UKSC 2016/0083

IN THE SUPREME COURT OF THE UNTED KINGDOM

ON APPEAL

FROM THE HIGH COURT OF JUSTICARY, SCOTLAND

Between:

A.B.

Appellant

- and-

W. JAMES WOLFFE, QC, HER MAJESTY'S ADVOCATE

Respondent

Revised Submissions for Intervener

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for

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Intervener

1. The Intervener welcomes the opportunity to make submissions in relation to this matter. The appeal raises issues that are important not only for the appellant but also, more generally, for the welfare of children within the criminal justice system in Scotland.

2. The Intervener is Community Law Advice Network, a registered Scottish Charity (Scottish Charity SC 039156) and a company limited by guarantee (company limited by guarantee 335011). It is widely known as Clan Childlaw. It aims to improve life chances for children and young people in Scotland by making sure that every young person in Scotland has access to legal advice and by securing the recognition and enforcement of their rights in Scots law. It provides free legal advice and representation to children and young people in Edinburgh, the Lothians and Glasgow. The legal services are provided by Clan Childlaw Ltd, a law firm. The Intervener pays the running costs of Clan Childlaw Ltd and the profits of Clan Childlaw Ltd are paid to the Intervener. It operates on an outreach basis, seeing clients at times and places suitable to them.

3. The majority of the Intervener's clients are or have been looked after children. It delivers training to professionals working with children and young people and contributes to policy development in relation to child law. Its Policy Development Unit aims to improve outcomes for children and young people by contributing to policy development in relation to the realisation of their rights in Scotland. It uses evidence gained from its work in representing children and young people to inform its contributions to policy.

4. The Intervener has experience and expertise in the operation of the Children's Hearings system in Scotland and has an informed understanding of the decision-making processes affecting children and young people. Through its work and its engagement with others involved in the system, it has experience of the way in which the Sexual Offences (Scotland) Act 2009 has been implemented, and of its impact on children and young people, and it represents children in relation to offences under that Act. The Intervener also provides training in relation to the 2009 Act, among other legislation, to professionals, including teachers, youth workers and social workers, and also to parents.

5. The Intervener intends to focus its submissions on the second of the two issues identified, that being:

> Is it compatible with the rights under Articles 6, 8 and 14 of the ECHR to apply section 39(2)(a)(i) so as to deprive the Appellant of the possibility of relying upon a "reasonable belief" defence as a consequence of the fact that he had, as a child, been charged with a relevant sexual offence?

6. In particular, the Intervener proposes to address Article 8. The Intervener agrees with the Appellant's position in relation to Articles 6 and 14, but considers that there is little that it could usefully add to the argument already advanced. In relation to Article 8, however, the Intervener considers that, in assessing the necessity and proportionality of the measure, it is appropriate that the Court should have regard, among other things, to the welfare-based principles which are the foundation of the Children's Hearing system and to the impact of section 39(2) on the welfare of children in the position of the Appellant.

The Children's Hearing System: foundation and practice

7. Before turning to the nature of the legislation at issue and the compatibility of section 39(2) with Convention rights, the Intervener considers that it may assist to set out the statutory, procedural and factual context within which offending by children is dealt with in Scotland.

8. A starting point is the definition of a child. Section 199 of the Children's Hearings (Scotland) Act 2011 provides:

> (1) In this Act, "child" means a person who is under 16 years of age (but subject to subsections (2) to (9)).
>
> (2) In paragraph (o) of section 67(2) and the other provisions of this Act in their application in relation to that paragraph, "child" means a person who is of school age.
>
> (3) Subsection (4) applies where a person becomes 16 years of age—
>
> (a) after section 66 applies in relation to the person, but
>
> (b) before a relevant event.

(4) For the purposes of the application of this Act to the person, references in this Act to a child include references to the person until a relevant event occurs.

(5) A relevant event is—

(a) the making of a compulsory supervision order in relation to the person,
(b) the notification of the person under section 68(3) that the question of whether a compulsory supervision order should be made in respect of the person will not be referred to a children's hearing, or
(c) the discharge of the referral.

(6) Subsection (7) applies if—

(a) a compulsory supervision order is in force in respect of a person on the person's becoming 16 years of age, or
(b) a compulsory supervision order is made in respect of a person on or after the person becomes 16 years of age.

(7) For the purposes of the application of the provisions of this Act relating to that order, references in this Act to a child include references to the person until whichever of the following first occurs—

(a) the order is terminated, or
(b) the person becomes 18 years of age.

(8) Subsection (9) applies where a case is remitted to the Principal Reporter under section 49(7)(b) of the Criminal Procedure (Scotland) Act 1995.

(9) For the purposes of the application of this Act to the person whose case is remitted, references in this Act to a child include references to the person until whichever of the following first occurs—

(a) a children's hearing or the sheriff discharges the referral,
(b) a compulsory supervision order made in respect of the person is terminated, or
(c) the person becomes 18 years of age.

9. The position in relation to the Criminal Procedure (Scotland) Act 1995 is, for most purposes, the same. The interpretation section, section 307, provides that "child" has the meaning assigned to it for the purposes of section 199 of the 2011 Act, but there are complicated exceptions in section 46(3) of the 1995 Act applicable in circumstances in which the person in respect of whom the offence is committed is under the age of 17 years. Those exceptions are not relevant for present purposes.

10. The age of criminal responsibility in Scotland is eight: section 41 of the 1995 Act. This is the lowest in Europe and for many years there has been pressure for

reform. Most recently, the Scottish Government has consulted on a proposal to raise that age to 12. The consultation, which also covered a range of related questions, had a closing date for responses of 17 June 2016. No detailed analysis of the results is yet available, but the basic data show overwhelming support for the policy.[1] It is reasonable to assume that when the appropriate legislation is brought forward it will have firm support. In its report issued with the consultation ("the MACR Report"),[2] the Scottish Government acknowledges that reform is necessary in order to bring Scots law in line with the United Nations Convention on the Rights of the Child ("UNCRC"),[3] but in introducing a minimum age of criminal responsibility of 12, only the minimum requirement is met. Article 32 UNCRC is in the following terms:

> "Rule 4 of the Beijing Rules recommends that the beginning of MACR shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. […] it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level."

11. The MACR Report recognised that where children engage in criminal activity it is a product of negative childhood experiences mostly rooted in the home; applying the label of criminality to harmful behaviour by young children was therefore neither 'useful' nor constructive.[4] There is a wealth of evidence linking child offending with vulnerability and victimisation. Child offenders may themselves have experienced trauma and crime and are especially vulnerable to environmental pressures.[5] (This analysis is corroborated by recent analysis by the

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[1] Among other questions, the consultation asked: "Do you agree with the Advisory Group's recommendation that the age of criminal responsibility in Scotland should be raised from 8 to 12 years of age?" There were 74 responses, with 46 from organisations and 28 from individuals. 44 organisations agreed, one disagreed and one did not know. 22 individuals agreed and six disagreed. Information obtained from Scottish Government website https://consult.scotland.gov.uk/youth-justice/minimum-age-of-criminal-responsibility/consultation/published_select_respondent

[2] Supplementary Appendix, tab 1

[3] Authorities Vol 2 , tab 27

[4] Supplementary Appendix, tab 1 at 1.11,1.12,1.13

[5] Supplementary Appendix, tab 1 at 2.1

Scottish Children's Reporter Administration into the backgrounds of children coming before the Reporter).[6]

12. In Scotland, a child under the age of 12 years may not be prosecuted for an offence, and a person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years: section 41A of the 1995 Act. This provision, which was introduced by amendment, came into force in March 2011. Notwithstanding the minimum age for prosecution, a child aged 8 to 11 may be charged with an offence.

13. A child aged 12 years or more but under 16 years may not be prosecuted for any offence except on the instructions of the Lord Advocate, or at the instance of the Lord Advocate: section 42 of the 1995 Act.

14. The principal statute under which the Children's Hearing system operates is the Children's Hearings (Scotland) Act 2011[7], but it has a much longer history. In April 1964 the Kilbrandon Report was published. In 1995 it was described thus:

> "The approach and style of the report reflect the composition of the committee. It is crisp and matter of fact. However, despite the apparently traditional membership, its recommendations were radical, humane and far-reaching. They have profoundly affected the way in which we approach children's problems in Scotland. In its conclusions, the committee set out the principles which underlie the establishment of one of our most remarkable institutions, the Children's Hearings. The report and the underlying principles are still the touchstone against which the work of the hearings is tested.
>
> "The key principles underlying the committee's proposals were: separation between the establishment of issues of disputed fact and decisions on the treatment of the child; the use of a lay panel to reach decisions on treatment; the recognition of the needs of the child as being the first and primary consideration; the vital role of the family in tackling children's problems; and the adoption of a preventive and educational approach to these problems.
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> "It was these key principles which led Lord Hope, the present Lord President of the Court of Session, to refer in a recent judgement to "the genius of this reform [the Kilbrandon Report] which has earned it so much praise."[8]

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[6] Supplementary Appendix, tab 4 'Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending' SCRA March 2016, chapter 4 "Children's backgrounds".

[7] Authorities Vol 2, tab 15; Supplementary Authorities for the Intervener, tab 3

15. Since the beginning, more than 50 years ago, there has been a recognition that the welfare of the child is paramount. In the intervening years, the structure of the Children's Hearing system has undergone reform. The Social Work (Scotland) Act 1968 and the Children (Scotland) Act 1995 have given way to the 2011 Act, which came into force on 24 June 2013. The welfare principle finds its statutory force in sections 25 and 26 of the latter Act:

> "25. Welfare of the child
> (1) This section applies where by virtue of this Act a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child.
> (2) The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.
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> "26. Decisions inconsistent with section 25
> (1) A children's hearing or a court may make a decision that is inconsistent with the requirement imposed by section 25(2) if—
> (a) the children's hearing, pre-hearing panel or court considers that, for the purpose of protecting members of the public from serious harm (whether physical or not), it is necessary that the decision be made, and
> (b) in coming to the decision, the children's hearing, pre-hearing panel or court complies with subsection (2).
>
> (2) The children's hearing, pre-hearing panel or court is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as a primary consideration rather than the paramount consideration."

16. This welfare principle is entirely in harmony with the UNCRC and the focus there on the best interests of the child.[9] The UK is a party to the UNCRC and the

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[8] The Kilbrandon Report, republished in the 'Children in Society' series, foreword by Lord Fraser of Carmyllie, HMSO, Edinburgh, 1995. The reference to the judgment of Lord President Hope (as he then was) is *Sloan v B* 1991 SC 412.

[9] Authorities Vol 2, tab 27 Article 3 UNCRC "*1. 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.*
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."
Article 40

obligations arising therefrom are relevant domestically, first, because they accord with the intent behind section 25(2) of the 2011 Act. Secondly, for the reasons given by Baroness Hale in *R (on the application of SG and others (previously JS)) v Secretary of State for Work and Pensions* [2015] 1 W.L.R. 1449; [2015] UKSC 16[10] at paragraphs 213 to 218, they inform the interpretation and application of rights contained within the ECHR, which apply domestically. Furthermore, Lord Reed in *R (T) v Chief Constable of Greater Manchester Police and Others* [2015] A.C. 49; [2014] UKSC 35[11] at 131-134 explained that the European Court of Human Rights looks to domestic and international consensus in its application of the Convention, and cited UNCRC as one such relevant source. Thus the Court, when interpreting and applying Conventions rights, should be informed by Articles 3, 32 and 40 of UNCRC.

17. The 2011 Act sets out a detailed framework for the functioning of the Principal Reporter and the Scottish Children's Reporter Administration ("SCRA") (usually referred to as "the Reporter"), the Children's Panel and procedure at Children's Hearings. A short introduction will suffice for present purposes, but further information is contained in the overview of Children's Hearings published by the Intervener.[12] The Reporter is responsible for receiving referrals for children and young people who are believed to require compulsory measures of supervision.

"(1)States Parties recognize the right of every child alleged as, accused of, or recognized 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 recognized 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 dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

[10] Supplementary Authorities for the Intervener, tab 2, paras 213 to 218

[11] Authorities Vol 5, tab 49, paras 131 -134

[12] Supplementary Appendix, tab 3

18. Referrals to the Reporter are usually made by police officers, social workers, teachers, courts, health professionals, relatives and, very occasionally, by the child himself or herself. A reference may be made on one or more of the grounds listed in section 67 of the 2011 Act. Ground 67(2)(j) is that the child has committed an offence. If the Reporter determines that it is necessary, the matter is considered at a Children's Hearing. A Children's Hearing is carried out by three members of the Children's Panel. The Children's Panel is the largest legal tribunal in Scotland, with approximately 2,500 specially trained lay members.

19. There are detailed provisions covering the process whereby grounds may be accepted or not accepted by the child or the relevant person (the relevant person is usually a parent or guardian having parental responsibilities or parental rights). There is also provision, where grounds are not accepted, for making application to the sheriff for a determination on whether the grounds are established. Where such an application is made on an offence ground, the standard of proof is that which applies in criminal proceedings.

20. The Children's Hearing may decide that compulsory measures of supervision are necessary and may make a compulsory supervision order. If it decides that such measures are not required, it may discharge the case. A compulsory supervision order has no set time limit but should last only as long as is necessary. It must be reviewed by a Children's Hearing at least once a year, when it may be continued, varied or stopped. A compulsory supervision order may contain one or more of a range of measures, which include a secure accommodation authorisation, or a direction regulating contact between the child and a specified person.

21. At the same time, it is possible for a child who is at least 12 years old and who is charged with an offence to be prosecuted. A child may be jointly reported to the Procurator Fiscal and to SCRA. There is an agreement in place between the Crown Office and Procurator Fiscal Service and SCRA regulating decision-making regarding such children.[13] The agreement also applies to police officers involved in such decision-making. The Respondent has also issued guidelines to

[13] Supplementary Appendix, tab 5 Joint publication: COPFS and SCRA "Decision making in cases of children jointly reported to the Procurator Fiscal and the Children's Reporter"

A the Chief Constable, which make provision for categories of offence which require to be jointly reported.[14] These include offences which normally give rise to solemn proceedings. The offences in sections 28 to 36 of the 2009 Act are included in category 1, but the guidelines state that these "should only be considered for joint reporting where the offence has been committed by a "child" aged 16 or 17 who is subject to a supervision order or where a relevant event has not yet occurred."

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22. A report recently published by the Centre for Youth and Criminal Justice discusses the operation of joint reporting in practice.[15] Among its recommendations are changes to the effect that there should be a presumption that all those under 18 should be dealt with in the Children's Hearing system.

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23. The SCRA publishes detailed data about referrals to the Reporter. The statistics cover, among other things, the grounds of referral, the source of referral and the ages of children referred. They show that the recent trend is toward a reduction in charges brought against children. In 2014-5 the number of children (8 to 17 years old) referred to the Reporter on offence grounds was 2891, compared to 7857 in 2010-11.[16] This does not *per se* indicate a reduction in child offending but more likely an alteration in the management of those incidents hitherto giving rise to the charge.

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24. The majority of offences in 2014-5 were of low gravity, 19% moderate gravity and 10% high gravity, the last category includes sexual offences. In relation to sexual offences, the numbers of 8 to 17 year olds *referred* on offence grounds for

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[14] Supplementary Appendix, tab 6 Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children, revised version published March 2014

[15] Supplementary Appendix, tab 7 Fiona Dyer, Centre for Youth and Criminal Justice (University of Strathclyde): "Young People at Court in Scotland", January 2016

[16] Supplementary Appendix, tab 4 Chapter 3, pages 11-12 "Backgrounds and outcomes for children aged 8 to 11 years old who have been referred to the Children's Reporter for offending" SCRA, March 2016

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sexual offences were as follows:[17] (an * denotes that the offence is listed in schedule 1 of the 2009 Act as a relevant offence for s39(2)(a)(i)):

15	rape of a young child (s. 18)*
5	assault by penetration of a young child (s. 19)*
39	sexual assault (s. 3)*
5	coerce into looking at a sexual image (s.6)*
10	communicating indecently (s.7(1))*
11	sexual exposure (s.8) *
11	sexual exposure young child (s.25)*
48	sexual assault young child (s.20)*
13	cause a young child to participate in sexual activity (s.21)*
14	communicate indecently with a young child (s.24(1))*
10	engage by consent sexual conduct older child (s.37(4))

25. Of these referrals, the number of children aged 8 to 11 is extremely small; the SCRA records that there were nine children aged 8 to 11 whose first (or only) offence referred to the Reporter in 2013-14 was a sexual offence. The SCRA data do not disclose whether, in relation to those aged 12 and over, there was a charge by the police in every case, but it is likely that there would be a charge in the great majority of cases. The number of sexual assaults is relatively high, but this is likely to encompass a broad range of behaviour. Further, the majority of referrals to the Reporter emanate from the police: 19,680 out of 27,538 in 2014-5.[18] Of 15,858 child referrals 2,872 are on offence grounds of which 2,856 are made by the police.[19] Notwithstanding the incidence of charging for schedule 1 offences may be low, for the reasons discussed below, the impact is high upon those children.

Section 39(2) of the Sexual Offences (Scotland) Act 2009

[17] Supplementary Appendix, tab 8 SCRA 2014-15 Children and young people referred on offence grounds by alleged offence and age at receipt (excerpt shows offences under the Sexual Offences (Scotland) Act 2009 where the number of referrals recorded by SCRA was ≥ 5)
[18] Supplementary Appendix, tab 9 SCRA online statistics 2014-15 table 1(g)
[19] Supplementary Appendix, tab 9 table 1(d)

26. The effect of section 39(2)(a)(i) on a person who has been charged with a relevant sexual offence as a child is illustrated by the Appellant's own circumstances. Before turning to proportionality questions in that context, the Intervener wishes to draw attention to an aspect of section 39(2) not otherwise considered. Whereas the provision has an impact on the Appellant in proceedings brought against him as an adult, it is not limited to such a case. It might be thought to be surprising that a child would also be denied the "reasonable belief" defence whilst still a child. Whereas the offences specified in sections 28 to 36 can only be committed by a person who has attained the age of 16 years, the offence of engaging while an older child in sexual conduct with another older child, in terms of section 37(1) and (4), can only be committed by a child who is 13, 14 or 15. That offence is also subject to the provisions in section 39. The effect of that is that a 15 year old, for example, who engages in sexual conduct with another 15 year old and who had previously been charged with a relevant sexual offence, could not claim to have a reasonable belief that the other child was 16. Of course, if the other child was in fact 16, then there would be no section 37 offence. Section 37 is not, directly, the subject of this appeal, but this glimpse of its workings indicates that it carries its own burden of complication and uncertainty. The main point for present purposes is that children of 13, 14 and 15 may also be deprived of the statutory "reasonable belief" defence. In reality, standing the Lord Advocate's guidelines, a prosecution is probably unlikely, but a potential impact exists.

27. This is important because, in the context of justification, the Respondent relies on the fact that the Appellant is now no longer a child. On the Respondent's analysis, the proportionality of the measure is contingent on the Appellant being an adult: paragraph 44 of the Respondent's case. This fails to recognise that section 39(2) applies to section 37 offences. The Appeal Court also referred, at [25], to the provision having "the aim of protecting children *from adults* who may prey on their vulnerability".

Article 8 ECHR and proportionality

28. The Respondent now accepts that section 39(2)(a)(i) engages the Appellant's Article 8 rights, through the disclosure of and reliance upon his November 2009

charges. That is consistent with the Intervener's position. Further, as both parties note, the European Court of Human Rights in *G v United Kingdom* (2011) 53 EHRR SE 25 was prepared to accept that the sexual activities at issue fell within the meaning of "private life".

29. The interference is disproportionate. The Intervener agrees that it is a legitimate aim to protect children from premature sexual activity, young teenage pregnancy, sexually transmitted diseases, exploitation and abuse. That the State has an obligation to protect children from exploitation and abuse is entirely obvious. More specifically, as the Appeal Court held:

> "The purpose of the restriction in section 39(2)(a)(i) is to prevent sexual predators from avoiding conviction by repeated use of the defence of reasonable belief."

30. That is also legitimate, but, whether the aim is given a wide or narrow scope, the interference cannot be justified. The Intervener proposes to confine its observations in relation to justification to the context in which the Article 8 rights of a person charged with relevant sexual offences as a child are engaged. The Intervener should not be taken thereby to accept that in the case of a person charged with such offences as an adult there would be no Convention incompatibility.

31. In introducing these submissions, the Intervener observes that the Scottish Government fully accepts that the needs of child 'offenders' require differential treatment. That is made clear in the MACR Report, referred to above.

32. The Children's Hearing system is a manifestation of the principle that children require differential treatment. It looks at children's actions in the context of their 'support needs' and an understanding of why behaviour occurs.[20] For the majority of children who are brought before a Children's Hearing on offence grounds, it will be their first and last offence.[21] Children should not be criminalised or stigmatised as a result of behaviour in early childhood.[22] For children referred to

[20] Supplementary Appendix, tab 1 1.16
[21] Supplementary Appendix tab 1 1.19, citing SCRA analysis of March 2016
[22] Supplementary Appendix, tab 1, page 9, para.10

A the Children's Hearing on offence grounds the impacts upon their whole life chances can be 'devastating', giving rise to a criminal record which may stay with them into adulthood with all of its obvious associated negative outcomes.[23] Specifically Scotland operates a disclosure scheme requiring the Chief Constable to disclose relevant information to the Scottish Government who may list an individual on their schedule of persons not permitted to work with children and vulnerable adults within certain roles. Whether the individual is listed is determined against the singular test of "suitability", which can be based upon non-conviction information.[24] In the Intervener's submission, for all of these reasons, and having particular regard to the operation of section 39(2) of the 2009 Act, charging a child with an offence poses a potentially highly significant and long-term interference with his or her private life stretching into his or her choice of career and opportunities for further education. Whilst these children are few in number, the impact upon them is high.

33. It may assist to consider individual circumstances in a hypothetical case. The Intervener would commend the example of 'Tony', one of the case studies appended to the MACR Report[25] and which involves serious violent and sexualised conduct. The case study records the consequences with and without the proposed safeguards. Without those safeguards, 'Tony' is charged with an offence, but not otherwise. This is a helpful illustration of the recognition by the Scottish Government of differential and welfare-based treatment of a child, even in a case involving rape. Of course, 'Tony' is 11 and a child between 12 and 15 might still be prosecuted, but the distinction in impact is still relevant.

34. The Intervener submits that in light of the increasing understanding of the (i) responsibility of children, and (ii) causes of children to offend, the proportionality analysis must be different. It must have regard to the above distinguishing features surrounding child offending - *or rather charging* - that are plainly absent in the context of how section 39 affects adults charged with a schedule 1 offence. Not

[23] Supplementary Appendix, tab 1 1.20-1.21
[24] Supplementary Authorities for the Intervener , tab 1 Protection of Vulnerable Groups (Scotland) Act 2007: section 18 describes the duty upon the Chief Constable, and sections 15 and 16 provide that the statutory test is 'unsuitability', thus neither criminality nor indeed risk are required.
[25] Supplementary Appendix, tab 1

only is there no basis to conclude that section 39(2)(a)(i) generates an effective deterrent for children, it also treats children as adults, contrary to everything above.

Rational connection

35. Applying the conventional elements of the proportionality analysis, first, there is no rational connection between the measure and the aim. The Respondent characterises a charge as "an official warning". The shift from the "shot across the bows" metaphor is welcome – invoking such an image in the context of child welfare is startlingly inappropriate – but in that same context the idea of an official warning is neither accurate nor helpful.

36. Fundamentally, for children, it runs counter to the welfare principles on which the Children's Hearing system is based. The Respondent refers to a child being "afforded special treatment" by the criminal justice system. It is "special" insofar as the law recognises the need to treat children and adults differently, but that is what Parliament has determined must happen. The decision taken by the Children's Hearing, including on an offence referral, is on welfare grounds. Punishment is not imposed. An official warning has no place in such a scheme. Decisions based on the welfare of the child may be intended to guide future conduct, but they do not consist of warnings about behaviour at a hypothetical future date.

37. For a warning to be in any way effective, there would have to be an obvious connection between the behaviour that gave rise to the charge and the behaviour that is being warned against. The list of relevant sexual offences in schedule 1 to the 2009 Act is very long, and, it may be noted, significantly longer than the "like offences" in the predecessor legislation, the Criminal Law (Consolidation) (Scotland) Act 1995. Sexual exposure to a young child, in terms of section 25 of the 2009 Act, is a relevant sexual offence. A 13 year old who exposes his genitals to a 12 year old may be charged with committing an offence within the meaning of that section. On the Respondent's analysis, that charge is an "official warning" which must serve to warn that 13 year old that at some point in the future, maybe

A many years into the future, if he has sex with a person who is, in fact 15, but whom he believes to be older, he will not be able to rely on a "reasonable belief" defence. There is no obvious connection between a 13 year old boy exposing his genitals to a 12 year old and then, six years later, as a 19 year old, having sex with a girl of 15 whom he reasonably believes to be older, contrary to section 28 of the B 2009 Act. They are different offences and, crucially, the first may be committed by a child but the second only by an adult. For the warning to be meaningful, the 13 year old is supposed to remember it throughout his teenage years and into adulthood and to heed it in very different circumstances.

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38. The Intervener has extensive experience in consulting with children and in giving them explanations about the law, their rights and what they are allowed to do and what they are not allowed to do. There is a presumption that a child of 12 or more has the capacity to instruct a solicitor: section 2(4A) of the Age of Legal Capacity D (Scotland) Act 1991. The Intervener's experience is that there is a wide variety in levels of capacity. Capacity issues arise, in particular, in children with mental health difficulties and learning disabilities. The SCRA report[26] breaks down the incidence of mental health issues in a research sample of 100 children referred to them. Within that sample 23 had some form of mental health issue with 13 having E a disability including an autistic spectrum disorder or learning disability. This is higher than the general child population where mental health problems are found in 15 to 16% of children. 25% of children referred to the Reporter were victims of abuse (sexual and or physical).[27] In light of their vulnerability as both children and persons with difficulties it is especially improbable that any charge will serve F as an effective warning. A police constable may, properly, charge a child with an offence without knowing whether that child is capable of understanding the consequences. It may be only be at a later stage, and perhaps with the benefit of legal representation, that the lack of capacity becomes evident. The charge exists, G permanently, and the child cannot be 'uncharged'. A child who does not have the capacity to instruct a solicitor will certainly not have the capacity to appreciate the significance of the charge as an "official warning", and many children who do

[26] Supplementary Appendix, tab 4 'Backgrounds and outcomes for children aged 8 to 11 years old who H have been referred to the Children's Reporter for offending' SCRA March 2016, chapter 4, table 3
[27] Supplementary Appendix, tab 4 page 15

have that level of capacity will not understand it. They will not have the ability to retain the relevant information for, potentially, many years. For the "official warning" to have any validity, and for there to be a rational connection between the measure and the aim, the warning must be one that can be understood. It is the Intervener's experience that very few children would properly be able to understand the complicated concepts involved in the "warning" and retain the information that they will not be able to rely on a defence of "reasonable belief" in future, even into adulthood.

39. Even when there is clearly capacity, it should be remembered that adolescents can find it difficult to retain information, act on advice and modify behaviour. In this context, the Appellant's reference at paragraph 7.6 of his case to the speech of Baroness Hale in *R (Smith) v Secretary of State for the Home Department* [2006] 1 AC 159 (at paragraph 23)[28] is apposite.

40. This supposes, of course, that that information is provided to them and an appropriate explanation given. The reality is that that does not happen. The Intervener is not aware of any safeguards to ensure that the permanent effects, in terms of section 39, of charging a child with a relevant sexual offence are explained to the child in a manner that is both practical and effective. It is no part of the function of the police constable who administers the charge to explain that, that having been done, the statutory defence in terms of section 39(2) of the 2009 Act will not now be available. Nor is it part of the approach taken within the Children's Hearing system. Meeting a child's welfare needs following a referral on offence grounds does not involve giving a child a lesson about the later availability or otherwise of a statutory defence of "reasonable belief", however simplified such a lesson might be. The warning has to be capable of being identified as such, and in almost all circumstances involving children, it will not be. In reality, the first point at which a person in the Appellant's position will become aware that there had been an "official warning" will be at the point, having been charged with an offence such as having intercourse with an older child, under section 28 of the 2009 Act, that that person claims that he reasonably

[28] Authorities Vol 5, tab 48, par 23

believed that the child was 16 or over and is then told that that makes no difference because of the existence of the previous charge. At that point, it is, of course, much too late. If the purpose of the warning at the time of the charge is to put a person on notice that he or she must take care about future sexual behaviour, and that person is unaware that it *is* a warning, then it fails its purpose. The Intervener submits, on the basis of its experience, that that will be the position in the majority of cases where a child has been charged. That being the case, the "official warning" is no warning at all.

41. Further, for there to be a rational connection between the measure and the aim in this case, there must be some link between the offence circumstances in which the warning is given and that which is being warned against. In a case where a warning is given to a child, by charging him or her with a relevant sexual offence, and leaving aside the possibility of the section 37 offences, that child is being warned against committing a different sort of sexual offence as an adult. For that to be proportionate and lawful, there must be some basis for considering that the sexual offence which is the subject of the previous charge is, indeed, relevant. In the application of the measure to children, if, indeed, any consideration was given to that, it may simply have been assumed that juvenile sex offenders are tomorrow's adult sex offenders. The Intervener is aware of recent research which tests that assumption. A study using data from the 1984 Dutch Birth Cohort examined the criminal career of juvenile sex offenders ("JSO") and the continuity of sex offending into early adulthood.[29] Adult sex offenders are referred to as "ASO". The study findings showed:

> "… much heterogeneity in the criminal careers of JSO suggesting several criminal career outcomes in adulthood. Put differently, the vast majority of JSO do not become ASO while adult sex offending does not require juvenile sex offending. Against the backdrop of this principle, the study found a small group of JSO recidivist at-risk of persisting into adulthood and a group of chronic juvenile offenders who are at-risk of escalating their offending to sex crimes in adulthood."

The authors concluded:

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[29] Supplementary Appendix, tab 10 Lussier and Blokland: *The adolescence-adulthood transition and Robins's continuity paradox: Criminal career patterns of juvenile and adult sex offenders in a prospective longitudinal birth cohort study*. Journal of Criminal Justice 42 (2014) 153-163

> "For the most part, JSO and ASO are two distinct phenomenon. The vast majority of JSO desist from sex offending while the vast majority of ASO started sexually offending in adulthood. As the frequency of general nonsexual offending increases during adolescence, so is the risk of becoming ASO. […] First, the sexual criminal activity of JSO appears to be short-lived and limited to the period of adolescence. Second, it is almost inconceivable to argue that the small group of JSO who persist into adulthood account for a substantial proportion of sex crimes committed by adults."

42. Whilst a small element of adult sex offenders had committed a sex offence in their youth, the greater proportion was attributable to 'adult-onset' sex offending which the authors described as an "important phenomenon". In fact, 67% of the Dutch cohort who committed sex crimes in adulthood had no juvenile offending history; recidivists and chronic offenders accounted for 22.8% of all sex crimes committed by the cohort in adulthood; and chronic offenders account for 8.7% of adult sex offences from the cohort. When analysing that background, the authors concluded that as the frequency of general offending in youth increases, so does the likelihood of committing in adulthood a sexual offence. [30]

43. While a warning *may* have some value where the types of offending are alike, in the case of a child it is not safe to assume that there is likely to be a continuity in sex offending. As the authors of the study note:

> "While policymakers assume in the absence of firm evidence against it that such continuity exists, the empirical evidence currently available is not supportive of this assumption."[31]

In that context, there must be serious doubt that the warning is proportionately targeted, or effective.

44. This evidence supports the argument advanced by the Appellant in paragraphs 7.13 to 7.16 of his case. It is submitted that it usefully illustrates that there is a relevant difference between a child charged with a sexual offence and an adult in the same position, and that it cannot be assumed that what might work for an adult will work for a child. This is, of course, significant in the context of Article 14.

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[30] Supplementary Appendix, tab 10, p158

[31] Supplementary Appendix, tab 10, p154

Less intrusive means

45. The Intervener notes the list of potentially more effective but less intrusive means set out by the Appellant in paragraphs 6.45 to 6.62 of his case. Beyond observing that these are, indeed, likely to be both effective and less intrusive, the Intervener has nothing to add to that argument. However, there is a further alternative which is of significance in the context of a person charged with a relevant sexual offence whilst a child. The Respondent acknowledges in paragraph 31 of his case that the Scottish Parliament "could have chosen to exclude cases in which the accused was a child at the time of the previous charge." It appears to the Intervener that that would be a perfectly sensible restriction and it would address the problems with which the Intervener is principally concerned. The Respondent rejects that alternative, along with limiting the application to a previous conviction rather than a charge, but gives no compelling reason specific to that particular option. The fact that it may be difficult for the Crown to exclude the defence is irrelevant, and, for the reasons given above relating to the ill-founded assumption that juvenile sex offenders become adult sex offenders, the precautionary principle does not apply. Further, for a precautionary approach to be legitimate, the charge would have to work as a warning and in the case of children, it does not.

A fair balance

46. Section 39(2)(a)(i) does not strike a fair balance between the rights of an individual in the position of the Appellant, who has been charged with a relevant sexual offence whilst a child, and the interests of the community. It is contrary to the welfare of a child that he or she should be made, by the operation of law, to carry something akin to a criminal record into adulthood. Of course, if there has been no conviction, then there is no criminal record, but the retention of information about a previous charge is no less problematic. If anything, in circumstances such as arise in this case, information about a charge may be more burdensome on the individual. A conviction can only follow a procedure in which the accused has had the opportunity either to plead guilty or to be tried. A charge remains on the record regardless of its consequences. A person may have been

charged on the basis of an error. Proceedings might never have been brought, or, if they were, they may have resulted in an acquittal. The charge exists regardless. The interference in the rights of a child in these circumstances is especially serious. A child charged with an offence will very likely be referred to a Children's Hearing. Even if a prosecution in court is the route taken, he or she will have the benefit of child-specific protections. In the context of the Children's Hearing system, the fact of being charged with a criminal offence is a gateway to the consideration by the panel members of what the welfare of the child requires. A court coming to a decision about a child must also have the child's welfare as the paramount consideration. Even if the consequence is the imposition of compulsory measures of supervision, the child's welfare is paramount. It is quite inconsistent with that fundamental principle that, at the same time and by virtue of the same set of circumstances with which the Children's Hearing is concerned, the child should also have been issued with a warning, which, if he or she is aware of it at all, is likely to be incomprehensible, about sexual behaviour that might take place at some unspecified point in the future.

47. It might be suggested that it is only when the child becomes an adult that the matter is likely to have any significance and that his or her rights as a child have not been subject to any interference, but that would be to overlook the existence of the information burden throughout childhood and adolescence and into adulthood. The child carries the fact of having been charged and he or she – the same person – becomes the adult who suffers the deprivation of the "reasonable belief" defence. That does not respect the rights of the child and results in an unfair balance.

48. The Intervener's submissions are focused on Article 8. Article 14 is already covered in the Appellant's case and the Intervener does not seek to advance additional argument in that regard. It will be seen, nevertheless, that the factors discussed above are relevant considerations within that context also.

The possible remedy

49. The Intervener does not seek to make any representations on the remedy which may be available to the Appellant; that is a matter for him. The Intervener does observe that the Respondent relies on *McGeoch v Lord President of the Council* 2014 SC (UKSC) 25[32] for the proposition that, even if section 39(2)(a)(i) might potentially breach the Convention rights of some accused persons, but not the Appellant, it would not be appropriate to find the legislation to be incompatible with Convention rights on a hypothetical basis. In bringing to the attention of the Court broader considerations that are relevant to the operation of section 39(2) of the 2009 Act, the Intervener would respectfully suggest that, separately from the Appellant's circumstances, this may be a case in which it is appropriate to make a declaration *in abstracto*, *per* Baroness Hale at paragraph 102.

MORAG ROSS, Advocate

DANIEL BYRNE, Advocate

[32] Authorities Vol 1, tab 5 *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] AC 271