can be influenced by triggers from traumatic early life experiences in care. Police can often be the first professional children and young people in care come into contact with and can be associated with extremely difficult and upsetting incidents, potentially involving family. One of our care experienced members reflected that: *“Police were only involved when there was trouble, not always with us but were called all the time to extended family.”* This heightened awareness of police and association with negative incidents, can cause young people to act differently, for example, in stop and search situations. Members have told us that they may present as hyper vigilant in an officer’s presence or demonstrate behaviours that could be misinterpreted as suspicious. This behaviour can then escalate situations with Police and become criminalised, rather than being understood as potentially caused by the life-long effects of trauma.
- Care experienced people often have more involvement with formal processes, such as the Children’s Hearing System, which can lead to them gaining convictions if referred on offence grounds.

It is traditionally assumed that in the Scottish youth justice system the young person’s welfare is prioritised, based on the philosophy of justice advocated by the Report of the Kilbrandon Committee.⁴ This recognises the special status of children and that their ‘involvement in crime is linked with ‘social problems’ which are symbolic of deeper social and psychological difficulties, rather than from free, rational and informed choice.’⁵ We know that children who are care experienced generally come from lower socio-economic backgrounds and the reasons they become looked after include loss, neglect, abuse and parental alcohol or substance misuse which are all extremely traumatic. Yet, they are being criminalised at higher rates in our current justice system. This Bill is a historic moment to change this and truly realise the principles of the Kilbrandon committee that will ultimately

³ Howard League, *Programme to end the criminalisation of children in residential care*: <https://howardleague.org/what-you-can-do/children-and-policing/programme-to-end-the-criminalisation-of-children-in-residential-care/>

⁴ SHHD (1964), *Children and Young Persons (Scotland)*. London: HMSO.

⁵ Muncie, J. (2004), *Youth and Crime*. London: Sage Publications.

help secure a lifetime of equality, love and respect for all care experienced people in Scotland.

What changes to or additional services are required to support an increase in the age of criminal responsibility/prosecution to 14 or 16?

There is overwhelming evidence which has been explored throughout the parliamentary scrutiny of the Bill that criminalising young people does not improve outcomes. In fact, more contact with the justice system correlates with an increase in an individual's offending behaviour. This is backed up by evidence presented by the Centre for Youth and Criminal Justice in their response to Stage 1 of the ACR Bill.⁶ They have highlighted the Edinburgh Study, which 'revealed that where children commit the same level of frequency of offence, those who are formally responded to through the criminal justice system are more likely to continue offending than those who are not, in short the justice lens makes offending more likely'.⁷

By de-criminalising the harmful behaviour of under-16s there is opportunity to create an alternative needs-focused response, which also provides a way to make Scotland a safer place to live by reducing overall offending rates of young people. However, this shift in approach needs significant amounts of resource and a change in cultural attitudes from frontline professionals and those involved in all parts of the justice system.

There must be concrete alternative methods and pathways given to professionals working with children who display harmful behaviours and multi-agency training must be developed to ensure practice and culture changes in the frontline workforce, who may be the first point of contact for any harmful or concerning behaviours of children and young people. This training should aim to contextualise the behaviours that some children may display and lead to a reduction in the use of criminal justice mechanisms. Our care experienced members have discussed the use of other methods which could be used instead of charging a young person with a crime. They expressed doubt over whether experiencing arrest and gaining criminal charges helped young people to stop re-offending:

"They should take into consideration how jailing you and charging you makes you lose your income and before you know it you're homeless. Young people don't have to be criminalised and have a record, can make sure they get some punishment but not a criminal record – maybe something like a behavioural course."

The justice system for young people and children must also be easier to understand for all individuals involved. Current processes which criminalise young people are complex and difficult to understand for practitioners, let alone the children and young people navigating them. We would urge that any changes which occur as a result of the Bill, includes the creation of resources, tools and comprehensive methods of communication about the values and principles of the Bill, which will ensure effective implementation. This should be led by and informed by those with lived experience of the justice system and the care system.

Linked to this is also the vital importance of bringing the public with us in how we change our approach to youth justice in Scotland. Changing the age of criminal responsibility and prosecution is about not just changing the way the justice system operates but is also about changing Scotland's culture and understanding of how we view justice. The Bill is an

⁶ Lightowler, C. Centre for Youth and Criminal Justice, (2018), *Evidence Submission to the Equalities and Human Rights Committee on the Age of Criminal Responsibility*.

⁷ McAra, L., and McVie, S. (2010), *Youth crime and justice: Key messages from the Edinburgh study of youth transitions and crime*. Criminology and Criminal Justice, pp. 211-230.

important opportunity to raise awareness of how few children behave in seriously harmful ways and educate the public in why the age must be higher. Adults can generally overestimate young people's involvement in offending and there may be a considerable backlash to the increase of the age if this is not addressed.

The impact on young people of raising the age of responsibility/prosecution to 14 or 16:

Young people under 16 who show harmful behaviour that is currently criminalised, will experience an overwhelmingly positive impact by the age of responsibility and prosecution increasing. This will be felt even more strongly within the care experienced population in Scotland, due to the overrepresentation of care experience in the prison population.

We know this because our care experienced members have told us how criminal convictions affect someone for life, because a criminal record never goes away. It can create specific barriers to employment within the current PVG processes which exist and also causes emotional and psychological anxiety for individuals that have to disclose criminal convictions to others in later life for a multitude of reasons.

“At 12 you don't know it's going to stick with you for the rest of your life.”

Cultural attitudes towards those with a history of 'criminal' behaviour can seriously impact an individual's life. They are often judged and feel unable to access the same opportunities as others. For example, being targeted and stopped by police later in life if they are known in that area for historic behaviour and sometimes if known by a certain family name. We have heard about how the stigma of being labelled an 'offender' or a 'criminal' does not help to rehabilitate or support individuals to move on positively:

“I'm not a bad person, but I get classed as a criminal. I've just got issues that make me do things like having no family. And drinking makes things come to the surface.”

The positive impact of removing the stigma of criminality from those who are care experienced and show harmful behaviour cannot be emphasised enough, due to the fact that being care experienced is also stigmatised. For example, one of our members expressed how interlinked criminality and care experienced stigma can be:

“Police should not be influenced to stereotype and stigmatise care experienced young people because of the public and others stereotyping them, like neighbours to a unit phoning the police on a care experienced young person smoking outside the unit. Police are then treating care experienced young people as bad kids and troubled.”

We know that discrimination against care experienced people can be linked to assumptions and stereotypes about their behaviour, and as the quote above suggests it can be that they are in care due to being 'bad kids and troubled.' Yet organisations such as the Centre for Youth and Criminal Justice recognise that children and young people in care, experience a form of 'double jeopardy' by being placed in care as they are often exposed to further risk factors which make them vulnerable to criminalisation.⁸

By raising the age to 16, young people in care who show any form of harmful behaviour will be helped to address it in a way which could help them work through the root issues, potentially related to trauma, abuse and neglect they have experienced, rather than compounding it with a traumatising, criminalising response. It allows our workforce and

⁸ CYCJ (2017), *Response to Consultation on the Proposed Draft Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018.*

wider society to understand harmful behaviour as a form of communication and as something which, with the right support, can be overcome by individuals who are then able to lead positive, fulfilled lives.

"I had no support, and now something as stupid as that comes up on a PVG. The way I looked at things changed, I just needed the right support."

Whether Scots Law in this area should be tied to the United Nations minimums:

It is important that Scots Law ties in with the recommendations of the United Nations, however we do not think Scotland should be restricted to the minimum set and can work to build its own consensus beyond the United Nations set age for criminal responsibility. The key part of Scots Law which should tie to United Nations minimums is that the UNCRC classifies children as under 18 years old. Therefore, if we are to build a justice system which decriminalises and reduces the offending rates of all children in Scotland – we should look to provide further reform for all individuals in contact with the justice system who are under 18.

Any other impacts in relation to disclosure, victims and police powers:

Police Powers: Stop and Search

We understand that if the age of prosecution/responsibility rises to 16, that stop and search powers will be likely to remain for those under 16. We would like to see further work conducted to create guidance and implement practice which reflects the potential differences of working with this age group.

If a young person is 16 or under and needing to be searched by Police, our care experienced members have told us they would like a parent, guardian or carer to be contacted when this happens. It was emphasised that the decision to contact them should be based on the choices of the young person being searched. They also saw stop and search procedures as a method of keeping under 16s safe and an opportunity to take them home to their parents or carers.

- *"ID under 16s, take them home to their parents to tell them what has happened and gain permission to search."*
- *"I don't think they should be allowed to search someone under 16 without their parents or carers. It would stop accidents happening, otherwise the young person won't get listened to and gives police too much power..."*
- *"Be there, be respectful."*

One young person described the way police should practice stop and search with this age group: *"Once searched, if the police don't have anything then they should apologise for taking your time, give you their contact details, remaining polite and apologetic. If you want to talk about being searched, you could then contact them."*

Police Powers: Use of Force

A strong theme in discussions with our care experienced members on the justice system, centres around the need to communicate properly with young people, especially when force is used by police. This will be important to include in the implementation of the Bill, because raising the age will also mean assessing how and why certain police methods are still utilised with young people under 16.

One of our members shared that at aged 14, they had their shoulder dislocated by police and were put in a cell overnight. There was a theme in discussions with the care

experienced young people we work with, that in a lower age bracket, up to 16 years old, an individual should not be subject to such extreme uses of force by police. By increasing the age of responsibility and prosecution, we want to see the culture of police practice change in all areas towards those under 16.

It was also seen as important for police to try and understand what the young person may be thinking or feeling before they decide to use force:

- *“If someone is acting out, they need help, they are communicating something.”*
- *“Police need to speak to you, give you a choice and explanation of what’s happening.”*
- *“The young person needs to understand why police are acting in a certain way.”*
- *If a young person is scared or anxious, force shouldn’t be used.*

Our members also expressed concerns over how police use force in situations specifically with care experienced children and young people. They felt that young people in care placements were negatively impacted by police use of force because of being highly vulnerable and having potentially traumatic backgrounds.

- *“Force by police is used in a residential setting to ‘calm’ things down. They apply same force to all young people regardless of needs and circumstances.”*
- *“They don’t take into account people’s backgrounds, issues, trauma, vulnerabilities.”*
- *“The presence of police can trigger things for care experienced young people, that there’s a threat and something is wrong.”*
- *“Impact of previous experiences and trauma, particularly for care experienced young people - physical restraint (how it feels).”*
- *“Young people in residential units are being ‘controlled’ by police coming out when staff can’t cope – this shouldn’t happen!”*

One young person suggested that care experienced young people’s stories could be used to educate the police. This is something which the WC?S corporate parenting team are currently working on with Police Scotland and we would like the implementation of the Bill to build on this ongoing work.

Changes to the Disclosure system:

If the age of responsibility/prosecution changes to 16, there will be a significant number of individuals who will have already accrued convictions when under the age of 16. We would like there to be clear action on addressing the lifetime effects these convictions may have in negatively impacting the life chances of these individuals today.

Many care experience young people we spoke to expressed concern about charges picked up between the age of 12-16 years old appearing on a disclosure check. They emphasised the type of crime should be used as a way to determine whether this information was shared with an employer:

“I understand places need to know about criminal past but only certain things that should be brought up but jail for shoplifting at 14, employers don’t need to know that.”

Some young people thought 16 was a more reasonable age to receive charges in the first place and so did see crimes committed from 16 years of age and beyond as more reasonable to tell employers about.

We would like to see the higher age of responsibility/prosecution explicitly acknowledged in both the new Disclosure Bill and in the Management of Offenders Bill, which will affect the way in which criminal records are disclosed. There must be co-ordination between the Age of Criminal Responsibility Bill and these two other pieces of legislation so that they interlink and make sense, both legally but also to those working within the justice system and the wider public.

Victim Support

We would also like to revisit the need to be aware of the often-false dichotomy of victim/perpetrator which is a dominant narrative in some of the moral arguments put across for a lower age of responsibility and prosecution for children and young people. In protecting and helping an individual who has shown harmful behaviour towards another individual, it is of paramount importance to also support whoever has been affected by the behaviour and has been harmed as a result of the actions that have taken place. There should be emphasis on all individuals involved being supported, in a needs-focused way, to ensure no-one affected by the harm is stopped from living their lives to the fullest. Our care experienced members have emphasised that victims of harmful behaviour should be given the information they need in order to understand what has happened and how the needs-focused response to the individual who has shown harmful behaviour will ensure their future safety and wellbeing.

Our care experienced members have told us about incidents in which they have been on the receiving end of harmful behaviour. One of our members shared their experience of being part of a crime, and the importance of having information:

“Never told me anything about the real person, what had really happened or the consequences. Did they go to Prison? I think about it every day. I hated not knowing. I need to know the outcome.” They then went on to say that although they asked the Police and Social work to give them information, this was never done.

We would like to emphasise that increasing the age of responsibility and prosecution to 16 does not come at the cost of victim support or rights and that these should go hand-in-hand as we change Scotland’s approach to youth justice. It is also of vital importance that those who have experienced criminalised harmful behaviour be involved in the development of victim support approaches, services and resources. We would like to see care experienced people included as a part of this process.