



lawyers for  
children & young people

## **Note for Alison McInnes MSP: Age of Criminal Responsibility in Scotland**

### **About Clan Childlaw**

We aim to improve life chances for children and young people in Scotland by making sure that every young person in Scotland has access to the legal advice they need, and by securing the recognition and enforcement of their rights in Scots Law. Underpinning our work is the belief that every child and young person should have the opportunity of growing up in a just and fair society, where the rights and responsibilities of all are upheld. We believe children and young people should be given the opportunity to express their views and that these views should be taken into account in decision-making processes which affect them. We deliver our service under three broad categories – representation, training and information, and policy development.

We offer a unique legal advocacy service to children and young people within Edinburgh, the Lothians and Glasgow. We aim to make the law more accessible to children and young people, including the most vulnerable in our society, by providing specialist legal advice and representation at a place suitable to them at the time that they need it, irrespective of their ability to pay. Our unique service fills the gap in dedicated legal services to support children & young people, and gives practical effect to Article 12 of the United Nations Convention on the Rights of the Child, enabling children to participate in decision-making processes which affect them and allowing their voices to be heard.

From our experience representing children and young people, we have developed 2 possible scenarios that allow for a discussion of the issues surrounding the current low minimum age (8) of criminal responsibility in Scotland. The discussion below is designed to support the amendment lodged by Alison McInnes MSP to the Criminal Justice (Scotland) Bill at Stage 2 of proceedings in the Scottish Parliament, seeking to raise the minimum age of criminal responsibility in Scotland from 8 to 12.

### **Possible Scenarios<sup>1</sup>**

*1. A girl of 10 was referred to the children's Reporter on the ground that "she is being, or is likely to be, exposed to persons whose conduct is such that it is likely that she will be abused"*

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<sup>1</sup> These are not actual examples, but are hypothetical – they are pulled together from a mixture of elements of actual cases, and possibilities, given the current state of the law and SCRA practice guidance.

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or harmed or her health, safety or development will be seriously affected" (section 67(2)(e) Children's Hearings (Scotland) Act 2011). This is a **non-offence** ground of referral. Within the statement of facts, however, the Reporter included references to the girl stealing money and vandalising a shop, ie reference was made to her having committed criminal offences.

2. A boy of 11 was referred to the Reporter on **offence** grounds. He was alleged to have committed an offence under part 4 of the Sexual Offences (Scotland) Act 2009 against a girl of 10. The 2009 Act provides that a child under 13 is legally deemed to be incapable of consenting to sexual behaviour, therefore the boy was being treated as an offender even though he fell into the class of those whom the law seeks to protect.

## **Discussion**

For the non-offence grounds in Scenario 1, if they are not accepted, the Reporter has to lead evidence before the sheriff to establish the grounds **on the balance of probabilities**. This is a lower (and therefore easier) standard of proof for the Reporter to meet, than the standard required to establish offence grounds (under section 67(2)(j) of the Children's Hearings (Scotland) Act 2011). In Scenario 2, the Reporter would have to prove that a child has committed an offence **beyond reasonable doubt**.

However, if offence grounds are accepted or established, then that acceptance or establishment "shall be treated for the purposes of this Act ... as a conviction, and any disposal of the case thereafter by a children's hearing shall be treated for those purposes as a sentence" (section 3 Rehabilitation of Offenders Act 1974). Although some changes to this system are contained in sections 187 and 188 of the Children's Hearings (Scotland) Act 2011, those changes are not yet in effect. It follows that, if a child is referred on offence grounds (section 67(j)) rather than non-offence grounds, serious consequences can follow from acceptance or establishment of those grounds.

In the **Scottish Children's Reporter Administration Practice Direction 7 - Decision Making and Drafting**, Guidance is given about the choice of section 67 ground when the child has been referred to the reporter as a result of the child committing an offence:

*3.8. In deciding on whether the appropriate section 67 ground for the statement of grounds is section 67(2)(j) or another section 67 ground, the reporter is to consider the following factors:*

- *Following the decision of the Court of Session in Constanda v M, 1997 SLT 1396, where the whole basis of the supporting facts is that the child has performed certain acts that constitute criminal offences, the section 67 ground must be section 67(2)(j);*
- *The more serious the child's behaviour in a specific incident of offending then the more likely that the section 67 ground should be section 67(2)(j);*

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- *The more distinct an incident of a child's offending behaviour from the other facts for a section 67 ground other than section 67(2)(j), then the more likely that the section 67 ground should be section 67(2)(j);*
- *The more that the principal concerns about the child relate to their offending behaviour, then the more likely that the section 67 ground should be section 67(2)(j).*

3.9. The consequences of the [Rehabilitation of Offenders Act 1974](#) for a section 67(2)(j) statement of grounds is not a relevant factor for this decision – the reporter is to choose the condition that reflects the principal concern for the child's welfare and the reason or reasons why compulsion is necessary.

3.10. The reporter can refer a child over the age of 8 but under the age of 12 to a children's hearing on a section 67(2)(j) statement of grounds. However the reporter is to give particular consideration as to whether a section 67 ground other than section 67(2)(j) is appropriate when deciding to refer such a young child to a children's hearing as a result of concerns about their behaviour.

It is apparent from the Scenarios set out above that Practice Direction 7 can be applied in different ways by different Reporters. There is also considerable leeway in its terms, allowing Reporters a great deal of discretion in how grounds are framed.

Leaving aside the intricacies of standards of proof, the main difference between a referral on offence ground and one on a non-offence ground is the potential long term consequence for a young person of having an admitted or established offence treated as a criminal conviction. The only way to eradicate that consequence for children under 12 who exhibit offending behaviour is to raise the age of criminal responsibility from 8 to 12. Children between 8 and 11 would then be referred into the Children's Hearings system on non-offence grounds if their behaviour is of sufficient concern, much in the way that under 8s currently are. Presently, a child under 8 who demonstrates what would be regarded as offending behaviour in an over 8 can be referred on non-offence grounds, often under section 67(2)(m) – where the child's conduct has had or is likely to have, a serious adverse effect on the health, safety or development of the child or another person.

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