**Submission of the Australian Government**

**Draft General Comment No. 24, replacing General Comment No. 10 on Children’s rights in juvenile justice**

1. The Australian Government presents its compliments to the United Nations Committee on the Rights of the Child (the Committee) and has the honour to refer to the Committee’s invitation for written comments on draft General Comment No. 24, replacing General Comment 10, on Children’s rights in juvenile justice.[[1]](#footnote-1)
2. The Australian Government thanks the Committee for the opportunity to provide a written submission on the draft General Comment and extension of time to do so. Australia is a longstanding party to the Convention on the Rights of the Child (the Convention), the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the Involvement of Children in Armed Conflict, and is firmly committed to upholding its obligations. Australia has identified the following matters that it wishes to bring to the attention of the Committee.[[2]](#footnote-2)

States Parties’ Obligations

1. Australia is of the view that the draft General Comment would benefit from being less prescriptive, noting that States have a margin of appreciation in how they fulfil their obligations under human rights treaties.[[3]](#footnote-3) Australia submits that a preferable approach would be to recommend best practice and to provide examples of ways in which States Parties could fulfil their obligations to children in the youth justice context as suggestions or recommendations and not actions that States are required to, or must, do in order to fulfil their obligations.
2. Australia notes that economic, social and cultural rights addressed in the draft General Comment are progressively realisable and measures to achieve such rights should be taken by States to the maximum of their available resources.[[4]](#footnote-4)
3. Australia commends the Committee in adopting the language of the Convention throughout the draft General Comment. However, some parts of the draft purport to extend the responsibilities of States Parties beyond the legal obligations in the text of the Convention.[[5]](#footnote-5)
4. In particular, Australia invites the Committee to clarify the statements in the draft General Comment regarding the scope of the legal obligations of States Parties under the Convention, particularly the following:

*The Best Interests of the Child*

1. Australia notes the Committee’s view that ‘[t]he protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.’[[6]](#footnote-6) Australia recalls that the best interests of the child are ‘*a* primary consideration’ and not ‘*the* primary consideration’. Accordingly, Australia suggests this paragraph reflect that the best interests of the child offender need to be considered in concert with other considerations such as, (in addition to ‘public safety’ as identified by the Committee), access to justice for any victim(s) or the family of any victim(s) of youth offending and the best interests of children who may come into contact with child offenders, either in the general community or through diversion programmes.

*Age of criminal responsibility*

1. Paragraphs 6 and 30-36 of the draft General Comment deal with the minimum age of criminal responsibility.
2. Australia recalls that article 40(3)(a) requires States to establish a minimum age ‘below which children shall be *presumed* not to have the capacity to infringe the penal law’ (emphasis added). This language has been largely replicated throughout the draft General Comment, with the exception of paragraphs 30-31, where the draft describes the minimum age of criminal responsibility as the age ‘below which children are considered by law not to have the capacity to infringe the criminal law’[[7]](#footnote-7) and ‘when below the minimum age of criminal responsibility the operation of law dictates that they cannot be formally charged and held responsible’.[[8]](#footnote-8) Australia recommends that these sentences be amended to reflect that fact that the minimum age of criminal responsibility involves a presumption. The Committee may wish to note that this does not *prevent* States Parties from considering children under a certain age to be immune from prosecution. For example, in Australia, children under ten years of age cannot be charged with an offence; and children under fourteen years are presumed *doli incapax* (incapable of crime) with the onus of rebutting this presumption resting on the prosecution.[[9]](#footnote-9)
3. The draft further states that ‘States parties are encouraged to increase their minimum age to at least 14 years of age.’[[10]](#footnote-10) In Australia’s view, the obligation in article 40(3)(a) of the Convention is to ‘seek to promote [inter alia,] [t]he establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’.[[11]](#footnote-11) As the Convention does not mention a specific minimum age in this regard, Australia views this obligation as an obligation for States to set a minimum age of criminal responsibility without a particular age limit being required by the Convention. While Australia commends the Committee for encouraging States to reconsider very low ages of criminal responsibility, we consider that this could still be achieved whilst refraining from specifying a particular age.

*Continuation of juvenile justice measures after criminal majority*[[12]](#footnote-12)

1. The draft General Comment recommends in paragraph 46 that States Parties to the Convention ensure young persons who reach eighteen years while undertaking a programme or sentence ‘can continue the completion of the programme or sentence in conditions suited to their age, maturity and needs and are not sent to centres for adults.’ Australia suggests that the Committee reiterate that, in taking any such decision, the best interests of any children in the programme or facility should be a primary consideration.

*Minimum age of deprivation of liberty*

1. In paragraph 101 of the draft General Comment, the Committee ‘encourages the State parties to fix an age limit for the use of deprivation of liberty and recommends that no child in conflict with the law below the age of 16 years old be deprived of liberty, either at the pre-trial or post-trial stage’.
2. There is no obligation in the Convention to establish a minimum age for deprivation of liberty. Australia considers that children are best protected by the increased promotion of existing Convention obligations, including the establishment of an appropriate minimum age of criminal responsibility (article 40(3)(a)) and increased use of diversion measures (article 40(3)(b)) and alternatives to detention (article 40(4)). As such, Australia considers that fixing a minimum age for deprivation of liberty is neither required nor appropriate.
3. Australia takes its obligations under international human rights law seriously and recently became a State Party to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). Australia considers that the OPCAT strengthens the protection of persons deprived of their liberty, including children, against acts of torture and other cruel, inhuman or degrading treatment or punishment. The Committee might encourage States Parties to the Convention to consider ratifying the OPCAT to provide further human rights protections and safeguards to children deprived of their liberty.

*Expression of views*

1. Australia notes the Committee’s comments in paragraph 14 of the draft General Comment on the right to be heard (article 12). Australia recalls that under article 12(2) of the Convention, children can be heard either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.[[13]](#footnote-13)

Interconnected nature of human rights obligations

*Multiple forms of discrimination*

1. Given that age can be a ground of discrimination under ‘other status’ in article 2 of the Convention, Australia welcomes the guidance in the draft General Comment about multiple and interconnected forms of discrimination.[[14]](#footnote-14) Australia notes the importance of special measures in combatting systemic discrimination and further notes that not every differentiation in treatment will constitute discrimination provided that such treatment constitutes legitimate differential treatment.

*References to obligations in other Conventions*

1. In a number of places, the draft General Comment refers to obligations in other Conventions, such as the International Covenant on Civil and Political Rights or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[[15]](#footnote-15) As mentioned in previous government comments on draft General Comments,[[16]](#footnote-16) Australia is supportive of this approach because it ensures the United Nations Committees’ views as to the content of international human rights law are considered cohesively.
2. Australia reiterates its support for the work of the Committee and avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.
1. Committee on the Rights of the Child, draft General Comment no. 24, replacing General Comment No. 10 (2007) on Children’s rights in juvenile justice, approx. December 2018 (the draft General Comment). [↑](#footnote-ref-1)
2. An absence of comment on other parts of the draft Comment should not necessarily be taken as agreement by Australia with the Committee’s interpretation. [↑](#footnote-ref-2)
3. For example, paragraphs 10-11, 19-20, 44-45, 49, 59, 93-94, 102, 108, 114-115 and 119 of the draft General Comment. [↑](#footnote-ref-3)
4. For example, paragraph 18 of the draft General Comment. [↑](#footnote-ref-4)
5. For example and in addition to the below: the reference to a ‘nonpublication rule’ in paragraph 78; or the final dot point in paragraph 108 which suggests that States ‘should’ empower independent and qualified inspectors to conduct regular inspections of locations which children are detained. [↑](#footnote-ref-5)
6. Paragraph 12 of the draft General Comment. [↑](#footnote-ref-6)
7. Paragraph 30 of the draft General Comment. [↑](#footnote-ref-7)
8. Paragraph 31 of the draft General Comment. [↑](#footnote-ref-8)
9. Australian Institute of Criminology, *The Age of Criminal Responsibility*, 13 September 2005, available at <https://aic.gov.au/publications/cfi/cfi106>. [↑](#footnote-ref-9)
10. Paragraph 32 of the draft General Comment. [↑](#footnote-ref-10)
11. Convention on the Rights of the Child, Article 40(3) and draft General Comment, paragraph 32. [↑](#footnote-ref-11)
12. In accordance with Australia’s Reservation to the Convention of 17 December 1990, Australia accepts the obligation to separate children from adults in prison only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. These comments do not affect this reservation. [↑](#footnote-ref-12)
13. See article 12(2) of the Convention. [↑](#footnote-ref-13)
14. See paragraph 8-9 and 77 of the draft General Comment. [↑](#footnote-ref-14)
15. See paragraphs 49, 52, 61, 64, 65, 70, 74, and 90 of the draft General Comment for intersections with the ICCPR and paragraph 70 for intersections with the CAT. [↑](#footnote-ref-15)
16. See for example the Australian Government Submission on the draft General Comment on the implementation of the rights of the child during adolescence (2006). [↑](#footnote-ref-16)