



## Standing Committee for Youth Justice

### **SCYJ Response: UN Committee on the Rights of the Child Draft revised General Comment No. 10 (2007) on children's rights in juvenile justice - Call for comments**

#### **Summary**

The Standing Committee for Youth Justice (SCYJ) is an alliance of over 50 not-for-profit organisations campaigning for improvements to the youth justice system in England and Wales. Our [members](#) range from large national charities to grassroots service providers.

We are grateful for the opportunity to feed in our views, and consider that some of the revisions mark a considerable advance on the previous comment, particularly the increase in the stated internationally acceptable minimum age of criminal responsibility, and the introduction of a recommended minimum age for deprivation of liberty.

#### **Overview**

We welcome the general simplification of the document and clarifications throughout, and as with the previous version of the comment we commend the child friendly, child-rights focussed approach taken to dealing with children in conflict with the law.

We warmly welcome the minimum standards the document sets for State parties to abide by, and the higher standards it recommends States should pursue. We continue to cite the UN Convention on the Rights of the Child (UNCRC) and accompanying general comment in our policy and lobbying work to hold our government to account, and hope that the revised document will give us more leverage to win much needed reforms to child justice in England and Wales.

We welcome the change in the objectives of the general comment, given in section II, and the explanation in paragraph 3, which together acknowledge the important progress that has been made by States parties since the previous version of the comment, while recognising that more progress should be made in regards to minimum age of criminal responsibility, prevention, diversion, guarantees for a fair trial, and deprivation of liberty.

To ensure the document is more effective in protecting all children, as well as our recommendations below we would like to see mention of more specific articles in paragraph 5, point 1 (articles 16, 19, 20, 24, 27, 28, 31, 33, 36), and of children in care of the state and care leavers as children vulnerable to discrimination (paragraph 8).

#### **Child-friendly version**

Alongside the updated general comment, we recommend that the UN Committee on the Rights of the Child lead by example and publish a child-specific version of the document, such that children in contact with the youth justice system may be able to fully understand their rights and the provisions the UN Committee considers they be entitled to. The document should be developed with the involvement of children, and with consideration to the speech language and communication difficulties many children in contact with the criminal justice system have. Examples of child-specific documents include Unicef's "UNCRC in child-friendly language"<sup>1</sup>, and the Children's Rights Alliance for England's child friendly version of the UN's Concluding Observations on the UK.<sup>2</sup>

#### **Terminology**

Part III of the document states that the revised general comment no longer refers to children as 'juveniles', and acknowledges and encourages the trend towards using more child-friendly terms such as 'youth justice' and 'child justice', which promote the dignity and worth of children in conflict with the law.

We welcome this change in language and wider recognition, but note that the document continues to refer to children as 'child offenders', and to their behaviour as 'juvenile delinquency' throughout. Other terms used with problematic connotations include 'vagrancy', 'recidivists' and 'correctional facilities'. We recommend that the language in the general comment is amended to use child friendly terms such as 'children in conflict with the

<sup>1</sup> <https://www.unicef.org/rightsite/files/uncrcchildfriendlylanguage.pdf>

<sup>2</sup> [http://www.crae.org.uk/media/121613/child-friendly-obs\\_a5-younger\\_screen.pdf](http://www.crae.org.uk/media/121613/child-friendly-obs_a5-younger_screen.pdf)



law', 'child justice', and 'offending behaviour' throughout. This avoids labelling and stigmatising children as far as possible, and is supported by desistance theory.

### **Prevention**

In general we welcome the slight change of tone in Section A towards wider primary prevention rather than prevention or intervention aimed specifically at 'at-risk' children and families. We welcome this shift away from a 'risk-focused' prevention strategy, towards a 'public health' approach. In line with this, we recommend mention of the importance of minimising contact with the criminal justice system; the removal of "an increased or" before "serious risk" in paragraph 18; the inclusion of "non-coercive", "voluntary" or "non-punitive" in front of "support for families" in paragraph 19; and the substitution of "drop out of school" with "are excluded from school" in paragraph 19.

In paragraph 18, where the importance of prevention of economic or sexual exploitation is mentioned, we recommend the insertion of "and all other forms of exploitation (art. 36)" (see our comment below on children involved in crime as victims of exploitation).

While paragraph 19 does mention peer groups and schools, we feel that the role of schools and importance of access to informal activities, such as youth clubs, sports, arts and hobbies, could be emphasised. A holistic approach should be taken in prevention.

### **Diversions**

We welcome the increased emphasis in the revised general comment, in sections B, E, and throughout, that diversion is the appropriate and preferable response over criminal justice measures in the majority of cases involving children. We welcome, for example, the removal of mention of minor offences and first time entrants in paragraphs 23 – 27 so that it is implied that diversion is appropriate for a much wider set of children than in the previous general comment. We support the attention brought to the fact that opportunities for diversion should be continuously explored throughout a child's involvement with the law, not just at the first instance (paragraph 82). All interventions should keep justice system contact to a minimum.

While we recognise the attempt to remove duplication and simplify the general comment throughout, we are slightly concerned that the removal of paragraph 23 in general comment No. 10 removes an important emphasis on article 37 (b) of the UNCRC (the arrest, detention or imprisonment of a child may be used only as a measure of last resort), and we recommend that mention of article 37 (b) is included in section B, paragraph 22 or 23.

We are also concerned that in paragraph 27, bullet point 3, there is no longer specific mention to the importance of regulation and review "in particular to protect the child from discrimination". Given the increases in racial disparity in criminal justice we have seen in England and Wales,<sup>3</sup> (49.8% of children in custody are now Black Asian and Minority Ethnic<sup>4</sup>) consistent with other jurisdictions, and the fact that unconscious or conscious biases, or structural factors, may impact a child's likelihood to be diverted, we believe the specific mention of discrimination should remain, and should be referenced throughout.

### **Dispositions and deprivation of liberty**

We welcome that paragraph 28 emphasises that community sentences should be used over deprivation of liberty except when it is a last resort. However, we feel the case could be made stronger, for example with an additional sentence outlining the need for State parties to ensure the judiciary considers the best interests of the child, as well as their young age and other mitigating factors when sentencing, with a strong preference for community sentences.

We are encouraged by the increased emphasis in paragraphs 84 and 86 regarding the harm deprivation of liberty causes and that it should be avoided altogether, and the specification that where it occurs, sentences should have maximum terms and be considerably shorter than those for adults. The Committee should specify more information on the types of facility that are least and most appropriate to hold a child, such as that they should be non-penal, small, care-based, following a child welfare approach.

There are a number of edits in section F that we applaud, in particular paragraph 101, which introduces a recommended minimum age under which no child should be deprived of their liberty. We warmly welcome the recommended age of 16-years-old, and expect that this specification will assist us in lobbying to decrease the number of children currently in custody in England and Wales.

As well as this, paragraph 99 provides further clarity around options for minimising the use of pre-trial detention and the time a child is deprived of their liberty in general; and paragraph 102 decreases the recommended time

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<sup>3</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf)

<sup>4</sup><https://www.gov.uk/government/statistics/youth-custody-data>

of reviewing a child's pre-trial detention from fortnightly to weekly. We hope these edits will encourage States parties to better control and monitor the use of pre-trial detention.

While we welcome the addition in paragraph 17 of after care and reintegration services as core elements of a comprehensive child justice policy, we do not feel that enough attention has been paid to these aspects throughout the general comment. For example, we believe that section F should make specific mention of the importance of good quality resettlement services for children in detention and when they leave, in order to fulfil article 40 (1), promoting the child's reintegration and the child's assuming a constructive role in society.

Given the frequent use of life sentences for children in England and Wales, we would encourage stronger recommendations in paragraph 92, such that it is clear the Committee is against all life sentences for children, rather than just those without parole.

We are aware of many children deprived of their liberty in England and Wales who are kept segregated, left in their cells for the majority of the day. However, the government does not accept the conditions amount to solitary confinement. As such, we would welcome an expansion on isolation and bullet point 1, paragraph 108. We are also aware of many children who are subject to pain-inducing restraint, and the negative psychological and emotional impact of restraint and use of force.<sup>5</sup> We recommend clarifications in bullet point 6 that where restraint is used as a last resort, the techniques used should not be pain-inducing, should never be used for the purposes of maintaining "good order and discipline", should not cause humiliation or degradation, and should be used only for the shortest possible period of time, to prevent harm to the child or others. We would also welcome more information in paragraph 108 on punishment or discipline regimes, for example specifying that preventing showers, exercise or contact with family be prohibited.

### **Age of criminal responsibility**

We are hugely supportive of the statement in paragraph 33 that the absolute minimum age of criminal responsibility (MACR) considered internationally acceptable is now 14 rather than 12, alongside the encouragement to States parties to adopt higher minimum ages of 15 or 16.

We have long been campaigning for an increase in the MACR in England and Wales from the low age of 10, with little success. As such we would encourage the inclusion of stronger language in this section to place more pressure on States parties to increase their MACR in line with, or preferably above, UNCRC recommendations. For example, "commendably high" in reference to a MACR of 14 should be removed; the wording from the previous comment that 12 was the "absolute minimum age that is internationally acceptable" should be maintained for 14; and the sentence in paragraph 33 should read that States parties should be "strongly encouraged" rather than "encouraged" to increase their minimum age to at least 14. We would recommend the addition of a sentence stressing the unacceptable nature of any State having a MACR lower than 14.

As well as this, we encourage the addition after "emotional, mental and intellectual maturity", paragraph 33, of "and the potential harmful effects that being brought into formal criminal justice processes has on children's wellbeing and development". This demonstrates that a MACR should not only depend on maturity or capacity but rather on what is in the best interests of the child.<sup>6</sup>

There is also an issue with the language used in paragraph 31 that "even young children do commit offences". Children below the MACR cannot commit offences – conceptually, it should not just be that they cannot be formally processed, but that their behaviour is not criminal. Likewise, the comment still reads in some places elsewhere that adult-type criminal justice responses may be appropriate for children, or that children and adults should be treated equally (see for example paragraph 10 on Status offences). This language should be reviewed.

### **Two minimum ages of criminal responsibility**

We understand the intention of the committee of preventing confusion by recommending that States parties do not have a second minimum age of criminal responsibility (MACR) that has regard for maturity. However, given the extremely low MACR in England and Wales, we recommend the addition of the following sentence or similar to paragraph 43: "However, this should not preclude the inclusion of a defense to a criminal offence that the child lacked sufficient maturity or capacity to understand the nature of the offence".

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<sup>5</sup> D. Strout 'Perspectives on the experience of being physically restrained: An integrative review of the qualitative literature' (2010) 19 *International Journal of Mental Health Nursing* 416;

P. Smallridge and A. Williamson *Independent review of restraint in juvenile secure settings* (London: Ministry of Justice and Department for Children, Schools and Families, 2008), 4-5;

R. Arthur, *The Criminal Justice and Courts Act 2015 – Secure Colleges and the Legitimation of State Sponsored Violence* *Modern Law Review* (2016) 79, 1, pp. 102-121

<sup>6</sup> K Hollingsworth (2013), 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' 76 *Modern Law Review* 1046.

## **Guarantees of a fair trial**

While we recognise the committee's intention to remove unnecessary duplication, we question whether the removal of a sentence in paragraph 51 that reiterates article 40 (1) removes an important emphasis on the need for children to be treated by professionals in a manner that promotes their sense of dignity and worth, respect for human rights, and reintegration.

We welcome the addition in paragraph 55 that no adverse inference should be drawn if a child elects not to testify, and recommend that it is made clear that this and the rest of a child's rights should be made clear to the child. We are aware that many children are often unsure or unaware of their rights in police custody, interviews, and throughout their involvement with the justice system.

We support the clarification in paragraph 57 that for effective participation to be fulfilled, proceedings must be conducted in a language the child fully understands, and if not themselves, with the assistance of a free interpreter. However, even where English is a child's first language, they often do not understand legal proceedings and the language used<sup>7</sup>, and may often not receive sufficient explanations to be able to give instructions to their lawyer or make vital decisions.<sup>8</sup> The committee should specify that a child's entitlement is to mediation services, a communication specialist, and appropriate adult, not just an interpreter. It should be reiterated throughout section D that active steps should be taken to test and ensure a child's ability to understand and participate in the proceedings, and the child's views and wishes must be heard and given due weight (article 12).

We welcome the expansion of paragraphs 61 – 62 around children's right to legal representation, as we are aware of children in England and Wales appearing unrepresented in court, especially following cuts to Legal Aid. It should be specified that a child's legal representation must have child's rights knowledge.

## **Anonymity**

We are aware of many barriers to rehabilitation in England and Wales that arise from a child's anonymity not being maintained during or after their involvement with the law, as a suspect or defendant.<sup>9</sup> As such, we make the following recommendations:

Readers of the general comment should be reminded that children are entitled to anonymity by virtue of them being children (article 16), whether or not they are in contact with the law, and whether or not they are guilty of an alleged offence.

Specific mention could be added to paragraph 17 of protection of children's privacy as a core element of a comprehensive child justice policy; and to paragraph 29 of the importance of maintaining a child's anonymity (article 16).

The pre-charge naming of children is an issue in England and Wales but it is not currently explicitly mentioned in the general comment, and should be. For example emphasis could be added to the sentence in paragraph 53 on ensuring children are treated in accordance with the presumption of innocence, by specifying that children are not named pre-charge.

More detail on the importance of anonymity in general could be provided within the section on respect for privacy (paragraphs 78 – 81).

While we welcome the committee clarifying that a child's anonymity should be maintained after they turn 18 (paragraph 78), we would recommend that in order to remove any doubt over the on-going nature of the protection, the sentence be amended such that it is clear anonymity should be lifelong. We are aware of many instances in England and Wales where anonymity is breached when a child turns 18.

We welcome the additional recognition that States parties must take steps to prevent the naming of children on social media, along with the revision that it is not just "journalists" but "all persons" who are capable of violating the right to privacy and therefore be subject to sanction. This reflects the changing nature of child identification issues, and applies particularly to the issue of pre-charge naming.

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<sup>7</sup> J Jacobson and J Talbot *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children* (PRT, 2009); H Neal, A Hagell and L Brazier *Young Offenders' Perceptions of their Experiences in the Criminal Justice System* (Policet Research Bureau, 2002); M Botley, B Jinks and C Metson *Young people's views and experiences of the Youth Justice System* (CWDC, 2010); Stalford and Hollingsworth (2019, forthcoming)

""This is a case about you and your future" Towards Judgments for Children'

<sup>8</sup> R. Arthur *Giving effect to young people's right to participate effectively in criminal proceedings* Child and Family Law Quarterly (2016) 28, 3, 223-238.

<sup>9</sup> [http://scyj.org.uk/wp-content/uploads/2014/05/Whats-in-a-Name-FINAL-WEB\\_VERSION\\_V3.pdf](http://scyj.org.uk/wp-content/uploads/2014/05/Whats-in-a-Name-FINAL-WEB_VERSION_V3.pdf)

## **Criminal records**

The childhood criminal record system in England and Wales remains overly punitive and disproportionate, acting as a barrier to rehabilitation and reintegration. Records are not erased upon turning 18, and even minor convictions, cautions or police intelligence can be disclosed for life on certain criminal record checks. While there are mentions of criminal records in the general comment that we welcome (for example paragraph 80), we would encourage an expansion on the issue here and throughout, with an increased emphasis on how criminal record systems can stand in the way of rehabilitation and therefore a child's rights. For example:

Paragraph 9 (Part IV) refers to education and labour market discrimination, and the importance of States parties taking steps to prevent this, such as public campaigns and support services. To prevent such discrimination it is also vital that States parties have a criminal record system that is not overly punitive and involving widespread disclosure.

Paragraph 27 should emphasise that children be made aware when measures will result in criminal records, and it should be specified in the final bullet point that the information should not be disclosed to third parties such as employers or education providers.

Paragraph 29 reminds parties that promoting reintegration requires children to be protected from stigmatisation. Criminal records could again be mentioned here.

## **Children involved in crime as victims of exploitation**

In section G the general comment discusses the importance of recognising children recruited by non-State armed groups, terrorist, or violent extremist groups primarily as victims, and to therefore avoid punitive criminal justice responses. We are aware of many children in the UK who are victims of criminal and sexual exploitation who come into contact with the law as a result. For example, a seemingly increasing number of children are being criminally exploited by drug gangs, where they are often trafficked across the country to distribute and sell drugs. These children should also be recognised primarily as victims and therefore have appropriate measures put in place. We would encourage the widening of the mention of exploitation in the general comment, with consideration to articles 33, 35 and 36.

Section G could also mention that children should not be placed at risk by being used as covert human intelligence sources.

## **Turning 18**

We support the new emphasis in paragraph 41 that children who turn 18 between the time of their offence and the offence being dealt with should be dealt with by the youth justice system. We would recommend that a sentence is added here specifying that this should include provisions around criminal records, as we know in England and Wales that this is not currently how criminal records are treated.

We welcome paragraph 46, which expands recommendations around keeping children in conflict with the law who turn 18 in programmes and conditions that suit their age, maturity and needs, rather than being moved to adult programmes and centres. It should however also be made clear that young adults should be kept separately to children. It should be specified that wherever possible, children should be released before any transfer to adult centres – and where a transfer is unavoidable it should be carefully planned. We also welcome paragraphs 47 – 48 on similar matters. For more information and evidence on transitions and the needs of young adults, see T2A, the Transition to Adulthood alliance.<sup>10</sup>

## **Police**

There is very little mention throughout the comment on the treatment of children by the police, including on arrests, detention in police cells, and use of force such as Spithoods, strip-searching, and Tasers. Given the frequency of violence towards children by police, we would welcome more detail on such matters, in relation to article 19.

## **Monitoring and data**

We welcome the addition in paragraph 17 of monitoring as a core element of a comprehensive child justice policy. In accordance with this, we are pleased to see the additional section on monitoring (paragraphs 93 – 94). However, there is not enough detail provided in this section, for example it does not make specific mention of monitoring discrimination, treatment in detention and other issues. We would also welcome more disaggregated data that allows more complete scrutiny of child justice, such as race and age. We suggest that the requirement for monitoring and data collection is added throughout the comment wherever scrutiny and oversight would be beneficial.

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<sup>10</sup> <https://www.t2a.org.uk/t2a-evidence/research-reports/>