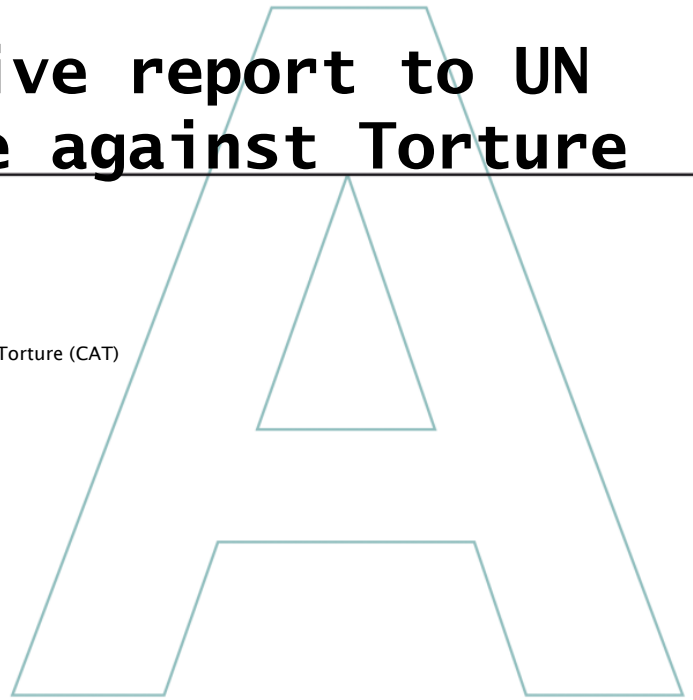


# Alternative report to UN Committee against Torture

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COMMISSIE Committee against Torture (CAT)



## Alternative report of the Flemish Office of the Children's Rights Commissioner to the UN Committee against Torture

Belgium submitted its fourth periodic report to the UN Committee against Torture on the 1<sup>st</sup> of October 2018. In this alternative report, the Flemish Office of the Children's Rights Commissioner zooms in, from a children's rights perspective, on the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Flanders and Belgium.

The Flemish Office of the Children's Rights Commissioner is established by decree as independent institutions. The Office was set up by the Flemish Parliament and ensures children's rights in Flanders.

The Flemish Office of the Children's Rights Commissioner is a children's ombudsman services.

- We pick up signals from children, young people, parents and professionals.
- We investigate complaints concerning violations of children's rights and based on the Convention.
- We provide advice to the Flemish or Belgian governments and parliaments.

Beside a children's ombudsman, the Flemish Office of the Children's Rights Commissioner also heads up the administrative office of the Supervisory Committee for youth detention centres and for institutions with a secured care setting. The Flemish Parliament has set up a

Supervisory Committee for youth detention centres in 2017. This Committee enables Parliament to properly monitor the places where minors live in a closed or secured setting, such as the Community Institutions: De Zande, De Kempen, De Grubbe, the private institutions: De Switch, JEZ 11, De Leemwinning, De Overstap, and the detentioncentre 'De Wijngaard' for persons under the age of 18 who are tried as adults.

The Supervisory Committee is made up of visiting officers who are volunteers and who visit the centres each month. As the chair of the Committee, the Children's Rights Commissioner heads up the Committee's administrative office, enabling the Committee to perform its assignment fully independently.

In this alternative report, we respond from a children's rights perspective, to some of the issues mentioned in the List of Issues Prior to Reporting (LoIPR). We zoom in on the efforts and shortcomings in the Flemish and Belgian legislation and policy towards minors and their rights, when deprived of their liberty. And we formulate recommendations that can feed the concluding remarks of the UN Committee for the Flemish and Belgian governments.

Our references are:

- The complaints we receive as children's ombudsman service from youngsters and adults.
- The observations made by the voluntary visiting officers of the Supervisory Committee.
- Our prior advice to the Flemish or Belgian governments and parliaments.

## All persons held in custody are provided with all the fundamental legal safeguards

### LoIPR 8

Further to the Committee's previous concluding observations (para. 11) and the State Party's follow-up thereto (CAT/C/BEL/CO/3/Add.1), please inform the Committee of any additional steps that ensure that all persons held in custody are provided with all the fundamental legal safeguards under the Convention from the very outset of their deprivation of liberty. More specifically, please elaborate on the measures taken with regard to the right to be informed in an appropriate language of the reasons for their detention; the right to have prompt access to a lawyer and to consult him or her immediately following their detention; the right to contact family members or other persons of their choice; and the right to have an independent medical examination performed without delay by a doctor of their choice.

### Right to a lawyer in all procedures?

The Belgian government has made efforts in recent years to enable minors to be assisted by a lawyer or a juvenile law lawyer as early on as their first Police interview. Minors are entitled to free legal assistance in all matters that come under youth care and juvenile delinquency law. Most Bars will assign minors a lawyer trained in juvenile law, even though this is not a statutory obligation yet.

#### Recommendations

- Make sure that youngsters are able to rely on legal assistance at all times, not just before the courts but also in practice.
- Make sure that youngsters are assisted by a trained juvenile law lawyer at all times.
- Remind the lawyers of the obligation to take into account what the children themselves have to say.

## Monitoring on a systematic basis

### LoIPR 11

In the light of the Committee's concluding observations (para. 12) and the State party's follow-up thereto, please provide information on the monitoring and inspections carried out on a systematic basis to ensure compliance with the obligation in line with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly Resolution 43/173, annex).

### A Supervisory Committee for youth detention centres in Flanders since 2017

We are happy to state that the Flemish Parliament has set up a Supervisory Committee for youth detention centres. This Committee enables Parliament to properly monitor the places where minors live in a closed or secured setting. The Committee is made up of visiting officers who are volunteers and who visit the centres each month. As the chair of the Committee, the Flemish Children's Rights Commissioner heads up the Committee's administrative office, enabling the Committee to perform its assignment fully independently.

### Monitoring on a systematic basis by voluntary visiting officers of the Supervisory Committee

The Supervisory Committee monitors the Community Institutions: De Zande, De Kempen, De Grubbe, the private institutions: De Switch, JEZ 11, De Leemwinning, De Overstap, and the Flemish detentioncentre 'De Wijngaard' for persons under the age of 18 who are tried as adults.

Community institutions cater for 314 young people. The age of the youngsters ranges from 12 to 18 years. In addition, they can accommodate 40 young people for time-outs. The four private institutions have a total of 35 youngsters. The Flemish detention centre 'De Wijgaard' caters for 15 young people who are tried as adults and for 6 youngsters who are waiting for their trial as adult

### **Observations and recommendations made by the Supervisory Committee in 2019<sup>1</sup>**

All institutions have their own individuality. Of course, they all pursue the same objective and welcome young people who have been placed there by the juvenile court. The institutions offer pedagogical assistance to young people in need of temporary shelter in a structuring and a freedom-restricting framework.

There are differences between the community institutions in terms of how they work in practice.

Over the last few years, the voluntary visiting officers noted a number of positive developments. For example, the institutions have started working on the recommendations made by the Supervisory Committee in its first annual report.

More attention has been paid to:

- Positive living environment with a focus on the personal growth of young people
- Basic attitude of youthworkers aimed at this purpose
- The reception phase with de facto isolation upon arrival in the institution and phone moments have been adjusted in some institutions

On the other hand, the voluntary visiting officers still identified several bottlenecks.

#### **Bottleneck 1: challenges caused by large differences between the youngsters**

There are big differences between the youngsters held in custody. Both in terms of difference in age, intellectual, psychological and socio-emotional development, as in terms of the care needs of the young people.

##### Recommendations

- Continue to invest in staff support and training

#### **Bottleneck 2: youngsters with complex mental problems in community institutions**

Due to a lack of places in child psychiatry, youngsters with complex mental and behavioural problems often end up in adult psychiatry or, if they are sanctioned, they are put into Community run detention centres.

##### Recommendations

- A multidisciplinary approach and more collaboration with other institutions, such as education and mental health, is needed

#### **Bottleneck 3: need for clarity about rules and sanctions**

Daily life in the community institutions is very structured. The excess of rules and agreements leads to confusion and frustration. Young people tell the

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<sup>1</sup> Commissie van Toezicht voor jeugdinstituten, *Jaarverslag 2019*, Open venster op gesloten en besloten jeugdinstituten, <https://www.cvtj.be/jaarverslagen>, [https://www.kinderrechtencommissariaat.be/sites/default/files/bestanden/jaarverslag\\_cvtj\\_2019\\_def\\_lr\\_def.pdf](https://www.kinderrechtencommissariaat.be/sites/default/files/bestanden/jaarverslag_cvtj_2019_def_lr_def.pdf)

voluntary visiting officers that the atmosphere in the community is better if educators dare to let go of the strictness. Youngsters tell the voluntary visiting officers that too many rules are leading to sanctions.

#### Recommendations

- Limit oneself to a set of basic rules that are really needed
- Giving young people a say in the rules
- The system of reward or sanction must be clear
- Need for clarity about duration of sanction, and reason
- Sometimes sanctions are used to maintain order instead of creating a learning moment

#### **Bottleneck 4: the double use of isolation cell**

In some institutions the voluntary visiting officers still see the double use of the isolation cell. On the one hand as protection, on the other hand as a sanction.

#### Recommendations

- Need for clarity about the use of isolation cell

#### **Bottleneck 5: use of handcuffs leave severe impressions**

The use of handcuffs around the wrists and ankles leaves a strong impression on the youngsters.

#### Recommendations

- Do not handcuff every young person by definition, but try to use a risk assessment to see if the use of handcuffs is necessary.

#### **Bottleneck 6: need for consultation between police and institutions**

The police intervenes in community institutions when situations escalate to such an extent that employees can no longer guarantee safety, or when there is a large-scale drug control in the institution itself. Sometimes these interventions go well, sometimes with a lot of tension.

#### Recommendations

- There has to be a better consultation between the institution and the police district concerned

#### **Bottleneck 7: de facto isolation upon arrival is still a practice in some institutions**

In some institutions the voluntary visiting officers still see that youngsters are put in isolation for a certain length of time upon arrival as a matter of routine. According to the institutions, this enables the young person to reflect and enables them to inform youngsters of the internal rules of procedure and customs of the institution, to chart the identity and the social context of the youngsters and to build a safe working relationship between the youngster and the institution.

#### Recommendations

- The long reception phase with de facto isolation upon arrival has to be abolished in all institutions because the Supervisory Committee sees that this is harmful for the young persons entering the institution.

## **Need of monitoring by the Care inspectorate that children are not subjected to unduly protracted time-out**

At the impetus of the Care Inspectorate, Community institutions in Flanders have continued to work up a policy on solitary confinement in recent years. A good thing.

For years, Flanders has seen the practice of time-outs, which allows for youngsters from a private institution to be transferred to a Community institution for a fortnight – a move which may be extended once. This solitary confinement extra muros too merits the attention of the Care Inspectorate. The Flemish Office of the Children's Rights Commissioner is receiving reports that youngsters are made to spend time in time-out for longer than permitted, for instance because the facilities refuse to readmit the youngsters.

### Recommendations

The Care Inspectorate needs to scrutinise time-outs in the Community institutions more closely.

## **Minors in Police cells**

The Flemish Office of the Children's Rights Commissioner receives reports about youngsters who are locked up in Police cells.

This is permitted by law in case of serious offences, pending the offenders' appearance before the Youth Court judge. Nonetheless, we are seeing young offenders being placed in cells that are less clearly enshrined in statute law. Sometimes youngsters end up in Police cells, because they are no longer welcome at the youth care facility after an incident or an escape. Or judges may impose placement in a cell because no places are available at a youth care facility or in crisis situations where there are no places in a crisis shelter.

### Recommendations

- Make sure there is enough cooperation between the Youth Courts, youth care and child psychiatry to prevent youngsters being locked up in Police cells.
- Prohibit the confinement of young people in police cells if they have not committed an offense.

## **Improve infrastructure of prisons**

### **LoIPR 29.**

With regard to the Committee's previous concluding observations (para. 15), please provide information on the measures taken to ensure that detention conditions in all places of deprivation of liberty are in conformity with the Standard Minimum Rules for the Treatment of Prisoners,<sup>9</sup> in particular with regard to the steps taken: (a) To alleviate overcrowding in prisons and all places of detention by, in particular, making use of non-custodial measures as provided for in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules); (b) To improve the infrastructure of prisons and all places of detention and to ensure that conditions of detention in the State party do not breed violence among prisoners; (c) To separate the different categories of prisoners and to ensure that remand prisoners are separated from convicts and minors are separated from adults (see A/HRC/18/3, para. 44); (d) To improve working conditions for prison staff and to ensure a level of service in prisons that would ensure that prisoners' fundamental rights are respected, even in the event of a strike.

## Referrals of juvenile delinquents to adult courts are made to occur in undignified buildings

Since 2009, youngsters who have been referred to an adult court are locked up at the detention centre in Tongeren, a former prison for adults which was closed down as it was no longer fit for purpose. In spite of the efforts of management and staff, the infrastructure does not offer sufficient scope to ensure crucial legal guarantees. For one thing, there is no space to develop residential community groups.

### Recommendations

- Close down the 'De Wijngaard' detention centre in Tongeren. Detention centres that are unsuited for adults are even less so for youngsters.

## Detention of asylum seekers

### LoIPR 33.

Further to the Committee's recommendation in its previous concluding observations (para. 21), please provide information on the application of the Dublin II Regulation, and on the steps taken by the State party to ensure that the detention of asylum seekers is used only as a last resort and for as short a time as possible and without excessive restrictions. Please provide information on the arrangements that the State Party has established and used as an alternative to detention for asylum seekers?

## No detention of children because of parents' migration status

Apart from the practice of detaining families with underaged children for a maximum of 48 hours or shorter, as needed to organize a repatriation flight, since 2008 Belgium did not put expelled foreign families with underaged children in closed detention centres. A Belgian law dating from November 16th, 2011 defined such detention practices as exceptions to the general rule by stating that expelled foreign families with underaged children 'principally' cannot be detained in a closed detention centre in view of their repatriation, unless (a) the place of detention is adapted to the needs of families with minor children, (b) the detention is restricted to a short time, (c) a family member has trespassed one or more terms of agreement between the family and Foreign Office with regard to the return trajectory, showing unwillingness to cooperate and (d) as a measure of last resort.

Since a Royal Decree of July 22<sup>nd</sup>, 2018 changed a number of operating rules for detention centres, from August 11<sup>th</sup>, 2018 on detention of expelled foreign families with underaged children became legally possible for a period of twice two weeks. Between August 13<sup>th</sup>, 2018 and April 4<sup>th</sup>, 2019 a total of eight families with children were held in detention for longer than one night in one of the five 'family units' on the campus of the closed detention centre for expelled foreign adults, located near Brussels Airport. Among the twenty minors belonging to those eight families were at least eleven children under the age of 8. For at least two families the maximum term of 28 days was exceeded.

A judgement by the Council of State, dated April 4<sup>th</sup>, 2019 temporarily ended this practice

'because the provisions [in the Royal Decree] do not exclude the detention of young children in places where they could be exposed to very high levels of noise from the nearby airport, while detention could last up to a month'.



So far, the actual Belgian Government took no steps to make another location ready for the detention of foreign families with minor children. However, we are still concerned about the legal possibility of such detention since putting it back into practice appears to be only a matter of finding a more suitable location. In addition, in the nearly seven months the Royal Decree was put in to practice, among other things it became clear that (1) detention in a closed family unit was not only used as measure of last resort, (2) the selection of the families raised doubts on how the criterion of 'being unwilling to cooperate with their repatriation' was applied, (3) the impact of the detention on the children's health and wellbeing was not assessed impartially by an independent body, (4) the way the transfer to the detention centre was organized was in certain cases quite traumatizing for the children, and (5) in the whole procedure there appeared to be lack of independent assessment of the best interest of the concerned children.

#### Recommendation

Since detention of underaged children for reasons of their parents' migration status can never be in the best interest of the child, even not if the material conditions of the detention location would 'meet the needs of families with underaged children, the legal possibility of such detention should be removed from Belgian law. If such a legal possibility is kept, the conditions of its application should be monitored independently by an external body, not resorting under Foreign Office nor the Ministry of Internal Affairs.

## Juvenile Justice

#### **LoIPR 34.**

With regard to the Committee's previous concluding observations (para. 25), please provide detailed information on the steps taken to establish a system of juvenile justice that fully conforms to the provisions of the Convention on the Rights of the Child, in law and in practice, and to ensure that persons under the age of 18 are not tried as adults.

The Flemish Community has been working on new regulations for minors who committed an offence qualified as a crime. The new regulation addresses a number of aspects of article 40 of the Convention on the rights of the child.

- The Flemish authority continues to work towards specific regulations and a distinct approach to offensive behaviour by minors.
- The minor's legal certainty is strengthened by setting clear boundaries in respect of the measures and sanctions imposed.
- In each phase of the judicial procedure, the youngster can rely on the assistance of a lawyer.
- Dedicated services and facilities are to be put in place to guide and protect the youngsters.
- Attention is made to go out to extrajudicial and judicial responses.
- Flanders is prioritising restorative consultation.

On the other hand the new Flemish regulation is clearly found wanting in a number of respects.

#### Recommendations

- The Public Prosecutor has a range of powers to respond to the delinquent behaviour of minors. In doing so, the legislator is looking to provide a wider framework for possible extrajudicial responses. Nonetheless the legislator is walking a thin line when it comes to the presumption of innocence (and other principles of fair trial). The Public Prosecution's office will be able to impose conditions and propose measures without proof of guilt. The Youth



Court judges too will be able to impose measures on youngsters whilst the investigation is still ongoing

- The legal position of minors is not sufficiently articulated. Minors who committed an offence qualified as a crime currently need to scout out their legal guarantees in various decrees, Federal regulations and statutory Acts for adults. The new regulations allow for mental health care for minors with a mental illness to be delivered in a detention setting. There is a lack of rules that respect the rights of these youngsters and of plans that render explicit the implementation of the care delivered in a detention setting.
- We deplore long-term guidance delivered in a detention setting for minors. From now on, under exceptional circumstances, 12-year-olds may be imposed guidance in a Community run detention centre for a period of two years, 14-year-olds for a period of five years and 16-year-olds for a period of seven years.
- In theory, minors with a mental illness can spend up to eleven years in a detention care setting under the new Flemish regulations.

## Ensure persons under the age of 18 are not tried as adults

### LoIPR 34.

With regard to the Committee's previous concluding observations (para. 25), please provide detailed information on the steps taken to establish a system of juvenile justice that fully conforms to the provisions of the Convention on the Rights of the Child, in law and in practice, and **to ensure that persons under the age of 18 are not tried as adults.**

## Referrals of juvenile delinquents to adult courts remains in place

The new regulation do not repeal the system of referrals of juvenile delinquents to adult courts. On each of the three occasions Belgium submitted a country report with the UN Committee on the Rights of the Child, the Committee commented that the referral of a juvenile delinquent to an adult court is incompatible with the Convention on the Rights of the Child.

### Recommendations

- The General Comment no. 10 of the UN Committee on the Rights of the Child argues in favour of a 'comprehensive juvenile justice policy'. The juvenile justice system is to be applied to all youngsters up to 18 years of age, without exception.

## Corporal punishment

### LoIPR 41.

Further to the Committee's recommendation in its previous concluding observations (para. 27), please indicate which actions and measures have been taken to expressly prohibit corporal punishment of children in all settings, and, as a matter of priority, in the family and non-institutional childcare settings.<sup>17</sup> In addition, please provide information on allocation of resources, legislative measures, advocacy campaigns and training of officials, law enforcement officers and medical personnel to combat corporal punishment of children.

In Belgium, corporal punishment of children is unlawful in schools, the penal system and some alternative care settings, but it is not prohibited in the home,

despite previous recommendations of the Committee Against Torture and the Committee on the rights of the Child.

Recommendations

Concluding observations 22 of the Committee on the Rights of the Child on the combined fifth and sixth periodic reports of Belgium:

Noting that, in Flanders, the Act on the status of minors in youth care (2004) already explicitly prohibits corporal punishment in alternative care, the Committee regrets that the bill to amend article 371/1 of the Civil Code has not been approved, and with reference to its general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, it reiterates its previous recommendation (CRC/C/BEL/CO/3-4, para. 40) and urges the State party:

- (a) To explicitly prohibit corporal punishment, however light, by law, at home and in alternative care throughout the country;
- (b) To promote positive, non-violent and participatory forms of childrearing and discipline, including by means of awareness-raising programmes and campaigns, targeting children, parents and childcare professionals.