



centre for youth
& criminal justice

Ethical Decision Making with Young People Involved with Serious Offending

Authors: Stuart Allardyce (Barnado's) and Jill McAfee (SCRA)

May 2016

Each year a minority of serious offences in Scotland are committed by children and young people under the age of 18. Although relatively uncommon in relation to overall reported crime, the social cost of such offending is significantly high with regards to its impact upon victims, their families and their communities.

This paper has been written to help professionals navigate some of the issues further to a young person being charged with a serious offence and to promote robust child centred practice with this challenging service user group.

Contents

Introduction.....	1
Case Example.....	2
Time Scales and Legal Decision Making.....	2
Risk Assessment and Management.....	3
Young Person’s Involvement in Assessment.....	4
Contamination of Evidence.....	5
Interventions.....	6
Conclusion.....	7
Acknowledgements.....	7

Introduction

Each year a minority of serious offences in Scotland are committed by children and young people under the age of 18. These include a wide range of offences involving interpersonal violence and harmful sexual behaviour. Although relatively uncommon in relation to overall reported crime, the social cost of such offending is significantly high with regards to its impact upon victims, their families and their communities.

The small number of young people who are involved with serious offending place a considerable burden on services. This is in part because those who commit such crimes often have highly complex needs, and have experienced significant maltreatment and abuse at various points in their lives as well as encountering different forms of social exclusion and marginalisation. Professionals working with young people involved with sexual and violent offending are required to balance the need for public protection – the management of risk of further offending – with the need to help young people develop positive social relationships in a community context and move on from lives defined by criminal actions.

This perceived tension between risk management and nurturing protective factors that increase the likelihood of desistance from further offending raises many significant ethical challenges for professionals in the immediate aftermath of a child being charged. Balancing the rights of the child who had been accused of a serious violent or sexual crime against the right of the public to be protected - squaring the child's basic rights to stability, education and family life and respecting the presumption of innocence until proven guilty while also doing everything possible to robustly protect potential victims who may be at risk - can often feel impossible.

These ethical challenges are often compounded by legal decision making in such cases. It is not unusual for there to be significant delays with regard to the disposal of serious offences for a variety of different reasons: case investigation; the gathering of forensic evidence; witness identification etc. However such delays - which in some cases can extend to many months - can leave young people feeling that their life "has been put on hold" and leave professionals anxious about making decisions about placements, education and social activities without adequate risk assessment prior to the conclusion of legal processes.

The author's experience of working with such cases involving young people who have committed serious offences is that there are often significant misconceptions by professionals regarding what can and cannot be done in relation to assessment and intervention with young people prior to the disposal of a serious offence. Sometimes those misconceptions involve a misunderstanding of the law and how it operates; at other times they relate to outdated views in relation to good practice in assessment and intervention with young people who offend. This briefing has been written to help professionals navigate some of the issues further to a young person being charged with a serious offence and to promote robust child centred practice with this challenging service user group.

Case Example

Jerry is 14 and lives at home with his mother, his 12 year old sister and his 17 year old brother. He has not previously been known to social work or other services. Maisie, a 12 year old girl in first year at Jerry's secondary school discloses to her mum that Jerry forced her at knifepoint to perform oral sex on him in the woods next to the school. Maisie said that she received several sexual texts from Jerry in the days before the alleged offence. Jerry is interviewed by the police and denies the offence. He is charged with rape of a young child (ss 18 of the Sexual Offences (Scotland) Act 2009). Jerry's phone is confiscated and police find that he sent highly sexualised messages to six other girls at the school during the week of the allegation. Jerry is excluded from school temporarily. His case is jointly reported to the Children's Reporter and Procurator Fiscal.

A number of issues are raised by this case example. Jerry has been charged with a very serious offence. What level of risk does he present and who does he present a risk to? What level of assessment can take place to inform decision making at the moment? How are his educational needs met safely? Can he remain at home at present? How do we ensure that his wellbeing needs are met while providing appropriate supervision and monitoring? What conversations can happen with him about his behaviour? And can anything be done to reduce the risk he potentially presents while a legal decision is made about the case?

Time Scales and Legal Decision Making

The offence of rape of a young child (s18 of the Sexual Offences (Scotland) Act 2009) is a category 1 offence requiring to be jointly reported to the Procurator Fiscal and Children's Reporter on [instruction](#) of the Lord Advocate. All jointly reported cases are discussed by a Children's Reporter and Procurator Fiscal before the Procurator Fiscal decides whether they will deal with the case or whether it will be dealt with by the Children's Reporter. For young people under the age of 16 there is a presumption that the case will be dealt with by the Children's Reporter. However this presumption can be overridden if it is considered in the public interest to prosecute the child. [In assessing whether the presumption should be overridden a number of factors need to be considered](#): the offence should be of such gravity that it requires prosecution on indictment; any pattern of serious offending; supports that are required or currently in place through the Children's Hearing System; health or development issues and impact on the victim.

Both SCRA and COPFS agree that decision making for children who offend should be timely, appropriate and proportionate. To achieve this they aim to make the initial decision on which agency should proceed with the case within 10 working days of the joint discussion. However, the seriousness of the offence is a significant factor when deciding whether it is in the public interest to prosecute and further investigation of the case is often necessary to establish whether there is sufficient evidence to prove the allegation. Where further investigation is required the Procurator Fiscal aims to review the decision making process within 45 working days. When the Children's Reporter takes the referral, the investigation and decision should be made within 50 working days.

Both agencies need to investigate and assess the circumstances of the case. This involves asking other professionals and agencies for assessments, analysis of evidence, witness information and statements etc. This process of multi-agency sharing of information and assessment, at times, can take longer than the timescales indicated above. Furthermore the agreed timescales of 45 and 50 working days only refers to the decision about whether the PF or Children's Reporter will deal with the case. There are many other steps in either scenario to be taken before the case may be concluded.

In cases where the Procurator Fiscal is seeking prosecution, steps include: full preparation of the case for both prosecution and defence (witnesses, evidence, experts), court schedule, vulnerable witness applications and arranging any measure deemed appropriate.

In terms of referral to the Children's Reporter steps can include: requesting an assessment of the child prior to deciding whether to arrange a children's hearing, attending a children's hearing if one is arranged and accepting or denying the grounds, referral to court to establish or not the grounds of referral, attendance of a further hearing if the grounds are established, appointment of a safeguarder, requests for further assessment (mental health or risk), appeal of the substantive decision of the panel or any interim decision, decision of the court regarding any appeal etc. All of these steps increase the time it takes for the young person like Jerry to have a final decision to be made. However all decision making concerning children should comply with [article 3](#) of the UNCRC:

"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."

Clearly a wait of months or in extreme cases, years, for a final outcome – while Jerry grows, develops and moves towards young adulthood – is unlikely to be in his best interest as a child. Nor can it be in the best interests of Maisie, his victim, who in this case is also a child and may have no closure in relation to the incident until a final legal disposal is made. The principle that 'justice delayed is justice denied' holds true here and should inform actions. Accordingly, if as a professional involved with a case you are unhappy with the length of time taken to arrive at a legal decision, your courses of actions involve making representations directly to the Reporter or Procurator Fiscal to expedite legal processes.

Risk Assessment and Management

The Scottish Government's [Framework for Risk Assessment and Evaluation \(FRAME\) for under 18s](#) recommends that effective inter-agency collaboration requires 'sound decision-making, based on information-sharing, thorough assessment, critical analysis and professional judgement'. The 2014 edition of the guidance goes on to state that:

'A local care and risk management (CARM) process should be in place to assist with the early identification, assessment and management of children and young people who display harmful behaviours. This process should ensure a transparent, proportionate and rights-based approach

which places the child or young person at the centre of decision-making and considers risks and needs holistically. The process does not stand alone from GIRFEC and the Child's Plan: rather the care and risk management process ensures that decisions about risk inform the Single Plan in a meaningful way.'

Accordingly a multi-agency approach to decision-making bringing together social work, police, health, education, third sector and housing (where relevant) plus other relevant professionals is optimum with respect to Jerry's situation.

Whatever procedural stage the case is at, an assessment will be necessary to look at risks and needs in relation to home, community, school and other settings and to anchor decision making made by the CARM group and other relevant meetings. Assessments of children and young people involved with serious offending behaviour need to be made within the context of a detailed assessment of social, developmental and psychological needs as set out in the GIRFEC approach. Assessments will need to be as specific as possible about risk and any reports should acknowledge that the offence is untested and remains an allegation. Any report should note that conclusions about risk are drawn only to inform proportionate and defensible risk management.

The use of a risk assessment tool can provide a guide in relation to relevant risk and protective factors, although scorings should be contextualised by professional judgement. Some assessment tools – AIM 2 for instance – have specific guidance for their use when offences are untested in law. The use of unstructured clinical judgement without recourse to relevant assessment tools is likely to over or underrate risk. The purpose of a risk assessment is not to adjudicate on the veracity of allegations but rather to balance all information available to provide as detailed an understanding of risk as possible within the context of the child's life and current circumstances.

At a practical level, the decisions you make about Jerry's living situation and education will inevitably be informed by your views of risk in this situation – you end up making a risk assessment even if it is not formalised in a report. In many situations the seriousness of the offence (which is not in itself a predictor of future risk) will elicit strong feelings amongst professionals that can lead to an over-estimation of risk if decision making is not also informed by careful assessment. It is clearly more ethical, effective and rights based for the assessment to be explicit, transparent and accountable as well as grounded on relevant empirical risk indicators rather than being something informal, unstructured and unrecorded.

Young Person's Involvement in Assessment

Should assessments actively engage the child? Absolutely: GIRFEC places the child at the centre of assessment, planning and decision making and values the child and family's views about how to improve their wellbeing needs. An assessment that does not seek out the child's views and understands the world from the child's perspective will have limited value. It is also good practice for any assessment – including the assessment of risk – to be shared with the child and parents / carers so they can be active agents in safety planning. This can and should be done even when the child is in denial about the offence.

Young people should be encouraged to consider their harmful behaviour from the perspective of others to assist their understanding regarding where professionals perceive any risk to be and any recommendations to limit this risk. Young people do not need to agree with the risk assessment but if they can understand what is being said and that plans are in place to ensure that the young person does not get into further trouble, the likelihood of compliance with any safety planning will be increased.

The child has the right not to engage with the assessment and may be actively advised by their legal team to not engage on the grounds that compliance with a risk assessment may be seen by a court as an implicit admission of guilt. The decision to engage ultimately lies with the young person (and possibly their parents / guardian depending on the child's age) and not with their solicitor who can only advise. The principal aim of the assessment is to promote the child's wellbeing within the context of possible risk. Both the young person and their legal advisers may need encouragement to address whether encouraging non-engagement with services is genuinely in the best interests of the child.

Contamination of Evidence

The young person should not be encouraged by professionals to discuss their offence in any detail while the decision about whether the case is to be dealt with at a children's hearing or in court is pending. This is to avoid allegations that the child has been coached and / or evidence is contaminated prior to being tested in law. This principle of contamination is critically important in the adult criminal justice system.

If a decision has been made for the case to be dealt with by the Children's Reporter, the Reporter will normally expect to obtain a full assessment of the child prior to deciding whether to arrange a children's hearing in relation to the offence. A more detailed discussion with the young person about their offending will normally be appropriate to inform this assessment. Having received that assessment, the Children's Reporter may decide not to arrange a children's hearing and may refer the child to the local authority for work to be undertaken with the child on a voluntary basis.

In the adult criminal justice system, contamination can occur where a child changes their recollection of events as a consequence of questioning by an adult, where such questioning contains misleading information, is in the form of leading questions, involves the repetition of questions already answered or indicates that previous answers might not have been believed. Coaching is described as any activity carried out by an adult in relation to a child which involves the discussion of the questions which might be asked of the child and/or the rehearsal of the answers the child ought to provide in any proceedings in which that child might be accused.

During risk assessments professionals often want to confirm that they have got the information correct and repeat questions for the purpose of clarity. Professionals should be aware that repeated questioning could constitute coaching or be interpreted by the young person that the professional is looking for a different answer. Young people are easily susceptible to perceived pressure from authority figures and often look to please.

None the less, a young person who is due to appear in an adult court can voluntarily choose to share with professionals their side of the story in relation to the offence at any time during proceedings. If a child does recount events relating to an offence, the professional should be careful to ask open-ended, non-leading questions and should carefully record the information. Poor questioning techniques used during the process of discussing a memory with the young person (for instance their memory of the offence to which they are accused), are likely to undermine the credibility of their narrative in court proceedings because they can permanently distort the child's memory for the event. Extensive research has shown that our memories are fragile and subject to influence.

In cases where children who are likely to be dealt with in the adult criminal justice system do want to tell their story, they should know that you will be required to share what they tell you if you are called as a witness in court. If you are working with a young person throughout proceedings either at court or at a Children's Hearing, information about the purpose of your support and any progress made by the young person may be helpful for the Children's Panel or Sheriff in reaching the most appropriate decision.

Interventions

There is often a concern that any therapeutic or intervention work with the child needs to be put on hold while a decision is made about the young person's offence for fear of prejudicing the legal case against the child. This needs to be considered in the context of the rights of the child. The child's well-being is of paramount consideration and, as such, the provision of therapeutic or practical support should not be delayed until after the court proceedings. However, the nature of the therapeutic and practical support to be provided should be considered carefully in order to avoid the risk of contaminating the evidence or the allegation that the young person has been coached.

If Jerry's case is to be dealt with by the Procurator Fiscal, clearly any work with Jerry should not involve detailed discussion of his offence while it remains untested in law and as such, offence specific work would be wholly inappropriate. However, Jerry has a right to have any identified wellbeing needs met and thus should not be left unsupported. Given the previously highlighted timescales of decision making, Jerry could wait for months before his offence is dealt with in legal processes. Support for Jerry should flow from clear assessment, which should be undertaken to highlight particular areas of need including areas that may also potentially contribute to risk reduction. It may be the case that work around – for instance - social and relationship skills, healthy sexuality (including consent), internet safety, problem solving, management of stress, impulse control, plans for his future, awareness of self and others, empathy and perspective taking, attitudes to gender and so forth could be undertaken with Jerry. Many of these areas could contribute to risk reduction as well as helping promote Jerry's overall wellbeing outcomes. It should be recognised that Jerry would need to consent to be involved with such work and he may – at the end of the day – be found innocent of the crime he has been charged with. Work focusing on keeping himself safe and out of trouble is a useful way of framing ongoing therapeutic and practical support while he awaits a legal outcome in relation to his offence.

It is likely that Jerry will also need support if he goes to court. The vulnerable witness guidance (Scottish Executive 2005) acknowledges that children are particularly vulnerable and likely to find the process of giving evidence and being involved in the criminal justice system stressful. This is also true of the child accused: appropriately supporting a vulnerable child while they proceed through a challenging legal process further to being charged with a serious offence is a vital part of what we can do to help Jerry. This would also be relevant if Jerry's case is dealt with by the Children's Reporter who decides to arrange a children's hearing, and then proof proceedings result from Jerry or his parents not accepting the statement of grounds.

Conclusion

Young people under the age of 18 charged with serious offences are children first and foremost. We need to promote their rights in relation to healthy social development and must do all we can to help them feel socially 'anchored' in the community they belong to. This requires proportionate risk management, particularly while young people wait for legal outcomes in relation to their offences. This can be a trying time for young people, their families and professionals, but this paper has argued that best outcomes for children in this situation need to be driven by GIRFEC principles promoting wellbeing indicators, as well as foregrounding assessment including proportionate risk assessment. This assessment in turn can inform appropriate supervision, monitoring, interventions, victim safety planning and communication in relation to risk. To undertake risk management without assessment will lead to unclear and possible unfair recommendations, over or under estimation of risk and a lack of transparency in decision making.

Risk management is the responsibility of all of us, and a GIRFEC joined up approach that promotes the relationship with the child and family while also emphasising assessment and intervention plans grounded in relevant risk and protective factors is optimum.

Acknowledgements

CYCJ would like to thank those who peer reviewed this paper: