



Standing Committee for Youth Justice

STANDING COMMITTEE FOR YOUTH JUSTICE (SCYJ)

RESPONSE TO COUNCIL OF EUROPE

DRAFT GUIDELINES ON CHILD-FRIENDLY JUSTICE

December 2009

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The **Standing Committee for Youth Justice (SCYJ)** is a membership body which:

- Provides a forum for organisations, primarily in the non-statutory sector, working to promote the welfare of children who become engaged in the youth justice system; and
- Advocates a child-focussed youth justice system that promotes the integration of such children into society and thus serves the best interests of the children themselves and the community at large.

Its members are: 4Children, Action for Children, Association of YOT Managers, Barnardo's, Catch22, The Children's Society, Children's Rights Alliance for England (CRAE), Council for Disabled Children, Howard League for Penal Reform, Just for Kids Law, JUSTICE, Nacro, National Youth Agency (NYA), National Association for Youth Justice (NAYJ), NCB, NSPCC, The Prince's Trust, Prison Reform Trust, Sainsbury Centre for Mental Health, Secure Accommodation Network (SAN), TACT and VOICE.

The contents of this briefing do not necessarily reflect the views of all member organisations

Introduction and general observations

The Standing Committee for Youth Justice (SCYJ) welcomes the opportunity to respond to the Council of Europe's Draft Guidelines on Child-Friendly Justice. While our work relates to youth justice law and policy in the United Kingdom alone, we believe that international institutions such as the Council of Europe (CoE) have an important role to play in standard-setting and in encouraging and monitoring improvements in the justice systems of the Member States. 'Soft-law' standards such as CoE guidelines on child-friendly justice can both supplement and amplify binding international law obligations including those in the European Convention on Human Rights (ECHR) and the UN Convention on the Rights of the Child (UNCRC).

In relation to the draft guidelines in their current form, we are concerned that in some areas they do not set sufficiently high standards for child-friendly justice and therefore are at risk of undermining, rather than amplifying, binding international standards. Children in the judicial system are particularly vulnerable and it is therefore of extremely high importance that their rights are fully respected at all stages of the proceedings. We reiterate the importance of the following rights, which we do not believe have been sufficiently respected and emphasised in the guidelines:

- (1) The right to participate in proceedings under Articles 5 and 6 ECHR, which necessitates special consideration, assessment and procedural modifications and may necessitate the abandonment of the proceedings in some cases (for example, in a criminal case against a child);
- (2) The obligation in Article 37(b) UNCRC that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time';
- (3) The right to freedom from torture and (cruel), inhuman or degrading treatment or punishment under Article 3 ECHR and Article 37(a) UNCRC. The European Court of Human Rights (ECtHR) has recognised that children in detention are particularly vulnerable in this regard;
- (4) The right to legal assistance under Article 37(d) UNCRC and Articles 6(1) and 6(3)(c) ECHR. In any criminal proceedings, and any other proceedings involving the human or civil rights of a child party, that child must be provided

with free legal assistance in order to ensure the fairness of the proceedings and the right to a remedy under Article 13 ECHR;

- (5) The obligations under Article 3 UNCRC, in particular the principle that the best interests of the child shall be a primary consideration in all actions concerning children;
- (6) The right of the child to express his/her views and to be heard in judicial or administrative proceedings affecting him/her under Art 12 UNCRC.

We believe that the guidelines should further address the following points throughout:

- (1) Lack of affordable access to free and good quality legal representation from lawyers for children;
- (2) Children should always have oral hearings for decisions which affect them if they wish to;
- (3) 'Court' should be used instead of 'judge' throughout.

Detailed comments on guidelines – by page and paragraph number

Page	Para	Comments
2	(c)	The section in brackets should also include the right to participate effectively in the proceedings.
3	(n)	'Encouraging' is weak. 'Calling for member states to take all necessary steps to enable children to exercise their right to participate....' would be stronger. 'Enforceability' should remain. Maybe use 'requiring' instead of 'encouraging'?
4	I(4)	Something is missing here after 'participation'.
4	II(A)(1)	The wording of this is clumsy and unclear.
4	II(A)(2)	'Equal treatment' may need glossing regarding children, as while children should not be victims of age discrimination, they may need differential treatment on account of their age. (a) It is unclear what 'due weight' means. This needs to be replaced by something tangible / or state that reasons must be given to remove subjectivity. (b) should include all rights in UNCRC.
5	II(A)(3)	We are wary of using the language of 'balance', as it sets up a false opposition: the best interests of two or more children in a case are often served by the same outcome – affording all appropriate rights to each. We are particularly concerned that the best interests of the child should never be balanced against anything, especially not the competing interests of other (especially non-child) parties.

		The last sentence of this paragraph should definitely be struck out, and the first amended to remove notion of ‘balance’.
5	II(A)(4)	We are not sure what is meant by ‘multidisciplinary mechanisms’ and request clarification to make sure that what is referred to is appropriate assessment. Member states have bigger role than supporting/encouraging methods of assessing the best interests of the child; they have also to legislate for and fund such methods of assessment. The obligation here is weak. Assessment should also be informed by legal representations made on the child’s behalf.
5	C	The obligation to ensure effective participation here is vague. We believe that Member States should be called upon to take specific steps to ensure that children can participate effectively in proceedings involving them. We also believe that the notion of giving ‘due weight’ to the child’s opinion is vague and should be specified more clearly.
5	D(1)	Age is notably missing here from the grounds of discrimination. Why?
5	D(2)	Should mention mental health problems and learning disabilities and speech, language and communication difficulties.
6	E(1)	We do not believe that ‘at least’ is needed here. The rule of law applies equally to all people, adult and child. Member states should review whether strict liability offences should apply to children – there should be discretion to be more lenient to ensure the best interests of each child.
6	E(2)	Elements of fair trial in judicial proceedings – this is extremely important and worthy of a whole section in the guidelines. This paragraph should refer to the extra procedural obligations in criminal proceedings under Art 6(3) ECHR and Art 40 CRC as well as to the specific obligations where civil or human rights may be at stake and those in relation to detention (Art 37 UNCRC and Art 5 ECHR).
6	E(3)	The language of this paragraph is weak; it should say that only a situation of the direst emergency would justify a <i>short-term and temporary</i> derogation from Articles 5 or 6 ECHR so far as children are concerned. Long-term derogation should not be permitted.
6-7	III(A)(1)	There is nothing here about the right to legal advice, which is of extremely high importance. This paragraph should say that any child in criminal proceedings should have access to free, independent legal advice from a lawyer of their choosing upon arrest and then at all stages of the proceedings. Analogous provision should be made where child is a party in civil proceedings where a civil right or obligation or any ECHR right is engaged. Should refer to rights under Arts 5 and 6 ECHR and Arts 37 and 40 CRC. This includes the right to a fair judicial hearing within a reasonable time to challenge detention.
6	A(1)(1)	‘To the extent feasible and appropriate’ should be left out of this paragraph. The

		<p>following should be added: ‘In particular, any child arrested or detained should be promptly informed, in a language that they understand, of their rights - including their right to legal advice. A parent, guardian or other appropriate adult should be contacted immediately in order to attend the police station or other place of detention; the child’s rights should be communicated to them; they should be able to confer with the child alone; and they should remain with the child throughout any questioning or other investigative acts carried out by the detaining authority’.</p> <p>Children without a parent or guardian capable of supporting them should be provided with guidance in respect of legal matters and should be provided access to an independent, trained adult to fulfil this role.</p>
6	A(1)(5)	Why would this happen?
7	A(2)(1)	<p>Comma needed after ‘media’ but not after ‘reveal’. This paragraph is clumsily worded.</p> <p>This needs to apply to all matters concerning events that occurred as children e.g. if someone appears in court as an 18 year old, their previous history pre-18 should be protected.</p>
7	A2(2)	Should read ‘Member states should prevent the violation of the privacy rights expressed in (1) above through legislation and provision for judicial orders. Outside these circumstances, they should further encourage the media...’. What is a ‘co-regulatory measure?’ Should this instead be ‘regulatory measures’?
7	A2	Most importantly, this part of the guidelines should restate the Art 40 UNCRC obligation that privacy of child defendant in criminal proceedings must be fully respected at all stages of the proceedings.
7	A(2)(3)	Clear guidance is needed on who gets what information, especially in relation to public protection.
7	A(2)(4)	<p>Not sure which ECtHR decision is being talked about here, but this is not in line with Art 40 UNCRC. Criminal proceedings involving children should not be open to the public; journalists, law report writers etc may be admitted providing that no reporting would identify the child.</p> <p>This should be in a separate paragraph, and then para (4) could apply to non-criminal proceedings. In criminal proceedings where defendant not a child but witness is a child, it may not be necessary for child to give evidence behind closed doors but measures should be taken to ensure child can give best evidence, eg video link etc.</p>
8	A3	Should list the special protections here for children in detention under Art 37 UNCRC and protections under Arts 3 and 5 ECHR. Under Art 3 ECHR children in detention are recognised as particularly vulnerable. Also should mention UNCAT obligations, which should also be mentioned in the Preamble to the guidelines.
8	A(5)(1)	<p>‘Court’ rather than ‘judge’ should be used here. What is a ‘bailiff’? Should also refer to probation or equivalent.</p> <p>Should use existing statutory assessments under Member States’ current welfare</p>

		arrangements if appropriate. If not, then defer to a common assessment framework.
8	B(1)	The relevant information should also be given to parents/guardians/appropriate adults and legal advisers.
9	B(2)	Final sentence of this paragraph should make clear that restorative justice, diversion etc can be an alternative to the prosecution of a child.
9	B(3)	Refer to above at III(A)(1) where should refer to right of child to free and independent legal advice in many cases especially in criminal cases and/or where child arrested or detained. They should be proactively helped to find this advice.
9	C(1)(3)	Should refer to right to access to justice under Art 6(1) ECHR.
9	C(2)(1)	Should state that children should always have their own counsel and representation of their choosing in any criminal case against them and in any other case where an ECHR right or a civil right or obligation is at stake. This should be provided for free.
9	C(2)(2)	'Children who have sufficient understanding of their rights as well as of the use of remedies to protect these rights' – clarify what this means / how to measure this / who does this exclude? What are the implications?
10	C(3)	As well as right to be heard should be a section on right to participate effectively in the proceedings – see <i>S.C. v UK</i> and <i>T. and V. v UK</i> in the ECtHR. This does not only apply where child is giving evidence but throughout the proceedings.
10	C(3)	In criminal proceedings the child's right to silence shall be respected at all stages.
10	C2(4)	'Bringing forward the opinion of the child' is the job of an advocate. This should be removed.
11	C(3)(5)	Procedures should also be adapted.
11	C(3)(7)	This should be reviewed with a lawyer in advance.
11	E(5)(1)	Clarify principle of 'immediacy' – do not want rushed trials/summary justice.
11	E(5)(3)	Not sure how this would apply in criminal proceedings. Clarify. There should also be a principle to continually review post court proceedings
12	E(6)	Criminal proceedings – assessment should be done to see if child able to participate effectively in proceedings and if so what adjustments should be made. If not able then should be diverted into an alternative that respects all their rights. Should also mention right to privacy here – criminal proceedings against children should take place in private but with appropriate access to journalists, provided details that could identify the child are anonymised.
12	E(6)(2)	This should happen in advance of the proceedings.
12	E(6)(5)	If reasoned judgment is made against a person, the child should be allowed to nominate an alternative. A child should always be able to be accompanied.
12	E(6)(11)	However this should not be done in a way that would prejudice criminal proceedings.

13	E(7)(3)	This should include the child defendant if wished by him/her. 'Defence' should therefore be changed to 'parties'.
13	E(10)	Child defendants must be allowed to testify or not at their own choosing. They should be legally advised as to possible consequences either of their choice. Unclear what is meant by 'duly motivated'
13	E(7)(11)	Video link or child-friendly environment should also apply to child defendants if wished by them. No evidence should be heard by court in absence of defendant.
14	E(7)(12)	This should also apply in relation to protection of child defendants from co-defendants where necessary.
14	IV(A)(3)	'Limited amount of force' – please clarify if this refers to the use of physical force. If so, 'limited amount' should be more closely defined. The use of force against children is only justified where they present an immediate threat of injury to themselves or others (and possibly if they attempt to escape when in custody) and then only to the minimum extent necessary to meet the relevant threat.
14	IV(A)(5)	'Complaint mechanism' and 'access to justice' are not mutually exclusive
14	B(1)	The international obligation under Art 37(b) UNCRC should be re-stated here that detention of children should always be a last resort and for the shortest possible period of time.
14	B(2)	Member States should implement all relevant obligations under UNCRC. The contents of General Comment of the UN Committee on the Rights of the Child n10 should be regarded as international legal obligations, in particular that the age of criminal responsibility should not be lower than 12.
15	B(2)	Children should not be detained with adults – unless it would be detrimental to their welfare to separate them from family members who are in detention eg young children whose parents are in detention in immigration proceedings
15	B(2)	Use of restraint or force – agree with circumstances, also must only be used to minimum degree necessary to remove the imminent threat
15	B(2)	Children maintain all rights in detention that they do not lose as a necessary consequence of the fact of detention
15	V(A)(1)	Should include sexual offences
15	V(A)(4)	Violent here should include 'sexual' or this should be added Neglect should also be included
16	A(5)	Should include neglect and sexual offences
17	B(5)	Quantify what age they are alluding to.
17	B(8)	Detention should not merely be for a 'limited time' but for the shortest possible period of time see Art 37(b) CRC

		'Adequate detention premises' - should refer to specific standards here
18	B(9), (10)	See above for comments re legal advice and appropriate adults This contact should be facilitated throughout their time in custody
18	C	There should be child-friendly police policies in every Member State
18	C(3)	What justifications are there for not informing the parent/guardian? Instead of saying 'where appropriate', presumption should be of informing them unless [specified circumstances occur]. Where parent/guardian unable or where it is inappropriate for them to attend station, appropriate adult should be contacted and should attend.
18	C(4)	Not just 'another adult' but another appropriate adult, independent from the police, prosecution etc
18	C(6)	Should read 'shall not have contact'
18	C	Should also refer to detention for minimum possible period of time and as last resort. Should also refer to conditions of detention meeting international standards and that the treatment of child at all times shall make allowances for their age and vulnerability, eg frequent breaks in questioning etc; no questioning for more than certain amount of time per day; food breaks etc. Should also refer to possible need for assessment in station for mental health/learning disability.
19	VI(5)	And access to justice should be included on the curriculum

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