



Committee on the Rights of the Child Joint Comments on Draft Revised General Comment No. 10 (2007)

Together (Scottish Alliance for Children's Rights) is an alliance of over 380 members working to improve the awareness, understanding and implementation of the UNCRC. Members range from large international and national NGOs, through to small volunteer-led after school clubs and individuals. The views expressed in this submission are based on wide consultation with our members but may not necessarily reflect the specific views of each of them.

The Centre for Youth and Criminal Justice (CYCJ) is dedicated to supporting improvements in youth justice, contributing to better lives for individuals, families and communities. CYCJ's vision is a Scotland where all individuals and communities are safe and flourish; and where Scottish youth justice practice, policy and research are internationally renowned and respected. CYCJ contributes to this by developing, supporting and understanding youth justice practice, policy and research in Scotland, and through seeking and sharing learning internationally.

Who Cares? Scotland (WC?S) is a national voluntary organisation, working with care experienced young people and care leavers across Scotland. WC?S provides direct advocacy to children and young people with care experience, as well as opportunities for local and national participation. WC?S aims to provide care experienced people in Scotland with knowledge of their rights and empower them to positively participate in the formal structures and processes.

The Centre for Excellence for Looked After Children in Scotland (CELCIS) is Scotland's centre of excellence for children's care and protection, based at the University of Strathclyde. CELCIS works to ensure the best international evidence is reflected in policy and practice, strengthening the skills and capacities of people who care for children and young people. CELCIS is part of the Institute for Inspiring Children's Futures, working together to build brighter futures for children in need of care and protection around the world

Introduction

Together (Scottish Alliance for Children's Rights) and the above partners welcome the opportunity to comment on the Draft Revised General Comment 10. Developments in research and practice mean updated guidance is now necessary. We are pleased that the Committee on the Rights of the Child (the Committee) is seeking to provide further clarity and stronger protections of children and young people's rights and would like to provide the following comments for the Committee's consideration.

1. Minimum age of criminal responsibility

Together and partners believe that a minimum age of criminal responsibility (MACR) of 12 is too low and that effective protection of children and young people's rights requires a higher threshold.¹ A MACR beyond 12 is necessary to reflect what we know about the backgrounds of children and young people who come into conflict with the law (links between vulnerability, victimhood and harmful behaviour), and research into children and young people's neurological development (including their developing capacity to evaluate risks and consequences).² Accordingly, we support the Committee's finding at **para. 33** that a MACR of 12 is too low.

The Committee should not view 14 as the 'limit' for the MACR. Rather 14 should be viewed as a point on a journey towards removing all children and young people from the criminal justice system. The Edinburgh Study of Youth Transitions and Crime³ returned several key findings for children aged 12-15:

¹ See responses to the Age of Criminal Responsibility (Scotland) Bill: [Together \(2018\)](#); [CYCJ \(2018\)](#); [Who Cares? Scotland \(2018\)](#); [CELCIS \(2018\)](#).

² See [CELCIS \(2018\)](#); [CYPCS \(2018\)](#) pp.4-5; Delmage, E. (2013) 'The Minimum Age of Criminal Responsibility: A Medico Legal Perspective', 13(2) *Youth Justice* 102-110; Dwyer, C., and McAlister, S. (2017) 'Raising the age of criminal responsibility: endless debate, limited progress', 3 *ARK Feature* 1-3; Bryan-Hancock, C. and Casey, S. (2011) 'Young People and the Justice System: Consideration of Maturity in Criminal Responsibility' 18(1) *Psychiatry, Psychology and Law* 69-78.

³ McAra L. and McVie S. (2010) 'Youth Crime and Justice: Key messages from the Edinburgh Study of Youth Transitions and Crime', *Criminology and Criminal Justice* 211-230

- The period between age 12-15 is critical in determining whether a child or young person with early criminal justice system contact will follow a ‘chronic’ criminal conviction trajectory; and
- Increased contact with police/juvenile justice system between age 12-15 *increases* the likelihood of reoffending.

We recognise that raising the MACR to 14 reflects developing international practice, including the Parliamentary Assembly of the Council of Europe (PACE) Resolution (2014).⁴ The Edinburgh Study supported a MACR of 15 based on arguments of effectiveness. Several bodies, including the European Network of Ombudspersons for Children, consider that the MACR should be raised to 18.⁵ As such, we support the MACR being raised *beyond* 14.

Some members consider that a rigid, age-only, approach can lead to vulnerable children being further disadvantaged. In particular, care experienced children and young people (alternative care) are more likely to have experienced life events which have a detrimental impact on their emotional and cognitive development. Accordingly, whilst they may be above the MACR, their emotional and reasoning capacities may be less well developed in comparison to non-care experienced peers. These children and young people may struggle to understand the criminal justice system and participate effectively in it.⁶ This has clear implications for the right to a fair trial/procedure. Some members note the overrepresentation of children with developmental difficulties and additional needs in the criminal justice system,⁷ and call for greater consideration of developmental needs, rather than an assessment based solely on age. A dual approach is used in Germany which has a MACR of 14, but children aged 14-18 will only be held criminal responsible if they are ‘*morally and mentally mature when the offence took place;...can realise the unlawfulness of his/her behaviour and act according to that realisation*’.⁸ We would welcome the Committee’s comments on dual approaches which use age as a starting point before considering other factors.

Based on the above, we offer the following key points:

- **Para. 32: The reference to a MACR of 14 as “commendably high” should be removed as it contradicts the overall messaging that 14 is the *absolute minimum* accepted level.**
- **The Committee should support upwards review of the MACR in future and make explicit reference to this.**
- **The Committee should make clear that children exhibiting harmful behaviour are in need of care and protection and have often been the victims of harm themselves.**
- **The use of terms such as ‘offending’, ‘offence’ and ‘child offender’ should be reviewed in relation to younger children (see e.g. paras 8-9, 30-31). Language based around ‘offending’ has criminalising implications and is inappropriate for children below the MACR who lack the capacity to commit a criminal ‘offence’. Alternative terminology such as ‘harmful behaviour’ or ‘children in conflict with the law’ is more appropriate.**
- **We would welcome the Committee’s comments on two-stage approaches which use age as a starting point before considering factors such as capacity, maturity and understanding.**

2. Upper age limit (age of criminal majority)

Together and partners welcome the clarity given at **paras. 41** and **46** that young people who have turned 18 since the commission of an offence should remain within the youth justice system for the duration of any measures imposed. We also welcome the added clarity at **para. 47** that young people involved in a ‘string of offences’, some pre-18 and some post-18, should continue to be dealt with in the youth justice system if they would benefit from this approach.

We note calls from some organisations for greater sensitivity in relation to developmental needs. These arguments are more prevalent in relation to the minimum age of criminal responsibility but can also be found in relation to the maximum age.⁹ The Committee might consider commenting on the extension of youth justice systems to young

⁴ Parliamentary Assembly of the Council of Europe Resolution 2010 (2014) [Child-friendly juvenile justice: from rhetoric to reality](#).

⁵ ENOC, ‘[Position Statement: The rights of children/young people in conflict with the law](#)’ (2012)

⁶ CYCJ, Papadadoimitraki, Y. (2016) [Minimum Age of Criminal Responsibility \(MACR\) – Comparative Analysis – International Profile: Germany](#).

⁷ Centre for Youth and Criminal Justice, (2016) [Key messages from the Centre for Youth & Criminal Justice](#). Glasgow: CYCJ; Arthur, R. (2012)

“Rethinking the Criminal Responsibility of Young People in England and Wales”, *European Journal of Crime, Criminal Law and Criminal Justice*, vol 20, pp13-29

⁸ CYCJ, Papadadoimitraki, Y. (2016) [Minimum Age of Criminal Responsibility \(MACR\) – Comparative Analysis – International Profile: Germany](#), p.2

⁹ Herweijer M. & van der Laan, P. (2018), ‘Applying juvenile criminal law to young adult offenders. A promising innovation of the justice system in the Netherlands?’, presentation at the [World Congress on Justice for Children 2018](#), UNESCO Paris; Siringil Perker, S., Chester L.E.H. & Beyene, Y. ‘Defining the Age of Juvenile Justice Jurisdiction: Current Practices and the Need for Reform’, presentation at the [World Congress on Justice for Children 2018](#), UNESCO Paris

people aged 18-21 (or higher) who have developmental or other additional support needs and who may benefit from being dealt with in the youth system.

- **The Committee could note/comment on the use of child and youth justice systems for young people older than 18 who have developmental or other additional support needs. This may be most appropriate as an addition to paras. 42 or 46.**

3. Legal and other appropriate assistance

It is essential that all children and young people in contact with the justice system are given adequate information and professional support to allow them to participate effectively, know their rights and understand any risks or consequences. This is an essential prerequisite before children and young people can effectively exercise their right to be heard and their right to a fair trial/procedure. Assistance and advice are particularly important in situations where information volunteered by a child may go on to have an impact later in life.¹⁰

We welcome the greater clarity given at **para. 59** on what is needed to ensure that the child is informed in a manner they understand (translations of jargon, oral explanations). We also welcome the clarity provided in **para. 62** that assistance *must* come from a legal representative in cases where a child/young person is facing formal justice procedures, and *preferably* from a legal representative in diversion cases. It is essential that these lawyers are given thorough and ongoing child rights training, and guidance on *how* to conduct discussions and deliver advice in a child and young person-friendly manner. We note that **para. 63** refers to such training being necessary for social workers and paralegals ('other appropriate assistance'), but there is no provision in relation to legal representatives within this section. The redraft should be amended to include this, notwithstanding **para. 123**. The child/young person's perception of meetings with a lawyer is important. If the context and conduct of these discussions too closely resembles the provision of an 'adult criminal lawyer', then this risks the child feeling that they are being dealt with as a suspected criminal and stigmatised as such.

- **The Committee should develop paras. 62-63 to include reference to the ongoing and in-depth training required of lawyers in relation to children's rights *how* to work in a child and young person-friendly manner.**

4. Minimum age for deprivation of liberty

Together and partners welcome the introduction of a minimum age for the deprivation of liberty. We consider that this should be set higher than 16 but appreciate that 16 is a starting point on a journey to removing all children and young people from the scope of detention. We encourage the Committee to make clear that States should put in place measures to ensure that no child under the age of 16 is detained as punishment, and to emphasise that States should extend these measures to 16-18-year olds as far as possible.

- **A minimum age for the deprivation of liberty is welcome. The Committee should encourage States to extend this approach to 16-18-year olds as far as possible.**

5. Other

Leading Principles: non-discrimination (paras. 8-11)

We note the call for attention to be paid to *de facto* discrimination against 'vulnerable children' (**para. 8**) and the reality that certain groups of children are more likely to be criminalised than others (**para. 10**). We encourage the Committee to include "children and young people with care experience"¹¹ in the list of examples given at **paras. 8 and 10**. Research shows that children and young people with care experience are:

- More likely to be criminalised than non-looked after peers,¹² and often criminalised for behaviour which is shaped by and rooted in the trauma that they may have experienced.¹³

¹⁰ For example, through the recording and disclosure of 'other relevant information' pertaining to pre-12 behaviour under the Minimum Age of Criminal Responsibility (Scotland) Bill.

¹¹ Also known as children and young people with experience of alternative care.

¹² The Howard League of Penal Reform (2016) *Criminal Care*. London: The Howard League of Penal Reform); Scottish Government. (2018). [Age of criminal responsibility \(Scotland\) bill policy memorandum](#). Edinburgh: Scottish Government; Nolan, D. (2018, p.8) [Debating Disclosure - Improving Life Chances Through Awareness and Understanding](#). Glasgow: CYCJ "In spite of only 0.28% of the population being care experienced, a third of young people in custody have reported being care experienced"; Broderick, R., & Carnie, J. (2016). [Young people in custody 2015](#). Edinburgh: Scottish Prison Service.

¹³ CELCIS (2018), [Submission at Stage 1: Age of Criminal Responsibility \(Scotland\) Bill](#)

- More likely to be drawn into youth justice systems, partly because of their increased proximity to public officials and the likelihood that such professionals may contact the police in relation to behaviour that, had the child/young person been at home with parents or other carers, would be unlikely to result in the police being called.¹⁴

Care experienced children and young people report their experiences of over-involvement of police in their lives (sometimes linked to early traumatic experiences) and stigma in certain police practices such as stop and search, which links to the stigma of being in care. This can then result in increased involvement with the youth justice system.¹⁵

A MACR of 18 would ensure that all children are recognised and treated as children first and foremost, through non-criminalised measures which focus on individualised care and protection needs. This would help alleviate the current discrimination faced by care experienced children and young people.

- **The Committee should make explicit reference to care experience in paras. 8-10.**

Diversion (paras. 23-27)

Research shows that contact with the youth justice system is the biggest factor in whether a child or young person will continue to ‘offend’.¹⁶ Wherever possible, the best course of action is to refrain from intervening as a ‘justice’ service, but to provide support via universal services (health, education, welfare) and focus on building relationships, strength, skills, opportunities and hope.¹⁷ This care and protection-focused approach helps reduce the likelihood of further ‘offending behaviour’¹⁸ by focusing on the root causes (for example abuse, neglect, lack of support) rather than considering harmful conduct in isolation. Children and young people dealt with through non-criminalised approaches are more likely to engage with processes designed to help and support them. **The redraft could emphasise the role that diversion plays in reducing the likelihood of further engagement in harmful behaviour.**

Together and partners believe **para. 23** would be strengthened by the removal of the phrase “seek to” in “States parties shall seek to promote [diversion]”. This change would sharpen the duty placed on States by creating an obligation of an outcome, rather than an obligation to *attempt* a certain course of conduct. We would also encourage the Committee to present diversion as the norm, to which exceptions are possible. The current wording that diversion should be used “whenever appropriate” gives the impression that diversion is a secondary choice. A stronger approach may be to provide that “States parties *shall* promote diversion, *unless inappropriate* based on the facts and circumstances of an individual case”.

Together and partners welcome the removal of ‘desirability’ from considerations of whether diversion should be offered (**para. 23**). The previous inclusion of desirability resulted in a highly subjective test, giving States remarkably broad discretion. The emphasis that the range of offences to which diversion is possible should continually be extended is also positive (**para 24**), as is the emphasis on the need for ongoing training and support for diversion officials (**para 27**).

We note that the text of the original General Comment provides that States’ law “has to” set out the cases in which diversion is possible. This has been softened to “should” in **para. 27** of the redraft. Together and partners believe the position in the original General Comment is stronger. It is crucial that the cases in which diversion is possible are clear at the outset in the interests of clarity, certainty and predictability. This is essential to prevent discriminatory outcomes for children and young people, especially those belonging to groups at risk of discrimination.

- **Strengthen para. 23 by removing “seek to” in “States parties shall seek to promote [diversion]”.**
- **Strengthen para. 23 by presenting diversion as the norm, to which exceptions are possible.**

¹⁴ NACRO (2003) Reducing Offending by Looked After Children: A Good Practice Guide. London: NACRO

¹⁵ Who Cares? Scotland, (2018) ‘[Who Cares? Scotland’s Report on the Criminalisation of Care Experienced People](#)’; Who Cares? Scotland (2018), [Stage 1 Submission: Age of Criminal Responsibility \(Scotland\) Bill](#)

¹⁶ McAra L. and McVie S, ‘Youth Crime and Justice: Key messages from the Edinburgh Study of Youth Transitions and Crime’, (2010) *Criminology and Criminal Justice* 211-230

¹⁷ CYCJ. (2016) [Key messages from the Centre for Youth & Criminal Justice](#). Glasgow: CYCJ, also McAra L. and McVie S, ‘Youth Crime and Justice: Key messages from the Edinburgh Study of Youth Transitions and Crime’, (2010) *Criminology and Criminal Justice* 211-230

¹⁸ McAra L. and McVie S, ‘Youth Crime and Justice: Key messages from the Edinburgh Study of Youth Transitions and Crime’, (2010) *Criminology and Criminal Justice* 211-230

Strengthen para. 27 by replacing “should” with “must” or “has to” in “the law should indicate the cases in which diversion is possible”.

Dispositions (paras. 28-29)

Together and partners welcome that the redraft envisages a more active role for States in rehabilitation and protection from stigmatisation. (**paras. 28-29**). There is potential for further strengthening here, particularly around the steps States can take to *actively prevent* stigmatisation. This can be contrasted from actions States can take to combat discrimination as and when it happens (i.e. protection vs prevention, both are necessary to ensure effectiveness). For example, the redraft could include directions to States to engage in public awareness and understanding campaigns.

- **Strengthen paras. 28-29 by emphasising the need for States to take proactive and pre-emptive steps to prevent stigmatisation.**

Fair Trial

At **para. 22**, the redraft notes that fair trial rights are guaranteed to those who are *not* diverted. The redraft should be clear that this is not to the prejudice of children and young people who *are* diverted. The redraft should emphasise that those who *are* diverted still have the right to a fair process.

- **Clarify para. 22 by adding that children and young people who *are* diverted have a right to a fair process/procedural guarantees.**

In the section on the right to be heard (**paras. 54-56**), Together and partners note the removal of ‘wishes’ and ‘preferences’ for children facing alternative measures. The redraft simply notes that ‘specific concerns’ of the child should be given due weight. ‘Concerns’ does not cover the wide range of views that a child or young person may have in relation to diversion. The focus on ‘concerns’ appears to limit what types of views should be considered.

- **Para. 56 should be broadened to clarify that *all* views of the child (wishes, preferences, concerns etc.) should be taken into account in accordance with the age and maturity.**
- **Paras. 54-56 should give clear guidance to ensure *effective* participation of those with additional support needs.**

Terminology

We note the Committee’s statement at **para.6** that the “revised general comment does not refer to children as ‘juveniles’”. We also note the Committee encourages States to follow in using alternative terms such as ‘child justice’ or ‘youth justice’. These are ‘positive developments as they aim to reinforce the dignity and worth of children in conflict with the law” (**para. 6**). These intentions are welcome. However, we note the need for consistency throughout the redraft text, as the terms ‘juvenile’, ‘juvenile justice’ and ‘juvenile delinquency’ appear in later paragraphs and headings (e.g. **paras 17, 19, 121**). Language has clear implications for retaining the focus on children first and foremost. Consistency here would support the overall message and aims of the redraft and encourage States to follow suit.

- **Review use of ‘juvenile’ and ‘juvenile delinquency’ throughout the text (e.g. paras. 17, 19, 121)**
- **Review use of the language of ‘offending’ in relation to younger children (see Section 1)**

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