

Equalities and Human Rights Committee Age of Criminal Responsibility (Scotland) Bill

Submission of the Children and Young People's Commissioner Scotland

The call for additional evidence to the Equalities and Human Rights Committee in relation to the Age of Criminal Responsibility (Scotland) Bill is most welcome and extremely timely. It comes as the United Nations Committee on the Rights of the Child (CRC) has published a draft revised General Comment 10 (2007): Children's Rights in Juvenile Justice¹. Article 40 of the United Nations Convention on the Rights of the Child (UNCRC) calls on States to treat children in conflict with the law 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 desirability of promoting the child's reintegration and the child's assuming a constructive role in society. Key to this is *"the establishment of a minimum age of criminal responsibility below which children shall be presumed not to have the capacity to infringe the penal law"*².

Setting a Minimum Age of Criminal Responsibility

The draft revised General Comment reflects developments that have occurred since 2007, improved understanding of child and adolescent development and the CRC's own jurisprudence and concerns, including negative trends relating to the minimum age of criminal responsibility. The CRC recognises that preservation of public safety is a legitimate aim of the justice system, but views that this is best served by full respect for and implementation of the principles of juvenile justice as enshrined in the UNCRC.

One of the main objectives of the revised comment is to provide clarity on the setting of a minimum age of criminal responsibility. In the original General Comment No. 10 (2007), the CRC considered 12 years to be the absolute minimum age. It now states that this age is still low and calls on States to increase their minimum age to at least

¹ UN Committee on the Rights of the Child. 2018. *General Comment No. 24 (201x) replacing General Comment 10 (2007): Children's Rights in Juvenile Justice*.

<https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

² United Nations Convention on the Rights of the Child, Article 40(3)(a)

14 years. The CRC has also been concerned that States had been misinterpreting the General Comment and viewing 12 as an acceptable MACR and the target aim.

As the Commissioner stated in his oral evidence, the CRC:

“specifically said that no one should lower that age to 12, which was never intended as a target but the absolute minimum will immediate effect in 2007. Any country where the age was already 12 in 2007 needed to raise it progressively. Even 10 years ago, the Committee said that a higher age of criminal responsibility - for instance, 14 or 16 – contributes to a better juvenile justice system... the starting point for our discussions needs to be 18 and we need to be looking at 14 or 16 as the norm, internationally. If Scotland wants to be a human rights leader, I am very confused as to why we are talking about 12”³.

As we outlined in our previous evidence to this committee⁴, our view is that the Minimum Age of Criminal Responsibility (MACR) in Scotland should be raised to at least the age of 16. The CRC has consistently stated that not only is 12 the absolute minimum acceptable MACR but that States should continue to raise the age above 12 and that *“the minimum age of criminal responsibility shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity”⁵*. Most recently, in its Concluding Observations to its examination of the UK’s compliance with the UNCRC, in 2016, it recommended that the MACR be raised *“in accordance with acceptable international standards”* and not merely to 12⁶. This reflects the direction of travel which has culminated in a draft replacement for General Comment 10, in November 2018, with a recommendation that the MACR be raised to at least 14.

3 Equalities and Human Rights Committee 27 September 2018 *Official Report*.

<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11697>

⁴ Children and Young People’s Commissioner Scotland. 2018. *Age of Criminal Responsibility – Evidence to the Equalities and Human Rights Committee*. <https://www.cypcs.org.uk/ufiles/MACR-Evidence.pdf>

⁵ UN Committee on the Rights of the Child. 2007. *General Comment 10: Children’s Rights in Juvenile Justice*. https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f10&Lang=en

⁶ CRC, 2016. *Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland*.

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en

Concerns about the low MACR in Scotland have also been raised through the Council of Europe. The Parliamentary Assembly of the Council of Europe (PACE) recommended a MACR of at least 14 in 2014 (see page 9 of our previous evidence for full details).⁷ In her letter to the Minister for Children and Young People, dated 6th December 2018, Council of Europe Commissioner for Human Rights Dunja Mijatovic stated that the current proposals “would still leave Scotland behind the majority of Council of Europe Member States” and called on the Minister to ensure that the MACR be fixed at 14, at least⁸. Speaking with one of the Commissioner’s Young Advisors, the UN Secretary General’s Special Rapporteur on Violence Against Children, Marta Santos Païs said that it is important “to ensure that the minimum age of criminal responsibility is not putting children at risk of a life of criminality if they are placed in criminal justice systems too early”⁹.

MACR in the context of a juvenile justice system

In our previous evidence we outlined the benefits, to children and to society of raising the MACR beyond 12. A low age of criminal responsibility does not keep us safer, nor does it provide an effective remedy for those affected by the behaviour of children. We believe that the Children’s Hearings system represents a criminal justice system which meets many of the standards required by the UNCRC and it is therefore an example of good practice. However, we disagree with the Scottish Government’s position that this absolves it from the requirement to set a MACR in line with international standards. The Edinburgh Study of Youth Transitions and Crime Study found that increased levels of police contact and juvenile justice system intervention between 12-15 years are the key factors which determine whether a child with early ‘convictions’ will continue to offend, even the context of the Children’s Hearings system¹⁰.

⁷ Children and Young People’s Commissioner Scotland, 2018. *Age of Criminal Responsibility (Scotland) Bill - Evidence to the Equalities and Human Rights Committee* <https://www.cypcs.org.uk/ufiles/MACR-Evidence.pdf> page 9

⁸ Letter from the High Commissioner for Human Rights. http://www.parliament.scot/S5_Equal_Opps/Inquiries/20181220LetterfromCOE.pdf

⁹ CYPSCS. 2018. *Interview with Marta Santos Païs, UN SGSR on Violence Against Children.*

¹⁰ i.e. McAra, L. and McVie, S., 2013. Delivering justice for children and young people: Key messages from the Edinburgh study of youth transitions and crime. *Justice for young people: Papers by winners of the research medal*, pp.3-14.

It its draft revised General Comment, the CRC have clarified its position on an upper age limit for juvenile justice systems, making it clear that these systems should extend until the age of 18 years without exception¹¹. At present, although those already within the system may continue to be considered within the Children's Hearings system, it is not possible to refer a young person aged 16 or 17, on either offence or welfare grounds, if they have had no previous contact with the system.

Linking Scots Law to International Minimums

The Scottish Government have, in the Policy Memorandum accompanying this Bill, described the intention to raise the MACR as reflecting Scotland's commitment to international human rights standards and advancing Scotland's position in relation to international treaties and other obligations. It is not in line with these ambitions to only meet the minimum standard. In any case, the CRC do not see minimum standards as a goal, but rather as an absolute minimum acceptable level which States should progressively develop from. As a result, it would wrong to permanently tie Scots Law to these minimum standards, both in terms of our understanding of human rights and of the Scottish Government's own ambitions in relation to human rights. We believe Scots Law should always exceed the minimum acceptable international standard and that the Scottish Parliament, in its role as a human rights guarantor, should support this by challenging the government to exceed international minimum standards.

Disclosure and Other Relevant Information (ORI)

We continue to be concerned about the stigmatising impact of disclosure on young people. The extension by the Bill of these provisions to those under the MACR, with no criminal convictions, through the use of ORI is of particular concern. The way the Bill is currently framed, not only will those above the current MACR have such information recorded and disclosed, but it will be extended children under the age of 8. This is a retrograde step which is not in line with international human rights standards. We would draw the Committee's attention to our previous evidence on

¹¹ UN Committee on the Rights of the Child. 2018. *General Comment No. 24 (201x) replacing General Comment 10 (2007): Children's Rights in Juvenile Justice*. <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf> p10

this¹², with that of other organisations, particularly the Centre for Youth and Criminal Justice (CYCJ)¹³ and the Centre for Excellence for Looked-after Children in Scotland (CELCIS)¹⁴.

The CRC, in its draft General Comment, outlines States' responsibilities in relation to the avoidance of stigmatisation of children in conflict with the law. Although these provisions already existed in General Comment 10, they have been strengthened in the new draft General Comment. Paragraphs 78 to 80 outline the ways in which children's privacy must be respected. In particular we note that the CRC proposes the following for inclusion in the revised General Comment:

- vigilance concerning press releases, which should be limited to very exceptional cases;
- measures to ensure children are not identifiable via any such releases, articles or publications, extending to all forms of social media;
- rules permitting the automatic removal of convictions from the criminal records of children when they turn 18 (in the case of serious offences this may be subject to certain condition)¹⁵.

This concern was shared by Commissioner Mijatovic who, in her letter to the Minister for Children and Young People, urged that if the provisions were retained they should be accompanied by "*very clear safeguards around the circumstances in which this can be recorded, the length of time such records are kept, the situations in which disclosure is possible and the possibility for the child in question to seek review of any decisions to disclose*"¹⁶.

¹² Children and Young People's Commissioner Scotland, 2018. *Age of Criminal Responsibility (Scotland) Bill - Evidence to the Equalities and Human Rights Committee* <https://www.cypcs.org.uk/ufiles/MACR-Evidence.pdf>

¹³ Centre for Youth and Criminal Justice. 2018 *Age of Criminal Responsibility (Scotland) Bill: Submission from the Centre for Youth and Criminal Justice*

https://www.parliament.scot/S5_Equal_Opps/ACR_Submission_-_Centre_for_Youth_Justice.pdf

¹⁴ Centre for Excellence for Looked After Children in Scotland . 2018. *Age of Criminal Responsibility (Scotland) Bill: Submission from Centre for Excellence for Looked After Children in Scotland.* https://www.parliament.scot/S5_Equal_Opps/ACR_Submission_-_CELCIS.pdf

¹⁵ UN Committee on the Rights of the Child. 2018. *General Comment No. 24 (201x) replacing General Comment 10 (2007): Children's Rights in Juvenile Justice.*

<https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

¹⁶ Letter from the High Commissioner for Human Rights.

http://www.parliament.scot/S5_Equal_Opps/Inquiries/20181220LetterfromCOE.pdf

We believe that the current measures relating to disclosure of convictions and of ORI are not compatible with the draft General Comment. We would support amendments to bring the Bill in line with these draft recommendations.

The CRC also recommends that *“all persons who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and where necessary criminal sanctions”*. This recommendation would extend to information provided to victims. The appropriateness of sharing any information with victims and the risk of victims committing an offence under s182 of the Children’s Hearings (Scotland) Act 2011¹⁷, possibly without realising, reinforce our view that the sharing of information with victims is never appropriate where a child is below the MACR and any such disclosure in relation to a child above MACR should be rare. We believe that the best interests of victims, particularly child victims, are served by ensuring they receive adequate support, in line with UNCRC article 3. We therefore support the Committee’s earlier call for further information on the supports currently available to victims, in particular child victims, in Scotland.

If you require any further information, please contact Megan Farr, Policy Officer on megan.farr@cypcs.org.uk.

¹⁷ Children’s Hearings (Scotland) Act. <http://www.legislation.gov.uk/asp/2011/1/contents>