

## **Non-discrimination and the protection of persons with increased vulnerability in the administration of justice**

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This submission will focus on discrimination faced by children in the criminal justice system in general and particularly in detention. It aims to briefly address the extensive and diverse ways that children face discrimination in this setting.

### **Discrimination against children in the justice system**

#### Status offences

Status offences - that is offences that criminalise actions only for certain groups of people - are among the most overt forms of discrimination children face within the criminal justice system. Curfews, truancy laws and vagrancy offences penalise children for being in public, and “disobedience” laws transform activities that would be lawful for an adult into a criminal offence. Curfews commonly prohibit children from being in public in the evenings or at night. For example, in 2011, the Australian State of Victoria implemented a 12 hour curfew for children aged ten to 18 between the hours of 7pm and 7am<sup>1</sup> and Belarus introduced a similar curfew between 11pm and 6am in 2012.<sup>2</sup> Laws allowing for the punishment of children for disobedience, “delinquency”, begging, or lack of parental control are also common. It is lawful in Belize to place their children in detention for being “out of control”, while detention is lawful in Trinidad and Tobago.<sup>3</sup>

The discriminatory nature of these offences is well established in international law. The Riyadh guidelines require that “legislation be enacted to ensure that any conduct not considered or not penalised if committed by an adult is not considered an offence or not penalised if committed by a young person”.<sup>4</sup> The principle has since been reiterated in a General Comment of the Committee on the Rights of the Child,<sup>5</sup> Human Rights Council resolutions<sup>6</sup> and the UN Study on Violence Against Children.<sup>7</sup>

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<sup>1</sup> News.com.au website, “Night curfews in Victoria to drive down crime”, 17 August 2011. Available at: <http://www.news.com.au/national/night-curfews-in-victoria-to-drive-down-crime/storye6firfkp9-1226116292338>.

<sup>2</sup> Law on amendments and additions to some laws of the Republic of Belarus on the prevention of child neglect and juvenile delinquency N 376-3, 26 May 2012. Available at: <http://naviny.org/2012/05/26/by11391.htm>.

<sup>3</sup> For more information, see CRIN, *Discrimination and Disenfranchisement: Global report on status offences* (Third Edition), April 2016, pp. 25 to 29. Available at: [www.crin.org/node/42559](http://www.crin.org/node/42559).

<sup>4</sup> United Nations Guidelines for the Prevention of Juvenile Delinquency (“the Riyadh Guidelines”), para. 56.

<sup>5</sup> Committee on the Rights of the Child, General Comment No. 10, para. 8.

<sup>6</sup> A/HRC/18/L.9, para. 14 and A/HRC/24/L.28, para. 23.

<sup>7</sup> Paulo Sergio Pinheiro, Independent Expert of the United Nations Secretary-General, *World Report on Violence Against Children*, October 2006, pp. 194 and 204.

Status offences that do not explicitly single out children can also disproportionately impact children, particularly those with the lowest levels of resources and the least available support from home or family environments. Anti-Social Behaviour Orders (ASBOs) were first introduced in the United Kingdom, empowering civil courts to impose an order preventing an individual from carrying out specific behaviour or entering a certain area. In themselves, the orders are not a criminal punishment - it is not necessary to commit a criminal offence in order to be given an ASBO - but breach of the order can result in a criminal conviction and prison sentence. ASBOs blur the boundary between civil law and criminal law, drawing people into the criminal justice system. The orders do not exclusively target children, but the way they police non-criminal activity in public spaces mean that children are disproportionately affected. In England and Wales, for example, between 1999 and the end of 2013, 36 per cent of ASBOs were applied to people under the age of 18. The Committee on the Rights of the Child recommended the abolition of ASBOs, recognising them as an infringement of the freedom of movement and peaceful assembly of children as well as noting the serious consequences of converting non-criminal activity into a criminal offence.<sup>8</sup>

For more information on status offences affecting children, see CRIN's report, *Discrimination and Disenfranchisement: A global report on status offences*.<sup>9</sup>

### Discrimination against vulnerable groups of children

The prohibition on discrimination under the Convention on the Rights of the Child is broad enough to cover any characteristic or status of a child.<sup>10</sup> The Committee on the Rights of the Child has also clarified this application to vulnerable groups such as street children, children belonging to racial, ethnic, religious or linguistic minorities, indigenous children, girls, children with disabilities and children who are repeatedly in conflict with the law.<sup>11</sup> The Committee has also stated that the emphasis of the juvenile justice system should be on prevention policies that are focused to support particularly vulnerable families and that extend special care and attention to young people at risk.<sup>12</sup>

In most respects, discrimination against children within the justice system reflects discrimination against vulnerable groups of people within the broader community. There are, however, groups of children that are particularly vulnerable beyond these broader forms of discrimination or where this vulnerability is exacerbated for children.

### *Disproportionately punishing vulnerable children, particularly children in care*

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<sup>8</sup> Committee on the Rights of the Child, *Concluding observations on the combined third and fourth reports of the United Kingdom of Great Britain and Northern Ireland*, CRC/C?GBR/CO/4, 20 October 2008, paras. 34,35, 68, 79 and 80.

<sup>9</sup> Available at: [www.crin.org/node/42559](http://www.crin.org/node/42559).

<sup>10</sup> Convention on the Rights of the Child, Article 2(1): "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."

<sup>11</sup> Convention on the Rights of the Child, General Comment No. 10, para. 6.

<sup>12</sup> *Ibid.* para. 18.

Evidence strongly indicates that the detention of children is disproportionately punishing those who are already marginalised and have particular needs. Research conducted by the Prison Reform Trust in the United Kingdom, for example, found that half of children detained in the criminal justice system lived in a deprived household or unsuitable accommodation, two-fifths were on the child protection register and/or experienced abuse or neglect; one third had an absent mother and more than a quarter had witnessed domestic violence. The report concluded that the high level of correlation between offending behaviour by children and the multiple forms of disadvantage they experience suggested that prevention of offending turns at least in part on tackling the deep-rooted and complex needs of these children.<sup>13</sup>

Children in care in particular are commonly disproportionately represented in the justice system. There are no global figures to demonstrate this phenomenon around the world, but in the United Kingdom, children living in children's homes are almost six times more likely to be criminalised than children in other placements and almost 20 times more likely to be criminalised than a non-looked after child. Research carried out in 2016 found that many of the relevant offences were related to minor incidents that would not have come to police attention had they occurred in family homes.<sup>14</sup>

#### *Mental health and drug use*

Children with mental health needs are disproportionately represented within the criminal justice system and particularly in detention. In the United States, for example, children with mental health or substance use disorders make up as many as two-thirds of children affected<sup>15</sup> and as many as 30 per cent of these disorders are so severe as to cause functional impairments.<sup>16</sup> Detention in these circumstances can worsen the symptoms children experience undermining any attempt to address the underlying issues related to offending. Clearly failing to take into account the health needs of children, including mental health, when deciding to impose a sentence of detention is also a failure to properly consider what is in the best interests of the child.

#### *Sexual Orientation and Gender Identity*

There is a small but growing literature on LGBT children in detention, focusing on increased isolation, vulnerability and victimisation as well as barriers to healthy sexual development. Data from the Bureau of Justice Statistics in the United States, for example, indicates that children who identify as non-heterosexual are more likely to be sexually victimised in prison

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<sup>13</sup> Prison Reform Trust, *Punishing Disadvantage: A profile of children in custody*, 2010, p. vii.

<sup>14</sup> Howard League for Penal Reform, *Criminal Care: Children's homes are criminalising children*, 30 March 2016. Available at: <http://howardleague.org/publications/criminal-care/>.

<sup>15</sup> Meservey and Skowrya, "Caring for Youth with Mental Health Needs in the Juvenile Justice System: Improving Knowledge and Skills", *National Center for Mental Health and Justice Research and Program Brief Vol. 2, Issue 2*, May 2015.

<sup>16</sup> Shuffield and Coccozza, *Youth with mental health disorders in the juvenile justice system: Results from a multi-state, multi-system prevalence study*, National Center for Mental Health and Juvenile Justice, 2006. Available at: <http://www.ncmhjj.com/wp-content/uploads/2013/07/7.-PrevalenceRPB.pdf>.

and seven times more likely to be victimised in general than a heterosexual prisoner.<sup>17</sup> The obligation to protect children from all forms of mental or physical violence under the CRC clearly covers violence on the basis of sexual orientation or gender identity and, interpreted in line with the non-discrimination provisions of the Convention, requires specialised responses to violence on this basis.

A study by the Howard League for Penal Reform in the United Kingdom has also highlighted the effect of suppression of sexuality in prison, the absence of models of healthy adult relationships for children in detention and the effect this can have on children's healthy sexual and emotional development.<sup>18</sup> Article 40 of the Convention on the Rights of the Child requires that States promote the reintegration of children within the justice system and this must address children's social development, which involves addressing relationships and sexuality.

#### Justice measures likely to increase discrimination

The naming of a child convicted of a criminal offence or involved in criminal proceedings can result in discrimination against children and set back their rehabilitation. Publicly available information about an offence committed by a child may result in discrimination when applying for work or further education and, with the preservation of this information on the internet, a conviction may follow a child beyond any legal obligation to disclose to employers or partners.

International standards on anonymity of children involved in criminal proceedings are well established. The CRC grants every child the right "[t]o have his or her privacy respected at all stages of the proceedings" and the Committee on the rights of the child has stated that proceedings involving children in conflict with the law should almost invariably be conducted behind closed doors.<sup>19</sup> The Beijing rules further specify that children's "right to privacy shall be respected at all stages" and that "no information that may lead to the identification of a juvenile offender shall be published."<sup>20</sup>

Nonetheless, legislation allowing the naming of children in conflict with the law is common: a quarter of States do not have legal provisions guaranteeing the privacy rights of children involved in legal proceedings.<sup>21</sup> Litigation has also emerged in a number of States in recent years on whether anonymity for children involved in legal proceedings expires when a child reaches the age of 18.<sup>22</sup>

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<sup>17</sup> Reported in Commission on Sex in Prison, *Health sexual development of children in prison: Briefing paper 4*, 2015. Available at: <http://howardleague.org/wp-content/uploads/2016/03/Healthy-sexual-development-of-children-in-prison.pdf>.

<sup>18</sup> Ibid.

<sup>19</sup> Committee on the Rights of the Child, General Comment No. 12, para. 61.

<sup>20</sup> UN Standard Minimum Rules for the Administration of Juvenile Justice ("Beijing Rules"), Article 8.

<sup>21</sup> CRIN, Rights, Remedies and Representation Global report on access to justice for children, February 2016, p. 31.

<sup>22</sup> See for example, *JC v. Central Criminal Court* [2014] EWHC 1041 in the United Kingdom and ongoing litigation in South Africa, media coverage available at: <http://citizen.co.za/news/news-national/1417433/child-rights-lobby-groups-square-off-against-media/>.

## Children in detention

### The use of detention for children in the justice system

That children should only be detained as a last resort and for the shortest appropriate period is perhaps the most entrenched juvenile justice standard in international law.<sup>23</sup> Building on and clarifying the application of this standard, the UN Study on Violence Against Children recommended that States "ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family-and community-based rehabilitation and reintegration programmes".<sup>24</sup> This recommendation is an expression of a holistic view of the requirements of the Convention on the Rights of the Child, interpreting the provisions that explicitly address detention alongside the requirements of the best interests of the child.<sup>25</sup>

### Vulnerabilities of children in detention and access to justice

As recognised by the OHCHR, "[a]ccess to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights."<sup>26</sup> While access to justice is essential for the realisation of all rights, the increased vulnerability of children in detention requires that mechanisms be tailored to ensure that children are able to complain and access remedies for violations of their rights in detention, whether in relation to the detention itself or violations that occur while they are detained.

Reflective of the more general right of children to access justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty apply the right specifically to the situation of children deprived of their liberty. The rules particularly address inspection and complaints mechanisms for children deprived of their liberty<sup>27</sup> requiring:

- that children who are detained be able to make requests and complaints without censorship as to substance to the central administration, the judicial authority or other proper authorities and to be informed of the response without delay;<sup>28</sup>
- calls for States to establish an ombudsperson to receive and investigate complaints made by children deprived of their liberty;<sup>29</sup>

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<sup>23</sup> Convention on the Rights of the Child, Article 37(b); UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Rule 13.1; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 1; Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), Guideline 18.

<sup>24</sup> Paulo Sergio Pinheiro, Independent Expert of the United Nations Secretary-General, *World Report on Violence Against Children*, October 2006, p 218.

<sup>25</sup> For discussion of a holistic reading of the detention standards of the Convention, see Ratledge, "End detention of children as punishment" in *Protecting Children Against Torture in Detention: Reflections on the Special Rapporteur on Torture's 2015 Thematic Report*.

<sup>26</sup> *Report of the United Nations High Commissioner for Human Rights: Access to justice for children*, A/HRC/25/35, 16 December 2013, para. 3.

<sup>27</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Section M.

<sup>28</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 76.

<sup>29</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 77.

- every juvenile has a right to request assistance from family members, legal counsellors, humanitarian groups or others, where possible, in order to make a complaint<sup>30</sup>

For discussion of access to justice for children and its implementation around the world, see CRIN, *Rights Remedies and Representation: Global report on access to justice for children*.

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<sup>30</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Rule 78.

<sup>31</sup> Available at: [www.crin.org/node/42383](http://www.crin.org/node/42383).