

# Citizen Participation and Public Petitions Committee

4th Meeting, 2024 (Session 6), Wednesday 6  
March 2024

## PE2064: Ensure that under 16s charged with rape are treated as adults in the criminal justice system

<b>Petitioner</b>	Julie Mitchell
<b>Petition summary</b>	Calling on the Scottish Parliament to urge the Scottish Government to ensure that under 16s charged with rape are treated as adults in the criminal justice system.
<b>Webpage</b>	<a href="https://petitions.parliament.scot/petitions/PE2064">https://petitions.parliament.scot/petitions/PE2064</a>

### Introduction

1. This is a new petition that was lodged on 9 November 2023.
2. A full summary of this petition and its aims can be found at **Annexe A**.
3. A SPICe briefing has been prepared to inform the Committee's consideration of the petition and can be found at **Annexe B**.
4. Every petition collects signatures while it remains under consideration. At the time of writing, 183 signatures have been received on this petition.
5. The Committee seeks views from the Scottish Government on all new petitions before they are formally considered. A response has been received from the Scottish Government and is included at **Annexe C** of this paper.

### Action

The Committee is invited to consider what action it wishes to take on this petition.

**Clerk to the Committee**

## Annexe A

### PE2064: Ensure that under 16s charged with rape are treated as adults in the criminal justice system

#### Petitioner

Julie Mitchell

#### Date lodged

09 November 2023

#### Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to ensure that under 16s charged with rape are treated as adults in the criminal justice system.

#### Previous action

I've reached out to the Scottish Crown Office and Procurator Fiscal Service and the Lord Advocate.

I've bombarded the Ministry of Defence for 3 years.

#### Background information

Under 16s charged with rape or sexual assault are protected and treated as children. Where are the human rights of child victims? Rape is an adult crime and should be treated as such. I believe that such individuals should be added to the sex offenders register.

## Annexe B



**The Information Centre**  
An t-Ionad Fiosrachaidh

### Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2064](#): Ensure that under 16s charged with rape are treated as adults in the criminal justice system, lodged by Julie Mitchell

#### Brief overview of issues raised by the petition

The petition calls for the Scottish Parliament to urge the Scottish Government to ensure that under 16s charged with rape are treated as adults in the criminal justice system.

It raises the issue of the rights of child victims in these cases, and that those under 16 charged with rape should be added to the sex offenders register.

#### Current legal position

Currently, the Lord Advocate has to authorise the prosecution of all children who are over the age of criminal responsibility (age 12) and under the age of 16.

The [Lord Advocate's Guidelines: Offences committed by children](#) (updated October 2021) set out which offences must be jointly reported by the police to both the Children's Reporter and the Procurator Fiscal (PF). Category 1 in the Guidelines refers to:

“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.”

This would cover the crime of rape.

Currently, there is also a requirement under these Guidelines to jointly report offences committed by those aged 16 and 17 years old and subject to a [Compulsory Supervision Order](#) (CSO), or within the children's hearings system awaiting a decision on whether compulsory measures are required.

Following such joint reporting, a discussion between the PF and the Children's Reporter will take place, with the PF making the final decision on whether they will proceed with a prosecution within the adult justice system. If a child is remitted to the children's hearings system, the Children's Reporter will then decide on the grounds of referral and whether to take these to a children's hearing.

One outcome of a children's hearing can be that a [CSO is made](#). This "requires a child to comply with specified conditions and requires the local authority to perform duties in relation to the child's needs". The conditions can include that the child resides in a particular place, placing a restriction on the child's liberty including a movement restriction order, or requiring the child is placed in secure accommodation (if specific conditions are met). A children's hearing cannot place a child's name on the sex offenders register.

Where a case proceeds within the adult criminal justice system and results in a conviction for rape, the notification requirements of the Sexual Offences Act 2003 apply regardless of the age of the individual. The length of the notification period is, however, reduced for those aged under 18.

## Children (Care and Justice) (Scotland) Bill

The [Children \(Care and Justice\) \(Scotland\) Bill](#) ("the Bill") was introduced in the Parliament on 13 December 2022. Stage 2 of the scrutiny process was completed on 7 February 2024. At this stage, MSPs can propose changes to the Bill, and these are considered and decided on by a committee. The lead Committee for this Bill is the [Education, Children and Young People Committee](#).

### *Prosecution of children (under the age of 18)*

Section 10 of the Bill will amend [Section 42 of the Criminal Procedure \(Scotland\) Act 1995](#) so that the Lord Advocate would now have to

authorise the prosecution of all those aged over 12 and under 18, rather than the current upper age limit of 16.

Part 1 of the Bill makes changes to the children's hearings system. It means that all children under the age of 18 will be able to be referred to the Children's Reporter.

The Lord Advocate's Guidelines: Offences committed by children are currently being reviewed due to the proposed changes in the Bill.

Amendments were lodged at Stage 2 of the Bill scrutiny process that would require that indictable (serious) offences for 16 and 17 year olds must be dealt with by the adult criminal justice system. These were then withdrawn.

### *Victims' rights*

In terms of victims' rights, this Bill means that the [Scottish Children's Reporter Administration](#) (SCRA) must inform victims of their right to receive information.

Amendments which were accepted at Stage 2 of the Bill mean that information victims can receive will include:

- Where the decision at a hearing is to make, terminate, vary or continue a CSO.
- Measures which have been included on the CSO around there being no contact or communication with the victim. (The Bill includes specific provisions meaning that a CSO may contain measures that prevent a child from approaching or communicating with someone or entering a specific place.)
- If a secure accommodation authorisation has been included in a CSO, and when a child is released from secure accommodation or transferred to an adult prison.
- Details of how a referral has been discharged in all circumstances.

Further amendments to this Bill that were agreed at Stage 2 mean that:

- Support services will be provided for victims involved in cases dealt with by the children's hearings system.
- In cases where a court would be entitled to make a non-harassment order following a plea or finding of guilt, they can still do this even if the case is remitted to be dealt with by the children's hearings system.

## Review of diversion from prosecution for sexual offences

The Lord Advocate announced a [review of diversion from prosecution for sexual offences](#) in July 2023. Diversion from prosecution is one of a range of community justice interventions that prosecutors can consider. It involves an offender being referred to social work services or a partner agency for support, treatment or other action to address the underlying causes of the alleged offending rather than the case being taken through the criminal justice system. This review will look at whether diversion is being used appropriately for sexual offences.

The review was [subsequently expanded](#) to include an examination of those aged between 12 and 15 who are accused of rape and dealt with through the children's hearings system.

### Scottish Government response

The [Scottish Government responded to this petition](#) on 7 December 2023.

In their response, they highlight the independence of the Lord Advocate in making prosecutorial decisions, indicating that the Crown Office and Procurator Fiscal Service will always make the final decision on whether a child is prosecuted in the adult court system.

They also outline their general policy position, in line with their obligations under the United Nations Convention on the Rights of the Child and their commitment to The Promise, stating this is to “keep children out of the criminal justice system, wherever possible and appropriate”.

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**Senior Researcher**  
**7 February 2024**

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## Annexe C

### Scottish Government submission of 7 December 2023

#### PE2064/A: Ensure that under 16s charged with rape are treated as adults in the criminal justice system

Please find a response to petition PE2064 relating to under 16s charged with rape, calling on the Scottish Parliament to urge the Scottish Government to ensure that under 16s charged with rape are treated as adults in the Criminal Justice System. The petition highlights that the petitioner has been in contact with the Crown Office and Procurator Fiscal Service (COPFS) and the Lord Advocate and also had communication with the Ministry of Defence over the last 3 years. The petitioner is enquiring about the rights of victims, and states their view that under 16s charged with rape should be added to the sex offenders' register.

We recognise the devastating impact of sexual crimes on victims, their families and wider society. However, I must advise that neither Scottish Ministers or officials are able to comment on, or intervene in, independent prosecutorial decision making by the COPFS. In particular, section 48(5) of the Scotland Act 1998 provides that any decision taken by the Lord Advocate as head of our system of prosecution in Scotland shall be taken by her independently of any other person.

Decisions around whether to prosecute a child are taken by COPFS. Where children's offence cases are jointly reported to COPFS and the Principal Reporter, COPFS will make the ultimate decision – having considered a range of factors such as, for example, the seriousness of the alleged offence and prior pattern of offending. The Lord Advocate has [instructed a review](#) of prosecutors' current approach to the prosecution of a range of cases, including children accused of rape.

It may be helpful to outline the Scottish Government policy position around the issues contained within the petition. The more general policy position is to keep children out of the Criminal Justice System, wherever possible and appropriate, ensuring that they receive the right support via an age-appropriate mechanism, to address their behaviour, as well as to attend to their underlying needs and any risks they may present to

others. This is in line with our obligations under the UN Convention on the Rights of the Child and our commitment to keeping the Promise. We are also conscious of the need to strike a balance between supporting children who come into conflict with the law and ensuring that our communities are safe and that victims are supported.

Operating as part of our wider Whole System Approach to youth justice, Scotland's children's hearings system is a long-established forum for addressing concerns about children and young people, including where they may have committed a serious offence and the COPFS have decided to remit the case to the Principal Reporter. This is a welfare based system that treats offending and harmful behaviour by children in different ways from the criminal justice system.

The Children (Care and Justice) (Scotland) Bill currently progressing through Parliament includes provisions which will enable more children to have access to the hearings system on offence grounds, but only where COPFS consider that it is appropriate in an individual case. This Bill also includes new provisions around support and information for victims, balancing the rights of those who have been harmed with children who have caused harm. The Bill gives the children's hearings system more scope to protect victims with regards to information sharing notification, measures to specify that a victim or place is not to be approached, and widening of the cases that can be dealt with by the application of movement restriction conditions. Intensive support and monitoring can be put in place to support a child to stay away from a specified person and/or place.

For those involved in offending behaviour, such as sexual offending, then multi-agency public protection arrangements, known as 'MAPPA', are in place. These are partnership arrangements to assess and manage the risk posed by that type of offending. Implementation of MAPPA with under 18s is strengthened through integration of the framework of risk assessment, management and evaluation (FRAME) guidance for children aged 12-17 and care and risk management (CaRM) processes. This approach is followed by partners across Scotland working with children where their behaviour may cause, or has caused, serious harm.

With regard to the points made in the petition relating to the sex offenders' register, if a child is over the age of criminal responsibility (12 years) but aged under 16 (or 18) and they are prosecuted for rape and



convicted, the notification requirements of the Sexual Offences Act 2003 (the 2003 Act) will apply. Section 82(2) makes specific reference to situations where the offender is under 18 and reduces the length of the notification period. Section 89 of the 2003 Act makes specific provision in relation to young offenders aged under 16 (18 elsewhere in the UK) allowing the court to impose the requirement to notify a parent rather than the young person.

Where an offence has a sexual component, as in the category of cases of concern to the Petitioner, a court can choose to add them to notification arrangements. Under section 80, the notification requirements apply where the person is convicted of an offence which is listed in schedule 3. Paragraph 60 of schedule 3 (which is the final paragraph for Scottish offences) lists “An offence in Scotland other than is mentioned....[above]....if the court, in imposing sentence or otherwise disposing of the case, determines for the purposes of this paragraph that there was a significant sexual element to the offender’s behaviour in committing the offence”.

Turning to questions of the disclosure of childhood offending and protection of vulnerable groups, section 3 of the Rehabilitation of Offenders Act 1974 (‘the 1974 Act’) provides that where a child is referred to a children’s hearing on grounds that the child committed an offence, the acceptance or establishment of that ground is a conviction for the purposes of the 1974 Act and the disposal by the hearing represents a ‘sentence’.

The purpose of section 3 is to ensure disposals from a children’s hearing are given protection under the 1974 Act. The Management of Offenders (Scotland) Act 2019 set the disclosure period for all children’s hearings disposals at zero, which means they are spent immediately. This means that they will not appear on a basic disclosure issued by Disclosure Scotland.

However, different rules apply when it comes to higher level disclosure regime – the standard disclosure or enhanced disclosure under the Police Act 1997 (the 1997 Act) and PVG scheme record under the Protection of Vulnerable Groups (Scotland) Act 2007. These disclosures are sought in relation to roles which involve a particular level of trust, for example, working with vulnerable people or having access to sensitive assets. Higher level disclosures can therefore contain certain ‘spent’ convictions. Schedule 8A of the 1997 Act contains offences which will

continue to be disclosed indefinitely unless a sheriff orders otherwise, and it includes the statutory and common law offence of rape. This applies regardless of whether the offence is dealt with in a criminal court or at a children's hearing.

Other Relevant Information (ORI) is also important for public protection. It allows for the disclosure of non-conviction information and is a direct response to past tragic cases where information/intelligence was known about serious offenders but not disclosed. However, a statutory test must be applied before this information can be disclosed. If a police force holds information about a disclosure applicant, the chief constable must decide whether they reasonably believe that it is relevant to the purpose of the disclosure request and whether it ought to be disclosed. Any disclosure of ORI in respect of conduct below the age of criminal responsibility (pre 12) will be subject to review by the Independent Reviewer – that function introduced in 2021 for under 12s' conduct under the Age of Criminal Responsibility (Scotland) Act 2019.

I hope the Committee finds the foregoing information helpful.

**Children and Families Directorate**