

Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice

Submission of the Children and Young People's Commissioner Scotland

I am delighted to comment on this draft revised General Comment No. 10 on Children's Rights in Juvenile Justice which is most welcome. We believe that the proposed revisions will serve to increase clarity and reinforce the child-centred approach the Committee calls for. We also welcome the emphasis throughout the draft General Comment on mitigating the negative impact that stigmatisation has on children in conflict with the law.

Age of Criminal Responsibility

At age 8, Scotland currently has the lowest minimum age of criminal responsibility (MACR) in Europe and the publication of this draft General Comment coincides with the consideration by the Scottish Parliament of the Age of Criminal Responsibility (Scotland) Bill, which proposes an increase of the MACR in Scotland to 12. This would still leave Scotland with one of the lowest MACR in Europe and one which meets only the minimum international standards as outlined by the Committee in General Comment 10.

This office and other organisations in Scotland, have called for the Parliament to raise the MACR further and evidence has been presented to the Parliament's Equalities and Human Rights Committee to support this call. We therefore welcome the recommendation of the CRC Committee that the age of 14 should now be considered the absolute minimum standard.

We also welcome the CRC Committee's clarification that the upper age limit for youth justice systems should be 18 and that exceptions should not apply.

Juvenile Justice Systems

In Scotland, most children in conflict with the law have their cases considered within the Children's Hearings system, which the Scottish Children's Reporter Administration, which administers the hearings, describes as "*a system which does not punish young people, but which identifies their needs and seeks to put in place*

supports which encourage young people to become healthy, fully functioning and contributing adult members of society.”¹

In the case of *S v Miller*, the Court of Session found that when considering an offence ground a Children’s Hearing could not be characterised as criminal proceedings, but that the hearings system does share some features with criminal proceedings². The criminal burden of proof applies, the criminal rules of evidence are used for the most part, and most importantly acceptance or establishment of an offence ground is a conviction to which the Rehabilitation of Offenders Act 1974 applies. The consequences for children of having an offence ground accepted or established can therefore be lifelong.

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. Quite the contrary, the holistic nature of the hearings system and its recognition that children who offend are in need of care, protection and supportive intervention is a strong argument for a higher MACR. The unique nature of the hearings system actually renders it more capable than a purely criminal system of responding effectively to the needs of a child whose behaviour presents as challenging, without the need to badge that behaviour as an offence.

Furthermore, children over 12 are not dealt with exclusively in the children’s hearings system. Section 42(1) of the Criminal Procedure (Scotland) Act 1995 states that "*No child under the age of 16 years shall be prosecuted for any offence except on the instructions of the Lord Advocate*"³. The Lord Advocate publishes guidance for the police on which offences are liable for prosecution and which therefore must be jointly reported to the Reporter and to the Procurator Fiscal. Children aged over 12 can be and are therefore prosecuted and tried in an adult court for a range of offences. Moving the MACR to 12 would not change this. Moving it to 14 would.

¹ Age of Criminal Responsibility (Scotland) Bill: Submission from Scottish Children’s Reporter Administration. 2018. http://www.parliament.scot/S5_Equal_Opps/Inquiries/ACRSubmissionScottishChildrensReporterAdministration.pdf

² *S v Miller* 2001, which concerned access to legal representation at a Children’s Hearing.

³ <https://www.scotcourts.gov.uk/search-judgments/judgment?id=6edd86a6-8980-69d2-b500-ff0000d74aa7>

³ Criminal Procedure (Scotland) Act 1995. <http://www.legislation.gov.uk/ukpga/1995/46/contents>

A Children's Hearing can, at present, find that a child aged 8 or over make a finding which results the child having a criminal conviction. Children aged 12 or over can be tried in an adult court and at present the maximum age for a new referral to a Children's Hearing is 16, although those who have been referred previously may continue to be considered in that forum until 18 or beyond.

Disclosure

In our evidence to the Scottish Parliament's Equalities and Human Rights Committee on the Age of Criminal Responsibility (Scotland) Bill, we expressed concerns about the Scottish Government's proposals regarding the disclosure of criminal convictions and what is termed as 'Other Relevant Information' (i.e. non-conviction information) regarding the behaviour of children in conflict with the law, including those below the MACR, both as part of the Disclosure Scotland Protecting Vulnerable Groups scheme and potentially to victims. We therefore welcome the provisions within the draft General Comment regarding full respect for the privacy of children in conflict with the law and in particular the recommendation that States introduce provision for the automatic removal from criminal records of offences committed before the age of 18. We agree with the CRC Committee that confidentiality of information is vital to prevent the stigmatisation of children in conflict with the law, to facilitate their reintegration into society and have raised concerns that the current proposals in Scotland are not compatible with children's rights in this respect. We are pleased to see that, in paragraph 78, States are called upon to ensure that information which identifies children is not published in any format, including on social media, and that violations of this should be subject to, where necessary, criminal sanction.

Age Assessment

Establishment of the age of children, where no official records exist, can be an issue in Scotland in the case of children who have been trafficked into the country. We therefore welcome the addition, in paragraph 46, of guidance on age assessment and, in particular, clarity that benefit of the doubt should apply and that medical and dental examinations are not appropriate when assessing a child's age. This will help to ensure that children without documentary evidence of their age enjoy the protections provided by the UNCRC.

Additional comments

We welcome the inclusion of new sections on children who are recruited and used by non-state armed groups and on customary justice.

We would like to comment on the following specific paragraphs:

- Paragraph 47 would benefit from more clarity that this relates to connected offences and regarding the length of time between offences;
- We are concerned that reference to specific groups of vulnerable children, i.e. disabled children, has been removed from Paragraph 49

Thank you again for the opportunity to comment on this draft General Comment. If you require any further information, please contact Megan Farr, Policy Officer on megan.farr@cypcs.org.uk.