

T: 0300 244 4000
E: scottish.ministers@gov.scot

Dunja Mijatović
Commissioner for Human Rights
Council of Europe
Strasbourg

ref: CommHR/DM/sf 091-2018

19 December 2018

Dear Commissioner Mijatović,

Thank you for your letter of 6 December 2018.

I very much welcome your interest in Scotland's approach to how we support vulnerable children and young people who engage in harmful behaviour. We take a Scotland-specific approach to youth justice, which is not only quite distinct from that in England and Wales but also materially different from many other member States. This has had considerable success in recent years - markedly reducing the numbers of children and young people involved with statutory systems, appearing in court, being convicted of offences or accruing criminal records. Scotland offers a distinctive approach to supporting children and young people's needs and interests. For your reference Annex B provides data on the number of children who have been referred to the Children's Reporter on offence grounds and this shows that since 2007/2008 there has been a decrease of 78%.

I would very much like to invite you to visit Scotland to find out more about what we do and the difference this government is making to children and young people, and their families' lives. I would be interested to hear your views on what more we might do to further advance our work in this regard.

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The Age of Criminal Responsibility (Scotland) bill as introduced exists in a wider, uniquely Scottish context. The 'Guide to Youth Justice in Scotland: policy, practice and legislation' published in June 2018 by Strathclyde University's Centre for Youth & Criminal Justice provides a detailed description of Scotland's approach. You may consider this a useful reference point.¹

I thought it might be helpful to offer some brief explanatory information. Scotland's approach to youth justice represents a particular application of our 'Getting it right for every child (GIRFEC)' framework, ensuring that the best interests of children and young people are treated as the primary consideration by all public services which come into contact with them. This is articulated in Scotland's Whole System Approach (WSA) which emphasises early, preventative action wherever possible rather than escalation to formal systems. Scotland's approach to youth justice is to help and support children who have engaged in harmful behaviour, working to restore them to positive pathways which lead to a fulfilled, productive adulthood.

If informal, collaborative work with children and families delivered via mainstream universal services cannot address children's needs, formal action to consider compulsory protection can be taken through the Children's Hearings System. This is the legal system for children and young people in Scotland who are either at risk or who have allegedly committed an offence.

In Scotland setting the age of criminal responsibility at a particular age does not imply that children above that age who are alleged to have committed an offence will be dealt with through the criminal justice system. The great majority of children who commit offences will, in fact, be dealt with through the Children's Hearings system.

The Children's Hearings system was established in the 1960s and extensively modernised in the past 5 years. Its underlying philosophy is to recognise that children who commit offences, like children who are themselves at risk due to the actions or omissions of others, should be dealt with through the whole system and these children often need measures of support.

A child may be referred to the Children's Hearing on one of a number of grounds. Those grounds include, for children over the age of criminal responsibility, that the child has committed an offence. But regardless of the ground on which a child has been referred to the Children's Hearing, the Hearing takes decisions on the basis of the child's needs. Any Children's Hearing must regard the need to safeguard and promote the welfare of the child as the paramount consideration, with limited exceptions where there is significant risk to public safety. Even in those cases the child's welfare remains a primary consideration. Concepts such as deterrence or retribution play no role at all in that system. Further information on the Children's Hearings System is available from the Scottish Children's Reporter Administration.²

¹ The Centre for Youth & Criminal Justice's Guide can be accessed here : <https://www.cycj.org.uk/resource/youth-justice-in-scotland-guide/>.

² Further information provided by the Scottish Children's Reporter Administration is available here: <https://www.scra.gov.uk/wp-content/uploads/2018/08/01-Fact-Sheet-The-Childrens-Hearings-System.pdf>

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Notwithstanding the current age of criminal responsibility in Scotland, a child under 12 may not be prosecuted. Where a child under 12 is alleged to have committed an offence, that child can only be dealt with through the Children's Hearing system.

Although children over 12 can be prosecuted in court, in practice, the great majority of children under 16 who are alleged to have committed offences are not prosecuted, but as explained above are dealt with through the Children's Hearings system. Certain young people who are 16 and 17 may also be dealt with through the Children's Hearings system.

This is achieved by the following mechanisms. First, only certain categories of alleged offences require to be reported to the prosecutor; others are dealt with by the Children's Reporter. And, secondly, in relation to those cases which are reported to the prosecutor, prosecutors (who, in our system, exercise an independent judgment in the public interest) apply a presumption in cases involving children under 16 in favour of referring the case to the Children's Reporter.

This system is a sophisticated one, which enables a careful and professional judgment to be applied to particular cases in which a child is alleged to have committed an offence. It proceeds on the basis that, in the great majority of cases, where a child is alleged to have committed an offence, the correct response will be to proceed through the Children's Hearings system rather than by way of prosecution; but recognises that there may be cases where this is not the correct response.

Your own thoughtful comments, and any future revision of the UN Committee on the Rights of the Child's General Comment on children's rights in juvenile justice, will of course be taken fully into account as we continue to consider our approach to these issues, and as we plan for future change in Scotland. Further information on the Age of Criminal Responsibility (Scotland) Bill is provided in the third attached annex.

I hope that the attached information is helpful. In the hope that you will be able to accept my invitation to visit Scotland to hear more about the operation of Scottish legislation and policy in practice, I look forward to hearing from you in due course as to your availability for a visit.

Yours sincerely



MAREE TODD

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The following information is taken from the Scottish Children's Reporter Administration and provides further information on Scotland's Children's Hearings System.³

Getting it Right

The Scottish Government introduced its 'Getting it Right for Every Child' (GIRFEC) agenda which aims to improve outcomes for all children and young people in Scotland; getting them the help they need, when they need it; listening to them and their families, keeping them involved and at the centre at all times; and ensuring that all services work together effectively towards fully integrated solutions. This agenda is still the foundation for work with all children and young people, and is embedded in the developing early years and youth frameworks, as well as in the Children and Young People (Scotland) Act 2014.

Preventing Offending by Young People

Preventing Offending by Young People – A Framework for Action was published by the Scottish Government in June 2008. The framework outlines a shared vision of what should be done by national and local agencies working with children and young people who offend, or are at risk of offending, to prevent, divert, manage and change that behaviour. Recent years have seen the development of the Whole Systems Approach, which involves putting in place planning, assessment and decision making processes for young people who offend, diverting them where possible from statutory measures, prosecution and custody through early intervention and robust community alternatives. In line with the Getting it Right for Every Child (GIRFEC) approach, the intent is to ensure that children and young people receive the right help at the right time. SCRA is fully supportive of the Scottish Government's approach to tackle youth offending.

Scotland's Children's Hearings System

The Children's Hearings System is Scotland's distinct system of child protection and youth justice. It stems from the recommendations of the Kilbrandon Committee in 1964. Recognising that the existing model of juvenile courts was inadequate, the Committee's conclusions led to the establishment of a unique system which is still recognised internationally today as an example of best practice.

Guiding Principle

One of the System's most important aspects is the recognition that children and young people who offend are often the same children and young people who require care and protection.

³ <https://www.scra.gov.uk/wp-content/uploads/2018/08/01-Fact-Sheet-The-Childrens-Hearings-System.pdf> and <https://www.scra.gov.uk/wp-content/uploads/2018/08/12-Fact-Sheet-Youth-Offending.pdf>

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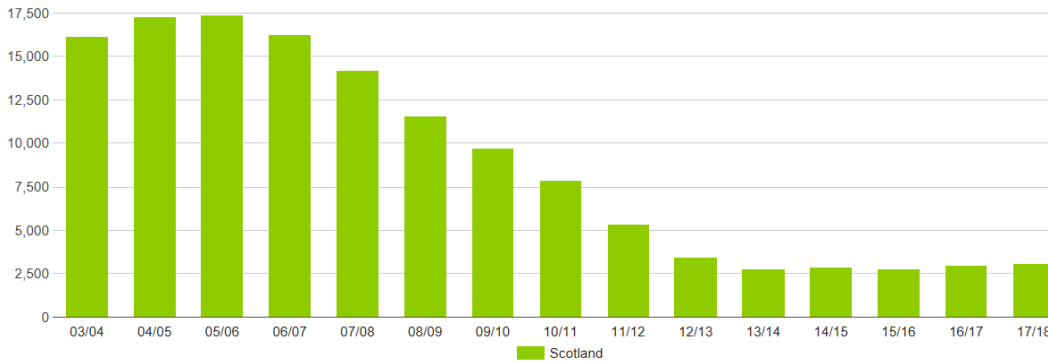


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The following chart and data table from the Children’s Reporter Administration shows the number of children referred on offence grounds to the Children’s Reporter has reduced significantly in the last decade.⁴

Children referred - offence
Counts



Characteristic	Scotland
03/04	16,134
04/05	17,273
05/06	17,361
06/07	16,229
07/08	14,209
08/09	11,554
09/10	9,765
10/11	7,857
11/12	5,336
12/13	3,473
13/14	2,764
14/15	2,891
15/16	2,761
16/17	2,995
17/18	3,060

⁴ Data provided by Scottish Children’s Reporter Administration
<https://www.scra.gov.uk/stats/?=undefined&areas%5B%5D=Scotland&measures%5B%5D=Children%20referred&measure=Children%20referred%20-%20offence>
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I hope that it is helpful if I offer some clarification on the ‘Other Relevant Information (ORI)’ and ‘Police Powers’ provisions in the bill to which your letter refers. Please see below for information which provides further clarity on this. A complete explanation of the bill and the background to it is provided for in the Policy Memorandum to the bill available on the Scottish Parliament’s website.⁵

Other Relevant Information (ORI)

The ORI provisions in the Age of Criminal Responsibility (Scotland) Bill relate to disclosure by the state in extremely limited circumstances of information about the background of individuals, particularly those seeking to move into particular sensitive roles or to work with vulnerable groups of people. It is important to note that they do not enhance the rights of victims by enabling them to obtain information about the perpetrator. The bill also does not permit the publication of individual children’s details in the media. There are clear prohibitions in Scotland on the publication of the details of alleged child perpetrators - and child victims - which extend to all under 18s.

Specifically, ORI is information about a disclosure applicant which is provided to Disclosure Scotland, by the Chief Constable of a UK police force. This includes non-conviction information, typically a narrative description of alleged conduct and any relevant background factors. It can only be included on an Enhanced Disclosure certificate or a Protection of Vulnerable Groups (PVG) scheme record which would be sent to a lawfully authorised person, such as a named employer or a regulatory body. Enhanced Disclosure certificates and PVG Scheme Records are the mechanisms for the state to disclose information where an individual is carrying out particular types of work, such as regulated work with children or vulnerable adults. The bill provides an additional safeguard as it requires the Chief Constable to send information contained in an ORI to the Independent Reviewer before the disclosure can occur.

The ORI will then only be included on an Enhanced Disclosure or PVG Scheme Record if the Independent Reviewer (or sheriff on appeal) agrees that disclosure should take place. It is anticipated that this will only take place in extremely limited circumstances and where there is a strong public interest in the information being disclosed.

Police Powers

Scotland’s approach to children in conflict with the law, for many years, has emphasised the importance of prevention, education and diversion.

The police powers in the bill are intended for use in the most exceptional circumstances only – where the seriousness of the conduct under investigation is very grave, and the circumstances of the case mean that the powers are the only way of getting to the truth of the matter. In considering the potential exercise of any power, promoting and safeguarding

⁵[http://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20\(Scotland\)%20Bill/SPBill29PMS052018.pdf](http://www.parliament.scot/S5_Bills/Age%20of%20Criminal%20Responsibility%20(Scotland)%20Bill/SPBill29PMS052018.pdf)

the child's wellbeing must always be a primary consideration and this is made explicit on the face of the Bill.

Removing children from the criminal justice system requires a meaningful departure from adversarial criminal investigative techniques and experiences. The interview process in the bill has been designed to be transparent (so that any evidence arising from it has integrity), but also to be as child-centred as possible. The child will not be interviewed as a criminal suspect and it is important that the interview process will not be criminalising or stigmatising.

Police and Social Work must plan the interview in accordance with the statutory guidance that will be issued under the bill, and take account of the child's communication abilities and any other capacity challenges or needs they may have. This will help minimise the potential for interviews to be arduous for the child.

As part of ensuring that the rights of the child are protected during any such investigative interview, the child will have:

- the right not to answer any question asked during the interview;
- the right to information about the interview and their rights, in an easy-to-understand form; and
- the right to have a supporter with them: a responsible adult preferably known to them who can provide emotional support
- the right to specialist independent professional assistance to understand their rights and to help them have their voice heard.

These safeguards provide robust protection of the child's rights throughout the interview process.

The term "place of safety" is a concept which has been in use since the Social Work (Scotland) Act 1968 and which laid the statutory framework for the Children's Hearings System – a child against whom offences were believed to have been committed could be removed to a place of safety by a constable or anyone so authorised by a court.

The current bill extends this existing power for a constable to remove a child to a place of safety to children behaving or likely to behave in a manner that is likely to cause significant harm to others. This is an emergency power which is restricted to a clearly articulated lawful purpose; to protect other people from risk of significant harm or further such harm. It is not a power of detention, nor is it a power of arrest designed to facilitate the type of enquiries a traditional criminal investigation might involve.

The bill follows already established precedent on the use of places of safety for children in Scotland by mirroring section 189 of the Children's Hearings (Scotland) Act 2011 which confines the use of a police station as a place of safety to "last resort" situations. Further, if the place of safety used in the first instance is a police station, there is an obligation on the police constable to identify an alternative place of safety as soon as is reasonably practicable.

The place of safety could be (and is most likely to be) the child's home, a friend's home, a grandparent's home, a local authority residential facility, a hospital or a surgery. Essentially, it could be in any place where the person who occupies it is willing to receive temporarily that

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child. I must emphasise that a police station should only ever be used as a last resort and for the shortest time necessary.

The power is created only for the most serious circumstances, and a child can only be kept in a place of safety under this power for so long as is necessary to put in place arrangements for the care or protection of the child (or for an order authorising the taking of samples to be obtained). This is why an absolute maximum time limit of 24 hours has been applied. If it becomes apparent that a child needs to be kept in a safe place for longer than this, for example because they would not be safe to return home - then this will need to be taken forward through existing child protection measures which focus on the risk posed to the child.

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