**Public Prosecution Service for Northern Ireland**

**Draft Guidelines for Use of the Diversionary Disposals**

The Commissioner for Children and Young People (NICCY) was created in accordance with ‘The Commissioner for Children and Young People (Northern Ireland) Order’ (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons. In carrying out her functions, the Commissioner’s paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner must has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

It is NICCY’s intention to issue advice to the recently published PPS Consultation on “Guidelines for the Prosecution of Young Offenders” and therefore this advice seeks to remind PPS of framework by which should guide their diversionary work with young people.

**Children’s Rights Obligations**

As with all law, policy and practices, diversionary measures must be directed by international children and human rights standards, in particular the European Convention on Human Rights and the UNCRC and other relevant international standards such as the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines),[[1]](#footnote-1) the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) [[2]](#footnote-2) and the United Nations Guidelines for the Protection of Juveniles Deprived of their Liberty.[[3]](#footnote-3)

Adequate cognisance must also be taken of the Concluding Observations of the Committee on the Rights of the Child following its examinations of the UK Government’s compliance with its obligations under the UNCRC and any relevant General Comments issued by the Committee which expand upon and clarify the obligations the Government is under by virtue of ratification of the UNCRC. The General Comments of most relevance to intervention with children and young people involved with the criminal justice system are General Comment No. 10 Children’s Rights in Juvenile Justice[[4]](#footnote-4) and No. 12 on the Right of the Child to be Heard[[5]](#footnote-5).

Through the ratification of the UNCRC the Government has committed to giving effect to a set minimum standards and obligations in respect of all aspects of children’s lives. Government has also committed to the implementation of the terms of the Convention by ensuring that United Kingdom (and that of the devolved administrations) law, policy and practice relating to children is in conformity with UNCRC standards. The UK Parliamentary Joint Committee on Human Rights in its report[[6]](#footnote-6) on the UNCRC described the obligations the UNCRC places on Government as follows;

*“The Convention should function as… a set of child-centred considerations… by all departments of Government when evaluating legislation and in policy-making… We recommend, particularly in relation to policy-making, that Government demonstrate more conspicuously a recognition of its obligation to implement the rights under the Convention.”[[7]](#footnote-7)*

Article 40 of the UNCRC requires every child under 18 who has been alleged as, accused of or recognised as having infringed the penal law to be afforded the following minimum rights:

i) To be presumed innocent until proven guilty according to law;

ii) To be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance, and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

vi) To have his or her privacy fully respected at all stages of the proceedings

State parties are required under Article 40 to seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law.

In addition, the DoJ should also have regard to the Council of Europe’s Guidelines on Child Friendly Justice which were adopted in November 2010 and developed following widespread consultation, including with children and young people. In the Guidelines on Child Friendly Justice child-friendly justice is defined as,

*“...justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child, including the rights to due process, to participate in and understand proceedings, to respect for private and family life and to integrity and dignity”[[8]](#footnote-8)*.

The PPS is also bound by the standards laid down in the Havana and Beijing Rules and the Riyadh Guidelines which make a number of very important provisions for children in conflict with the law. The Havana Rules recommends that, *“upon release, the records of juveniles shall be sealed, and, at an appropriate time, expunged.”*[[9]](#footnote-9)

In addition, the Beijing Rules state that,

*“5.1 The juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence”

“7.1 basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to presence of a parent or guardian, the right to confront and cross examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of the proceedings”

11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or his or her parents or guardians, provided that such decision to refer a case shall be subject to review by a competent authority, upon application

11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes such as temporary supervision and guidance, restitution and compensation of victims.”*

Similarly, the Riyadh Guidelines emphasise the importance of preventative strategies and programmes to divert children and young people away from offending behaviour and emphasise the importance of education, family support and community based services which respond to special needs, problems, interests and concerns of young people.

**NICCY recommends that the PPS undertakes a child’s right impact assessment to ensure that it work complies with children’s rights and have provided a very helpful guide from the Welsh Government (appendix 1).**

In such an exercise NICCY would recommend that PPS also examine whether the diversionary landscape is too complicated and confusing for children and their parents an whether they have considered the principle of proportionality as outlined in recommended 6 by the Youth Justice Review.

*“The aims of the Youth Justice System should reflect the principle of proportionality and include a presumption that low level offending should be dealt with by parents (with support where necessary), school and communities or through a police disposal. This will require:*

*a. the introduction of triage (or similar) at the point of arrest;*

*b. building on the successful practices of community based restorative justice schemes;*

*c. the extension of police discretion while ensuring adequate safeguards;*

*d. greater use of police warnings and cautions for offences that would otherwise have been dealt with through more formal channels[[10]](#footnote-10).*

**Best interests**

The Commissioner welcomes the amendment in 2015 of the Justice (NI) Act, 2002 to introduce the best interest principles as a core aim of the youth justice system in NI. This enshrines into domestic law article 3 of the UNCRC. Whilst this principle is mentioned in the draft guidelines in relation to Diversionary Youth Conferences it applies to all diversionary disposals concerning children and young people.

**NICCY recommends that the guidelines are amended to recognise PPS’s responsibility to have regards to the best interests of children in all of their work.**

**Additionally NICCY recommends that PPS develops indicators and gather evidence to demonstrate how they are adhering to this principle.**

**Criminal Record**

In 2016 the UN Committee on the Rights of the Child recommended that the United Kingdom government should:

*“Ensure that children in conflict with the law are always dealt with within the juvenile justice system up to the age of 18, and that diversion measures do not appear in children’s criminal records”*[[11]](#footnote-11)

The draft Guidelines reiterate that PPS diversionary disposals concerning children are part of a criminal record. It is of serious concern is the now routine disclosure of diversionary disposals for at least a period of time and, if for a specified offence, possibly for life. This is in direct conflict with Recommendation 21 of the Independent Review of Youth Justice in Northern Ireland which states that, *“…diversionary disposals should not attract a criminal record or be subject to employer disclosure”*.[[12]](#footnote-12)

NICCY believes it to be contrary to the intention of diversion if young people who are given diversionary disposals are subject to the consequences of the formal criminal justice system.

**Conclusion**

Guided by international standards it is the view of the NI Commissioner for Children and Youth that diversionary disposals for children and young should primarily be aimed at ensuring that they are diverted from the criminal justice system in its entirety. The diversionary disposal landscape in NI is unnecessarily complicated and appears to have added more layers to the criminal justice system rather than diverting young people from it.

**Therefore we strongly recommend that providing clear evidence of adherence to the best interests principle and undertaking a Child’s Rights Impact Assessment will assist the PPS to ensure that they system is one that meets the needs of young people and victims**.

1. Adopted by General Assembly Resolution 45/112 of 1990. [↑](#footnote-ref-1)
2. Adopted by General Assembly Resolution 40/33 of the 29th November 1985. [↑](#footnote-ref-2)
3. Adopted by General Assembly Resolution 45/113 of the 14th December 1990. [↑](#footnote-ref-3)
4. CRC/C/GC/10, 25 April 2007 [↑](#footnote-ref-4)
5. CRC/C/GC/12, 1 July 2009 [↑](#footnote-ref-5)
6. Tenth Report of Session 2002-2003 [↑](#footnote-ref-6)
7. Para 25 [↑](#footnote-ref-7)
8. Para II c [↑](#footnote-ref-8)
9. Rule 19, Havana Rules (1990) [↑](#footnote-ref-9)
10. ‘A Review of the Youth Justice System in Northern Ireland’, Department of Justice, September 2011 [↑](#footnote-ref-10)
11. Para 78(b), **CRC/C/GBR/CO/5**, 3 June 2016 [↑](#footnote-ref-11)
12. ibid 11 [↑](#footnote-ref-12)