

## Minimum Age of Criminal Responsibility (MACR) – Comparative Analysis International Profile – Portugal

Yanna Papadodimitraki, CYCJ

This international profile presents information and evidence on the minimum age of criminal responsibility in Portugal. It specifically focuses on policies and practices about investigating offences committed by children/young people.

### Key Findings:

- MACR is 16
- Children's deprivation of liberty is a last resort
- Focus on the reintegration and rehabilitation of children
- Best interests of children should govern all processes and procedures
- Different procedures for different age groups
- Court has no legal obligation to consider the child's views to determine his/her best interests
- Lack of universal process and guidance in determining the child's best interests
- Lack of specialised training for those involved in youth justice

## Background

The age of criminal responsibility is 16; however, there are special disciplinary measures applicable to children 16 to 21 who have offended. The Criminal Justice System (CJS) has different ways of dealing with a child who has offended and is considered in danger. This is because children under 12 are considered incapable of breaching the law, therefore they require protection, not punishment. The State will, also, intervene if the child is considered in danger due to absence of required educational care. This intervention takes place through the system of promotion and protection (PP). Moreover, the CJS has special procedures for the judgment of an offence committed by a child who is 12. This would take place through the Educational Guardianship system (EG) and the CJS. PP procedures are applicable to children under 12; EG procedures to children between 12 and 16, and CJ procedures to those 16 and above. However, as specialised courts are not available throughout Portugal, children might be dealt in adult courts.

Regarding PP, children under 12 are considered to be victims, not offenders, when committing an offence qualified by the penal law as crime. The measures applied aim to remove any risks, promote the child's safety, health and personal development, and guarantee his/her psychological recovery. They are divided in two groups: measures in normal living environment (implemented at the child's residence) and placement measures.

With regard to EG, if the child is between 12 and 16 when the offence is committed, he/she is considered an offender. The court will decide on the measure which should serve the social integration of the child, be educational and promote a sense of duty.

Regarding CJ penalties, the criminal laws that apply to adults, apply to children who have reached 16. The penalties are imprisonment and a fine, however ordinary penalties can be replaced by substitutive ones and imprisonment can be suspended. Moreover, until 21 the child is entitled to a more favourable legal regime. Under this regime the following measures are offered: reduced imprisonment when considered fitting for the child's integration, EG instead of criminal penalties for any child under 18 who committed an offence punishable by imprisonment of two years maximum, correctional measures instead of criminal penalties for any child between 16 and 21 (admonition, imposition of certain obligations, a fine and detention).

Despite the legal framework with regard to the application of a special detention measure, there are no detention centres for children. It should also be noted that the measures are not mandatory, but rely on the court's perception of applicability with regard to the rehabilitation of the child. The number of children in contact with the Police in 2010 was 3,200 (1.4% of all contacts with the Police). The number of convictions for the same year was 7,647.

## Findings

There are no specific rules as to how the police should deal with children in CJ procedures. There are guidelines, but they are not legally binding. The guidelines stress the significance of a friendly environment and provide information on how

interviews and inquiries should be done, including details such as where the police officer should seat, presence of family members, and how to gain the child's trust.

The manual of the police provides information regarding how to interview children: good practice on conducting the interview (e.g. avoiding interruptions or repetition, use of supporting materials); interview techniques (explained and organised by age group); how to help children remember facts; criteria for not proceeding to interview (e.g. if the child suffers from the effects of the crime, the recommendation is that the child should not be interviewed until he/she is fully recovered). Emphasised in the manual is the protection of victims/witnesses from distress and their priority over the investigation, the avoidance of interviews if information can be acquired through other means, and the consideration of the child's testimony, provided that the child has enough memory and cognitive ability.

A child (and his/her parents/guardians/legal representatives) undergoing a PP procedure, ought to be informed of his/her rights and the procedural developments in a language appropriate to his/her age. During the measure, the child can access his/her files through his/her lawyer, however, the judge can authorise personal access after considering his/her level of maturity. With regard to EG, the children between 12 and 16 should be informed of their rights in general and of their right to remain silent regarding questions about their character in particular.

In CJ procedures, there are no specific provisions for children; therefore children have no rights/duties, since they only acquire legal status as participants in the criminal procedure after becoming defendants formally. Then, they must be informed of all their rights and obligations, the procedure and the public defender (if one is needed). During the procedure, they should be informed of their rights and the aspects of the procedure (including during the investigation stage), unless it is confidential. In that case, they gain access to all the documentation (even those produced during the confidential stage), when it becomes public again. Also, before testifying, they should be informed of the facts the charge is based on.

A child under 12 who offended, but is also considered in danger in terms of PP, should be reported to the Commission for the Protection of Children and Juveniles (CPCJ). Any person aware of such a situation should report it to the authorities.

Regarding EG, a child over the age of criminal responsibility can be arrested by any authority (or anyone else, if authorities are not available), if caught in the act. However, if arrested by a civilian, he/she should be handed to the authorities as soon as possible. However, the child can only be arrested if the crime is punishable by imprisonment and the arrest is valid only if the offence is punishable by imprisonment of more than three years, or the child has committed two or more offences, also punishable by imprisonment of more than three years. If these do not apply, the child can only be identified. The identification should respect the criminal proceedings and, in case the child does not have any documents, the police should inform the parents/guardians/legal representatives and not keep the child in the police station more than three hours. The Public Security Police have specific procedural guidelines in place for police officers involved in cases with children.

Regarding CJ procedures, there are no specific rules that apply to children. When a child is suspected of a crime, the police may identify him/her, but must have good

grounds and inform the child of the identification procedure. If he/she is not able to provide identification, the police may take him/her to the police station to establish it, but not for more than six hours, and should allow the child to contact someone. Also, the police can question the child to obtain offence-related information; however, if during the questioning there is a suspicion that the child has offended, they should stop right away. If there is a suspicion that a child is carrying any object related to a crime, the authorities can search the child with a search warrant.

Finally, if a crime punishable by imprisonment is committed, any authority may detain the child and conduct him/her to the court within 48 hours while treating him/her all the time as a defendant; also, the parents/guardians/legal representative should be informed as soon as possible. The parents/guardians/legal representatives can attend the first judicial hearing, but cannot interfere.

When the child is in court, a trial may take place right away to decide whether a cautionary measure should be applied. Detention is possible by means of a detention warrant or by police decision (without a warrant) if: the child has committed a crime for which pre-trial detention applies, there is risk of fleeing and it is not possible for a judicial authority to intervene due to the urgency and danger of the situation. When the police detain a child they should inform the judicial authority; if the detention does not abide by the above mentioned rules, the child should be released right away.

Regarding PP, a child under 12 who is considered in danger, can only be placed before the CPCJ or the court in cases of urgency (e.g. danger to the health, security, life). The police transfer the child to an appropriate location and report to the Public Prosecutor who should require an urgent PP procedure.

With regard to EG, before detention, the judge appoints legal counsel for the child (if the child has not chosen one). The time spent in an EG centre during the procedure is deducted from the final sentence.

Regarding criminal procedures, there are no specific rules for pre-trial detention/custody of children, besides that it is not to exceed 48 hours. The pre-trial detention should only be used if: a child already has become defendant, it complies with the principles of necessity and proportionality, there is a risk of fleeing, there is a danger of tampering with evidence or further offending. Pre-trial detention (and home detention) should only be applicable when all other measures are considered inadequate, and there is a suspicion the child has committed crimes punishable by more than five years of imprisonment, terrorism offences, violent or highly organised offences punishable by more than three years of imprisonment, and the child has entered/remained illegally in national territory.

Regarding PP, for children below 12 protection is the main concern and the least invasive measure will be implemented. The support of the family is the measure of preference; however, children will be placed in institutions, if the available legal measures are not sufficient.

With regard to EG, for children over 12 an EG measure can apply which should be the least intrusive, and non-placement measures should be favoured. Placement measures in an educational centre should be used as a last resort, only when other available measures are not sufficient.

There are no specific rules in relation to children defendants in criminal proceedings, so general rules apply: the investigation is conducted according to the adversarial system; the child has the right to attend any procedural act that concerns him/her, be heard by the court and intervene in the investigation to give evidence and request necessary actions to be taken.

In general, no child under 16 is obliged to take the oath. His/her testimony in criminal proceedings is assessed according to his/her age and maturity by the judge; hearings involving children are open to the public, unless the court decides otherwise. Children must be deprived of liberty only as a last resort and placement measures must only be applicable as the final solution.

Preservation of image and protection of private life are fundamental guidelines in Portuguese law. Regarding PP, bodies such as schools, hospitals and day-cares are called to preserve the privacy of the children and the CPCJ and CJS should only be a final resort. Interventions to protect children in danger must be kept as unobtrusive as possible and the procedure should be confidential. Members of the CPCJ, parents/guardians/legal representatives and other interested parties, can be informed of the process, if permitted. The files can be accessed for research purposes, however, the identity of those involved in the case should not be revealed.

With regard to EG, the procedure is private until a date for the judicial hearing is set. After that, all disclosures should be made with respect to the child's privacy and his/her identity should be kept private, if possible. Any files should be destroyed when the child reaches 21.

Regarding CJ procedures disclosure, if the judicial authority decides during the investigation stage that the procedure is considered confidential, everyone involved should respect confidentiality; disclosure of information is considered a crime. Even if the procedure is public, any information that is not evidence should not be disclosed. The judicial authority can decide what data are confidential, however there is no state regulation of the media with regard to the privacy of children suspected of crime (the media impose self-regulatory measures).

There is no criminal record for children up to 12. However, EG measures are recorded in an EG measures registry which contains information on the identity of the child, revocation, revision and termination of the measures. The registry is aimed to provide information on the measures applied to children. The child does have access to the registry and can request amendments of the information recorded. The child's parents/guardians/legal representatives, judges and prosecutors involved in the case as well as social services and organisations authorised by the Minister of Justice (for research purposes) have access to the records. The information stored are deleted two years from the date of the termination of the EG measure and always when the child reaches 21. Children over 16 who have been sentenced to a criminal penalty, fall in the general rules of criminal records.

## Evidence

The above presented information was based on data collected and collated through policy, evaluation and academic documents on criminal justice, human rights and rights of the child in Portugal. Further contacts were made (Ministry of Justice, Police) to collect pertinent information, however, no information has been made available to date.

As a final note, given the limited time to collect the data, the limited sources available as well as the length of the expected output, we should be aware of the restricted outcome of the fieldwork and the data collected. Triangulation of the collected data took place where possible; where not possible, the most recent publication was taken into consideration.

## Bibliography

Castro, J. (2011) The punitive turn – are there any points of resistance? An answer from the Portuguese experience in Bailleau, F. (eds) *The Criminalisation of Youth: Juvenile Justice in Europe, Turkey and Canada*, Chicago: Independent Publishers Group

Council of Europe (2010) *Answers to the questionnaires on principles of public prosecution as regards juvenile justice – Portugal* [online]. Strasbourg: Council of Europe. Available from:  
[http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP\\_5\\_Question\\_Portugal.pdf](http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP_5_Question_Portugal.pdf) [Accessed 30/11/2015]

European Commission (2015) *Children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU*. Brussels: European Commission

European Commission (2014) *Study on children's involvement in judicial proceedings: Contextual overview for the criminal justice phase – Portugal*. Brussels: European Commission

European Commission (2014) *Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union*. Brussels: European Commission

Office of the United Nations High Commissioner for Human Rights (2014) *Concluding Observations on the third and fourth periodic reports of Portugal*. Geneva: Office of the High Commissioner for Human Rights

Office of the United Nations High Commissioner for Human Rights (2012) *Consideration of reports submitted by States parties under article 44 of the Convention: Third and Fourth periodic reports of States parties due in 2007 – Portugal*. Geneva: Office of the High Commissioner for Human Rights