

DOCUMENT A

The International Standards Relating to Youth Justice: An Overview

Youth justice, and the responses that States choose to adopt to young people in conflict with the law, have been the subject of considerable debate and discussion at both national and international level. There is now a significant body of international children's rights law that sets out minimum requirements for the treatment of children in conflict with the law, and that provides substantial guidance to States on the operation of rights-compliant youth justice systems. These instruments establish a set of binding legal obligations, and set out guiding principles for states parties, providing a common benchmark against which national practice can be measured.¹

At both United Nations (UN) and Council of Europe (CoE) level, binding international legal obligations relevant to youth justice have been set out in the UN Convention on the Rights of the Child² ("the UNCRC"), and under the European Convention on Human Rights ("the ECHR").³ The meaning and requirements for implementation of these standards have been further elaborated on through General Comments and guidelines adopted at both UN and CoE level, as well as through the jurisprudence of the European Court of Human Rights ("the ECtHR"). As Ireland has signed and ratified both the UNCRC and the ECHR, it has an obligation to ensure that its laws and policies are compliant with the requirements of this body of international law.⁴ The additional guidance on the implementation of these legal requirements provide both a valuable tool and a benchmark for States seeking to ensure that youth justice law and policy is compliant with international human rights law.

The aim of this briefing note is to provide a brief overview of these standards, and to set out, in broad strokes, some of the key principles emerging from these instruments. The Committee on the Rights of the Child has highlighted the need to ensure that domestic legislation reflects consistently the standards and principles of the UNCRC.⁵ These instruments can provide guidance both on the high level principles that should guide the operation of youth justice systems, and more detailed and specific guidance relating to the operation of specific parts of the youth justice system, including diversion, the investigation and prosecution of offences, and the implementation of measures, including detention. While this document provides a brief introduction to and overview of the key principles emerging from these standards, we suggest that more detailed briefing notes on specific thematic issues – such as prevention, diversion, procedural rights, the implementation of measures and

¹ Kilkelly, U. (2008) 'Youth Justice and Children's Rights: Measuring Compliance with International Standards' 8(3) *Youth Justice* 187-192.

² UN General Assembly, *Convention on the Rights of the Child* (adopted by resolution 44/25 of 20th November 1989, entry into force 2nd September 1990) 1577 UNTS 3

³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4th November 1950) ETS 5

⁴ See UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003) CRC/GC/2003/5 at para.1

⁵ UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003) CRC/GC/2003/5 at para.22

the treatment of children deprived of their liberty – may be provided for discussion when each thematic area is considered by the Expert Steering Group.

The standards relating to children in conflict with the law

The **United Nations Convention on the Rights of the Child** is the core human rights treaty setting out the rights of children. It has been signed and ratified by all states, except the United States. While Articles 37 (on the rights of children deprived of their liberty) and 40 (on the rights of children in conflict with the law) of the UNCRC are particularly relevant to youth justice law and policy, it is important to note from the outset that children in conflict with the law also continue to enjoy the wide range of other rights set out in the Convention. This includes the overarching principles contained in Article 2 (non-discrimination), Article 3 (best interests), Article 6 (right to life, survival and development) and Article 12 (participation), as well as specific rights such as rights to the highest attainable standard of healthcare (Article 24), to education (Articles 28 & 29), and to privacy (Article 16), amongst others.

The Committee on the Rights of the Child (“the Committee”) – the body with responsibility for monitoring the UNCRC – have made it clear that states parties to the Convention have an obligation under international law to implement its provisions (Article 4, UNCRC) through the adoption of laws which are compliant with the UNCRC, and through a range of other measures including the “development and implementation of appropriate policies, services and programmes”.⁶ The requirement for States to develop a comprehensive youth justice policy has been emphasised by the Committee, who have made it clear that such a comprehensive policy should take account of all relevant articles of the UNCRC, and not limit itself to Articles 37 and 40, (which are discussed in further detail below).⁷

Further detailed guidance on the implementation of the legal requirements contained in the UNCRC are set out in supporting instruments. Of particular importance is **General Comment No. 10 on children’s rights in juvenile justice** (“General Comment No.10”),⁸ which provides an authoritative statement from the Committee on the Rights of the Child on how the UNCRC should be implemented in the context of youth justice. It is important to be aware that General Comment No.10 is currently in the process of being revised, and it is expected that it will soon be replaced by General Comment No. 24, the final text of which is not yet available. It is advised that due consideration should be given to General Comment No. 24 in formulating the new Youth Justice Strategy.

Further supplementary guidance is also available in supporting instruments including the **UN Standard Minimum Rules for the Administration of Juvenile Justice** (“the Beijing Rules”), the **UN Guidelines for the Prevention of Juvenile**

⁶ UN Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (2003) CRC/GC/2003/5 at para.1 & 9

⁷ UN Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice* (2007) CRC/C/GC/10 at para.4

⁸ UN Committee on the Rights of the Child, *General Comment No. 10: Children’s rights in juvenile justice* (2007) CRC/C/GC/10

Delinquency (“the Riyadh Guidelines”), the **UN Rules for the Protection of Juveniles Deprived of their Liberty** (“the Havana Rules”). While these instruments are non-binding, they provide important further detail on how the rights of children should be implemented in youth justice systems, and are frequently cited by the Committee on the Rights of the Child, as well as by other bodies, including the European Court of Human Rights in interpreting the binding provisions of the UNCRC and the ECHR.

At the European level, a number of standards exist that are relevant to young people in conflict with the law. The **European Convention on Human Rights**⁹, an instrument of general applicability, contains a number of provisions that are relevant to youth justice. Article 3, containing the prohibition on torture and cruel, inhuman or degrading treatment, Article 5, setting out the right to liberty and security, Article 6, which details the right to a fair trial, and Article 8, providing for the protection of family life, all have particular relevance for young people in conflict with the law. The European Court of Human Rights has developed a substantial body of jurisprudence relating to children and young people, and increasingly cite the provisions of the UNCRC and other supporting instruments.¹⁰ The jurisprudence of the ECtHR has been particularly useful in providing clarity on the requirements for compliance with the ECHR in youth justice in the context of detention, and in relation to the procedural rights of children.

A number of standards specific to youth justice have also been produced at the European level. These include the **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice**¹¹ (“the Child-friendly Justice Guidelines”) and the **European Rules for juvenile offenders subject to sanctions or measures** (“the European Rules”).¹² There is also a recent **EU Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings**¹³; while Ireland has opted out of this Directive, it nonetheless provides useful guidance on how rights-compliant youth justice systems are developing internationally.

Taken as a whole, these international instruments provide significant guidance to States seeking to ensure that youth justice law and policy, and the practical operation of youth justice systems, develop in a manner that respects the rights of the children concerned. The next section, while far from comprehensive, provides a broad

⁹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (4th November 1950) ETS 5

¹⁰ Verhellen, E., “Children’s Rights in Europe” (1993) 1(3/4)*International Journal of Children’s Rights* 357; Kilkelly, U., *Children’s Rights in Ireland: Law, Policy and Practice* (Sussex: Tottel Publishing, 2008)

¹¹ Council of Europe: Committee of Ministers, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (adopted by the Committee of Ministers on 17th November 2010 at the 1098th meeting of the Ministers’ Deputies) CM/Del/Dec(2010)1098/10.2 (hereinafter “Child-friendly Justice Guidelines”)

¹² Council of Europe: Committee of Ministers, *Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures* (5th November 2008) CM/Rec(2008)11 (hereinafter “the European Rules”)

¹³ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

overview of some of the key principles relevant to the development of a rights-compliant youth justice system emerging from these standards.

Key principles of a rights-compliant youth justice system

Articles 37 and 40 of the UNCRC set out important standards governing the treatment of children in conflict with the law. Article 37 sets out the requirements for the treatment of children deprived of their liberty, emphasising that detention should only be considered as a last resort, and underscoring the vulnerability of children in this situation. Article 40 is relevant to all children alleged as, accused of, or recognised as having committed an offence, and sets out in detail key principles that should govern the operation of the youth justice system, and the legal rights, safeguards and treatment that children in conflict with the law are entitled to.

A key concern of the international standards, overall, is to underscore that children in conflict with the law remain children, and are entitled to **dignity and respect**, and treatment that promotes their **reintegration** as a central goal. At a basic level, this requires that states should establish laws, procedures, authorities and institutions specific to children in conflict with the law (Article 40(3)).¹⁴

Article 40(1) stipulates that children should be “treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”¹⁵ This is a defining feature of a rights-compliant youth justice system; both the Committee on the Rights of the Child and the Beijing Rules have also highlighted that the protection of the best interest of children means that goals of retribution and punitiveness must give way to goals rehabilitation and restorative justice in responding to children in conflict with the law.¹⁶ A strictly punitive approach is not considered to be in compliance with Article 40(1),¹⁷ and is contrary to the need to uphold the **best interests** of the child, under Article 3 of the Convention. It should also be recognised that children's physical and psychological development is different from that of adults,¹⁸ and that an approach based on the best interests of the child must recognise children's different physical, psychological, developmental emotional, educational needs.¹⁹ Similarly, at the European level, the importance of reintegration, and

¹⁴ General Comment No.10 at para.4

¹⁵ Article 40(1) of the UNCRC

¹⁶ General Comment No.10 at para.10; Commentary to Rule 17 of the Beijing Rules

¹⁷ General Comment No.10 at para.71

¹⁸ General Comment No.10 at para.10; there is now a substantial body of research on adolescent brain development that underscores that children are different from adults in important ways which justifies treating them differently, with more focus on reintegration, in the youth justice system. See for example, Monaghan, K., Steinberg, L. & Piquero, A.R., “Juvenile Justice Policy and Practice: A Developmental Perspective” (2015) 44 *Crime and Justice* 577; Scott, E., Grisso, T., Levick, M. & Steinberg, L., “Juvenile Sentencing Reform in a Constitutional Framework” (2016) 88(4) *Temple Law Review* 675; Policy and Law 410

¹⁹ General Comment No.10 at para.10

addressing the needs of young people in relation to education, health, housing, etc., is emphasised in its guidance.²⁰

Young people should also be treated at all times in a way that **reinforces respect for the human rights and freedoms of others** (Article 40(1)). While this requires that the treatment and education of children in the youth justice system should reinforce the rights and dignity of others, it also requires that children be treated with full respect for their rights by all those they come into contact with at all stages of the youth justice system.²¹ In particular, the standards emphasise the need to ensure **non-discrimination**

However, approaches focusing on reintegration must nonetheless adhere to principles of **proportionality**. Rule 5 of the Beijing Rules emphasises that as well as focusing on the well-being of young people, the reaction to any offence must “always be in proportion to the circumstances both of the offenders and the offence”.²²

It is also significant that children have a **right to be heard** at every stage of their involvement in the criminal justice system (Article 12).²³ It has been noted that the voices of children can have significant impact on efforts to bring about positive reform in youth justice systems;²⁴ this right also has significant consequences for the procedural rights that children in conflict with the law are entitled to, and should be taken into account from the earliest stages of a child’s contact with the youth justice system, and should continue throughout their involvement in that system.

The international standards also provide further guidance on the key elements that must be in place in a rights-compliant youth justice system. The Committee on the Rights of the Child have emphasised that **prevention** should form a part of a comprehensive youth justice strategy.²⁵ The Riyadh Guidelines²⁶ set out core elements that should be taken into account when thinking about prevention, and emphasise the need to take a holistic approach on the part of society as a whole to promote the harmonious development of children from early childhood, with a focus on well-being as a whole.²⁷ The Riyadh Guidelines emphasise the need to avoid penalising or criminalising children where possible,²⁸ a focus on community-based services and programmes in preference to formal agencies of social control,²⁹ and set out the need to emphasise the positive socialisation and development of all children in society through family, education, community, mass media and social policies.³⁰ These Guidelines also highlight the need to ensure that children are not criminalised

²⁰ Council of Europe: Committee of Ministers, Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Adopted by the Committee of Ministers on 24 September 2003 at the 83rd meeting of the Ministers’ Deputies), Rules 1 & 19

²¹ General Comment No.10 at para.13

²² See also General Comment No.10 at para.23 & 71

²³ General Comment No.10 at para.13

²⁴ *ibid*

²⁵ General Comment No.10 at paras.16-21

²⁶ Otherwise known as the UN Guidelines for the Prevention of Juvenile Delinquency

²⁷ See Rule 3 of the Riyadh Guidelines

²⁸ See Rule 5 of the Riyadh Guidelines

²⁹ See Rule 6 of the Riyadh Guidelines

³⁰ See Parts IV and V of the Riyadh Guidelines

for behaviour that would not be considered criminal if committed by an adult.³¹ The Committee on the Rights of the Child has highlighted that a core aspect of prevention is to ensure full and equal implementation of children's rights, including the right to the highest attainable standards of living, and access to healthcare, the right to education, the right to protection from violence injury or abuse, and to appropriate services for the care and protection of children.³²

Diversion is also given significant weight in the international standards. Article 40(3) of the UNCRC requires States to promote the use of measures for responding to children without resorting to judicial proceedings. The UNCRC stresses that diversion from formal judicial processes is encouraged "whenever appropriate and desirable"; however, this is subject to the caveat that children's rights and legal safeguards must be respected in diversionary processes. The Child-Friendly Justice Guidelines also affirm that alternatives to formal court proceedings, such as diversion, should be promoted "wherever these may serve the child's best interests".³³ Supporting guidelines at the UN level also emphasise the importance of diversion, emphasising that it should not be limited to petty cases, and that efforts should be made to maximise its use at various points of the youth justice system.³⁴ The international standards set out clear requirements for the use of diversion, emphasising the need for the consent of the child to diversionary measures, compelling evidence that the child committed the alleged offence, ensuring adequate procedural safeguards including access to a lawyer, and the privacy of young people involved.³⁵

Throughout the international standards, there is a clear emphasis that children should have access to adequate and effective **legal and procedural safeguards**. Article 12, setting out the child's right to be heard in matters affecting them, has particular significance in this context. Article 40(2) also sets out the rights that children in conflict with the law are entitled to in detail. These include the right to be presumed innocent, to information about the charges, to access to legal and other appropriate assistance, to determination of the issue without delay, to freedom from self-incrimination, and the right to have adverse witnesses examined, a right of review, a right to an interpreter, and a right to have his or her privacy fully respected. These requirements ensure that children have access to the same legal safeguards as adults to, and to additional protections that may be necessary by virtue of their age and lesser capacity. The issue of ensuring that children have adequate legal safeguards, and ensuring that legal processes and procedures are adapted sufficiently for children have been the subject of significant discussion at the international level.

³¹ See Rule 56 of the Riyadh Guidelines

³² General Comment No.10 at para.16

³³ Rule 24, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum available at www.coe.int/children

³⁴ See Rule 11 of the Beijing Rules; General Comment No.10 at paras.24-27

³⁵ General Comment No.10 at paras.26-27; see also Part IV, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum

These rights also, and importantly, include the child's right to **privacy**. The Committee on the Rights of the Child has provided significant guidance on the implementation of these rights,³⁶ and at the European level, a range of standards deal specifically with the implementation of children's legal and procedural rights. These include the Child-friendly justice Guidelines, and the recent EU Directive on procedural safeguards for children who or suspects or accused persons in criminal proceedings. Significantly, the European Court of Human Rights has developed a significant body of case law on the right of children to **effective participation** in criminal proceedings; this case law makes it clear that a range of procedural adaptations are required to ensure that children's rights are adequately protected in criminal processes, and highlight the need to ensure that these safeguards are in place from the earliest possible stage of the child's contact with the youth justice system.

The international standards also provide significant guidance on the **measures** that should be adopted to respond to young people in conflict with the law. Article 37 of the UNCRC highlights that the **deprivation of liberty should only be used as a measure of last resort and for the shortest appropriate period of time**. Article 40(4) highlights the need to ensure that a **wide variety of dispositions are available**, to ensure that the principle that detention should only be used as a last resort is effective in practice. These dispositions should be sufficient to ensure that children can be dealt with "in a manner appropriate to their well-being and proportionate both to their circumstances and the offence".³⁷ This emphasizes the need to ensure that measures taken both address the well-being of children and meet the requirements of proportionality. The Committee on the Rights of the Child has acknowledged the complicated nature of the balancing act required at the sentencing stage, taking into account the offence, the circumstances and needs of the offender, as well as the needs of society.³⁸ However, the emphasis on reintegration is maintained, and the Committee has highlighted the need for "ample opportunities to deal with children in conflict with the law by using social and/or educational measures".³⁹ Within the Council of Europe guidelines, principles of education emerge particularly strongly in the rules around sanctioning, which emphasise the link between the goal of reintegration and the need for education. The Child-friendly Justice Guidelines, for example, highlight that measures should "always be constructive and individualised responses"⁴⁰, and states that rights to education, training, employment and rehabilitation should be guaranteed.

Finally, the international standards are particularly clear that children deprived of their liberty are entitled to **special care and protection**.⁴¹ Article 37(c) of the UNCRC emphasises the need to ensure that all children deprived of their liberty "shall be treated with humanity and respect for the inherent dignity of the human

³⁶ General Comment No.10 at paras 42-67

³⁷ Article 40(4) of the UNCRC

³⁸ General Comment No.10 at para.71

³⁹ General Comment No.10 at para.28

⁴⁰ Part IV, Guideline E.82 of the Child-friendly Justice Guidelines

⁴¹ See, for example, Rule 26 of the Beijing Rules

person, and in a manner which takes into account the needs of persons of his or her age". This includes a provision that children should be separated from adults while detained, and the right of children to maintain contact with his or her family. The Committee on the Rights of the Child has set out a range of guiding principles in relation to the treatment of children deprived of their liberty,⁴² and the Havana Rules have particular significance in this context. At the European level, Article 5 of the ECHR has particular relevance to detained children. The European Rules for juveniles subject to sanctions and measures are also important. The standards emphasise the need both to ensure that children in detention have adequate procedural rights, and are treated in a manner that takes account of their age and needs. The Havana Rules set out a range of procedural rights children are entitled to, including the right to make a complaint,⁴³ and the right to detailed rules on the imposition of disciplinary procedures and sanctions within the institution.⁴⁴ Detailed provisions in the Havana Rules set out requirements relating to the conditions of detention, and highlight the need for children to have access to specific programmes to meet their needs, to education and to healthcare, to recreation, and to communication with the outside world. Throughout the relevant international standards in this area, it is highlighted that a special level of care is required for children who are deprived of their liberty, and detailed provisions exist to govern the provision of care in this context.

The Development of a Rights-Compliant Youth Justice Strategy

While the above provides only an overview of the key requirements of the international standards, important principles for the development of youth justice law, policy and practice at the national level can be gleaned from these international standards and guidelines. The guidelines provide overarching principles relating to the treatment of children in conflict with the law, emphasising **non-discrimination, best interests, effective participation, reintegration and treatment that upholds the child's dignity and which promotes respect for the fundamental rights and freedoms of others**. It is important to note that a rights-based approach to youth justice does not mean that children cannot be held accountable for their behaviour; however, it does require that responses take into account the age, stage of development, and capacities of children, and to adapt procedures and measures taken accordingly. The principles set out in the international instruments in this area are capable of co-existing with concerns around the protection of the public, and public safety.⁴⁵

The guidelines also provide significant specific guidance on the implementation of specific aspects of the youth justice system, such as diversion, and the procedural safeguards children are entitled to in investigation and adjudicative processes. It is proposed that this more detailed guidance will be outlined to the Expert Steering

⁴² General Comment No.10 at paras.72-89

⁴³ Rules 75-76 of the Havana Rules

⁴⁴ Rules 66-71 of the Havana Rules

⁴⁵ General Comment No.10 at para.10

Group in relation to each thematic issue discussed, with a view to considering how this guidance may be useful in the development of a new Youth Justice Strategy.

Finally, the international guidelines also provide valuable guidance on implementation of youth justice law and policy. They highlight the need for appropriate “cross-sectoral co-ordination” between different levels of government,⁴⁶ and for specialised services to be available to support implementation.⁴⁷ The Committee on the Rights of the Child has also highlighted that “comprehensive data collection, awareness-raising and training and the development and implementation of appropriate policies, services and programmes” are required for effective implementation. Taken as a whole, these instruments provide a valuable tool for the development of youth justice law and policy that is rights-compliant, and that seeks to fully realise Ireland’s obligations under international children’s rights and human rights law.

⁴⁶ General Comment No.5 at paras.27&37

⁴⁷ General Comment No.10 at para.94