

## **Incarceration of children considered beyond parental control**

### **Violations by Jamaica of**

**Articles 2(1) and 26 (non-discrimination)**

**Article 9 (liberty)**

**Article 14 (fair trial rights)**

**Article 24 (measures of protection for children)**

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**Submitted for consideration at the 116<sup>th</sup> Session of the  
Human Rights Committee  
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**Submitted by:**

**Faculty of Law, the University of the West Indies, Mona Campus, Jamaica, and  
Center for International Human Rights, Northwestern University Pritzker School of Law.**

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## **I. Introduction and Summary**

Section 24 of Jamaica's Child Care and Protection Act ("CCPA")<sup>1</sup> permits the incarceration of children considered to be beyond parental control. Nowhere in the law is there any specification of the acts or behaviours that a child must commit to warrant incarceration. Children can be, and have been, incarcerated under CCPA § 24 for conduct that would not be considered criminal if committed by an adult. The proceedings that lead to possible incarceration generally have been marked by an absence of basic fair trial procedures, such as representation by counsel and a meaningful opportunity to prepare and present a defence. Children incarcerated under § 24 are detained in the same detention centres as children convicted of criminal offences, and detention can continue for years, until the child reaches the age of 18. Most if not all of the children incarcerated for being beyond parental control have past histories of sexual or other abuse, mental illness, or both. There is a gender dimension to this issue, as "the overwhelming majority of the children who are deemed 'uncontrollable' are girls."<sup>2</sup> These children need a therapeutic rather than a penal response.

Dire as this situation has been, there are reasons to be optimistic. While CCPA § 24 is extremely problematic, other sections of the CCPA reflect Jamaica's efforts to bring its juvenile justice and child protection systems into compliance with its international human rights obligations. Jamaica has also, in recent years, taken steps to improve its treatment of incarcerated children. Following the July 2013 entry by the Inter-American Commission on Human Rights of

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<sup>1</sup> Child Care and Protection Act, *available at*

<http://moj.gov.jm/sites/default/files/laws/Child%20Care%20and%20Protection%20Act.pdf> [hereinafter CCPA].

<sup>2</sup> Office of the Children's Advocate, "Focusing on the Uncontrollable Child," Recommendations to the Houses of Parliament (March 2013), at 3, *available at* <http://www.welcome.oca.gov.jm/resources/> [hereinafter OCA Recommendations].

precautionary measures in favor of girls in Jamaica detained in an adult correctional centre,<sup>3</sup> Jamaica has put an end to its practice of housing children – including those incarcerated for being beyond parental control – in adult correctional centres.<sup>4</sup> Educational services for children incarcerated in juvenile correctional centres have, in some if not all centres, been significantly improved.<sup>5</sup>

Of particular significance to the issues raised in this report, in August 2013 Jamaica’s Cabinet<sup>6</sup> approved an amendment to CCPA § 24 that would remove the possibility of incarcerating a child on the ground of being beyond parental control.<sup>7</sup> If enacted into law, this will be a major step forward.

Unfortunately, although more than two years have gone by since the August 2013 announcement of Cabinet approval of this amendment, the law remains unchanged. Before a proposal approved by the Cabinet can become law, draft legislation must be prepared and submitted to Parliament. The bill then must go through three readings and a committee stage in each of Jamaica’s two Houses of Parliament, and must receive the formal assent of the Governor-General.<sup>8</sup> Regrettably, none of these steps has yet been taken toward enacting the proposal approved by the Cabinet into law.<sup>9</sup>

Nevertheless, the Cabinet’s approval of this proposal has already had some salutary effects. In the spirit of the proposed amendment, some judges who hear § 24 proceedings have become more protective of the rights of the children in these proceedings and more likely to suggest therapeutic responses instead of ordering the child’s incarceration.<sup>10</sup> While this shift in judicial practice is to be commended, it is dependent on the discretion of the particular judge. As long as CCPA § 24 remains the law, courts have the power to incarcerate children for being beyond parental control, and some courts have continued to use that power.<sup>11</sup>

This Committee’s upcoming review of Jamaica’s compliance with its Covenant obligations provides an opportunity for the Committee to urge Jamaica to follow through on its intention, announced more than two years ago, to prohibit the incarceration of children for maladaptive behaviours that would not be criminal if committed by an adult. We therefore would urge the Committee to include the following questions in its List of Issues for Jamaica:

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<sup>3</sup> Inter-American Commission on Human Rights, Annual Report 2013, at ¶ 29, *available at* <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap2-MC.pdf>.

<sup>4</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>5</sup> *Id.*

<sup>6</sup> According to the Government of Jamaica’s website, the Cabinet is “the highest decision making body in the Executive which is charged by the Constitution with the general direction and control of the Government and is the principal instrument of policy.” *See* <http://www.cabinet.gov.jm/cabinet>.

<sup>7</sup> Pride News Magazine, “Jamaica Government Gives Green Light to Amendments to Child Care and Protection Act,” 21 Aug. 2013, *available at* <http://pridenews.ca/2013/08/21/jamaica-government-gives-green-light-to-amendments-to-child-care-and-protection-act/>; Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>8</sup> Jamaica Information Service, “The Legislature, How a Bill Becomes Law,” *available at* <http://jis.gov.jm/government/the-legislature/>.

<sup>9</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

1. When will Jamaica enact into law an amendment to the Child Care and Protection Act that prohibits the incarceration of children on the ground of being beyond parental control and that requires a therapeutic rather than a penal response to children with behavioural issues?
2. How many girls, and how many boys, are currently incarcerated as a result of “correctional orders” (*i.e.*, orders that the child be incarcerated<sup>12</sup>) under CCPA § 24?
3. In how many cases during 2014 and 2015 have courts issued correctional orders under CCPA § 24? Please provide these figures separately for boys and girls.
4. How many of the children placed under correctional orders in 2014 and 2015 were represented by counsel during the § 24 proceedings, and how many were not represented by counsel?

## **II. Section 24 of the Child Care and Protection Act**

### **A. The provisions of CCPA § 24**

Section 24 of the Child Care and Protection Act permits a court to incarcerate a child for the ambiguous offence of being beyond parental control. It reads as follows:

“(1) The parent or guardian of a child may bring the child before a juvenile court and where such parent or guardian proves to the court that he is unable to control the child, the court may make an order in respect of the child if satisfied --

(a) that it is expedient so to deal with the child; and

(b) that the parent or guardian understands the results which will follow from, and consents to the making of, the order.

(2) An order under subsection (1) may –

(a) be a correctional order; or

(b) provide for the child-

(i) to be committed to the care of any fit person, whether a relative or not, who is willing to undertake the care of the child; or

(ii) to be placed for a specified period, not exceeding three years, under the supervision of a probation and after-care officer, a children's officer or of some other person to be selected for the purpose by the Minister.”<sup>13</sup>

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<sup>12</sup> CCPA, *supra* note 1, § 2(1) (definitions).

<sup>13</sup> *Id.*, § 24.

Thus, under CCPA § 24, parents or guardians may bring a child to court if they believe that they are “unable to control the child.”<sup>14</sup> If the court accepts this claim, it may issue one of three types of orders. One of the three is a “correctional order,”<sup>15</sup> which is an order for the child’s incarceration in a juvenile correctional centre.<sup>16</sup> Such an order can incarcerate the child for any period of time up until the child attains the age of 18.<sup>17</sup>

Once the court accepts the claim that the child is beyond the parents’ or guardians’ control, the only prerequisites for ordering the child’s incarceration are that the court must consider it “expedient,” and the parents or guardians must understand and consent to the order.<sup>18</sup> Section 24 provides no guidance whatsoever as to what factors would make incarceration of a child “expedient.”

## **B. Practice under CCPA § 24**

Proceedings under § 24 typically begin with a parent going to the police for help in controlling a child. Initially, the parent may only want the police to scare the child into behaving, and the police may give the child a warning. But if the child’s problematic behaviour continues, the police or the parents may take the child to court for proceedings under § 24.<sup>19</sup>

Although the law requires the parent’s (or guardian’s) informed consent before an order can be made to incarcerate the child, in practice, such consent is sometimes lacking.<sup>20</sup> Sometimes the parents are not even present in court,<sup>21</sup> and other times parents later say that they received no explanation of what a correctional order would entail.<sup>22</sup> For example, parents have thought their child would be sent to a short-term “boot camp” style program, and only learned afterwards that the child had been sentenced to a long term of years in one of the same correctional centres that house children convicted of serious crimes.<sup>23</sup>

On other occasions, proceedings under § 24 are begun not by a parent but by Jamaica’s Child Development Agency (“CDA”).<sup>24</sup> Under other sections of the CCPA, children found to be “in need of care and protection” can be placed in a “Children’s Home” under the custody of the CDA.<sup>25</sup> When such children exhibit behavioural problems, CDA staff have initiated proceedings under § 24 to have the child removed from the Children’s Home and placed in a correctional

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*, § 2(1).

<sup>17</sup> *Id.*, § 81(4).

<sup>18</sup> *Id.*, § 24.

<sup>19</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015; Interview with Debian Livingston Edwards, Legal/Policy Officer, Office of the Children’s Advocate, 30 Oct. 2015.

<sup>20</sup> *Id.*; Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015; Interview with Debian Livingston Edwards, Legal/Policy Officer, Office of the Children’s Advocate, 30 Oct. 2015.

<sup>21</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015; Interview with Sharian Hanson, former Senior Legal/Policy Officer (2011-2014), Office of the Children’s Advocate, 30 Oct. 2015.

<sup>22</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> OCA Recommendations, *supra* note 2, at 8 n. 1; CCPA, *supra* note 1.

centre.<sup>26</sup> Child rights advocates have noted that this is contrary to the intent of the law, which was intended to assist parents who feel overwhelmed by the difficulty of raising a child who exhibits behavioural problems.<sup>27</sup>

Section 24 says nothing about which acts or behaviours can justify the determination that a child is beyond parental control. Lacking any statutory guidance, courts have incarcerated children as beyond control for behaviours that include the following: missing school, running away, using marijuana or alcohol, staying out late at night, partying without approval, getting into fights, being uncooperative in the home and not doing chores, attacking parents or siblings verbally or physically, hanging out with gangs or known criminals, gambling, and cursing.<sup>28</sup>

Children receive long sentences for these transgressions. According to a 2013 report by Jamaica's Office of the Children's Advocate, most § 24 correctional orders sentence the child for the longest period of time permitted by the law – that is, up to the child's 18<sup>th</sup> birthday.<sup>29</sup>

### **III. The children who have been incarcerated for being deemed beyond control**

For many if not all of the children incarcerated under § 24, the behaviours that led to their incarceration stemmed from past trauma and mental health problems.<sup>30</sup>

One tragic example is the case of Vanessa Wint. As a pre-teen, Vanessa was sexually abused, repeatedly, by a man who lived in the same building as Vanessa's family. The man told Vanessa that he would kill her parents if she told anyone. In response, Vanessa skipped school and ran away from home, leading her mother to take her to court as uncontrollable. Vanessa was sentenced to three years in a correctional centre. When she was returned to her parents three years later, she ran away again, leading to the entry of another correctional order. On 22 November 2012, Vanessa used a bedsheet to hang herself in her cell. She was 16 years old at the time of her death.<sup>31</sup>

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<sup>26</sup> Interview with Diahann Gordon Harrison, Children's Advocate of Jamaica, 30 Oct. 2015.

<sup>27</sup> OCA Recommendations, *supra* note 2, at 8 n. 1; Interview with Diahann Gordon Harrison, Children's Advocate of Jamaica, 30 Oct. 2015.

<sup>28</sup> *Id.*; Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015; Interview with Margarete Macaulay, children's rights advocate, former Judge of the Inter-American Court of Human Rights, and (as of 1 January 2016) Commissioner of the Inter-American Commission on Human Rights, 10 Nov. 2015; Interview with Sharian Hanson, former Senior Legal/Policy Officer (2011-2014), Office of the Children's Advocate, 30 Oct. 2015; Shannon Hendricks, "Uncontrollable Children": An Assessment of Jamaica's Treatment of Status Offences (unpublished paper, 2014) (Ms. Hendricks served as a Legal/Policy Officer at the Office of the Children's Advocate from 2011 to 2013) [hereinafter Hendricks, 'Uncontrollable Children'].

<sup>29</sup> OCA Recommendations, *supra* note 2, at 9.

<sup>30</sup> Interview with Diahann Gordon Harrison, Children's Advocate of Jamaica, 30 Oct. 2015; Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015; OCA Recommendations, *supra* note 2, at 16.

<sup>31</sup> Hendricks, 'Uncontrollable Children,' *supra* note 28, at 22-23; Stabroek News, "Jamaica teen who hung herself in remand centre was tormented by fear," 23 Nov. 2012, available at <http://www.stabroeknews.com/2012/archives/11/23/jamaica-teen-who-hung-herself-in-remand-centre-was-tormented-by-fear/>.

Vanessa's story is not the only tragic one. A snapshot of the lives of these children can be seen from a series of interviews conducted in 2013 by Jamaica's Office of the Children's Advocate ("OCA")<sup>32</sup> with girls incarcerated in a particular correctional facility. The OCA attempted to interview all seventeen girls at that facility, but three could not be interviewed because they were hospitalized for overdosing on anti-depressants. Of the fourteen girls interviewed, twelve were incarcerated solely for uncontrollable behaviour.<sup>33</sup>

Ten of the fourteen girls had a history of rape or other sexual abuse.<sup>34</sup> Seven had experienced physical abuse.<sup>35</sup> One girl was raped by her father when she was 9, and raped again by strangers when she was 14. Her mother's response was to introduce the girl, at the age of 9, to drinking alcohol daily as a way to cope. Another girl was raped at ages 8 and 9 by her foster father's brother; when she reported the rapes to her biological mother, her mother beat her. A third girl was raped at age 11 by a stranger. Her mother's failure to be very supportive plunged her into depression, and she turned to daily use of alcohol and marijuana to ease the pain.<sup>36</sup>

Based on these interviews, the OCA concluded,

“[T]he majority, if not all of the girls, experienced some episode of trauma prior to being placed on correctional orders by the court. Invariably, these traumatic experiences went unreported or untreated, either totally or in part. Acting out, truancy, drug and alcohol use are common responses to trauma. . . .

The maladaptive behaviour that they have been associated with which has caused them to be deemed 'uncontrollable' and placed on correctional orders, is often times a manifestation of the symptoms of the underlying problem(s).<sup>37</sup>

As these findings illustrate, the children who are incarcerated under § 24 need a therapeutic rather than a penal response from the State.

#### **IV. Violations of Covenant Rights**

##### **A. Incarceration for conduct not specified by law (Liberty, Article 9)**

The incarceration of children on the ground that they are beyond parental control constitutes an arbitrary deprivation of these children's liberty, in violation of Article 9.

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<sup>32</sup> Jamaica's Office of the Children's Advocate was established by the CCPA “[f]or the purpose of protecting and enforcing the rights of children.” CCPA, *supra* note 1, § 4(1).

<sup>33</sup> OCA Recommendations, *supra* note 2, at 4, 10.

<sup>34</sup> *Id.* at 10.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 12-13.

<sup>37</sup> *Id.* at 16.

Under Art. 9(1), “[n]o one shall be deprived of his liberty except on such grounds . . . as are established by law.”<sup>38</sup> As this Committee has recognized, this requires that “[a]ny substantive grounds for . . . detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”<sup>39</sup>

CCPA § 24 fails to provide any specification whatsoever of the conduct on which a judge may rely to determine that a child is beyond parental control.<sup>40</sup> Jamaican child rights advocates have stated bluntly that there exists no definition of “uncontrollable.”<sup>41</sup>

Incarceration under CCPA § 24 is arbitrary for the additional reasons, discussed below, that it discriminates on the basis of age, it is imposed without the most basic fair trial guarantees, and it ignores the requirements that children should only be deprived of liberty as a last resort and that their best interests must be a primary consideration.<sup>42</sup>

## **B. Incarceration of children for conduct that would not lead to incarceration of an adult (Non-Discrimination, Articles 2(1) and 26)**

Only children can be incarcerated for being beyond parental control. In situations “where an adult exhibits maladaptive behaviour and persons who live with him or her are frustrated by the behaviour, they certainly do not have the option to obtain a court order that will . . . place such an adult in a correctional facility.”<sup>43</sup>

The Committee on the Rights of the Child, in its General Comment No. 10, recommends that States “abolish the provisions on status offences” – i.e., acts that “are not considered to be criminal if committed by adults” – “in order to establish an equal treatment under the law for children and adults.”<sup>44</sup> The United Nations Guidelines for the Prevention of Juvenile

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<sup>38</sup> International Covenant on Civil and Political Rights, art. 9(1), *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter Covenant].

<sup>39</sup> Human Rights Committee, General Comment 35, Liberty and security of person, ¶ 22, U.N. Doc. CCPR/C/GC/35 (2014) [hereinafter General Comment 35].

<sup>40</sup> This was noted as a matter of concern during Jamaica’s 2011 State review. Human Rights Committee, Summary of record of the 2839<sup>th</sup> meeting held on 20 Oct. 2011, ¶ 34, CCPR/C/SR.2839, *available at* <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhs0BTKouDPNIMXWAuPwondF%2fHMPSWgsTI0h02iEdQoNXbrT81rvLF6wjhOlmBpQ2nEF2ONqut7ZWqugr1z%2b21wkP5VGOgVsNTMcgZWMIm5t>. Mr. Krister Thelin “noted with concern that the Child Care and Protection Act of 2004 allowed for the detention of minors who were considered “uncontrollable”. He sought clarification concerning the criteria and procedure under which the “uncontrollable” character of minors was established and concerning the guarantees provided by law to prevent abuse.” *Id.* In response, the Jamaican delegation indicated that it would provide “the definition of ‘uncontrollable’ children or, otherwise, the relevant case law” at a later date. *Id.*, ¶ 54. Regrettably, it does not appear that this information was provided in the follow-up documents received from Jamaica and posted on the Committee’s website.

<sup>41</sup> Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015; Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>42</sup> *See* General Comment 35, *supra* note 39, ¶ 17 (“detention on discriminatory grounds . . . is also in principle arbitrary”), ¶ 17 (“[i]mprisonment after a manifestly unfair trial is arbitrary”), and ¶¶ 18, 24 (referring to “last resort” and “best interests” requirements).

<sup>43</sup> OCA Recommendations, *supra* note 2, at 9.

<sup>44</sup> Committee on the Rights of the Child, General Comment 10, Children’s rights in juvenile justice, ¶ 8, U.N. Doc. CRC/C/GC/10 (2007).



Delinquency (Riyadh Guidelines) are in accord: “In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.”<sup>45</sup>

By allowing the incarceration of children for conduct that would not lead to incarceration if committed by an adult, CCPA § 24 violates the Article 2(1) and 26 guarantees of non-discrimination and equality.

### **C. Violation of fair trial rights (Article 14)**

The proceedings that lead to a § 24 correctional order deprive the child of the most basic fair trial guarantees and thus violate Jamaica’s obligations under Covenant Article 14. In particular, children appearing in these proceedings generally have not been represented by counsel, and they generally have not had a reasonable opportunity to be heard in their own defence.

#### *Right to counsel*

CCPA §§ 71(8) and 71(9) provide children with the right to counsel, and Jamaican children’s rights advocates observe that these provisions should apply to children in § 24 proceedings. Section 71(8) states that whenever a child is brought before a court, the court must explain in the simplest possible language that the child has a right to the assistance of the Children’s Advocate.<sup>46</sup> Section 71(9) states that whenever a child is “charged . . . with any offence and does not have legal representation,” the court must follow the requirements of CCPA § 4(3) to obtain counsel for the child.<sup>47</sup>

As a matter of practice, however, courts did not apply these provisions in § 24 proceedings. When a child has been charged with a crime, courts generally have followed these provisions to ensure the right to counsel. But because being beyond parental control has been viewed not as a crime but as a quasi-civil offence – notwithstanding the criminal punishment of incarceration – courts have not in the past implemented §§ 71(8) and 71(9) in § 24 proceedings.<sup>48</sup> On rare occasions, children in § 24 proceedings have received legal assistance through the Office of the Children’s Advocate, but these have been the exceptional cases, not the rule, due to severe resource limitations at the OCA.<sup>49</sup>

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<sup>45</sup> U.N. Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), ¶ 56, adopted by G.A. Resolution 45/112 (14 Dec. 1990), *available at* <http://uncrcpc.org.cy/assets/images/Documentation/Docs/UnitedNationsGuidelinesforthePreventionofJuvenileDelinquency.pdf>.

<sup>46</sup> CCPA, *supra* note 1, at §§ 71(8).

<sup>47</sup> *Id.*, § 71(9).

<sup>48</sup> Hendricks, ‘Uncontrollable Children,’ *supra* note 28, at 30; Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015; Interview with Sharian Hanson, former Senior Legal/Policy Officer (2011-2014), Office of the Children’s Advocate, 30 Oct. 2015.

<sup>49</sup> Correspondence from Shannon Hendricks, former Legal/Policy Officer at the Office of the Children’s Advocate, 17 Dec. 2015. The OCA is based in Kingston, and has only three attorneys serving the entire nation. These attorneys’ time is further limited by the fact that they have many responsibilities other than Section § 24 proceedings. *Id.*; Interview with Sharian Hanson, former Senior Legal/Policy Officer (2011-2014), Office of the Children’s Advocate, 30 Oct. 2015.

In August 2013, Jamaica's Ministry of Justice announced that "[t]he Legal Aid Council has decided to make legal aid available to children . . . brought before the court on the ground that their parent/guardian is unable to control them."<sup>50</sup> The Ministry of Justice acknowledged that, up to then, counsel had not been provided:

"The Legal Aid Council has long provided legal representation for children under 18 years old who are charged with criminal offences. However, this was not previously extended to children who are brought to court under the Child Care and Protection Act on the ground that their parent/guardian is unable to control them, where no criminal offence is alleged."<sup>51</sup>

Regrettably, serious questions remain as to whether, in practice, all children in § 24 proceedings are now represented by counsel. The Legal Aid Council, a State entity which depends on private attorneys who volunteer to take cases for relatively low set fees, has significant resource limitations,<sup>52</sup> and the danger is substantial that it will prioritize criminal matters over § 24 proceedings. It also remains up to the individual judge to ensure that a child in a § 24 proceeding obtains counsel. Doubts have been expressed as to whether this is consistently being done, particularly outside of Kingston.

For this reason, we would urge the Human Rights Committee to request, as part of the List of Issues, detailed information on the number of children placed under correctional orders in 2014 and 2015 who were represented by counsel during the § 24 proceedings, and the number of such children who were not represented by counsel.

#### *Right to be heard and to present a defence*

Children who lack counsel have no meaningful opportunity to be heard or to present a defence in § 24 proceedings. Although these proceedings can result in the child being incarcerated for years, there is no real trial. The parents or guardians explain to the court why they believe the child is beyond their control, and the court reaches its decision. While courts usually obtain a Social Enquiry Report (SER) before reaching their decisions, these reports, prepared by a children's officer (*i.e.*, a social worker) or a probation officer, commonly make no mention of a child's history of abuse.<sup>53</sup> According to a former Legal/Policy Officer with the Office of the Children's Advocate:

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<sup>50</sup> Ministry of Justice, Press Release, "Legal Aid for Children in Court for Being Uncontrollable," 15 Aug. 2013, available at <http://www.moj.gov.jm/sites/default/files/Press%20Release%20re%20Legal%20Representation%20of%20Children%20in%20Court%20for%20being%20Uncontrollable.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> Interview with Debian Livingston Edwards, Legal/Policy Officer, Office of the Children's Advocate, 30 Oct. 2015; Correspondence from Shannon Hendricks, former Legal/Policy Officer at the Office of the Children's Advocate, 17 Dec. 2015; Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015.

<sup>53</sup> Hendricks, 'Uncontrollable Children,' *supra* note 28, at 21, 28.

“The history of abuse quite rightly should be included in the SER that is presented to the court, but invariably it is not. This may be due to the fact that the information gathered for the SER is based primarily on interviews with the adults in the home and the community, who perhaps may be the perpetrators of the abuse, or are ignorant of the abuse, or choose to conceal the abuse because they believe that the information is trifling or is a private concern. In cases where the child is interviewed, the child is not comfortable with the interviewer to discuss such personal trauma or might have been instructed by parent(s) or guardian(s) not to speak about it. Consequently, the SER does not provide a comprehensive picture and the child is whisked off to a juvenile correctional centre without attempts to identify and address the causal factors of his or her status offending.”<sup>54</sup>

Children may not be invited by the court to respond to the allegations made against them, and even if they are invited to do so, they can be expected to be too intimidated by the courtroom atmosphere to do so.<sup>55</sup> It is not realistic to expect children to be able to speak openly in court, without the assistance of counsel, particularly about topics such as past sexual abuse or mental health problems. The end result is that the child has no meaningful opportunity to present a defence.

It is important to note that a particular judge can make a difference in the way that § 24 proceedings are handled in his or her courtroom. In this regard, the Senior Resident Magistrate for the Kingston and St. Andrew Family Court has won high regard for her diligence in protecting the rights of children appearing in her courtroom.<sup>56</sup> It is important, however, that respect for children’s Covenant rights not be dependent on the discretion of particular judges.

#### **D. Failure to accord children special measures of protection (Articles 24 and 14(4))**

Article 24 recognizes the right of every child to “such measures of protection as are required by his status as a minor.”<sup>57</sup> Article 14(4), concerning fair trial rights of children, requires that judicial procedures “be such as will take account of their age and the desirability of promoting their rehabilitation.”<sup>58</sup> Jamaica’s incarceration of children for being beyond parental control violates these rights.

Addressing the overlapping requirements of Articles 9 (liberty) and 24, this Committee has emphasized that “[a] child may be deprived of liberty only as a last resort and for the shortest appropriate period of time.”<sup>59</sup> In § 24 proceedings, however, courts too often have opted to issue correctional orders as a first resort, not a last one.<sup>60</sup> Additionally, rather than incarcerating

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<sup>54</sup> *Id.* at 28 (fn. omitted).

<sup>55</sup> *Id.* at 3-4.

<sup>56</sup> Interview with Janet Cupidon Quallo, UNICEF Child Protection Specialist, Jamaica, 28 Oct. 2015; Correspondence from Shannon Hendricks, former Legal/Policy Officer at the Office of the Children’s Advocate, 17 Dec. 2015.

<sup>57</sup> Covenant, *supra* note 39, art. 24.

<sup>58</sup> *Id.*, art. 14(4).

<sup>59</sup> General Comment 35, ¶ 62.

<sup>60</sup> Hendricks, ‘Uncontrollable Children,’ *supra* note 28, at 29.

children for the shortest appropriate period of time, courts have generally ordered their incarceration for the longest period allowed by law – that is, from their current age until they reach the age of 18.<sup>61</sup>

The incarceration of children for behavioural problems also ignores the requirement that “the best interests of the child must be a primary consideration in every decision to initiate or continue the deprivation [of liberty].”<sup>62</sup> Children whose poor behaviour stems from past sexual abuse or mental illness are not well served by incarcerating them for years, as Jamaica does, with children who have committed criminal offences.<sup>63</sup> Instead, these children need counseling and other supportive services designed to address the underlying problems that led to the maladaptive behaviours.

Since the announcement of the Cabinet’s support for amending § 24, some judges have moved away from the near-automatic issuance of correctional orders and toward a more therapeutic approach to children exhibiting behavioural difficulties.<sup>64</sup> This is a very positive change. Other judges, however, take the position that § 24 is still the law, so they will implement it as it is written.<sup>65</sup>

## V. Conclusion

The incarceration of children for being beyond parental control violates a host of Covenant rights. These children – whose problematic behaviour so often stems from past histories of abuse and mental health issues – need a therapeutic response from the State, not a penal one.

Jamaica’s Cabinet is to be commended for its 2013 decision to amend the CCPA to remove the possibility of incarceration as a response to children’s behavioural difficulties. It is worrisome, however, that more than two years have passed since this decision was reached, and the matter still has not been brought before Jamaica’s Parliament, much less enacted into law.

We urge the Human Rights Committee to include the issues raised in this report in its List of Issues for Jamaica. It is our hope that, with the encouragement of the Human Rights Committee, Jamaica will move forward expeditiously to enact the proposed amendment into law and to provide these children and their families with the supportive services that they so deeply need.

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<sup>61</sup> OCA Recommendations, *supra* note 2, at 9.

<sup>62</sup> General Comment 35, ¶ 62.

<sup>63</sup> Interview with Margarete Macaulay, children’s rights advocate, former Judge of the Inter-American Court of Human Rights, and (as of 1 January 2016) Commissioner of the Inter-American Commission on Human Rights, 10 Nov. 2015; Interview with Sharian Hanson, former Senior Legal/Policy Officer (2011-2014), Office of the Children’s Advocate, 30 Oct. 2015; Hendricks, ‘Uncontrollable Children,’ *supra* note 28, at 32.

<sup>64</sup> Interview with Diahann Gordon Harrison, Children’s Advocate of Jamaica, 30 Oct. 2015.

<sup>65</sup> *Id.*