Submission in response to the United Nations Committee on the Rights of the Child's call for comments relating to revisions of: General Comment No. 24 (201x), replacing General Comment No. 10 (2007) on children's rights in juvenile justice

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Thank you for the opportunity to provide a submission in response to the proposed revisions to the General Comment No. 24 (201x), replacing General Comment No. 10 (2007) on children's rights in juvenile justice. This opportunity to draw upon ongoing research on the experiences and rights of children in conflict with the law in Australia and comparatively in other international countries. Our submission focuses on the minimum age of criminal responsibility and awareness-raising and training relating to the impact of negative publicity in the media and the discriminatory and negative stereotyping of children in conflict with the law. Our submission draws on our combined expertise of having researched, written and published in these areas for over a decade.

We would welcome the opportunity to discuss any aspects of our submission, recommendations and wider research further with members of the Committee.

Yours sincerely,

Dr. Faith Gordon & Dr. Kate Fitz-Gibbon
Criminology, School of Social Sciences, Faculty of Arts, Monash University, Victoria, Australia
E: faith.gordon@monash.edu; kate.fitzgibbon@monash.edu

Background and Context – Australia

The Australian Government signed up to the Children's Convention in 1990. Despite this, Australia does not have a national strategy or national measures to ensure the implementation of appropriate protection of children's rights (Fitz-Gibbon and Gordon 2018). The UN Convention on the Rights of the Child does not have an 'overarching legal force in Australia' and critically there is a lack of clear, distinct and 'well resourced strategic and coordinated measures to implement and protect children's rights' (UNICEF 2018: 6). This lack of enforcement mechanisms has not stymied academic attention and related advocacy. Significant concerns about the state of children's rights in Australia have been made at international, national and localised levels. The UN Committee's (2012: 3) Concluding Observations found that the lack of a 'comprehensive child rights Act at the national level…has resulted in fragmentation and inconsistencies in the implementation of child rights…with children in similar situations being subject to variations in the fulfilment of their rights depending on the state or territory in which they reside'.

We acknowledge that this submission is provided to the UN at a time when concerns surrounding the treatment of children in the criminal justice system are receiving national attention and animating significant concern among relevant advocacy groups, human rights practitioners, the legal and academic community (see O'Brien and Fitz-Gibbon 2018). In particular we draw attention here to critical bodies of work that have been recently completed – the 2018 UNICEF Children's Report and the 2017 Report and Recommendations of the *Royal Commission into the Protection and Detention of Children in the Northern Territory.*

The 2018 Children's Report, published by UNICEF, draws on 58 consultations with 527 children and young people in 30 locations around Australia. Its findings draw significant attention to Australia's gross violations of the rights of children held in detention and engaged in other levels of the criminal justice system. The report makes a number of key recommendations, calling on the Australian Government to immediately review and amend youth justice legislation, policies and practices to ensure that all children are treated consistent with the Beijing Rules and the UN Convention on the Rights of the Child. Further recommendations made in the Report include the prohibition of the use of solitary confinement other than as a last resort; prohibition of the use of restraints against children and routine strip searches, unless all other options have been exhausted. Significantly, the report also recommended that governments ensure the existence of child specific, independent inspectorates and complaint mechanisms. In addition to the recommendations specifically set out in our submission here, we support those made in the Children's Report and call on the Australian Government to action these as a matter of priority.

The Children's Report was published just prior to the one-year anniversary of the conclusion of the *Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017). The Royal Commission confirmed that over the past decade, children detained in the Northern Territory (NT) had been mistreated, verbally abused, humiliated, isolated and/or left alone for long periods, among other human rights

breaches. As we have noted elsewhere (Fitz-Gibbon and Gordon 2018), the Royal Commission found that children held in detention had been assaulted by staff, who either willfully ignored rules or were unaware of the rules, clearly in breach of Australia's international human rights obligations and some domestic laws.

These two pieces of work demonstrate the significant need for reform of Australian responses to children in conflict with the law. The latest publication on Youth Detention by the Australian Government's Institute of Health and Welfare (AIHW 2018: 1) sets out current figures on the number of children held in detention in Australia. The AIHW (2018) report found that about 1 in 500 children aged 10-17 were under supervision in the youth justice system on an average day, with 4 out of 5 being identified as male. This equals a total of 5,359 young people aged 10 and over were under youth justice supervision on an average day in 2016–17 (AIHW 2018: 1). These figures demonstrate that although only about 5% of children aged 10–17 in Australia are Indigenous, half (50%) of those under supervision on an average day in 2016–17 were Indigenous, thus Indigenous children aged 10-17 were 26 times more likely than non-Indigenous children to be held in detention on an average night (AIHW, 2018: 1). Comparing the incarceration figures with other international jurisdictions demonstrates the high levels of children imprisoned in Australia. Morgan *et al.* (2018: 38) found that on an average day in 2016-2017, the rate of young people in detention in Australia (3 per 10,000 young people) was higher than in England and Wales (2 per 10,000), but lower than in Canada (5 per 10,000) and the US (14 per 10,000).

We call on Australian governments to be held accountable to the children affected by state failings in the provision of youth justice, and in particular call for action to implement core recommendations from independent reviews into the failings in youth justice, such as the NT Royal Commission (2017).

Response to Comments

JUVENILE JUSTICE: THE CORE ELEMENTS OF A COMPREHENSIVE POLICY

We are of the opinion that all comprehensive youth justice policies must be compliant with the United Nations Convention on the Rights of the Child (1989); the Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) and the Vienna Guidelines for Action on Children in the Criminal Justice System.

We agree that children's rights-based youth justice policies and practices should be developed and implemented in light of evidence and evidence-based academic and practitioner research. We agree with the importance of ensuring that prevention, interventions which are not judicial/courts-based are preferred and that diversion is prioritised as part of the youth justice system. We further agree that ensuring that children in conflict with the law receive due and fair process, that their deprivation of liberty (including pre-trial detention and post-trial) is avoided wherever possible, as well as the after care and reintegration services and the monitoring of these measures, are all key aspects requiring careful consideration and sensitive, comprehensive rights-based policy solutions.

We note that direct reference to children in care has been omitted and in light of the intersection between the child protection and youth justice systems, we feel that it is important to ensure that this is recognised. Recent Australian figures demonstrate, children aged 10-16 years who are in the child protection system, were 12 times more likely to be in the youth justice system, compared with their peers of the same age (AIHW 2017: V, see further Dean 2018).

We recommend that there needs to be an increase in the availability of community-based therapeutic environments for children in care, who come into conflict with the law (see also Mendes, Baidawi & Snow 2014).

We recommend that the terminology 'child offenders' should be replaced with 'child/children in conflict with the law' in all Australian government and other relevant policy publications and legislation.

INTERVENTIONS WITHOUT RESORTING TO JUDICIAL PROCEEDINGS (DIVERSION)

Diversion prevents children from progressing through the youth and criminal justice systems. As previous research has demonstrated, a child's level of contact with the criminal justice system increases their risk of offending (Richards 2011). As outlined by the *Smart Justice* programme in Victoria, Australia, evaluations of individual diversionary programmes indicate clearly that they are effective methods of reducing reoffending. For example, 88% of children participating in the ROPES diversion programme did not reoffend (KPMG Evaluation 2010), with over 80% of children involved not reoffending two years later, compared to 57% of young people placed on

Probation or a Youth Supervision Order. By diverting children away from crime, prosecution, detention and custody and by providing needs-focused and children's rights-based diversion programmes, children are supported and provided with the necessary resources to support their desistance.

We assert that the system needs to ensure that there are available age-appropriate, culturally aware and sensitive, therapeutic community-based programmes with approaches that are evidence-based. We recommend that the importance of diversion be covered in the General Comment.

INTERVENTIONS IN THE CONTEXT OF JUDICIAL PROCEEDINGS (DISPOSITION)

We agree that the use of the deprivation of liberty and pre-trial detention for all children in conflict with the law should be limited wherever possible. International concern about the continued high levels of use of custody for children pre-trial persist (see, inter alia, Gibbs and Ratcliffe 2018). Research continues to emerge from the UK and Australia that demonstrates concerning levels of discrimination and abuse of children held in detention facilities.

We recommend that children should not be held on remand wherever possible. Pre-trial imprisonment should only be used in exceptional circumstances where there are immediate community safety concerns. Australian state and territory legislation should be reformed to align with this recommended approach.

THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY

In Australia, along with England, Wales and Northern Ireland, the minimum age of criminal responsibility is set at 10 years old. In Australia, the age of criminal majority is 18 years old in all states and territories. The minimum age of criminal responsibility remains 10 years old in Australia despite clear communication from the UN and other international bodies. For example, The UN Committee on the Rights of the Child (2007) concluded in paragraph 32 of its 'General comment no. 10: children's rights in juvenile justice' that 'a minimum age of criminal responsibility under the age of 12 years is considered by the Committee not to be internationally acceptable'. But in practice, the age of criminal responsibility varies considerably across countries. An investigation of 90 countries found that the minimum age of criminal responsibility ranged from 6 to 18, and the median age was 13.5 (Hazel 2008). There have been repeated calls for the minimum age of criminal responsibility in Australia to be raised including calls from the Committee on the Elimination of Racial Discrimination, the Human Rights Committee and the UN Special Rapporteur on the rights of Indigenous peoples for Australia. NGOs and civil society groups in Australia such as UNICEF, the findings of the NT Royal Commission, and the National Children's Commissioner, each assert the need for the minimum age of criminal responsibility to be raised to align with international standards. To date this has not been achieved.

Research undertaken by O'Brien and Fitz-Gibbon (2017) evidenced broad based support among the Victorian legal community for the minimum age of criminal responsibility to be increased to 14 years old. Further, in 2018, Australian law experts called for the age to be raised to 16 years old (Morgan 2018), following which the Council of Australian Governments (COAG) agreed to investigate the matter. We welcome national attention on this critical issue and support campaigns in Australia and in the UK to raise the minimum age of criminal responsibility.

We recommend that the minimum age of criminal responsibility in all jurisdictions should be raised to 12 years old as a minimum with a national strategy enacted to work towards a national minimum age of 14 years old.

We support the findings and recommendations of the 2018 UNICEF Children's Report, including that the minimum age of criminal responsibility should be raised and that there must be age appropriate and evidence based programs made available for children between the ages of 10 and 13 years old who are identified as at risk and/or exhibiting anti-social behaviours. Importantly, a suite of culturally appropriate and sensitive programs must be developed in partnership with Aboriginal and Torres Strait Islander communities.

THE APPLICATION OF THE JUVENILE JUSTICE SYSTEM

We agree that clear guidelines must exist in relation to the age range of the youth justice system. These should be appropriately communicated to children and enforced by all agencies and at all levels of the justice system. Gordon's (2015) research in Northern Ireland demonstrated that children in the juvenile justice setting who were approaching their 18th birthday held serious concerns about moving to the adult prison system and this had produced anxiety amongst children. The research also found that children had not received communication in an age-appropriate format, they had not been informed in adequate timeframes as to what the arrangements for their

detention would consist of, and as one young man who was about to turn 18-years-old, stated: "I feel like I have been left in limbo and don't know what's going on" (Gordon, field notes, juvenile justice centre, 2014).

We recommend that children should not be moved to adult detention facilities in any circumstances, as the buildings, regimes and environments are not appropriate and staff are not adequately equipped or trained.

FULL RESPECT OF PRIVACY

We have both conducted extensive research into the naming and shaming of children in conflict with the law in Australia, England, Scotland, Wales and Northern Ireland. Our findings demonstrate the extent, nature and impact of negative media stereotyping and negative legal constructions on children, their advocates and their experiences of the youth justice system, of their community and the potential impact on their future prospects.

We recommend that the General Comment states the importance of ensuring that the identities of children in conflict with the law are protected, regardless of the seriousness of their offending and/or their age.

Gordon's research into the area of has spanned over a decade (2006; 2008; 2012; 2018) including detailed content analysis of 2456 news items, which demonstrated the overwhelmingly negative content of journalistic output in relation to children. The findings demonstrate that negative characterisations were commonly matched by calls for more punitive responses. Children and their advocates described the impact of labeling and demonization on children's wellbeing, safety, relationships, experiences within their community and on access to service provision. Fitz-Gibbon's research with legal practitioners in England and Wales documents the risks associated with publicly naming children in conflict with the law and the need to avoid 'naming and shaming' policies (Fitz-Gibbon and O'Brien 2016a). The research documents that pushes to 'name' children in conflict with the law, made under the guide of serving the public interest, are highly problematic and made at the expense of the court's domestic and international obligations to consider the welfare and best interests of the child.

Gordon's (2017) research also demonstrates the implications in relation to the publication of the details of children in conflict with the law in the UK. In the case of *JC & RT*, Lord Justice Leveson ruled, as in previous cases, that s.39 of *Children and Young Persons Act* 1933 (CYPA) orders expire when a child reaches 18 (R (JC & RT) v Central Criminal Court, [2014] EWHC 1041 (Admin); [2014] 2 Cr. App. R. 13). Therefore, in the UK when a child benefitting from an anonymity order reaches the age of 18, even when legal proceedings had potentially been concluded many years previously, their identity can be revealed. There is no mechanism, except for seeking a civil injunction, for a court to apply lifelong anonymity for a child even if they wished to do so.

We feel that reaching the age of 18 should not mean the end of youth justice protections, children's rights-based specialised measures and support available to those in conflict with the law. We argue that life-long anonymity should be granted to children and young people, with no exceptions and that this should apply to all forms of media and communications. Particularly in the digital age, we argue that the law and core rights-principles need to evolve to meet the changing dynamics, as well as ensure that long-term, damaging and permanent stigmatization of children does not occur, the impacts of which can follow them into adulthood.

In light of ongoing research (Gordon 2017; Gordon 2020 forthcoming), we also recommend that this General Comment integrates reference to the digital age and privacy rights of children, particularly as digital media and social media platforms can perpetuate and maintain violations of the rights of children alleged to be involved in anti-social behaviour and crime, particularly their rights to privacy.

We support the campaign in the UK led by the charity UNLOCK, who provide a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record. We support the automatic removal of the criminal records of children who committed an offence upon reaching the age of 18. As evidence demonstrates, criminal records can affect rehabilitation and can perpetuate continued stigmatization, labelling and can affect a person's future third level education and work prospects.

We assert that children's courts should be closed courts to the media and journalists should not identify any child involved in legal proceedings in their reporting. Green's (2008) comparative research of a UK and Scandinavian case study demonstrates that when children's identities are protected and they are not imprisoned, compared to 'naming and shaming' and incarceration, they are less likely to reoffend.

AWARENESS RAISING AND TRAINING

We agree that the States parties should conduct, promote and support educational and other campaigns to raise awareness of the need and the obligation to respond to children alleged of violating the law in accordance with the spirit and the letter of Convention on the Rights of the Child. Gordon's (2012, 2015) research made a number of recommendations in relation to education and training for journalists, children's advocates and practitioners, as well as children. Gordon's (2017) recent and ongoing research into children rights in the digital age has noted the UN should integrate references to the digital age and privacy rights of children in conflict with the law. As Gordon's research demonstrates, digital media and social media platforms can perpetuate and maintain violations of the rights of children alleged to be involved in anti-social behaviour and crime, particularly their rights to privacy. As collaborative research into the use of social media by paramilitary groups in Northern Ireland (Gordon and Reilly 2018) demonstrates, social media has been used both by such paramilitary groups to 'police' children and it has become a tool for organising campaigns against such violence, which targets and inflicts violence on child. We also argue that legislators, policymakers and media regulatory bodies need to keep up with advances in online and social media practices to proactively ensure that children's rights are protected and that remedies are sought where that are being breached (see further Gordon 2017).

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