

SCOTTISH LAW COMMISSION
(Scot Law Com No 185)



Report on Age of Criminal Responsibility

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Age of Criminal Responsibility

To: Jim Wallace Esq QC MSP, Deputy First Minister and Minister for Justice

We have the honour to submit to the Scottish Ministers our Report on Age of Criminal Responsibility

(Signed) BRIAN GILL, *Chairman*

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27 November 2001

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Part 1 Introduction

Terms of reference

1.1 On 31 October 2000 we received the following reference from the Scottish Ministers:

"To identify the legal issues which are involved in rules fixing an age of criminal responsibility; to consider in the light of contemporary legal doctrines and principles the rule contained in section 41 of the Criminal Procedure (Scotland) Act 1995 that it shall be conclusively presumed that no child under the age of 8 can be guilty of any offence; to identify the legal implications of any change to that rule; and to make recommendations for reform."

Our remit is limited in that we are not to consider any changes to the law on the prosecution of children or to the children's hearing system beyond those required for the purposes of the terms of reference.

1.2 In July 2001 we published a discussion paper which contained a detailed examination of the range of issues involved in consideration of the age of criminal responsibility and which set out our proposals for reform.¹ The discussion paper was widely distributed and we are grateful to those who submitted comments on our provisional proposals.² In October 2001 representatives of the Commission attended a seminar in Edinburgh held to discuss the proposals set out in the discussion paper. The seminar was organised by Children in Scotland and brought together a number of persons and organisations concerned with the interests of children. The seminar gave rise to a wide-ranging exchange of views on age of criminal responsibility, which we found useful in formulating our final recommendations for reform, and we are grateful to have been given the opportunity to participate in the proceedings.

The concept of age of criminal responsibility in Scots law

1.3 In this report we make various recommendations for reform of the existing law on the age of criminal responsibility. We take the view that the existing law provides not one but two different rules on age of criminal responsibility. One rule is contained in section 41 of the Criminal Procedure (Scotland) Act 1995, which is mentioned in our terms of reference.³ That section provides that it "shall be conclusively presumed that no child under the age of eight years can be guilty of any offence." The rule in section 41 uses the idea of age of criminal responsibility in the sense of the age below which a child is deemed to lack the capacity to commit a crime.

¹ Scottish Law Commission, *Discussion Paper on Age of Criminal Responsibility* (Discussion Paper No 115 (2001)).

² A list of those who submitted comments on the discussion paper is contained in Appendix E.

³ The 1995 Act is a consolidating statute. Section 41 derives from ss 170 and 369 of the Criminal Procedure (Scotland) Act 1975 which in turn consolidated similar provisions in the Children and Young Persons (Scotland) Act 1937, s 55. The rule in this form was first introduced by s 14 of the Children and Young Persons (Scotland) Act 1932.

1.4 By contrast another meaning of age of criminal responsibility is the point at which the age of a suspect or offender has no relevance for his treatment or disposal as part of the criminal justice system, most typically the age at which an accused becomes subject to the full or adult system of prosecution and punishment. The 1995 Act also contains various rules which use this second notion of age of criminal responsibility, most notably that in section 42(1) which provides (in part) that "no child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance."

1.5 The recommendations contained in this report are based on the argument that for a variety of reasons there is no need to retain the rule on criminal capacity. Instead, the age of criminal responsibility is better conceptualised as relating to immunity from prosecution. Approaching the age of criminal responsibility in this way not only gives greater coherence to Scots law but also brings that law more into line with other legal systems and with international conventions. Reform of the law on the children's hearings system and criminal prosecution is in general terms beyond the scope of our remit. We must emphasise, however, that our recommendations are premised on the continued existence of a system, like children's hearings, which provides a welfare-based approach for children who commit offences.

Scope of the report and our recommendations in outline

1.6 In Part 2 we look at the current meaning and the historical development of the concept of the age of criminal responsibility in Scots law. We identify the issues which are involved in abolishing section 41 of the 1995 Act and in using the idea of immunity from prosecution as the basic idea behind the age of criminal responsibility in Scots law. The requirements of the European Convention on Human Rights as they affect the age of criminal responsibility as well as the provisions of other relevant international conventions are also considered.

1.7 In Part 3 we set out our recommendations for reform of the existing law in this area. First, we recommend the abolition of the rule on age of criminal responsibility which is concerned with the capacity of children to commit crimes. The purpose of the abolition of this rule, as presently contained in section 41 of the 1995 Act as well as its common law equivalent, is to make clear that in Scots law age of criminal responsibility means the age below which children are immune from the adult system of criminal prosecution and punishment. Secondly, we reject the idea that all child offenders below the age of 16 should be dealt with solely by children's hearings and instead recommend that the Crown should continue to enjoy a discretionary power to prosecute children in exceptional cases where prosecution is required in the public interest. We also consider ways in which the discretion of the Crown to prosecute should be limited or structured, and we recommend that it should not be competent to prosecute a child who is below the age of 12. Next, we deal with one particular issue concerning the ground for referring a child to a children's hearing that the child has committed an offence. In *Merrin v S*⁴ the Inner House decided that this ground for referral could not be used in respect of a child under the age of 8 on the basis that a child of that age could not be guilty of any offence. We recommend that this decision should be overruled. The effect would be that any child under the age of 16 who engaged in conduct

⁴ 1987 SLT 193.

which constitutes an offence would be capable of being referred to a children's hearing, even if the child were immune from prosecution in the criminal courts in terms of our other recommendations. We also consider various matters on which we consulted in our discussion paper but which are not the subject of any recommendations. These are the questions (1) whether the existing law on art and part guilt and on incitement to crime and conspiracy deals adequately with the situation where offenders seek to exploit children under the age of criminal responsibility (in either of its senses) to commit crimes on their behalf; (2) whether a rebuttable presumption about the age of capacity of children to commit crimes should be introduced; and (3) whether, if our primary proposal to repeal section 41 of the 1995 Act were not accepted, the rule should be re-stated as a substantive rule of law rather than as a conclusive presumption.

1.8 Part 4 lists our recommendations. A draft bill to implement those recommendations is contained in Appendix A. Appendix B sets out excerpts from the *Prosecution Code* issued by the Crown Office and Procurator Fiscal Service. Appendix C contains the terms of the Lord Advocate's Direction to Chief Constables on the reporting to procurators fiscal of offences alleged to have been committed by children. Appendix D contains statistics on prosecution of children in Scotland and referrals to children's hearings. Appendix E lists the persons and organisations who submitted comments on our discussion paper.

Legislative competence

1.9 The recommendations in this report relate to criminal law, prosecution policy and children's hearings. With a few exceptions which do not concern the matters in this report these areas of law are not reserved to the Westminster Parliament.⁵ We consider that our recommendations would therefore be capable of being implemented by legislation of the Scottish Parliament.

1.10 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.⁶ In our view enactment of the recommendations made in this report would not breach Convention rights.⁷

⁵ Scotland Act 1998, Sch 5.

⁶ Scotland Act 1998, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).

⁷ See paras 2.14 and 3.25 below.

Part 2 Issues in the Law of the Age of Criminal Responsibility

Introduction

2.1 In this Part we identify the issues which are involved in any consideration of the law relating to the age of criminal responsibility. We consider in the first place the development in Scots law of two different rules on the subject, each embodying a different conception of the general idea of age of criminal responsibility. We argue that conceptualising age of criminal responsibility in the sense of immunity from prosecution, as opposed to lack of capacity to commit crimes, better explains the historical development of our law as well as providing a closer coherence with contemporary understanding. We also examine various international conventions which have a bearing on the age of criminal responsibility. We consider first the provisions of the European Convention on Human Rights. We do so to examine whether the Convention requires Scots law to adopt a particular approach to the age of criminal responsibility and also to ensure that our own recommendations for reform are compatible with the provisions of the Convention. Next we consider the provisions of the Beijing Rules on the Administration of Juvenile Justice,⁸ and the 1989 United Nations Convention on the Rights of the Child.

A: AGE OF CRIMINAL RESPONSIBILITY IN SCOTS LAW

Development of the age of criminal responsibility in Scots law

2.2 In our discussion paper we traced in some detail the historical development of the provisions on age of criminal responsibility in Scotland.⁹ Hume's treatment of the topic follows his general discussion of 'dole'.¹⁰ The context of his discussion is whether offenders of various ages were liable to punishment, of either a capital or non-capital form. As regards children below 14, Hume was of the view that there was no hard and fast rule that they were liable to capital punishment, and much would depend on the circumstances of each case. With lesser forms of punishment, however, matters were more definite:¹¹

"No authority has ever maintained, that a mere infant, one who is under seven years old, is in any case liable to any sort of punishment. It is as little to be doubted, on the other side, that for all crimes whereof they may know the wickedness, and more especially if committed in circumstances of freedom (for there may sometimes be room for the plea of constraint), all who are above that age, and proved to be of dole, are liable to such mitigated pains as shall be adequate, in the opinion of the Court, to the ends of correction and example."

⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), commonly referred to as the Beijing Rules.

⁹ Discussion Paper No 115, paras 2.8-2.16.

¹⁰ Commentaries I, 30.

¹¹ Commentaries I, 35.

Alison's statement of the law is broadly similar to Hume's.¹² His formulation of one of the rules of the age of an offender was that: "[c]hildren under seven years of age are held to be incapable of crime, and not the object of any punishment."

2.3 It is important to note that when read correctly the context of the discussions by Hume and Alison is that of appropriateness of applying forms of punishment to young people and not of mens rea. Neither author stated the rules on age in terms of the presence or absence of mens rea in children of different ages. Indeed it can be argued that the modern idea of mens rea, the 'mental element' required to attach criminal liability for specific forms of conduct, developed later in the 19th century.¹³ It is true that Hume considered the rules on age by referring to the 'dole' of the accused but for Hume this concept referred to the general character of an accused person, rather than the capacity to form specific types of mental state.¹⁴ Similarly it is anachronistic to read Alison's reference to children being incapable of crime in terms of the later idea of capacity to form mens rea.

2.4 An important change to the nature of the rule on age of criminal responsibility occurred in the early part of the 20th century. In 1928 the Morton Committee on the treatment of young offenders in Scotland reported.¹⁵ The Committee's main concern was with improving the system of special courts for juvenile offenders which had been introduced by the Children Act 1908. In addition the Committee considered the age of criminal responsibility, which it described in the following terms:¹⁶

"A child under seven years of age is regarded as *doli incapax* - in other words, the child is presumed to be unable to appreciate the real nature of the offence. In Scotland this age stands as a matter of common law, and no child under seven is brought before the juvenile court, or, as it is put in the legal text books, a child under seven years of age is not liable to punishment as a criminal."

2.5 The Committee recommended that the age of criminal responsibility should be raised from 7 to 8. No obvious point of principle was given for this recommendation (or its equivalent for English law¹⁷). However the effect was that, by virtue of section 14 of the Children and Young Persons (Scotland) Act 1932, Scots law on the age of criminal responsibility was placed on a statutory basis and the age raised from 7 to 8. Furthermore the rule in its statutory version now took a new form. The 1932 Act was enacted by way of one Bill as the basis for two separate Acts for England and Scotland.¹⁸ The result was that the rule in both countries was in identical terms to the effect that it was conclusively presumed that no child under the age of 8 years could be guilty of any offence.¹⁹ This form of rule reflected the approach of English law to the age of criminal responsibility and moved Scots

¹² *Principles of the Criminal Law of Scotland*, pp 663-667.

¹³ Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (1997) at pp 160-172.

¹⁴ *Ibid*; see also V Tadros, "Insanity and the Capacity for Criminal Responsibility" (2001) 5 *Edinburgh Law Review* 325, 329-331.

¹⁵ Report of Departmental Committee appointed by the Secretary of State for Scotland (Chairman Sir George Morton KC) (HMSO, 1928).

¹⁶ *Ibid*, p 48.

¹⁷ See Report of the Committee on the Treatment of Young Offenders (Chairman Sir Thomas Molony) (Cmnd 2831, 1927), p 21.

¹⁸ For fuller discussion of this point, see Discussion Paper No 115, para 3.43.

¹⁹ The age of criminal responsibility in English law was further raised from 8 to 10 by the Children and Young Persons Act 1963, s 16(1).

law away from its earlier emphasis on not punishing children accused of crime rather than deeming them incapable of guilt.

2.6 The next and crucial stage in the development of the law on age of criminal responsibility was the report in 1964 of the Committee on Children and Young Persons in Scotland, chaired by Lord Kilbrandon.²⁰ The Kilbrandon Committee identified what it saw as a major flaw in the juvenile court system introduced by the 1908 Act. Juvenile courts were concerned with the welfare of the child yet they were also part of the wider criminal justice system which embodied the traditional 'crime-responsibility-punishment' concept rather than preventive and educational principles. The Committee's solution was to separate the distinct issues of (i) had a child committed an offence? and (ii) what are the appropriate measures for dealing with a child who offends? The second issue was to be removed from the courts (and not just the criminal courts) altogether and given to a new specialised agency whose sole function was "the consideration and application of training measures appropriate to the child's needs."²¹

2.7 There are two key aspects of the Kilbrandon scheme which should be noted. The first is that the Committee considered that the new agencies should deal with the vast majority of children under 16 who committed crimes, but that there would still be cases in which it would be appropriate for children to be prosecuted in the criminal courts. The Committee envisaged that such cases would be very rare:²²

"We consider that the common law power of the Lord Advocate should continue to be applicable to juvenile offences. Its exercise would, we assume, arise only exceptionally and on the gravest crimes, in which major issues of public interest must necessarily arise, and in which, equally as a safeguard for the interests of the accused, trial under criminal procedures is essential."

The second point follows from the first. If the vast majority of offenders under the age of 16 were to be subject to the new agencies rather than criminal prosecution, what should happen to the existing provisions on age of criminal responsibility? The Committee argued that the rule was not based on any empirical data on the understanding of children of right and wrong. They traced its historical development as being concerned with not exposing very young children to criminal punishment. The Committee concluded:²³

"The legal presumption by which no child under the age of 8 can be subjected to criminal proceedings is not therefore a reflection of any observable fact, but simply an expression of public policy to the effect that in no circumstances should a child under the age of 8 be made the subject of criminal proceedings and thus liable to the pains of the law. Equally, at various intermediate stages prior to adulthood, the effect of statute law is to exempt juveniles below certain ages from certain forms of judicial action. . . . It is clear, therefore, that the 'age of criminal responsibility' is largely a meaningless term, and that in so far as the law refers to the age of 8 as being the minimum age for prosecution, this is essentially the expression of a practical

²⁰ Cmnd 2306.

²¹ *Ibid*, para 73.

²² *Ibid*, para 125.

²³ *Ibid*, para 65.

working rule determining the cases in which a procedure which may result in punishment can be applied to juveniles."

2.8 The Committee argued that the original basis for the rule, the harshness of criminal punishment as applied to young offenders, had already disappeared. It accepted that there might be cases where children even younger than 8 should be subject to criminal proceedings,²⁴ but considered that the question of more practical importance was whether children of 8 and older could be better dealt with by some form of non-criminal procedure. The Committee therefore recommended that all juveniles under the age of 16 should in principle be removed from the jurisdiction of the criminal courts. This was subject to the overriding discretion of the Crown, "to be exercised exceptionally and for grave reasons of public policy" to prosecute children.²⁵ Furthermore the Committee recommended that "any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed."

2.9 The bulk of the Kilbrandon Committee's recommendations were implemented by the Social Work (Scotland) Act 1968 (which came into effect in April 1971). The new system of children's hearings applied to children under the age of 16.²⁶ The restriction on prosecution of children under that age for offences was set out in section 31 of the Act (now section 42 of the Criminal Procedure (Scotland) Act 1995) but no effect was given to the Committee's recommendation to remove the rule on children under 8 being deemed incapable of guilt for any offence (that is, the rule in what is now section 41 of the 1995 Act).

The nature of the rule on age of criminal responsibility in Scots law

2.10 As a consequence of the ways in which the age of criminal responsibility developed, Scots law now contains a variety of quite different rules on age in the criminal justice system. One meaning of 'age of criminal responsibility' is reflected in the rule which is specifically mentioned in our terms of reference. Section 41 of the Criminal Procedure (Scotland) Act 1995 provides that:

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

However this is not the only rule on the age of children and young persons in the criminal justice system. In our discussion paper we identified a number of provisions in the Criminal Procedure (Scotland) Act 1995 which deal with the prosecution, and punishment or other disposal, of young persons.²⁷ For present purposes the most relevant of those provisions is that contained in section 42(1) of the 1995 Act which states that:²⁸

²⁴ "It is, of course, arguable on the basis of observable fact that children under the age of 8 do sometimes commit acts amounting in law to criminal offences, and do so in the knowledge that they are doing wrong. There may well be occasions, e.g., where they are acting in concert with slightly older children, in which it would be equally appropriate even at that early age that they should be the subject of action under criminal, as distinct from 'care and protection', procedure. Such cases would on any criterion be likely to be rare" (*ibid*, para 67).

²⁵ *Ibid*, para 139.

²⁶ In certain situations children's hearings have jurisdiction over children who are 16 or older. See para 2.13.

²⁷ Discussion Paper No 115, para 2.1. The statutory provisions which we referred to included Criminal Procedure (Scotland) Act 1995, ss 42 (7),(8); 49; 51; 142(1); 207.

²⁸ Section 42(1) is derived ultimately from s 31(1) of the Social Work (Scotland) Act 1968, which gave effect to a recommendation of the Kilbrandon Committee.

"No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate, or at his instance; and no court other than the High Court [of Justiciary] or the sheriff court shall have jurisdiction over a child under the age of 16 years for an offence."

2.11 It is important to bear in mind the whole range of rules on age which exist in our criminal justice system, for the use of an age limit does not necessarily serve the same function or give effect to the same legal policies in every rule. As far as these provisions relate to the idea of age of criminal responsibility, the two major contrasting senses are (i) the age at which a child is deemed too young to be able to commit a crime and hence cannot be brought into the criminal justice system at all (ie, the rule in section 41 of the 1995 Act); and (ii) the age at which a suspect or offender becomes liable to the full rigours of the system of prosecution or punishment for adults. For present purposes the most significant rule in the second sense is that in section 42(1) of the 1995 Act.

2.12 This distinction was noted by the Ingleby Committee on Children and Young Persons in England and Wales, which reported in 1960.²⁹ The Committee stated that most of the evidence submitted to it was in favour of raising the age of criminal responsibility (then 8 in English law) but pointed out that there was insufficient understanding of what would be the effect of the various proposals being advanced. The Committee noted that in addition to the rule that a child under 8 years cannot be convicted of any offence, there were other rules on the age of children and young persons in the English criminal justice system. It pointed out that:

"In many countries the 'age of criminal responsibility' is used to signify the age at which a person becomes liable to the 'ordinary' or 'full' penalties of the law. In this sense, the age of criminal responsibility in England is difficult to state: it is certainly much higher than eight."

The Committee concluded that an age of criminal responsibility could not be laid down except as a part of the whole system of courts and legal procedures which may be involved in the protection, control and discipline of children.

2.13 We must stress that our main concern is with the rule on the minimum age of responsibility in the sense of capacity to commit a crime. Our terms of reference specifically mention section 41 of the 1995 Act and the legal implications of any change to that rule. It follows therefore that it is not part of our remit to consider, for example, whether the upper age limits for the jurisdiction of children's hearings should be changed,³⁰ or at what age it becomes appropriate to impose particular penalties on young offenders. Nonetheless, our concluded view is that age of criminal responsibility in the sense of immunity from prosecution and criminal punishment better coheres with the historical development of the rules in Scotland, as well as their present form, than does a rule about criminal capacity. In short, we agree with the reasoning of the Kilbrandon Committee that with the existence of a welfare-oriented system which deals with the vast majority of child offenders, there is no

²⁹ Report of the Committee on Children and Young Persons (Chairman the Rt Hon Viscount Ingleby), Cmnd 1191 (October 1960), paras 78-82.

³⁰ Generally speaking, children's hearings have jurisdiction only over children who are less than 16 years of age, but this rule is subject to various exceptions which allow children over 16 to be subject to the hearings system (Children (Scotland) Act 1995, s 93(2)(b) (definition of 'child')). See also Criminal Procedure (Scotland) Act 1995, s 49 (allowing courts to remit young people aged up to 17 years and six months to children's hearings).

need for a rule on age of criminal responsibility in the sense of capacity to commit crime. The strategy for reform in Part 3 of this report is that in Scots law the idea of age of criminal responsibility should be based on freedom from criminal prosecution. We must stress that our recommendation to abolish a rule that a child below 8 is deemed incapable of being found guilty of any offence is not a proposal to get rid of the entire idea of age of criminal responsibility. Rather the effect of our recommendations is to give greater clarity to the principles on age of criminal responsibility which already exist in Scots law. The existence of two different senses of age of criminal responsibility is a source of considerable misunderstanding and we consider that our proposed reforms will result in the elimination of a confusing anomaly from our law.

B: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND OTHER INTERNATIONAL CONVENTIONS

European Convention on Human Rights

2.14 Two important issues are (1) whether the European Convention on Human Rights requires particular rules on the age of criminal responsibility and (2) whether our recommendations for reform, which are contained in Part 3 below, are themselves consistent with the requirements of the Convention.

2.15 The leading authority on age of criminal responsibility and the Convention is the joint case of *T v UK; V v UK*.³¹ There the European Court of Human Rights considered applications by two persons who at the age of 10 abducted and murdered a 2 year-old boy and were convicted after a trial at a Crown Court in England when they were 11 years of age. Part of the applicants' submissions was that in view of their age a public trial in an adult Crown Court violated their rights under articles 3 and 6.³² In considering this submission the European Court of Human Rights made a number of observations about the age of criminal responsibility. The relevant rule of English law was that there was a conclusive presumption that a child under 10 could not be guilty of an offence. The Court concluded that attribution of criminal responsibility to a child aged 10 did not involve a breach of article 3; and further that subjecting a child as young as 11 to a criminal trial did not by itself involve a breach of article 6(1).³³ However the Court added:³⁴

"The Court recalls its above findings that there is not at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility and that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention. Likewise, it cannot be said that the trial on criminal charges of a child, even one as young as eleven, as such violates the fair trial guarantee under Article 6(1). The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his

³¹ (2000) 30 EHRR 121.

³² Article 3 of the Convention provides: "No one shall be subjected to torture or to inhumane or degrading treatment or punishment." Article 6 sets out various requirements constituting the right to a fair trial. These applications also involved submissions that article 14 (which prohibits discrimination in the enjoyment of Convention rights) had been breached but the Court held it was unnecessary to examine those submissions.

³³ However the Court did hold that the nature of the trial procedures which the applicants in the present case had experienced did involve a breach of their rights under article 6(1).

³⁴ Para 86, p 179.

age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings."

2.16 In a concurring opinion Lord Reed, who was an ad hoc member of the Court for these applications, considered that the compatibility of a rule on age of criminal responsibility and article 3 of the Convention would depend upon the impact of the procedures to which a child is subjected.³⁵

"The effect upon a child of attributing criminal responsibility to him will depend primarily upon the nature of the trial procedure and sentences applicable to such a child under domestic law. The attribution of criminal responsibility cannot in itself give rise to an issue under Article 3 of the Convention unless it inevitably constitutes or results in ill-treatment attaining the necessary minimum level of severity. That matter has to be considered in accordance with prevailing standards amongst the member States."

2.17 Five judges issued a separate opinion which dissented from the Court's judgment on the effect of article 3 of the Convention. The five judges took the view that an age of criminal responsibility as low as 10 and prosecuting a child aged 11 in an adult court would almost inevitably breach article 3. Those judges seemed to be conceptualising the age of criminal responsibility as the point of entry into the full, adult criminal process. The five judges added: "The very low age of criminal responsibility has always to be linked with the possibility of adult trial proceedings. That is why the vast majority of Contracting States have eschewed such a very low age of criminal responsibility."³⁶ These judges also referred to a general practice in Council of Europe States of a system of 'relative' criminal responsibility beginning at the age of 13 or 14, which entails special court procedures for juveniles, and 'full' criminal responsibility at the age of 18 or above. In the case of children aged from 10 to about 13 or 14 who have committed crimes, educational measures are imposed to try to integrate the young offender into society.

2.18 It is clear from the *T v UK* and *V v UK* cases that the Convention will have an effect on the age of criminal responsibility primarily in the sense that the age determines the entry point into the full system of prosecution and punishment appropriate for adults. It is clear from the opinions of the judges, including those who dissented on the submission in relation to article 3, that the Court was using the concept of age of criminal responsibility not in the sense of mens rea but as concerned with the appropriate methods of dealing with children who commit crimes. We conclude that the Convention is not directly concerned with rules relating to the criminal capacity of children. Indeed the Convention does not require a legal system to contain any rules presuming (conclusively or otherwise) that children of certain ages do not have the capacity to form mens rea. In Part 3 of this report we recommend that Scots law should abolish its existing rule on age of criminal responsibility in the sense of criminal capacity.³⁷ We are of the view that this reform is consistent with the provisions of the Convention.

2.19 Furthermore, subjecting a child to criminal prosecution does not by itself breach the Convention provided the procedures involved are adapted to take account of the level of the

³⁵ At p 192.

³⁶ At p 203.

³⁷ Recommendation 1, para 3.5.

child's maturity. The focus of the Convention is with protecting children from the full rigours of criminal prosecution. The Convention does not lay down any particular age for this purpose. In Part 3 we also propose that Scots law should retain the rule that some children under 16 may be prosecuted in exceptional cases where this is required in the public interest (subject to a recommendation that children under the age of 12 cannot be prosecuted). We are of the view that provided court procedures are adapted to take account of the child's maturity and level of understanding, this proposal would also be compatible with the requirements of the Convention.

International conventions and instruments

2.20 In addition to the European Convention on Human Rights there are two other international conventions and instruments which are relevant to the age of criminal responsibility.

(a) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)

2.21 The Beijing Rules were adopted by the United Nations General Assembly on 29 November 1985. They are not binding in international law. States are invited, but not required, to adopt them. Article 4(1) provides:

"In those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity."

The official commentary on this provision states that:

"The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of criminal responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable."

2.22 At first sight the concept of age of criminal capacity used in article 4(1) is that of criminal capacity but it is clear from the commentary that the provision is concerned rather with an appropriate age for being prosecuted in the criminal justice system. One of our recommendations discussed in Part 3 of this report is that Scots law should retain its existing provisions on prosecuting children under 16 contained in section 42 of the 1995 Act subject to an amendment that children under the age of 12 cannot be prosecuted. It is the provisions

of an amended section 42 which set out the rules of Scots law on the age of criminal responsibility for the purposes of international instruments such as the Beijing Rules.³⁸

2.23 Article 4 of the Beijing Rules also links the age of criminal responsibility with the age used in other areas of the law. Although the age limits in the civil law need not reflect the same policy goals as those for the age of criminal responsibility, we believe that as far as possible we should try to avoid major discontinuities between age limits fixed by the law. The civil law adopts a variety of ages for purposes of the legal capacity of children,³⁹ but two ages in particular are worthy of note in the present context. First, the Children (Scotland) Act 1995 contains provisions under which it is presumed that a child of 12 years or more has sufficient maturity to be consulted and to express a view on various matters concerning him.⁴⁰ Secondly, the Age of Legal Capacity (Scotland) Act 1991 lays down a general rule that, subject to exceptions, a child of 16 years or older has full legal capacity. One consequence of our recommendation to fix the age of criminal responsibility in terms of an amended section 42 of the 1995 Act is that it brings the ages used in those provisions (namely 12 and 16) into line with the ages of capacity in civil law in the Children (Scotland) Act 1995 and the Age of Legal Capacity (Scotland) Act 1991.⁴¹

(b) The United Nations Convention on the Rights of the Child

2.24 The UN Convention was adopted by the General Assembly of the United Nations on 20 November 1989 and has binding force under international law on the Contracting States. The Convention is not part of the domestic law of Scotland and an Act of the Scottish Parliament which did not fulfil the requirements of the UN Convention would not for that reason be outwith the Parliament's legislative competence. However we take the view that as far as possible any recommendations which we make for reform of the law of Scotland should be consistent with the international obligations of the United Kingdom Government.

2.25 For purposes of the Convention a child is a person under the age of 18 unless, under the domestic law applicable to the child, majority is attained earlier.

Article 3(1) of the Convention states:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 37 provides:

"States Parties shall ensure that:

(a) no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age;

³⁸ See paras 3.6 to 3.20.

³⁹ See K McK Norrie, *Parent and Child* (2nd edn, 1999), pp 476-489.

⁴⁰ See eg Children (Scotland) Act 1995, ss 6(1); 11(10); 16(2).

⁴¹ See further para 3.16.

(b) no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; "

Article 40 provides:

"1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

"3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions, specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) whenever appropriate and desirable, measures for the dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

2.26 A Committee set up by the United Nations to monitor compliance with the Convention issued a report on the United Kingdom in 1995. Its concluding observations included the following comments:

"17. The administration of the juvenile justice system in the State Party is a matter of general concern to the Committee. The low age of criminal responsibility as well as national legislation relating to the administration of juvenile justice seem not to be compatible with the provisions of the Convention, namely articles 37 and 40."

"35. The Committee recommends that law reform be pursued in order to ensure that the system of the administration of juvenile justice is child-oriented."

"36. More specifically, the Committee recommends that serious consideration be given to raising the age of criminal responsibility throughout the areas of the United Kingdom."

2.27 Several points are to be noted about article 40(3)(a) of the Convention. In the first place it does not in terms use the expression 'age of criminal responsibility' but that general concept is clearly the subject-matter of its provisions. Certainly most commentators interpret article 40(3)(a) in that way, as does the Committee which monitors compliance with the Convention. Furthermore, on a strict reading the requirement of the article is weak and calls only for a presumption (which could be merely rebuttable) rather than a substantive rule on age of criminal responsibility. In addition the article appears to require that a provision on age of criminal responsibility must be in terms of criminal capacity rather than immunity from criminal prosecution. In our discussion paper we took the view that

when read in context article 40(3)(a) did not have this effect. However one of our consultees has argued that the provision must be read in this narrow sense and that it is a requirement of the Convention for a legal system to contain provisions on age of criminal responsibility in the sense of capacity to commit crime and that the provisions must be in the form of a presumption rather than a substantive rule of law. On this view our recommendations for the repeal of section 41 of the 1995 Act and for rules of criminal responsibility to be based on (amended) provisions of section 42 would not fulfil the requirements of the UN Convention.

2.28 We continue in our view that our recommendations for reform would not involve a breach of the UN Convention. It is important that article 40(3)(a) is read in the context of other provisions of the Convention, especially article 3(1) (which requires a general standard of the best interests of the child) and article 40(3)(b) (which requires that children below the age of criminal responsibility be dealt with other than by judicial proceedings). These provisions suggest that the context of rules on the age of criminal responsibility is the types of legal process which are appropriate for dealing with children who offend.⁴² We therefore conclude that the concept of age of criminal responsibility of concern to the UN Convention is that relating to the age for entry into the criminal justice system. In any case we note the provisions of article 41 of the Convention which state that nothing in the Convention shall affect any provisions contained in the law of a State Party which are more conducive to the realisation of the rights of the child. In our view the Convention's purposes are secured as much, if not more, by provisions relating to immunity from criminal prosecution and punishment as by provisions on criminal capacity.

2.29 We also interpret the phrase 'shall be presumed' in article 40(3)(a) in a wide sense to cohere with the purpose of the provisions as set out above. We do not read the article as requiring that a provision on age of criminal responsibility should be framed by way of evidential presumptions rather than by rules of law. Even if it is the case that article 40(3)(a) is satisfied by use of presumptions, a fixed rule would achieve a greater realisation of the relevant right of the child in terms of article 41 of the Convention. In Part 3 we recommend that section 42(1) of the 1995 Act should be retained subject to an amendment that children under 12 cannot be subject to any criminal prosecution. The effect of our recommendations is that children under the age of 12 are granted an absolute immunity from prosecution, whereas for children aged over 12 and under 16 the immunity is in effect (though not in strict terms) presumptive. We believe that both in terms of the substance and form, the law on age of criminal responsibility which would result from our recommendations would not breach the requirements of the UN Convention on the Rights of the Child.

2.30 We are also of the view that our recommendations would meet the points raised by the United Nations monitoring committee referred to earlier.⁴³ By emphasising restrictions

⁴² This reading of the Convention is consistent with the limited help to be derived from the *travaux préparatoires*. It appears that there was virtually no discussion of age of criminal responsibility during the drafting stages of the Convention (see S Detrick, *The United Nations Convention on the Rights of the Child. A Guide to the Travaux Préparatoires* (1992), pp 492-494). The record of proceedings indicates only one relevant determination: "States Parties recognise the right of children who are accused or recognised as being in conflict with the penal law not to be considered criminally responsible before reaching a specific age according to national law, and not to be incarcerated. The age of criminal responsibility shall not be fixed at too low an age, bearing in mind the facts and circumstances of emotional, mental and intellectual maturity and stages of growth." This determination does not suggest that age of criminal responsibility must be used solely in the sense of capacity to commit crimes. Indeed it is more consistent with a 'legal process' interpretation. We are grateful to Elaine E Sutherland of the University of Glasgow for pointing out these references to us.

⁴³ See para 2.26.

on the prosecution of children under 16 (including the absolute immunity from prosecution for children under the age of 12) and placing the issue of the prosecution of children in the wider context of the children's hearings system, it becomes easier to appreciate the general nature of the system of juvenile justice in Scotland. Under the present law the existence of a rule on 'age of criminal responsibility' of 8 could well give the impression that children above that age are subject to prosecution in the criminal courts. With the removal of both that rule and of the rule in *Merrin v S*,⁴⁴ and the introduction of a rule barring prosecution of children under 12,⁴⁵ it will be clear that the vast majority of children under 16 who commit crimes are dealt with in the welfare-oriented system of children's hearings rather than through the criminal justice system.

⁴⁴ 1987 SLT 193.

⁴⁵ See Recommendations 1-3, paras 3.2 to 3.26. The effect of our recommendations would be to increase the range of child offenders who come within the jurisdiction of children's hearings without at the same time making those children liable to criminal prosecution.

Part 3 Recommendations for Reform

Overview

3.1 We now set out our recommendations for reform of the law on the age of criminal responsibility in Scots law. There are 3 major recommendations:

- (1) Abolition of the rule in section 41 of the Criminal Procedure (Scotland) Act 1995 that a child under 8 years of age cannot be guilty of an offence, and of its common law equivalent.⁴⁶
- (2) Amendment to section 42 of the 1995 Act by providing that a child under 12 years of age cannot be prosecuted.⁴⁷
- (3) Reversal of the decision in *Merrin v S*⁴⁸ so that a child may be referred to a children's hearing on the ground of having committed an offence even if the child could not be prosecuted for that offence.⁴⁹

We also make recommendations for the transitional effects of these reforms. Further, we discuss various matters considered in our discussion paper but which are not subject to any recommendations for reform.

Abolition of the rule on criminal capacity of children

3.2 In Part 2 we discussed in some detail the historical development of the rule which now appears in section 41 of the 1995 Act. We have reached the conclusion that with the introduction of the children's hearings system in 1971 and the experience of the workings of that system, there is no need for the rule in section 41. While that provision is set out in the language and concepts of criminal capacity, its historical rationale has been concerned with the unfairness of prosecuting and punishing young children. That consideration is now the concern of other and more elaborate rules, especially that in section 42(1) of the 1995 Act. In essence we agree with the approach of the Kilbrandon Committee that with the existence of the welfare-based children's hearings for young offenders and severe restrictions on prosecuting children in the criminal courts, there is no need for a rule on the criminal capacity of children.⁵⁰ The issue on which contemporary debate is focussed is the age of entry of young offenders into the criminal justice system, and we consider that it is in respect of that issue which our legal system should state its provisions on 'age of criminal responsibility.'

⁴⁶ Recommendation 1, para 3.5.

⁴⁷ Recommendation 2, para 3.20.

⁴⁸ 1987 SLT 193.

⁴⁹ Recommendation 3, para 3.26.

⁵⁰ Some early commentators on the Kilbrandon Committee Report recognised that the Report was arguing for a change in the nature of the idea of age of criminal responsibility. See, for example, J V M Shields, 1964 J R 180 (at p 185): "The most important point in the recommendations made by the Kilbrandon Committee is, if the proposals contained in the Report are adopted, that the age of criminal responsibility is in effect being raised to sixteen."

3.3 For these reasons we proposed in the discussion paper that the rule which appears in section 41 of the 1995 Act, as well as its common law equivalent, should be abolished. This proposal received overwhelming support from our consultees. Many consultees pointed to the understandable public confusion that has arisen from the existence of two different rules about the age of criminal responsibility. There was also support for our argument that age of criminal responsibility was better thought of in terms of not subjecting children to the criminal justice system.⁵¹

3.4 Several consultees expressed concern that removal of a rule on criminal capacity might be misunderstood as involving the abolition of the very idea of age of criminal responsibility or that as a consequence of our proposal very young children could find themselves facing criminal charges. We wish to make clear that our recommendations for reform are seeking to give greater clarity to the idea of age of criminal responsibility, not to abolish it. Our objective is for Scots law to use a concept of age of criminal responsibility which is appropriate for a system in which the vast majority of child offenders are not processed through the criminal courts but are dealt with by the welfare-oriented system of children's hearings. Our specific proposal to abolish rules on the criminal capacity of children has to be understood as being part, but only part, of achieving that more general objective. It is not a consequence of this proposal that children of any age, even children below 8, would necessarily be liable to criminal prosecution. Instead our point is that the issue is better characterised as one relating to prohibition or restriction on prosecution rather than about the capacity to commit crimes. We consider the particular issue of a prohibition on the prosecution of children below a fixed age immediately below.

3.5 Accordingly we recommend that:

1. **Any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished.**

(Draft bill, section 1)

The prosecution of children in the criminal courts

3.6 In the discussion paper we examined the issue whether all children under the age of 16 who commit offences should be immune from criminal prosecution and subject only to the jurisdiction of the children's hearings system. The Kilbrandon Committee recommended that rules on the minimum age of criminal capacity should be abolished and that the vast majority of young offenders should be dealt with under the new welfare system. Nevertheless the Committee also considered that it was important to retain the option of prosecuting young offenders in exceptional cases. This recommendation was implemented by section 31 of the Social Work (Scotland) Act 1968 and now appears in section 42 of the 1995 Act. It is important to bear in mind that our terms of reference preclude us from considering whether the specific age contained in those provisions should be amended. Rather our concern is with the nature of the rule that children under 16 are not to be subject to criminal prosecution unless on the instructions of the Lord Advocate. In the discussion paper we identified a number of factors which placed restrictions on the Lord Advocate's

⁵¹ An editorial comment in SCOLAG Legal Journal said of our proposal for a rule giving children immunity from criminal prosecution: "This latter is surely what most people mean by the age of criminal responsibility." (SCOLAG Legal Journal, September 2001, p 150).

discretion in deciding to prosecute children. We also examined the use made in practice of prosecution of children under 16 and found that the vast majority of children who are alleged to have committed an offence were not subject to criminal prosecution. Our provisional view was that it should continue to be possible for children under the age of 16 to be prosecuted in exceptional cases where this was in the public interest. However, without stating a concluded view on the matter, we also asked whether there should be absolute prohibition on the prosecution of children below a specified age. In the light of the points raised during the consultation process we remain of the view that the existing statutory provisions which allow the prosecution of children under 16 should be retained. We are also of the view that the existing controls on the Lord Advocate's discretion are in general terms adequate to ensure that children under 16 are subject to prosecution only in rare cases where required in the public interest but we now recommend that that children under the age of 12 should be totally immune from prosecution.

3.7 As noted earlier, the Kilbrandon Committee rejected the idea that children who committed offences should be subject only to the new system of hearings. The Committee believed that there would be some circumstances in which prosecution of children was in the public interest but it envisaged that these cases would be rare. This part of the Kilbrandon Committee's reasoning has been subject to the criticism that it is inconsistent to argue that young offenders should be dealt with on a welfare basis yet at the same time allow some young offenders to be prosecuted through the criminal courts.⁵² Indeed it might be thought that the more serious the offence the more the offender should be subject to procedures which are imbued with welfare considerations. However, we are not persuaded by this line of criticism. It has for long been a fundamental principle of Scots law that in decisions relating to a child the court should regard the welfare of the child as its paramount consideration.⁵³ Yet it has also been accepted that the welfare of the child, though paramount, is not the sole or overriding principle for the court to consider.⁵⁴ Similarly, the UN Convention on the Rights of the Child refers to the best interests of the child as 'a primary' consideration in all actions concerning children. This expression clearly does not envisage welfare as an overriding consideration and may even allow for the existence of other 'primary' considerations.

3.8 On this matter we agree with the reasoning of the Kilbrandon Committee. We accept that the vast majority of children under 16 who commit offences are better dealt with as part of the children's hearings system but equally we believe that the option of prosecuting in exceptional cases should be retained. We believe that public confidence in *both* the hearings system and the criminal justice system requires that in exceptional cases children should be prosecuted where that would be in the public interest. As we pointed out in the discussion paper, there are controlling factors which limit the discretion of the Lord Advocate in deciding whether the public interest calls for the prosecution of children under 16 years of age.

⁵² For discussion see Allison Morris, "Scottish Juvenile Justice: A Critique" in R Hood (ed), *Crime, Criminology and Public Policy. Essays in Honour of Sir Leon Radzinowicz* (1974) at pp 360-366; G H Gordon, "The Role of the Courts" in F M Martin & Kathleen Murray (eds), *Children's Hearings* (1976) at p 22; Andrew Lockyer and Fred Stone "The Kilbrandon Philosophy Revisited" in Andrew Lockyer and Frederick Stone (eds), *Juvenile Justice in Scotland. Twenty Five Years of the Welfare Approach* (1998), at p 28.

⁵³ See eg Guardianship of Infants Act 1886, s 5; Guardianship of Infants Act 1925, s 1; Illegitimate Children (Scotland) Act 1930, s 2; Law Reform (Parent and Child) (Scotland) Act 1986, s 3(2). See now the Children (Scotland) Act 1995, ss 11(7); 16(1).

⁵⁴ K McK Norrie, *Parent and Child* (2nd edn, 1999), pp 317-319; cf Children (Scotland) Act 1995, s 16(5).

(a) In the first place, (apart from cases of strict liability) the Crown must always prove that the accused acted with the requisite mens rea for the offence. In the case of children who are accused of crime, there might be formidable difficulties in proving the criminal capacity of the child. In our discussion paper we were of the view that this requirement would have the effect that in practice very young children would not be prosecuted. We now take the view that this goal is better achieved by a rule which prevents the prosecution of children under the age of 12.⁵⁵

(b) Secondly, the effect of the European Convention on Human Rights is that when a child is to be subject to prosecution in the criminal courts, the procedure must be modified to reflect fully the child's capacity to understand and to participate effectively in the proceedings against him.⁵⁶ The younger the child the more modifications to the procedure there will have to be.

(c) Thirdly, the Crown's discretion is subject to guidelines on when it is appropriate to prosecute children under 16. The Crown Office has published a Prosecution Code which sets out the general criteria for prosecution decision-making.⁵⁷ These criteria include the nature and gravity of the offence, and the impact of the offence on the victim. Another criterion includes the age of the accused. The Code also refers to the range of options available to the Crown when considering alternatives to prosecuting in the criminal courts. One of these options, 'Referral to Scottish Children's Reporter', states:

"The Lord Advocate has issued confidential guidelines to the police in relation to reporting offences alleged to have been committed by children. The prosecutor retains a discretion to refer to the Reporter cases involving children where such action is considered to meet the public interest."

3.9 We set out in Appendix C the terms of the Lord Advocate's direction to chief constables on reporting to procurators fiscal of offences alleged to have been committed by children.⁵⁸ It does not follow that because an offence is reported to the procurator fiscal that the outcome will be a criminal trial, as these cases are subject to further guidelines on prosecution policy. Our understanding of current policy is that in respect of all children under 16 the presumption is in favour of a case being dealt with by the Reporter. Criminal proceedings are to be taken only where there are compelling reasons in the public interest to do so. In the case of a child who was under the age of 13 years at the time of the offence, the prior and express authority of the Lord Advocate must be obtained.⁵⁹

3.10 It is also important to examine the practical impact of these provisions. In practice the vast majority of children under 16 who commit crimes are not prosecuted. From the statistics in Appendix D it can be seen that in the year 1997/1998 the total number of children dealt with the hearings system on the offence ground was 27,562. The figure in 1998/1999 was 28,213 and 30,633 in 1999/2000. By contrast the number of children under 16

⁵⁵ Recommendation 2, para 3.20.

⁵⁶ *T v UK ; V v UK* (2000) 30 EHRR 121.

⁵⁷ We reproduce part of this Code in Appendix B.

⁵⁸ For discussion of an earlier version of this direction see *Stair Memorial Encyclopaedia*, vol 17, para 888.

⁵⁹ A similar policy has been applied since the introduction of the children's hearings system: see G H Gordon, "The Role of the Courts" in F M Martin & Kathleen Murray (eds), *Children's Hearings* (1976), at p 21.

prosecuted in the criminal courts was 189 in 1997, 179 in 1998 and 105 in 1999.⁶⁰ The statistics for referrals and criminal prosecution do not match exactly. Each uses a different basis for determining the year in question and the referral statistics include a small number of cases involving children aged 16 and 17.⁶¹ Also the age of children in the referral statistics is their age at first referral but for prosecution it is their age at sentence. Nonetheless it is abundantly clear from these figures that of children under 16 who are alleged to have committed an offence, over 99% are dealt with in the hearings system and only about 0.5% are prosecuted in the criminal courts. Furthermore the fact that a child has been prosecuted in the criminal courts does not mean that welfare considerations are absent. Tables 11 and 12 in Appendix D show that for children against whom a criminal charge has been proved the largest single mode of disposal is for the court to remit the case to a children's hearing.⁶²

3.11 On the whole consultees tended to support our provisional proposal that it should remain competent for children under the age of 16 to be prosecuted, though some doubted whether the existing safeguards were adequate to ensure that prosecutions which did occur were truly exceptional and clearly justified in terms of the public interest. In the discussion paper we mentioned a further possible measure to restrict the Crown's discretion in respect of the prosecution of children, namely a statutory rule that children below a specified age could not be prosecuted for any offence.

3.12 In the discussion paper we pointed out that if section 41 of the 1995 Act were to be abolished and the provisions on the prosecution of children retained, one consequence would be that it would be possible, at least in theory, for a very young child, even a child under 8 years of age, to be prosecuted in the criminal courts. Our view was that it was highly unlikely that very young children would ever be prosecuted as a matter of practice given the three controlling factors on decisions to prosecute a child of any age below 16 (namely the duty on the Crown to prove mens rea, the requirement to adapt trial procedures to enable full and effective participation by the child, and guidelines limiting prosecution to only those cases in the public interest).

3.13 At the same time we accepted that there might be advantages in having a rule which makes children below a certain age absolutely immune from criminal prosecution. In the first place, it might be thought repugnant that our legal system should countenance the prosecution of very young children, however much court procedure was adapted to take account of their age. Secondly, the resulting restriction on prosecution discretion would be minimal given that so few children under 16 are prosecuted and the vast majority of them are in the 14-15 age bracket. On the other hand, we pointed out that any age limit for this purpose would be arbitrary and it might be difficult to define the criteria to be used in fixing it. Problems would arise in cases where the child was just below the fixed age limit. For example, if the rule was that no child under the age of 10 could be prosecuted, it is difficult to see how the public interest considerations which would justify the prosecution of a child aged 10 would not also apply to a child aged 9 years and 11 months.⁶³ Further any age limit

⁶⁰ The number of children aged 13 or younger prosecuted in the criminal courts was 14 (1997), 9 (1998) and 5 (1999).

⁶¹ Appendix D, Tables 1-6.

⁶² For the period 1994-1999 the total number of children under 16 against whom a criminal charge was proved was 906. In 276 (30.5%) of these cases the mode of disposal was a remit to a children's hearing.

⁶³ We noted earlier (para 2.8) that the Kilbrandon Committee accepted that its own recommendations had the consequence that a child younger than 8 could be prosecuted but it thought that such cases would be rare.

for prosecution could be avoided by the Crown delaying prosecution until the child reached the appropriate age.⁶⁴

3.14 We did not state a concluded view on this issue in the discussion paper. No clear view emerged on consultation, though the majority of those who commented on this question favoured the introduction of a rule which specified an age below which prosecution would be incompetent. Consultees who were against a fixed rule argued that the existing provisions were adequate to ensure that very young children were not prosecuted. The degree of flexibility in the present system was said to be in accordance with the general approach of the Crown to consider each case respecting child prosecution on its merits and to prosecute only where that step was in the public interest. Other consultees took a completely different view and argued that a fixed age limit on prosecution was necessary. Allowing the possibility of the prosecution of very young children would be to send a wholly inappropriate message about both the criminal justice and the children's hearings systems.

3.15 We find the views of the majority of our consultees persuasive and we have come to the conclusion that there should be a rule that a child below a certain age cannot be prosecuted. We are also of the view that the age should be 12. We deal first with our reasons for recommending the introduction of a rule setting out a fixed minimum age for prosecution. We agree with the view of several of our consultees that a rule of this nature expresses important values about the ways in which society should deal with young children who offend. Our reasons for recommending a fixed-age rule are based mainly on the principle that the criminal process is not a suitable mechanism for dealing with such children. This general principle is implicit in the decision of the European Court of Human Rights in *T v UK; V v UK*.⁶⁵ We consider it appropriate that the general principle should be given a more precise formulation in statute. Furthermore, as several of our consultees pointed out, no other European legal system permits the prosecution of children to be based entirely on discretion without also an absolute prohibition on the prosecution of children below a defined age.

3.16 Next we set out our reasons for recommending that the specified age should be 12.

(1) In the first place, 12 was the age most commonly suggested by those consultees who favoured the introduction of a fixed rule on a minimum age for prosecution. We attach particular value to the views of consultees when selecting an age from a range of possible options.

(2) Secondly, the age of 12 would be consistent with the requirements of the European Convention on Human Rights. As noted earlier the Convention does not impose a specific age of criminal responsibility.⁶⁶ However the decision in *T v UK; V v UK* has the effect that if a child is to be prosecuted the procedures used must take account of the child's level of maturity and intellectual and emotional capacities and must promote the child's understanding of, and participation in, the proceedings against him. As a consequence of

⁶⁴ We doubt whether deliberate delay by the Crown to get round a provision on a minimum age for prosecution would be likely in practice and, more to the point, would be compatible with the requirements of the European Convention on Human Rights. We consider this matter further at para 3.18.

⁶⁵ (2000) 30 EHRR 121.

⁶⁶ See para 2.15.

that decision it is highly unlikely that children under the age of 12 would be subject to criminal prosecution.

(3) Thirdly, as we noted earlier, 12 is also a significant age in respect a child's capacity in civil law.⁶⁷ In the present context there are several aspects of the civil law which support adopting 12 as the age for a rule on the criminal prosecution of children. A child aged 12 or more is presumed to be of sufficient age and maturity to have the understanding for instructing a solicitor in civil proceedings, and as a consequence to have the capacity to pursue and defend civil proceedings.⁶⁸ A similar presumption in respect of a child of 12 or older requires a court to give a child of this age an opportunity to express his views and to have regard to such views in proceedings in the sheriff court or the Court of Session concerning court orders relating to parental responsibilities and rights and other matters of concern to the child.⁶⁹ Furthermore, within the context of the children's hearings system, where a decision relating a child is to be made by a children's hearing or by a sheriff, the child should be given an opportunity to express his views and have these views considered. Again it is presumed that a child aged 12 or older has sufficient maturity to form a view.⁷⁰

3.17 One argument against introducing an absolute immunity from prosecution is that a fixed rule might give rise to an implication that children above the age mentioned in the rule are liable to be prosecuted. We accept that this argument has some force. Indeed we argued earlier that since the introduction of the children's hearings system in 1971 the age of criminal responsibility in Scots law has in effect been 16 and that the existence of a rule on criminal capacity has tended to obscure this position.⁷¹ The effect of a rule barring prosecution of children under the age 12 might be to give the impression that the age of criminal responsibility has been raised from 8 to 12. However we believe that by introducing a rule relating to immunity from prosecution (rather than capacity to commit an offence) this danger can be avoided. In our view a rule on children under the age of 12 being absolutely immune from criminal prosecution should be seen as part of a wider set of provisions relating to the prosecution of children. These provisions include section 42 of the 1995 Act and the other factors which limit the Crown's discretion to prosecute children under 16. The outcome would be that children aged below 12 years of age would have an absolute immunity from criminal prosecution; in the case of children between 12 and 16 their immunity from prosecution would apply except in rare situations where prosecution was in the public interest. Accordingly we recommend that the rule in relation to children under the age of 12 should be introduced by amendment of section 42 of the 1995 Act.⁷²

3.18 Both the existing and amended versions of section 42 state that no child under a certain age 'shall be prosecuted'. The 1995 Act does not provide a definition of prosecution for the purposes of this provision. As a result the date of a prosecution at which the age of the child is relevant for section 42 depends on the general law. Solemn proceedings normally commence on the date of whichever happens first: the grant of a petition warrant

⁶⁷ See para 2.23.

⁶⁸ Age of Legal Capacity (Scotland) Act, s 2(4A),(4B), added by Children (Scotland) Act 1995, Sch 4, para 53.

⁶⁹ Children (Scotland) Act 1995, s 11(7), (10).

⁷⁰ S 16(2). See also Child Support Act 1991, s 7 (a child who has attained the age of 12 may apply to the Child Support Agency for a maintenance assessment to be made); Adoption (Scotland) Act 1978, ss 12(8), 18(8) (a child 12 or older must consent to his adoption or freeing for adoption unless the court dispenses with the child's consent on the ground of lack of capacity).

⁷¹ See para 2.13.

⁷² Draft bill, section 2.

to arrest and commit the accused, the intimation of a petition, or the service of an indictment.⁷³ The complaint is the document that commences summary proceedings. An accused who is brought before the court from custody is given a copy of the complaint beforehand.⁷⁴ For non-custody cases proceedings normally commence when the citation and service copy complaint is posted to the accused.⁷⁵ Provisions prohibiting or restricting the prosecution of children below a certain age cannot be got round by the Crown delaying prosecution until the child reaches the age in question. Such an approach would be incompatible with article 6 of the European Convention on Human Rights which provides that in the determination of a criminal charge: "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." It has been held that what constitutes unreasonable delay must be determined in the context of the Scottish legal system.⁷⁶ If our recommendations for reform were to be implemented that context would include the principle that children under 16 who commit offences should normally be subject to the children's hearings system rather than criminal prosecution and more especially that children under 12 should not be prosecuted at all. It has also been held that proceedings against children call for particular expedition and that avoidance of delay is an important element in the general approach of the Beijing Rules and the UN Convention on the Rights of the Child that:⁷⁷

"children accused of committing crimes should be treated in a manner which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

We have no reason to suppose that the Crown would adopt a tactic of holding back the prosecution of a child in order to get round a rule that children below the age of 12 could not be prosecuted. In any case we are of the view that any such tactic would be open to challenge under the law which regulates delay in the system of criminal prosecution.

3.19 To summarise our position on the prosecution of children: We do not favour removing all children under the age of 16 from the ambit of the criminal justice system but we do recommend that it should not be competent to prosecute a child who is under the age of 12. For children above 12 and under the 16 prosecution should remain competent but subject to existing safeguards to ensure that prosecution is used only in rare cases where it is in the public interest to do so.

3.20 Accordingly we recommend that:

2. **The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted.**

(Draft bill, section 2)

⁷³ Renton and Brown, *Criminal Procedure* (6th edn) para 12-04; *Hamilton v H M Advocate* 1996 SCCR 744.

⁷⁴ A N Brown, *Criminal evidence and procedure: an introduction* (1996), pp 94-95.

⁷⁵ Renton and Brown, *Criminal Procedure Legislation*, para 4-291.

⁷⁶ *Gibson v HM Advocate* 2001 SLT 591, 593E-H.

⁷⁷ *HM Advocate v P* 2001 SLT 924, 927J-928A. The UN Convention provides that a child alleged to have infringed the penal law has the right "to have the matter determined without delay" (article 40(2)(b)). Rule 20 of the Beijing Rules states that: "Each case shall from the outset be handled expeditiously, without any unnecessary delay." See further paras 2.20 to 2.30 on the UN Convention and the Beijing Rules.

Referral to a children's hearing on ground that the child has committed an offence

3.21 One of the grounds of referral of a child to a children's hearing to consider whether compulsory measures of supervision are necessary is that the child "has committed an offence."⁷⁸ This ground is the most commonly used ground of referral.⁷⁹ In *Merrin v S*⁸⁰ the Inner House held by a majority that this ground could not apply to a child under the age of 8. The majority judges read the rule on the age of criminal responsibility as relating to mens rea. Consequently a child under 8 could not 'commit' an offence (at least one requiring mens rea).⁸¹ Lord Dunpark dissented, taking the view that while the rule on the age of criminal responsibility applied where a child was being prosecuted in the criminal courts, it had no place in the separate and distinctive children's hearings system.⁸²

3.22 Lord Dunpark further noted that a consequence of the majority decision was that a child under the age of 8 who engaged in criminal conduct could not be brought into the hearings system unless one of the other grounds of referral applied to him.⁸³ Several commentators have argued that *Merrin v S* would have little impact in practice as alternative grounds would usually exist if a child under 8 has been 'committing' what amounts to criminal offences.⁸⁴ However in *Merrin* itself Lord Dunpark made the point that on the facts of that case no alternative ground existed. Moreover in a later decision, *Constanda v M*,⁸⁵ the Inner House stressed that where the ground of referral was the commission of an offence by the child, the only possible ground that could be used was that in section 52(2)(i). The Court accepted that offending by a child might in some circumstances indicate the existence of a different ground.⁸⁶ However the Act made special provision for the offence ground in that a case under this ground had to be established on the standard of proof in criminal proceedings.⁸⁷ All other grounds (including those that the child is the victim of certain specified offences, or shares the same household as the victim or perpetrator of those offences) need only be proved on the balance of probabilities.⁸⁸ There would be no point in these special protections if the commission of an offence by the child and nothing else could form the basis of any ground of referral other than that in section 52(2)(i).

3.23 It follows that the effect of *Merrin v S* is that there are cases of children under the age of criminal responsibility who are not subject to the children's hearings system despite having 'committed' crimes. In the discussion paper we stated that it was paradoxical that children who commit offences, and who might be thought to form the most suitable cases to come within the hearings system, are beyond the scope of *both* the criminal justice system

⁷⁸ Children (Scotland) Act 1995, s 52(2)(i) (formerly Social Work (Scotland) Act 1968, s 32(2)(g)).

⁷⁹ In 1999/2000 out of a total of 69,173 referrals dealt with by reporters 30,633 were on the offence ground (Scottish Children's Reporter Administration, *Annual Report 1999-2000*, p 7). See further Appendix D.

⁸⁰ 1987 SLT 193.

⁸¹ See Lord Justice Clerk (Ross) at 196F; Lord Brand at 199F.

⁸² 1987 SLT 193 at 197E-F.

⁸³ *Ibid* at 197K-198A.

⁸⁴ For example, K McK Norrie, *Children's Hearings in Scotland* (1997), p 28; Stair Memorial Encyclopaedia, vol 3, para 1336.

⁸⁵ 1997 SLT 1396.

⁸⁶ For example proof that a child had repeatedly committed thefts might give rise to an inference that the child was beyond parental control under s 52(2)(a) of the Children (Scotland) Act 1995. Cf *Constanda v M* 1997 SLT 1396 at 1399H, per Lord Coulsfield.

⁸⁷ Children (Scotland) Act 1995, s 68(3)(b). The court has extended this idea of the 'criminal' standard of proof to include other evidentiary rules in criminal cases, such as the requirement of corroboration (*Constanda v M* at 1399H).

⁸⁸ *Harris v F* 1991 SLT 242.

and the hearings system solely because of their age. We proposed that the decision in *Merrin v S* should be reversed by statute. The actual basis of the decision in that case disappears with the repeal of section 41 which we have recommended earlier. However we also proposed that the rule in *Merrin v S* should be changed if a rule were to be adopted that children below a certain age are immune from prosecution (which we have also recommended in this report).

3.24 Virtually all of the consultees who commented on this issue agreed with our proposal and the reasons underlying it. Some made further comments about the nature of criminal proof required to establish the offence ground of referral and one body argued that the offence ground should be reformulated to emphasise that the focus of attention of the hearings system was on a child's anti-social conduct rather than on the criminality of the conduct as such. However these further comments do not concern matters within our present terms of reference and accordingly we express no views on them.

3.25 We have also considered whether there are European Convention implications in allowing the commission of a crime to be established for purposes of the children's hearing system against a child who is immune from criminal prosecution. We are of the view that such a provision would not breach the terms of the Convention. The key factor is the nature of proceedings under the Children (Scotland) Act 1995 as being centrally concerned with the welfare of the child, and not the prosecution and punishment of crime. In *S v Miller*,⁸⁹ the Inner House held that a child referred to a hearing on the offence ground was not a person charged with a criminal offence in terms of article 6 and accordingly the special protection of that article in respect of proceedings concerned with the determination of a criminal charge did not apply.⁹⁰

3.26 Accordingly we recommend that:

3. It should be competent to refer a child to a children's hearing under section 52(2)(i) of the Children (Scotland) Act 1995 notwithstanding that because of his age the child cannot be prosecuted for the offence.

(Draft bill, section 3)

Matters on which we make no recommendations for reform

3.27 In the discussion paper we set out a number of other issues for consultation. In the light of the responses which we received and our recommendations for reform, we make no proposals in respect of those issues.

3.28 (1) *Rebuttable presumption as to the mens rea of children.* In the discussion paper we noted that in some legal systems there is a rebuttable presumption that children below a certain age lack the capacity to form the mens rea of any offence. We noted that many of those systems had experienced a number of practical problems and difficulties in the operation of the presumption. In England the presumption has been subject to considerable

⁸⁹ 2001 SLT 531.

⁹⁰ It was accepted that the hearings system was subject to article 6 in respect of the determination of the child's civil rights.

criticism and was abolished by statute in 1998.⁹¹ We proposed that no equivalent presumption should be introduced into Scots law. In the light of the relatively low number of cases to which it would have any application we saw no advantage in adopting it as part of our system. In Scots law the onus of proving mens rea rests with the Crown. We took the view there was no need to alter this fundamental principle. In as much as a rebuttable presumption is designed to protect the interests of young people who have committed a crime, those interests were better protected by other means. Our provisional proposal was supported by virtually all consultees who commented on it. Accordingly we adhere to the position which we adopted in the discussion paper.

3.29 (2) *The law on art and part guilt and on incitement and conspiracy.* We examined these areas of criminal law in the discussion paper. We did so in the context of an argument, sometimes found in discussions of the age of criminal responsibility, that children who are presumed incapable of committing a crime or who are immune from prosecution are likely to be used by older and professional criminals to carry out criminal activity on their behalf.⁹² We stated that we were not aware of any information which suggested that the exploitation of children to commit crimes was a problem in Scotland but we accepted that if the age of criminal responsibility were to be fixed at a higher age, the possibility that children would be exploited in this way could not be altogether dismissed. We reached the conclusion that the current law on art and part guilt and on incitement and conspiracy were adequate to deal with problems which may arise from attempts to use children below the age of criminal responsibility to commit crimes. However we asked whether the existing law should be re-stated in statutory form.

3.30 None of the consultees who responded on this matter provided us with any evidence which suggested the scale of any problem of this nature in Scotland. Consultees also agreed that the existing principles of the criminal law were adequate to deal with any problem which might arise. However there was a division of view on the desirability of statutory reformulation of the law, a majority favouring a restatement but a minority taking the view that such a course was neither necessary nor desirable. In the absence of any agreed view we have decided not to make any recommendation on this matter. In the discussion paper, we noted the existence of an unofficial draft Criminal Code for Scotland.⁹³ The draft Code contains provisions on art and part guilt and on the offences of incitement and conspiracy, and we are of the view any consideration of the form of the law on these topics should await the outcome of the work on the Code.

3.31 (3) *Form of a rule on criminal capacity.* In the discussion paper we proposed that if Scots law were to retain a rule on the minimum age of criminal responsibility in the sense of criminal capacity, that rule should be expressed as a rule of substantive law and not as a conclusive presumption. Virtually all consultees who commented on this proposal agreed with our view. However as we are now recommending that rules on age of criminal responsibility in the sense of criminal capacity should be abolished, the form of such a rule no longer requires consideration.

⁹¹ Crime and Disorder Act 1998, s 34.

⁹² See eg the Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong* (2000), paras 3.2-3.3

⁹³ The draft code has been prepared by a group of academic lawyers. For an account of the background to the code see Barry T Smith, "Draft Criminal Code for Scotland" 2001 SLT (News) 17. The code has been drafted in the form of a bill of the Scottish Parliament.

Transitional provisions

3.32 We next consider the transitional effects of the recommendations contained in the draft bill. The general presumption is that statutes do not alter the law retroactively and therefore the provisions of an Act do not apply to action or conduct committed prior to its commencement or to any litigation started (even if continuing) before that date. We recommend that the bill should contain transitional provisions to give effect to this general principle. This approach is in any case necessary to avoid a situation of rendering a child liable to prosecution after the commencement of the Act for a prior offence committed while under the age of 8. This scenario is, however, unlikely to occur in practice. Section 2 of the bill prohibits the prosecution of a child under 12. Consequently a transitional problem would arise only where a child was under 8 at the time of the offence but is 12 or older after the commencement of the Act. At the very least such a prosecution would invite a challenge in terms of article 7 of the European Convention on Human Rights.⁹⁴ Accordingly we recommend that the provisions of the draft bill should not render a person liable to prosecution in respect of an offence committed by him prior to the commencement of the Act when he was under the age of 8.

3.33 We considered whether a different approach would be appropriate in respect of the other provisions in the bill. As noted section 2 of the bill renders incompetent the prosecution of a child under the age of 12.⁹⁵ At the date of commencement of the Act it could be possible that a child under 12 is subject to an existing prosecution. Given the numbers of children under that age who are prosecuted,⁹⁶ this is unlikely but we believe that any prosecution which has started before the commencement date, whether or not completed, should continue under the pre-Act provisions.

3.34 Thirdly, section 3 of the bill makes it competent to refer a child to a children's hearings on the offence ground,⁹⁷ notwithstanding that the child could not be prosecuted for that offence. In the absence of any transitional provision, it would be competent for a child to be referred to a hearing in respect of an offence committed by him prior to the commencement of the Act. Given that the system of children hearings, even when dealing with offence referrals, is characterised as part of the civil rather than criminal law,⁹⁸ such a situation would not necessarily face the same problems in respect of a challenge under the European Convention on Human Rights.⁹⁹ Moreover the outcome would be to allow a child who might otherwise be outwith the jurisdiction of a children's hearing to be subject to a system which has the welfare of the child as its basis. However in our view this outcome does not outweigh the need to give effect to the established principle that a person does not become subject to any form of legal process for conduct committed at time when he was free from such liability.

⁹⁴ Article 7(1) provides: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

⁹⁵ See para 3.18 for discussion of the determination of the date of commencement of a prosecution.

⁹⁶ See Appendix D.

⁹⁷ Children (Scotland) Act 1995, s 52(2)(i).

⁹⁸ *S v Miller* 2001 SLT 531. See para 3.25.

⁹⁹ See para 3.32.

3.35 Accordingly we recommend that:

4. **None of the provisions in the Act shall apply in respect of the conduct of a child committed prior to the date on which the Act comes into force or to any prosecution commenced prior to that date.**

(Draft bill, section 4)

Part 4 List of Recommendations

1. Any rule (whether at common law or statutory) on the age at which children cannot be found guilty of an offence should be abolished.

(Paragraph 3.5)

2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained subject to an amendment to the effect that a child under the age of 12 cannot be prosecuted.

(Paragraph 3.20)

3. It should be competent to refer a child to a children's hearing under section 52(2)(i) of the Children (Scotland) Act 1995 notwithstanding that because of his age the child cannot be prosecuted for the offence.

(Paragraph 3.26)

4. None of the provisions in the Act shall apply in respect of the conduct of a child committed prior to the date on which the Act comes into force or to any prosecution commenced prior to that date.

(Paragraph 3.35)

APPENDIX A

Children (Criminal Responsibility and Prosecution) (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to abolish any rule or presumption that children under a certain age cannot be guilty of an offence; to prohibit the prosecution of children under the age of 12 years; and for connected purposes.

1 No minimum age for criminal capacity

- (1) Any rule of law or presumption that a child under a certain age cannot be guilty of an offence is abolished.
- (2) Section 41 of the Criminal Procedure (Scotland) Act 1995 (c.46) is repealed.

NOTE

This section implements Recommendation 1 and abolishes rules as to the criminal capacity of children in general. Capacity will in future be a matter to be considered in each case involving a child offender.

Subsection (2) repeals section 41 of the 1995 Act which provides that a child under the age of 8 is conclusively presumed not to be guilty of an offence. Section 41 is a re-enactment without change of section 14 of the Children and Young Persons (Scotland) Act 1932.

Subsection (1) deals with the common law rule or presumption that was replaced by a statutory provision in 1932. It prevents the common law reviving on the repeal of section 41.

2 Prosecution of children

Section 42 of the Criminal Procedure (Scotland) Act 1995 (c.46) is amended as follows—

(a) before subsection (1) there is inserted—

"(A1) No child under the age of 12 years shall be prosecuted for any offence."

(b) in subsection (1), after "child", where it first appears, there is inserted "aged 12 years or more but".

NOTE

This section implements Recommendation 2 by prohibiting the prosecution of any child under the age of 12. The age limit applies at the commencement of the prosecution. The prosecution of children between 12 and 16 would remain subject to the existing statutory provisions, requirements of the European Convention on Human Rights, and the current practices and directions of the Lord Advocate and the Crown Office. The main statutory provision limiting prosecution of children under 16 is section 42(1). This provides that no child under 16 is to be prosecuted except on the instructions of the Lord Advocate or at his instance and that any prosecution is to take place in the High Court or a sheriff court.

Section 2 does not prevent persons over the age of 12 being prosecuted for an offence they committed when under that age, but see section 4(b).

3 Amendment of the Children (Scotland) Act 1995

In section 52 of the Children (Scotland) Act 1995 (c.36), at the end of subsection (2) paragraph (i), there is inserted —

"(whether or not the child can be prosecuted for the offence)".

NOTE

This section implements Recommendation 3. Section 52 of the Children (Scotland) Act 1995 provides that a child may be referred to a children's hearing to consider whether compulsory measures of supervision are necessary on various grounds. One of these, in subsection (2)(i), is that the child has committed an offence. In *Merrin v S* 1987 SLT 193 the Inner House, construing section 32(2)(g) of the Social Work (Scotland) Act 1968 (the precursor of section 52(2)(i)), held that the offence ground could not be used when the child was under 8 at the time of the offence, because the child was conclusively presumed not to be guilty of it in terms of section 41 of the Criminal Procedure (Scotland) Act 1995.

The basis of the decision in *Merrin v S* disappears with the repeal of section 41 by section 1 of the bill. Section 3 makes it clear that a child who cannot be prosecuted for an offence due to section 2 may be referred to a hearing on the offence ground.

4 Transitional provisions

Nothing in this Act —

- (a) affects any prosecution commenced before the Act comes into force;
- (b) makes any person liable to prosecution for anything done before the Act comes into force which, by reason of any rule or presumption abolished by the Act, was not an offence by that person at the time when it was done;
- (c) makes any child liable to compulsory measures of supervision by virtue of section 52(2)(i) of the Children (Scotland) Act 1995 (c.36) in respect of anything done before this Act comes into force which, by reason of any rule or presumption abolished by the Act, was not an offence by that child at the time when it was done.

NOTE

This section implements Recommendation 4. It prevents sections 1 to 3 of the bill having retroactive effect.

Paragraph (a) deals with the prosecution of a child under the age of 12 which had started but had not finished prior to the date of commencement of the enacted bill. It may continue to a conclusion.

Paragraphs (b) and (c) relate to the abolition by section 1 of the statutory and common law rules that a child under 8 cannot be guilty of an offence. The phrase "was not an offence by that person/child" is a reference to those rules. Paragraph (b) prevents the prosecution after the date of commencement of a child aged over 12 for an offence committed pre-commencement when aged under 8. Paragraph (c) similarly prevents such a child being referred after commencement to a hearing on the offence ground.

5 Short title and commencement

- (1) This Act may be cited as the Children (Criminal Responsibility and Prosecution) (Scotland) Act 2002.
- (2) This Act comes into force at the end of the period of three months beginning with the date of Royal Assent.

APPENDIX B

CROWN OFFICE AND PROCURATOR FISCAL SERVICE PROSECUTION CODE¹⁰⁰

CRITERIA FOR DECISIONS

In considering the action to be taken in relation to reports of crime the prosecutor must take account of both legal and public interest considerations.

LEGAL CONSIDERATIONS

Domestic Law

In considering cases the Procurator Fiscal must decide whether the conduct complained of constitutes a crime known to the law of Scotland and whether there is any legal impediment to prosecution. For example, it may be necessary to consider the effect of any delay which has arisen; the Procurator Fiscal must consider any relevant statutory time limits and case law.

International and European Law

The Human Rights Act 1998 and the Scotland Act 1998 require Scottish prosecutors to act in a way which is compatible with the European Convention on Human Rights. The Scotland Act 1998 also makes it clear that the Scottish Executive must act compatibly with the United Kingdom's international obligations in general. In some cases, these obligations will be relevant to decisions about prosecution. For example:

The UN Convention on the Rights of the Child recognises and guarantees certain fundamental rights of the child. Article 3 provides that in all actions concerning children the best interests of the child shall be a primary consideration. This is relevant in cases involving child witnesses or children accused of crime.

EVIDENTIAL CONSIDERATIONS

Sufficiency of evidence

The Procurator Fiscal must be satisfied that there is sufficient admissible evidence to justify commencing proceedings.

¹⁰⁰ Version dated May 2001 on www.crownoffice.gov.uk.

In general, for there to be sufficient evidence there must be corroboration, that is evidence from at least two separate sources to establish the essential facts of the case, ie

- that the crime was committed; and
- that the accused was the perpetrator

The prosecution must prove these matters beyond reasonable doubt.

The various sources of evidence which may be available include not only 'eye witness' evidence but medical, scientific and other forensic evidence as well as evidence of statements by an accused person.

If the evidence appears to be insufficient, the Procurator Fiscal can instruct the police, or request another reporting agency, to carry out further inquiries. If, after a full inquiry, the Procurator Fiscal is satisfied that the evidence is insufficient he cannot then proceed with a prosecution.

Admissibility

The laws of evidence determine whether a court can consider certain types of evidence. In considering the evidence, the prosecutor will assess whether, having regard to the laws of evidence, a court will allow the evidence to be considered in the case. For example, the court may refuse to take account of evidence that has been obtained improperly, irregularly or unlawfully. Similarly, certain categories of evidence are inadmissible.

Reliability

Although there may be sufficient, admissible, evidence to justify criminal proceedings, consideration must also be given to the reliability of that evidence. This involves an assessment of the quality of the evidence. Concerns about the reliability of evidence may result from the existence of contradictory evidence, or from the existence of information which suggests that a witness is unable to provide an accurate account of events.

Where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate.

Credibility

As with reliability, the assessment of the credibility of evidence is ultimately a matter for the court. However, there may be doubt about the credibility, or truthfulness, of a witness's evidence because of other contradictory and apparently credible evidence: because a witness is known to be dishonest or because of prior inconsistent statements made by the witness.

Where there are concerns regarding the credibility of the evidence the Procurator Fiscal may take account of this in assessing whether there is sufficient evidence.

PUBLIC INTEREST CONSIDERATIONS

Assuming that the report discloses sufficient admissible, reliable and credible evidence of a crime committed by the accused, the prosecutor must consider what action is in the public

interest. Assessment of the public interest often includes consideration of competing interests, including the interests of the victim, the accused and the wider community.

The factors which require to be taken into account in assessing the public interest will vary according to the circumstances of each case.

The following factors may be relevant. Not all of them will apply in every case and the weight to be attached to any applicable factor will depend on the circumstances of each case.

The assessment of the public interest involves a careful consideration of all the factors relevant to a particular case.

(i) The nature and gravity of the offence

The nature of the offence will be a major consideration in the assessment of the public interest. In general, the more serious the offence the more likely it is that the public interest will require a prosecution. On the other hand, in the case of less serious offences the prosecutor may consider that the public interest would be best served other than by prosecution. In some circumstances the prosecution of a relatively minor offence, at least without first offering an alternative to prosecution, may be regarded as a disproportionate response to the circumstances of the case.

The particular circumstances of the offence may affect the prosecutor's assessment of the public interest. For example, prosecution may be indicated where the accused was in a position of trust or authority or the victim was a child or otherwise vulnerable.

(ii) The impact of the offence on the victim and other witnesses

Consideration must always be given to the effects of the crime on the victim and any other witnesses. Where an offence results in significant injury or impairment, significant financial loss, distress or psychological consequences for the victim or any other witness it is likely that the public interest will be best served by prosecution. In the absence of such factors, the prosecutor may consider that the public interest would be best served by action other than prosecution.

(iii) The age, background and personal circumstances of the accused

The youth or advanced age of the accused may, depending on other circumstances, be a factor which influences the prosecutor in favour of action other than prosecution.

The public interest is more likely to require prosecution where the accused has a significant history of recent previous convictions, particularly where they include convictions for similar crimes. However, where an accused person is already serving a lengthy custodial sentence, depending on other factors, there may be little to be achieved by a further prosecution.

Finally, the prosecutor may consider that ill health or other adverse personal circumstances on the part of an accused person may justify the exercise of discretion in favour of action other than prosecution.

(iv) The age and personal circumstances of the victim and other witnesses

Similar considerations apply in relation to the victim; the youth, or advanced age or personal circumstances of the victim eg ill health, may be regarded as an aggravating factor tending to indicate that prosecution is appropriate.

Conversely, it may be relevant to consider the possible impact on a witness of attending court and giving evidence; the age or state of health of an essential Crown witness, or some other personal factor may persuade the prosecutor to exercise his discretion otherwise than by prosecution. Such a situation might arise where the prosecutor considers that attending court and giving evidence regarding a relatively minor offence is likely to traumatise or seriously inconvenience a very young, elderly, vulnerable or infirm witness. However, in such circumstances the prosecutor will consider whether the evidence of such a witness can be considered by the court without the witness having to appear in court in person.

(v) The attitude of the victim

In addition to considering the impact of the alleged offence on the victim and other witnesses the prosecutor must take into account any available information indicating the views of the alleged victim about whether prosecution or alternative action is appropriate.

However, any views expressed by a victim or witness will only be one factor in the assessment of the public interest.

(vi) The motive for the crime

The public interest is likely to require prosecution where criminal behaviour was sexually motivated or motivated by any form of discrimination against the victim's ethnic or national origin or religious beliefs.

It may also be relevant to consider whether the behaviour of the accused was spontaneous or planned in advance and whether it was part of a course of criminal conduct by the accused.

(vii) The age of the offence

A significant delay since the date of an offence may indicate that a prosecution will no longer be in the public interest. However, other factors will also be relevant, particularly the nature of the offence: the more serious an offence the more likely that a prosecution will remain appropriate.

In considering this factor, prosecutors must have in mind the relevant legal considerations which may affect the Crown's ability to prosecute viz statutory timebars, the requirements of domestic law and the European Convention on Human Rights.

(viii) Mitigating circumstances

The prosecutor may have reliable information indicating that the accused's actions are mitigated by circumstances such as extreme provocation. Depending on the other circumstances of the case, strong mitigating circumstances may persuade the prosecutor that

prosecution is not necessary and that the case can be dealt with appropriately by other means.

(ix) The effect of prosecution on the accused

In some cases prosecution may have the potential to affect the accused in a way or to an extent which is wholly disproportionate to the gravity of the alleged offence. In relation to less serious offences, this may influence the prosecutor's decision as to the appropriate action.

(x) The risk of further offending

Where there is information regarding the likelihood of further offending this will be relevant in deciding whether to prosecute. A legitimate purpose, both of prosecution and of the use of alternatives, is to prevent/deter further offending.

(xi) The availability of a more appropriate civil remedy

On consideration of the whole circumstances of a case, civil proceedings may offer a more appropriate method for settling the conflict or issue which forms the core of the case. The right of a party to seek civil redress may, depending on other circumstances, influence the prosecutor in favour of a disposal other than prosecution.

(xii) Powers of the court

The ability of the court to take certain action on conviction may be a factor which weighs in favour of prosecution. Examples include the power to award compensation, to disqualify from driving or to order a driver to re-sit the driving test.

(xiii) Public concern

In assessing the public interest the prosecutor will take account of general public concerns as well as local community interests. Arrangements can be made to enable local community representatives to discuss general matters of concern with the Procurator Fiscal although the final decision is the responsibility of the prosecutor.

OPTIONS

PROSECUTION

For many of the cases reported to the Procurator Fiscal prosecution will be the preferred option, assuming that there is sufficient evidence to justify proceedings. In determining the appropriate level of court and type of proceedings the prosecutor will have regard to factors such as the gravity of the offence, the offender's record and the likely penalty in the event of conviction. The practical test to be applied is to consider the sentencing powers of the various courts.

The general rule is that cases should be taken in the lowest competent court unless there is some good reason for prosecuting in a higher court. Certain crimes such as murder and rape can only be prosecuted in the High Court. Where the Procurator Fiscal considers that a case should be prosecuted before a sheriff and jury or before the High Court he is required

to conduct his own investigation and to report the circumstances of the case to Crown Office. The Lord Advocate or one of his deputies (Crown Counsel) will instruct on further action to be taken.

ALTERNATIVES TO PROSECUTION

No Proceedings

In the absence of sufficient evidence the only appropriate action is to take no proceedings. However, where there is sufficient evidence the prosecutor retains a discretion not to proceed where, in his assessment, prosecution is not in the public interest.

No Proceedings Meantime

Where the prosecutor decides that there is insufficient available evidence to justify proceedings in respect of a serious allegation but there is a possibility that further evidence implicating the accused will be submitted within a reasonable time, the case should be marked "no proceedings meantime". Similarly, such action may be appropriate where despite there being insufficient evidence the nature of the criminal conduct suggests that the accused may re-offend in similar circumstances which might provide additional evidence so that proceedings could be brought.

Warnings by the Procurator Fiscal

Other than for cases reported by the Health and Safety Executive, the Procurator Fiscal may issue a written or personal warning to an accused. Such a warning will make it clear that a report of a crime has been submitted to the Procurator Fiscal and that repetition of the alleged behaviour will be likely to result in a prosecution.

Fiscal Fines (statutory conditional offers of fixed penalty)

Section 302 of the Criminal Procedure (Scotland) Act 1995 empowers the Procurator Fiscal to make a conditional offer of a fixed penalty in relation to any offence in respect of which an alleged offender could competently be tried before a district court. A range of penalties of £25, £50, £75 or £100 is available and fixed instalment payments of between £5 and £20 per fortnight may be offered.

Conditional Offers of Road Traffic Offence Fixed Penalties

Section 75(2) of the Road Traffic Offenders Act 1988 (as amended) empowers the Procurator Fiscal to offer a conditional offer of fixed penalty as an alternative to prosecution for specified road traffic offences, including offences such as speeding, failure to comply with road traffic directions and signs and breaches of construction and use regulations.

Diversion from Prosecution

Diversion is the referral of an accused to the supervision of a social worker, psychiatrist, psychologist or mediator for the purposes of support, treatment or other action as an alternative to prosecution. The use of diversion by a Procurator Fiscal will, of course, be dependent on the availability locally of a suitable diversion scheme.

Diversion may be appropriate for less serious offences where it may prevent or deter further offences.

Referral to Scottish Children's Reporter

The Lord Advocate has issued confidential guidelines to the police in relation to reporting offences alleged to have been committed by children. The prosecutor retains a discretion to refer to the Reporter cases involving children where such action is considered to meet the public interests.

REVIEW OF DECISIONS TO PROSECUTE

Discontinuing proceedings

Where the prosecutor has advised an accused person, or has stated publicly, that no proceedings will be taken he has no power to reverse that decision.

However, where the decision has been taken to commence criminal proceedings the prosecutor remains under a duty to ensure that the decision remains appropriate in the public interest. Where there is a change of circumstances or where the prosecutor receives new information it will be necessary to consider whether the prosecution should continue. Where it is no longer in the public interest to prosecute or where it is no longer considered that there is sufficient evidence the prosecutor should not proceed with the case.

Plea adjustment

The prosecutor has a discretion to accept adjusted pleas where to do so is consistent with the available evidence or otherwise in the public interest.

The deciding factor in discontinuing proceedings or in accepting a reduced plea is the prosecutor's assessment of the public interest. Thus, it will not be appropriate to accept a reduced plea for reasons of convenience or where, despite there being sufficient evidence, to do so will distort the court's assessment of the offending behaviour and of the appropriate sentence.

PROVISION OF REASONS FOR PARTICULAR DECISIONS

The prosecutor cannot disclose publicly the detailed reasons for a decision in a particular case. There are a number of reasons for this policy; the decision will have been based on confidential information, for example information relating to matters such as the credibility, reliability or state of health of an essential witness or details of police operations. Furthermore, public disclosure of the reasons for not proceeding or for accepting reduced pleas may expose the accused person to accusations of crime in circumstances where he no longer has the opportunity of defending himself against such allegations in a court of law.

APPENDIX C

LORD ADVOCATE'S DIRECTION TO CHIEF CONSTABLES

REPORTING TO PROCURATORS FISCAL OF OFFENCES ALLEGED TO HAVE BEEN COMMITTED BY CHILDREN

REVISED CATEGORIES OF OFFENCES

CATEGORY 1

Offences which require by law to be prosecuted on indictment or which are so serious as normally to give rise to solemn proceedings on the instructions of the Lord Advocate in the public interest.

CATEGORY 2

Offences alleged to have been committed by children aged 15 years or over which in the event of conviction oblige or permit a court to order disqualification from driving.

CATEGORY 3

Offences alleged to have been committed by children as described in section 30(1)(b) of the Social Work (Scotland) Act 1968.

EXPLANATORY NOTES

1. CATEGORY 1

- (i) Offences which require by law to be prosecuted on indictment fall under two heads -
 - (1) common law offences which are within the exclusive jurisdiction of the High Court of Justiciary namely treason, murder and rape; and (2) statutory offences for which the statute only makes provision for prosecution on indictment or for a penalty on conviction on indictment - for example, contraventions of the Firearms Act 1968, Section 16, 17(1) and (2), and 18(1), the Road Traffic Act 1988, Section 1, and the Criminal Law (Consolidation) (Scotland) Act 1995 Section 5(1).
- (ii) Offences of culpable homicide, attempted murder, assault to the danger of life, sodomy, assault and robbery involving the use of firearms, attempted rape, incest and related offences (contrary to the Criminal Law (Consolidation) (Scotland) Act 1995 Sections 1-3) are offences which are normally indicted in the High Court of Justiciary.

(iii) Other offences which may fall into this category as being those normally prosecuted on indictment are assault to severe injury or permanent disfigurement, assault with intent to rape, serious assault and robbery (in particular involving the use of weapons other than firearms), assault with intent to rob involving the use of firearms, fireraising and malicious mischief causing or likely to cause great damage to property or danger to life, all Misuse of Drugs Act offences involving possession of Class A drugs and possession with intent to supply and supply of any controlled drugs. It should be emphasised that only offences which are normally prosecuted on indictment are to be reported.

2. CATEGORY 2

This category applies exclusively to children aged 15 years or over. Children will be prosecuted for this type of offence only if the Procurator Fiscal considers that it would be in the public interest to obtain a disqualification which would still be in force when the child became 16 and that in the event of conviction it was likely that the court would impose such a disqualification. Minor Road Traffic Act offences carrying a liability to discretionary disqualification should not normally be reported.

3. CATEGORY 3

There is no restriction on the forum for the prosecution of children of or over 16 years of age who can be proceeded against in the District Court.

4. When reporting to Procurators Fiscal cases against adults in which it is alleged that a child also committed the offence (not being an offence specified in categories 1 to 3) along with the adult, the report should state that a copy of the report has been sent to the reporter for action in respect of the child.

5. The annexed direction does not preclude you from reporting to Procurators Fiscal any other offences, alleged to have been committed by children, where you are of the opinion that, for special reasons (which must be stated in the report) prosecution might be considered.

APPENDIX D

STATISTICAL TABLES ON OFFENCE GROUND REFERRALS TO CHILDREN'S HEARINGS AND CRIMINAL PROSECUTION OF CHILDREN¹⁰¹

Table 1: Alleged Grounds for Referral Offence/Non-Offence categories 1997/98

Alleged Grounds	Numbers		Percentages	
	Boys	Girls	Boys	Girls
Offences	23,060	4,502	66%	29%
Non-Offences	11,878	10,880	34%	71%
Total	34,938	15,382	100%	100%

Table 2: Alleged Grounds for Referral Offence/Non-Offence Categories 1998/99

Alleged Grounds	Numbers		Percentages	
	Boys	Girls	Boys	Girls
Offences	23,027	5,186	62%	28%
Non-Offences	13,875	13,264	38%	72%
Total	36,902	18,450	100%	100%

Table 3: Alleged Grounds for Referral Offence/Non-Offence Categories 1999/00

Alleged Grounds	Numbers		Percentages	
	Boys	Girls	Boys	Girls
Offences	24,844	5,789	56%	23%
Non-Offences	19,681	18,859	44%	77%
Total	44,525	24,648	100%	100%

¹⁰¹ Tables 1-6 reproduced from the Scottish Children's Reporter Administration, Statistical Bulletins Nos 22-24, (April 2001). Tables 7-12 supplied by the Scottish Executive Justice Statistical Unit.

Table 4: Number of Offences per Child by Age Group, 1997/98

Age at first referral in year		Number of Offences per child, All Referrals							Total Children	Total Offences Referred	Average Number of Offences per Child
		1	2	3	4 to 6	7 to 9	10 to 20	21+			
8 to 11	No	1,345	358	148	164	53	35	14	2,117	4,594	2.17
	%	64	17	7	8	3	2	1	100		
12	No	936	277	131	142	52	44	12	1,594	3,937	2.47
	%	59	17	8	9	3	3	1	100		
13	No	1,441	466	198	257	106	100	37	2,605	7,476	2.87
	%	55	18	8	10	4	4	1	100		
14	No	2,029	724	364	452	162	207	85	4,023	13,356	3.32
	%	50	18	9	11	4	5	2	100		
15	No	2,235	743	367	434	145	159	30	4,113	10,941	2.66
	%	54	18	9	11	4	4	1	100		
16 to 17	No	123	51	30	45	13	7	2	271	780	2.88
	%	45	19	11	17	5	3	0.7	100		
All Ages		8,109	2,619	1,238	1,494	531	552	180	14,723	41,805	2.79
<i>All Ages</i> %		<i>55</i>	<i>18</i>	<i>8</i>	<i>10</i>	<i>4</i>	<i>4</i>	<i>1</i>	<i>100</i>		

Table 5: Number of Offences per Child by Age Group, 1998/99

Age at first referral in year		Number of Offences per child, All Referrals							Total Children	Total Offences Referred	Average Number of Offences per Child
		1	2	3	4 to 6	7 to 9	10 to 20	21+			
8 to 11	No	1,471	367	162	151	52	62	10	2,275	4,937	2.17
	%	65	16	7	7	2	3	0	100		
12	No	1,042	288	118	170	65	66	36	1,785	5,444	3.05
	%	58	16	7	10	4	4	2	100		
13	No	1,519	474	234	320	123	120	45	2,835	8,789	3.10
	%	54	17	8	11	4	4	2	100		
14	No	1,948	684	336	457	174	205	58	3,862	12,513	3.24
	%	50	18	9	12	5	5	2	100		
15	No	2,260	678	328	415	159	101	25	3,966	9,955	2.51
	%	57	17	8	10	4	3	1	100		
16 to 17	No	95	43	26	40	11	13	0	228	730	3.20
	%	42	19	11	18	5	6	0	100		
All Ages No		8,335	2,534	1,204	1,553	584	567	174	14,951	42,367	2.83
<i>All Ages</i> %		<i>56</i>	<i>17</i>	<i>8</i>	<i>10</i>	<i>4</i>	<i>4</i>	<i>1</i>	<i>100</i>		

Table 6: Number of Offences per Child by Age Group, 1999/00

Age at first referral in year		Number of Offences per child, All Referrals							Total Children	Total Offences Referred	Average Number of Offences per Child
		1	2	3	4 to 6	7 to 9	10 to 20	21+			
8 to 11	No	1,243	448	132	203	49	54	11	2,140	4,922	2.30
	%	58	21	6	9	2	3	1	100		
12	No	855	348	130	208	58	72	30	1,701	5,375	3.16
	%	50	20	8	12	3	4	2	100		
13	No	1,286	594	214	368	115	153	64	2,794	10,198	3.65
	%	46	21	8	13	4	5	2	100		
14	No	1,742	828	342	549	196	234	83	3,974	14,624	3.68
	%	44	21	9	14	5	6	2	100		
15	No	1,847	792	289	456	145	146	33	3,708	10,531	2.84
	%	50	21	8	12	4	4	1	100		
16 to 17	No	58	40	20	33	11	10	0	172	585	3.40
	%	34	23	12	19	6	6	0.0	100		
All Ages	No	7,031	3,050	1,127	1,817	574	669	221	14,489	46,235	3.19
<i>All Ages</i>	<i>%</i>	<i>49</i>	<i>21</i>	<i>8</i>	<i>13</i>	<i>4</i>	<i>5</i>	<i>2</i>	<i>100</i>		

Table 7: Number of Children proceeded against in the Scottish courts, by crime, 1994-1999

Crime	Age								TOTAL
	8	9	10	11	12	13	14	15	
Homicide	-	-	-	-	1	1	3	6	11
Serious assault	-	1	-	-	1	2	22	49	75
Offensive Weapons	1	-	-	-	-	-	3	20	24
Robbery	-	-	-	-	-	4	13	58	75
Other violent crimes	-	-	-	-	1	2	-	5	8
Sexual assault	-	-	-	-	-	1	7	10	18
Lewd & libidinous conduct	-	-	-	-	-	-	1	4	5
Other indecency	-	-	-	-	-	-	2	6	8
Housebreaking	-	-	-	1	2	-	9	72	84
Theft by opening lockfast places	-	-	-	-	1	1	6	29	37
Theft of motor vehicle	-	-	-	-	-	2	9	208	219
Shoplifting	-	-	-	-	-	2	1	22	25
Other theft	-	-	-	1	1	2	5	63	72
Fraud	-	-	-	-	-	-	-	4	4
Other dishonesty	-	-	-	-	1	1	4	22	28
Fireraising	-	-	-	-	-	2	2	22	26
Vandalism	-	-	-	-	-	5	15	49	69
Crimes against public justice	-	-	-	-	1	2	6	59	68
Drugs offences	-	-	-	-	1	1	2	19	23
Other miscellaneous crimes	-	-	-	-	-	-	-	1	1
Simple assault	-	-	-	1	-	3	17	93	114
Breach of the peace	1	-	1	-	-	1	5	46	54
Drunkenness	-	-	-	-	-	-	-	1	1
Other miscellaneous offences	-	-	-	-	-	-	1	11	12
Reckless driving	-	-	-	-	-	2	4	13	19
Drunk driving	-	-	-	-	-	-	-	10	10
Unlawful use of a motor vehicle	-	2	-	2	-	-	5	63	72
Other motor vehicle offences	-	-	-	-	-	-	1	2	3
All crimes and offences	2	3	1	5	10	34	143	967	1,165

Table 8: Numbers of children proceeded against in Scottish courts, by age, 1994-1999

Age	Year					
	1994	1995	1996	1997	1998	1999
8	-	-	-	2	-	-
9	-	-	1	-	1	1
10	-	1	-	-	-	-
11	1	-	-	1	3	-
12	1	-	5	2	1	1
13	4	8	6	9	4	3
14	19	24	27	31	23	19
15	221	210	164	144	147	81
All under 16	246	243	203	189	179	105

Table 9: Number of male children proceeded against in the Scottish courts, by age, 1994-1999

Age	Year					
	1994	1995	1996	1997	1998	1999
8	-	-	-	2	-	-
9	-	-	1	-	1	1
10	-	1	-	-	-	-
11	-	-	-	1	3	-
12	1	-	4	2	1	1
13	3	5	4	6	4	3
14	19	18	24	31	22	16
15	209	196	153	133	141	74
All under 16	232	220	186	175	172	95

Table 10: Number of female children proceeded against in the Scottish courts, by age, 1994-1999

Age	Year					
	1994	1995	1996	1997	1998	1999
8	-	-	-	-	-	-
9	-	-	-	-	-	-
10	-	-	-	-	-	-
11	1	-	-	-	-	-
12	-	-	1	-	-	-
13	1	3	2	3	-	-
14	-	6	3	-	1	3
15	12	14	11	11	6	7
All under 16	14	23	17	14	7	10

Table 11: Numbers of children aged 8 to 16 proceeded against in Scottish courts, by result, 1994-1999

Result	Year						TOTAL
	1994	1995	1996	1997	1998	1999	
Charge not proved	67	46	42	41	39	24	259
Remit to Children's Hearing	45	51	46	57	54	23	276
Custody	36	48	47	31	21	17	200
Community Service Order	3	6	8	1	1	-	19
Probation	30	15	18	20	21	11	115
Fine	27	37	13	12	19	12	120
Other	38	40	29	27	24	18	176
TOTAL	246	243	203	189	179	105	1,165

Table 12: Number of Children proceeded against in the Scottish courts, by result and age, 1994-1999

Result	Age								TOTAL
	8	9	10	11	12	13	14	15	
Charge not proved	-	2	-	-	2	15	46	194	259
Remit to Children's Hearing	-	-	-	-	2	9	33	232	276
Custody	-	-	-	1	5	4	27	163	200
Community Service Order	-	-	-	-	-	1	1	18	20
Probation	1	-	-	-	-	-	8	106	115
Fine	-	1	1	3	-	3	9	112	129
Other	1	-	-	1	1	2	19	142	166
All results	2	3	1	5	10	34	143	967	1,165

APPENDIX E

**List of those submitting written comments on
Discussion Paper No 115
Age of Criminal Responsibility**

Association of Chief Police Officers in Scotland

Barnardo's Scotland

Professor Alastair Bissett-Johnson, University of Dundee

Board of Social Responsibility of the Church of Scotland

Centre for Research into Law Reform, University of Glasgow

ChildLine Scotland

Children in Scotland

Christian Action Research and Education for Scotland

Faculty of Advocates

Sir Gerald Gordon, QC

The Law Society of Scotland

Professor Kathleen Marshall, University of Glasgow

Susan Moody, University of Dundee

Professor Colin Munro, University of Edinburgh

NCH Scotland

Procurators Fiscal Society

Save the Children

Scottish Child Law Centre

Scottish Children's Reporter Administration

Scottish Law Agents Society

Scottish Police Federation

Elaine E. Sutherland, University of Glasgow

Dr Victor Tadros, University of Edinburgh

Victim Support Scotland

The Discussion Paper elicited two confidential responses.

The Discussion Paper was also the subject of two publications: see C. McDiarmid, "Age of Criminal Responsibility: Raise It or Remove It?" 2001 J.R. 243 and the editorial comment in SCOLAG Legal Journal, September 2001, 150.

