



## Briefing for the Public Petitions Committee

Petition Number: [PE1847](#)

Main Petitioner: Barry Donnan

Subject: Raise the age of criminal responsibility

Calls on the Scottish Parliament to urge the Scottish Government to urgently raise the age of criminal responsibility to a minimum of 14

### Background

The age of criminal responsibility is the age below which a child is deemed to lack the capacity to commit a crime.

Section 41 of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act") currently provides that:

"It shall be conclusively presumed that no child under the age of eight years can be guilty of an offence".

There are, however, further restrictions on when a child may be subject to the adult system of prosecution and punishment.

The Criminal Justice and Licensing (Scotland) Act 2010 inserted a new section 41A into the 1995 Act providing that no child under the age of 12 may be prosecuted for an offence. It also provides that an older person may not be prosecuted for an offence committed whilst under the age of 12. In addition, section 42(1) of the 1995 Act states that:

"A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate; and no court other than the High Court and the sheriff court shall have jurisdiction over such a child for an offence".

The Lord Advocate does not have to specifically authorise each prosecution of a child, but instead gives general instructions on the classes of cases in which children are to be prosecuted. These instructions are set out in the Lord Advocate's Guidelines for Reporting to Procurators Fiscal of offences alleged

to have been committed by children, which state that a child can only be prosecuted in serious cases which could be prosecuted on indictment<sup>1</sup>.

### **Scottish Government action**

On 13 March 2018, the Deputy First Minister, John Swinney MSP, introduced the Age of Criminal Responsibility (Scotland) Bill ("the Bill"). The main purpose of the Bill was to raise the age of criminal responsibility in Scotland from eight to 12 to align it with the current minimum age of prosecution, and, according to the Scottish Government, to reflect Scotland's progressive commitment to international human rights standards.

The [Policy Memorandum](#) published along with the Bill noted that the law as it then stood allowed children from the age of eight to be prosecuted in the criminal courts and that:

"This is considered by many to be contrary to international standards and the United Nations Convention on the Rights of the Child (article 40(3)(a)) which suggests that 12 is the minimum acceptable age at which children should be held accountable for their actions before full (adult) criminal justice proceedings".

Article 40 of the United Nations Convention on the Rights of the Child (1989) includes provisions requiring states to seek to promote the establishment of "a minimum age below which children shall be presumed not to have the capacity to infringe the penal law". The relevant article does not specify a minimum age, but the United Nations Committee on the Rights of the Child has recommended 12 as an absolute minimum and stated that:

"Children who commit an offence at an age below that minimum cannot be held responsible in a penal law procedure. Even (very) young children do have the capacity to infringe the penal law but if they commit an offence when below [the minimum age of criminal responsibility], the irrefutable assumption is that they cannot be formally charged and held responsible in a penal law procedure. For these children special protective measures can be taken if necessary in their best interests"<sup>2</sup>.

The question of whether relevant reforms to Scots law should go further with regard to the age of criminal responsibility has remained a live issue.

### **Scottish Parliament action**

The Age of Criminal Responsibility (Scotland) Bill was passed on 7 May 2019. The Bill passed by a vote of 123 for, 0 against, and no abstentions. The Bill received Royal Assent and became the Age of Criminal Responsibility (Scotland) Act 2019 ("the 2019 Act") on 11 June 2019.

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<sup>1</sup> An indictment is a court document which sets out the charges against an accused in solemn (more serious) cases. Solemn cases on indictment are heard before a jury.

<sup>2</sup> [General Comment No 10 \(2007\) Children's Rights in Juvenile Justice, para 31.](#)

Section 1 of the 2019 Act provides that a child aged under 12 cannot commit an offence. Therefore, once section 1 of the 2019 Act comes into force, this will mean that the age of criminal responsibility in Scotland will change from eight to 12.

Scottish Government officials have intimated that they are hoping to commence section 1 of the 2019 Act in autumn 2021. They could not provide a more definitive date for commencement at this stage<sup>3</sup>.

Section 78 of the 2019 Act requires the Scottish Ministers to carry out a review of the operation of the legislation. The review is to cover the operation of the 2019 Act generally, looking, for example, at whether it has achieved its policy objectives and whether all of the provisions within it are operating as intended.

In addition, and more pertinently for the petition at hand, the review is also to consider the operation of the 2019 Act with a view to considering the future age of criminal responsibility. For example, it could examine whether, in light of any benefits delivered by the change in approach to harmful behaviour by children under 12, the age of criminal responsibility should be raised beyond 12 and, if so, whether the provisions in the 2019 Act would be capable of operating successfully in relation to higher age groups or whether new provision would be required. If the review recommends a change in the age of criminal responsibility, further primary legislation will be required to deliver this change.

The review of the 2019 Act is to take place within the 3 years following section 1 coming into force.

**Graham Ross**  
**Senior Researcher**  
**9 December 2020**

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Published by the Scottish Parliament Information Centre (SPICe), an office of the Scottish Parliamentary Corporate Body, The Scottish Parliament, Edinburgh, EH99 1SP

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<sup>3</sup> SPICe contact 3 December 2020.