

Advice to Department of Justice in relation to their Consultation on Northern Ireland Law Commission Report on Bail in Criminal Law Proceedings

The office of the Northern Ireland Commissioner for Children and Young People (NICCY) was established under the Commissioner for Children and Young People (Northern Ireland) Order 2003. The Principal aim of the Commissioner is to safeguard and promote the rights and best interests of children and young people. As such this advice is limited to those recommendations relating to children and young people. Some general comments on the issues surrounding bail are made at the outset before consideration is given to the specific questions relating to children and young people as set out in the consultation document.

The law in relation to bail in Northern Ireland should be guided by relevant human rights instruments, most notably the European Convention on Human Rights (ECHR)¹ as incorporated into domestic legislation through the Human Rights Act 1998, the United Nations Convention on the Rights of the Child (UNCRC)², the UN Standard Minimum Rules for the Administration of Juvenile Justice³, the UN Rules for the Protection of Juveniles Deprived of their Liberty⁴ and the UN Committee on the Rights of the Child General Comment Number 10⁵.

Article 3 UNCRC provides that in all actions concerning children and young people, the best interests of the child is a primary consideration. Article 37(b) UNCRC states that “*no 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.*” This position is supported by the Beijing Rules⁶ and the Havana Rules⁷.

In 2010 the UN Committee on the Rights of the Child focused its attention on juvenile

¹ Article 5

² Articles 3, 6, 9, 12, 25, 37 and 40

³ The Beijing Rules

⁴ The Havana Rules

⁵ 2007

⁶ Rules 13, 17 and 19

⁷ Rules 1, 2 and 17

justice stating “...many State Parties still have a long way to go in achieving full compliance with the CRC, e.g. ... the use of deprivation of liberty only as a measure of last resort.”⁸ Focusing on the UK, the Committee has noted with concern that “the number of children deprived of liberty is high, which indicates that detention is not always applied as a measure of last resort.”⁹

It is these principles outlined above which must underpin the law in relation to bail for children and young people in Northern Ireland.

General Comments

A number of recommendations are made in the Northern Ireland Law Commission Report, which though not included in the specific section relating to children and young people, will have an impact upon them.

NICCY support the proposal for a single unified Bail Act for Northern Ireland including a statutory definition of bail. This will ensure clarity for practitioners and decision makers in addition to a consistent approach in respect of police and court bail.

NICCY agree with the proposed amendments to police bail as set out in question 4. Children and young people should only be subjected to bail conditions where absolutely necessary and onerous conditions should be avoided as far as possible. Further, any bail decision should be subject to an appeal/review.

With respect to ‘street bail’ NICCY note the damaging impact interaction with the criminal justice system can have on children and young people and as such they should only enter the arena of a police station where absolutely necessary, with an appropriate adult and for the shortest period of time possible. Provisions regarding ‘street bail’ should be clearly set out in statute and subject to governance. Training should also be provided to ensure that such powers are used only when required and appropriately so.

⁸ General Comment No. 10 (2007)

⁹ Concluding Observations of the Committee in the Rights of the Child: United Kingdom of Great Britain and Northern Ireland (2008)

Bail in respect of Children and Young People

The specific questions posed in the consultation paper regarding children and young people are considered below.

Q29. Do you agree that the general right to bail, subject to the power of police and courts to refuse it, should apply to children and young persons (as it is proposed to do for adults)?

NICCY agree that there should be a statutory right to bail for children and young people, subject to the power of police and court to refuse it in limited circumstances. This will ensure compliance with international human rights instruments, as set out above.

NICCY consider that there should be a single test for bail for children and young people to ensure consistency between decisions made by police and the court. The test for bail for children and young people may be the same as that for adults, provided that appropriate adaptations are made, as discussed further below. Of most importance will be consideration of the age, maturity, needs and understanding of the child in the decision making, the best interests of the child and the use of custody as a measure of last resort and for the shortest possible period.

Should the same test for bail be applied to adults and children, with modifications, it is more likely that practitioners and decision makers will better understand the new process leading to a consistent and transparent system.

Q30. Do you agree that the grounds for refusal of bail should (as it is proposed for adults) be failure to surrender to custody; interference with witnesses or obstructing the course of justice; the commission of offences; and if there are substantial grounds for believing that it is necessary for the preservation of public order?

NICCY have some concerns about the proposed grounds for the refusal of bail to a child or young person.

Regarding the ground of commission of offences, NICCY consider that bail should only be refused for this reason where there is a substantial risk that if released on bail, the child or

young person will commit further offences, and in addition there are no bail conditions which could be imposed to allay this fear.

NICCY have particular concerns about the proposed fourth ground, namely where there are substantial grounds for believing remand is necessary for the preservation of public order.

Consideration should be given as to the necessity of this ground. A child defendant's right to privacy as set out in the UNCRC,¹⁰ ECHR¹¹ and the Beijing Rules¹² is protected in the course of criminal proceedings under Article 22 of the Criminal Justice (Children)(NI) Order 1998.¹³ Therefore, when the public are not aware of the identity of the alleged offender it could be queried as to why the detention of the child defendant would be necessary to protect public order.

If circumstances were to arise where the identity of the child defendant was public knowledge, bail conditions could be imposed to alleviate the risk of public disorder. To place a child or young person on remand to preserve public order would appear disproportionate.

NICCY consider that the grounds for refusal of bail should be set out in statute to ensure consistency and transparency in the bail process.

Q31. Do you agree that in addition to the list of factors to be considered in bail decisions in adult cases, additional factors for children and young people should be: age, maturity and understanding of the young person; the best interests of the child should be a primary consideration; and that detention should be as a matter of last resort and for the shortest possible time?

NICCY agree that factors to be considered when making a bail decision should be set out in statute in order to ensure consistency and transparency in the bail process.

With respect to the factors considered, NICCY would urge caution regarding consideration

¹⁰ Article 16

¹¹ Article 8

¹² Rule 8

¹³ Applications to remove reporting restrictions can be made under Article 22(3) only after the child has been found guilty of the offence.

of the strength of evidence against the accused. Bail decisions are usually made at a very early stage in the proceedings when often the evidence in its entirety is not available.

The list of factors to be considered when making a bail decision in respect of a child or young person should provide them with additional safeguards. Any such list should be non-exhaustive and allow for flexibility so that the circumstances of each individual child can be fully considered before a decision is made. Therefore an additional consideration such as 'any other relevant factor' could be added to the list.

In addition to the list of factors to be considered for adults, NICCY support the inclusion of additional factors for children and young people, such as – the age, maturity, needs and understanding of the young person, the best interests of the child as a primary consideration and detention as a matter of last resort and for the shortest possible time.

Q32. Do you agree that bail law should prohibit the detention of children and young people on the grounds of a lack of suitable accommodation?

NICCY do not feel that children and young people should be remanded into custody because of a lack of suitable accommodation and therefore support this prohibition. International human rights standards consistently emphasise that the custodial detention of children and young people should be a measure of last resort and for the shortest time possible. Therefore children and young people should not unnecessarily enter a custodial facility simply due to a lack of suitable accommodation. Research has shown the detrimental effect custodial detention can have on a young person, therefore all steps which can be taken, should be taken, to avoid such detention.

Should this ground remain, there is a very real prospect that looked after children (LAC) will be significantly disadvantaged. On occasions when offending, even at a low level, takes place in a children's home the option of returning to that home is withdrawn. Therefore the retention of this ground would likely see an over-representation of LAC in custody.

While NICCY support this prohibition, steps must be taken to ensure the availability of suitable accommodation for children and young people so they are not released on bail with nowhere to reside. There needs to be much co-operation with the relevant departments and agencies to ensure same and the provision of support services. The

Youth Justice Review (YJR)¹⁴ recommended the development and availability of an appropriate mix of suitable accommodation for children and young people. NICCY understand that the Department of Justice, the Department of Health, Social Services and Public Safety and the Department of Social Development were to complete a joint scoping exercise on this issue by June 2013. NICCY urge the departments to address this issue and provide suitable accommodation accessible at short notice as soon as possible.

Q33. Do you agree that the definition of a Place of Safety for children and young people should have removed references to “hospital or surgery” and “any other suitable place the occupier of which is willing temporarily to receive the arrested juvenile”?

Regarding the definition of a Place of Safety, NICCY do not consider the occupier of such a place should have the discretion to refuse to accept a child or young person.

NICCY consider that should a child or young person on remand require medical intervention, the option of a hospital or surgery should be available.

NICCY do not support the removal of reference to “any other suitable place.” NICCY would have concerns if the Juvenile Justice Centre (JJC) were the only place of safety available for a child or young person. There is limited capacity within the JJC and therefore if this were the only option available to bail decision makers, there is a risk that there may be more children and young people remanded to the JJC than there is capacity. Furthermore, while it is hoped that the reforms to bail legislation will reduce the number of bail remands and eliminate short term remands, options other than the JJC should be available in order to avoid ‘criminal contamination’.

The YJR addressed the issue of accommodation and made a number of recommendations.¹⁵ The ethos of these recommendations is the development and availability of an appropriate mix of suitable accommodation. The YJR states clearly that the use of the JJC as a place of safety should be reduced to an absolute minimum¹⁶ and further suggests that the number of PACE places in the JJC should be limited to one or

¹⁴ 2011

¹⁵ Recommendations 8, 9, 18 and 19

¹⁶ Recommendation 8

two.¹⁷

NICCY agree that the use of the JJC as a place of safety should be reduced to an absolute minimum. As stated above, the unnecessary placement of a child or young person in the JJC could lead to ‘criminal contamination.’

Q34. Do you agree that the option of the young offenders centre and secure accommodation as Places of Safety should be repealed?

As set out above, NICCY consider that there should be a wide range of appropriate accommodation options available at short notice to children and young people released on bail. Therefore NICCY do not support the removal of the option of secure accommodation as a place of safety. This option should be available if necessary. The YJR also expressly recommended the development of secure accommodation where necessary.¹⁸

With respect to the option of the Young Offenders Centre (YOC), NICCY have maintained the view that no child or young person under the age of 17 should be placed in the YOC. Concerns have been raised about the placement of children and young people in the YOC by the Criminal Justice Inspectorate¹⁹, the YJR²⁰ and the Prisons Review Team.²¹ Furthermore, the UNCRC states “...every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so...”²² The Committee on the Rights of the Child have reiterated this position.²³

NICCY are aware that the Department of Justice are currently considering “exceptional circumstances” (and concerns already raised in relation to this) whereby children and young people under the age of 17 can be transferred to the YOC. Therefore any bail reform in respect of remands to YOC will have to be considered in light of this.

Q35. Do you agree that provision for the remand of children and young persons under 18 to the young offenders centre should be removed?

¹⁷ Recommendation 18

¹⁸ Recommendation 8

¹⁹ CJI 2011

²⁰ Recommendation 16

²¹ Review of Northern Ireland Prison Service , Final Report, October 2011

²² Article 37(c)

²³ General Comment No. 10 (2007), para 85

NICCY's position in relation to the placement of children and young people in the YOC is set out in answer to question 34 above.

Q36. Do you agree that requirements to remand 10 to 13 year olds to secure accommodation should also be repealed?

NICCY do not agree that this requirement should be repealed. NICCY do not consider custodial facilities, such as the JJC, to be an appropriate placement for children aged 10 – 13 years old.

Q37. Do you agree that bail legislation should include a presumption that a young person on remand will remain in the juvenile justice centre on turning 18 unless it is in their best interests to be moved to the young offenders centre?

A number of factors require consideration before making a determination on this issue; as such discretion should be permitted in this situation. Of particular importance will be the needs and circumstances of the particular young person and the duration of their period of remand.

The Committee on the Rights of the Child have considered this issue and state that the placement of a young person who has turned 18 should depend upon their best interests and that of the younger children in the facility.²⁴

The YJR recommends that where a young person turns 18 while in custody, the place of detention should be determined by an assessment of the circumstances, paying particular attention to their needs and best interests.²⁵ NICCY would support a similar approach where the young person is on remand and where the best interests of younger children in the facility are considered.

Q38. Do you agree that statutory guidance in relation to bail decisions should, along with adult proposals, apply to children and young people and that it should require consideration to be given to age, maturity and understanding of the young person and that the best interests of the child should be a primary consideration?

²⁴ General Comment No. 10 (2007), para 86

²⁵ Recommendation 17

In order to ensure a consistent approach to bail determinations, decision makers should be provided with guidance to aid their decision. Consideration should always be given to the age, maturity, needs and understanding of the child and young person, with their best interests a primary consideration. A degree of flexibility should be maintained so that determinations can be made in accordance with the particular circumstances of the child or young person.

Q39. Do you agree that, in light of that guidance and its requirements, the law on curfew and electronic monitoring requirements and its reference to remanding children for the protection of the public, should be repealed?

NICCY consider that bail conditions should only be imposed upon a child or young person where absolutely necessary. Such conditions should not be more onerous than absolutely necessary and should afford the child the opportunity to comply with the conditions. Furthermore, the focus of the youth justice system should be the best interests of the child.

The optimum position would be that all children would have access to suitable bail support which would assuage the concerns of the decision makers without the imposition of onerous conditions such as a curfew or electronic monitoring requirement. However, where that is not the case, NICCY are conscious to ensure that the decision makers have appropriate alternatives to custody at their disposal when considering individual cases.

40. Do you agree that accommodation options and bail support programmes for children and young persons should be expanded?

As outlined above, NICCY consider that there should be a range of accommodation options available to children and young people so that the most appropriate can be utilized.

NICCY would support the expansion of bail support programmes. Such assistance for children and young people will aid them to comply with their bail and any conditions imposed. Support programmes should be implemented at the earliest opportunity and tailored to the individual to ensure their full benefit is realised.

Q41. Do you agree this should be achieved by non-legislative means?

It is essential that children and young people are offered appropriate accommodation and bail support from an organisation which is funded and resourced to enable it to meet the needs of service users. This may be best achieved if these requirements were placed on a statutory footing.

Q42. Do you agree that there should be a statutory duty to explain bail decisions to children and young people in language that is appropriate to their age, maturity and understanding?

NICCY would support a statutory duty to explain bail decisions to children and young people. Such explanations should be delivered in a manner appropriate to their age, needs, maturity and understanding. An appropriate explanation of a bail decision to children and young people will ensure a greater understanding of the decision and any conditions imposed which will in turn result in greater compliance. This statutory duty is further necessitated by the fact that the current minimum age of criminal responsibility in Northern Ireland is 10 years and further that research has shown an over-representation of children and young people with mental health and / or learning difficulties in the youth justice system.