SCOTTISH LAW COMMISSION
Discussion Paper No 115

Discussion Paper on Age of Criminal Responsibility

July 2001

This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

EDINBURGH: THE STATIONERY OFFICE
£16.00

0 10 888047 8

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Gill, *Chairman*
Patrick S Hodge, QC
Professor Gerard Maher
Professor Kenneth G C Reid
Professor Joseph M Thomson.

The Secretary of the Commission is Miss Jane L McLeod. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

The Commission would be grateful if comments on this discussion paper were submitted by 31 October 2001. Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

Dr David Nichols
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

Tel: 0131 668 2131
Fax: 0131 662 4900
E-mail: info@scotlawcom.gov.uk

NOTES

1. Copies of comments received may be (i) referred to in any later report on this subject, (ii) made available to any interested party on request, and (iii) summarised on our website, unless consultees indicate that all or part of their response is confidential. Such confidentiality will of course be strictly respected.

2. For those wishing further copies of this paper for the purpose of commenting on it, the paper may be downloaded from our website at www.scotlawcom.gov.uk, or purchased from The Stationery Office Bookshops.

[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

Contents

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 the children's hearing system beyond those required for the purposes of the terms of the reference.

1.2 The focus of our considerations in this discussion paper is the notion of age of criminal responsibility. At the outset we wish to make clear that this idea can be understood in two quite different ways. In one sense 'age of criminal responsibility' is the age below which a child is deemed to lack the capacity to commit a crime. This meaning of the expression is probably that in common usage and is also the idea expressed in section 41 of the Criminal Procedure (Scotland) Act 1995, which is mentioned in our terms of reference.[1] That section provides that it "shall be conclusively presumed that no child under the age of eight years can be guilty of any offence."

1.3 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."

1.4 We examine this important distinction in further detail later.[2] What is of significance for present purposes is that Scots law currently uses not one, but two, concepts of 'age of criminal responsibility.' In other words it deploys both senses of the idea referred to earlier. On the one hand there is a rule on criminal capacity (in section 41 of the 1995 Act) and on the other a rule on immunity from criminal prosecution (in section 42(1) of the Act and other related provisions). The proposals set out in this discussion paper are based on the argument that for a variety of reasons there is no need to retain the rule on criminal capacity. Instead

[1] The 1995 Act is a consolidating statute. Section 41 derives from sections 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 section 14 of the Children and Young Persons (Scotland) Act 1932.

[2] Paras 2.1-2.7.

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.

Background to consideration of reform

1.5 There are two distinct elements to the background to the present review of the age of criminal responsibility. The first is whether the existing provisions of Scots law fulfil the requirements of the European Convention on Human Rights and the 1989 UN Convention on the Rights of the Child. We consider these provisions later.[3] The second and more immediate element is the report of the Advisory Group on Youth Crime.[4] The Advisory Group was set up by the Scottish Executive in November 1999. The chief focus of its report was offenders in the 14-18 age bracket and the problems arising from the so-called 'fractured' response to dealing with these offenders (ie, using the children's hearings system for (most) offenders under the age of 16 and the criminal justice system for (most) offenders above that age). One of the report's recommendations was to "review the case for raising the age of criminal responsibility to 12 years." The Scottish Executive issued a Response Paper.[5] That paper stated that the Executive accepted all of the Advisory Group's recommendations. Its comment on the specific issue of the age of criminal responsibility was that "The Scottish Executive will consider how best to review the age of criminal responsibility and the issues which might arise from any change." It may be noted, however, that in neither the Report of the Advisory Group nor the Executive's Response Paper is there any substantive discussion of the topic.

1.6 At about the same time the Scottish Consortium on Crime and Criminal Justice issued a report on *Rethinking Criminal Justice in Scotland*.[6] The Consortium took the view that Scotland has one of the lowest ages of criminal responsibility in the world but it accepted that most young offenders under 16 years are dealt with by the hearings system. The Consortium argued that the age of criminal responsibility should be raised "to the same age as that in which young people move into the adult criminal justice system which we believe should be 18 years."[7] It is clear that the focus of attention of the Consortium's report, as far as concerns the age of criminal responsibility, was the limitations on the prosecution of children under 16,[8] rather than the age at which children are conclusively presumed not to be guilty of any offence.

---

[3] Paras 2.17-2.34.

[4] *It's a Criminal Waste. Stop Youth Crime Now.* Report of Advisory Group on Youth Crime (June 2000). The remit of the Advisory Group was (a) to assess the extent and effectiveness of options currently available to children's hearings and courts in cases involving persistent offenders, and (b) to look at the scope for improving the range and availability of options aimed at addressing the actions of persistent young offenders.

[5] *It's a Criminal Waste. Stop Youth Crime Now.* Scottish Executive Response (June 2000).

[6] Report dated November 2000. The Consortium brings together a number of organisations and individuals concerned with crime and criminal justice in Scotland, including the Howard League Scotland, APEX Scotland, SACRO, the Scottish Human Rights Centre, and Victim Support Scotland.

[7] *Rethinking Criminal Justice*, para 13. Later they add: "Given that, in practice, because of the hearings system, very few children under 16 years old are, in fact, prosecuted in the criminal courts in Scotland, there would appear to be little problem in taking on board the United Nations recommendation that the UK give serious consideration to raising the age of criminal responsibility to bring the UK countries in line with much of Europe" (*ibid*, para 124).

[8] 1995 Act, s 42.

Scope of discussion paper and our proposals in outline

1.7 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 will be considered. Finally, we examine briefly the way in which child offenders are dealt with in some other jurisdictions.

1.8 In Part 3 we discuss possible reforms of the existing law in this area. First, we set out our views on the abolition of the rule on age of criminal responsibility which is concerned with the capacity of children to commit crimes. We then address the question whether the Crown should continue to enjoy a discretionary power to prosecute children or whether all child offenders below the age of 16 should be dealt with by children's hearings. If the existing discretion is to continue, as we think it should, then the main issue which arises is the extent to which the discretion of the Crown to prosecute should be limited or structured, including whether children below a defined age cannot be prosecuted at all. Another issue for consideration is the ground for referring a child to a children's hearing that the child has committed an offence. In *Merrin v S*[9] the Inner House decided that a child under the age of 8 could not be referred to a children's hearing on this ground. We have come to the preliminary conclusion that this decision should be overruled (whether or not any other changes are made). The effect would be that any child under the age of 16 who engaged in conduct which constitutes an offence would be capable of being referred to a children's hearing. We also consider whether the 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. We reach the conclusion that the existing law is adequate to deal with this problem but we ask whether the law should be subject to a statutory re-statement. We also consider whether a rebuttable presumption about the age of capacity of children to commit crimes should be introduced. Finally, if our primary proposal to repeal section 41 of the 1995 Act is not accepted, we suggest that the rule should be re-stated as a substantive rule of law rather than as a conclusive presumption.

1.9 Part 4 lists our proposals for reform. Appendix A sets out excerpts from the *Prosecution Code* issued by the Crown Office and Procurator Fiscal Service. Appendix B 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 C contains statistics on prosecution of children in Scotland and referrals to children's hearings. Appendix D lists the age of criminal responsibility in other jurisdictions. Appendix E sets out brief accounts of juvenile justice systems in various other legal systems.

Legislative competence

1.10 The proposals in this discussion paper relate to criminal law, prosecution policy and children's hearings. With a few exceptions which do not concern the matters in this

[9] 1987 SLT 193.

discussion paper these areas of law are not reserved to the Westminster Parliament.[10] We consider that our proposals would therefore be capable of being implemented by legislation of the Scottish Parliament.

1.11 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.[11] In our view enactment of the proposals made in this discussion paper would not breach Convention rights.[12]

Acknowledgements

1.12 In preparing this discussion paper we have had the benefit of comments and assistance from officials from the Crown Office and the Scottish Children's Reporter Administration. We are grateful to them for their help. None of them, however, bears any responsibility for any policy views or errors in this paper.

[10] Scotland Act 1998, Sch 5.
[11] Scotland Act 1998, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).
[12] See para 2.25 below.

Part 2 The Age of Criminal Responsibility in Scotland, International Conventions and other Jurisdictions

A: SCOTLAND

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

2.1 We noted in Part 1 that one, but not the only, meaning of 'age of criminal responsibility' is that 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. Other rules include the following:

1. No child under the age of 16 may 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 and the sheriff court has jurisdiction over such a child for an offence (1995 Act, s 42(1)).
2. Where a child under 16 is brought before a criminal court the chief constable of the area where the offence is alleged to have been committed must notify the local authority with the view to the authority providing the court with a report on various aspects of the child's background (1995 Act, s 42(7),(8)).
3. Where a child under 16 appears in the sheriff summary court, the procedure differs from that in normal summary proceedings (1995 Act, s 142(1); 1996 Act of Adjournal, r 6). [1]
4. Special provisions apply to the case of a child awaiting trial who is not liberated on bail (1995 Act, s 51).
5. A court cannot impose a custodial sentence on a person between the ages of 16 and 21 unless it is of the opinion that no other method of dealing with him is appropriate (1995 Act, s 207).
6. In certain circumstances a court may or must remit the case of a child (including in some cases a child aged up to 17 years and 6 months) convicted of an offence to the Principal Reporter, with a view to disposal by a children's hearing (1995 Act, s 49).

2.2 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. The two major contrasting senses of age of criminal responsibility 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

[1] As a consequence of the decision of the European Court of Human Rights in *T v UK; V v UK* (2000) 30 EHRR 121 all trial procedures involving children under 16 will have to be modified to ensure that the accused fully understands the proceedings and can participate effectively in them. See further at paras 2.18-2.25.

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]

2.3 This distinction was noted by the Ingleby Committee on Children and Young Persons in England and Wales, which reported in 1960.[3] 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 a variety of 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.

2.4 We must stress that for purposes of this discussion paper our main concern is with the rule in the narrower, traditional sense, that is as concerning the minimum age of responsibility in the sense of capacity to commit a crime. The background to our receiving the reference from the Scottish Ministers and the terms of the reference itself (which specifically mentions section 41 of the 1995 Act) point to this conclusion. It follows therefore that it is not part of our remit to consider, for example, the issue whether the *upper* age limits for the jurisdiction of children's hearings should be changed,[4] or the age at which it becomes appropriate to impose particular penalties on young offenders. However, although our discussion and proposals for reform will focus on the narrower concept of the age of criminal responsibility, from time to time we will make reference to other age limits in the criminal justice system.

2.5 There has been remarkably little discussion in Scotland of the nature of the rule currently set out in section 41 of the 1995 Act or its possible rationales and justifications. In *Merrin v S*,[5] an important decision on the ground of referral to a children's hearing that a child has committed an offence, the Inner House read the rule as being concerned with

---

[2] "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 or the sheriff court shall have jurisdiction over a child under the age of 16 years for an offence."

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

[4] 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. The effect is that most offenders aged between 16 and 18 are subject to the criminal justice system, not children's hearings. A key recommendation of the Advisory Group on Youth Crime (see para 1.5) was that offenders aged 16 and 17 should be dealt with by the hearings system. The Executive in its Response Paper (see para 1.5) has noted that this proposed extension has implications for many agencies, including the hearings themselves, the Crown Office and the courts. For further discussion see *Rethinking Criminal Justice in Scotland. Report of the Scottish Consortium on Crime and Criminal Justice* (2000), pp 23-24; B Whyte, "Reviewing Youth Crime in Scotland" SCOLAG Journal, May 2001, p 80.

[5] 1987 SLT 193. We consider this decision in more detail at paras 3.17-3.25.

criminal capacity. As such, the rule is to the effect that a child under the age of 8 must be deemed to lack the requisite mens rea for any offence. Furthermore, and consistently with this approach, the section title is 'age of criminal responsibility' and criminal responsibility is usually defined as the requisite mental element in criminal conduct.[6]

2.6 Nevertheless we prefer to interpret the rule as being concerned with providing children under the age of 8 with immunity from prosecution. In this sense the rule is that a child under 8 cannot be subject to criminal prosecution, irrespective of his actual capacity to form any criminal intent. There are two grounds for preferring this reading of section 41. In the first place it is consistent with the substance of the rule. Section 41 is expressed in terms of a child under 8 not being 'guilty' of an offence, instead of such a child not 'having criminal responsibility' in respect of an offence. Whereas it is true that an accused person who lacks criminal responsibility cannot, in general, be guilty of an offence, it does not follow that any person who cannot be found guilty of an offence is lacking criminal responsibility. The criminal justice system advances a variety of principles and policies for granting immunity from criminal conviction. Moreover the rule on children under 8 applies in cases of strict liability, where issues of mens rea are not involved.[7]

2.7 Secondly, we believe that consideration of the way this rule developed as part of Scots criminal law indicates that its purpose was to prevent young children being exposed to the full rigours of the criminal justice system.

Development of the age of criminal responsibility in Scots law

2.8 In his *Commentaries* Hume follows his general discussion of 'dole' with considering who may commit crimes.[8] He notes that English law has developed a number of 'not unreasonable' rules, namely absolute capacity for a child above 14 ("and the ordinary judgment shall pass on them, though it be even judgment of death"), a rebuttable presumption that a child under 14 has no capacity of dole, and in the case of persons under 7, "the presumption from dole is absolute, and does not allow a conviction to be obtained." By contrast, the position in Scots law is less certain. Persons above 14 have full capacity and are liable to the ordinary judgment, "not excepting that of death, for those crimes, such as murder, fire-raising, theft and the like, whereof they may know the wickedness even at those early years." He notes that in some cases the age of a convicted person between 14 and 21 has been used as a mitigating factor but he treats these cases as exceptional. As regards children below 14, Hume is of the view that there is no hard and fast rule that they are liable to capital punishment, and much will depend on the circumstances of each case.[9] Hume's discussion of this issue was initially concerned with one particular type of disposal, that is

[6] "It is characteristic of our own and all advanced legal systems that the individual's liability to punishment, at any rate for serious crimes carrying severe penalties, is made by law to depend, among other things, on certain mental conditions." (H L A Hart, *Punishment and Responsibility* (1968), p 28).

[7] Gordon, *Criminal Law* (3rd edn by M.G.A. Christie, 2000), p 332. It is significant that Gordon refers to the rule as a plea in bar. He does not discuss the rule in his treatment of the 'Criminal Mind' (chapter 7). However the article on Criminal Law in the *Stair Memorial Encyclopaedia* deals with the rule in the section on Capacity (vol 7, para 159).

[8] Commentaries I, 30.

[9] Hume adds at this point: "If, by any future judgment, it shall be found that a pupil is not absolutely exempted from this last and highest atonement for his crime, probably this severity shall not however be extended to one between seven and ten and a-half years of age; who, in the civil law, is termed *infantiae proximus*, and can hardly be supposed capable of full and capital degree of dole." (Commentaries I, 35).

capital punishment. He continued that with lesser forms of punishment, matters are more definite:[10]

> "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."

2.9 Alison's statement of the law is broadly similar to Hume's.[11] He states three propositions as summing up the rules:

" (1) Minors, whether male or female, who have attained the age of fourteen years, are liable to any punishment, not excepting death itself, for grave offences."

"(2) Pupils, though below fourteen years of age, nay though only nine, ten, or eleven years of age, may be subjected to an arbitrary punishment, if they appear qualified to distinguish right from wrong, but not to the pain of death."

"(3) Children under seven years of age are held to be incapable of crime, and not the object of any punishment."

2.10 It is to be noted that the context of the discussion by Hume and Alison is more that of appropriateness of applying forms of punishment to young people than the presence or absence of dole (mens rea) in children of different ages. During the 19th Century it became accepted that children below 7 could not be subject to criminal punishment though there was no definitive statement of this rule as one relating either to mens rea or to immunity from prosecution.

2.11 A crucial background to this issue was the lack of any special provision for dealing with children who committed crimes. The effect of the rule which exempted a child from criminal punishment because of his age was that the child was beyond any measure of social intervention in respect of his criminal conduct. An important development was the introduction of juvenile courts by the Children Act 1908. The Act sought to separate young offenders from adults within the criminal justice system and to add measures designed to educate and reform young offenders. In 1928 a Committee on the treatment of young

---

[10] Commentaries I, 35. Hume concluded his discussion by saying: "Before dismissing this article, I will only further observe, that in fixing the measure of punishment to be inflicted on a pupil, the Court are not, and cannot be confined to dispense it, according to years and days. They take into consideration all the circumstances, the whole equity of the case, and proportion their sentence to the character of the particular deed; so that humanity may be consulted whensoever it can, and the ends of public example be answered, when occasion shall require it. In this view, regard is to be had not only to the rank of the crime in the abstract, but to the contrivance also and way of execution of the particular deed; to the sort of concern which the pupil had in it, - was it as principal actor, or in the way only of remote and inferior assistance; to the circumstances of his doing it single, or with accomplices; and if with assistance, whether it was that of others of his own age, or of old and trained offenders, or perhaps of persons who stood in a situation of awe or authority over him." (I, 36-37).

[11] *Principles of the Criminal Law of Scotland*, pp 663-667. There is a social, or criminological, context to Alison's treatment of this issue. He begins his discussion by saying: "The vast increase in juvenile delinquency, arising from the corrupted manners, temptation to vice, and incessant drunkenness, of a large proportion of the lower orders, in all our great cities, has unfortunately fixed the law on too well known a footing in regard to minority and infancy, to render any lengthened discussion necessary."

offenders in Scotland reported.[12] The Committee made a number of recommendations designed to bring about modifications to the existing system of juvenile courts. In addition the Committee recommended an alteration to the age of criminal responsibility:[13]

> "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. We have already referred to typical sentences imposed on children and young persons during the nineteenth century, and they are sufficient to show that the attitude of society to juvenile delinquency has been entirely, and very wisely, altered. We know that there is a real reluctance on the part of police and court officials to take proceedings against quite young children, and we consider that the age of criminal responsibility should now be raised by statute to eight years. While this age may seem unduly young, we are satisfied that the courts make every necessary allowance and that no hardship is caused."

2.12 No obvious point of principle was given for this recommendation (or its equivalent for English law[14]). However the effect was that Scots law on this subject was placed on a statutory basis and the age raised from 7 to 8. Section 14 of the Children and Young Persons (Scotland) Act 1932 (which is in identical terms to that of section 19 of the [English] Children and Young Persons Act 1932) has the section title 'increase in the age of criminal responsibility' and is in identical wording to the provisions of what is now section 41 of the 1995 Act.[15]

2.13 The next and crucial stage in the development of the law on age of criminal responsibility was the Committee on Children and Young Persons in Scotland, chaired by Lord Kilbrandon, which reported in 1964.[16] 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 as an important consideration. Yet at the same time these courts were part of the wider criminal justice system which embodied the traditional 'crime-responsibility-punishment' concept rather than proceeding on preventive and educational principles. The Committee's solution was to separate the distinct issues of

---

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

[13] *Ibid*, p 48. In the following section of its report the Committee considered whether the maximum age of offenders who were dealt with by the juvenile courts should be raised from 16. The Committee noted the range of age levels used in different parts of the civil law but did not think these rules provided any analogy or guidance for the particular issue it was considering. It also took the view that raising the jurisdiction of the juvenile court to deal with offenders aged up to 18 might result in changing the character of that court. In the event it recommended that the age limit be raised to 17 but this recommendation was never implemented.

[14] At about the same time an equivalent committee in England and Wales made a similar recommendation in respect of English law: "As the law stands at present no act done by any person under seven years of age is a crime and no act done by any person over seven and under fourteen is a crime unless it be shown affirmatively that such person had sufficient capacity to know the act was wrong. The age of seven was adopted hundreds of years ago and the whole attitude of society towards offences committed by children has since been revolutionised. We think the time has come for raising the age of criminal responsibility, and we think it could safely be placed at eight. For children over this age the courts should bear in mind the requirement referred to above." (Report of the Committee on the Treatment of Young Offenders (Chairman Sir Thomas Molony) (Cmnd 2831, 1927) p 21).

[15] 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).

[16] Cmnd 2306.

(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."[17]

2.14 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:[18]

> "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 age of criminal responsibility (in the sense of the age below which a child cannot be convicted of an offence)? 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:[19]

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

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,[20] but considered that the question of more practical importance was whether children of 8 and older should be better dealt with by some form of non-criminal procedure.

---

[17] *Ibid*, para 73.
[18] *Ibid*, para 125.
[19] *Ibid*, para 65.
[20] "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).

2.15 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.[21] Furthermore the Committee recommended that "any rule of law or statutory provision establishing a minimum age of criminal responsibility should be repealed."

2.16 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 restriction on prosecution of children 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 particular recommendation in respect of the age of criminal responsibility.

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

European Convention on Human Rights

2.17 Two important issues are (1) whether the existing rules on age of criminal responsibility in Scots law are compatible with the European Convention on Human Rights and (2) whether our proposals for reform, which are contained in Part 3 below, are themselves consistent with the requirements of the Convention.

2.18 The issue of age of criminal responsibility arose directly in the joint cases of *T v UK; V v UK*.[22] 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, 6 and 14 of the Convention.[23] 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 noted that there was considerable variation on the age of criminal responsibility in European legal systems. It concluded:[24]

> "The Court does not consider that there is at this stage any clear common standard amongst the member States of the Council of Europe as to the minimum age of criminal responsibility. Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age-limit followed by other European States. The Court concludes that the attribution of criminal responsibility to the applicant does not in itself give rise to a breach of Article 3 of the Convention."

---

[21] *Ibid*, para 139.
[22] (2000) 30 EHRR 121.
[23] 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 and article 14 prohibits discrimination in the enjoyment of Convention rights.
[24] Para 74, p 176.

2.19 The Court also held for similar reasons that subjecting a child even as young as 11 to a criminal trial did not by itself breach article 6(1). However the Court added:[25]

> "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 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."

2.20 A concurring opinion was given by Lord Reed, who was an ad hoc member of the Court for these applications. Lord Reed noted that there would inevitably be difficulty in determining the age at which children should be held responsible for their actions under the criminal law. He added:[26]

> "Children who commit crimes present a problem to any system of criminal justice, because they are less mature than adults. Even children who may appear to be lacking in innocence or vulnerability are nevertheless evolving, psychologically as well as physically, towards the maturity of adulthood. One consequent difficulty lies in deciding whether children are sufficiently mature to be held responsible for their actions under the criminal law. *If children are held criminally responsible, they then have to be tried*; but ordinary trial procedure will not be appropriate if a child is too immature for such procedure to provide him with a fair trial. If children are tried and convicted, they then have to be sentenced; but it will not be appropriate to sentence them in the same way as an adult, if their immaturity has the consequence that they were less culpable or that reformative measures are more likely to be effective. All of these problematical aspects of the treatment of children in the criminal justice system - the age of responsibility, the trial procedure and sentencing - are raised in the present case."

2.21 It is clear that Lord Reed is using the concept of age of criminal responsibility not in the sense of mens rea but as concerned with the appropriate method of dealing with children who commit crimes. Accordingly the compatibility of a rule on age of criminal responsibility and article 3 of the Convention will depend upon the impact of those procedures on the child:[27]

> "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

[25] Para 86, p 179. The Court also rejected a further submission in relation to article 14 as not giving rise to any issue not already dealt with.
[26] At p 191 (emphasis added). It is not entirely clear why Lord Reed thought that children above the age of criminal responsibility cannot be subject to an alternative procedure to criminal prosecution. Under existing Scots law child offenders between 8 and 16 years are normally dealt with as part of the children's hearings system but in exceptional cases are instead prosecuted in the criminal courts. See further at paras 3.7-3.12.
[27] At p 192.

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."

2.22 Five judges issued a separate opinion which dissented from the Court's judgment on this part of the application. The five judges took the view that an age of criminal responsibility as low as 8 would almost inevitably breach the provisions of the Convention. However 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."[28]

2.23 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.

2.24 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. 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 we propose that Scots law should abolish its existing rule on age of criminal responsibility in the sense of criminal capacity.[29] We are of the view that our proposal is consistent with the provisions of the Convention.

2.25 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 child's maturity. The focus of the Convention then 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 children under 16 may be prosecuted in exceptional cases where this is required in the public interest.[30] 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.

[28] At p 203.
[29] Para 3.5.
[30] Para 3.12.

International conventions and instruments

2.26 In addition to the European Convention on Human Rights there are various 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)

2.27 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."

2.28 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. Part of our primary proposal is that Scots law should retain its existing provisions on prosecuting children under 16 contained in section 42 of the 1995 Act, and that it is this provision which sets out the rule of Scots law of age of criminal responsibility for the purposes of international instruments such as the Beijing Rules.[31]

2.29 Article 4 of the Beijing Rules also links the age of criminal responsibility with the age used in other areas of the law. We doubt whether too much weight should be given to this principle, as the age limits in the civil law need not reflect the same policy goals as those for the age of criminal responsibility. Nonetheless we believe that as far as possible we should try to avoid major discontinuities between age limits fixed by the law. The civil law fixes a variety of ages for purposes of the legal capacity of children,[32] but the age most commonly used is 16. Furthermore the Age of Legal Capacity (Scotland) Act 1991 lays down a general rule that, subject to exceptions, a child 16 years or older has full legal capacity. One

[31] See paras 3.6-3.12.
[32] See K McK Norrie, *Parent and Child* (2nd edn, 1999), pp 476-489.

consequence of our proposal to fix the age of criminal responsibility in terms of section 42 of the 1995 Act is that it brings that age into line with the age of capacity in civil law.

(b) The United Nations Convention on the Rights of the Child (1989)

2.30 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. For purposes of the Convention a child is a person under the age of 18 unless, under the domestic law as 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;
> (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."

2.31 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."

2.32 It is a curious feature of article 40(3)(a) that it appears to use age of criminal responsibility in the sense of capacity to form criminal intent, and even more curious that it requires the provision on this issue to be in the form of a presumption rather than a rule. However it is necessary to read that article 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). We therefore conclude that the concept of age of criminal responsibility of concern to the UN Convention is that relating to the age for the entry point into the criminal justice system.

2.33 It is not clear whether the UN Committee which considered the UK's compliance with the Convention had its attention drawn to the workings of the children's hearing system in Scotland or to the provisions in section 42(1) of the 1995 Act relating to the prosecution of children. As we mentioned above and as we discuss in more detail in Part 3 our primary proposal is two-fold: abolition of the rule in section 41 of the 1995 Act and retention of section 42(1) of the Act as the rule of Scots law on the age of criminal responsibility. We are of the view that our primary proposal meets the requirement of the Convention. For purposes of the Convention the age of criminal responsibility is that set out in section 42(1) of the 1995 Act.

2.34 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 the use of the terminology of presumptions. Below we propose that if our primary proposal is not adopted and section 41 of the 1995 Act is retained in its current or amended form, the provision should be in the form of a rule rather than a presumption.[33] It may be noted in any case that the rule in section 42(1) of the 1995 Act, which we argue states the position of Scots law on the age of criminal responsibility for purposes of the Convention, in fact uses the concepts, if not the actual language, of legal presumptions.

[33] Para 3.45.

C: COMPARATIVE LEGAL MATERIAL

2.35 A considerable amount of comparative legal material is contained in the Report on the Age of Criminal Responsibility of the Law Reform Commission of Hong Kong.[34] We acknowledge our debt to this Report and we have drawn freely upon its findings. However there are limitations in considering this material in the present context. First, as argued earlier there are different concepts of age of criminal responsibility, and when using comparative legal material it is often difficult to be sure that one is comparing like with like. Secondly, the crucial context for considering the age of criminal responsibility is the juvenile justice system in its *broadest* sense (including non-criminal procedures) used in respect of young offenders in each legal system under consideration. The volume of material that requires to be consulted is accordingly huge. This point was recognised by the Hong Kong Commission itself. It noted that where change has been made to the age of criminal responsibility the trend had been towards raising the minimum age. At the same time the Commission stated:[35]

> "The international trend towards a raising of the minimum age of criminal responsibility must be viewed with some caution, however. Equally, while the practice in other jurisdictions is of relevance, it cannot be regarded as presenting a conclusive case for change, particularly in an area of the law which even more than most reflects the cultural and social values of the particular jurisdiction."

The Commission recommended that the minimum age of criminal responsibility in Hong Kong should be increased from 7 to 10 years of age. Significantly, the Commission also recommended that there should be a general review of the juvenile justice system in Hong Kong.

2.36 One of the factors that appears to drive moves for reform of Scots law is that by comparison with other legal systems the age of criminal responsibility is low. However those who adopt this argument use age of criminal responsibility in its narrow sense (ie age of criminal capacity) which may not be the same sense as other ages which appear in comparative tables. This point was well made in a study by the UNICEF International Child Development Centre:[36]

> "The [United Nations] Committee on the Rights of the Child constantly refers, in its Concluding Observations on State reports, to the desirability of setting the highest possible minimum age. It has in particular criticized countries where the age is set at 10 or below. At the same time, the level at which this age is set is in no way an automatic indication of the way a child is dealt with after committing an offence. Thus, in Scotland where the age is among the lowest (8 years), the progressive 'children's hearings' system in fact avoids contact with the formal justice system for children under 16 – and even many 16- and 17-year olds – for all but the most serious offences, and is solidly oriented towards non-custodial solutions. This compares with Romania, for example, where the minimum age is 14 and where a child of that age will be brought to court for the same offence and possibly sentenced to detention

[34] *Report on the Age of Criminal Responsibility in Hong Kong* (Law Reform Commission of Hong Kong, 2000), chapter 2. We reproduce from that Report at Appendix D below a table on age of criminal responsibility in other jurisdictions. The Report can be found on the Internet at http://www.info.gov.hk.hkreform
[35] *Report*, para 2.35.
[36] *Innocenti Digest* (Jan 1998), pp 4-5.

as a result; or with Guatemala, with 18 as the minimum age but where a long-term 'socio-educational' institutional placement may be ordered for an offence committed by a child under that age. In sum, the age at which criminal responsibility is set may or may not reflect a repressive or rehabilitative perspective on the part of the authorities."

2.37 In Appendix E we set out brief descriptions of the juvenile justice systems in a number of other countries. The consideration of the law and practice in other legal systems is far from comprehensive but it does suggest that in many countries the age of criminal responsibility functions in a broadly similar way to the rule which we propose for Scots law in Part 3 below. In other words, a child below the age of criminal responsibility in this sense cannot be, or is not usually, subject to the adult system of criminal prosecution and punishment. However the age of criminal responsibility does not act to prevent intervention by another form of legal process to consider the conduct of the child, albeit this sort of legal process is typically concerned with the welfare of the child rather than with imposing criminal penalties.

Part 3 Proposals for Reform

Overview

3.1 We turn now to discuss the issues which are involved in rules fixing an age of criminal responsibility with a view to making proposals for reform. In Part 2 we discussed the development of the rules on the age of criminal responsibility in the Scottish criminal justice system, and considered the implications for this topic of the European Convention on Human Rights, the United Nations 'Beijing Rules', and the United Nations Convention on the Rights of the Child. We have identified the following issues as requiring consideration for possible proposals for reform:

(1) Retention, amendment or abolition of the rule in section 41 of the 1995 Act that a child under 8 years of age cannot be guilty of an offence.[1]
(2) The prosecution in the criminal courts of children under 16 years of age.[2]
(3) The ground of referral to a children's hearing that a child has committed an offence.[3]
(4) Exploitation of children under the age of criminal responsibility by older offenders.[4]
(5) The introduction of a rebuttable presumption about the criminal capacity of children.[5]
(6) The form of any rule that a child below a certain age cannot be guilty of an offence.[6]

Our primary proposal: the abolition of the rule on criminal capacity of children and retention of power to prosecute children under the age of 16 in exceptional cases

3.2 We start by considering what we regard as the central issue, or set of issues, involved in the age of criminal responsibility in Scots law, namely removing the ambiguity and resulting confusion which results from there being two different meanings to the term. We make our primary proposal for reform. This proposal is in two parts, removal of the lower age relating to criminal capacity, but retention of the rule that children under the age of 16 should not be prosecuted in the criminal courts unless in very exceptional cases.

(a) The rule that a child under 8 years of age is deemed incapable of being guilty of an offence.

3.3 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

[1] Paras 3.2-3.5.
[2] Paras 3.7-3.12.
[3] Paras 3.17-3.23.
[4] Paras 3.31-3.41.
[5] Paras 3.28-3.30.
[6] Paras 3.42-3.45.

essence we agree with the approach of the Kilbrandon Committee that with the introduction of a welfare system such as children's hearings for young offenders and severe restrictions on prosecuting children in the criminal courts, there is no need for a rule on criminal capacity of children.[7] 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.'

3.4 It does not follow from our recommendation that the question of criminal capacity or mens rea would be irrelevant in the prosecution of a child in the criminal courts. On the contrary, the fundamental principle of our criminal process remains that the Crown has to establish the mens rea of any accused person and our proposal would not affect that principle in a case against a child accused. Indeed, as we consider below, in some cases problems in proving mens rea of a child accused might be a factor which would lead the Crown to decide not to prosecute. Nor is it 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 debated 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.[8]

3.5 Accordingly we propose 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.

3.6 Our view is that Scots law should approach the age of criminal responsibility as relating to the age which reflects fundamental differences in the manner in which young persons who are accused of offences are dealt with. As we pointed out earlier that issue is the one which explains the historical development of the common law rule on age of criminal responsibility, as well as the rule in section 41 and its statutory predecessors. Furthermore this approach brings Scots law more into line with that taken in many other legal systems. Understandably, confusion has been created about the position of Scots law on the age of criminal responsibility, especially in the context of comparative studies and the requirements of international conventions. This situation has arisen by concentrating attention on the rule in section 41 of the 1995 Act rather than by looking at the provisions of section 42(1) of the Act and the operation of the children's hearing system. In our view since the time when the Social Work (Scotland) Act 1968 came into effect in 1971, the age of criminal responsibility in Scots law has been 16, as much as if not more than the age of 8. This is not a matter on which we can make a formal proposal. Nonetheless we suggest that for purposes of international conventions and instruments relating to the age of criminal responsibility, Scots law should characterise this issue in terms of the rule or rules on the age at which children become subject to the normal rules and practices of criminal prosecution which apply to adults.

[7] 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."

[8] Paras 3.13-3.16.

(b) The prosecution of children in the criminal courts

3.7 While 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 the 1968 Act and now appears in section 42 of the 1995 Act. We have considered whether those provisions should be retained or whether there should be no overlap between the hearings system and the criminal justice system. 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.

3.8 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.[9] 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.[10] 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.[11] 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.

3.9 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 if that would be in the public interest. It must be borne in mind that 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.

(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, especially very young children, there might be formidable difficulties in proving the criminal capacity of the child.

---

[9] For discussion see Allison Morris, "Scottish Juvenile Justice: A Critique" in R Hood (eds), *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.

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

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

(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.[12] 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 recently published a Prosecution Code which sets out the general criteria for prosecution decision-making.[13] 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."

3.10 We set out in Appendix B 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.[14] 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.[15]

3.11 We take the view that there are exceptional circumstances in which the prosecution of children under 16 is justified. In practice the vast majority of children under 16 who commit crimes are not prosecuted. From the statistics in Appendix C 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 prosecuted in the criminal courts was 189 in 1997, 179 in 1998 and 105 in 1999.[16] 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.[17] 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

[12] *T v UK ; V v UK* (2000) 30 EHRR 121. For an account of this sort of modification to trial procedure and of a recent High Court of Justiciary trial where they were made, see "Children in Court. Towards a Child Friendly Court" Part I (N Dowie, 2001 SLT (News) 179), Part II (D Ogg, *ibid* 181).
[13] We reproduce part of this Code in Appendix A.
[14] For discussion of an earlier version of this direction see Stair Memorial Encyclopaedia, vol 17, para 888.
[15] 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.
[16] The number of children aged 13 or younger prosecuted in the criminal courts was 14 (1997), 9 (1998) and 5 (1999).
[17] Appendix C, Tables 1-6.

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 C 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.[18]

3.12 Overall in our view the consistent pattern of infrequent resort to prosecuting children under 16 indicates a proportionate response in Scots law to dealing with young offenders. We believe that current law and practice strikes a proper balance between the welfare approach which applies to the vast majority of offenders under 16 and the very rare cases where the public interest requires prosecution of under-16s in the criminal courts. Accordingly we propose that:

2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained.

A lower age limit for prosecution?

3.13 We now turn to consider whether there should be a rule that children below a specified age cannot be prosecuted for any offence, irrespective of the nature of the offence and their actual capacity or mens rea.

3.14 At present no child under the age of 8 can be subject to criminal prosecution as a consequence of section 41 of the 1995 Act. We proposed above that that section should be repealed along with any common law rule relating to the capacity of children to commit crimes. We have also proposed that the Crown should retain the authority to prosecute children under 16 but that prosecutions should be limited to exceptional cases which are required in the public interest. If these proposals were to be enacted, 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. We very much doubt whether very young children would ever be prosecuted as a matter of practice. We mentioned above three controlling factors on decisions to prosecute a child of any age below 16, namely the duty on the Crown to prove criminal capacity, 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.

3.15 Nonetheless there may 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 in any case be minimal given that so few children under 16 are prosecuted in any case and the vast majority of them are in the 14-15 age bracket. On the other hand, 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 aged of 10 could be prosecuted, it is difficult to see how the public interest

[18] 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.

considerations which would justify the prosecution of a child aged 10 would not also apply to a child aged 9 years and 11 months.[19]

3.16 We have not arrived at a firm conclusion on this issue. In order to obtain views we pose the following questions:

3. (a) Should there be a statutory rule that children under a specified age below 16 years cannot be prosecuted for any offence?

(b) If so, what should the specified age be?

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

3.17 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."[20] This ground is the most commonly used ground of referral.[21] In *Merrin v S*[22] 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).[23]

3.18 Lord Dunpark's dissenting opinion favoured a more purposive approach to the 1968 Act:[24]

> "The sheriff said that 'committing an offence' meant exactly the same thing as 'being guilty of an offence', carrying the same implication of ascription of responsibility.
>
> At first sight this may seem to be a logical proposition but, in my opinion, it ignores the radical distinction between our criminal law and procedure in relation to children and the philosophy of Part III of the [1968] Act which replaced the concept that children who committed criminal offences should be prosecuted and punished with a totally different concept that children in need of compulsory measures of care should receive 'protection, control, guidance and treatment' (see s 32(3) of the Act)."

3.19 Lord Dunpark argued that 'child' was defined in the 1968 Act as a child who has not attained the age of 16, and that the Act made no distinction between the ages of a child in respect of any of the grounds for referral. Further, his Lordship pointed out that proceedings under the 1968 Act have consistently been characterised as civil *sui generis* rather than as criminal in nature. He concluded 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.

---

[19] We noted earlier (para 2.14) 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.
[20] Children (Scotland) Act 1995, s 52(2)(i) (formerly Social Work (Scotland) Act 1968, s 32(2)(g)).
[21] 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 C.
[22] 1987 SLT 193.
[23] See Lord Justice Clerk (Ross) at 196F; Lord Brand at 199F.
[24] 1987 SLT 193 at 197E-F.

3.20 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. 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.[25] 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*,[26] 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.[27] 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.[28] 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.[29] 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).

3.21 It follows that the effect of *Merrin v S* is that there will be cases of children under the age of criminal responsibility who are not subject to the children's hearings system despite having 'committed' crimes. Writing shortly after this decision Professor John Grant pointed out that even with the age of criminal responsibility as low as 8 there was still a small but significant number of children who would slip through the net for this reason.[30] If the rule on the age of criminal responsibility in the sense of criminal capacity were to be retained with a higher age level, then the scale of this problem would increase considerably.

3.22 We find it 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 and the hearings system solely because of their age. We draw attention to the likely impact that keeping the present rule but raising the age of criminal responsibility would have in exacerbating this situation. We propose that the decision in *Merrin v S* should be reversed by statute. This proposal is not dependent on any other proposals which we make in this discussion paper. This change is in any case implicit in our primary proposal above to abolish the existing rule on the minimum age of criminal responsibility in section 41 of the 1995 Act. However even if that proposal were to be implemented we consider that the change to the rule in *Merrin v S* should be subject to express provision for the avoidance of doubt. Furthermore we propose that the rule in that decision should be changed if a rule were to be adopted that children below a certain age are immune from prosecution. We also suggest a similar change if there is to be no alteration to the terms of section 41 of the 1995 Act or if the section is amended to alter the age in it.

---

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

[26] 1997 SLT 1396.

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

[28] 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).

[29] *Harris v F* 1991 SLT 242.

[30] John P Grant, "The Under Age Offender" 1987 SLT (News) 337 referring to research reported in (1981) *Journal of Social Welfare Law* 140.

3.23 Accordingly we propose that:

4. 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 or it is presumed the child cannot be guilty of the offence.

3.24 In *Merrin v S* Lord Justice Clerk Ross and Lord Brand stressed that an offence cannot be committed unless the perpetrator had mens rea.[31] If the decision in that case is overturned and it becomes possible to use the offence ground of referral for a child where there is no minimum age relating to criminal capacity or where the child is below any such age, the question arises whether the reporter needs to establish that the child had actual capacity or whether it suffices that no matter the child's general understanding, his conduct would be characterised as 'criminal' if committed by an older person. The offence ground of referral is generally subject to methods of proof in criminal proceedings, and in ordinary criminal proceedings the Crown is under a duty to prove that the accused acted with mens rea in relation to the offence. This issue could already arise under the present law where the reporter uses the offence ground of referral but the child had a defence of no mens rea (eg acting in a state of automatism). If the reporter were required to prove criminal capacity in respect of offences committed by very young children, the question would arise of what evidence would be relevant and sufficient to do so.[32] The whole question of proof of mens rea involves wider issues about the offence ground of referral to a children's hearing and is not one on which we can make a formal proposal. Nonetheless we draw attention to what may be an important consequence of giving effect to our proposal to allow a child below the age of criminal responsibility (in either sense) to be referred to a hearing on this ground.

3.25 We have also considered whether there are European Convention implications in allowing the commission of a crime to be established against a child for purposes of the children's hearing system who is otherwise below the age of criminal responsibility (in the sense of capacity) or who is immune from criminal prosecution. We are of the view that our proposal would not breach the provisions 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*,[33] 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.[34]

Presumption as to the criminal capacity or mens rea of children

3.26 Earlier we argued that the rule on age of criminal responsibility which is set out in section 41 of the 1995 Act reflects a policy about the impropriety of prosecuting young

[31] In that case the Court was not dealing with strict liability offences.
[32] At English common law the Crown could not rebut the presumption of *doli incapax* of children under 14 simply by proving the acts constituting the offence but by other 'clear, positive evidence' that the child knew that his act was seriously wrong *C v DPP*[1996] AC 1 at 38C-39F. This aspect of the English rebuttable presumption has been subject to sustained criticism. See further below at para 3.28 and 3.29.
[33] 2001 SLT 531.
[34] It was accepted that the hearings system was subject to article 6 in respect of the determination of the child's civil rights.

children rather than as encapsulating accepted wisdom about the ability of young children to form the mens rea for offences. This point was given considerable emphasis in the Report of the Kilbrandon Committee in its discussion of the earlier version of section 41:[35]

> "We think it important, in considering this aspect of the problems before us, to realise that the age of criminal responsibility has been laid down for purely legalistic reasons; it cannot possibly be said that the age so laid down either bears, or was ever intended to bear, any relation to the observable phenomena of child life."

3.27 In addition, treating the rule as a presumption as to capacity and nothing else would have implications for the types of consideration which would be of relevance to its possible reform. The key issue on this approach is where to draw the line. The sole basis for the rule would be the empirical determination of the age at which children in contemporary society typically reach a level of moral development that criminal capacity can be ascribed to them. The age of 8 was introduced by statute in 1932, modifying (but only slightly) a rule of much greater antiquity which fixed the relevant age at 7. It could therefore be argued that there is a case for *lowering* the age of criminal responsibility to reflect the earlier maturity and understanding of children today as compared with children in 1932. We doubt whether there is evidence of this type which would be generally accepted as true of most children in Scotland. But more to the point we doubt whether this kind of evidence is relevant to the issues we are examining. We do not think that any rule on the age of criminal responsibility is to be determined solely by evidence of the age of the typical moral development of children. In saying this we are not in any sense making any judgment on the validity or importance of work done by experts in the field of child development and educational psychology. We are making the different point that the policies behind the rule which we are considering involve other matters. In discussing the raising of the age of criminal responsibility in English law in the 20th Century, Nigel Walker commented:[36]

> "Nor was it the result of research by psychologists into the moral development of children, although Piaget's work was well known in England by the 1960s. It simply reflected the increasing preference of penal reformers for non-punitive, welfare measures."

3.28 Conceptualising the issue as relating to problems of proof has more relevance to a rule that children of certain ages are presumed to lack criminal capacity but that this presumption may be rebutted by proof of capacity. Until 1998 there was a rule in English law that a child between the ages of 10 and 14 was presumed to lack criminal capacity, and a similar rule exists in many jurisdictions influenced by English law. However, the rule has been strongly criticised, and its abolition was proposed by the Ingleby Committee.[37] The

---

[35] Report, para 62. See also at para 64: "It is quite outside human experience to assert that there is any age at which children change from being persons who are incapable of forming a criminal intention into persons who are capable of so doing. A moment's reflection will show that there was nothing about the climate of the year 1932 which could have justified anyone in Scotland saying, 'At the age of 8 a child can be guilty of an offence whereas at the age of 7 he cannot.' " . . . "No witness who gave evidence before us was prepared to say that by clinical observation or otherwise it was possible to come to a conclusion that chronological age as such has any direct bearing on the capacity to form a criminal intent and to commit a crime."

[36] "Childhood and madness: history and theory" in Allison Morris & Henri Giller (eds), *Providing Criminal Justice for Children* (1983) 19, at p 26.

[37] Many of the issues are discussed in the House of Lords' decision in *C v DPP* [1996] AC 1. In that case the House of Lords accepted that the rebuttable presumption that a child between the ages of 10 and 14 was *doli incapax* could give rise to anomalies and absurdities but held that the presumption could only be abolished by Parliament and not by judicial decision.

rebuttable presumption ceased to be part of English law by virtue of section 34 of the Crime and Disorder Act 1998 and has been abolished in other legal systems (for example, by Canada in 1984), though some countries have recently decided to retain it (for example, Ireland and Hong Kong).[38]

3.29 We do not favour introducing a similar rebuttable presumption into Scots law. We are conscious of the many practical problems and difficulties which the presumption can give rise to, and in the light of the relatively low number of cases to which it would have any application we see no advantage in adopting it as part of our system. In Scots law the onus of proving mens rea rests with the Crown. We are not aware of any problems which arise from this requirement and we see no need to alter that fundamental principle. In as much as a rebuttable presumption is designed to protect the interests of young people who have committed a crime, we believe that those interests are better protected by other means. In this context we note the comments of Lord Jauncey of Tullichettle in *C v DPP*:[39]

> "The presumption has been subject to weighty criticism over many years, by committees, by academic writers and by the courts . . .. I add my voice to those critics and express the hope that Parliament may once again look at the presumption, perhaps *as part of a larger review of the appropriate methods in a modern society of dealing with youthful offenders*.
>
> No such presumption operates in Scotland where normal criminal responsibility attaches to a child over 8 and I do not understand that injustice is considered to have resulted from this situation. In this connection it is worth mentioning that the system of children's hearings constituted by the Social Work (Scotland) Act 1968 which enables many offending children between 8 and 16 years of age to be effectively dealt with outside the criminal courts works extremely well."

3.30 Accordingly we propose that:

> **5. No rebuttable presumption that a child below a defined age lacks mens rea in respect of any offence should be introduced**.

Exploitation of children under the age of criminal responsibility by older offenders

3.31 An argument sometimes used in discussions of the age of criminal responsibility is 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.[40] We are not aware of any information which suggests that the exploitation of children to commit crimes is a problem in Scotland but we accept that if the

[38] Section 52 of the Children Act 2001 (not yet in force) raises the age of criminal responsibility in Irish law from 7 to 12 and retains the rebuttable presumption of *doli incapax* for children between 12 and 14. The Law Reform Commission of Hong Kong has recommended that the age of criminal responsibility in Hong Kong should be raised from 7 to 10 and that the *doli incapax* presumption should be retained for children aged between 10 and 14. (The Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong* (2000), pp 80-85). The Commission further recommended that these issues should be re-examined as part of a general review of the juvenile justice system (*ibid*, p 86).

[39] [1996] AC 1 at 20G-21A (emphasis added).

[40] See eg Report of the Law Reform Commission of Hong Kong, paras 3.2-3.3

age of criminal responsibility (in either of the two senses distinguished above[41]) were to be fixed at a high age, the possibility that children would be exploited in this way could not be altogether dismissed.

3.32 We consider first the position of the child who is caught up in this situation. A child who has been incited to commit a crime (whether or not he actually commits the crime) would be liable to the jurisdiction of a children's hearing on the ground that he is falling into bad associations or is exposed to moral danger.[42]

3.33 Secondly, we doubt whether using children to commit a crime would confer immunity on the older person from criminal liability. In general where A uses B to carry out a crime, both A and B can be charged as art and part guilty of the offence. Although direct authority on the point is sparse, the principle is clear that A can still be art and part guilty of the offence even if B cannot be prosecuted or is acquitted. Hume described the liability of a person who incited another who himself lacked full criminal capacity as follows:[43]

> "It is possible to imagine cases where the mandant, instigator, or contriver, shall be answerable, and the immediate actor be wholly free: as if an idiot or a madman is set on to murder."

3.34 In modern law the situation is explained in terms of a doctrine of innocent agency. Gordon states the position:[44]

> "A may be convicted of an offence actually, i.e. physically, committed by B, even if B is acquitted of the offence for lack of *mens rea*, or because of some excuse personal to him, such as non-age or insanity. It is murder for A to employ a lunatic or a child to kill B, or to employ a postman to deliver a bomb to him."

3.35 Moreover where an older person seeks to use a child to carry out a crime which the child does not in fact commit, the older person would not escape criminal liability. There are two possible methods of dealing with this situation, by use of a charge of incitement or of conspiracy.

3.36 (*i*) *Incitement*. For one person to incite another to commit a crime is an offence in itself in regard to common law and statutory offences.[45] The actus reus of the offence is the invitation to another to commit a crime. It is irrelevant if the invitation is declined. The mens rea is the intention of the inciter that the other party willingly assists in a criminal scheme.[46] There are, however, few reported cases of incitement, and in none is there any discussion of the topic of whether the incited party must have been capable of committing

---

[41] Para 2.2.
[42] Children (Scotland) Act 1995, s 52(2)(b).
[43] Commentaries I, 281. See also Macdonald, *Criminal Law of Scotland* (5th edn), pp 3-4 in discussing the situation when an accessory may become liable as a principal: "The strongest case is that a person inciting an unreasoning being, such as an infant or an idiot, to commit a crime. In such cases the instigator is truly a principal, using an unreasoning being to commit a crime."
[44] G H Gordon, *Criminal Law* (3rd edn by M G A Christie, 2000), p 147. The authorities cited by Gordon on this point are English and Commonwealth.
[45] See *H M Advocate v Tannahill and Neilson* 1943 JC 150; Criminal Procedure (Scotland) Act 1995 s 293: "any person who aids, abets, counsels, procures or incites any other person to commit an offence against the provisions of any enactment shall be guilty of an offence and shall be liable on conviction, unless the enactment otherwise requires, to the same punishment as might be imposed on conviction of the first-mentioned offence."
[46] Stair Memorial Encyclopaedia, vol 7, para 175.

the crime or whether the crime could have been committed at all.[47] Nonetheless the essence of the crime of incitement is seeking to bring about the commission of a crime by another person and in principle it does not affect the wrongdoing of the *inciter* that because of some characteristic personal to the other party that that person could not be convicted of the incited crime.

3.37 *(ii) Conspiracy*. Macdonald states that a conspiracy is committed where "two or more persons agree to render one another assistance in doing an act which would be criminal if done by a single individual."[48] In *Maxwell v H M Advocate* Lord Cameron gave a similar definition of the crime and added:[49]

> "a criminal purpose is one which if attempted or achieved by action on the part of an individual would itself constitute a crime by the law of Scotland. It is the criminality of the purpose and not the result which may or may not follow from the execution of the purpose which makes the crime a criminal conspiracy."

3.38 Lord Sutherland in *H M Advocate v Megrahi (No 1)*[50] said that Lord Cameron was pointing out that a successful conclusion to the conspiracy is not a necessary part of the commission of the offence and that the offence is committed when the agreement is made. Thus the key element of conspiracy is an agreement between two or more persons to take part in an act which would constitute a known crime in Scotland. Impossibility of achievement should not matter in constituting the crime and in *Maxwell v H M Advocate*[51] the argument was rejected that impossibility made a difference.[52]

3.39 Finally, we note the terms of a draft Criminal Code for Scotland which contains provisions on art and part guilt and on the offences of incitement and conspiracy.[53] Section 15 of the draft code is headed 'Art and part guilt' and subsection 15(5) provides:

> "For the purposes of this section references to an offence committed by another person include references to anything which would be an offence but for –
>
> (a) the lack of criminal capacity by the other person;
>
> (b) the lack of some mental element on the part of the other person; or
>
> (c) the existence of a defence (not being a defence, such as lawful authority, self defence or necessity, which justifies the acts done) which is personal to the other person."

---

[47] Stair Memorial Encyclopaedia, vol 7, para 176 where the view is stated that impossibility of achieving the ultimate criminal purpose should be irrelevant to an offence of incitement.
[48] Macdonald, p 185.
[49] 1980 SLT 241, at 243.
[50] 2000 SLT 1393, at 1398.
[51] 1980 SLT 241.
[52] Though in this case the charge was conspiracy to bribe – a crime which is complete on the offer being made so therefore the question of impossibility was not in point.
[53] The draft code has been prepared by a group of academic lawyers and has no official status. 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. We quote from the revised version of the code dated July 2001.

3.40 Similar provisions appear in the code in respect of the offences of incitement and conspiracy.[54]

3.41 We take the view that the current law on art and part guilt and on incitement and conspiracy is adequate to deal with problems which may arise from attempts to use children below the age of criminal responsibility to commit crimes. However we accept that there may be advantages in explicitly re-stating the law in statutory form. Accordingly we ask:

6. Should there be a statutory reformulation of the law on art and part guilt and on incitement and conspiracy in respect of the criminal liability of persons who seek to incite or engage in criminal conduct with children under the age of criminal responsibility (either in the sense of criminal capacity or immunity from prosecution)?

Form of the rule

3.42 An odd feature of the current rule in section 41 of the 1995 Act is that it is expressed as a conclusive presumption. Strictly speaking presumptions are aspects of the law of evidence and function to allocate the burden of proof on the issues of fact they relate to. Conclusive or irrebuttable presumptions function more as rules of law and for that reason have been described as a contradiction in terms.[55]

3.43 Examples of statutory irrebuttable presumptions are rare in Scots law. Neither Hume nor Alison discusses the Scottish rule on criminal responsibility in the language of presumptions. The statutory form of the rule has remained the same since it was introduced in section 14(1) of the Children and Young Persons (Scotland) Act 1932. The wording is identical to that of section 19(1) of the Children and Young Persons Act 1932, which similarly increased the age of criminal responsibility from 7 to 8 in English law. It is understandable that the rule in English law has this form. Blackstone's discussion of the issue is in terms of presumptions (rebuttable in respect of children between 7 and 14, irrebuttable in the case of children under 7). It may be surmised that the drafting for the provision in the English Act was thought appropriate for use in the Scottish Act. This is all the more likely given the remarkable way in which the two statutes were enacted. It appears that Parliament was presented with only one Bill for the two different Acts. Section 89(1) of the (English) Act states that the Act shall apply to Scotland subject to adaptations set out in a Schedule. Section 89(2) contains a provision that the Act as thus applying to Scotland is to be certified by the Clerk of Parliaments as if it were a separate Act which received the Royal Assent on the same date as the (English) Act, whereupon the (Scottish) Act takes effect as a separate Act, with a different chapter number, applying to Scotland.

[54] Section 90 (Incitement) provides: "A person is guilty of incitement to commit an offence although the person incited (a) could not commit that offence because of (i) the lack of criminal capacity by that person; (ii) the lack of some mental element on the part of that person; or (b) would have a defence (not being a defence, such as lawful authority, self defence or necessity, which justifies the acts done) which is personal to that person" (section 90(3)). An identical provision is made in respect of the offence of conspiracy (section 91(3)).

[55] "Evidence may not be led in order to contradict certain rules of substantive law which are misleadingly expressed in presumptive form and are traditionally called, by a contradiction in terms, 'irrebuttable presumptions'. These rules do not fall within the law of evidence except in the sense that they exclude evidence." (Stair Memorial Encyclopaedia, vol 10, para 520.)

3.44 Our primary recommendation is that the rule in what is now section 41 of the 1995 Act should be repealed. However if the rule is retained, either in respect of the same or a different age, we propose that it should take the form of a direct rule rather than a conclusive presumption. We note that section 13 of the Criminal Code of Canada provides:[56]

> "No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years."

3.45 Accordingly we propose that:

7. If, contrary to our primary proposal, there is to remain 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.

3.46 We considered above whether the form of any rule on criminal responsibility is affected by the requirements of the 1989 UN Convention on the Rights of the Child.[57]

[56] The draft Criminal Code for England and Wales re-states the rule of English law as follows: "A child is not guilty of an offence by reason of anything he does when under ten years of age." (Law Com No 177 (1989), vol 1, Criminal Code Bill, cl 32(1)). Section 13 of the draft Criminal Code for Scotland (see footnote 53 above), which is headed *Criminal capacity of children*, provides: "A child is not guilty of a criminal offence by reason of anything the child does when under […] years of age."

[57] Para 2.30-2.34.

Part 4 List of Proposals

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.

(Para 3.5)

2. The existing statutory provisions which place restrictions on the prosecution of children under 16 should be retained.

(Para 3.12)

3. (a) Should there be a statutory rule that children under a specified age below 16 years cannot be prosecuted for any offence?

(b) If so, what should the specified age be?

(Para 3.16)

4. 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 or it is presumed the child cannot be guilty of the offence.

(Para 3.23)

5. No rebuttable presumption that a child below a defined age lacks mens rea in respect of any offence should be introduced.

(Para 3.30)

6. Should there be a statutory reformulation of the law on art and part guilt and on incitementand conspiracy in respect of the criminal liability of persons who seek to incite or engage incriminal conduct with children under the age of criminal responsibility (either in the sense of criminal capacity or immunity from prosecution)?

(Para 3.41)

7. If, contrary to our primary proposal, there is to remain 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.

(Para 3.45)

APPENDIX A

CROWN OFFICE AND PROCURATOR FISCAL SERVICE PROSECUTION CODE[1]

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.

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

[1] Version dated May 2001 on www.crownoffice.gov.uk.

- 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 deputes (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 B

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 C

STATISTICAL TABLES ON OFFENCE GROUND REFERRALS TO CHILDREN'S HEARINGS AND CRIMINAL PROSECUTION OF CHILDREN[1]

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

	Numbers		Percentages	
Alleged Grounds	**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

	Numbers		Percentages	
Alleged Grounds	**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

	Numbers		Percentages	
Alleged Grounds	**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%

[1] 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**
All Ages	***%***	***55***	***18***	***8***	***10***	***4***	***4***	***1***	***100***		

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	2275	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**
All Ages	***%***	***56***	***17***	***8***	***10***	***4***	***4***	***1***	***100***		

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**
All Ages	**%**	***49***	***21***	***8***	***13***	***4***	***5***	***2***	***100***		

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

	Age								
Crime	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**15**	**TOTAL**
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 1994	1995	1996	1997	1998	1999	TOTAL
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 8	9	10	11	12	13	14	15	TOTAL
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 D

COMPARATIVE TABLE ON THE AGE OF CRIMINAL RESPONSIBILITY[1]

Jurisdiction	*Age of criminal responsibility*
Belize	7
Cyprus	7
Ghana	7
Hong Kong[2]	7
India	7
Ireland[3]	7
Liechtenstein	7
Malawi	7
Nigeria	7
Papua New Guinea	7
Singapore	7
South Africa	7
Switzerland	7
Bermuda	8
Cayman Islands	8
Gibraltar	8
Kenya	8
Scotland[4]	8
Sri Lanka	8
Western Samoa	8
Zambia	8
Malta	9

[1] We have adapted this Table from that in Annex 2 to the Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong* (2000).

[2] The Law Reform Commission of Hong Kong has recommended that the age of criminal responsibility in Hong Kong should be raised from 7 to 10 (*ibid*, p 83).

[3] Under the Children Act 2001, the age of criminal responsibility in Ireland is raised to 12. The provision has not yet been brought into force.

[4] The age for Scotland is that based on section 41, not section 42, of the Criminal Procedure (Scotland) Act 1995.

Australia	10
England and Wales	10
Fiji	10
Guyana	10
Kiribati	10
Malaysia	10
New Zealand	10
Northern Ireland	10
Vanuatu	10
Canada	12
Greece	12
Jamaica	12
Netherlands	12
San Marino	12
Turkey	12
Uganda	12
France	13
Austria	14
Bulgaria	14
Germany	14
Hungary	14
Italy	14
Latvia	14
Lithuania	14
The People's Republic of China	14
Mauritius	14
Romania	14
Slovenia	14
Taiwan	14
Connecticut (USA)	15
Czech Republic	15
Denmark	15
Estonia	15
Finland	15
Iceland	15
New York (USA)	15
Norway	15
Slovakia	15
South Carolina (USA)	15
Sweden	15

Andorra	16
Georgia (USA)	16
Illinois (USA)	16
Japan	16
Louisiana (USA)	16
Macau	16
Massachusetts (USA)	16
Michigan (USA)	16
Missouri (USA)	16
Poland	16
Portugal	16
South Carolina (USA)	16
Spain	16
Texas (USA)	16
Belgium	18
Luxembourg	18
United States of America (most other states)	18

APPENDIX E

COMPARATIVE LEGAL MATERIAL ON SOME JUVENILE JUSTICE SYSTEMS

Australia
Under federal law[1] and in all states no child under 10 years of age can be subject to criminal proceedings. In most states, for example Queensland, Tasmania, Western Australia, there is a presumption that children above the age of 10 but below 14 are not criminally responsible for an act or omission unless it is proved that the child had the capacity to know that he or she ought not to do the act or make the omission.

In the Northern Territory, Victoria, Tasmania and Queensland those over the age of 17 will be dealt with in the adult criminal justice system. In all other states and under federal law only those over 18 will be subject to this. Those below these ages will be dealt with by the children's courts. Emphasis is placed on diverting young persons from the criminal justice system and on average only 2% of young people aged 10-17 come into contact with the children's courts.[2]

Belgium[3]
There is a bar to the prosecution of persons under the age of 16. Children below 16 are dealt with by the very well developed welfare services. 16-18 year olds generally appear before juvenile courts where no criminal sanctions are available. Instead they are dealt with by non-punitive usually welfare based measures. Only in the most serious cases and road traffic offences do 16-18 year olds appear in adult courts where criminal sanctions are available.

Canada[4]
Children who commit an offence when under 12 years of age cannot be convicted, but they may be subject to child welfare procedures that vary from province to province. 12-14 year olds are dealt with by youth courts which employ special procedures. Those between 14 and 18 are generally tried in youth courts, but may be transferred to ordinary criminal courts if a serious crime is involved and it is considered appropriate in all the circumstances.

China [5]
A child under the age of 14 is not criminally responsible. Children aged 14 or 15 are regarded as criminally responsible only for serious crimes like murder, serious assault, drug trafficking or robbery. Children aged 16 or over are regarded as criminally responsible for any crime. The head of the child's family will be ordered to discipline any 14 or 15 year old

[1] Crimes Act, s 4.
[2] Australian Law Reform Commission, Report No 84, *Seen and Heard: Priority for children in the legal process*, (1997), chap 18.
[3] The Howard League, *Child Offenders, UK and International Practice*, (1995), p 13.
[4] The Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong*, May 2000, para 2.11.
[5] *Ibid*, para 2.21.

convicted offender. 16 and 17 year olds are punished by the courts but to a lesser extent than if they were adults.

England and Wales

No child under the age of 10 can be found guilty of any offence.[6] Children (10-14) and young persons (14-18) will normally be dealt with by a youth court which is more informal than an ordinary court. Cases are heard by magistrates sitting in private without a jury. Where a person under the age of 18 is convicted in the Crown court of an offence other than homicide, that court must remit the offender to a youth court for sentence unless satisfied that it would be undesirable to do so.[7] An ordinary magistrates court must also remit unless it intends to dispose of the young person's case by referral to a youth offender panel, a discharge or a fine. A person under 18 convicted of murder faces a mandatory sentence of indefinite detention. The minimum period of detention ("the tariff period") is determined by the sentencing judge in open court.[8]

The Crime and Disorder Act 1998 introduced measures applicable to children under 10 years of age such as local curfew schemes[9] and child safety orders.[10] Under the latter a child under the age of 10 can be placed under the supervision of a responsible officer and be required to comply with certain conditions. The magistrates court, on the application of a local authority, will grant such an order where the child has committed an act which if he were aged over 10 would have constituted an offence; to prevent the commission of such an act; where a curfew notice has been contravened; or where the child has caused harassment, alarm or distress to another.

France

A child under 13 cannot be prosecuted. For 13-18 year olds a presumption of incapacity applies that must be rebutted by the prosecution.[11] Young persons who commit criminal offences will in most cases be subject to measures of protection, assistance, supervision or education although criminal sanctions may be imposed if appropriate.[12] Criminal penalties are regarded as being mainly for adults and if applied to 13-16 year olds any fine or period of imprisonment for adults must be halved. For 16-18 year olds it is discretionary to reduce such penalties.[13]

Although no child under 13 can be criminally liable the juge des enfants can impose various measures of protection and education.[14] The type of non-criminal measure that will be imposed will be determined by examination by the court of the child's understanding and intention. If children are deemed not to have understood the nature of their actions they will be made subject to educative measures. In general, a child aged around 8 years will be regarded as possessing an understanding, although this will depend on the individual child and the nature of the act committed.[15]

---

[6] Children and Young Persons Act 1933, s 50 as amended by Children and Young Persons Act 1963, s 16.
[7] Powers of Criminal Courts (Sentencing) Act 2000, s 8.
[8] Powers of Criminal Courts (Sentencing) Act 2000, s 82A inserted by the Criminal Justice and Court Services Act 2000, s 60.
[9] S 14.
[10] S 11.
[11] French Criminal Code, art 122-8.
[12] Bell, Boyron and Whittaker, *Principles of French Law*, (1998) p 223.
[13] Report by Justice, *Children and Homicide: Appropriate procedures for juveniles in murder and manslaughter cases*, (February 1996), Appendix Two.
[14] Ordonnance of 2 February 1945
[15] Bell, Boyron and Whittaker, p 234

Hong Kong
No child under the age of 7 can be guilty of an offence. For 7-14 year olds a presumption of incapacity applies which is rebuttable by the prosecution. The Law Reform Commission recommended that the minimum age that a child can be guilty of an offence be raised to 10 years and that the rebuttable presumption of incapacity should apply to 10-14 year olds. The Commission concluded that a general review of the juvenile justice system should be carried out once the results of raising the minimum age to 10 have been properly assessed. However, the Commission did recognise that provisions do currently exist for dealing with those below the age of criminal capacity. These include the availability of a care and protection order if a child is deemed to require such protection.[16]

Ireland
Children under 7 years of age cannot be prosecuted. For those aged 7-14 years a presumption of incapacity applies which is rebuttable by the prosecution. Under the Children Act 2001, which has yet to be brought into force, the minimum age below which no child may be prosecuted is raised to 12 years of age. The rebuttable presumption of incapacity is preserved for 12-14 year olds. In conjunction with these reforms welfare orientated measures have been introduced to deal with unruly children under 12 years of age. Such children may be brought to the attention of the local Health Board and where they are deemed to be in need of care or protection, a care or a supervision order may be made or a family welfare conference convened.[17]

Japan [18]
The age of criminal responsibility in Japan is 16. Offenders aged between 16 and 20 are generally dealt with in family courts and the sentences imposed are relatively lenient compared with those imposed on adults. They include counseling, monitoring at home or detention in a juvenile institution.

South Africa
No child under the age of 7 can be guilty of an offence. For those aged 7-14 years of age a rebuttable presumption of incapacity applies. The South African Law Commission has recommended that the age under which no child can be guilty of an offence be raised to 10 years and that the rebuttable presumption of incapacity continues to apply to those 10-14 years of age.[19] Although the Commission recommended that children under 10 years of age lack criminal capacity, they also recommend that children under 10 years may be subject to assessment by a probation officer. The probation officer would have the power to refer the matter in question to a children's court, refer the child for counselling or therapy, arrange a family conference or the provision of support services.[20]

Spain
Children under 16 are not criminally responsible, but can be made subject to rehabilitative or educational programmes for a maximum of 2 years. These programmes are individually tailored to the needs and circumstances of each child. Confinement is imposed in serious

[16] The Law Reform Commission of Hong Kong, *Report on the Age of Criminal Responsibility in Hong Kong*, May 2000, paras 5.1-5.19.
[17] *Ibid*, paras 5.45-5.62.
[18] *Ibid*, para 2.27.
[19] South African Law Commission, *Report on Juvenile Justice*, (Project 106, 2000), chap 3.
[20] *Ibid*, Draft Child Justice Bill, clause 46.

cases. 16-18 year olds are criminally responsible, but age is a mitigating factor which reduces sentence.[21]

Sweden

Children under 15 cannot be prosecuted.[22] There are special rules governing the prosecution of 15-18 year olds, and in practice these are usually extended up to 21. As a general rule there is no imprisonment for under 18 year olds, but it can occur (rarely, in March 1995 there were 11 children so detained, according to information from Swedish Save The Children) in exceptional circumstances, 18-21 year olds are imprisoned only very infrequently, and indeterminate sentences can only be passed on over 21s.[23]

Although children under 15 years of age cannot be prosecuted it is acknowledged that they can commit criminal acts. The police may investigate crimes alleged to have been committed by those under 15 to resolve important issues and recognise the rights of the victim. Such children will be dealt with in the welfare system that is in place.[24]

United States of America[25]

Each of the 50 states adopts (sometimes with variations) one of three general models. In the model followed by the majority of states all children under a specified age (typically 14) at the time of the offence have to be prosecuted in the juvenile court. That court may transfer the case to an adult court. The second model requires older children (13-16 in North Carolina) to be sent to an adult court for murder, and gives the juvenile court judge a power to remit for other felonies. The third model provides that children over a certain age charged with serious offences appear before an adult court but may then be remitted to a juvenile court.

In most states a child tried as an adult is liable to be punished in exactly the same way as an adult, except that those who commit murder when under 16 cannot be sentenced to death. A minority of states take age into account if the child is convicted in an adult court.

Printed in the UK for The Stationery Office Limited

[21] Report by Justice, *Children and Homicide: Appropriate procedures for juveniles in murder and manslaughter cases*, (February 1996), Appendix Two.
[22] Administration of Justice Act, s 752(2).
[23] Report by Justice, *Children and Homicide: Appropriate procedures for juveniles in murder and manslaughter cases*, (February 1996), Appendix Two.
[24] The Howard League, *Child Offenders, UK and International Practice*, (1995), p 12.
[25] *Ibid*, pp 26-30.