



CHILDREN BELOW THE AGE OF CRIMINAL RESPONSIBILITY IN
BERMUDA: MEASURES, RIGHTS, PROCEDURE, PARTICIPATION
National Report for AIMJF's Comparative and Collaborative Research.

Niños por debajo de la edad de responsabilidad penal en Bermudas: medidas, derechos,
procedimiento, participación
Informe nacional para la investigación comparativa y colaborativa de la AIMJF

Enfants n'ayant pas atteint l'âge de la responsabilité pénale aux Bermudes: mesures,
droits, procédure, participation
Rapport national pour la recherche comparative et collaborative de l'AIMJF

Bermudan Judiciary

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on children below the age of criminal responsibility. The article explains the applicable measures and the procedure adopted, the child's rights and his or her participation in the Protective and Justice System in Bermuda.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre niños por debajo de la edad de responsabilidad penal. El artículo explica las medidas aplicables, el procedimiento adoptado, los derechos del niño y su participación en el sistema de protección y de justicia en Bermuda

Résumé: Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur les enfants n'ayant pas atteint l'âge de la responsabilité pénale. L'article explique les mesures passibles d'application et la procédure adoptée, les droits des enfants et leur participation dans le système de protection et de justice aux Bermudes

Introduction

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The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of measures, procedure, rights and participation of children below the minimum age of criminal responsibility.

This national report is based on a questionnaire prepared by AIMJF.

QUESTIONNAIRE:

1. General information

- 1.1. What is the minimum age of criminal responsibility in your country (the **age of criminal responsibility** is the age below which a child is deemed incapable of having committed a criminal offence, it can also be referred as age of accountability, **age of responsibility**, and **age of liability for children and it is different of the age when a person becomes an adult**)?

Under the age of 8 years for any act or omission.

- 1.2. Is there more than one minimum age of criminal responsibility? Which one? Is it possible to apply the ‘doli incapax rule’ in your country (possibility of

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demonstration that the child is sufficiently mature and capable to understand that the behavior was an offense and therefore could be criminally responsible)?

Under the age of 14 years for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or omission. So, there is a rebuttable presumption that a child under 14 years is not criminally responsible for his acts or omissions.

It is conclusively presumed that a male child under the age of 14 years cannot have carnal knowledge (i.e. penetrative sexual activity).

2. Age assessment

- 2.1. In case of application of the ‘doli incapax rule’, how is this assessment made? Is there a specific methodology for this evaluation? A protocol on how to evaluate? Who assesses the child? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

The Prosecution may rebut the presumption by calling admissible evidence to show that the defendant had the capacity to know that his act or omission was seriously right or wrong.

Such may include: previous convictions; answers given by the child to police questions in previous matters when admissible; answers given by the child in the instant matter; evidence of the child’s good upbringing by his respectable family and his good behaviour; good character evidence; his education level and performance; the manner of his speech; his demeanour; evidence of his conduct connected to the circumstances of the offence, including for example false alibi, the sophistication of his commission of the crime or his concealment of it. This is not an exhaustive list.

Proof of mental normality may generally rebut the presumption.

The Court may order that a psychological, psychiatric, and/or behavioral assessment to be carried out by our Child and Adolescent Services (“CAS”) department.

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In every Juvenile case a Duty Counsel (funded by the Government through the Legal Aid system) is present to provide legal representation and the child can challenge the assessment.

- 2.2. In case of necessity of age assessment (due to a lack of birth registration), how is this assessment made? Is there a procedure? Is the child heard in this procedure? Does the child have legal assistance in this situation? Is it possible for the child to challenge the conclusions of this assessment?

The Court can make inquiries and/or request documentary evidence from the relevant authorities as to the birth of the child, and if deemed necessary to issue a subpoena and/or witness summons for the production of such information.

3. Police intervention

- 3.1. In case a child under the minimum age of criminal responsibility commits an act considered as a crime, is he/she brought to a police station? Is it mandatory to do so? If not, in which situations is it necessary to be brought to the police station?

In most, if not all instances, the police will seek the assistance of the Department of Child and Family Services (“DCFS”) which will provide the venue and the facilities for the child to be asked questions by the police.

- 3.2. In case the child is brought to the police station, what is expected from the police to do? What are the legal guarantees for the child in this context? Is it possible, in any circumstance, that the child be imprisoned, even for a very short time? In this case, how long is it possible for the child to be deprived of liberty?

Where it is known that the child is under the minimum age of criminal responsibility they would not be taken into the police station in any event and there are no circumstances under which the child would be imprisoned. If the child’s safety is in jeopardy they would be placed with the DCFS which would secure suitable and safe accommodation.

4. Measures

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- 4.1. In case a child below the minimum age of criminal responsibility has committed an act considered as a crime, is it possible to impose any kind of measure? Which one?

There are mechanisms within the Family Court context whereby the Court has the power to order a Care Order (remove the child from the family home and place the child in the custody of the Director of DCFS, such as in foster home or kinship care) or order a Supervision Order (whereby the child remains in the family home but the care of the child is supervised by DCFS).

With either order, a Plan of Care is formulated and implemented on an interim or long-term basis.

- 4.2. Is it possible to impose an out-of-home placement (such as alternative care, in institution or foster family; in health facilities, for instance)? in which circumstances? For how long?

Out-of-home placement is possible where the child is beyond parental supervision or the parents/guardians are unfit to care for the child. This can be for an indefinite period of time but the overriding objective is to reunify the child with their parents or guardians as soon as they are equipped to receive the child.

5. Procedure

- 5.1. Who imposes such measures?

The Family Court with the assistance of DCFS.

- 5.2. Is there a legal procedure for the determination of these measures? What is the nature of these procedures? Can you describe it shortly?

Yes. The DCFS will prepare a report for determination by the Family Court. This report will set out the needs of the child and the risk factors involved with the child, and, it will make recommendations as to whether the child should be placed on a Care Order or a Supervision Order or no order at all. If an order is made it will include a therapeutic Plan of Care for implementation.

- 5.3. Is it possible to adopt alternative resolution mechanisms in these situations, such as mediation or restorative justice?

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It is possible but the parties are often reluctant to participate.

6. Assessment

- 6.1. Is there any kind of assessment of the child for the imposition of such measures (on vulnerabilities, risk, rights violations)? Who assesses the child? Is there a protocol or guideline on how to assess the child? Can you please share it?

See 5.2 above.

The DCFS carries out a comprehensive inquiry into the child. This will include speaking with parents, relatives, teachers, etc., and if deemed necessary refer the child for any psychological/psychiatric assessments. While DCFS can provide an abbreviated report within approximately 48 hrs (particularly with urgent matters) a more comprehensive report can take up to 6 weeks to complete.

7. Legal and procedural guarantees

- 7.1. What are the rights of the child in this procedure (legal and procedural guarantees)?

The rights and interests of the child are of paramount importance. The Court will not hear a matter unless or until the child has legal representation and/or with a parent present.

The Court is also legislatively compelled to consider whether the child should be appointed a Litigation Guardian and/or a Litigation Counsel.

- 7.2. Does the child have the right to refuse any of these measures? Or to challenge in court any of these measures?

The child does not have the right to refuse any measures but they do have the ability to challenge the measures by way of representations made to the Family Court or by way of appeal to the Supreme Court of Bermuda.

- 7.3. What happens if the child does not fulfill the obligations inherent to these measures?

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If the parent is the reason for the child not fulfilling the obligations then this can be considered to be a contempt of a court order for which there are penalties.

If the child refuses to comply with the obligations then the Court will continue to assess and/or implement the proper treatment modalities and interventions.

8. The role of the justice system

- 8.1. Is it possible in your country that the justice system gets involved in these situations? In which situation (vg. to impose the measure or to review it, in case of resistance by the child or his/her family, or to impose some child protection order)? For what purpose? Which branch of the justice system is involved (youth court, family court, child protection court, criminal court...)?

The Family Court is the ultimate arbiter of what is in the best interest of the child and will make orders accordingly. Having said this, not all matters are referred to the Court and they are often resolved without Court intervention.

- 8.2. In case of involvement of the justice system, can you briefly describe the procedure?

A report is made by the DCFS which initiates the Court proceedings. Parents are summoned to Court (although on most occasions they appear voluntarily). At the first hearing, particularly if urgent, the Court may make an interim order. Directions are given, parties are encouraged to obtain legal advice, and a hearing date is set.

- 8.3. What are the rights of the child in this procedure? Does the child have the right to legal assistance? The right to appeal against any kind of decision?

The rights of the child are sacrosanct and the child, or the Court on its own volition, may order that the child have a Litigation Counsel and/or a Litigation Guardian.

9. Assistance or support

- 9.1. Besides the measures imposed to children, are there other kind of assistance available on a voluntary basis (social, psychological, medical)?

Yes, through our DCFS and CAS which provide services free of charge.

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10. Child participation

10.1. Is the child heard in this procedure? By whom? At which stage of the procedure?

Yes, at anytime if the Court deems it necessary. However, the Court more likely than not will turn to the Litigation Guardian to voice the concerns or questions of the child.

10.2. Is the child heard more than once in this procedure? How many times?

Hearing the child on more than one occasion is discouraged as the Court can be a traumatic or intimidating place for a child.

10.3. Is there a protocol or guideline on how to hear the child in this situation? Can you please share it?

Yes, through the Litigation Guardian. The Court also has the power to excuse others from the Courtroom and only hear from the child, however it is preferable that a Litigation Guardian or Litigation Counsel is present at all times.

11. Legal implications

11.1. Is there any record of legal infringement committed by children below the age of criminal responsibility? When the child reaches the age of criminal responsibility, are these records taken into consideration?

No records of legal infringement (or criminality) are kept outside of the Family Court files which are not open to inspection by members of the public, and no such information is taken into consideration in any future criminal proceedings instituted against the child (or when the child is an adult).

11.2. In case of damages, what kind of rights and remedies does the victim have regarding the child and the family? Besides financial reparation, does the victim have the possibility to have a say on the measures applied to the child?

The victim has no rights or remedies against the child. However, any act of wilful misconduct by a child which results in the loss, damage or destruction

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of the property of another shall be imputed to the parent of the child and the parent shall be liable for the loss suffered by the owner of the property.

12. Reforms in progress

12.1. Are there ongoing reforms on this subject?

None at this time.

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