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A. Introduction

Overall, one of the outstanding qualities of the United Nations Convention on the Rights of the Child ('CRC')¹ is its universality. It is the most ratified² treaty in the world.³ Through rights, then, it offers uniform protection and priority to almost all of the world's population aged under 18.⁴ As part of this, the Article 3 'best interests' rubric holds out the promise of 'really good' decisions for children being taken by public bodies, courts and tribunals. Universalism, however, does not elide all concerns about access to, ability to exercise, and exclusion from, the rights apparently conferred. While all children have CRC rights, practical issues like poverty⁵ or the scarcity, as a fact, of national resources may prevent their exercise and the status of the CRC as not directly incorporated into domestic law in many jurisdictions militates against the provision of mechanisms for addressing violations.⁶ Alongside these practical issues, other *perceived* barriers also arise such as the risk of essentialism – that, whilst there is no 'universal' child, the Convention may be construed as applying an image of the western or northern or developed world's children for this purpose.⁷ Similarly, the perception of the child-offender sometimes engenders a view of lesser entitlement to the protection offered by rights. In the context of the Scottish legal system, this paper adopts a literal, 'back-to

¹ UN, General Assembly, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.

² Radhika Coomaraswamy, 'Women and children: the cutting edge of international law' (2015) 30 *American University International Law Review* 1- 40 at 7.

³ Only the USA has not ratified it. Somalia did so on 1st October 2015.

⁴ CRC, Art. 1.

⁵ See Wouter Vandenhoe, 'Child poverty and children's rights: an uneasy fit?' (2013) 22 *Michigan State International Law Review* 609 – 636.

⁶ The Third Optional Protocol to the CRC on a Communications Procedure, New York, 19 December 2011, in force 14 April 2014 creates a mechanism for reporting violations to the UN Committee on the Rights of the Child however this has not been ratified by the UK.

⁷ See, for example, Jane Fortin, *Children's Rights and the Developing Law* (3rd ed) (Cambridge: Cambridge University Press, 2009), p. 45; Nicola Ansell, 'The Convention on the Rights of the Child: advancing social justice for African children' in Afua Twum-Danso Imoh and Nicola Ansell (eds.) *Children's Lives in an Era of Children's Rights: The Progress of the Convention on the Rights of the Child in Africa* (London: Routledge, 2014), p. 235.

basics' approach to the terms of Article 3, in order to highlight both its potential, and, indeed, its requirement, to achieve 'really good' outcomes for all children coming within its reach. The paper takes the position of children who offend as its focal point considering particularly how the Article should apply in their cases. Its key argument is that Article 3 mandates 'really good' outcomes for all children including, equally, for those who do wrong, a position which is fully supported by the Committee on the Rights of the Child.⁸

The paper will firstly consider the negative perception of children who offend in relation to their rights. It will then turn to the terms of Article 3 itself and examine the ways in which it is incorporated into Scots law as it applies to offenders, and its application. Finally it will look at recent research reports compiled by the Centre for Youth and Criminal Justice and by the Scottish Children's Reporter Administration which shed some light on young peoples' own views of decision-making allegedly in their best interests. Overall, it concludes that the terms of Article 3 provide the framework to offer and achieve much more in terms of outcome than is currently the case.

B. The Rights of Children who Offend

Children who commit crime are still children and, as such, are bearers of the rights conferred by the CRC.⁹ In fact, the Convention specifically recognises them as in need of greater protection in certain respects by its inclusion of Article 37 which tempers the application of criminal sanctions to the young and in Article 40 which makes provision for their right to a fair trial. Nonetheless, there is a particular rhetoric, stronger at historical moments when youth crime is a highly politicised issue,¹⁰ that child-offenders, through their (deemed) choice to commit wrongful acts, render themselves less

⁸ United Nations Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration (Art. 3, para. 1)* (2013) (CRC/C/GC/14). Available at: http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

⁹ *Ibid*, para. 28.

¹⁰ For example, in England and Wales between 1997 and 2010 under New Labour, as exemplified by the White Paper, *No More Excuses* (London: TSO, 1997).

entitled to other, so-called, protection rights.¹¹ Indeed, at the extreme, some might argue that these are forfeited.¹² Raymond Arthur has explained the issue in this way, in relation to English criminal procedure:

The English youth justice system ... developed in a way which weakens and negates the protection rights stemming from the UN Convention by perpetuating the idea that if children are competent they are automatically assumed capable of negotiating their way through a liberal universe of choices, and the offender is no longer a child and no longer worthy of special protection of their rights.¹³

The issue arises partly because children who offend present a paradox¹⁴ which law is not always equipped to resolve effectively. On the one hand, children, as a group, are regarded as vulnerable and in need of protection. On the other, 'offenders' are regarded as worthy of punishment because they have exercised an autonomous choice to do wrong. 'Child-offenders' belong to both of these groups at once but the law is more used to dealing with each as a separate category. Child and family law is applied to the vulnerable; criminal law applies to the offender. Children's rights, conceived as a discrete area of law, has been relatively more successful in adopting the holistic approach which is needed, in that Articles 37 and 40 specifically give cognisance to some of the unique vulnerabilities of the child-offender and Article 12 is widely recognised as at least a basic mechanism for giving credence to the child's autonomy (in the right to express views) but with some protection in that weight is to be given to these views 'in accordance with the age and maturity of the child'.¹⁵ Nonetheless, in the context of the law as a whole, the rights of children who do wrong

¹¹ Protection rights include, for example, rights to health (Art. 24), to benefit from social security (Art. 26) and to an adequate standard of living (Art. 27).

¹² See Fortin, *Children's Rights and the Developing Law*, (above, note 7,) p. 683.

¹³ Raymond Arthur, 'Recognizing children's citizenship in the youth justice system' (2015) 37 *Journal of Social Welfare and Family Law* 21 – 37 at 27 (reference omitted).

¹⁴ See Claire McDiarmid, *Childhood and Crime* (Dundee: Dundee University Press, 2007), pp. 165 – 167.

¹⁵ See, for example, Aoife Nolan, 'The child as 'democratic citizen': - challenging the 'participation gap'' (2010) *Public Law* 767 – 782, particularly 780, though the author criticises the tendency to subjugate autonomy to protection.

are not prominent and, in Scotland, there has been only very limited recourse to Articles 37 and 40.¹⁶

Another key issue is that ‘the public interest’ may sometimes be, or be perceived to be, in direct opposition to the interests of a child who commits a crime. For example, the CRC accords to a child ‘in trouble’ with the law at any stage of proceedings, a right ‘to have his or her privacy fully respected’.¹⁷ In a recent English case, a 15-year old who murdered his teacher in a pre-meditated knife attack was named by the media following a specific order by the judge, who justified this by stating that he had come down ‘firmly on the side of the public interest’.¹⁸ It cannot therefore be said that children’s rights are not affected by offending behaviour. The argument is the normative one that they *should not* be. Even where there must be some form of balancing of competing rights – for example, the child’s right not to be separated from his/her parents¹⁹ cannot be upheld where s/he has been sentenced to a period of detention by a criminal court²⁰ - there is no justification for the Article 3 protection ceasing to apply. Its content, and its application in the Scottish context, will now be considered.

C. The Promise of the Best Interests Standard in Article 3

Article 3 sets the bar high in terms of expectation of outcome arising from its application. Art 3(1) states:

¹⁶ See footnotes 45 – 49 below and accompanying text.

¹⁷ Art. 40(2)(vii).

¹⁸ C Brooke, ‘Judge: why I was right to name the teacher’s teen killer’, Daily Mail, 6 Nov 2014. See also Ursula Smartt, ‘Why I was right to name the teacher’s teen killer’: naming teenagers in criminal trials and law reform in the internet age’ (2015) 20 *Communications Law* 5 - 14 at 6.

¹⁹ Art. 9(1).

²⁰ Criminal Procedure (Scotland) Act 1995, ss. 44 and 208.

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.

This is not qualified. It includes ‘*all* actions concerning children’ and *inter alia*, those undertaken by public social welfare institutions, courts of law and administrative authorities. The principle clearly extends, then, to institutions which take ‘actions’ concerning children who offend. In terms of what it means, if an element is a ‘primary’ consideration in reaching any decision both common sense and basic legal interpretative skills would indicate that it must be an *important* one in that decision-making process. Even if Article 3 stated only that it had to be a consideration (unqualified), ‘best interests’ would have to be part of the mix. ‘Primary’, if it is not just a weasel word, inserted without meaning, makes best interests *significant*. Indeed ‘*best*’ means more than just the child’s interests. If ‘best interests’ are ‘a primary consideration’ – and Article 3 says that they *shall* be, not that they may be²¹ - a child about to enter a decision-making process armed with this information could reasonably expect that something really *good for him/her* is likely to come out of it. In other words:

The expression “primary consideration” means that the child’s best interests may not be considered on the same level as all other considerations. ... Viewing the best interests of the child as “primary” requires a consciousness about the place that children’s interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.²²

How, then, is this translated into Scots law, particularly in relation to child-offenders?

D. Scots Law and Children Who Offend

²¹ See UN Committee on the Rights of the Child *General Comment No 14 (Art. 3(1))*, (2013) (above note 8), para. 36.

²² *Ibid*, at paras. 37 and 40 (emphasis added).

It is first of all necessary to explain the mechanisms by which Scots law deals with children who offend. The primary route is through the children's hearings system, one of the grounds for referral to which is that 'the child has committed an offence'.²³ Children aged eight and over may be so referred.²⁴ It is also possible for those aged 12 and over to be prosecuted but only 'on the instructions of ..., or at the instance of[,] the Lord Advocate'²⁵ and usually for grave offences.²⁶ The vast majority of child-offenders are referred to the children's hearings system,²⁷ which deals with such cases in the same way as those of children referred on each of its other 15 (care and protection) grounds.²⁸ Decisions are taken by a panel of three lay members, trained for the function and, importantly, the determinative principle is the child's welfare. It is here, then, that Article 3 finds its first direct expression in Scots law.

E. Article 3 in Scots Law

(a) Best Interests and Welfare

²³ Children's Hearings (Scotland) Act 2011, s. 67(2)(j).

²⁴ Criminal Procedure (Scotland) Act 1995, s. 41.

²⁵ Criminal Procedure (Scotland) Act 1995, s. 42(1).

²⁶ See the *Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children* (2014) available at:

http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Lord_Advocates_Guidelines/Lord%20Advocates%20Guidelines%20offences%20committed%20by%20children.pdf.

²⁷ Statistics for prosecution and for referral to children's hearings on the offence ground are compiled separately and do not readily dovetail. In 2013/14, the official government statistics record that the number of children aged under 16 with a charge proved against them in court *per 1000 population* was zero. 8 per thousand 16-year olds and 25 per thousand 17-year olds were counted. The *Report* notes that 'In the past 10 years, the number of convictions for younger people has fallen at much faster rates than for older people.' (Scottish Government, *Statistical Bulletin Crime and Justice Series: Criminal Proceedings in Scotland 2013/14*, para. 3.5.1 and Table 5 (available at: <http://www.gov.scot/Resource/0046/00469252.pdf>). By contrast, 2764 children were referred to the children's hearings system for offending behaviour – a decrease of 20.4% on the previous year: Scottish Children's Reporter Administration, *Annual Report 2013/14*, p. 22 (available at http://www.scra.gov.uk/cms_resources/Annual%20Report%202013-14%20web%20version.pdf). The Scottish Law Commission estimated that 99% of children *aged under 16* alleged to have committed an offence were dealt with in the children's hearings system: *Report on Age of Criminal Responsibility* (Scot Law Com No 185) (Edinburgh: TSO, 2002) at para. 3.10.

²⁸ Children's Hearings (Scotland) Act 2011, s. 67.

Unlike the European Convention on Human Rights, the CRC as a whole is not incorporated into Scots law and, therefore, does not have direct effect. Despite this, the provisions of Article 3 *are* directly legislated but (like English law)²⁹ using the term ‘welfare’ instead of ‘best interests’.

‘Welfare’ has a number of uses including the pejorative, if primarily tabloid, notion of the ‘welfare scrounger’.³⁰ In Scottish child law, however, it has a long and well-respected history and denotes the principle that identifying and meeting hitherto unmet needs on the part of children will have a generally beneficial effect on their lives and will, specifically, operate to reduce to a vanishing point their offending behaviour. This argument is given passionate expression - quite specifically in relation to ‘juvenile delinquency’ - in the Kilbrandon Report of 1964 on the basis of which the children’s hearings system was set up. It states:

The object must be to effect, so far as this can be achieved by public action, the reduction, and ideally the elimination, of delinquency. If public concern must always be for the effective treatment of delinquency, the appropriate treatment measures in any individual case can be decided only on an informed assessment of the individual child's actual needs.³¹

There may be (though, in fact, this is rare) some debate as to the relationship between the Scottish legislation’s preference for ‘welfare’ and the CRC’s use of ‘best interests’³² but, here, they are used interchangeably.³³

(b) Scottish ‘Article 3’ Legislative Provisions

(i) the Paramountcy Principle

²⁹ Children Act 1989, s. 1(1).

³⁰ See, eg ‘The welfies: recognising the country’s scroungers and dossers’ *The Sun* 15 January 2015, p. 2.

³¹ Scottish Home and Health Department, Scottish Education Department *Report on Children and Young People, Scotland* (Edinburgh: HMSO, 1964) Cmnd. 2306, p. 8, para. 12.

³² For an in-depth comparison, see Jonathan Herring and Charles Foster, ‘Welfare means relationality, virtue and altruism’ (2012) 32 *Legal Studies* 480 – 498, pp. 482 – 483.

³³ In fact, there is little clear distinction drawn in the case law. See, for example, *M v. K* 2015 CSIH 54.

For most decisions concerning children, the domestic Scottish legislation augments the Article 3 primacy requirement. The relevant provision (which does not cover the small number of children who are prosecuted) states:

[W]here ... a children's hearing, pre-hearing panel or court is coming to a decision about a matter relating to a child [, ...it] is to regard the need to safeguard and promote the welfare of the child throughout the child's childhood as the paramount consideration.³⁴

It would be hard to give a stronger statement of the importance of the child's welfare and this is applied to those who offend in the same way as to those referred on any other ground.³⁵

(ii) Welfare as a Primary Consideration

In the immediately following section of the relevant Act, however, the paramountcy requirement is qualified so that the listed decision-making bodies (children's hearings, pre-hearing panels, courts) may depart from it where they deem this necessary 'for the purpose of protecting members of the public from serious harm (whether physical or not)' but, in those circumstances, the child's welfare must still be 'a primary consideration rather than the paramount consideration'.³⁶ This provision makes no specific reference to child-offenders yet it is hard to think of circumstances where a child is likely to cause such 'serious harm' without breaking the criminal law. In fact, this power to depart from paramountcy first appeared, in a different form, in the Children (Scotland) Act of 1995³⁷ and an examination of the Parliamentary debate relating to it illustrates the point. Lord Macaulay of Bragar said:

³⁴ Children's Hearings (Scotland) Act 2011, s. 25(1) and (2).

³⁵ See *Merrin v. S* 1987 SLT 193.

³⁶ Children's Hearings (Scotland) Act 2011, s. 26(1) and (2).

³⁷ S. 16(5).

With this amendment we are seeking to deal with "a little monster" in society, a person who slashes car tyres, who breaks car windows and who is out of control. What is the paramount consideration? I do not know where the word "paramount" comes from. I think it is an Americanism, but it is a horrible word. It does not mean anything, but anyway it is in the Bill. Where does paramourncy go in achieving the balance between society and the individual?³⁸

The shift away from paramourncy, then, seems to have been conceived as an intentional, government-sanctioned, dilution of the rights of children who offend with no clear statement of the way in which their welfare was to be considered instead.³⁹ In the current (2011) version of the provision, this public (safety) interest is only to be balanced in alongside best interests, which remain primary. It does not trump them. This can be taken as a welcome recognition that children's rights matter though, clearly, there is still some diminution between best interests as paramount and as a primary consideration.

But are these apparently different standards of best interests meaningful? What is the difference in practice between paramourncy and primacy in this context? There appears to be no reported case in which this power to depart from the paramourncy principle has been considered. This makes it difficult to know how to determine the difference *in law* between 'paramount' and 'primary' for these purposes. Indeed, the official training manual for children's panel members states of the public safety rule: '[t]his is an exception that panel members will very rarely use.'⁴⁰ While, clearly,

³⁸ Official Report of the Grand Committee on the Children Scotland Bill, *Hansard, HL Deb 06 June 1995 vol 564 cc1-66GC*, at § 37GC (available at: http://hansard.millbanksystems.com/grand_committee_report/1995/jun/06/official-report-of-the-committee-on-the#S5LV0564P0_19950606_GCR_260).

³⁹ The original, 1995 version of s. 16(5)(a) stated:
'If, for the purpose of protecting members of the public from serious harm (whether or not physical harm)—
(a) a children's hearing consider it necessary to make a decision under or by virtue of this Part of this Act which
(but for this paragraph) would not be consistent with their affording paramourncy to the consideration
mentioned in subsection (1) above, they may make that decision'.

⁴⁰ Children's Hearings Scotland, *Practice and Procedure Manual* (Edinburgh: Children's Hearings Scotland, 2013) p. 16, para. 3.4.

the existence of the provision demonstrates that it is permissible to give less prominence to the welfare of children who are deemed a risk to public safety than to that of others, there is little to indicate that this is actually being done in the practice of the children's hearings system.

(iii) Welfare of Prosecuted Children

The final Scottish provision meriting consideration in the Article 3 context relates specifically to children who are prosecuted. It also considerably pre-dates both the CRC and the children's hearings system⁴¹ yet it still occupies the territory of welfare-based approaches. It states:

Every court in dealing with a child who is brought before it as an offender shall have regard to the welfare of the child and shall in a proper case take steps for removing him from undesirable surroundings.⁴²

This is not ambitious. It does not use 'significance' terminology like 'paramount' or 'primary' but it is unambiguous in its attachment to children who offend. It imposes a duty on all courts to consider their welfare. It is a provision for the tiny number of Scottish children who are prosecuted in the adult courts and it cannot be balanced against, or diluted by virtue of, offending behaviour because its *only* application is where such acts are alleged. As such, it seems valuable. It does, however, have some limitations.

First, it is unclear what would happen if a court failed to apply it. Second, the meaning to be attached to 'welfare' is not spelt out. Does it mean 'best interests' or 'ensuring the child's unmet needs are identified and met' or does it relate only to the child's comfort and understanding during the criminal proceedings in question – a more 'well-being' sense of the term? The fact that the section goes on to consider the child's residence – something beyond the scope of the instant

⁴¹ It appeared in the Children and Young Persons (Scotland) Act 1937 (s. 49) and was repeated in the Criminal Procedure (Scotland) Act 1975 as s. 172.

⁴² Criminal Procedure (Scotland) Act 1995, s. 50(6).

proceedings - suggests the former. Again, a dearth of case law makes it difficult to put the matter beyond doubt.

F. The Temporal Dimension and Paternalism

This inquiry also brings into focus the temporal dimension of Article 3 and its domestic Scottish derivatives. In other words, for how long must the child's welfare weigh in the making of the decision? The Scottish paramountcy provision is unequivocal that decision-makers must take it into account 'throughout the child's childhood'. Article 3 and the Scottish public safety exception both make best interests primary, thereby giving it at least some longevity beyond the moment of making the decision, since it will continue to operate as the decision is implemented.

On the face of it, this seems to enhance its overarching 'real goodness' for the child. Not only must a decision-maker have that child's *best* interests in mind at the moment of making the decision but also for (possibly) years to come. In fact, however, as far as the child is concerned, this need to look to the future may operate to allow a particularly adultist or paternalist approach to come to the fore. The child's wishes and his/her welfare are not the same even if these wishes (or 'views')⁴³ should be taken into account in determining best interests. Child-friendly statements of the principle of Article 3 make clear just how little weight needs to be conferred on these wishes however. UNICEF states:

All adults should do what is best for you. When adults make decisions, they should think about how their decisions will affect children.

The Scottish Government states:

If a decision is being made by any organisation about your well-being, then your interests must be considered when making the final decision. What is best for

⁴³ Art. 12; Children's Hearings (Scotland) Act 2011, s. 27.

YOU is what matters. For example, if a local authority is planning a new road they have to think about how their plans affect your safety.⁴⁴

The child who has read the original Article and is expecting a decision in which his/her best interests are, at least, a primary consideration will realise that it is an adult view of his/her good which is definitive. Adults have also, by definition, proceeded to the end of the period of the lifespan called childhood. There may be an argument that this equips them to know better how a decision will bear ‘throughout’ that period than the child who is in the midst of it. If this revelation is disappointing for a child expecting his/her own version of the ‘really good’ to emerge from a process, it does not detract from the overarching principle that the outcome should still *be* ‘really good’. To what extent is this the case? The paper will look firstly at prosecuted children and then at those who are processed through the children’s hearings system.

G. The Best Interests of Children who are Prosecuted

Only a very small number of children (for this purpose, those aged 17 and under) are prosecuted in the adult courts. At the outset of this process, a decision will have been taken jointly to refer such a child to the reporter to the children’s panel and to the procurator fiscal to decide whether his/her case should be processed through the children’s hearings system or by prosecution. It is noteworthy that the Lord Advocate’s Guidelines,⁴⁵ which govern this process, make no reference to the child-accused’s best interests, though the existence of Article 3 is at least noted in the Crown Office’s *Book of Regulations*.⁴⁶ Nonetheless, the Scottish High Court has noted with approval resort being made to

⁴⁴ *The UN Convention on the Rights of the Child: A Guide for Children and Young People* (Edinburgh: The Scottish Government, 2008) (emphasis in original).

⁴⁵ *Lord Advocate’s guidelines on reporting of offences alleged to have been committed by children* (2014) (above note 26).

⁴⁶ Crown Office and Procurator Fiscal Service, *Prosecution Policy and Guidance – Book of Regulations*, Chapter 16 – Children (1998), p. 1 available at: http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Book_of_Regulations/Book%20of%20Regulations%20-%20Chapter%2016%20-%20Children.PDF. Similar guidance provided by the Crown Prosecution Service in England and Wales on *Youth Offenders* (available at: http://www.cps.gov.uk/legal/v_to_z/youth_offenders/#a01) is more nuanced and, in places, makes reference

the CRC where the accused is a child. In *HM Advocate v. P*,⁴⁷ Lord Reed made reference to Article 40 (right to a fair trial) and to the Beijing Rules,⁴⁸ noting that the European Court of Human Rights had used each 'as a source of guidance as to the requirements imposed by the European Convention in relation to proceedings involving juvenile offenders'.⁴⁹ Little seems to have been said beyond this in any subsequent case – and, in fact, the accused's status as a child is not necessarily noted in case reports suggesting that, once the decision to prosecute has been taken, it is not seen as particularly significant.

In relation to the sentencing of juveniles though, it has been stated, in *Hibbard v. HM Advocate*,⁵⁰ that

the court has no difficulty with the proposition that, when sentencing a child for any offence, the sentence selected ought to take into account, as a primary consideration, the welfare of the child and the desirability of his reintegration into society. It is not the only primary consideration, since the legislation requires that the seriousness of the offence be taken into account and that the period selected satisfies the requirements for retribution and deterrence. But it is one. In this way, the sentencing of a child will differ in the degree of emphasis or weight placed on the welfare of the person sentenced. With an adult, it is also a consideration, but it may not always be categorised as a primary one, at least where murder is concerned.⁵¹

Subsequent cases have also articulated the principle but the emphasis on welfare as only one among a number of important considerations means that the outcome is not always necessarily *in* the

to the types of information which should be obtained in deciding whether to prosecute (eg 'views of local authority Children's and Young People's Service' in relation to rape and other offences against children (where the defendant is also a child)). See Laura Hoyano, 'Decision to prosecute: whether decision of defendant to prosecute a child for alleged sexual abuse by her of her two younger sisters amenable to judicial review' (2012) *Criminal Law Review* 39 – 46.

⁴⁷ 2001 SLT 924.

⁴⁸ The UN Standard Minimum Rules for the Administration of Juvenile Justice, Beijing, 29 November 1985.

⁴⁹ *HM Advocate v. P* 2001 SLT 924, at p. 927 para. 11.

⁵⁰ 2011 JC 149.

⁵¹ *Ibid*, at pp. 153 – 154 per Lord Carloway.

child's best interests. In *HM Advocate v KH*⁵² for example, while the judgment states that court 'had specific regard to the welfare of the respondent as a primary consideration'⁵³ the accused's sentence (absolute discharge) was quashed as unduly lenient and a community payback order was imposed instead. He was aged 15 at the time of the offence and had pled guilty to a sexual assault against a classmate. A competing interest – the need for a punitive element – was considered definitive. It might be questioned *how* 'primary' the child-offender's welfare was deemed to be in a decision, taken by the state, to appeal a sentence in order to have it made more severe where the young person has already been through a court process, accepted his guilt and, to some extent, moved on.

On the other hand, in *HM Advocate v Smith*,⁵⁴ another Crown appeal against an unduly lenient sentence, the original sentence remained in place. It had been reached after careful assessment of a range of factors including the accused's troubled home background. While there is no overt reference to welfare or best interests, it appears that considerations relevant to these issues were applied.

The extent to which best interests looks to collapse into leniency is of some relevance. The Committee on the Rights of the Child is unequivocal in its view that 'protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.'⁵⁵

H. Children's Hearings System: Young People's Views of 'Best Interests' in Practice

⁵² 2014 SCCR 485.

⁵³ *Ibid*, at p. 487, para. 11 per Lord Justice-Clerk Carloway.

⁵⁴ 2014 SCCR 39.

⁵⁵ UN Committee on the Rights of the Child *General Comment No 14 (Art. 3(1))*, (2013) (above note 8), para. 28.

Finally, then, views on the extent to which actual decisions taken within the children’s hearings system are perceived as ‘really good’ by the young people in respect of whom they are taken will be considered, through examination of two, recent, small-scale, research projects. The first, entitled *Youth In Justice: Young People Explore What Their Role in Improving Youth Justice should be*⁵⁶ was produced jointly by the Centre for Youth and Criminal Justice (‘CYCJ’)⁵⁷ and by Space Unlimited,⁵⁸ and the young people who participated were all either ‘involved in, or at risk of becoming involved in, youth justice services.’⁵⁹ Accordingly, they are well qualified to comment. Overall, they were aged between 13 and 21 and participated as three separate groups.⁶⁰ The other study was conducted by the Scottish Children’s Reporter Administration (‘SCRA’) and was entitled *The Children’s Hearings System: Understood and Making a Difference: Young People’s Views*.⁶¹ SCRA’s members – children’s reporters – are the gatekeepers and administrators of the children’s hearings system. The 21 young participants in the study were aged between 11 and 17 and had experience of the hearings system, some in relation to offending behaviour.⁶²

The two studies are partly concerned with the participants’ experience of the children’s hearings process. In principle, Article 3 relates to decisions and their consequences. Article 12 which affords to the child who wishes to do so the right to express views and have these taken into account seems more directly relevant to process. There is, however, a close link between views and decisions such that the Committee on the Rights of the Child has specifically stated that ‘there can be no correct

⁵⁶ (Glasgow: Space Unlimited, 2015).

⁵⁷ Which exists to support improvements in youth justice through practice, research and knowledge exchange. See its own website at: <http://www.cycj.org.uk/about-us/background/>.

⁵⁸ A social enterprise and charity which ‘supports organisations to work in direct collaboration with young people in order to design and take action together.’ See Space Unlimited’s website at: <http://www.spaceunlimited.org/>.

⁵⁹ Space Unlimited, *Youth in Justice* (2015) (above note 56), at p. 2.

⁶⁰ *Ibid*, at pp. 5 -6.

⁶¹ (Stirling: SCRA, 2011) (available at:

http://www.scra.gov.uk/cms_resources/Young%20peoples%20views%20on%20decisions%20services%20and%20outcomes.pdf).

⁶² *Ibid*, at p. 7 and p. 21.

application of article 3 if the components of article 12 are not respected.’⁶³ There is also an argument that the fairness of any such process has a direct impact on perceptions of the justice or acceptability of the final decision⁶⁴ and will, therefore, have an impact on the individual young person’s view of its relationship to his/her best interests. Process and outcome or views and best interests are, thus, closely linked. With this in mind, what do the reports say about children’s hearings? The view of CYCJ participants was ‘mostly negative. They described feeling judged, ignored, not listened to, sometimes barely even addressed when in the room, and talked about being excluded from the process and not understanding it.’⁶⁵ While this may tell us little about outcomes, the participants’ perception of the decision was that it had not been good.

The SCRA study asked a question which was more directly relevant to Article 3: ‘[d]oes the Children’s Hearings System make a difference to the lives of children and young people?’⁶⁶ but still took the process into account. Some young people felt, specifically, that their views had not been heard in the process and ‘[a]ll the young people had experienced a Hearing that made a decision that was against their wishes. However, there still appeared to be widespread acceptance that it was a fair process.’⁶⁷ The study’s overall conclusion relates to outcomes. It found that:

[m]ost of the young people in this research felt their lives had got better since being involved in the Hearings System. ... Hearings could provide the impetus for change – for young people and their parents. ... Overall, young people said that it was their own commitment to change that had improved their lives.⁶⁸

⁶³ United Nation Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to be Heard* (2009), CRC/C/GC/12, (available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>) at para. 74.

⁶⁴ Victoria Weisz, Twila Wingrove and April Faith-Slaker, ‘Children and Procedural Justice’ (2007) 44 *Court Review* 36 – 43.

⁶⁵ Space Unlimited, *Youth in Justice* (2015) (above note 56), p. 8.

⁶⁶ *The Children’s Hearings System: Understood and Making a Difference: Young People’s Views* (2011)(above, note 61) at p. 6.

⁶⁷ *Ibid*, p. 12 (emphasis added).

⁶⁸ *Ibid*, p. 27.

On the one hand then, these young people do *not* report that the decision of the children's hearing was 'really good' for them – that as a direct consequence of it, their lives improved. On the other, there is a sense that they themselves converted a, probably paternalistic, decision about what would be best for them, into a catalyst for positive change. They reclaimed their agency to achieve the good outcome. Thus, if the hearing's decision was not 'really good', it was, equally, not wholly bad. 'Welfare as being paramount throughout childhood' became 'an improved life'.

I. Conclusion

Overall then, in its clear terms, Article 3 holds out considerable promise of 'really good' outcomes for all children in respect of whom official decisions are taken including, on the same terms, those who offend. Within the children's hearings setting, the commitment to welfare is paramount. In other words, it could not have greater significance yet the young people about whom its decisions are taken do not always experience its decisions as 'really good'. For children who are prosecuted, the status of best interests as a primary consideration may allow other primary considerations to be balanced in alongside, rather than the overarching concentration on welfare, rehabilitation and reintegration into society which the UN children's rights regime, taken as a whole, envisages. Article 3 states that *best interests shall be primary*. Decision-makers, and particularly those deciding about children who offend who may have fewer advocates, must welcome the opportunity this provides to ensure those really good outcomes.