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The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach

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Abstract

The minimum age of criminal responsibility in England and Wales remains 10 years: something which has attracted criticism globally by policy makers and youth justice practitioners. Yet, the Westminster Government refuses to consider changes to minimum age of criminal responsibility, despite evidence supporting reform. This article, drawing on the United Nations Committee on the Rights of the Child's consultation to revise General Comment No. 10 (2007) and the activities of UK devolved administrations, explores the need for minimum age of criminal responsibility reform, considering how a holistic approach focused on diversion and the provision of rights respecting appropriate interventions can create positive, even transformative outcomes for children.

Keywords

appropriate interventions, children's rights, diversion, human rights, MACR, youth justice

Introduction

In the 2018 consultation regarding revision of the Committee on the Rights of the Child's General Comment No. 10 (United Nations Committee on the Rights of the Child (UNCRC), 2007), it was proposed that minimum age of criminal responsibility (MACR) globally should be set no lower than 14 years of age. Such would arguably assist in developing an internationally accepted and appropriate global MACR standard (UNCRC, 2018). However, at this point in time, MACR has been applied asymmetrically by different countries. In continental Europe, for example, there has arguably been a continuing liberalisation of approaches towards children, which has been reflected in generally higher MACR (Crofts, 2009; Dünkel and Pruin, 2012). Although, it should be noted that the picture is sometimes much more nuanced, with a diverse array of treatment pathways and

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interventions, engagement with which can be required of children by the state, even where they are below MACR (Campistol and Aebi, 2018). Elsewhere, such generally progressive approaches have been less visible (or even invisible), with certain countries continuing to employ an extremely low MACR. For instance, in the United States, many states do not employ a MACR, while a number of those that have adopted legislation have set their MACR as low as 7 years of age. In addition, in other jurisdictions, there is evidence that some governments have sought to regressively amend existing MACR legislation. Recently in the Philippines, a bill was introduced to Congress in January 2019 which sought to lower MACR. From these examples alone, it is clear to see that a universal approach to MACR has not yet been deployed.

In England and Wales, it is the case that substantive progress in respect of raising MACR has not been forthcoming and such arguably has significant implications which flow beyond legal considerations into the very lives and future potential of children (Cipriani, 2016). This article, reflecting upon key messages from the literature and the work undertaken by devolved administrations in the United Kingdom to assist children who may come into conflict with the law, notably in Scotland and Wales, considers whether the time is finally right for reform of MACR. Yet, and as will become evident, reform is intended to be understood as embracing critical areas of activity not merely concerning a legal threshold but relating to the provision of rights respecting appropriate interventions for children and diversion. It is, in fact, a central contention of this article that it would be a mistake to view any reform of MACR, especially in Wales, as an isolated legal artefact or a type of sequestered legislative action which is detached from the wider Welsh policy climate. Rather, it is contended that conditions are now right for progressive MACR reform to occur. However, and poignantly, it is contended that MACR has 'moved on' and any argument regarding it should be located within a broader debate concerning rights respecting appropriate interventions for children and the adoption of diversionary approaches, rather than being constricted to considerations of a legal construct. In Wales, significantly because there already exists a mesh of child-support and diversionary provision which would complement progressive MACR reform, the possibility of a unique model, and one that encapsulates the type of model envisaged in draft General Comment No. 24 (UNCRC, 2018), appears possible. Such would though require a new conceptualisation of what is meant by 'rights respecting appropriate interventions' (as opposed to earlier and sometimes negatively construed types of welfare support), 'diversion' and MACR itself, as well as a new understanding of how not merely national policy, but devolved or more locally determined policy interconnectedness could transform the way that 'the system' engages with children who come into conflict with the law.

The Remaining MACR Stalemate: An Unmoveable Westminster Parliament?

The MACR in England and Wales is 10 years, meaning that a child from that age can be arrested and sent to court if they commit a criminal offence. Since the beginning of the 1960s, the MACR in England and Wales has, at least nominally, remained unchanged (Bateman, 2014; Goldson, 2013). Yet, legislative activity, notably the regressive steps

taken during the enactment of the Crime and Disorder Act (1998), especially Section 34 (which, as will be explored below, abolished the rebuttable presumption that a child is doli incapax) in England and Wales has come under increasing attack (Arthur, 2012). Particularly at a global level, concerns and misgivings around the low MACR in England and Wales have been articulated by the United Nations Committee on the Rights of the Child (UNCRC, 2007, 2008, 2016), academics (Bateman, 2015; Cunneen et al., 2018; Goldson, 2009, 2013; McDiarmid, 2013) and non-governmental organisations (NGOs) and civil society groups (for consideration of views concerning youth justice in England, see CRAE, 2015). Indeed, MACR is no sterile debate, instead being very much on 'the agenda' in the Westminster Parliament, as evidenced by Lord Dholakia who has repeatedly introduced bills in the House of Lords aimed at raising the age threshold, including during the current Parliament. In spite of these concerted efforts, the UK government has refused to countenance reforming MACR. This has resulted in stalemate and to all extents and purposes political deadlock.

The UK Government's preference for maintaining the post-1998 approach to MACR flows from Ministers conviction that this is appropriate. For example, in 2012, Jeremy Wright, the then Minister with oversight of youth justice, in responding to a letter from the National Association for Youth Justice (cf. NAYJ, 2012) calling for reform of MACR (and signed by 55 experts) made it clear that there would be no change to the existing legislation (Bateman, 2015). The rationale of the Government was that no change was required, despite protestations to the contrary: Government was convinced that the MACR level was appropriate. Subsequently, in its 2014 periodic review submission to the Committee on the Rights of the Child, the UK Government rejected any re-examination of the MACR threshold in England and Wales, maintaining that children and young people

> . . . aged ten are able to differentiate between bad behaviour and serious wrongdoing. (UNCRC, 2015, Paragraph 248)

An almost identical retort was again reiterated a year later in 2016 (UNCRC, 2016, Paragraph 90) when the UK Government responded to a range of challenges (which the UK Government needed to address) outlined by the UNCRC in relation to its 2014 periodic submission (Newson, 2017). More recently, in January 2016 during the second reading of Lord Dholakia's Age of Criminal Responsibility Bill, the Conservative Minister of State, Lord Faulks made clear that

> In order to avoid any unnecessary suspense, I should say that the Government have no plans to raise the age of criminal responsibility from 10 to 12. (HL Hansard, 29 January 2016, Column 1574)

The responses by the UK Government are clear: the policy 'status quo', exemplified by the provisions of the 1998 Crime and Disorder Act, is considered to be the way that children should, in Ministers views, be treated by the criminal justice system. The thrust of governmental opinion indicates that it is accepted that those aged 10 and above, irrespective of what has been found in research and practice (Cipriani, 2016) are indeed capable of understanding the severity and wrongful nature of their actions. While arguably

dogmatic, government is at least consistent in this respect and, despite efforts by Parliamentarians and experts to argue to the contrary, there is no appetite by the UK Government to revisit MACR. The current MACR settlement in England and Wales accordingly stands and must be expected to do so for the near future.

The Rationale for Reconfiguring MACR in England and Wales

Offsetting and directly challenging the UK Government's reluctance to consider any reconfiguration of MACR in England and Wales has been a growing and compelling evidence base for raising the threshold above 10 years of age. This evidence base has been underpinned by a series of issues which, when synthesised, seemingly offer a coherent and comprehensive case for legislative, policy and justice-practice reform. Among these issues, the following are key:

The relationship between MACR and diversion

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Locally driven diversionary policy has become widespread, driven by Youth Offending Teams and the Youth Justice Board (Kelly and Armitage, 2015). Such is demonstrable with reference to the government's own data. For example, in England and Wales the most visible recent statistical trend to emerge in relation to children in conflict with the law has been the stark reduction in numbers of first-time entrants (FTEs). FTEs as a measure of system 'success' is, in the view of government important, being one of two Key Performance Indicators adopted by central government in Westminster. Diversion is something that the criminal justice system, in the context of FTEs deems critical and, has arguably been an operational focus, with statistics presented at Figure 1 demonstrating that between the years ending March 2008 to 2018, reductions in FTEs have totalled 86 per cent.

Although some tensions and complexities exists when the true extent of diversion's impact upon youth crime is considered, it can nevertheless be said that at the same time as there has been a purposeful growth of national- and local-level youth diversion schemes (cf. Haines et al., 2013; Home Office, 2012; Rix et al., 2011; Soppitt and Irving, 2014) in England and Wales, so also have FTE numbers fallen. The promotion of diversion schemes (something that Parliament has encouraged via the Legal Aid, Sentencing and Punishment of Offenders Act, 2012) has created, in the contexts of system contact and FTEs, positive impacts, that is, less children are becoming embroiled within the youth justice system (Haines and Charles, 2010). Although, as emphasised, the use of diversion clearly forms an important and effective tool for engaging with children, it is routinely employed once a child has committed an offence and made contact with the criminal justice system. In this sense, it is a positive tool which is utilised post-system contact (when harm may already have been caused to a child, Ministry of Justice, 2016). However, progressive reform of MACR, it is suggested, would mean that more could be done to enable children to avoid system contact and the negative implications it possesses (McAra and McVie, 2007). For example, raising the MACR would mean that a cohort of children (and also their families) could potentially benefit from a renewed emphasis on primary prevention initiatives and

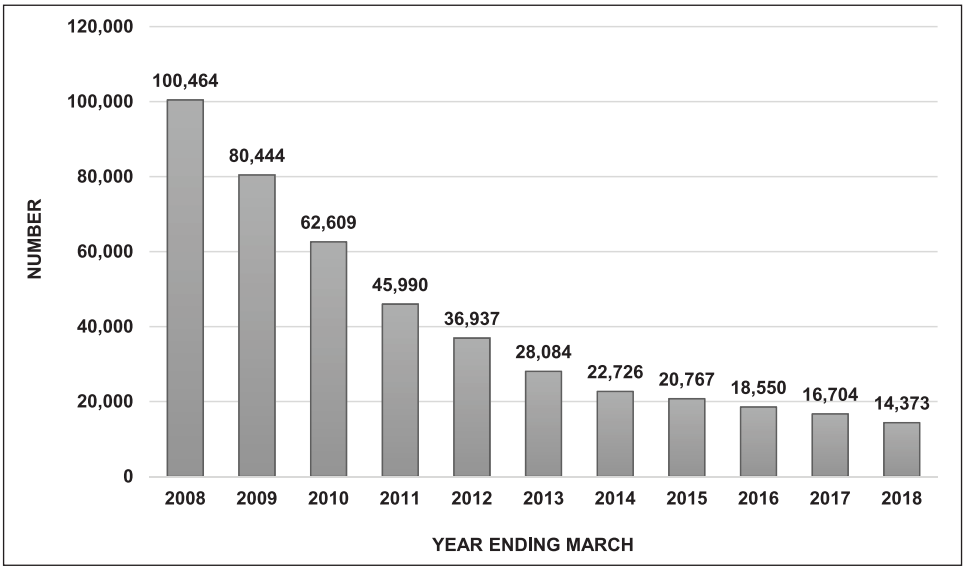

Figure 1. Number of first-time entrants in England and Wales for the year ending March 2008 to March 2018.
Source: Youth Justice Board / Ministry of Justice (2019).

non-stigmatising community-based supports, in the process, avoiding the potential criminogenic risks that accompany exposure to the post-offence diversionary arena. As Goldson (2013) suggests,

> The most effective diversionary strategy, of course, is literally to remove children from the reach of the youth justice system altogether, by significantly raising the minimum age of criminal responsibility. (p. 122)

At its most basic level, reform of MACR, specifically raising it, would mean that certain age groups of children could benefit from the subsequent vacuum created: a vacuum which could be filled with non-stigmatising forms of support and initiatives which would act to reduce the likelihood of a child penetrating deeper into the formal youth justice system (McAra and McVie, 2018). Fundamentally, this would help mitigate against children experiencing what Bateman (2012) has acknowledged to be adverse experiences, including labelling and stigma and potentially the impairment of future life chances (House of Commons Justice Committee, 2017). The detrimental impact of labelling (Becker, 1963) is well evidenced as a criminogenic factor and one which negatively works to impair a child's chances of successfully reintegrating back into society.

The focus here on system contact, labelling and negative consequences for children is not, however, simply a philosophical point. In 2019, the UK Supreme Court specifically recognised the reality in particular of the long-term life chance implications of system contact when it determined *R (on the application of P, G and W) (Respondents) v Secretary of State for the Home Department and another* (Appellants), 2019. While the case in question did not seek to determine the law regarding MACR, its immediate implications and

relationship are, reflecting upon the Court's judgement, clear. For the highest Court in the United Kingdom to see the reality of system contact and its corrosive effects upon children is heartening. Yet, despite this, Ministers have not adopted a position which mirrors that of the Court, despite evidence, both in the United Kingdom and more widely, that suggests such a shift in policy could create positive impacts.

Reforming the reform: Using progressive changes to MACR to undo New Labour's abolition of doli incapax

Congruent with New Labour's broader reforms of the youth justice system, Section 34 of the Crime and Disorder Act (1998) abolished the presumption of doli incapax for children in England and Wales. Prior to 1998, children aged 10 until turning 14 years of age by virtue of being doli incapax were viewed as incapable of criminal intent. Doli incapax granted children a partial safeguard, with those aged between 10 and 14 years being considered as incapable of forming criminal intent. In cases where those prosecuting wished to claim that children indeed understood what they were doing, they had to establish, before the Court that that a child understood that what they were doing was a serious wrong as opposed to a stunt or prank turned bad (Fitz-Gibbon, 2016). In this context, doli incapax possessed important implications for the protection of children and its removal 'made childhood irrelevant to criminalisation' (Bandalli, 1998: 121). New Labour's approach to doli incapax effectively lowered MACR for young children and arguably enabled a net-widening effect (see Fitz-Gibbon, 2016) which poignantly contradicts empirical evidence that contact with the formal youth justice system is counterproductive and may even promote future recidivism (McAra and McVie, 2007). For example, Bateman (2012) has highlighted the quantifiable detrimental impact of the decision to abolish doli incapax, stating that

> In 1999 the number of ten to fourteen-year-olds given cautions or convictions for indictable offences was 29% higher than it had been in the year prior to implementation. (p. 5)

There was a subtle irony to New Labour's position: Parliament wished to reform youth justice and create appropriate avenues for children coming into contact with the system, not least to avoid over-contact and future negative effects, but government policy created the reverse (Wells, 2007). The consequence of New Labour's approach was that, as of 1998, the limited protection afforded by doli incapax to children in conflict with the law was removed, effectively increasing the legal vulnerability of 10- to 14-year-olds in England and Wales. Essentially, the removal of doli incapax enabled a depression of the MACR threshold to encompass those as young as 10 (Bateman, 2012). This legal construct, far from promoting justice and holding to account those who have committed crime, has created net-widening, capturing often vulnerable individuals who may not understand what they have done (see Delmage, 2013; Elliott, 2011; Rocque, 2015) and subjecting them to the full force of the criminal law. When the principal purpose of the youth justice system, articulated by New Labour in Section 37 of the Crime and Disorder Act (1998), that is, to prevent crime, is considered, government policy seems more likely

to be fissiparous rather than unifying. While there are few calls for the restoration of doli incapax, MACR reform could help to rectify this particular legislative action and its negative consequences.

Reforming the MACR to respect maturation and developmental evidence

The importance of age (and capacity) in youth justice proceedings has increasingly been acknowledged by those who examine justice-related narratives (see, for example, McDiarmid, 2013; UK Parliament and Parliamentary Office of Science & Technology, 2018) and underline the significance of child-developmental processes in relation to offending behaviour. Commenting specifically on the relationship between physical and mental capacity and MACR, Wishart (2018) helpfully suggests that

> Neuroscience tells us adolescents lack capacity . . . It seems more plausible, if there were to be an increase, that the minimum age of criminal responsibility is raised higher than 12 years to reflect the stages of developmental maturity obtained. (p. 319)

Concurring with such sentiments, the practice of holding children from the age of 10 to account for their actions has been viewed by some as increasingly questionable. As Bateman (2012) has noted, that children's 'capacity' differs from adults is recognised in other areas of social life. For example, a young person can only begin driving aged 17 (or 16 if claiming mobility benefit); can only purchase alcohol aged 18; or apply for a mortgage for a house at 18. Yet, and in policy terms, paradoxically they can be exposed to the full force of the criminal justice system as young as 10 years old.

In critically reflecting on this point, it is necessary to highlight that a tension does exist in pursuing MACR reform based exclusively on arguments around children's age and evolving capacities. A more robust human rights argument can be made (see James and Prout, 1998, *Gillick v West Norfolk and Wisbech AHA*, 1986, Article 12, Convention on the Rights of the Child (CRC)) which focuses on the reality that children are the inviolable holders of rights. Such is not a fanciful concept, but has implications for MACR, notably, as suggested by Goldson (2013) that

> irrespective of the vexed question of capacity – there are strong grounds for raising the minimum age of criminal responsibility in England and Wales if the 'goals' of the youth justice system are taken to include: complying with the provisions of the international human rights standards that have been formally ratified by the UK government; modelling a system of justice that is broadly compatible with practice elsewhere in Europe . . . minimizing social harm and obtaining the best outcomes for children in conflict with the law . . . (p. 116)

Reflecting on Goldson's (2013) statement, it is significant that in relation to 'minimizing social harm' and 'obtaining the best outcomes for children in conflict with the law', 47 children aged between 10 to 14 years of age were situated in the youth secure estate as of March 2018 (Ministry of Justice, 2019). Should such a reality be presented in discussions concerning MACR? Arguably this is important, since evidence exists to highlight the serious and disturbing challenges facing those who may enter the youth secure estate,

Table 1. The ages of criminal responsibility in European Union member states.

Member state	Age (MACR)	Member state	Age (MACR)
Austria	14	Italy	14
Belgium	12	Latvia	14
Bulgaria	14	Lithuania	16
Croatia	14	Luxembourg	16
Rep of Cyprus	14	Malta	14
Czech Rep	15	Netherlands	12
Denmark	15	Poland	15
Estonia	14	Portugal	16
Finland	15	Romania	14
France	13	Slovakia	14
Germany	14	Slovenia	14
Greece	14	Spain	14
Hungary	14	Sweden	15
Ireland	12	United Kingdom	10 (England, Wales and Northern Ireland) 8 Scotland

Source: Scottish Parliament (2018).
MACR: minimum age of criminal responsibility.

such as incidents of self-harm and exposure to violence. Proven assaults in secure estate settings were, for instance, during the year ending March 2018, the highest recorded for the past 5 years (Youth Justice Board / Ministry of Justice, 2019, c.f. HMCIP, 2017). Longer term, system contact and continuing system immersion (potentially as a consequence of the consolidation of criminogenic behaviour, toxic mix and negative impacts on a child's character) also remain, particularly when those as young as 10 could possibly be embroiled in such a circumstance (Cunneen et al., 2018). How such can be made to align with human rights discourse is difficult to envisage (Farmer, 2011).

The isolation of England and Wales' position: Misalignment with other countries

As a result of continuing UK Government policy, it is clear that (see Table 1) MACR in England and Wales has been largely 'out of sync' with a majority of other European countries and is among the lowest in Europe (Bateman, 2012; Goldson, 2013; Hazel, 2008; Weijers, 2016).

Should the example of other jurisdictions matter? Well, in international terms, the isolation of the United Kingdom is significant, especially in the light of the UK claiming to be a country that promotes human rights and pivotal legal protections such as due process (Field, 2017). The UNCRC has, as a global entity, repeatedly reproved the UK government for its almost dogmatic position which is set against re-considering the case for raising its MACR threshold. For example, in 2008 in its 'Concluding Observations: United Kingdom of Great Britain and Northern Ireland' the UNCRC recommended in Paragraph 78 that

> . . . the State party . . . Raise the minimum age of criminal responsibility in accordance with the Committee's general comment No. 10, and notably its paragraphs 32 and 33. (UNCRC, 2008, Paragraph 78)

This message was subsequently reiterated 8 years later (UNCRC, 2016) and domestically dissatisfaction has been expressed by Children's Commissioners for both England and Wales (UK Children's Commissioners, 2008) and also by youth justice and child rights NGOs (SCYJ, 2017).

Significantly, the schism between the UK Government's position on the MACR in England and Wales and international practice (and policy direction) has been further compounded by the intention of the UNCRC to develop General Comment No. 24. Paragraph 33 of the proposed General Comment No. 24 (UNCRC, 2018) seeks to revise General Comment No. 10 and explicitly encourage State parties to raise their MACR to at least 14 years of age. If adopted, this would send a powerful global message.

It is noteworthy that efforts at the international level, via the UNCRC, have been evolving for some time (see UNCRC, 2007) and are not something which have recently become manifest. In the case of the United Kingdom, despite it being a signatory to the CRC, it stubbornly resists key aspects of guidance and advice which, for some time have existed globally. For example, in the 2007 version of General Comment No. 10, where the UNCRC advocated that a comprehensive approach to juvenile justice policy should be adopted by States (especially in relation to the implementation of Article 2, 3, 6, 12, 37 and 40), with this being augmented by supportive provisions to help children who are in conflict with the law. Particularly critical among these provisions are the statements Paragraphs 32 and 33 of the 2007 General Comment No. 10. Some 12 years ago, the UNCRC recommended that

> . . . a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. (UNCRC, 2007, Paragraph 32)

Furthermore, the Committee exhorted States,

> . . . not to lower their MACR to the age of 12. A higher MACR, for instance 14 or 16 years of age, contribute to a juvenile justice system which, in accordance with Article 40 (3) (b) of CRC, deals with children in conflict with the law, without resorting to judicial proceeding, providing that the child's human rights and legal safeguards are fully respected. (UNCRC, 2007, Paragraph 33)

Despite this clear guidance and the reality that it has influenced change in policy and legislation concerning MACR (for instance, Council of Europe, 2010), the UK government remains intransigent. Such unwillingness to change MACR has been maintained even in the face of a rebuke by the UNCRC in 2016 when in its concluding observations on the fifth periodic report of the United Kingdom's compliance with the Convention it said:

> With reference to its general comment no. 10 (2007) on children's rights in juvenile justice, the Committee recommends that State party to bring its juvenile justice system . . . fully into line with the Convention and other standards. In particular, the Committee recommends that the State party:

> (a)Raise the minimum age of criminal responsibility in accordance with acceptable international standards. (UNCRC, 2016, Paragraph 79)

The provisions of General Comment No. 10 (UNCRC, 2007) will, if approved, be amplified in the anticipated, revised General Comment, placing yet greater pressure on the United Kingdom to move its approach to youth justice in line with international standards. Such inevitably reveals and highlights the differences between much of Europe and other developed countries (Bateman, 2012) and the United Kingdom which maintains, especially in England and Wales, a distinct status quo which regrettably may be damaging children, sitting quite uncomfortably with international standards (Kilkelly, 2008; Smith, 2014).

Dissolving Dogma: Movement on MACR in Scotland – The Age of Criminal Responsibility (Scotland) Bill

While criticism of the United Kingdom, as a whole, is being voiced internationally, it is incorrect to type-cast all UK constituent nations as supporting a restrictive standpoint. In Scotland, where since 1998, fully devolved powers on justice have been exercised by Scottish Ministers, discussions have been on-going regarding how Scots Law can be reformed. Section 14 of the Children and Young Persons (Scotland) Act, 1932 set the Scottish MACR at 8 years old. Resultantly, Scotland has one of the lowest MACR's in Europe (see Table 1), if not globally (Sutherland, 2016). Yet, in a divergent manner to England and Wales, the Scottish Government and Scottish Parliament have focused upon and agreed to amend MACR in Scotland. Following criticism from the UNCRC (2007) concerning Scotland's low MACR, the Scottish Government in its 2012 'Do the Right Thing: children's rights progress report' stated that it would give fresh consideration to raising MACR. Accordingly, in 2015, the Scottish Government established an Advisory Group on the Minimum Age of Criminal Responsibility to investigate raising MACR to 12 years old. The Advisory Group consisted of professionals, including those working with children, child victims, as well as the Police, Crown Office and Procurator Fiscal Service. Principally, their mandate was to examine four areas, encompassing

> . . . the management of risk in relation to children's harmful behaviour; changes that may be required to the Children's Hearings System; Police powers and issues in relation to Disclosure certificates and the weeding and retention of non-conviction information. (Scottish Government, 2016a: 3)

In March 2016, the Advisory Group made clear that Scotland's relationship to children was changing and what would previously have been 'unthinkable' was no longer the case. In fact, the Advisory Group

> . . . concluded that the age of criminal responsibility in Scotland can and should be raised to 12 years old, and that any change should happen at the earliest opportunity. (Scottish Government, 2016a: 48)

These recommendations were quickly followed by a public consultation. Significantly, ninety-five per cent of respondents believed that the MACR threshold should be increased to 12 years or older. This momentum led in March 2018 to the introduction of the 'Age of Criminal Responsibility (Scotland) Bill' in the Scottish Parliament to grant legal effect to the raising of MACR to 12 years of age (Part 1, lines 10-13). In May 2019, MSPs unanimously voted to change MACR legislation from 8 years of age to 12 years of age. While the move to increase Scotland's MACR is encouraging, at 12 years of age it still will not meet the minimum requirements of the proposed UN draft General Comment No. 24 (see Paragraph 33).

As such, it might be contended that while positive, Scotland needs to do more (McVie, 2018). Nonetheless, it is the case that Scotland as a nation post-devolution has been able to push back against what is considered a more regressive position, authored by Westminster. Perhaps tellingly, Scotland's journey has been underpinned by a strong evidence base, which has helped catalyse change. At an international level, the recommendations of the UNCRC have of course been significant, but domestically longitudinal research undertaken by McAra and McVie (2007) has also been important, as have the views of professionals and children themselves (Scottish Government, 2016a, 2016b). These views all attest to the importance of recognising the fundamentally crucial importance of not criminalising children unnecessarily, of acknowledging key arguments such as those relating to capacity and age and the desirability of engaging with a more sophisticated approach to tackling criminogenic behaviour by children through social, welfare and diversion-focused services.

Scotland, in defying the orthodoxy of Westminster, offers hope to other UK constituent nations, and it is the case that even with limited devolved powers, much can arguably be done to articulate policy and service frameworks that encourage not merely MACR reform, but new ways of comprehending the manner in which children who come into conflict with the law should be treated. Accordingly, it is relevant then to consider the blurred yet exciting position of Wales and how its distinctively 'dragonised' (Haines, 2009) post-devolution commitment to promoting the rights, universal entitlements and best interests of its children (including those in conflict with the law) can overcome the deficiencies of current UK law and synergise discussion about MACR.

Welsh Devolution: Deploying Mechanisms for MACR Reform?

Although Scotland has fully devolved justice powers and has been able to enact legislation to amend MACR, it is not the case that only Scotland, within the United Kingdom, has made progress in adopting different approaches to protect children from the potentially negative effects of criminal justice system exposure. Wales has a unique devolution settlement and has the capacity to influence justice policy. Alas, while it is not possible here to consider the complex journey that the Welsh nation has travelled since 1998, it does need to be said that criminal justice as a strict field of legislative competence is currently a non-devolved matter and remains the legislative responsibility of Westminster. On the issue of legal jurisdiction and capacity, following Carwyn Jones' decision in 2017, a 'Commission on Justice in Wales' was convened to review the workings of the justice system within the country. The Commission, chaired by Lord Thomas of Cwmgiedd (a

former Lord Chief Justice for England and Wales), has been set a remit that includes examining criminal justice and policing; civil, commercial, family and administrative justice; access to justice; legal education and training; the legal professions and economy; and the legal jurisdiction. Specifically, the 'terms of reference' of the Commission of Justice in Wales' are to

> . . . review the operation of the justice system in Wales and set a long term vision for its future, with a view to:
>
> - promoting better outcomes in terms of access to justice, reducing crime and promoting rehabilitation;
> - ensuring that the jurisdictional arrangements and legal education address and reflect the role of justice in the governance and prosperity of Wales as well as distinct issues that arise in Wales;
> - promoting the strength and sustainability of the Welsh legal services sector and maximising its contribution to the prosperity of Wales.
>
> (Welsh Government, Terms of Reference, 2018)

It is anticipated that the 'Justice Commission in Wales' will publish its report findings and recommendations sometime during late 2019. Dependent on its findings and recommendations, it may be that youth justice (as well as other criminal justice and legal apparatus) are devolved to Wales. Although the devolution of youth justice in particular has previously been explored (Morgan, 2009), it is suggested that if this transpires it may herald a unique opportunity for progressive reform of the MACR in Wales, if this matter is considered in a traditional manner, that is, amendment of criminal law. In that context, the Welsh Assembly could, if there were further devolution of powers, raise MACR, cementing on-going positive work with children and becoming a 'beacon for positive youth justice reform' (Morgan, 2009: 90).

The potential for this '. . . positive youth justice reform' (Morgan, 2009) has accelerated over time. Following devolution to Wales in 1998, the Assembly began its life by adopting a distinctively rights-focused policy approach to children in Wales. Operating as a robust cornerstone for this child-centric vision has been the CRC, and particularly Article 12, which recognises children's inviolable rights to participate in decision making. The National Assembly for Wales' early endorsement of the provisions of the UNCRC are well documented and influence key areas of devolved authority such as local government and health and well-being (Welsh Government, 2015, 2004, Williams, 2013). Yet, what the Welsh devolved administration sought to do was not develop some type of legal rhetoric: rather, using its powers, the Assembly and Assembly Government began a process of embedding rights in services and effecting the progressive liberalisation of universal services for children. For example, in 2002, secondary legislation was enacted to develop 'Extending Entitlement' (National Assembly Policy Unit, 2002) which outlined 'ten universal entitlements' for children and young people aged between 11 and 25 years, which were intended as far as possible, to be free at point of use, universal and unconditional.

Since 2002, Extending Entitlement has been consolidated by the Children and Families (Wales) Measure (National Assembly for Wales, 2010) and the Rights of Children and Young Persons (Wales) Measure (National Assembly for Wales, 2011) which uniquely placed a child rights 'due regard' duty on Ministers, along with the creation of the United Kingdom's first Children's Commissioner.

Consistently, and using its social welfare, education, local government and community safety powers, the devolved administration in Wales has evidenced a commitment to the 'rights and entitlements' of children, especially as stated in the CRC (see Social Service and Well-Being (Wales) Act, 2014). This has spilled over into youth justice policy and practice (which, although not devolved, have proved fertile grounds for Welsh approaches). Despite legislative power in the field of youth justice not being devolved to Wales, the Assembly's financial and related-service powers have allowed it leverage. Specifically, a number of tailored policy strategies have been developed in partnership with the Youth Justice Board, including the All Wales Youth Offending Strategy (Welsh Assembly Government / Youth Justice Board, 2004) and Children and Young People First (Welsh Assembly Government / Youth Justice Board, 2014): both of which place a key 'dragonised' (Haines, 2009) emphasis on treating children as 'children first, offenders second' (Haines and Case, 2015) – something which, on the grounds of capacity and maturity at least, could be harnessed to support reform within youth justice. Certainly, given Wales' ethos on children, progressive reform of the MACR in Wales would not run in opposition to its policy and legislative vision to date, but rather would consolidate, reinforce and harmonise with Wales' distinctive, positive and progressive rights-based approach to children and young people that has evolved post-devolution.

Again though, and this matters, discussion in Wales concerning MACR has not simply focused on the potentially blunt tool of a legal threshold. When reflection on the direction of travel which is evident in Wales is undertaken, it is discernible that something more nuanced is happening, which has consequences for debate regarding MACR. Significantly, and flowing from an express use of devolved power, a distinctive and more sophisticated rights respecting appropriate interventions approach centred on notions of intervening where necessary and 'supporting', 'empowering' and 'entitling' children has become manifest (Welsh Assembly Government / Youth Justice Board, 2004; Welsh Government, 2014). For example, within the Children and Families (Wales) Measure (National Assembly for Wales, 2010) emphases on family support and anti-poverty are woven into a broader legislative fabric that envisages the generation of positive futures for children. In the Prevention of Offending by Young People White Paper issued by the Welsh Government in 2014, it was also said that

> A criminal record is the biggest obstacle between a young person and the life they want to lead. We have the opportunity to help remove this obstacle. (Welsh Government, 2014: 1)

Such resonates in the Well-Being of Future Generations (Wales) Act (2015), the due regard duty created via the Rights of Children and Young Persons (Wales) Measure (National Assembly for Wales, 2011) and the ambitious, whole-child approach being incorporated into the new Welsh Curriculum, which will become operational in 2022 (Welsh Government, 2019a).

Rights Respecting and Appropriate Interventions: Raising MACR, Yet Ensuring that those Children Who Need Assistance Are Not Abandoned by the State?

The term 'rights respecting and appropriate intervention' has been used in this article, and in the context of the potential for MACR reform in Wales, it is important. It is critical that, in the context of State intervention provision for children, what is being described concerning Wales' current efforts should be distinguished from 'welfare' (as previously understood by many). There will undoubtedly be some who recoil from the term 'welfare', associating it with negative connotations from the past (Thorpe et al., 1980). However, and arguably adopting the positive principles underpinning what was called welfare, and its intention to support children (which is difficult to refute), what is now happening in Wales is no mere treatment model, or an excuse for State intervention. Rather, flowing from CRC respecting and embedding legislation (for example, as stated above, the Rights of Children and Young Persons (Wales) Measure, National Assembly for Wales, 2011) and policy, allied with the child-focused social policy and service-related powers of the Welsh Government which inter-link and inform youth justice matters in Wales (Drakeford, 2010) appropriate interventions are becoming mainstreamed. The emergence of rights respecting appropriate interventions are not about dependency, nor a 'nanny state', but rather a recognition that children need (and, as the CRC would suggest, deserve) interventions to support them as they face personal, social and familial issues, especially in an age where public services are retreating. Appropriate interventions which recognise the rights of the child focus on the activities of a compassionate state which values quality preventive and support services, that sees social problems and acknowledges the need for intervention to attain the original goal of the Crime and Disorder Act (1998) to '. . . prevent offending by children and young persons' (Crime and Disorder Act, 1998, Section 37). Interventions in this context are not stifling nor suffocating. Instead, the rights respecting appropriate interventions are concerned with ensuring a continuum of support for children: but support which meets their needs rather than being arbitrarily enforced by the State. The aim in this sense is not to interfere with a child's rights, but to respect them, and to help a child move away from those things which are negatively affecting them, so that they can fully achieve their developmental, economic and civic potential (cf. Articles 6, 12, 28, 40, CRC, 1989).

Why is this relevant in the context of MACR? This is relevant because the logical conclusion of the direction of devolved Welsh policy is a multi-tiered prevention approach, that is embedded not in justice services, but in school-based practice, strong universal services offered by local government, a partnership approach to Youth Justice Board and Welsh Government strategy and an underpinning legislative framework that positively emphasises rights, well-being and future opportunities (cf. Ball, 2014; Byrne and Lundy, 2015; Tisdall, 2015). In fact, the youth justice blue print adopted by the National Assembly of Wales in 2019 exemplifies and sets within a single strategic framework all of these things (Welsh Government, 2019b). To an extent, it may be argued that over the last two decades this type of approach has served to mitigate an England and Wales MACR and obviate some of its deleterious impacts. But it should not be argued that this 'sticking

plaster' is an ultimate solution: it is treating a symptom within what can be described as a somewhat hostile youth justice environment. Looking forward, what is being suggested is that a rights respecting appropriate intervention ethos can be utilised to underpin progressive amendment of the MACR in Wales, which may be on the horizon. For example, if the MACR was raised to 14 years of age in Wales (in line with UN recommendations), it is the case that strong multi-agency, support-orientated patterns of working are already well established and notions of 'rights', 'opportunities' and 'entitlements' for children are already ingrained in everyday youth practice. There is no doubt that Welsh MACR reform would possess certain practical challenges (particularly resource wise), but ultimately, it is contended that the existing sphere of support provision could be extended and moulded to meet the demands of engaging with children not simply at preventive and diversionary stage, but also post serious offending behaviour. This type of approach is envisaged within draft General Comment No. 24 (see Paragraphs 19 and 23-27).

Significantly, within existing Welsh practice, innovative youth justice blueprints already exist, which embody and display many of the 'practice traits' (e.g. multi-agency working, a rights focus, an emphasis on support, and a desire to see children not unduly criminalised but rehabilitated back into society) that will need to be amplified in the event of MACR reform. Welsh Bureaux, for instance, while part of the reserved legislative regime in Wales, but influenced strongly by the devolved administration and local government (a devolved responsibility), have been at the forefront of this approach for a decade and have been commended for the way in which they offer an innovative, holistic (providing both diversion and support) and rights-focused form of post-offence, but pre-court youth diversion for children aged between 10 and 17 years old (see Brown, 2018; Haines and Case, 2015; Haines and Charles, 2010, for an overview of its workings). Within these Bureaux, rights-focused and appropriate interventions principles have underpinned successful practice which has identified and enabled the resolution of challenges facing children, which often have led to types of behaviour resulting in system challenge. It is though, through a positive lens, rather than an imposition of 'treatment' that support has been applied: as data suggest, this has led to positive results which arguably, criminalisation of children or the negative effects of locking them into sometimes inappropriate treatment models would not have achieved (see Haines et al., 2013; Lee and Villagrana, 2015). This demonstrable reality presents the potential for transformative change and policy opportunity.

Conclusion: Removing the Roadblock and Making the MACR Work for Children?

MACR in England and Wales is characterised by the lack of political impetus, despite practice and evidence at national and international levels to the contrary, to instigate progressive reform. A political impasse has occurred in spite of pressure from a variety of different quarters, including the UNCRC, NGOs, youth justice academics and politicians. Key arguments for progressive reform of the MACR are now globally being discussed, via the UNCRC's efforts to revise General Comment No. 10. Despite the intransigence of the Westminster Parliament, within the United Kingdom efforts to reform MACR are being undertaken, notably via the Age of Criminal Responsibility (Scotland) Bill),

although in the context of international debate, such reform appears to be modest. While MACR remains an important aspect of what is commonly referred to as the 'youth justice system', it may be contended that the MACR debate has moved on from being simply about a legal tool. Due in part to the renewal of emphasis on prevention and state services inspired by implementation of the Crime and Disorder Act (1998), within the United Kingdom at least, although this is referenced at UN level too, debate concerning the ways in which more holistic approaches to achieving less system contact and the promotion of rights respecting appropriate interventions are becoming more visible. It is in this contextual reality that the situation of Wales, as an area of the United Kingdom with a defined set of devolved powers, offers some hope and a solution to achieving a satisfactory approach to MACR (and the example of Wales could apply elsewhere). In Wales, through the creation of an appropriate, intervention net which is predicated on children's rights, state services and support and a positive vision of each child's future, the scene may be being set for a more holistic type of MACR reform. Were, for instance, MACR to be raised to 14, there would not be a vacuum of support: existing legislative and policy provision would ensure that children were not abandoned at a time when they might be vulnerable. Rather, this type of forward-looking and progressive youth support model could help children, addressing underlying health, social care or educational issues (through non-justice agencies such as schools and local authorities) and use the new space that MACR reform would generate to undo problems. Clearly, this type of approach has profound implications for the criminal justice system. While such an approach might be antithetical to Westminster politicians, it may be revelatory and transformative for children who might otherwise become entrapped by a MACR threshold which appears not to comprehend issues of capacity, maturity and the need for support services, not system contact. Surely, holistic reform of this type is worth considering and pursuing.

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