

To: Commission on
Justice in Wales

Via email only

01 July 2019

Dear Commissioners,

I would like to thank you for the opportunity to provide oral evidence to the Commission on Justice in Wales and to share, as the Children's Commissioner for Wales, my considerations as to how we can establish a long term vision for a distinct justice system here in Wales. Following on from the evidence provided by Rachel Thomas, my Head of Policy, on April 8th 2019, I am writing to share my position and observations on the current Minimum Age of Criminal Responsibility.

As the Children's Commissioner for Wales, my mandate is to ensure that the UN Convention on the Rights of the Child (UNCRC) is upheld in Wales by Welsh Ministers, and that consideration to children and young people's rights are given due regard in each governmental decision. In light of this, I feel that it is my duty to share with you my concerns surrounding the current Minimal Age of Criminal Responsibility (MACR) and how the current age here in Wales falls short of the age that is recommended by the UN Committee.

I firmly believe that the Commission for Justice in Wales provides a unique opportunity for Wales to establish an approach to national justice that places great value on a restorative and rehabilitative approach and fully upholds Wales' commitment to social equality and human rights, including those set out in the UNCRC. With this in mind, the age at which children and young people are determined to be "criminally responsible" is an integral aspect and warrants careful consideration by the Commission.

Age of Criminal Responsibility (ACR) and the UNCRC

In England, Wales and Northern Ireland the age of criminal responsibility is currently 10 years of age. This is second lowest of all European Union Member States, with the ACR in Scotland currently at 8 years of age. However, the Scottish Parliament have taken measures to address this, with the passing of the Age of Criminal Responsibility (Scotland) Bill, which raises the Age of Criminal Responsibility to 12. As such, without action, our shared justice system is set to subject children to the lowest age of criminal responsibility in Europe.

The current age of criminal responsibility here in Wales is considerably lower than the age recommended by the UN Committee on the Rights of the Child, and has been for some time. This is despite the fact the UNCRC is partially



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incorporated into Welsh Law via the Rights of Children and Young Persons (Wales) Measure 2011, unlike England. Whilst, the UN Committee is in the process of revising its General Comment No.10 (2007) on children's rights in juvenile justice, in 2007, the Committee concluded that *"a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable"*¹ and urged countries with MACR below 12 to raise this to the *"absolute minimum age"*.

However, the position of the Committee has moved forward in recent years, with the draft revised guidance to replace the General Comment No.10 (2007), currently under consultation,² stating that *"the Committee finds that this age indication [12] is still low. States parties are encouraged to increase their minimum age to at least 14 years of age."*³

Scotland and the Age of Criminal Responsibility

The Age of Criminal Responsibility (Scotland) Bill will increase the MACR to 12 years, from 8. Whilst children in Scotland cannot be prosecuted below the age of 12 at present, they are still exposed to the full investigation procedures and deemed an 'offender'. The Bill puts in place new, additional measures to deal with these changes — including investigative measures in the most serious of cases and changes to the disclosure system.⁴

There are a very small number of children aged 8-11 who commit serious offences, with a significant decrease in the number in Scotland in recent years, with on average three 8-11 year olds referred each month to the Principal Reporter for more serious offending concerns.⁵ Under the proposals, all children who would have been referred through an offence route will instead be considered for support and protection referrals.

However, the MACR proposed in the Bill has been criticised, considering the UN Committee's explicit intention to explore whether the MACR should be raised beyond 12 years of age. The Children's Commissioner for Scotland has therefore taken the policy position, that if the Scotland is to meet its *"progressive commitment to international human rights standards"*, the age of criminal responsibility must be raised beyond 12, stating that *"the starting point for discussion should be on raising it to 18"*.⁶ The Children's Commissioner for

¹ https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/CRC_General_Comment_10.pdf

² <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DraftGC10.aspx>

³ <https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.pdf>

⁴ [https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20\(Scotland\)%20Bill/SPBill29PMS052018.pdf](https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20(Scotland)%20Bill/SPBill29PMS052018.pdf)

⁵ Ibid.

⁶ <https://www.cypcs.org.uk/ufiles/ACR-evidence-Jan-19.pdf>



Scotland has taken the position that the MACR should be at least 16, bringing Scotland in line with Lithuania, Luxembourg, and Portugal.⁷

Youth Justice in Wales

I welcome Wales' commitment to pursue a "divert and prevent" approach to youth justice, working across both devolved and non-devolved organisations. With the establishment of a number of triage/bureau approaches, it is my understanding that there are some strong examples of this working well in Wales, although, perhaps not entirely consistently, which is a cause of concern.

In their recent evidence to the Commission for Justice, the Youth Justice Board reiterated how a successful approach to youth justice must be founded on a genuine partnership between devolved and non-devolved area organisations with children's rights at the centre. However, whilst there are success stories in Wales and a predominant focus on prevention and diversion (accounting for almost 50% of Youth Offending Teams' work) there remain inherent challenges in the system, namely, funding restraints, ensuring prolific and complex cases receive enhanced support (such as CAMHS) and the divergences in UK and Welsh Government policies being understood by practitioners. These concerns have been further echoed in the evidence provided by Youth Offending Team Managers, who have cited a lack of clear pathways, policy divergence, and lack of national strategic leadership as hindering the effectiveness of Wales' approach to youth justice.

As I am sure you are aware, the recent HM Inspectorate of Probation report of Youth Justice and Early Intervention services in Western Bay (Swansea, Bridgend and Neath Port Talbot) further substantiated the challenges faced by the youth justice sector. The inspection found that whilst there were some excellent examples of joint working, the organisational delivery and service impact has been deemed inadequate, falling short in its ability to fully safeguard young people with complex needs and to work effectively and consistently across the three local authority areas.⁸ It is my understanding that a comprehensive action plan is now in place to address the concerns found in the report.

Despite these challenges, evidence provided by the Youth Justice Board support a compelling case for greater investment and resourcing of Youth Offending Teams across Wales. For example, where a restorative justice approach has been used instead of formal criminal proceedings, there has been an 87% reduction in the number of young people entering the youth justice system since

⁷[https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20\(Scotland\)%20Bill/SPBill29PMS052018.pdf](https://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20(Scotland)%20Bill/SPBill29PMS052018.pdf)

⁸ <https://www.justiceinspectorates.gov.uk/hmiprobation/wp-content/uploads/sites/5/2019/03/Western-Bay-YJS-inspection-report.pdf>



2007.⁹ The number of first time entrants in Wales per 100,000 population is 258, compared with 304 in England and there has been a significant reduction in the number of young people in custody. In December 2008 the number of Welsh young people in custody was 151. There are currently 30¹⁰.

In Wales we are already showing progressive leadership in our approaches to crime prevention, particularly in regards to young people, with the growing commitment and understanding of employing a trauma based approach, such as seen by South Wales Police. In my own work, we have seen how the failure to adopt such an approach can have lasting impacts on the life chances of young people. In my report, "The Right Care", we highlighted how young people in residential care homes were at greater risk of developing criminal records or being charged with offences for behaviours or actions that would usually be dealt with informally in a family home setting.¹¹ As a result, young people's life chances were impacted greatly, as minor offences were often disclosed.

Adopting an approach that better identifies complex behaviours early on, with strengthened preventative and early intervention services, would be a far more effective way of supporting a child or young person than seeking to have their needs met through the criminal justice service. This must be considered in the context that many young people who come in to contact with the criminal justice system have higher prevalence of mental illness, communication difficulties or learning disabilities, which raises further questions about their ability to effectively participate in criminal proceedings.

It is in light of this, I believe there is a solid foundation for youth justice services here in Wales to support a movement towards increasing the age of criminal responsibility to 16 years of age, or at the very least the recommended age of 14. Alongside this I would also support the devolution of youth justice matters. Welsh public services are responsible for health, social care, housing and education; all key elements of support for young people involved in the justice system. The artificial separation of youth justice however can create confusion between services as to their responsibilities and it is young people that are negatively impacted by this. Devolution of youth justice would enable Wales to fully realise its commitment to the UNCRC and legal duty to promote and protect the rights of its children and young people.

Yours sincerely,

⁹ <https://gov.wales/sites/default/files/publications/2018-06/Submission-the-youth-justice-board.pdf>

¹⁰ <https://gov.wales/sites/default/files/publications/2018-06/Submission-the-youth-justice-board.pdf>

¹¹ <https://www.childcomwales.org.uk/wp-content/uploads/2016/06/The-right-care.pdf>





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