**Public Prosecution Service for Northern Ireland**

**Draft Guidelines for the Prosecution of Young Offenders**

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 be cognisant of all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

NICCY welcomes the opportunity to provide advice to the Public Prosecution Service (PPS) on the draft guidelines for the prosecution of young people. Whilst we wish to commend the PPS for their consistent reference to the UNCRC throughout the Guidelines, we wish however to advise as follows.

Children’s Rights Obligations

As with all law, policy and practice, the prosecution of juveniles must be directed by international children and human rights standards. In particular, regard should be given to the European Convention on Human Rights and the UNCRC alongside 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 fifth periodic examination of the UK Government’s compliance with its obligations under the UNCRC and any relevant General Comments issued by the Committee. These general comments 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 of minimum standards and obligations in respect of all aspects of children’s lives. The Government has also committed to the implementation of the terms of the Convention by ensuring that the United Kingdom’s (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 PPS 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 who may be in conflict with the law. The Havana Rules recommend 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. These Guidelines also emphasise the importance of education, family support and community based services which respond to the special needs, problems, interests and concerns of young people.

Further, the PPS must have regard to the stated Aims of the Youth Justice System[[10]](#footnote-10), namely:

1. The principal aim of the youth justice system is to protect the public by preventing offending by children;
2. All persons and bodies exercising functions in relation to the youth justice system must have regard to that principal aim in exercising their functions, with a view (in particular) to encouraging children to recognise the effects of crime and to take responsibility for their actions;
3. But all such persons and bodies must also have regard to the welfare of children affected by the exercise of their functions (and to the general
4. principle that any delay in dealing with children is likely to prejudice their welfare), with a view (in particular) to furthering their personal, social and educational development;

Use of the term ‘Young Offenders’

NICCY’s concern in relation to the use of this terminology is twofold. Primarily, the use of the term ‘Young Offenders’ is inappropriate in Guidance which specifically refers to the *prosecution* (not conviction) of juveniles, who of course are presumed innocent until found guilty under the law. It is therefore incorrect to label these young people as Young Offenders before they are subject to a finding of guilt.

Secondly, NICCY takes cognisance of the Riyadh Guidelines which describe how such labelling of young people can subsequently contribute to them displaying corresponding patterns of behaviour.[[11]](#footnote-11) By avoiding such labels and adopting a “children first” approach PPS is more likely to realise the best interests of the child.

**NICCY therefore recommends that the Guidelines be re-named to refer to the Prosecution of Children.**

Data

In her 2018 ‘Statement on Children’s Rights in Northern Ireland’, the Commissioner called for the Youth Justice System to publish annual performance data. We also note that in June 2017 the NI Audit Office found that a lack of reliable data makes a long term analysis of the effectiveness of the Youth Justice System difficult.[[12]](#footnote-12)

**NICCY therefore recommends that the PPS collects relevant data and undertakes a child’s rights impact assessment to ensure that its work complies with children’s rights. We have attached a helpful guide from the Welsh Government (Appendix 1).**

Participation of Children and Young People in the Formation of the Guidelines

These proposals will directly affect children and young people and so they must be consulted in relation to them in line with the statutory equality obligations on designated public authorities under section 75 of the Northern Ireland Act 1998. Ongoing consultation, engagement and feedback with children and young people are also essential in ensuring the Government’s compliance with Article 12 of the UNCRC.

The Equality Commission’s Guidance for Public Authorities on Implementing Section 75 of the Northern Ireland Act, 1998 states that in conducting consultations, the accessibility of language and the format of information should be considered to ensure that there are no barriers to the consultation process, with information being made available on request in accessible formats. Systems should be put in place so that information can be made available in accessible formats in a timely fashion. In addition, the Commission’s Guidance recommends that specific consideration is given to how best to communicate information to children and young people, people with learning disabilities and minority ethnic communities. The Equality Commission’s Guidance for Consulting with Children and Young People, “Let’s Talk, Let’s Listen”[[13]](#footnote-13) reminds Government that children and young people have particular needs concerning information and that actions should be taken by Government to facilitate young people to take part in consultation and decision-making processes, especially on issues that affect them.  It emphasises the particular importance of considering which methods are most appropriate for consulting children and young people. Public authorities should also make sure to provide information which is clear, easy to understand and in an appropriate format, to ensure there are no problems preventing effective consultation with children and young people.

We would be grateful if you would provide us with details of how you have or intend to consult directly with children and young people as part of this consultation process.  We also wish to request copies of the child accessible version of this consultation document by return.

It is unclear whether an adapted children and young person friendly version of the Guidelines have been drafted and we would be obliged if this could be clarified. UNCRC General Comment No. 12 makes clear that the child’s ‘right to information’ is an essential component of young people’s right to participate in any judicial proceedings affecting them.[[14]](#footnote-14) These guidelines must therefore be made available in a child friendly version, to enable a meaningful realisation of this right.

**NICCY therefore reminds the PPS of its duty to consult directly with children and young people and for their views to be taken into account as part of the process in the development of these guidelines.**

Best Interests Principle

As outlined above the Justice (NI) Act, 2002 was amended in 2015 to introduce the best interests principle as a core aim of the Youth Justice System in NI. This enshrines into domestic law Article 3 of the UNCRC.

NICCY wishes to commend the PPS for both the inclusion of this principle throughout the Guidelines and in particular the thorough definition of the principle on page 9.

However, we recommend the further specific inclusion of the best interests principle in the following sections:

* para 4.1 Youth Diversion – General principles;
* para 4.3.9 Factors to be considered in respect of Youth Engagement;
* para 4.4 Factors to be considered in respect of diversion;
* para 5.3.1 The decision to prosecute (LAC);
* para 6.2.3 Mental Health and Learning Disabilities, Key considerations.

**Additionally NICCY recommends that PPS develops indicators and gathers evidence to demonstrate and monitor how they are adhering to this principle (as part of the child’s rights impact assessment).**

Delay

The Beijing Rules describe the speedy conduct of formal procedures in juvenile cases as a ‘*paramount concern’*.[[15]](#footnote-15) Further, the ‘Review of the Youth Justice System in NI’ identified that delay was ‘*far and away the most urgent challenge’*.[[16]](#footnote-16) This review went on to suggest that ‘*all relevant agencies should find the means to significantly reduce the time taken in advance of the legislation’*.[[17]](#footnote-17) The latest DoJ data[[18]](#footnote-18) show that young people consistently wait longer than adults for their cases to be dealt with in Magistrates’ courts and that whilst the median time for charge cases has fallen there has been a 55% rise in time taken for summons cases.  Therefore, despite a whole system programme to reduce delay there has been minimal improvement in addressing delay for youth justice cases.

We have some concern in relation to Para 3.3.1 of the draft guidelines which states that a prosecution decision should be taken ‘*as expeditiously as possible’*. This is insufficiently precise to address the issue of delay in any meaningful way. We welcome the PPS initiative to process diversionary disposals in a timely manner, however, we echo the recommendation of the Youth Justice System Review that the success of this must be monitored.

In line with the ‘Review of the Youth Justice System in NI’, **we recommend the implementation of internal PPS time limits for the administration of each stage of a prosecution**. We wish to address specifically the possible causes of delay and the solutions for reducing this at each stage as follows:

* We have significant concerns in relation to the time taken to consider a file once it has been submitted to the PPS by the PSNI, before a summons is issued. **We recommend the implementation of internal PPS time limits for the consideration of PSNI files and the subsequent issuing of summons;**
* We would suggest that data should be collected to monitor the length of time between the issuing of a summons and the first court date. **NICCY recommends that time limits should be introduced for the listing of a first appearance court date from the date a summons was issued, although we recognise the implications of this recommendation on the NICTS;**
* Anecdotal evidence would suggest that often by the time a charge matter is before the court that the PPS are not in a position to make a final decision with regards to the charges they are proceeding with. The matter is then adjourned until they are able to make this decision. We are concerned that the PSNI are proceeding to charge before there is sufficient evidence for the reasonable prospect of conviction test to be met. **NICCY therefore recommends that the PPS monitor the number of cases which are charged to court, before they are ready to proceed;’**
* We understand that often the prosecutor in Youth Courts is not the directing officer, or the prosecutor with carriage of the case. We are concerned about the delay this causes as the prosecutor in court is unable to make an immediate decision to divert, following defence solicitor’s oral request for this in court. The result of this is that the matter is adjourned to enable the defence solicitor to write to the directing officer with their suggestion that the matter should be diverted. Further, we have been advised about subsequent delay in the consideration of these written requests by directing officers, which causes a significant number of unnecessary adjournments. If for some unavoidable reason a request for diversion cannot be considered in advance of the next court date (meaning that the matter would need to be further adjourned), defence solicitors should be notified so the young person can be advised of this in advance of court. Finally, consideration may also need to be given to imposing time limits on defence solicitors for submitting their requests for a diversion. Given that the Youth Justice Review highlighted that ‘urgent attention’ needed to be given to driving down the time taken for diversionary disposals, **NICCY recommends that internal time limits be introduced for the consideration of defence solicitor requests for a diversion, once the matter is before the court;**
* Alternatively, we would recommend that consideration be given to introducing a system for defence solicitors to correspond with the PPS and make an argument that the matter should be diverted, after the PPS have made an initial decision to prosecute but prior to first appearance in court. This is because, as discussed in the above paragraph, the consideration of these requests often results in multiple adjournments once the matter is before the court. In our view, the 28 days between the decision to charge and the first court date could be used more effectively for the consideration of such requests. Consideration should be given to implementing a process whereby there is a time limit for defence submission of such requests, and a further time limit for the PPS to make a decision. In addition to this, a similar system could be introduced for the period between the issuing of a summons and the first court date. However, this is of course dependent on the young person or their parent or guardian instructing a solicitor in a timely manner. It is therefore also important that the PPS ensure that the language used in all relevant paperwork is child friendly and accessible. We are of course also cognisant of the fact that the criminal legal aid system would need to be amended accordingly to facilitate this. **NICCY recommends that consideration be given to implementing a system whereby defence solicitors can submit a request for a diversion, once a decision to prosecute has been taken, but before the first court date.**

**NICCY recommends that the PPS gather specific data surrounding the number of PPS sought adjournments in the Youth Court, and in particular monitor the reasons that the PPS sought these adjournments.**

**NICCY would recommend that the PPS consider the implementation of internal administrative time limits for each stage of the prosecution of juveniles. In line with the Youth Justice System Review Recommendations, data must be collected to monitor adherence to these deadlines.**

Bail and Custody as a last resort

Prosecutors should be reminded that the Concluding Observations of the UN Committee on the Rights of the Child (2016) reminded the UK government of its responsibility to under article 37(b) of the UNCRC that detention and imprisonment shall be used “only as a measure or last resort and for the shortest appropriate period of time.”

In view of the fact that in 2017/18 71% of young people in custody in the JJC[[19]](#footnote-19) were on remand there is NICCY would welcome the insertion of guidance on the PPS attitude to bail outlining a presumption of bail without conditions.

**NICCY recommends the insertion of a section on the PPS attitude to Bail in the Guidelines.**

The Prosecution Decision

We welcome the assertion in Paragraph 3.2.5 that the decision whether or not to prosecute must take into account an analysis of background information of the child provided by other agencies. However, we would suggest that this should be widened to include an obligation on Prosecutors to proactively seek background information from the relevant agencies involved with the child. Given that the decision to prosecute a child is so sensitive, with profound impact on the young person’s life outcomes and well-being, it is important that Prosecutors are fully equipped with all the necessary information to enable them to make a decision.

We wish to remind the PPS of the recommendation of the ‘Review of the Youth Justice System in NI’ which suggests that the high proportion of ‘no prosecution’ cases must be examined, with a view to removing them from the formal system at an earlier age.[[20]](#footnote-20) Again, we would suggest that this should be considered as part of the child’s rights impact assessment.

**NICCY recommends the insertion of an obligation on prosecutors to seek background information on the child when considering prosecution. NICCY further recommends that the high proportion of ‘no prosecution’ cases be examined.**

Training of Prosecutors

The Riyadh Guidelines suggest that all professionals working in the Juvenile Justice System should be specialised and trained to respond to the unique needs of young people[[21]](#footnote-21). NICCY would therefore welcome the introduction of specialised training for prosecutors working within the Youth Justice System. In particular, the decision as to whether to offer a diversion is highly complex and requires the consideration and balancing of a number of factors to avoid arbitrary application. It would be our view that Prosecutors require specialised training to enable them to make such decisions, not least because of the profound impact a prosecution may have on a young person, in terms of both their well-being and the acquisition of a criminal record.

**NICCY recommends that all prosecutors working within the Youth Justice System receive specialised training.**

Youth Diversion

The Beijing Rules are clear that the provision of systems of review and appeal are necessary to permit scrutiny of decisions and enable accountability.[[22]](#footnote-22) In this regard, **we would be obliged if the PPS could clarify whether there is an internal appeal against the refusal to offer a diversion.** Given that the criteria for a diversion could be considered as somewhat subjective, it is important that there is an appeals mechanism against any decision not to divert.

Further, we have significant concern that the diversionary landscape is too complicated and confusing for parents and their children. In particular we have some concern, that young people do not understand the difference between Court Ordered and Diversionary Youth Conferences. In our view, this is most likely because the child’s experience at each conference is broadly similar. NICCY recommends that the PPS give consideration as to how this can be clarified for young people. Fundamentally, if young people fail to comprehend any material or practical difference between Court Ordered and Diversionary Youth Conferences, it is our view that one of the principle aims of diversion is entirely lost.

**It is therefore important that if a child’s right’s impact assessment is undertaken, that it monitors the level of comprehension of young people surrounding the diversionary landscape as well as informed consent of young people concerning diversionary disposals.**

**NICCY would suggest that the principle of proportionality, as outlined in recommendation 6 of the Youth Justice Review should be inserted below Paragraphs 4.4 ‘Factors to be considered in respect of Diversion’**:

*‘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.’*[[23]](#footnote-23)*

NICCY wishes to remind the PPS of the recommendation of the Youth Justice Review that most cases should be dealt with outside the Justice System.[[24]](#footnote-24) We recommend the insertion of this at Paragraph 4.4 ‘Factors to be considered in respect of diversion’.

**NICCY strongly recommends that as part of the child’s right’s impact assessment, that data should be collated surrounding the decision to prosecute and the use of diversionary disposals. This data should also monitor the number of cases which are diverted after the decision has been taken to refer the matter to court.**

Youth Engagement

We have some concern that children are not being reminded of their right to legal advice at Youth Engagement clinics. **We would welcome assurance from the PPS that if there is a solicitor on record for the young person, that they are formally invited to these clinics, and if not, that the young person is reminded of their right to obtain a solicitor.**

Criminal Records

The draft Guidelines state that diversionary disposals concerning children will be recorded on their criminal record. This is in direct conflict with Recommendation 21 of the Review of Youth Justice[[25]](#footnote-25) which states that ‘*diversionary disposals should not attract a criminal record or be subject to employer disclosure’.*

NICCY wishes to remind the PPS that in 2016 the UN Committee on the Rights of the Child recommended that the UK 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’.*

It is our belief that to record diversionary disposals on a juvenile’s criminal record is firmly contrary to the intention of diversion.

Looked after Children & Children with Learning Disabilities/Mental Health Problems

Whilst we commend the endeavor to consider the particular vulnerabilities of Looked After Children and those with learning disabilities and or/mental health issues, we have some concern that other vulnerable groups have not been included. We would suggest that if there is to be a focus on certain groups of vulnerable children, that all such groups must be considered separately. It is not in the interests of justice to specifically examine the special circumstances of some groups, but to ignore those of others.

Sexual Offences/Bullying/Road Traffic Offences

It is not entirely clear to us why there has been a focus on sexual offending, bullying and road traffic offences. It appears inconsistent to focus on these groups of offences without referring to other types of crime. We would welcome clarity surrounding the reasons for the focus on these particular areas.

Conclusion

As previously stated the Commissioner welcomes the consistent reference to the UNCRC throughout the draft Guidelines and looks forward to receiving further information with regards to how the PPS intend to evaluate and monitor the implementation of the policy and effectiveness of its practice in relation to engaging with young people involved with the youth justice system including adherence to the child’s rights particularly their best interests. We look forward to receiving your response.

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. Justice (NI) Act 2002 [↑](#footnote-ref-10)
11. Para 5. (f) [↑](#footnote-ref-11)
12. Managing Children Who Offend, NIAO, July 2017 [↑](#footnote-ref-12)
13. Let’s Talk, Let’s Listen: Guidance for public authorities on consulting and involving children and young people’ Equality Commission for Northern Ireland, May 2008. [↑](#footnote-ref-13)
14. IBID 5 para 25 [↑](#footnote-ref-14)
15. IBID 2 para 20.1 [↑](#footnote-ref-15)
16. Page 109 [↑](#footnote-ref-16)
17. Page 115 [↑](#footnote-ref-17)
18. <https://www.justice-ni.gov.uk/publications/r-s-bulletin-28-2018-case-processing-time-criminal-cases-dealt-courts-northern-ireland-> [↑](#footnote-ref-18)
19. <https://www.justice-ni.gov.uk/publications/292018-northern-ireland-youth-justice-agency-annual-workload-statistics-201718> [↑](#footnote-ref-19)
20. Page 44 [↑](#footnote-ref-20)
21. IBID 1 Para 9. (i) [↑](#footnote-ref-21)
22. IBID 2 Para 6. Commentary [↑](#footnote-ref-22)
23. Page 114 [↑](#footnote-ref-23)
24. Page 11 [↑](#footnote-ref-24)
25. Page 116 [↑](#footnote-ref-25)