

**Submission to the Committee on the Rights of
the Child on the Draft revised General
Comment No. 10 (2007) on children's rights
in Juvenile Justice**

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7th January 2019

The CRC requires that young people in conflict with the law should be treated in a manner consistent with their dignity and worth, in a way which reinforces respect for human rights and fundamental freedoms and which promotes the child's reintegration and assumption of a constructive role in society. Article 37 and Article 40 place limits on the ways in which state parties can respond to young people alleged as, accused of, or recognised as having infringed the penal law, including limiting the use of detention and promoting alternatives to judicial proceedings where legal safeguards are met. In line with this, the Committee has highlighted that a strictly punitive approach is not in accordance with the spirit of the CRC.¹

While many jurisdictions have taken steps to implement these provisions, i.e. to introduce diversionary measures that reduce children's contact with the criminal justice system, to adapt court procedures to allow children to participate more effectively in criminal proceedings and to ensure limited use of detention and other punitive sanctions, in many instances these have been limited to children who are accused of less serious offences. Conversely, children who are alleged or found to have committed serious offences (especially violent and/or sexual offences) continue to be tried in adult court, are subject to harsh treatment and receive punitive sanctions.² Nothing in the Convention advocates a different approach depending on the nature of the child's offending. In fact, Article 2 requires that all children enjoy Convention rights without discrimination and Article 3 supports an individualised approach that takes account of a child's particular needs. The Committee has articulated that the aim of preserving public safety is best served by full respect for the juvenile justice principles enshrined under the Convention.³ In order to maximise the potential of the UNCRC to promote respect for child rights among all children in conflict with the law, therefore, it is recommended that General Comment No. 10 be revised to reinforce its application to all children regardless of the nature or seriousness of their offending behaviour.

In many countries, children who are alleged to have committed serious offences are transferred out of child or youth courts for trial in adult court.⁴ Apart from denying children justice in an appropriate setting, trial in adult court can lead to worse outcomes for children, including very significant penalties on conviction with life-long consequences.⁵ In some countries, sentencing takes place in line with CRC principles

¹ [General Comment No.10 at para.10 ; New draft, GC10, para.85](#)

² Lynch, N., "Towards a Principled Legal Response to Children Who Kill" (2018) 18(3) *Youth Justice* 211

³ [New draft, GC10, para.2](#)

⁴ Christiaens, J. & Nuytiens, A., "Transfer of Juvenile Offenders to Adult Court in Belgium: Critical Reflections on the Reform of a Moderate Practice" (2009) 9(2) *Youth Justice* 131; Cleland, A., "Portrait of the Accused as a Young Man: New Zealand's Harsh Treatment of Young People Who Commit Serious Crimes" (2016) 105(4) *The Round Table* 277

⁵ Christiaens, J. & Nuytiens, A., "Transfer of Juvenile Offenders to Adult Court in Belgium: Critical Reflections on the Reform of a Moderate Practice" (2009) 9(2) *Youth Justice* 131; Cleland, A., "Portrait of the Accused as a Young Man: New Zealand's Harsh Treatment of Young People Who Commit Serious Crimes" (2016) 105(4) *The Round Table* 277; Deuchar, R. & Sapouna, M., "'It's harder to go to court yourself because you don't really know what to expect': Reducing the negative effects of court exposure on young people – Findings from an Evaluation in Scotland" (2016) 16(2) *Youth Justice* 130; Dyer, F., *Young People in Court in Scotland* (Glasgow: Centre for Youth and Criminal Justice, January 2016)

like rehabilitation, regardless of the setting, in others this only happens in specialist child or youth courts.⁶ Even in countries where the overall approach to youthful offending is based on ‘best interests’, children who commit serious crimes are often excluded from child-specific approaches and are prosecuted in an adult court system that is ill-equipped to meet their needs.⁷ They are more likely to face pre-trial detention and are more likely to be sentenced to longer periods in detention. In short, children who are involved in serious criminal offending are less likely to benefit from the protections set out in the CRC, including Articles 37 and 40.

In light of this knowledge and in order to highlight the applicability of the youth justice principles enshrined in the CRC to all young people, regardless of the gravity of their offending behaviour, the following amendments are proposed. First, it is submitted that the following addition be made to para 2 of the current draft of the revised General Comment No.10:

“The Committee acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the juvenile justice system. However, in the Committee’s view this aim is best served – **in all cases, regardless of the seriousness of the alleged or proven offence**– by full respect for and implementation of the principles of juvenile justice as enshrined in the Convention on the Rights of the Child (hereafter: CRC).”

In order to emphasise the need to develop appropriate responses to children alleged as, accused of, or recognised as having committed more serious offences, it is submitted that the following addition to para 5 of the current draft of the revised General Comment No.10 should be considered:

“To underscore that the CRC requirement to develop and implement a comprehensive juvenile justice policy should not be limited to the implementation of the specific provisions contained in articles 37 and 40 of CRC, but should also take into account the general principles enshrined in articles 2, 3, 6 and 12, and in all other relevant articles of CRC, such as articles 4, **16, 19, 20, 23, 24, 27, 28, 31, 33, 34** and 39;

...

To encourage the establishment and full implementation of alternative measures that can be applied at all stages of the process; **These measures should be available to all children regardless of the nature of their offending behaviour;**

To ensure the guarantees for a fair trial for **all** those children who are not diverted, **regardless of the trial venue**, to alternative measures and to ensure the application of appropriate dispositions for **all** children who are convicted, **regardless of the severity of the offence**, and the avoidance of deprivation of liberty, except as a measure of last resort, and if used, for the shortest appropriate period of time and in appropriate conditions.

In order to highlight that the core principles of the CRC apply to all children under the age of 18, including those who commit serious offences, it is submitted that the

⁶ Kil Kelly, U. ‘Youth Courts and Children’s Rights: The Irish Experience’ 8(2) *Youth Justice* (2008) 8-39.

⁷ Muncie, J., “Illusions of Difference: Comparative Youth Justice in the Devolved United Kingdom” (2011) 51(1) *British Journal of Criminology* 40 at p.48

following change to para.12 on the application of the best interests principle should be considered:

“In all decisions taken within the context of the administration of juvenile justice, the best interests of the child should be a primary consideration. **This principle applies regardless of the gravity of the offence of which the child is suspected, alleged, or recognised as committing.** Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The 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. This can be done in concert with attention to effective public safety, **and as such is applicable to all children in conflict with the law, and is not limited to those who have committed minor offences.**”

It is important that requirements of age-appropriate treatment and the promotion of reintegration are applicable to all children in conflict with the law, regardless of the nature or the severity of their offending. This is in line with emerging scientific knowledge about child and adolescent brain development⁸ which reinforces the susceptibility of children to change and development, and evidence about the recidivist risks posed by young sexual offenders.⁹ In order to highlight the importance of treatment that promotes the reintegration of all children in conflict with the law, therefore, it is submitted that the following addition to para 15 of the current draft of the revised General Comment No.10 should be considered:

“Treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society. This principle must be applied, observed and respected throughout the entire process of dealing with the child, from the first contact with law enforcement agencies all the way to the implementation of all measures for dealing with the child. **This principle is applicable to all children in conflict with the law, regardless of the nature or gravity of the alleged, suspected, or proven offence.** It requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being, and the pervasive forms of violence against children. **Policy and decision-making in practice should take account of the latest scientific knowledge on adolescent brain development and the nature of youth offending in order to reinforce an individualised, positive and child-centred approach to all children in conflict with the law.**

In order to highlight that diversionary measures may be equally appropriate where children commit serious, including violent or sexual offences, the following

⁸ Steinberg, L. and Scott, E, ‘Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty’ 58 *American Psychologist* 1009 (2003)

⁹ Chaffin, M. ‘Our Minds Are Made Up—Don’t Confuse Us With the Facts: Commentary on Policies Concerning Children With Sexual Behavior Problems and Juvenile Sex Offenders’ *Child Maltreatment*, Vol. 13, No. 2, May 2008 110-121.

amendment to para 24 of the current draft of the revised General Comment No.10 is suggested:

“The diversion of matters away from the criminal/juvenile justice processing to a range of appropriate programmes should be the preferred manner of dealing with child offenders in the majority of cases. States parties should continually extend the range of offences for which diversion is possible, **and should give explicit consideration to** including serious offences where appropriate.

The right of young people in conflict with the law to privacy, while often particularly relevant to young people who commit serious crimes is relevant to all young people who come into conflict with the law. However, as noted by the CRC Committee on multiple occasions,¹⁰ young people’s right to privacy is frequently breached in youth justice proceedings. In particular, the naming of young people ‘in the public interest’ is often used to justify this breach of children’s rights; this justification can be seen particularly where children have committed serious crimes.¹¹ This naming and shaming of young people who have come into conflict with the law increases the marginalisation and exclusion of young people in society generally,¹² and is in direct conflict with the principles of Article 40 of the UNCRC emphasising rehabilitation and the assumption of a positive and constructive role in society. The authors submit that the Committee should consider revising the wording of paras. 29 and 78, as below:

“29. The Committee reminds States parties that, pursuant to article 40 (1) of CRC, promoting reintegration requires that a child who is or has been in conflict with the law should be protected from actions or attitudes that hamper the child’s full participation in his/her community, such as stigmatization, social isolation, or negative publicity. **In particular, no person who has committed an offence while below the age of 18 should be identified publicly; the prohibition on publicising the identity of young people who have committed crimes while below the age of 18 should be absolute and should continue once the young person attains the age of 18. Automatic registration of children convicted of sexual offences should not be permitted, with a risk-based approach taken to ensure that an appropriate balance is struck between public protection and the rights of the child offender. All forms of disclosure considered necessary to protect the rights of others should be strictly limited and regulated by law.**”

“78... This means that the goals of juvenile justice to promote the child’s reintegration and assumption of a constructive role in society is seriously impeded. Consequently, public authorities should be most vigilant concerning press releases, articles and publications related to offences allegedly committed by persons who were children at the time of the offence, **should never identify a young person alleged as, accused of or recognised as committing an offence while under the age of 18.** They must take measures to guarantee that children are not identifiable via such releases, articles or

¹⁰ See for example Concluding observations on the consolidated second to fourth periodic reports of Bosnia and Herzegovina, adopted by the Committee at its sixty-first session (17th September-5th October 2012) 29th November 2012; Concluding observations: Cook Islands (CRC/C/COK/CO/1) 22nd February 2012; Concluding Observations: Costa Rica (CRC/C/CRI/CO/4) 3rd August 2011

¹¹ Rice, G. & Thomas, T., “James Bulger – A Matter of Public Interest” (2013) 1 *International Journal of Children’s Rights* 1

¹² Piñero, V.B., “Child Protection vs. Crime Prevention: The Regulation of Young Offenders Private Information in Canada” (2009) 17(1) *International Journal of Children’s Rights* 111

publications. This should extend to all forms of social media. **This protection should continue to apply to young people who were under the age of 18 at the time of the commission of the offence after they attain the age of 18. Other forms of disclosure, such as vetting, should be strictly limited, justifiable by reference to the need to protect the rights or fundamental freedoms of others, and regulated by law.** All persons who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and where necessary with criminal sanctions.

In order to ensure that States which operate two minimum ages of responsibility end this practice, and to ensure that a lower minimum age of criminal responsibility does not apply where more serious offences are alleged, it is submitted that the Committee should consider the following revision to para.43:

“Several States parties use two minimum ages of criminal responsibility: children in conflict with the law who at the time of the commission of the crime are at or above the lower minimum age but below the higher minimum age are assumed to be criminally responsible only if they have the required maturity in that regard. The assessment of this maturity is often left to the court/judge, sometimes without the requirement of involving a psychological expert (who are often not available in developing states), and results in practice in the use of the lower minimum age in cases of serious crimes. The system of two minimum ages is often not only confusing, but leaves much to the discretion of the court/judge and may result in discriminatory practices. **Therefore, States should never operate two minimum ages of criminal responsibility. States which have a lower age of minimum criminal responsibility for more serious offences should ensure that this practice is abolished. The higher age of criminal responsibility in operation should be applicable regardless of the nature or severity of the offence. Additionally, consideration should be given to limiting the use of detention, including restrictions on pre-trial detention, to those above a particular age.**

Given that many young people accused of committing serious offences are transferred from specialised courts to adult courts, where lesser protections may apply, the following changes to para 57 are submitted:

“A fair trial requires that the child in conflict with the law is able to effectively participate in the trial, and the child therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. This includes a requirement that the proceedings be conducted in a language the child fully understands but if not, to be assisted by a free interpreter. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child’s age and maturity may also require modified courtroom procedures and practices. **Adaptations to trial proceedings to facilitate effective participation should apply regardless of the venue for trial; while specialised courts for children should be used where possible, where this is not possible, sufficient adaptations should be made to the trial process and procedure to ensure children are capable of participating effectively.”**