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## Committee on the Rights of the ChildDraft revised General Comment No. 10 (2007)on children’s rights in juvenile justice Joint submission

 **About us**Article 39 is an England-wide charity which fights for the rights of children living in state and privately-run institutions (children’s homes, boarding and residential special schools, mental health inpatient units, prisons and immigration detention). We take our name from Article 39 of the United Nations Convention on the Rights of the Child (UNCRC).

The National Association for Youth Justice (NAYJ) is the only membership organisation in England and Wales which exclusively campaigns for the rights of and justice for children and young people in trouble with the law.

**Introduction**We strongly welcome this revised GC on children’s rights in juvenile justice. Given space limitations, we focus our comments on making suggestions for how the GC could be further strengthened to give the best protection to children.

We believe the GC could go much further in outlining the comprehensive and indivisible obligations of the UNCRC, and encourage the Committee to give even more emphasis to the treaty obligations not usually associated with juvenile justice – positive family support, inclusive education, adequate standard of living and social security, therapeutic and other forms of assistance to recover from abuse, and so on.

This is a policy area where children's human rights breaches are highly visible and serious – before and after children’s contact with the criminal justice system. For this reason, we urge an even stronger narrative on the rights violations which push children into contact with the criminal justice system, and the harms they suffer as a consequence – particularly in prison and other places of detention. The Committee has consistently required States to pursue legislative reform and cultural change to end all forms of violence in the home. We urge similar boldness in ending the punitive treatment of children by the State.

**Headline concerns

*Age of criminal responsibility***The draft revised GC states that “States parties are encouraged to increase their minimum age to at least 14 years of age”. We believe this is too low, given the known – and often very severe – harms caused by contact with the criminal justice system and the treaty’s requirement that the arrest of children must be a measure of last resort with non-judicial proceedings as the default position.[[1]](#footnote-1)

Girls and boys living in poverty, street children, children from black and minority ethnic communities, children excluded from education, children with disabilities and children who have suffered violence within the home are disproportionately drawn into the criminal justice system.

We encourage the Committee to undertake a fuller interpretation of the treaty’s requirement for a minimum age of criminal responsibility, stressing States Parties’ obligations to ensure all children can enjoy their rights without any form of discrimination and providing positive forms of recovery and rehabilitation to those who have suffered violations. Article 5’s provisions on the evolving capacities of children are also pertinent. It is increasingly and widely accepted that there are no definitive ages and stages at which all children can be said to be equally capacitous. The Committee’s General Comment on the rights of the child during adolescence states:

*In seeking to provide an appropriate balance between respect for the evolving capacities of adolescents and appropriate levels of protection, consideration should be given to a range of factors affecting decision-making, including the level of risk involved, the potential for exploitation, understanding of adolescent development, recognition that competence and understanding do not necessarily develop equally across all fields at the same pace and recognition of individual experience and capacity.[[2]](#footnote-2)*

Given the apparent inconsistency between having a generic minimum age of criminal responsibility and respecting each child’s evolving capacities, we suggest the Committee adopts the approach taken in the Optional Protocol on Armed Conflict, whereby the harms of any form of contact with armed conflict provides the context for emphasising children’s right to special protection to the age of 18.

The risks to children’s survival and development of contact with the criminal justice system, particularly penal detention, make it impossible – from a children’s rights perspective – to appear to suggest that the risks are more manageable (legitimate) from age 14 onwards.

***Deprivation of liberty***We believe that the primary message of the GC in respect of deprivation of liberty (first mentioned para 3) is that it must be used extremely rarely. The best interests and maximum development obligations of the UNCRC, combined with the last resort requirement and positive obligations to protect the child from all forms of violence and inhuman and degrading treatment, weigh heavily against any form of child detention.

We are disappointed that the Committee does not give detailed consideration to the meaning of last resort. Our own broad interpretation of this is that all of the child's rights must have been implemented and, despite this, the child cannot be safely maintained within the community at the present time.

We strongly recommend that the Committee promotes secure settings which are not modelled on adult prisons but instead follow residential child care norms and standards. Additionally, the inherent risks and limitations of any form of institutionalised care must be stressed.

The aims, ethos, culture and conditions in which children’s liberty is curtailed must all comply with the UNCRC principles and provisions. We suggest the ‘Treatment and conditions’ of deprivation of liberty section (paras 104-108) could be reframed as residential settings where children’s liberty may be restricted for the shortest period possible with a discussion of the various requirements of the UNCRC in terms of children’s welfare and safety, care, relationships with their family, education, health, leisure and so on, followed by safeguards and procedural rights including article 25 periodic review. The restriction of children’s liberty within these residential settings should only be to the extent necessary. We hope the final revised GC will state that practices transferred or adapted from adult prisons – such as solitary confinement, corporal punishment, the sanction of extra days for breaching rules, pain-inducing restraint techniques and strip-searching – have no place in children’s settings.

The presumption of no deprivation of liberty below age 16 (para 101) is a welcome development in its acknowledgment of the harms of detention. However, to be consistent with the treaty’s principles and provisions the GC should require that all children be protected from penal detention. We draw the Committee’s attention to the UN Special Rapporteur on the Right to Health’s recent report on deprivation of liberty and confinement, which states:

*The scale and magnitude of children’s suffering in detention and confinement call*

*for a global commitment to the abolition of child prisons and large care institutions*

*alongside scaled-up investment in community-based services.[[3]](#footnote-3)*

We urge the Committee to promote a presumption against pre-trial detention unless this is demonstrably necessary for public protection or the child’s safety. The reduction of pre-trial detention (para 97) is too weak a recommendation when deprivation of liberty is meant to be a measure of last resort.

***Life imprisonment without possibility of release***The Convention states that life imprisonment should not be “imposed” on children. We recommend the Committee’s consideration of this provision be (radically) reformulated to provide States Parties with guidance on effectively implementing articles 25 and 37b – that is, outlining the systems which need to be in place to ensure children are held in secure settings for the shortest possible duration. Clearly, implementation of these two articles – together with articles 3 and 6 especially – is not compatible with life imprisonment even when provisions for release or parole exist.

We suggest the Committee includes some commentary on the severe harms to children's well-being and development of growing up incarcerated.

***Further comments***We recommend the GC includes a clear statement that punishment has no place in the juvenile justice system – citing knowledge and research on child development and the harms of inflicting suffering on children, together with its counterproductive nature.

The non-discrimination section (paras 8-11) could be improved by inserting a paragraph on the socio-economic factors affecting children’s contact with the criminal justice system, and States Parties’ obligations to ensure every child enjoys all of their rights without discrimination. The particular discrimination faced by children in alternative care, and disabled children, could be further emphasised here.

The best interests section (para 12) needs to be applied to the child’s experiences from first contact with law enforcement agencies to diversion to proceedings to responses (not sanctions) aimed at affirming the child’s sense of dignity and worth, reintegration and  constructive role in society. Best interests *must* be a primary consideration (not ‘should’) (para 12).

We recommend that the very negative effects of contact with the criminal justice system are emphasised in para 13, the right to maximum survival and development.

The obligations of article 12 could be spelled out more generally (para 14) before being applied to the criminal justice system. In the latter context, the link with article 39 is vital – in the UK, for example, the vast majority of children in sustained contact with the criminal justice system have experienced neglect (broadly defined), abuse and/or exploitation. Hearing the child is critical to their recovery.

Under the heading Dignity – fundamental principles – an additional section along the lines of ‘Treatment that recognises the social and economic factors affecting a child’s contact with the criminal justice system’ would be helpful. The current third bullet point – ‘Treatment that takes into account the child’s age…’ ought to stress prevention (general CRC implementation) and then diversion for the small number of children who do come into contact with the criminal justice system (since child arrest is meant to be a measure of last resort). The final bullet in this section – all forms of violence prohibited and prevented – could be improved by referencing the duty to provide effective remedies for children.

Presumption of innocence (para 53) – the draft revised GC states that in the case of inconclusive evidence the child must be given “the benefit of the doubt”. We suggest this is redrafted to state that the child must be treated as innocent of any offence.

Para 62 could be strengthened to explain the importance of legal representation, which must be tailored to the particular needs of children.

Punishment of parents (para 69) for child offending – we recommend the Committee urges States to desist from punishing parents for the actions of their children as this is plainly not conducive with the child’s best interests and UNCRC obligations to support parents. It also risks children suffering stigma within their communities and victimisation within the family.

Privacy rights of children – paras 78-81 – we ask that this part of the GC explains the short and long-term harms of public shaming, and the strong requirement of children’s privacy being “fully respected” in article 40(2).

Presumption of diversion (paras 82-83) needs to link with fundamental principles which currently start at page 5.

We recommend that the section on monitoring (paras 93-94) begins with a critical analysis of the backgrounds and circumstances of children who come into contact with the criminal justice system, and the extent to which this reveals deficiencies in the implementation of the UNCRC.

**Contacts**

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1. A paper published by the NAYJ suggests a minimum age of criminal responsibility of 16 years of, for consistency with legal ages of responsibility for other areas of social life: <http://thenayj.org.uk/wp-content/uploads/2015/06/2012-The-Age-of-Criminal-responsibility.pdf> [↑](#footnote-ref-1)
2. Committee on the Rights of the Child (2016) General comment No. 20 on the implementation of the rights of the child during adolescence. Paragraph 20. [↑](#footnote-ref-2)
3. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, April 2018. Paragraph 53. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/101/42/PDF/G1810142.pdf?OpenElement [↑](#footnote-ref-3)