



Advancing the Defence Rights of Children Manual for Practitioners



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About Fair Trials

Fair Trials is a global criminal justice watchdog with offices in London, Brussels, and Washington D.C., focused on improving the right to a fair trial in accordance with international standards.

Fair Trials' work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives from being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused.

Its work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

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Introduction

Criminal proceedings are a daunting prospect for all suspects and accused persons, regardless of age. Child suspects and accused persons, however, are especially likely to be overwhelmed and damaged by the experience of criminal proceedings. Failure to take into consideration their different needs and abilities can have devastating implications for their fair trial rights and their welfare.

Standards set by various international and regional instruments and bodies, including the UN Convention on the Rights of the Child, and the jurisprudence of the European Court of Human Rights, recognise the importance of treating child suspects and accused and defendants differently from their adult counterparts. Despite the existence of such standards, concerns have been raised about the extent to which the rights and welfare of children across the EU are protected effectively in practice.

In 2016, the EU adopted Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the ‘Children Directive’). The Directive’s aim is to establish minimum standards that are binding across EU Member States, thereby reinforcing and strengthening children’s rights.

Advancing the Defence Rights of Children

Advancing the Defence Rights of Children is a project led by Fair Trials, in collaboration with the International Juvenile Justice Observatory (‘IJJO’), the Hungarian Helsinki Committee, and APADOR-CH. We have developed a multi-disciplinary regional training programme to help criminal defence lawyers across the EU develop both the practical skills and the knowledge necessary to provide effective assistance to child suspects and accused persons.

Most criminal lawyers are fully aware that child suspects and accused persons need to be treated differently from adults in criminal proceedings, but few have had training on what sort of procedural adaptations are needed to give effect to their rights, and on the best ways to assist their child clients in practice. The Children Directive recognises the importance of training lawyers, and under Article 20, Member States are required to promote specific training for lawyers who work with children in criminal proceedings.

Criminal justice systems vary significantly from country to country, and there are vast differences in juvenile justice procedures and systems in place between Member States. The aim of this project is to create a regional training programme centred on the Children Directive that can be adapted and reproduced at local levels to suit the training needs in each country.

Fair Trials has worked with its partners to ensure that this training programme responds as far as possible to the needs of legal practitioners across the EU. In order to do this, we hosted a meeting which brought together various juvenile justice experts, including lawyers, NGO representatives, child psychologists, social workers, and prosecutors to advise on the content and the format of the training programme. The feedback provided by the experts at this meeting clearly showed the need of legal training on the ways in which additional procedural safeguards should apply to child suspects and

defendants. Furthermore, it confirmed our strongly held belief that lawyers need to be trained in developing skills for better understanding and communicating with their child clients. The finalised training programme has been developed after delivering pilot versions of the training to a group of lawyers and experts from across the EU, and locally adopted versions of the training in Romania and Hungary.

About this Manual

This manual has been designed as a component of the Advancing the Defence Rights of Children training programme, to serve two purposes:

- To be used as a source of information and knowledge for training providers interested in delivering the training programme to local lawyers; and
- To be used as a helpful resource for practicing lawyers, as a guide that will help them understand the law as well as the practical aspects of assisting children in conflict with the law.

This manual is broadly divided into two sections. The first section (Chapters 1 and 2) focuses on the law, and it explains the core principles and standards on children's rights found in the Children Directive, as well as in various other international and regional instruments. It also explains how these principles and standards apply at various stages of juvenile justice proceedings. The second section provides multi-disciplinary and skills-based guidance on how to assist child suspects and accused persons. It includes, *inter alia*, a basic introduction to child psychology and development and guidance on how to communicate with children. Fair Trials believes that these are essential skills and knowledge that lawyers would find helpful to give effect their child clients' rights.

We have designed this manual to be as helpful as possible to practicing lawyers by highlighting important 'Dos and Don'ts', tips, and useful facts.

Fair Trials recognises that this manual does not, on its own, provide complete training for lawyers working with child suspects and accused persons. There is a need for more extensive training that is relevant to local challenges, and we strongly believe that skills-based training can only be delivered effectively through interactive training, delivered by suitably experienced trainers. However, we hope that by consulting this manual, practicing lawyers will be better informed about the rights of children, and be more alert to the practical steps they can take to safeguard their interests.

Further Reading

Fair Trials would encourage lawyers looking for more guidance on the Children Directive and the practical application of international and European child rights in criminal proceedings to refer to the publications of Defence for Children International (DCI) – Belgium, produced as part of its 'My Lawyer, My Rights' Project. These include tables on relevant legal standards and a manual for Member States on implementing the Directive.¹

¹ Available at: <http://www.mylawyermyrights.eu/>

Chapter 1: Key Principles in International and European Standards

The rights of children in juvenile justice systems have developed steadily over several decades through a variety of international and European legal instruments. Most of the key principles underpinning juvenile justice and the rights of child suspects and accused persons are enshrined in these standards, only some of which are legally binding and directly enforceable.

Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the **Children Directive**) was adopted in 2016, and is designed to reaffirm many of the principles set out in existing international and regional instruments in a legally-binding measure, which practitioners across the EU can refer to more easily. This chapter examines the framework of international measures which pre-date the Children Directive, and the ways in which the Directive gives force to many (though not all) of those same standards.

Summary

- The rights of children in conflict with the law have been developed through various international and regional legal instruments, including the UN Convention on the Rights of the Child ('CRC').
- 'Juvenile Justice' is a system that emphasises the well-being of children. It requires children to be treated not only in a fair and 'child-friendly' way, but also in a way that promotes their well-being and reintegration into society.
- Directive 2016/800 on procedural safeguards for children (the 'Children Directive') sets binding minimum standards on the rights of child suspects and accused persons throughout the EU. It aims to implement and build on existing international and regional standards on the rights of the child.
- The Children Directive applies to all individuals under the age of 18, but does not apply to 'minor offences'.
- The 'best interests of the child' are always a primary consideration under the Children Directive – this means that the best interests of the child should be considered at a higher level than other factors regarding a wide range of decisions regarding a child.
- The best interests of the child should be determined on a case-by-case basis. Those who determine the best interests of the child should ensure that they understand the child and consider the child's own views regarding their interests, in accordance with their maturity and level of understanding.
- The best interests of the child are identified most effectively by adopting a multi-disciplinary approach, including social workers, child psychologists, and others.
- 'Effective participation' is a central concept in the European Court of Human Rights' jurisprudence regarding the rights of children in conflict with the law. This concept incorporates *inter alia* the right to be heard and the right for children to be given information.
- Children should not just be given opportunities to be heard. Lawyers need to make sure that they are able to communicate effectively, and that their views are taken into consideration in accordance with their maturity.

- Children should be given access to information, including about the accusations against them and the legal procedures. In addition to recognising the right of ‘access’ to a lawyer, the Children Directive requires Member States to ensure that children are assisted by a lawyer. The Directive does not appear to allow children to waive their right to be assisted by a lawyer.
- The privacy of child suspects and accused persons must be protected at every stage of the criminal proceedings. As a general rule, criminal proceedings involving children should be held behind closed doors, and public reporting of such cases should be subject to restrictions.

Definitions

First, some terms common among the various international standards are defined:

A ‘child’ means any person below the age of 18 years (see Article 1 UN Convention on the Rights of the Child (**CRC**)).

‘Children in conflict with the law’ are all children that are suspects or accused persons in criminal proceedings.

‘Juvenile justice’ is understood as the set of standards that recognise the child in conflict with the law as a human being with the right to a fair trial, but also with a special status requiring child specific treatment. This approach is recognised in Article 40 of the CRC, the core juvenile justice provision.

A ‘lawyer’ means any person who, in accordance with national law, is qualified and entitled to provide legal advice and assistance to suspects or accused persons.

1.1 Core Concepts in Juvenile Justice

The concept of juvenile justice has been developed and refined through a number of international legal instruments, including those adopted by the United Nations and by the Council of Europe.

Key UN Instruments

- The UN Standard Minimum Rules for the Administration of Juvenile Justice (the **Beijing Rules**, 1985);
- The UN Convention on the Rights of the Child (**CRC**, 1989)
- The Rules for the Protection of Juveniles Deprived of their Liberty (the **Havana Rules** 1990); and
- General Comment No. 10 on children's rights in juvenile justice, passed by the UN Committee on the Rights of the Child (**CRC Committee**).

Council of Europe Instruments

- The European Rules for juvenile offenders subject to sanctions or measures (**European Rules**, 2008);
- The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (the **Guidelines**).

Neither the European Rules nor the Guidelines are binding per se, but they have played a significant role in shaping the jurisprudence of the European Court of Human Rights (**ECtHR**).

Out of the instruments mentioned above, only the CRC is binding, but this network of 'soft law' instruments have defined the core concepts that underpin the Children Directive.

'Juvenile justice' was originally defined in the Beijing Rules as a system that emphasises the well-being of the child and the proportionality of the reaction to child offenders and their offences. The concept of juvenile justice was developed significantly by the CRC, which requires children in conflict with the law to be treated in a way which accords with two basic principles.

- The first is that every child is entitled to be treated fairly, with full respect for their human dignity and their right to a fair trial.
- The second is that every child is entitled to be treated in a special and child-friendly way.² This means, among other things, that every juvenile justice intervention should aim to reintegrate the child into society and allow them to play a constructive role. In other words, children should be able to learn from their mistakes and should receive support to prevent reoffending, and this should all be done in a fair manner.³

Measures taken in relation to children must align with the objectives of juvenile justice. They must:

- Enhance the well-being of the child;
- Be proportionate, child-friendly, and respectful to the child's human dignity and right to a fair trial; and
- Enable the child to reintegrate into society.

The CRC also requires that measures comply with the general principles of the CRC contained in Articles 2 (non-discrimination), 3 (best interest of the child), 6 (right to life) and 12 (right to be heard).⁴ Article 3 CRC requires that authorities adopt a holistic approach towards the child and think beyond

² Liefwaard 2015.

³ Liefwaard 2015.

⁴ General Comment (GC) 10, para. 5.

narrow legal provisions, taking into consideration the child's physical, mental, spiritual, moral, psychological and social development.⁵

Moreover, Article 40(2) CRC contains a list of minimum standards, specifying the right of all children in conflict with the law to fair treatment and to trial. According to the CRC Committee, these standards include the prohibition of retroactive juvenile justice; the presumption of innocence; the right to effective participation in the proceedings; the right to prompt and direct information of the charge(s); the right to legal or other appropriate assistance; the right to decisions without delay and with the involvement of parents; freedom from compulsory self-incrimination; equality of arms; the right to appeal; the right to free assistance of an interpreter; and, the right to full respect of privacy.⁶

The European Rules similarly include a requirement that sanctions or measures be based on the best interests of the child and be subject to the principle of proportionality, i.e. the sanctions or measures will depend on the gravity of the offence committed and take account of the child's age, physical and mental well-being, development, capacities and personal circumstances.⁷ Moreover, they require that measures be tailored individually,⁸ implemented without undue delay,⁹ and follow the principle of minimum intervention.¹⁰

As mentioned above, the CRC approach to juvenile justice is that every child is entitled to be treated in a special and child-friendly way. This is the basis of the notion of child-friendly justice, which was clarified in detail at the European level with the adoption of the Guidelines. Child-friendly justice has become part of the European legal and political framework concerning the position of children in criminal justice systems.¹¹ In particular, it refers to justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child.¹² Child-friendly justice principles apply to every judicial and administrative procedure involving children (any person under the age of 18, Guideline II(a)).

1.1.1 EU law and the Children Directive

The 'Roadmap'

EU Member States have been cooperating closely on cross-border issues, principally through mutual recognition mechanisms such as the European Arrest Warrant (**EAW**). The effectiveness of such mechanisms relies on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights (**ECHR**).

⁵ GC 14, para. 4.

⁶ GC 10, para. 41-67.

⁷ European Rule 5.

⁸ European Rule 6.

⁹ European Rule 9.

¹⁰ European Rule 10.

¹¹ Liefwaard 2016.

¹² Guideline II(c).

However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the '*Procedural Rights Roadmap*' (**Roadmap**). Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives, providing minimum standards to ensure mutual trust, which bind national authorities in all cases, including those which have no cross-border element.

Table 1: Overview of Directives based on the Roadmap

	Directive	Date of Adoption
1.	Directive 2010/64 on the right to interpretation and translation in criminal proceedings (Interpretation and Translation Directive)	20 October 2010
2.	Directive 2012/13 on the right to information in criminal proceedings (Information Directive)	22 May 2012
3.	Directive 2013/48 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings (Access to a Lawyer Directive)	22 October 2013
4.	Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings (Presumption of Innocence Directive)	9 March 2016
5.	Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (Children Directive)	11 May 2016
6.	Directive on 2016/1919 legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (Legal Aid Directive)	26 October 2016

The Children Directive

The EU Commission recognised that despite the existence of numerous international and European standards in the field of juvenile justice, the level of procedural safeguards for children in conflict with the law was insufficient to guarantee children's effective participation in criminal proceedings, and that improvements are needed to foster mutual trust between Member States.¹³ In particular, it considered that the CRC was too broad and limited in its applicability to criminal proceedings, and it recognised that other international and regional standards on children in conflict with the law lacked binding effect on Member States. The jurisprudence of the ECtHR on children's rights was seen to be scattered, and it had resulted in divergent interpretations and varying degrees of implementation.¹⁴

The Children Directive was adopted in May 2016, and the deadline for the transposition of this Directive is 11 June 2019 (i.e. by that date each Member State must have given force to the Directive within their national law by passing appropriate implementation measures). The Children Directive establishes common minimum standards on procedural safeguards for children that are binding across

¹³ Commission Impact Assessment, 4.1.1.

¹⁴ Ibid.

the EU, and it is designed to make the effective assertion of child suspects' rights more straightforward by giving them binding force under EU Law.

The Children Directive builds on the principles found in existing international and European standards, including the Guidelines,¹⁵ and it contains a '*non-regression*' clause which states that Member States cannot change lower protections in order to align their laws with the Children Directive. For lawyers, this means that the CRC and the ECHR, in addition to providing authoritative guidance through various means such as case-law, general comments, and soft-law principles, could also help to both interpret the provisions of the Children Directive and fill in any remaining gaps. A summary of the key provisions of the Children Directive is provided in the next few pages.

Other Roadmap Directives

Lawyers should also be aware that the other Roadmap Directives, including the Right of Access to a Lawyer Directive and the Legal Aid Directive, apply to accused persons and suspects, irrespective of their age. These directives are not discussed in detail here, but Fair Trials has produced a series of toolkits and training programmes on these directives.¹⁶

¹⁵ Children Directive, Recital 7.

¹⁶ These are available on the Fair Trials website: <https://www.fairtrials.org/fair-trials-defenders/legal-training/>

Table 2: Summary of key provisions of the Children Directive

Provision	Topic	Notable Aspects
Article 1	Subject Matter	The Directive covers two categories of children: • Suspects and accused persons in criminal proceedings (recital 17 excludes those proceedings which are specifically designed for children that lead to protective, educative, or corrective measures); and • Individuals subject to EAW proceedings.
Article 2	Scope	The Directive applies until the final determination of the case (which does not include the imposition of punishment after sentence), including any appeals for children who are under 18, or turn 18 during the criminal proceedings (however Recital 12 encourages member states to extend safeguards until age 21).
Article 3	Definitions	- A <i>'Child'</i> is someone under the age of 18, but there is a presumption that an individual is a child if there is uncertainty regarding their age. - <i>'Holder of parental responsibility'</i> refers to the person with all rights and duties relating to the person or the property of a child given to a natural or legal person by judgment, operation of law, or an agreement having legal effects, including rights of custody and rights of access.
Article 4	Right to Information	When children are made aware that they are suspects or accused persons in criminal proceedings, they must be informed promptly of, firstly, their rights under the Information Directive (2012/13/EU) and, secondly, general aspects of the conduct of the proceedings. An explanation of a child's rights should be given in simple and accessible language and should be recorded. Where the child is provided a Letter of Rights, the Letter should include a reference to their rights under the Children Directive. a) Children are to be informed <i>promptly</i> of their rights under the Right to Information Directive, as well as the particular rights children have under the Children Directive, including the: • Right to have the holder of parental responsibility informed; • Right to assistance by a lawyer; • Right to privacy; • Right to be accompanied by the holder of parental responsibility; and • Right to legal aid. b) <i>At the earliest possible stage of their proceedings</i>, children should be informed of additional rights, including the: • Right to an individual assessment; • Right to a medical examination; • Right to limitation of deprivation of liberty and use of alternative measures; • Right to be accompanied by the holder of parental responsibility during court hearings; • Right to appear in person at trial; and • Right to effective remedies.

		c) <i>Upon deprivation of liberty</i>, information shall be provided of the: • Right to specific treatment during deprivation of liberty.
Article 5	Right to have the holder of parental responsibility informed	The Directive requires Member States to ensure the holder of parental responsibility is informed of the child's rights. According to Recital 22, this should be done as soon as possible and in such detail necessary to safeguard the fairness of proceedings and the effective exercise of the rights of the child. Another appropriate adult, nominated by the child and accepted by the competent authorities, should be informed if: • Informing the holder of parental responsibility would be contrary to the child's interest; or • After reasonable attempts, it is not possible to identify or reach the holder of parental responsibility; or • It could jeopardise criminal investigations (such as when there is suspicion that the holder of parental responsibility is complicit in the crime). If the child does not appoint an appropriate adult, or the designated adult is not acceptable to the competent authorities, the competent authorities should designate another person, taking into account the best interests of the child.
Article 6	Assistance by a lawyer	Child suspects and accused persons have the right of access to a lawyer in accordance with the Access to a Lawyer Directive (2013/48/EU). Member States must ensure children are assisted by a lawyer to allow them to exercise their rights effectively. Children shall be assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons: • Before they are questioned by the police or other law enforcement or judicial authority; or • At the commencement of investigative or evidence-gathering acts (these include, at least, identity parades; confrontations and reconstructions of the scene of a crime); or • After deprivation of liberty; or • Where they have been summoned to appear before a court, in due time before they appear before that court. Such assistance includes: • The right to meet and communicate in private, including prior to questioning; • To be assisted by a lawyer during questioning; and • To be assisted during investigative acts. Member States may derogate from some of the above provisions, but in any event, children have a right to the assistance of a lawyer: • When they are brought before a court or judge to decide on detention; and/or • During detention. Member States must respect the right to confidentiality between the lawyer and child, and the right to confidentiality is non-derogable.
Article 7	Right to an individual assessment	Member States must ensure that specific needs of the child, such as protection, education, training, and social integration, are taken into account. To do so, an individual assessment must be carried out by qualified personnel, following, as far as possible, a multidisciplinary

		approach to assess the child's personality, maturity and their economic, social and family background, as well as any vulnerabilities (such as intellectual disabilities and communication difficulties). Assessments should be carried out at the earliest possible stage and with close involvement of the child. The assessment can establish and note relevant information that could be helpful in the determination of: • Whether any specific measures are of benefit to the child; • The appropriateness and effectiveness of precautionary measures; and • Decisions in the criminal proceedings, including sentencing.
Article 8	Right to a medical examination	Children deprived of liberty have the right to a medical examination without undue delay with a view to assessing their mental and physical condition. It should be carried out by a professional and should be as non-invasive as possible. The results of the medical examination should be taken into account when determining the capacity of child to be subject to questioning and other investigative acts or measures to be taken towards the child. A request for a medical examination can be made by the child, the holder of parental responsibility, or the child's lawyer.
Article 9	Audio-visual recording of questioning	The Directive requires that the questioning of a child is subject to audio-visual recording when proportionate in the circumstances of the case, taking into account circumstances such as the presence of a lawyer or whether the child is deprived of liberty, always keeping in mind the best interests of the child.
Article 10	Limitation of deprivation of liberty	Deprivation of liberty should be used as a measure of last resort and for the shortest appropriate time. The decision to deprive a child of liberty must be reasoned and subject to judicial review, at regular intervals, at the request of the child, the child's lawyer, or of a judicial authority which is not a court. Decisions should be made without undue delay.
Article 11	Alternative measures	Alternative measures to detention should be made available when appropriate.
Article 12	Specific treatment in the case of deprivation of liberty	Children should be held separately from adults unless it is not in the child's best interest to do so. In the case of police custody, member states may deviate from this when exceptional circumstances make separation impossible, or when it is in the best interest of the child. When children are detained, appropriate measures should be taken to: • Ensure and preserve health, and mental and physical development; • Ensure the right to education and training, including where they have disabilities; • Ensure effective and regular exercise of the right to family life (Recital 51); • Ensure access to programmes that foster development and reintegration into society; • Ensure respect for their freedom of religion or belief (Recital 52); and • Allow the child to meet with the holder of parental responsibility as soon as possible, so long as this is compatible with investigative and operational requirements.

Article 13	Timely and diligent treatment of cases	Member States must take all appropriate measures to ensure criminal proceedings are treated as a matter of urgency, with due diligence, and that the child is treated in a manner that protects their dignity and is appropriate for their age, maturity, and level of understanding (taking into account special needs, including any communication difficulties).
Article 14	Right to protection of privacy	Member States should ensure that the child's right to privacy during criminal proceedings is protected. Court hearings involving children should either be held in the absence of the public, or courts and judges may decide to hold such hearings in the absence of the public. Member States should also encourage the media to implement self-regulatory measures to achieve this objective.
Article 15	Right to be accompanied by the holder of parental responsibility during proceedings	Member States should ensure that children have the right to be accompanied by the holder of parental responsibility during court proceedings. An appropriate adult may be appointed in such circumstances and by such methods as outlined in Article 5. Member States should ensure the holder of parental responsibility or another appropriate adult is present at proceedings, other than at court hearings, if it is in the child's best interest and the presence of that person does not prejudice criminal proceedings.
Article 16	Right to appear in person at, and to participate in, their trial	Member States must ensure that children have the right to be present at trial and to take all necessary measures to enable the child to participate effectively, including the opportunity to be heard and to express their views (under Recital 60, Member States should also take appropriate measures to secure the child's attendance at trial, including sending summons to the holder of parental responsibility). Children who are not present at trial have the right to a new trial or another legal remedy.
Article 17	European arrest warrant proceedings	The Directive protects certain rights for children subject to EAW proceedings. These rights include the: • Right to legal assistance; • Right to have the holder of parental responsibility informed; • Right to medical examination; • Right to a limitation on deprivation of liberty; and • Right to be accompanied by the holder of parental responsibility in criminal proceedings.
Article 18	Right to legal aid	Legal aid must be made available where necessary to guarantee the effective exercise of the right to be assisted by a lawyer.
Article 19	Remedies	Children have a right to an effective remedy under national law in the event of a breach of their rights under the Directive.
Article 20	Training	Member States must take appropriate measures to ensure that judges and prosecutors have specific competence or have effective access to specific training. They should also take appropriate measures to promote training for lawyers working with children and to encourage initiatives enabling those providing children with support and restorative justice services to receive adequate training.
Article 23	Non-regression	The Directive should in no way be interpreted as a regression from the Charter, ECHR, or international law, including the CRC.

1.2 Key principles

The Children Directive is significant mainly because it gives specificity and direct enforceability to some of the core concepts of juvenile justice developed in other international and European standards. The form each of these principles takes in the Directive is now examined in turn, addressing each of the key protections the Directive provides and placing them in the broader context of international and European law (particularly the CRC).

1.2.1 Scope of juvenile justice

The Children Directive defines a ‘child’ as anyone under the age of 18,¹⁷ and requires that where there is uncertainty as to age, a presumption that the defendant is a child should operate.¹⁸ The Directive also provides explicitly that in the event a child turns 18 during the course of criminal proceedings, it will still apply to those proceedings.¹⁹ The Directive also applies whenever the child is deprived of liberty, irrespective of the stage of criminal proceedings.²⁰

The Directive is thus more stringent than the CRC, which is applicable to anyone below the age of 18 years, unless under the national law applicable to the child, maturity is attained earlier (Article 1 CRC). Both the Beijing Rules and the Havana Rules also grant the domestic legislator some flexibility in defining which children come under special legal protections.²¹ However, the Directive does not go as far as the European Rules, which encourage states to extend the scope to juvenile justice to ‘young adult offenders’, meaning persons between the ages of 18 and 21 who are alleged to have or have committed an offence.²²

The Children Directive also does not apply to cases involving minor offences (provided that detention cannot be imposed as a sanction, and the imposition of any sanction can be appealed to a court).²³ This may create some uncertainty, given that ‘minor offences’ are not clearly defined, leaving room for EU Member States to exclude certain offences from the scope of the Directive. This potentially leaves some room for confusion

Lawyers should be aware that even if an offence is classified as minor under domestic law, it may nevertheless be characterised as a criminal charge in accordance with Article 6 ECHR. Under the ECHR, criminal charge has an autonomous meaning. It is ultimately the ECtHR that decides what qualifies as

¹⁷ Children Directive, Article 3(1)

¹⁸ Children Directive, Article 3(1)

¹⁹ Children Directive, Article 2(3)

²⁰ Children Directive, Article 2(6)

²¹ A ‘*juvenile*’ according to the Beijing Rules is a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult (Rule 2.2 (a) Beijing Rules). In effect, the Beijing Rules grant the domestic legislator leeway to define ‘*juvenile*’ in relation to their own juvenile justice system. By contrast, a ‘*juvenile*’ according to the Havana Rules is every person under the age of 18. The Havana Rules however also stipulate that the age limit below 18 permitted to deprive a child of their liberty, should be determined by law (Rule 11(a) Havana Rules).

²² European Rules, 17 and 21.2.

²³ The other directives of the Roadmap contain similar clauses. They are however not identical to the one in the Children Directive.

a criminal charge and thus what offences require a fair trial (including the right to legal assistance) in accordance with Article 6 ECHR.²⁴

1.2.2 Best interests of the child

It is clear that the best interests of the child is a key concept in the Children Directive, which emphasises that Member States '*should ensure that the child's best interests are always a primary consideration*' (emphasis added).²⁵ The concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis.²⁶ The expression '*primary consideration*' means that the child's best interests may not be considered on the same level as all other considerations.²⁷ This strong position is justified by the special situation of the child: '*dependency, maturity, legal status and, often, voicelessness*'.²⁸ The Directive also provides explicitly that the best interests of the child should be the **determinative** factor in a wide range of decisions,²⁹ including those that concern access to a lawyer, the role of parents and other appropriate adults, and pre-trial detention.

This approach reflects Article 3(1) CRC, which gives the child the right to have their best interests assessed and taken into account as a primary consideration in all actions or decisions that concern them, both in the public and private sphere.³⁰ This means that lawyers have an important duty to ensure that the child's best interests are being taken into account **throughout** the criminal proceedings.

The CRC Committee stressed that the child's best interests is a threefold concept which operates variously as:

- a. A substantive right, requiring consideration of the child's interests over and above other factors whenever a decision is made concerning the child, even if there are other compelling interests at stake. Children are often unable to advocate their own interests, so authorities are under a legal obligation to be aware of their interests and treat them as being of the utmost importance;³¹
- b. An interpretative legal principle, whereby if a provision is ambiguous, the interpretation which most effectively serves the child's best interests should be chosen; and
- c. A procedural right, whereby any decision which affects a child must be arrived at by a process which includes an evaluation of the possible impact on the child. States should consider that children differ from adults in their development and needs. Such differences constitute the

²⁴ *Engel v Netherlands*, appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, (ECtHR 8 June 1976)

²⁵ Children Directive, Recital 8.

²⁶ GC 14, para. 32.

²⁷ GC 14, para. 37.

²⁸ GC 14, para. 37.

²⁹ Note that the references in the Children Directive to the child's best interests can be considered superfluous, as Article 24 (2) of the Charter of Fundamental Rights of the European Union requires EU Member States to consider '*the child's best interests*' as a '*primary consideration*' in '*all actions relating to children*' (emphasis added).

³⁰ GC 14, para. 1. See also GC 10, para 5, under which any juvenile justice action or decision should be taken and implemented in accordance with this right

³¹ GC 14, para. 37.

basis for the lesser culpability of children in conflict with the law, and mean that the traditional objectives of criminal justice, such as deterrence and retribution, must give way to rehabilitation and restorative justice objectives when dealing with child offenders.³²

Determining the best interests of the child

What is in the interest of each particular child must be determined on a case-by-case basis, and may change over time.³³ This means that lawyers and other actors in the juvenile justice system have an ongoing duty to determine a child's best interests.

Dos and Don'ts

Lawyers should not prioritise their own intuitive judgement to determine the best interests of the child, and should also be cautious about accepting authorities' assessments of the child's best interest. They should determine the best interests of their child clients both by listening to the views of their child clients, and by conducting a holistic assessment of their circumstances.

Children have the right to express their views, which should be given due weight by the authorities in all matters affecting them,³⁴ and this means that they have a significant role in determining what is in their own best interests. Lawyers should consider children as fully-fledged clients, and ensure that their views are heard.³⁵ However, lawyers need to be able to determine the extent to which their clients are capable of understanding the legal implications of their own decisions,³⁶ and so the weight given to the child's views for the purpose of determining their best interests should be assessed on a case-by-case basis. The more the child knows and understands, the more the lawyer should be guided by the views of the child in determining their best interests.³⁷

In order to assess the best interests of the child, lawyers need to acquaint themselves with the child's physical, mental, spiritual, moral, psychological and social state.³⁸ They should take a holistic view of the child's development, and this means that they will usually need to establish good rapport with the child to gain first-hand knowledge of the problems and challenges facing them (even beyond the confines of the legal case).³⁹ This also means that lawyers may need to consult social workers, the child's school,

Tip

Lawyers may also find it helpful to have knowledge of the adolescent brain, developmental science, poverty, mental illness, abuse, alcoholism, family dysfunctions, etc., to inform their own assessment of the child's best interests. (Polansky 2015)

³² GC 10, para. 10.

³³ GC 14, para. 32.

³⁴ CRC, Article 12 and GC 14, para. 43.

³⁵ Guideline 40.

³⁶ CRC, Article 5 (regarding the evolving capacities of the child) plays a role here.

³⁷ Beijer & Liefwaard 2011 and GC 14, para. 44.

³⁸ Guidelines 16 and 17.

³⁹ GC 14, para. 14.

parents and other relevant persons who can provide the lawyer with a comprehensive analysis of the child's circumstances. A multi-disciplinary and multi-agency approach is necessary to ensure a holistic approach and the continuity of care of children.⁴⁰

Lawyers must consider, as must the authorities, that children differ from adults in their physical and psychological development, and their emotional and educational needs, and that these differences constitute the basis for the lesser culpability of children in conflict with the law.

Best interests of the child as a procedural right

It is important for lawyers to ensure that children can access the procedures that enable the assessment of their best interests to occur. The Children Directive establishes that Member States have a duty to ensure that the child's specific needs (in terms of protection, education, training, social integration, etc.) are taken into account,⁴¹ and requires an individual assessment to be carried out for that purpose. The results of the assessment can be useful both in determining whether any specific measures would be of benefit to the child and the appropriateness of precautionary measures, as well as in sentencing.

Article 8 of the Children Directive creates a separate right to a medical examination to assess the child's mental and physical condition. This should be taken into account when determining the capacity of each child to be subject to questioning, other investigative acts, or other measures taken towards the child. A request for a medical examination can be made by the child, the holder of parental responsibility, or the child's lawyer.

1.2.3 Effective participation

Effective participation has been identified by the ECtHR as a guiding principle in juvenile justice and also by the CRC Committee as requisite for a fair trial.⁴² It is clear from the EU Commission's impact assessment for the Children Directive that the facilitation of effective participation of children was intended as a primary objective of the Directive. The Commission adopted the ECtHR's definition of effective participation in the case of *S.C. v. the United Kingdom* as recognising that:

'in the case of a child, it is essential that he/she will be dealt with in a manner which takes full account of their age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote their ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce as far as possible their feelings of intimidation and inhibition'.⁴³

⁴⁰ European Rule 15.

⁴¹ Children Directive, Article 7(1).

⁴² GC 10, para. 46.

⁴³ Commission Impact Assessment.

This makes it clear that effective participation means not only that a child should be heard, but also that states should ensure that the child has a broad understanding of the nature of the investigation and of what is at stake for them.⁴⁴

1.2.3.1 Effective Participation: Right to be Heard

The right to be heard is a principle enshrined in Article 12 of the CRC, and Article 16 of the Children Directive gives effect to this right by confirming that all children have the right to appear in person at their trial and to participate. This right must be observed at all stages of the process, starting with the pre-trial stage.⁴⁵

The right to be heard requires states to do more than simply provide opportunities for the child to speak. Children do not express themselves in the same way as adults, and are likely to be less familiar or comfortable with the language, formality and atmosphere of a trial (or in the intimidating setting of a police interview). Ensuring that they are given a real opportunity to express their views freely therefore requires the provision of special support,⁴⁶ and those views should be given due weight in accordance with the age and maturity of the child.⁴⁷

Dos and Don'ts

Whenever the child is being heard by the authorities (including in court) and the lawyer is present, the lawyer must ensure that there is an atmosphere that enables the child to express themselves freely (Beijing Rule 14.2). Proceedings should generally be conducted in a child-friendly manner and lawyers should be prepared to intervene when this is not the case, for example, when police officers are being hostile to the child or court proceedings take too long and no breaks are taken.

Children should also be consulted on the manner in which they wish to be heard.⁴⁸ A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects them, the judge should not (unless it is in the child's best interests) refuse to hear the child and should listen to their views and opinion on matters concerning them in the case.⁴⁹ Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.⁵⁰

The CRC Committee notes that children have the right to be heard directly and not only through their representatives if it is in their best interests.⁵¹ At this point the importance of a multidisciplinary approach towards assessing the child's best interests should be reiterated. With the help of other professionals (social workers or perhaps school teachers), the maturity of the child can be assessed

⁴⁴ *S.C. v the United Kingdom*, App. no. 60958/00, (ECtHR, 15 June 2004), para. 29.

⁴⁵ GC 10, para. 44.

⁴⁶ Guidelines 54-63.

⁴⁷ CRC, Article 12 (1); *T. v the United Kingdom* (1999), App. no. 24724/94 (ECtHR, 16 December 1999)

⁴⁸ Guideline 44.

⁴⁹ Guideline 47.

⁵⁰ Guideline 41.

⁵¹ GC 10, para. 44.

and their views be given due weight. Any communication difficulties which could hamper meaningful participation should be identified at this stage.⁵²

The right to be heard applies also to the period of implementation of any imposed measures, such as deprivation of liberty. Except in the case of very short periods of deprivation of liberty, an overall educational plan, tailored to the individual characteristics of the child must be developed. The views of the child should thereby be taken into account throughout the time in which they are under the supervision or control of the authorities.⁵³

1.2.3.2 Effective participation: Right to Information

The right to information is enshrined by Article 4 of the Children Directive, and it further affirms that an explanation of a child's rights should be provided in simple and accessible language. The ECtHR recognised in *S.C. v. the United Kingdom* that the accused needed to have a broad understanding of the nature of the trial process and of what is at stake for them, including the significance of any penalty which may be imposed, in order for the individual to participate effectively in the proceedings. It must be noted however, that neither S.C. nor the Directive requires children to understand every aspect of the trial. The position adopted by the Directive and the ECtHR reflects that of the CRC, whereby making children aware of their rights is essential to juvenile justice.⁵⁴

In order for children to participate effectively, they should be given information about:

- the juvenile justice process as a whole and of the possible measures that can be taken (CRC GC 10, para 44); and
- the charges against them '*promptly and directly*' (i.e. when a prosecutor or judge initially takes procedural steps against the child or when authorities decide to deal with a case without judicial proceedings) (Article 40(2)(b)(ii) CRC).

Do's and Dont's

Lawyers must ensure that their child clients are given information directly. It is not sufficient that their parents, or another adult with parental responsibility are given information about legal process and the details of the criminal case against the child.

It is the child that has to understand the accusations against them. The authorities should not leave this to the parents, legal guardians or the child's lawyer.⁵⁵ This means that the information and explanations should be communicated to the child directly and not via the parents or the lawyer.⁵⁶ Article 5 of the Children Directive also creates a distinct right for the child to have the holder of parental responsibility (or another appropriate adult) informed of the child's rights as soon as possible and in enough detail to safeguard the fairness of the proceedings.

⁵² Guideline III (A)(1).

⁵³ European Rules, 62.6 (c) and (d).

⁵⁴ Article 12 CRC.

⁵⁵ GC 10, para. 48.

⁵⁶ Liefwaard et al., 2016.

The Guidelines explain the right to information in more detail. They require the provision of information that may not be directly linked to the legal proceedings, but which may nevertheless be necessary for the child's reintegration into society, such as information regarding relevant support systems. According to the Guidelines, children should from their first involvement with the justice system or any other authority (such as the police) be adequately informed of: (a) their rights; (b) the system and procedures involved; (c) relevant support mechanisms; (d) the consequences of the judicial or non-judicial proceedings; (e) the charges; (f) the time and place of court proceedings where relevant; (g) the general progress and outcome of the proceedings or intervention; (h) the availability of protective measures; (i) mechanisms for review of decisions; (j) opportunities to obtain reparation from the offender or state; (k) the availability of services (such as health, psychological, social, interpretation and translation, and other) and the means of accessing such services (with financial support); and (l) any special arrangements if they are resident in another state.⁵⁷

1.2.4 Legal Assistance

The right of access to a lawyer is a crucial fair trial right, given the important role that legal assistance can play towards ensuring that other rights can be enjoyed. This right is especially significant for children, whose age and inexperience can amount to additional obstacles that compromise their ability to participate effectively in their criminal proceedings.

To this end, the Children Directive provides for the right of **assistance** by a lawyer, in addition to the right to of **access** to a lawyer granted to all suspects and accused persons in the Access to a Lawyer Directive.⁵⁸ This means that Member States have a positive obligation to ensure that the child is assisted by a lawyer, irrespective of whether the child has asserted their right of access to a lawyer.⁵⁹ It should be noted at this stage that the provisions relating to the right to legal assistance largely reflect the provisions in the Access to a Lawyer Directive. Member States are required to ensure that children are assisted by a lawyer without undue delay from the moment they are made aware that they are suspects or wanted persons (namely, before being questioned by the police, upon an investigation, after deprivation of liberty or after summons to appear in court).⁶⁰

Derogations

The Children Directive explicitly recognises that there are limitations to the right to legal assistance.⁶¹ According to Article 6(6) of the Directive, derogations are allowed where the assistance of a lawyer would not be proportionate in light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could

⁵⁷ Guideline IV(A)1(a-l).

⁵⁸ The Children Directive has given effect to Article 40(2)(b)(ii) CRC, the right to legal or '*other appropriate assistance*' in preparing their defence, and Article 37(d), the right of access to legal assistance for children deprived of their liberty. However, the Children Directive has gone beyond those articles in requiring the provision of actual assistance by a lawyer in certain circumstances, and not merely the right to legal (or other appropriate) assistance.

⁵⁹ Children Directive, Recital 25

⁶⁰ Children Directive, Article 6(3).

⁶¹ It was foreseen that the right to legal assistance could have substantial financial implications for Member States and a proportionality clause was inserted in the Children Directive (Cras 2016, 113).

be taken in respect of such an offence, it being understood that the child's best interests must always be a primary consideration. There is no derogation from the child's right to access to a lawyer in any case, whether during detention, when brought before a judge in order to decide on detention at any stage of the proceedings, when deprivation of liberty is to be imposed as a criminal sanction, or during trial hearings before a court.⁶²

Member States may also derogate temporarily from the obligation to ensure that children are assisted by a lawyer in exceptional cases at pre-trial stages, to the extent justified by the circumstances of the case. This is possible if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action by the investigation authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.

Again, the child's best interests have to be taken into account. The decision to proceed with questioning without the presence of lawyer under this derogation may be taken only on a case-by-case basis, either by a judicial authority or by another competent authority, on the condition that the decision can be submitted to judicial review.⁶³ The provisions relating to the derogation of the right of access to a lawyer largely mirror those relating to the right of access to a lawyer in Articles 3 and 8 of the Right of Access to a Lawyer Directive.⁶⁴

Waivers

Like other suspects and accused persons, children are often pressured to waive certain rights prior to the appointment of a lawyer. However, given their lack of experience and more limited capacities for judgement and decision-making, it is likely that children will be more susceptible to pressure than adults. To give a common example, a child told by a police officer that they '*does not need a lawyer and will probably be free to go after they answer a few questions*' is much less likely to insist on having a lawyer present than an adult.

As mentioned above, the Children Directive requires Member States to ensure that children are assisted by a lawyer, whether or not the child has requested the assistance. This appears to suggest that the Directive does not recognise the right of children to decide if they wish to be assisted by a lawyer, and in the absence of any explicit provisions regarding waivers, it seems that children cannot waive their right to legal assistance under the Directive.

Lawyers may wish to note, on the other hand, that the jurisprudence of the ECtHR is clear that the right of **access** to a lawyer may be waived by the child, although the practical implications of the requirements for such a waiver are not clarified. The ECtHR's position was:

- that a waiver must be expressed in an explicit and unequivocal manner, and that the child should be able to reasonably foresee what the consequences are of his conduct; and

⁶² Children Directive, Article 6(6).

⁶³ Children Directive, Article 6(8).

⁶⁴ Further discussion of derogations can be found in the Fair Trials toolkit on the Access to a Lawyer Directive. Available at: <https://www.fairtrials.org/wp-content/uploads/A2L-Toolkit-FINAL.pdf>

- that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of legal assistance can only be accepted after the authorities have taken all reasonable steps to ensure that he is fully aware of his defence rights and can appreciate, as far as possible, the consequence of his conduct.

It is not clear what the ECtHR considers ‘explicit’ and ‘unequivocal’, but it is clear that conveying information on the right to legal assistance to a parent while the child is being interrogated, does not meet the required standard.

Protection of privacy and confidentiality

A child suspect and accused person’s right to privacy must be protected at every stage of the proceedings.⁶⁵ The period encompassed by ‘*all stages of the proceedings*’ begins with the initial contact with law enforcement (e.g. a request for information and identification) and ends only with the final decision by a competent authority, or release from supervision, custody or deprivation of liberty.⁶⁶ This has implications for publicity related to child suspects, the confidentiality of the child’s communication with their lawyer and the child’s privacy during court hearings.

Article 14 of the Children Directive reiterates that Member States should take all appropriate measures to ensure the child’s right to privacy during criminal proceedings is protected. Court hearings involving children should be held in private, or courts and judges should be allowed to use their discretion in that regard. There is also an obligation on Member States to encourage self-regulation by the media to achieve this objective.

The Commentary to Beijing Rule 8 stresses that children are particularly susceptible to stigmatisation. As such, no information that may lead to the identification of a child offender may be published.⁶⁷ Authorities should limit press releases related to the child to very exceptional cases.⁶⁸ Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and/or penal law sanctions.⁶⁹

Similarly, court or other hearings should take place behind closed doors.⁷⁰ Public hearings in juvenile justice should only be permitted in specific cases, clearly stated by law. The verdict should be pronounced in public at a court session in such a way that the identity of the child is not revealed. Any criminal records relating to the child should be kept strictly confidential except for those directly involved in the investigation and adjudication of, and the ruling on, the case.⁷¹ The transfer of such

⁶⁵ CRC, Article 16 and GC 10, para. 64.

⁶⁶ GC 10, 64. See also Beijing Rules 8.1.

⁶⁷ Beijing Rules 8.2, Guideline 6.

⁶⁸ GC 10, para. 65.

⁶⁹ GC 10, para. 65.

⁷⁰ GC 10, para. 66, Guideline 9

⁷¹ GC 10, para. 66.

data should occur only in accordance with the best interest of the child, and with data protection legislation.⁷²

Dos and Don'ts

Lawyers themselves must strictly observe rules of confidentiality. Without a real guarantee that their communications with their lawyer are privileged, there is a danger that the child will no longer sufficiently trust the lawyer to disclose further relevant information. A breach of this kind therefore often amounts to denying the child effective representation.

The protection of the child's privacy complements the lawyer's obligation, existing in all European countries, to keep clients' matters confidential.⁷³ For lawyers to be effective in defending their clients' rights there must be confidence that communications between them and their clients are kept confidential. Article 6 of the Children Directive is therefore explicit in stating that the child's right to assistance by a lawyer includes the right to confidentiality between the lawyer and child, and the right to confidentiality is non-derogable. The state must secure the privacy and confidentiality of communications between the child who is detained or arrested and their lawyer.⁷⁴ Lawyers must be able to visit the child unrestrictedly and unsupervised.⁷⁵

The only exception is where there is a real risk of harm to the child, meaning that in such a case confidentially disclosed information should be shared with other professionals in order to prevent further harm to the child.⁷⁶

⁷² Guideline 8.

⁷³ CCBE 2016, p. 9, see also Guideline 10.

⁷⁴ Havana Rules 18(a); European Rule 120.2.

⁷⁵ European Rule 120.2.

⁷⁶ Guideline 10.

Chapter 2: Procedural Safeguards for Children in Conflict with the Law at Various Stages

Chapter 1 provided an overview of the rights afforded to children by international and European law, particularly the Children Directive. This section outlines the practical implications of the Directive and other international and regional standards at the various stages in criminal proceedings. Lawyers may find it useful to revisit this section after reading Chapter 3 of this manual (on child development), so that they have a better understanding of why certain procedural safeguards are necessary.

Summary

- Member States are required to ensure that child suspects and accused persons are assisted by a lawyer from the earliest stages of their criminal proceedings, including before they are questioned, and following the deprivation of liberty.
- Legal assistance includes lawyer-client consultations prior to questioning, and active involvement during questioning.
- Lawyers must ensure that the child's views are heard during questioning, and that they are able to express themselves without intimidation, unless they are exercising their right to remain silent.
- Children should be informed about their rights at the earliest opportunity, including those that are specific to the rights of children.
- The Children Directive requires Member States to ensure that the questioning of children is audio-visually recorded.
- Once lawyers have obtained a clear, holistic picture of the child's situation, they may, as long as this is in the best interests of the child and in agreement with the child's views, try to steer the police towards diverting the case out of the criminal justice system.

2.1 Arrest and police interrogation

The initial stages of criminal proceedings, in which a child could be arrested and taken to the police station, will often be a child's first ever contact with the police and the criminal justice system. It is a crucial and stressful moment for any suspect or accused person, but it is particularly challenging for children. Children could be scared, desperate and confused when they are arrested, and they are especially vulnerable during the moments immediately following the arrest and during their interrogation.

The lawyer's role at this first encounter is crucial: the child requires appropriate support at a moment of intense stress, and for their rights to be asserted as fully as possible from the offset of proceedings. At this delicate moment, the lawyer has to establish a relationship with their client, using the communication skills, developmental understanding and legal instruments discussed in previous chapters.

Lawyers are not alone in having a duty to ensure that the child's rights and interests are protected. This duty is shared with other actors in the juvenile justice system, including police officers, who are

legally bound under Article 3 of the CRC to treat the child's best interests as a primary consideration. The process of arrest and interrogation, however, is not designed in a way that gives much effect to that obligation, because they are usually deployed to secure confessions, and to obtain information helpful for the police for ongoing criminal investigations. In some countries, police officers undergo special training to ensure that their conduct and procedures are specifically adapted for children, but such training is not always effective, and lawyers should always take a cautious approach to ensure that police officers are acting in the best interests of their child clients.

2.1.1 Right to legal assistance

The lawyer's presence and legal assistance at the police station helps children to access their fair trial rights, including those that are specific to child suspects and defendants. For example, lawyers can play a key crucial role in ensuring that children understand their rights, and that they benefit from procedural adaptations that would enable them to participate effectively during the crucial initial moments of their criminal proceedings. For these reasons, it is generally in the interests of the child that lawyers are appointed as soon as possible after the child comes into contact with the criminal justice system as a suspect or an accused person.

Scope of the right of access to legal assistance

As mentioned in para. 1.2.4, Article 6 of the Children Directive requires Member States to ensure that a child suspect or accused person is assisted by a lawyer. Article 6 makes it clear that a child suspect or accused person has the right of access to legal assistance from the earliest moment in their criminal proceedings. More specifically, this provision states that children should be assisted by a lawyer 'without undue delay' once they are made aware that they are suspects or accused persons, including before they are questioned by the police or judicial authority, and following the deprivation of liberty.⁷⁷

The preamble to the Children Directive however makes clear that the obligation for Member States to provide children with assistance by a lawyer does not include providing support during the stages of identifying the child; determining whether an investigation should be started; or verifying the possession of weapons or other similar safety issues. Nor does it include carrying out investigative or evidence-gathering acts other than those specifically referred to in the Directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; or bringing the child to appear before a competent authority or surrendering the child to the holder of parental responsibility or to another appropriate adult, in accordance with national law.⁷⁸

The Children Directive mirrors the provisions found in the Access to a Lawyer Directive by confirming that legal assistance includes private lawyer-client consultations before questioning, as well as effective participation **during** questioning.⁷⁹ In other words, Member States are not only required to

⁷⁷ Other points at which legal assistance should be provided include during investigative acts, during confrontations and reconstructions of crime scenes, and after being summoned to appear in court.

⁷⁸ Children Directive, Recital 28.

⁷⁹ Children Directive, Article 6(4).

ensure that a lawyer is present during police interrogations, but they should also allow them to take an active role during the interrogations.

Derogations and waivers

The right to legal assistance under the Children Directive is not absolute. Derogations are permitted. Given that Article 6 of the Directive is framed not as a right for children, but as an obligation upon Member States, it seems that children cannot waive their right to legal assistance (see para. 1.2.4). However, under Article 6(6) of the Directive, derogations are not permissible during detention, and this seems to include cases in which a child is in police custody. In practice, lawyers may not always have an influential role in determining how decisions regarding derogations and waivers are made during the initial stages of criminal proceedings, but in these situations, the role of other actors, such as holders of parental responsibility and appropriate adults, could be significant. They could help to ensure that the child makes an informed decision about getting legal assistance, and to resist pressure from police officers who may try to dissuade the child from getting a lawyer.

5.1.2 Effective participation

Lawyers need to make sure that children are able to participate effectively during police interrogations. This is not satisfied merely by ensuring that children are asked questions and given opportunities to respond. Instead, the lawyer, and other actors in the proceedings must make sure that the child understands the questions they are asked, and the implications and potential consequences of answers they could give, as well as of remaining silent.

Lawyers can and should also ensure that police questions and actions are appropriate to the child's needs and characteristics, and that the child's responses and behaviour are not misinterpreted. This is especially important when children have disabilities or learning difficulties that need to be taken into account.

Dos and Don'ts

It is important for lawyers to have the opportunity to get to know their child clients, and to assess their needs and capabilities prior to their interrogation. If possible, also make sure that an appropriate medical and individual assessment takes place at the earliest stage, so that appropriate procedural adaptations can be sought.

2.1.2.1 Right to be heard

Lawyers have an important role to ensure that the child is able to have their own views heard (rather than those of the parents or the lawyer). This includes making sure that the child is able to give their own account of events without being influenced by intimidation, but also ensuring that the child is as free as possible to give their account of events rather than being discouraged, for example, from giving a particular answer because they are embarrassed by the reaction of a parent, or because they are afraid of incriminating someone else.

Dos and Don'ts

Lawyers should make sure that they understand the child's views and wishes prior to questioning, so that they are able to give effect to those views during questioning.

During the police interrogation, the right to be heard must also be balanced with the right to remain silent, and the lawyer should advise the client on the right strategy to deploy during a police interrogation. Lawyers should however, be careful when advising their child clients to make use of their right to remain silent. It has been suggested that lawyers are often too eager to advise this as a strategy, even in cases in which the child's guilt seems obvious. Relying on the right to remain silent could also prevent the use of diversion mechanisms, which may require the child's co-operation.⁸⁰

As discussed earlier, the Children Directive requires Member States to enable lawyers to participate actively during police interrogations. This means that lawyers should be able to intervene, for example, to ensure that questions are phrased in a way that their child client can understand, to check that their child client has understood the questions, and to also ensure that their responses are not misinterpreted. Lawyers should also be prepared to interrupt and protest where the questioning is unfair or if the conduct of the police officer is unduly intimidating.

Dos and Don'ts

Children are most likely to be able to participate effectively if they feel comfortable. This means, for example, that lawyers should ensure that children are given appropriate breaks for rest, food and drinks, particularly if they are in danger of feeling overwhelmed. This is part of the process of securing the child's general welfare, but lawyers should keep in mind that it can have a very direct effect on the child's ability to participate effectively.

The role of other actors

The role of other actors can be instrumental in ensuring that the child is heard. Lawyers can and should try to get to know their clients so that they are able to identify their needs and to assess their capabilities. In practice, however, the time given to lawyers to do this prior to police interrogations will often be insufficient, and in these situations, the role of others who know the child better, including social workers and those with parental responsibility, could be very significant. They could, for example, have a pre-existing understanding of how the child's communication and language skills, that could help to ensure that the child is heard.

Tip

Having a familiar face at a stressful time can help children feel more comfortable, and help them express their views, but holders of parental responsibility could also have a damaging impact on a child's right to be heard. This is particularly so if parents take an over-active role during questioning, or if the children feel intimidated or embarrassed about speaking openly in their presence.

⁸⁰ Liefwaard & Van den Brink 2014.

Member States are required by the Children Directive to ensure that children are accompanied by a holder of parental responsibility or an appropriate adult during their legal proceedings, so long as it is considered that this would be in their best interests, and the presence of that person does not prejudice the proceedings.⁸¹ The preamble of the Directive recognises police interrogations as a stage at which this obligation is engaged.⁸²

2.1.2.2 Right to information

A child's ability to understand their position, and to make sense of the information given to them by the police and by their own lawyer is generally more limited than that of an adult, for reasons that will be discussed in Chapter 3. Lawyers must also bear in mind that a child who has been arrested by the police might be encountering the justice system for the first time, and that they could find the experience more stressful than most adults. The lawyer must take special care to ensure that a child suspect understands the information being given to them, whether by interpreting it themselves, or by prompting the police to use simple, child friendly language, and by explaining the implications for the case.

As explained earlier, children are required under ECtHR case law to have a 'broad' understanding of the process, and of what is at stake.⁸³ This means that lawyers need to ensure that their child clients understand most relevant aspects of applicable laws and procedures, as a minimum the elements stipulated in Article 4 (the right to information) of the Children Directive, to enable the child to participate effectively in the proceedings.

Scope of the right to information

The Information Directive contains provisions about the scope of the information that must be provided to suspects and accused persons, irrespective of their age, and about the way in which such information should be provided. In particular, all suspects and accused persons should be given information promptly about certain procedural rights, and about the information about the criminal act that they are suspected or accused of having committed.⁸⁴

The Children Directive reaffirms that there is a specific obligation upon Member States to inform children of their rights, and it refers to the Information Directive, but it elaborates further on the rights that must be provided, and how and when this should be done. Article 4(1) of the Children Directive recognises that there are different rights that must be explained to children at different stages of the proceedings these are. It provides that the following rights must be provided promptly when the child is made aware that they are suspects or accused persons:

- a) The right to have the holder of parental responsibility informed;
- b) The right to be assisted by a lawyer;

⁸¹ Children Directive, Article 15(4).

⁸² Children Directive, Recital 59.

⁸³ *S.C. v. the United Kingdom*

⁸⁴ Information Directive, Articles 3, 4, and 6.

- c) The right to protection of privacy;
- d) The right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings; and
- e) The right to legal aid.

The Directive also specifies that some rights need to be explained to the child ‘at the earliest appropriate stage’ and others ‘upon deprivation of liberty’, which are discussed in more detail later, but it is important to note that amongst these rights are the right to an individual assessment, the right to a medical examination, the right of limitation of deprivation of liberty, the right of specific treatment during deprivation of liberty, all of which could be relevant at the very early stages of the proceedings. Lawyers should therefore ensure that information about these rights is also made available to the children at the earliest possible stage.

Procedure

The Children Directive makes it clear that the information needs to be provided orally, in writing, or both, in simple and accessible language, and that, as provided under the Information Directive, children should be given a letter of rights. Lawyers should note that the obligation to provide children with letters of rights are not satisfied providing the same letter of rights given to adults. This is not only because the language used in the letter of rights might not be comprehensible to children, but also because it will not contain information about rights that are specific to children.⁸⁵

In certain jurisdictions, like England and Wales, police officers often use letters of rights that are specifically adapted for children to provide information about their rights, but lawyers should not assume that the mere use of special procedures will not only ensure that children understand their rights, but also that they are given accurate information about their rights.

2.1.3 Audio-visual recording

The Children Directive requires Member States to ensure that the questioning of children is audio-visually recorded, where this is ‘proportionate in the circumstances of the case’, and it is in the best interests of the child. Decisions on the proportionality of audio-visual recording in a specific case should take into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not.⁸⁶ If no recording is made, the questioning should be recorded in another appropriate manner, such as by written minutes that are duly verified.⁸⁷

Tip

Audio-visual recording should be demanded in almost all cases. Lawyers may wish to point out the advantages of audio-visual recording to both their client and the police officers, for whom the recordings can protect them unjustified accusations of unfair treatment.

⁸⁵ Children Directive, Article 4(3).

⁸⁶ Children Directive, Article 9(1).

⁸⁷ Children Directive, Article 9(2).

Audio-visual recording can be an effective safeguard that helps to ensure that the rights of suspects and accused persons during police interrogations are protected. It can, for example, act as a strong deterrent to ill-treatment or coercive interrogation techniques, and it can provide evidence of the level of the child's effective participation, should this become an issue at a later stage. The recording could also protect police officers from unjustified accusations of poor treatment, enabling them to demonstrate to have treated a child fairly.⁸⁸ It is not an absolute obligation, however, as authorities have discretion under the Children Directive to decide whether a recording is proportionate.

2.1.4 Privacy and confidentiality

As noted before, lawyers have to keep matters between them and their clients strictly confidential, and this is reinforced by Article 14 of the Children Directive. This applies throughout the proceedings. The Directive further stipulates (in a non-derogable provision) that Member States must respect the confidentiality of communication between children and their lawyers. Such communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law.⁸⁹ States have to respect this confidentiality and may not intercept communications between a lawyer and a client.

As discussed, Article 6(5) of the Children Directive appears to be non-derogable, but this provision is without prejudice to procedures that address the situation where there is a suspicion that the lawyer is involved with the child in a criminal offence.⁹⁰ It is moreover without prejudice to a breach of confidentiality that is incidental to a lawful surveillance operation by competent authorities and to the work that is carried out, for example, by national intelligence services to safeguard national security.⁹¹

2.1.5 Diversion

Once lawyers have obtained a clear, holistic picture of the child's situation, they may, as long as this is in the best interests of the child and in agreement with the child's views, try to steer the police towards diverting the case out of the criminal justice system. Lawyers should be mindful that the objectives of juvenile justice discourage a purely punitive approach,⁹² so when diversion offers a better opportunity to reintegrate the child back into society, that option should be chosen. The lawyer has a substantial role to play in advocating for such a measure. Diversion programmes differ greatly from country to country, and lawyers should have a good understanding of such programmes, in order to determine whether diversion would be in the best interests of their child clients. An individual assessment could help to determine the appropriateness of diversion.

Arguably, it is usually in the interests of the child to be diverted from the justice system. Programmes that allow children to maintain their family ties and keep attending school seem to yield better results than prisons in which family life, education and work are of a different standard.⁹³ Detention

⁸⁸ Cras 2016, p. 116.

⁸⁹ Children Directive, Article 6 (5). See also Havana Rules, Rule 18(a).

⁹⁰ Children Directive, Recital 33.

⁹¹ Children Directive, Recital 34.

⁹² CRC, Article 40(1).

⁹³ Polansky 2015 paras. 53 and 56.

(especially when children are placed in isolation) tends to deliver lower levels of education, and higher rates of reoffending and crime. The impact on the individual is no less detrimental, leaving many convicts mentally and emotionally scarred, having lost their connection to their resources or support systems when returned into the community.⁹⁴

In many countries, police have a broad discretion to divert juvenile cases from the system by referring the child to a diversion program. Studies from the United States of the nature and effects of this informal diversion process suggest that the primary factors influencing the decision to divert a case include: the seriousness of the offense; the age of the child; the child's prior record of convictions, charges, prior contacts with the police; the race, gender, and socio-economic status of the child; the demeanour of the child (youths who seem respectful to the officers and fearful of sanctions are viewed as "salvageable" and therefore diverted from the system); the comments and attitude of the parents upon being informed of the child's arrest (with the officer assessing whether the parents are likely to appropriately punish the child and control their misbehaviour in the future); and, finally, the individual officer's personal feelings about the efficacy of the juvenile justice system and the likelihood that a child will derive any benefits from court.⁹⁵ Lawyers should point the police officers to these elements whenever favourable for the case of the child to persuade the police officer to divert the case.

2.2 Pre-trial Detention

Depriving a child of their liberty is almost never in their best interests. Deprivation of liberty produces severe adverse impacts on children. Even short periods of detention can undermine a child's psychological and physical well-being and compromise cognitive development.⁹⁶ Children deprived of their liberty are at a higher risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with posttraumatic stress disorders. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.⁹⁷ In institutions around the world where children are deprived of liberty, there are serious concerns with regard to violence, including peer-to-peer violence, violence between staff and children and forms of self-inflicted violence.⁹⁸

Lawyers must assist children in three main ways if they are in pre-trial detention, or they are at risk of being detained. They must ensure that their child clients are only detained as a matter of last resort and for the shortest period of time, they must ensure that they are receiving effective legal assistance during detention, and they must also help to ensure that their rights and welfare are protected in detention.

⁹⁴ Polansky 2015, para. 55.

⁹⁵ Hertz et al 2012, p. 15.

⁹⁶ UN Rapporteur on Torture 2015, para. 16.

⁹⁷ UN Rapporteur on Torture 2015, para. 16.

⁹⁸ Joint Report 2012, para. 8.

Summary

- The pre-trial detention of child is only permissible as a last resort, and for the shortest period of time.
- International and regional human rights standards do not recognise a specific time limit for holding children in pre-trial detention.
- ‘Last resort’ presupposes that deprivation of liberty of children can only be used if alternative options are not considered adequate, or have proven to be inadequate in light of the objectives of the deprivation of liberty.
- Lawyers should make sure that alternatives to pre-trial are workable and not too burdensome for their client, and try to consult social workers and other actors to ascertain suitable alternatives.
- Children should not be detained with adults.

2.2.1 Measure of Last Resort for the Shortest Appropriate Period of Time

The ECtHR has affirmed in the case of *Güveç v. Turkey*⁹⁹ that the pre-trial detention of a child is only permissible as a measure of last resort, and must be for the shortest possible time. This position has been adopted in Article 10 of the Children Directive, which requires Member States to limit deprivation of liberty of a child at any stage of the proceedings to the shortest appropriate period of time, taking the age and individual situation of the child, and the particular circumstances of the case into account.¹⁰⁰ Member States are moreover obliged to impose deprivation of liberty as a measure of last resort, and to base it on a reasoned decision and subject it to judicial review by a court.¹⁰¹

Given the significant adverse impact of pre-trial detention on children, and the serious human rights implications of the deprivation of liberty, lawyers should assume that it is in the best interests of the child to request their release. However, it is crucial that lawyers also understand their clients and their circumstances. This is because knowledge about the child’s circumstances could strengthen arguments in favour of their release, and identify suitable alternatives to pre-trial detention. Lawyers need to inform themselves of any factors that might mean that their release is against their best interests. In particularly difficult cases, children might be at risk of direct harm released to the custody of their parents or usual carers, whether because of an abuse or because of an ongoing and unsafe situation in which particular needs are not being met. The possibility of such circumstances makes the possibility of requesting an individual assessment and a medical examination all the more important.

Time limits

The Children Directive does not give minimum timeframes for the (pre-trial) deprivation of liberty of children. What amounts to the ‘shortest appropriate period of time’ and ‘measure of last resort’ in a specific case is left open to interpretation. This approach is consistent with that taken by the ECtHR in

⁹⁹ *Güveç v. Turkey*, App. No. 70337/01, (ECtHR, 20 April 2009)

¹⁰⁰ Children Directive, Article 10(1).

¹⁰¹ Children Directive, Article 10(2).

the case of *Nart v. Turkey*,¹⁰² in which the ECtHR held that the question of whether or not a period of detention is reasonable cannot be assessed *in abstracto*. The ECtHR opined that this had to be determined on a case-specific basis, by considering whether or not there is a genuine requirement of public interest that outweighs the rule or respect of individual liberty.¹⁰³

In *Nart*, the ECtHR found a violation of the ECHR (Article 5(3)), since the applicant was still a child while in pre-trial detention for forty-eight days.¹⁰⁴ The ECtHR found in *Güveç v. Turkey*, in which the applicant was detained from the age of fifteen and kept in pre-trial detention for a period in excess of four and a half years, excessive and in violation of Article 5(3) ECHR.¹⁰⁵ In *Selçuk v. Turkey*¹⁰⁶ the ECtHR considered pre-trial detention of a child for a period of four months in breach of Article 5(3) ECHR.¹⁰⁷

In contrast, in the case of *J.M. v. Denmark*,¹⁰⁸ in which a minor was held in pre-trial detention for over 16 months, the ECtHR found no violation of Article 5(3) ECHR. The child had been placed in a secure institution for young offenders, where their mental status was examined. Moreover, the lawfulness of the continued detention was regularly assessed by the domestic courts. The detention was not only based on the gravity of the accusation, but also on the public reaction: it would have offended the public sense of justice if J.M., who had confessed to the rape and homicide of an eighty-five-year old woman, had been released pending completion of the mental status examinations.¹⁰⁹

When children are detained in police custody, lawyers should refer to the CoE Recommendation (2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice.¹¹⁰ It states that where children are detained in police custody, they should not be detained for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time.

Last resort and alternatives to pre-trial detention

Last resort presupposes that deprivation of liberty of children can only be used if alternative options are not considered adequate, or have proven to be inadequate in light of the objectives of the deprivation of liberty. This means that objectives of the deprivation of liberty in should be clear and explicit in each. If there are no clear objectives, it will be difficult to assess the necessity of the placement and/or the use of alternatives.

Member States have an obligation under Article 11 of the Children Directive to ensure that alternative measures are available. Alternative measures should be available at any point a child is at risk of being

¹⁰² *Nart v. Turkey*, App. No. 20817/04 (ECtHR 6 May 2008)

¹⁰³ *Ibid.*, Para. 29.

¹⁰⁴ *Ibid.*, Para. 36.

¹⁰⁵ *Güveç v. Turkey*, Paras. 109 and 110.

¹⁰⁶ *Selçuk v. Turkey*, App. No. 21768/02 (ECtHR 10 January 2006)

¹⁰⁷ *Ibid.*, Para. 37

¹⁰⁸ *J.M. v. Denmark*, App. No. 34421/09 (ECtHR 13 November 2012)

¹⁰⁹ *Ibid.*, Para. 62

¹¹⁰ Recommendation 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 853rd meeting of the Ministers' Deputies), para. 15.

detained, including during the pre-trial stage. Pre-trial alternatives to detention could include police cautioning, release on bail, probation, community service, the imposition of fines, educational measures and mentoring, care-based and therapeutic measures and restorative approaches.¹¹¹

Lawyers should familiarise themselves with suitable alternatives to pre-trial detention in order to strengthen applications in favour of their release. However, they should be cautious not to advocate for measures or conditions that are inappropriate or unworkable. For example, subjecting children to too many conditions could make it difficult for them to understand and remember all of them, and it could make it difficult to ensure compliance with those conditions.¹¹²

Useful Fact

A US study found that children remember only one-third of court-ordered release conditions. (National Juvenile Defender Center)

It is important to note that there are no ‘one-size-fits-all’ measures. The advice and input of other actors (social workers, mental health and other medical experts in particular) is especially valuable in making the lawyer and the authorities are aware of the best available option for each child, and ensuring that suitable arrangements are in place to ensure that they can be released. In 2017, the UK Home Office adopted a ‘Concordat on Children in Custody’ which contains guidelines on how different actors, including the police and local authorities, should coordinate their activities to ensure that children are not kept in detention for prolonged periods. The concordat emphasises that resource limitations, particularly in relation to accommodation for the child, do not constitute a good reason for failing to provide a level of support that is in accordance with the child’s best interests.¹¹³

Despite the wide range of alternative sanctions and measures available, challenges still remain in encouraging the maximum possible use of these alternatives to detention. One key challenge which must be addressed is that of encouraging authorities to make use of alternative measures. In many countries, detention is still seen as the first option for children, even for minor offences, and reliance is still placed on the retributive tools of traditional criminal justice systems.¹¹⁴ Lawyers should advocate for the measure that suits the best interests of the child, ideally after the individual assessment and/or medical examination so that the lawyer can substantiate their arguments (see further chapter on needs assessment, at paras 4.1-4.3).

Review of pre-trial detention

Decisions on pre-trial detention must be subjected to periodic review, at reasonable intervals of time, by the court, at the request of the child, or the lawyer.¹¹⁵ A number of guarantees under international human rights law are relevant at this point. The CRC Committee stipulates that this should take place

¹¹¹ KilKelly, Forde & Malone 2016.

¹¹² National Juvenile Defender Centre, p. 4.

¹¹³ Available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655222/Concordat_on_Children_in_Custody_ISBN_Accessible.pdf p.21

¹¹⁴ KilKelly, Forde & Malone 2016.

¹¹⁵ Children Directive, Article 10(2).

within 24 hours after arrest and detention.¹¹⁶ Furthermore, the Committee has recommended that states ensure through strict legal provisions that the legality of pre-trial detention of a child is reviewed regularly, preferably every two weeks.¹¹⁷ Children in detention, like other detainees, have the right to bring proceedings of their own initiative to challenge the legality of their detention (with the assistance of a lawyer if necessary).¹¹⁸ The CRC Committee adds that children have the right to a prompt decision following such an action, not later than two weeks after the challenge is made.¹¹⁹

2.2.2 Right to information

The Children Directive require children to be informed both about the limitations on the deprivation of liberty and their right to specific treatment during their detention.¹²⁰ Furthermore, the Information Directive provides requires Member States to inform the suspects and accused persons, irrespective of age, of the maximum number of hours or days they may be deprived of liberty before being brought before a judicial authority.¹²¹ As with other rights mentioned earlier, lawyers should ensure that information about these rights are provided to their child client promptly, orally and in writing, and in a way that they are understood.

The stress imposed by the criminal justice process and by detention has a significant impact on a child's capacity to understand and retain information. Throughout a period of detention, a lawyer must take particular care to ensure that a child is aware and properly understands the evolving situation, and can participate effectively in preparations for a trial or hearing. Sadly, in many countries, lawyers only visit their child clients in detention very rarely, which sometimes adds to their confusion and anxiety, and some children have resorted to contacting their judge or prosecutor to obtain information about their trial.¹²²

2.2.3 Welfare

Children must be detained separately from adults, unless it is considered to be in the child's best interests not to do so.¹²³ Member States also have to separate children from adults when taken into police custody.¹²⁴

Member States moreover have to ensure that detained children (a) preserve their health and their physical and mental development (b) ensure their right to education and training, including

Useful Facts

Research from the United States shows that children in adult institutions reoffend more often than those placed in juvenile institutions. This may be due to the lack of age appropriate services and supports in adult institutions, and because of the greater risk of being influenced by other detainees. (Ziedenberg, 2011)

¹¹⁶ GC 10, para. 83.

¹¹⁷ Ibid.

¹¹⁸ Article 9(4) International Covenant on Civil and Political Rights and article 37(d) CRC.

¹¹⁹ GC 10, para. 84.

¹²⁰ Children Directive, Articles 4(1)(b)(iii), 4(1)(c).

¹²¹ Information Directive, Art. 4 (2)(d)

¹²² 'Advancing the Defence Rights of Children' Experts' Meeting, July 2017, Discussion paper.

¹²³ Children Directive, Art. 12(1); Rule 29 Havana Rules.

¹²⁴ Children Directive, Art. 12(2).

where children have physical, sensory or learning disabilities (c) ensure the effective and regular exercise of their right to family life (d) ensure access to programmes that foster their development and their reintegration into society; and (e) ensure respect for their freedom of religion or belief, all in proportion and appropriately to the duration of the detention.¹²⁵ Of these requirements, (a) and (e) apply also to situations of deprivation of liberty other than detention (such as police custody). Requirements (b), (c), and (d) apply to situations of deprivation of liberty other than detention only to the extent that is appropriate and proportionate in the light of the nature and duration of such situations. Lastly, children who are deprived of liberty should be able to meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements.¹²⁶

III-Treatment

At the international and European level, there is a growing recognition of the widespread and intense violence children face in state institutions, including police custody.¹²⁷ This concern is also reflected in the general comments of the CRC Committee, which recognized that children in conflict with the law are at an increased risk of violence by police officials, which may even amount to torture.¹²⁸

In *Zherdev v. Ukraine*,¹²⁹ the ECtHR found that the stripping of a child in police custody of his clothes, without any explanation to the failure of the authorities to provide them with replacement clothes, keeping them in such a state for two and a half hours in a state of uncertainty and vulnerability, and subsequently placing them in a cell with adult detainees for three days amounted to a violation of the prohibition of torture and ill-treatment of Article 3 ECHR.¹³⁰ Assistance by a lawyer has been recognised by the ECtHR as important mechanism for preventing torture and ill-treatment.¹³¹

Safeguarding the welfare of children in detention is not the sole responsibility of lawyers, but lawyers can play a crucial role of monitoring their treatment, and if needed, they need to record and report incidences of poor treatment, so that appropriate action can be taken. It must also be pointed out that lawyers can only monitor and report incidences of poor treatment if they visit their child clients in detention regularly.

2.3 Court proceedings

Depending on the situation and the jurisdiction, the approach of the courts towards children in conflict with the law may be punitive or paternalistic, and there are varying degrees to which court procedures are adapted to suit the needs of children. Supporting a child through the process of appearing in court involves the management of issues ranging from simple practical problems (can the child see and hear

¹²⁵ Art. 12(5) Children Directive.

¹²⁶ Art. 12(6) Children Directive.

¹²⁷ Joint Report 2012 , paras. 5, 29, 38-40.

¹²⁸ CRC GC 13, para. 3(i).

¹²⁹ *Zherdev v Ukraine*, App. No. 34015/07 (ECtHR 27 April 2017)

¹³⁰ *Ibid.*, paras. 84-95.

¹³¹ *Salduz v. Turkey*, App. No. 36391 (ECtHR 27 November 2008), para. 51.

from where they are sitting?) to more complex legal questions (such as whether a child has a right to a public trial, or to privacy).

Judges and prosecutors should be informed before the start of the trial about the child's personality and level of maturity, as well as their economic, social and family background, and any specific vulnerability that the child may have. This is essential so that appropriate procedural adaptations can be identified, and reasonable accommodations are made to serve the best interests of the child. If an individual assessment of the child's needs has not been carried out by this point then it is absolutely necessary before the commencement of the hearing, though lawyers should properly seek for a thorough assessment at a much earlier stage (see paras. 4.1-4.3 below).

Lawyers, judges and prosecutors may wish to agree on the types of procedural adaptations needed for the court hearing as a preliminary matter at the beginning of the trial. This could help to avoid unnecessary arguments and delays later in the proceedings.

Summary

- Children have the right to be informed promptly about the general aspects of their legal proceedings.
- Lawyers should take special care to prepare children for court and should help to keep them informed throughout the court process, so that they are able to follow the proceedings.
- Lawyers must ensure that children are able to participate effectively at court. This could be done by facilitating communication (for example, by ensuring that child-friendly language is used) and also by getting practical adaptations (to make the court-room a more child-friendly environment).
- As a general rule, court hearings should be held in private, but this is not an absolute rule.
- It is important that children are debriefed properly once a hearing has taken place.

2.3.1 Right to information

Communication challenges for children are manifest in the courtroom. The difficulties with retaining information which occur during pre-trial detention also arise in the stressful and often fast-moving situation in the courtroom. Lawyers should remember that the procedure and formality of the courtroom are likely to be more difficult to understand for a child than they are for most adults. In the same US study mentioned above, one quarter of children surveyed believed that no prosecutor was present in the courtroom during their hearing, or were not sure of their presence.¹³²

Dos and Don'ts

Lawyers need to take time to explain to children what is happening, so that they do not feel lost. In addition to procedure, lawyers must also ensure throughout the proceedings (but especially before and during their trial) that their child clients understand the accusations against them, and the possible outcomes.

¹³² National Juvenile Defender Centre, p. 5.

According to Article 4 of the Children Directive, children have to be informed promptly about general aspects of the proceedings. The preamble of the Directive clarifies that children should, in this respect, be given a brief explanation about the next procedural steps in the proceedings insofar as this is possible, and about the role of the authorities involved. Explaining the process and the order in which various stages occur will help the child understand what is expected of them during the proceedings and when they will be able to give their views to the court.¹³³ It is equally important to ensure that children are properly informed during the court proceedings, so that they are able to follow them, and participate, where appropriate.

Dos and Don'ts

Lawyers must also bear in mind that children are more likely than other clients to struggle not only to understand or retain complex information about their situation, but also to become confused by changes as their cases progress. The responsibility of informing children of their rights is an ongoing one, rather than one which can be discharged at a particular moment.

Article 4 also specifies that children must be informed about their right to be accompanied by a holder of parental responsibility, and the right to appear in person at trial. Children can be involved in criminal proceedings for lengthy periods, and it could be months before their case reaches trial, during which period they might have had multiple encounters with the police. It cannot be assumed that they have remembered all the information they were given previously, including information about their rights.¹³⁴

Preparing for court

It could be helpful for lawyers to arrange courtroom visits for children, so that they get a better understanding of its layout and procedures in a more relaxed setting. Such visits could also help children feel more at ease during the court hearing itself, and help them participate more effectively.

Tip

A helpful tool in explaining the juvenile justice process, its participants and the order of the proceedings taking place in court is to draw a map of the courtroom, together with the child. While drawing the map, the different actors and their roles can be explained and the order in which they will appear or speak in court. It is also important to explain to the child the goal of the court hearing - what will be decided during the hearing and what is at stake for the child (e.g. is it a pre-trial hearing, a hearing in which a plea will be arranged, a full trial, a review hearing, etc.). The visual representation of the courtroom can help children to understand and to remember what will happen in court. The child can take a photo of the map or take it home with them.

2.3.1 Right to be Heard

¹³³ Liefwaard et al 2016, 64.

¹³⁴ Liefwaard et al 2016, 64.

Member States must ensure that children have the right to be present at their trial and take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views (Article 16 (1) Children Directive).

Communication in the courtroom

During court hearings, lawyers should monitor whether the child is being addressed at their level of understanding and maturity, and whether the child understands the information given to them correctly so that the child will be able to give their views. If a judge or prosecutor fails to address the child in an appropriate manner during the hearing, the lawyer should intervene, pointing out the child's level of understanding and maturity, underscore the importance of the participation of the child in their own trial, and request them to adjust their language in a child-friendly way. It can be particularly challenging to ensure the effective participation of children in legal systems that have adversarial procedures that allow the cross-examination of children.

Tip

It could be helpful for lawyers to establish 'ground rules' on the types of questioning that can and cannot take place in advance of the court hearing.

Examples – Child-friendly communication in the courtroom

Depending on the circumstances, adaptations that lawyers may wish to pursue may include:

- Agreeing not to use questions that put the prosecution's case to the child (for example, 'you stole the bicycle, didn't you?'; 'you left your house before 7 o'clock, didn't you?');
- Agreeing to use short, simple questions;
- Agreeing not to use aggressive questioning techniques intended to put pressure on the child;
- Setting time limits on questioning; and
- Using visual aids, such as models and body plans

(These examples are adapted from the England & Wales Criminal Procedure Rules, 3.9(7)(b))

Lawyers may need additional assistance to ensure that children are able to communicate effectively with the court, and they may wish to consider requesting the assistance of an intermediary in order to help 'interpret' for the child.

Practical adaptations

The right to be heard is not only facilitated by ensuring that children are able to understand and respond, but by creating an atmosphere in which they are able to express themselves as far as possible, without feelings of intimidation and inhibition.¹³⁵ Most courtrooms and court procedures are not designed with the interests of children in mind, and lawyers may need to ask for various practical adaptations so that their clients are able to participate effectively, and to make them heard.

¹³⁵ *T v. the United Kingdom*, para. 85; see also Beijing Rules, Rule 14.2.

It is also important to ensure that the court hearing takes place in accordance with a timetable that takes into account a child's inability to concentrate for long periods. This means that where possible, lengthy proceedings should be avoided, and regular breaks should take place.

Examples – Child-friendly adaptations in the Courtroom

- Allowing children to sit next to, or close to their parents;
- Allowing children to sit close to their lawyer;
- Having all parties seated at the same level as the child;
- The removal of gowns and wigs, or any other 'unusual' courtroom attire; and
- In certain countries, it might be possible to arrange the court hearing to take place where the child is being detained, so that they do not need to adjust to an unfamiliar environment.

2.3.2 Protection of privacy

Publicity can have a highly damaging effect on child suspects and accused persons, not only because it affects their welfare and rehabilitation. The right to privacy in juvenile justice proceedings are accordingly protected by the CRC.¹³⁶ However, it has also been recognised that the need to protect the privacy of children during criminal proceedings should be balanced against the right to an open hearing, as protected by Article 6 ECHR.¹³⁷

The CRC Committee has recognised that as a general rule, court hearings should take place in private, but that there could be 'very limited' exceptions to this rule.¹³⁸ This position is reflected to some extent in Article 14 of the Children Directive, which provides that court hearings involving should either *usually* be held in private, that courts should allow such hearings to take place in private. This is a very loosely worded provision, and the preamble of the Directive suggests that this is due to the differences in Member States' legal systems.¹³⁹

The ECtHR looked into the issue of private court hearings involving children in the cases of *T v. the United Kingdom* and *V v. the United Kingdom*. T and V, who were children aged 10 at the time of the crime and 11 at the time of the trial, were convicted of murder. Although a number of special measures were used, the trial was a public one, and the children's names were published following their conviction. Whilst recognising the interest in the open administration of justice, the ECtHR remarked that this interest could have been satisfied by providing for 'selected attendance rights' and 'judicious reporting'. In other words, even if interests of justice require trials involving children to be held in public, there should be limitations on the openness of such trials. Lawyers should also note that the CRC Committee and the Beijing Rules have both stated that the identity of the child must be kept anonymous.¹⁴⁰

¹³⁶ Article 40(2)(b)(vii).

¹³⁷ Cras 2016, 118.

¹³⁸ GC 10, para. 66.

¹³⁹ Children Directive, Recital 56.

¹⁴⁰ GC 10, para 66; Beijing Rules, Rule 8.

Lawyers may not always be able to ensure that trials involving child accused persons are entirely closed to the public, and may not even be able to exclude members of the press, but they should ensure that public access to the court proceedings is limited, and that the identity of the child remains unknown to the public.

2.3.3 After the hearing

Dos and Don'ts

After the court hearing has taken place, lawyers must remember to explain the outcome and the likely implications of the decision. When a decision is taken against the wishes of a child, it is important that they understand how the decision has been reached, and the extent to which his own views have played a role in the considerations and what the decision means for them. (Plotnikoff & Woolfson, 2002)

Explaining the outcome of a hearing is of great importance because it might help the child to understand the consequences of their behaviour, and because it might help them to 'accept' the decision.¹⁴¹ A comprehensible explanation of the reasons behind a certain decision leads to a better insight of the child into their delinquent behaviour.

Explaining the reasons behind a certain decision and the concrete content of the decision should take place in a manner and language that is comprehensible for the child.

Children often do not understand the consequences of a certain legal decision, especially when they are first-time offenders.¹⁴² For example, it is often unclear to a child what a community sentence entails, (e.g. when they should perform the community service, what the work will be, where it will take place and how much time it will take them to complete the measure).

Appeals

Furthermore, it is important that the child receives information on the possibilities of appeal against the decision that is taken. Article 40(2)(b)(v) CRC provides that the child has the right to have the decision and any measures imposed reviewed by a higher competent, independent and impartial body.¹⁴³ In the *Guidelines on Child-friendly Justice* it is stated that the child's lawyer, guardian ad litem or legal representative should give the necessary information concerning appeal, after the decision or judgment is given to the child.¹⁴⁴ A private meeting with the child after the court hearing is also of importance to discuss with them the possibilities of appeal and to advise the child on that matter.

¹⁴¹ Rap, 2013, Cashmore & Parkinson, 2007; Schuytplot, 1999; Tyler, 2006; 2003

¹⁴² Plotnikoff & Woolfson, 2002

¹⁴³ See also GC 10, paras. 60-61

¹⁴⁴ Guidelines, Para. 75

Chapter 3: Juvenile Justice and Adolescent Development

3.1 Introduction to adolescent development

Lawyers working with children do not need to be experts in child psychology, and should seek help from appropriate professionals if and when needed. However, in order to defend the rights of children

Useful Fact

Psychological characteristics and levels of development can vary significantly from child to child, even if they are of the same age.

in conflict with the law effectively, it is helpful for lawyers to have some knowledge and understanding of the developmental phase and psychological characteristics of children and adolescents. This knowledge could help lawyers to interact with their juvenile clients more effectively, to identify their needs, and to better understand their behaviour.

The legal definition of a '*child*' differs from how the term is used amongst psychologists.

- Generally, in the field of developmental psychology '*children*' are defined as those developing from the time of conception until around 10 years of age. The phase of adolescence starts between 10 and 13 years of age and ends between the ages of 18 and 22. Moreover, a distinction can be made between early and late adolescence; the latter phase starting around 15 years of age.¹⁴⁵
- Legally, the minimum age of criminal responsibility (**MACR**) and the upper age limit determine the applicability of the juvenile justice system. The MACR varies widely among countries, ranging as low as seven years of age to 18.

This chapter provides a brief introduction to the cognitive and emotional development of adolescents, and explains the most common mental health problems experienced by children and adolescents in conflict with the law.

Summary

- Psychological characteristics and levels of development can vary significantly from child to child, even if they are of the same age.
- The stage of development of a child affects the extent to which a child can understand legal proceedings, and their relationship to the state.
- For most young people, delinquent behaviour is a phase, and it may be influenced by psychological and developmental factors that are very common for adolescents. They will 'age-out' of criminal behaviour.
- Mental health problems are prevalent amongst children who come into contact with the criminal justice system.
- Children with language and intellectual disabilities are significantly overrepresented in the juvenile justice system.

¹⁴⁵ Santrock, 2007.

3.1.1 Adolescent development and the understanding of juvenile justice proceedings

The developmental phase of adolescence affects young people’s understanding of the criminal justice process and proceedings.

Dos and Don’ts

Given young people’s perceived detachment from the state and the lack of familiarity with criminal proceedings more generally, lawyers should take special care to ensure that their child clients understand the relevance and implications of criminal proceedings and their possible impact.

Research shows that children around 12 or 13 years of age do not perceive themselves as citizens who can be called to account for their behaviour by the state.¹⁴⁶ This mainly has to do with the fact that they are only barely able to think in abstract terms and still see themselves as children who are accountable only to their immediate environment: their parents; grandparents; teachers; and, sometimes, neighbours. Children are still unable to respect the legitimacy of laws and legal procedures, which are in place to control the social order, and they do not see themselves as being part of that social system.¹⁴⁷

In adolescence, the ability to engage in abstract reasoning improves, and greater knowledge and life experience is gained. Studies on adolescents’ understanding of the nature of criminal proceedings show that adolescents below the age of 14 are less likely to be familiar with trial-related information than older adolescents.¹⁴⁸ The capabilities of 16- and 17-year olds are more similar to those of young adults (18- to 24-year olds).¹⁴⁹ Therefore, adolescents are more likely to be capable of understanding what it means to appear before a judge after they have reached the age of 14.

It should be acknowledged, however, that there are large differences between the developmental maturity of individual children. Some children are physically, cognitively, emotionally or morally behind or ahead in their development. The pace at which young people between the ages of 14 and 18 develop differs substantially between individuals. Trial-related knowledge (for example, understanding legal terms and the roles of different actors in the justice system) of children increases with age, but intelligence also has a strong effect on their understanding of proceedings.¹⁵⁰

3.1.2 Adolescent development and juvenile delinquency

It is well-known that the prevalence of offending and delinquent behaviour increases during

Useful Fact

For most young people who are in conflict with the law, delinquent behaviour is a one-off incident and not a persistent way of life. They will “age out” of delinquent behaviour and do not display severe personality disorders. (The MacArthur Foundation Research Network on Law and Neuroscience, 2017)

¹⁴⁶ Grisso, 2000.

¹⁴⁷ Buss, 2000.

¹⁴⁸ Grisso, 2000.

¹⁴⁹ Grisso et al., 2003.

¹⁵⁰ Grisso, 2000; Grisso et al., 2003.

adolescence. A peak in crime rates occurs around the ages of 15-19 and then declines in the early 20s. This is called the '*age-crime curve*', and it is found across all Western populations. Research shows that 40-60 per cent of juvenile delinquents stop offending by early adulthood.¹⁵¹

The high prevalence of offending in adolescence can partly be explained by the characteristics of adolescents and the developmental phase they are in. Appreciating various aspects of adolescent development and the psychological characteristics of children could help lawyers to deepen their understanding of both the mind-set of their clients and the reasons for their actions, as well as helping them to with their clients communicate.

3.1.2.1 Cognitive development

During adolescence, the intellectual abilities of young people develop markedly. Adolescents are able to think in more advanced, abstract and effective ways compared to children. Logical reasoning skills gradually increase between the ages of 11 and 16. A person's formal intellectual abilities (such as, IQ) do not increase notably after 16 to 18 years of age. Although IQ does not change notably after the age of 18, the reasoning skills of adolescents do not yet function at the same level as those of adults (aged 22 or over). Adolescents have less life experience and therefore less knowledge on which to draw when making decisions. They differ in their ability to make judgments as a consequence of less matured emotional and social skills.¹⁵²

The manner in which adolescents reach decisions differs from adult decision-making. The higher executive functions of the brain, such as planning, verbal memory and impulse control, develop even further and are only fully developed around the age of 25.¹⁵³ The psychosocial immaturity of adolescents also influences the manner in which decisions are taken. This means that even though the cognitive capacities of adolescents are mature, their decision-making might not be.¹⁵⁴

Risk-taking behaviour

Adolescents are characteristically more prone to risk-taking behaviour, such as drug use, violence, risky sexual behaviour and risk-taking while driving.¹⁵⁵ Adolescents tend to underestimate risks and do things they generally know are wrong, especially when they find themselves in an exciting situation and experience peer pressure, as their ability to assess the situation diminishes.¹⁵⁶

Some scholars argue that risk-taking is an important evolutionary behaviour. During adolescence people become more independent from their parents. Taking risks, exploring the environment, making friends and spending time with them, helps adolescents to become more independent and develop their own identity.¹⁵⁷

¹⁵¹ Loeber, Farrington & Petechuk, 2013.

¹⁵² Loeber et al., 2015; Scott & Steinberg, 2008; Steinberg & Schwartz, 2000.

¹⁵³ Loeber et al., 2015.

¹⁵⁴ Scott & Steinberg, 2008; Steinberg & Scott, 2003.

¹⁵⁵ Steinberg, 1999.

¹⁵⁶ Steinberg & Cauffman, 1996.

¹⁵⁷ Sercombe, 2014.

Foresight and impulse control

Research suggests that adolescents take more risks not because they do not perceive the risks, but because they invariably underestimate the risks attached to certain behaviour, particularly the long-term risks. Older adolescents are better able to assess risks and look ahead to see the likely consequences of different behavioural choices.¹⁵⁸ The capacity to foresee the short- and long-term consequences of behaviour increases gradually between childhood and young adulthood.¹⁵⁹

Another explanation for engaging in risky behaviour is the lack of impulse control that adolescents display.¹⁶⁰ Impulsivity gradually declines up until the age of 30. Sensation seeking (i.e. thrill and adventure seeking, involving conformist activities such as bungee-jumping or delinquent acts) increases between the ages of 10 and 15.¹⁶¹ Hormonal and physiological changes taking place in the second half of adolescence partly explain the inadequate impulse control and the lack of systemic behaviour among adolescents and young adults.¹⁶² Insights from neuroscience show that different regions of the adolescent brain develop along distinct timelines, resulting in asymmetry among different brain systems.

Peer pressure

A second characteristic of adolescent development is susceptibility to peer pressure. During adolescence, people show an increased interest in socialising with their peers.¹⁶³ Moreover, compared to young children and adults, adolescents are more vulnerable to the pressure exerted by the peer group.¹⁶⁴ Acceptance from peers is of great importance to adolescents.¹⁶⁵ From around the age of 8, children aim to associate with peers instead of making contact with adults.¹⁶⁶ Susceptibility to peer pressure peaks sometime between the ages of 12 and 16, and declines gradually thereafter.¹⁶⁷

Peer pressure can also be related to risk-taking behaviour. When in the presence of peers, adolescents are more likely to make risky decisions than children and adults.¹⁶⁸ The tendency to take risks is not only a consequence of spending more time with friends, but also of the inability to resist peer pressure and the sensitivity to rewards such as peer approval.¹⁶⁹ Research shows that conformity to peers is especially high with regards to antisocial behaviour and among boys.¹⁷⁰

¹⁵⁸ Greene et al., 2000; Schmidt et al., 2003; Steinberg & Cauffman, 1996; Steinberg & Scott, 2003.

¹⁵⁹ Steinberg & Cauffman, 1996.

¹⁶⁰ Steinberg & Cauffman, 1996.

¹⁶¹ Steinberg, 2011.

¹⁶² Steinberg & Cauffman, 1996; Steinberg & Scott, 2003.

¹⁶³ Steinberg, 2011.

¹⁶⁴ Steinberg & Scott, 2003.

¹⁶⁵ Crone & Dahl, 2012.

¹⁶⁶ Delfos, 2004.

¹⁶⁷ Scott & Steinberg, 2008; Steinberg & Cauffman, 1996.

¹⁶⁸ Steinberg, 2011.

¹⁶⁹ Gardner & Steinberg, 2005; Steinberg, 2011.

¹⁷⁰ Steinberg, 1999.

Research shows that young adolescents appear to be particularly sensitive to the views of their own age group.¹⁷¹ It has been further suggested that the fear of being excluded by peers constitutes a major determinant in adolescent decision making.¹⁷²

3.1.2.2 Emotional development

Autonomy

A key outcome of emotional development of adolescents is the establishment of a sense of autonomy or independence.¹⁷³ During childhood, the attachment to parents and their approval are the main influences guiding behaviour. Up to the age of 10 or 11, children like to please parents and other adults with their behaviour. In early adolescence individuals start to oppose their parents actively and start to seek separation. The emerging sense of autonomy is expressed by opposing the wishes and advice of parents and other adults as a way of proving their independence. The decisions adolescents take are often not taken reasonably, but to oppose their parents' wishes.

Emotional autonomy increases all throughout adolescence. Adolescents are directed at their peers and distance themselves from their parents. By late adolescence the process of individuation is largely complete and adolescents are more autonomous from their parents and peers.¹⁷⁴ During adolescence individuals also develop a greater self-awareness and they are increasingly able to have more reciprocal interpersonal relationships with others. Egocentrism gradually decreases and, as a result, adolescents are better able to see the (long-term) consequences of their behaviour for themselves and others.¹⁷⁵

Identity

Identity development takes place later in adolescence: during the late teens and early twenties. A coherent self-image and identity do not arise until the end of adolescence. Adolescents who have reached a sense of identity show a better ability to reason morally, show more reflectiveness and are better able to make deliberate choices concerning their educational or occupational career. Adolescents who are still in the process of developing their identity have more conflicts with authority and show higher levels of anxiety.¹⁷⁶ This period of experimentation passes when the individual's identity becomes more settled, and delinquent behaviour is therefore a transient phase for most adolescents.

Skills associated with a developed sense of identity include the ability to form interpersonal relationships, to reflect on one's own behaviour and to be able to morally reason on a higher level.

¹⁷¹ Knoll et al., 2015.

¹⁷² Blakemore & Mills, 2014.

¹⁷³ Steinberg & Schwartz, 2000.

¹⁷⁴ Scott & Steinberg, 2008; Steinberg & Cauffman, 1996; Steinberg & Schwartz, 2000.

¹⁷⁵ Steinberg & Cauffman, 1996.

¹⁷⁶ Steinberg & Cauffman, 1996; Steinberg & Schwartz, 2000.

These skills are also associated with the ability to take another's perspective, which increases gradually until the age of 16.¹⁷⁷

3.2 Mental health

Although most young people display risky or even delinquent behaviour as part of normal adolescent behaviour, young offenders are at higher risk of a range of problems.¹⁷⁸ At the individual level, developmental delays, intellectual deficits, learning disabilities and emotional disorders are prevalent, as are problems on the wider environmental level, such as street violence, victimisation, domestic problems, out of home placements, truancy and substance abuse.¹⁷⁹ Two factors will be highlighted here: mental disorders and low IQ.

3.2.1 Mental health

Mental health problems are more prevalent among young people who come into contact with the criminal justice system, and especially among those who are deprived of their liberty, when compared to adolescents who do not come into contact with the juvenile justice system.¹⁸⁰ Research on vulnerable groups, including young people who have been in juvenile institutions and those with low intelligence, shows that both groups have longer criminal careers and are convicted more often than other groups of young people.¹⁸¹

Several mental disorders involve cognitive disabilities, including cognitive impulsivity. Cognitive impulsivity means that a person makes very quick decisions and acts accordingly. Adolescents who display this behaviour are more often arrested by the police.¹⁸²

- Attention Deficit Hyperactivity Disorder (**ADHD**) can cause impulsivity, which is related to delinquency. ADHD and conduct disorder often go together.
- Symptoms of a conduct disorder include aggression towards people and animals, destruction of property, deceitfulness, theft and serious violations of rules. A conduct disorder can develop into an antisocial personality disorder.
- Symptoms of antisocial personality disorder include failure to conform to social norms, deceitfulness, impulsivity, irritability, aggressiveness and lack of remorse or empathy.
- Lack of empathy is also associated with autism. Adolescents who are diagnosed with autism can show a lack of cognitive empathy; they are not able to put themselves in the position of others. Young people who persistently commit crimes – particularly crimes that cause personal injury and harm – appear to have less well-developed empathic abilities. Empathy decreases the probability of certain types of offences, while a lack of empathy is assumed to have a facilitating influence on offending.¹⁸³

¹⁷⁷ Steinberg & Cauffman, 1996.

¹⁷⁸ Weijers & Grisso, 2009.

¹⁷⁹ Ten Brummelaar & Kalverboer, 2011; Van Domburgh et al., 2009; Grisso, 2000.

¹⁸⁰ Loeber et al., 2015.

¹⁸¹ Bijleveld et al., 2012.

¹⁸² Loeber et al., 2015.

¹⁸³ Jolliffe & Farrington, 2004.

- Furthermore, juvenile delinquents show higher levels of drug and alcohol use. Research shows that frequent use of drugs or alcohol causes developmental delays and delays in psychosocial maturation.¹⁸⁴

3.2.2 Learning and communication difficulties

Language problems and intellectual disabilities, can severely limit a child's capacity to communicate and put them at a serious disadvantage. However, these are largely undiagnosed and indivisible to professionals in the juvenile justice system.

Language difficulties

Communication always involves a sender and a receiver of messages and it requires encoding (sending messages in understandable form) and decoding (receiving and understanding). Language disorders include problems in comprehending and using language for communication. Usually language

Useful Fact

Some studies suggest that around three quarters of young people convicted of crimes have below-average language skills, and that around 40% have severe language difficulties. The prevalence of language difficulties amongst the average population is around 10%. (Crew, Ellis 2008)

disorders reflect problems in thinking and learning, because learning language is a cognitive skill. Difficulty in using language in social interactions and relationships is seen as a basic problem in many emotional and behavioural disorders, such as social withdrawal or aggressive behaviour. This means that young persons who are diagnosed with, for example, ADHD, conduct disorder or depression, might as well experience language problems.¹⁸⁵

Research shows that children with severe language and communication difficulties are less capable in telling a coherent and chronological story. Moreover, specific details are often lacking in their stories. When an interviewer is not aware of the child's language difficulties, parts of the child's account could be wrongly interpreted, not believed, or not found at all.¹⁸⁶ Children are not always good at noticing if someone understands what they are saying, and they often fail to clarify any confusion they might have caused. Lawyers need to be alert to the prevalence of language difficulties amongst children in conflict with the law, and be mindful of the additional challenges that this creates. The lawyer's ability to notice the child's language difficulties is often a significant factor that determines the quality of defence.¹⁸⁷

Two specific conditions relate to communication difficulties: intellectual disability and autism spectrum disorder (**ASD**). These will be elaborated on in the following sections.

¹⁸⁴ Loeber et al., 2015.

¹⁸⁵ Hallahan & Kauffman, 2003.

¹⁸⁶ Van Dijk-Fleetwood-Bird, 2017.

¹⁸⁷ Van Dijk-Fleetwood-Bird, 2017.

Intellectual disability

Young people with a low IQ are more likely to have more criminal convictions and have longer criminal careers than young people with an average or high IQ.¹⁸⁸ A low IQ often coincides with other problems. Often, people with a low IQ experience psychiatric disorders and behavioural problems. Furthermore, young people with a low IQ often have family-related problems or problems in their social environment. They frequently come from socially disadvantaged families, where parents also have a low IQ, and may live in poverty, have housing problems, previous contact with social services and/or a poor social network.¹⁸⁹

Useful Fact

Research shows that young people with an intellectual disability or a low IQ (less than 85) are overrepresented in the juvenile justice system.

Adolescents with a low IQ require extra attention, often having greater difficulty understanding the juvenile justice process. They also tend to score higher on cognitive impulsivity and are more often charged with delinquent offenses.¹⁹⁰ Moreover, professionals do not always adequately assess the cognitive and social abilities of young people with a low IQ.

Useful Fact

Identifying low IQ in people is difficult because those people cannot usually be distinguished from others by clear physical, behavioural or personality characteristics. It is often assumed that people with a low IQ are functioning at a level higher than their actual capabilities (Kaal, 2015)

Intellectual disability can cause young people to have communication difficulties. They can have problems in understanding others' perspectives, social situations and social cues and social information processing. This can cause difficulties in choosing appropriate ways of acting, besides an aggressive or passive way and expressing emotions verbally may also be difficult.¹⁹¹

Dos and Dont's

Lawyers assisting children should take into consideration the fact that there is a much higher prevalence of intellectual disabilities and language difficulties amongst children in conflict with the law. They must ensure that they and others around them adapt how they communicate with them, and understand their needs.

Autism spectrum disorder

The primary symptoms of ASD are impaired social interaction, disturbed communication and the presence of repetitive behaviour and interests.¹⁹² ASD can occur in various forms and levels of intensity. However, the diagnostic criteria include '*persistent deficits in social communication and*

¹⁸⁸ Loeber et al., 2015; Kaal, 2015.

¹⁸⁹ Kaal, 2015.

¹⁹⁰ Koolhof et al., 2007.

¹⁹¹ Wicks-Nelson & Israel, 2003; Kaal, 2015.

¹⁹² Wicks-Nelson & Israel, 2003.

social interaction across multiple contexts’, manifested by problems in social-emotional reciprocity, deficits in nonverbal communication and deficits in developing, maintaining, and understanding relationships. ASD frequently co-occurs with intellectual disability.¹⁹³

Young people diagnosed with ASD can have serious problems with social interaction and ASD relates to a lack of empathy. This can cause young people to come into conflict with the law. Antisocial behaviour can be the consequence of the inability to ‘*read*’ social situations.¹⁹⁴

ASD can have a profound influence on both the understanding of the juvenile justice process and the interactions taking place within the system with professionals, such as police officers, lawyers, judges and social workers. Young people with ASD may experience difficulties in understanding the perspective of the professionals and the reasons why certain questions are asked.¹⁹⁵

¹⁹³ DSM-5, 2013.

¹⁹⁴ Weijers & Duinstra, 2008.

¹⁹⁵ Lamb et al., 2008.

Chapter 4: Needs Assessment

An accurate and timely assessment of the needs of child suspects and accused persons is essential for ensuring that they are able to participate effectively, and for determining their best interests. Legal proceedings are inherently stressful for children, but this can be reduced by an effective assessment of their needs. Unnecessary, interrogative and formal assessments will likely add to a child's sense of being overwhelmed, and so information needs to be gathered in a way which respects the child's privacy and enables lawyers to put them at ease and best represent them. Legal proceedings, and their outcomes, influence children's lives profoundly and careful assessment is key to ensuring that that influence is as positive as possible.

Summary

- The Children Directive provides that child suspects and accused persons should be subject to an 'individual assessment', and if they are detained, they have the right to have a 'medical examination'
- Individual Assessments can help to identify and safeguard the best interests of children, including by helping lawyers to identify necessary procedural adjustments. Lawyers should ensure that they take place at the earliest stages.
- In addition to facilitating the formal individual assessment, lawyers should also carry out an informal assessment to identify the needs of their clients.

4.1 Informal assessment

The sooner an assessment is carried out, the sooner a child's needs can be met and the more likely the child is to engage effectively with the legal process. Lawyers cannot conduct a full assessment of the child's needs themselves, as they do not have the expertise to do so. However they are able to steer the process, engage relevant actors, and ensure that procedures that determine the child's needs happen. There is a much greater likelihood that children in conflict with the law, in comparison with children who are not, will have additional needs, particularly with regard to their cognitive ability, welfare, and mental health. It is important for lawyers to carry out an informal assessment of the child's needs at the earliest possible opportunity, so that the results can be highlighted to others.

4.1.1 Identifying vulnerabilities

Lawyers can be assisted by other actors involved in the child's legal proceedings, including a social worker or a holder of parental responsibility, in identifying vulnerabilities, such as disabilities, learning difficulties, and mental health issues. It is not uncommon for children's vulnerabilities to have been unrecognised by those around them, even if they are very serious. It is also not uncommon for individuals, irrespective of age, to conceal their vulnerabilities and to have developed ways of coping with them. This means that asking direct questions to the child or their parent about the existence of any factors that affect a child's capacity to participate effectively in their criminal proceedings, could be of limited help.

It may be possible for lawyers to identify the need for a more detailed assessment of a child's needs through questioning, and by examining their behaviour. Lawyers might, for example, get a sense of their client's vulnerabilities by asking questions about their performance in school, their ability to carry out basic tasks, such as telling the time using an analogue clock, and their ability to read and write. It might also be possible to identify certain vulnerabilities indirectly, for example, by asking about any medication they are taking, and establishing whether or not they have sought any specialist help for mental health or learning difficulties.

The UK Ministry of Justice has identified a number of '*prompts*' that could help the police to identify vulnerabilities. These include the following:¹⁹⁶

- Limited or no speech, or speech that is difficult to understand;
- Use of signs and gestures to communicate;
- Difficulty in understanding questions and/or responding inappropriately to questions;
- Difficulty in recalling basic personal information, for example, date of birth, age, and home address;
- Difficulty in telling the time;
- Repeating what is said to them;
- Being overexcited;
- Being physically withdrawn, uninterested, or lethargic; and
- Violence.

Lawyers should however also be mindful that certain characteristics or types of behaviour which suggest serious vulnerabilities in adults can also be normal in children. The identification of vulnerabilities can be particularly challenging where communication with the child is conducted through an interpreter, and for children from certain cultures, whose behaviour (such as the avoidance of eye-contact) could be misinterpreted.

4.2 Individual assessment

According to Article 7 Children Directive, children who are suspects or accused persons in criminal proceedings should be subject to an '*individual assessment*'. This provision requires authorities to acquire a holistic picture of the child in order to enable them to identify and serve the best interests of the child. An individual assessment could have a profound impact on the outcome of the child's case, including the use of any diversion programmes, and it can help identify procedural adjustments that should be made in order to accommodate the special needs of the child. Lawyers must therefore ensure that an individual assessment takes place promptly, and with the involvement of suitably qualified personnel.

The main objective of an individual assessment is to gather information about the child which might be of use to the authorities when: (a) determining whether any specific measure for the benefit of the child is to be taken; (b) assessing the appropriateness and effectiveness of any precautionary

¹⁹⁶ Ministry of Justice, '*Vulnerable and Intimidated Witnesses – A Police Service Guide*' (March 2011), <http://so-fi.org/wp-content/uploads/vulnerable-intimidated-witnesses.pdf>.

measures in respect of the child; and (c) making any decision or taking a particular course of action in the criminal proceedings, including when sentencing.¹⁹⁷ The individual assessment should take into account a wide range of factors, including the child's personality and maturity, the child's economic, social and family background, including living environment, and any specific vulnerabilities of the child, such as learning disabilities and communication difficulties.¹⁹⁸ The Children Directive thus embraces the holistic approach of Article 3 CRC as it requires the authorities to gain a full picture of the child's circumstances.

The Children Directive also requires EU Member States to instruct qualified personnel to carry out the individual assessment following, as far as possible, a multidisciplinary approach and involving, where appropriate, the holder of parental responsibility or another appropriate adult and/or a '*specialised professional*'.¹⁹⁹ Practitioners, when instructing such parties, should bear in mind their duty of confidentiality towards the child client, and that their permission must be sought before sharing confidential or privileged information with third parties. There is also a requirement that EU Member States carry out the assessment with the close involvement of the child,²⁰⁰ in order to guarantee the right of the child to express their views.²⁰¹

4.2.1 Timing of the assessment

Individual assessments should take place at the '*earliest appropriate stage*' of the proceedings, and lawyers should ensure that they take place as soon as possible. An early assessment could help obtain suitable procedural adjustments during the pre-trial stages of the proceedings, including at the police station, inform decisions regarding pre-trial detention, and facilitate early diversion away from the criminal justice system. At the same time, there is a risk that such assessments might contribute to delays, and that this could have an adverse effect on the best interests of the child. Lawyers may find, in particular, at the highly stressful early moments of criminal proceedings following a child's arrest, that arranging a multidisciplinary individual assessment might be impractical, and may prolong the child's time in police custody.

The Children Directive allows the individual assessment to be delayed until before the indictment, and it even allows an indictment to be presented without the individual assessment, provided that this is in the child's best interests and that the individual assessment is available at the beginning of the trial hearings before a court.²⁰² Other international and European standards seem to suggest that the individual assessment should occur much sooner. The Havana Rules require every child to be interviewed as soon as possible after the deprivation of their liberty, and that a psychological and social report should be drafted on the basis of this interview in which the specific type and level of care and programme are determined.²⁰³ The European Rules state that, except in case of a very short

¹⁹⁷ Children Directive, Article 7(4).

¹⁹⁸ Children Directive, Recital 36.

¹⁹⁹ Children Directive, Article 7(7).

²⁰⁰ Children Directive, Article 7(7).

²⁰¹ In accordance with Articles 5 and 12 CRC. This is also consistent with Rule 62.6(d) of the European Rules.

²⁰² Children Directive, Article 7(6).

²⁰³ Havana Rules, Rule 27.

period of deprivation of liberty, *‘an overall plan of educational and training programmes in accordance with the individual characteristics of the juvenile shall be developed (...)’*.²⁰⁴

The Children Directive requires individual assessments to be updated throughout the proceedings,²⁰⁵ recognising that the needs and best interests of children can evolve. Lawyers should be alert to any factors that should trigger such a review. The absence of an individual assessment does not invalidate any specific measures concerning children, but those measures will need to be reviewed after the assessment has taken place.²⁰⁶

4.2.2 Derogations

The right to an individual assessment is not absolute. Under Article 7(9) Children Directive, derogations are permitted when warranted by the circumstances of the case, provided that it is compatible with the child's best interests. The preamble of the Children Directive suggests that such derogations could be acceptable, for example, for non-serious offences and in cases which are unlikely to result in an indictment. There is also no need to conduct a new individual assessment if there is a recent one already in existence. In such cases the assessment should instead be updated.²⁰⁷ Lawyers may, however, request an individual assessment even for minor offences, given that an individual assessment could help to expose more significant problems that need to be addressed, and help the child access relevant services and measures.

4.3 Medical Examinations

Where appropriate, lawyers should also facilitate the right to a medical examination. The Children Directive provides for a right to a medical examination for children deprived of liberty.²⁰⁸ The results of the medical examination should be taken into account when determining the capacity of the child to be subject to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against the child.²⁰⁹ Therefore, if there are reasons to suspect that the child client could have disabilities or mental health problems, it may be in the child's best interests to ensure that the medical examination takes place as soon as possible and that questioning and investigative acts conducted at the early stages take those factors into consideration.

Member States are not obliged to carry out a medical examination of every child deprived of liberty. The medical examination should be carried out either on the initiative of the authorities, in particular where specific health indications call for such an examination, or at the request of the child, their lawyer or their parents (or legal guardians).²¹⁰ Lawyers should also ensure that the medical examinations are not unnecessarily invasive, and that they are conducted by a suitably qualified individual.²¹¹

²⁰⁴ European Rules, Rule 62.6(c).

²⁰⁵ Children Directive, Article 7(8).

²⁰⁶ Children Directive, Recital 38.

²⁰⁷ Children Directive, Recital 37.

²⁰⁸ Children Directive, Article 8(1).

²⁰⁹ Children Directive, Article 8(2).

²¹⁰ Children Directive, Article 8(3).

²¹¹ Children Directive, Recital 8(1).

Chapter 5: Communication

The Children Directive prescribes that professionals working with children in the justice system should be trained and taught appropriate interviewing techniques, child psychology and communication in a language adapted to the child.²¹² This also applies to lawyers, who meet and interact with children privately, throughout the proceedings.

This chapter is divided into two sections:

- The first section provides guidance on how to establish an effective working relationship with child clients; and
- The second section provides guidance on how lawyers should adapt their language and communication and conversation techniques in order to communicate effectively with children.

It is important to point out that every lawyer has their own way of building rapport and communicating with children, and it is important that they use techniques that work best for them.

Summary

- It is important for lawyers to make a good impression on their child clients, and to set 'ground rules' so that they can engage in effective conversation.
- Children may need to be assured that if they do not know the answer to a question, they should say that they do not know.
- Lawyers can help build rapport with their child clients by explaining the extent to which the information they provide will be treated confidentially. They should also try not to come across as judgmental.
- Children tend to be more suggestible and compliant than adults. Lawyers may wish to adapt their questioning to avoid 'leading' or 'suggestive' questions.
- It is important for lawyers to listen to not only listen to their child clients but to let them know that they are listening to them. This could be done, for example, through 'reflective listening' and by summarising what they have been told.
- Lawyers should adapt the language they use, not only by avoiding jargons but by avoiding sentence structures that can confuse children.

5.1 Setting

In order to have an effective working relationship with child clients and engage in meaningful conversation, it is important that the lawyer's interactions with the child begin on a positive note. The first part of this section explains how lawyers can initiate conversations with their child clients, and the second part discusses how they can build rapport.

5.1.1 Explaining the purpose and ground rules

²¹² Art. 19 Directive 2016/800; see also, *Guidelines on Child-friendly Justice*, explanatory memorandum IV, A, 67.

Conversations should take place in a relaxed and supportive environment, which should be, as far as possible, free of distractions (for example, other people present in, or entering the area, noise, incoming phone calls). A distraction-free environment will help the child to open up more easily, as they will be able to pay better attention, remember and retrieve information better, and be more accurate in their responses.²¹³

Lawyers should be aware that their initial interactions with their child client set the tone for the whole conversation, and so it is important to make a good impression. Lawyers should introduce themselves, explain their role and what they expect from the child. It is also important to let the child know why the information is needed, and why that information has to be as accurate and detailed as possible. Lawyers should also try to establish a few ground rules so as to ensure that the information they get from their child client is as helpful and reliable as possible.²¹⁴

The ground rules

The first conversational rule requires the lawyer to explain to the child that they was not present when the alleged offence happened, and that the child should give an as detailed as possible account of what happened. The child should be encouraged to recall the events freely, as this ensures a more accurate and reliable account from the child.

Secondly, the lawyer should explain to the child that they can respond to questions by saying, '*I don't know*', '*I don't remember*' and '*I don't understand*'.²¹⁵ The lawyer should also clarify to the child that they should correct them if they have misunderstood something. Younger children tend to find it particularly difficult to acknowledge that they do not know the answer to a question. This might be

Tip

Lawyers may wish to ask a few unanswerable questions to their child clients so that they can practice saying '*I don't know*'

because they are regularly expected to know the right answer to questions asked by the teacher in school. Children may also equate not being able to answer a question with failure. Research shows that when children practice saying '*I don't know*', it helps them admit that they do not know or understand something during the conversation. Simply telling a child that they can say '*I don't know*' is not enough for them to actually do so during the conversation.²¹⁶

Another common mistake is asking the same question twice. The child may try to give a different answer to the same question if it is asked again, because they might think they gave the wrong answer initially. This could create confusion and harm the consistency of their story. This problem will be even more apparent when closed-ended questions are asked (see below for more information on suggestibility and conversation techniques).

²¹³ Lamb et al., 2008.

²¹⁴ Research has shown that using these ground rules will increase the reliability of the answers given by children (Saywitz et al., 2010; Lamb et al., 2008).

²¹⁵ Lamb et al., 2008.

²¹⁶ Saywitz et al., 2010.

Conversational ground rules are not always easy to explain, but here are some suggestions as to how they could be explained to children:

1. Promoting accuracy, completeness, honesty: *“Tell me everything you remember, from beginning to end, even the little things you think are not very important. Do not make anything up.”* Explain that you were not there and that you do not know what happened.
2. Instructing children to say, ‘I don’t know’: *‘If you don’t know an answer, tell me you don’t know. Don’t guess. Don’t make up anything if you’re not true. But if you know the answer, tell the answer.* A way to practice this with children is to ask: *‘Do you remember my name?’* If they do not know (which will happen quite often), they will say *‘I don’t know’* without feeling too bad about it. It can be helpful to show that not knowing the answer is not a problem.
3. Instructing children to say “I don’t understand”: *“I’m going to ask you some questions. Some of the questions will be easy to understand and some questions might be hard to understand. If you hear a question you do not understand, tell me that you do not understand the question. Say ‘I don’t understand,’ ‘I don’t know what you mean,’ or ‘I don’t get it.’ I will ask you the question again in other words.’* Another way of explaining this is to ask the child *‘What is your domicile?’* Most children will not understand what did means and will say they don’t understand, which will show the child that it is good to ask for clarification.
4. Warning children about misleading questions: *‘Sometimes I may put my guess into a question or I may make a mistake. Tell me if I am wrong. I don’t know what happened. I want to know what you think. It is important for you to tell me if I make a mistake or say something wrong. I want to understand correctly.’*
5. Telling children that the interviewer cannot help answer questions: *‘I don’t know what’s happened to you or what happened in your family. I won’t be able to help you answer the questions.’* And *‘When I ask a question for the second time, it is not because the answer is wrong, but because I forgot the answer or didn’t understand the answer’.*²¹⁷

5.1.2 Building rapport

After making introductions and establishing the ground rules, lawyers should try to build rapport with their clients. In other words, a brief emotional bond should be formed between the lawyer and the

Example – Building rapport

“Now I want to get to know you better.”

Or “Tell me about things you like to do.”

When the child gives a brief response, the lawyer can ask more detailed follow-up questions (Lamb et al., 2008).

²¹⁷ Saywitz et al., 2010.

child.²¹⁸ Building rapport helps to create a more relaxed and supportive environment, which enables lawyers to get to know their client better. Lawyers might find it challenging to establish rapport with children, who are often reluctant to ‘open up’ to adults.

Lawyers should be careful not to come across as judgmental when speaking to children. A non-judgmental attitude requires a critical examination of one’s own beliefs, and acknowledging that those beliefs might not be universally shared.²¹⁹ This means that you should listen more than you speak, so that the child is able to share their thoughts and feelings.²²⁰ Listening non-judgmentally enables the child to realise that their opinion is valued, which in turn increases their trust in the adult.²²¹

Confidentiality

Assuring the child that the information will be treated confidentially will help the child feel safer and enable them to speak more freely to their lawyers.²²²

Tip

It is important to inform children before the conversation begins that their privacy will be protected and what this entails in practice.

Studies show that the responses children give are influenced by the presence of others. They could, for example, be reluctant to accuse adults or their peers in their presence, or they might look for cues from adults when providing answers. Parents may help children to overcome these difficulties, but this depends on the nature of the relationship between the parent and child, and the kind of support the parent provides.²²³

Sensitive issues may need to be discussed alone with the child in the absence of their parents. When parents are present, a child may try to conceal information that might upset the parents or that will change their perception of their child. Lawyers may wish to overcome this problem by speaking to the child alone and assuring them that they do not need to disclose everything to their parents. In the context of a court hearing however, this could be more difficult. The lawyer may need to inform the judge about the difficulties the child might have in discussing certain aspects of the offence in the presence of their parents, and to ask them to be excluded from the courtroom. It is also important to discuss with the child which information will be given to parents when they return, how the conversation can be summarised, and what information will be kept confidential.²²⁴

²¹⁸ Lamb et al., 2008.

²¹⁹ Grant et al., 2008.

²²⁰ American Psychological Association, 2002.

²²¹ American Psychological Association, 2002.

²²² Research on healthcare shows that children are more willing to disclose sensitive information when a health visit is started with a brief discussion about confidentiality (Grant et al., 2008).

²²³ Saywitz et al., 2010.

²²⁴ Grant et al., 2008.

5.2 Effective communication

Knowing how to communicate effectively with children will help lawyers to interact with children, and will help, in particular, with both obtaining and providing information. However, this knowledge could also help lawyers to identify bad practice and cases in which they may need to intervene in order to ensure that their clients are able to participate effectively in their proceedings (for example, during police interrogations, and during court hearings).

5.2.1 Compliance and suggestibility

In general, children are more compliant and suggestible than adults. This has important implications for the way in which children should be interviewed by professionals. For lawyers, this is important to acknowledge when speaking with a child, but it is also important to be mindful of this when accompanying a child suspect during a police interrogation or court hearing.

Compliance

Compliance means that someone confesses falsely, or gives false information just to speed up or end the interview or interrogation. Compliance takes place under pressure, and such pressure includes the threat that the child will be interrogated or detained for a longer period of time if they do not comply.²²⁵ Compliance can also result from the wish to avoid conflict or to please the interviewer.

Suggestibility

Suggestibility refers to the extent to which an individual can be led to believe the information that is wrongly presented to them. Highly suggestible people can develop pseudo-memories of the incident that is suggested to them. In the US, research shows that suggestible people are less likely to understand their rights and are more likely to make confessions.²²⁶

Research shows that suggestibility is higher amongst women compared to men, children under the age of 12, people with a lower IQ, people who are anxious or tired, and in situations where an individual thinks they must provide an answer to every question.²²⁷ Given that children often assume they have to give an answer to every question they are asked,²²⁸ and that they are in a subordinate

Examples – Suggestive interviewing techniques

- Encouraging the individual to pretend or imagine what might have happened;
- Introducing new information;
- Pressurising the individual to provide a response or comply; and
- Repetitive questioning with the encouragement of speculation about what might have happened (Delfos, 2005)

²²⁵ Gudjonsson, 2003.

²²⁶ Redlich et al., 2006.

²²⁷ Gudjonsson, 2003.

²²⁸ Saywitz et al., 2010.

position to adults, they are particularly vulnerable to suggestibility. Children often believe that the interviewer has superior knowledge and want to be cooperative, despite not knowing what the motives of the interviewer are.²²⁹

Following the conversational ground rules (mentioned above) can be a good way of avoiding suggestibility. Moreover, leading questioning and coercion should be avoided. It is particularly important for children to explain their right to remain silent. This right should not only be presented as a fact, but its implications should also be explained.

5.2.2 Conversation techniques

A general rule of conversation is to start the conversation as you would like it to proceed; create the expectation that the child will be doing most of the talking, and that you will listen. This is because children need time to process the meaning of the question, and to formulate answers. When a child stays silent, you should try to understand the reasons behind the child's reluctance to give an answer to the question.²³⁰

Tip

Children should be given time to answer questions (at least 10–20 seconds), and you should not rush with more questions.

It could be helpful to use certain conversational techniques in order to communicate with children more effectively. Miller and Rollnick (2002) have developed an evidence-based method of motivational interviewing, which was first developed in the context of healthcare, to help patients to adhere to treatment. This approach uses a direct, client-centred style of interaction to promote behavioural change.²³¹ The four conversational techniques explained below are: asking open-ended questions; reflective listening; affirmations; and summarising.

1. Open-ended questions

Tip

Open-ended questions encourage children to give longer, more detailed, more accurate, and less self-contradictory responses.

Open-ended questions do not direct a person to respond in a particular manner. Instead, they enable a person to think about their responses. Closed-ended questions generally require a simple 'yes' or 'no', or a numerical answer.²³² Closed-ended questions and other error-inducing interview techniques (e.g. verbal prompts that encourage the child to imagine, and option-posing questions) tend to prompt less detailed, shorter answers, particularly from younger children.²³³

Children tend to be reluctant to admit that they do not know the answer when asked to respond to a closed question, and they might instead try to guess.²³⁴ This is because when they do not give an

²²⁹ Lamb et al., 2008.

²³⁰ Saywitz et al., 2010.

²³¹ Levensky et al., 2007.

²³² Erickson et al., 2005.

²³³ Lamb et al, 2008.

²³⁴ Saywitz et al., 2010.

answer, they could feel as though they are ‘failing’, for reasons explained before (see para. 5.1.1). When someone asks a question twice, a child will often think that they gave the wrong answer the first time. This is even more so when a closed question is asked, because not only is the question asked, but the alternative answer is also suggested to the child. You should also be cautious when using option-posing questions (i.e. ‘either/or’ questions). In such cases, the latter option should always be left open, so that the child has the opportunity to give their own alternative answer.

However, this does not mean that closed questions should be avoided at all times. In some situations, it might be helpful to start the conversation with a few closed questions, especially where the child is very reserved and not eager to talk to others. These questions should be neutral and easy to respond to.

Lawyers should try to use open-ended questions to enable the child to give their own views (i.e. *invitations*). Conversation can be maintained by

asking follow up questions or by simply stating a single word that provokes a continuation of the story (i.e. *facilitators*), such as ‘ok’, ‘so...?’, ‘and...?’ or ‘because...?’. These non-suggestive words of encouragement will ensure the child talks informatively.²³⁵ The technique of chain-questioning can also be used. This is where the interviewer repeats a small part of the answer and asks a follow-up question, so that the child understands why the following question is asked.

Examples – Open-ended questions

‘Tell me everything about what happened.’

‘What happened right before? Right after?’

‘And then what happened?’

‘Tell me more about [person/object/activity mentioned by child]?’

‘What kinds of difficulties have you experienced because of your aggression?’

‘How would you imagine your life one year from now?’

Interviewers also regularly use ‘*directive utterances*’ to refocus the child’s attention on details or incidents that have been mentioned before. This means that the interviewer uses the word ‘you’ and requests the child to elaborate on something they said before. For example, ‘You mentioned Charlie earlier, can you tell me something more about him?’. ‘Wh-’ questions (e.g. why, when, where, what) are common types of open-ended questions, but these questions should be put in the context of the information that the child has already disclosed to avoid suggestive questioning. For example, ‘You mentioned that you and Charlie went to the park together. Can you tell me which park you went to?’.²³⁶ ‘Why’ questions should be used cautiously, because these can elicit a defensive reaction on the part of the child. It is therefore advisable to rephrase why-questions in different ways.

When talking with a child about an alleged offence or their behaviour more generally, it could also be helpful for them to understand their behaviour, and reasons behind it. In order to help a child gain insight into their behaviour, the lawyer can ask the child to look into the future and how their behaviour helps or hinders them in achieving certain goals. Giving unwanted advice or well-

²³⁵ Lamb et al., 2008.

²³⁶ Lamb et al., 2008.

intentioned warnings is not advisable, because it often provokes resistance.²³⁷ Behavioural change has to be internally motivated.

2. *Reflective listening*

Reflective listening refers to the practice of responding to a person's statement by stating the essence or a specific aspect of that statement back to them. This technique has three functions: (i) to ensure what the interviewer thinks the person means is accurate; (ii) to reduce the person's resistance; and (iii) to facilitate a discussion about the person's reasons for making any changes.²³⁸

Reflections can be very simple, and could just involve repeating what the child said. However, they can be made more complex by paraphrasing or amplifying statement. Reflections have to be tied closely to the child's expressions, and they should be given the opportunity to correct or elaborate on the reflection. This way, they will feel that they are better understood, and this will in turn facilitate progression in the child's thoughts about change.²³⁹

Example – Reflective Listening

'You feel that your social worker is not able to help you with your problems. And the situation at home is not getting any better. You're feeling stuck. What do you see as a solution to this problem?'

3. *Affirmations*

Affirmations can be a good way to show support and build rapport, when conversing with children. Affirmations could, for example, compliment the child for making an effort to be present, acknowledge small successes, or show appreciation or understanding.²⁴⁰ Affirmations should be honest and specific. Affirmations concerning a specific strength or effort that relate closely to what the child has said are likely to be most effective.²⁴¹ In interrogation or formal interview settings, lawyers should avoid complimenting children on what they say, because that will have a suggestive effect on the child. In these situations, the interviewer should have a neutral but friendly attitude, to avoid suggestibility.

²³⁷ Naar-King, 2011.

²³⁸ Levensky et al., 2007.

²³⁹ Levensky et al., 2007; Naar-King, 2011.

²⁴⁰ Levensky et al., 2007.

²⁴¹ Naar-King, 2011.

Examples - Affirmation

“Thank you for coming today.”

“It’s very smart of you to be thinking about your options.”

“It’s great that you decided to stop smoking marijuana.”

“I can see that you’re willing to consider difficult options to make the best choice for yourself”.

4. Summarising

When summarising the statements of a child, a full picture of his views should be reflected to them. This should be followed by checking whether the lawyer has understood the child’s views accurately.²⁴²

Examples - Summarising

‘You have told me lots of things today, and I want to thank you for helping me.’

‘Is there anything else you think I should know.’

‘Are there any questions you want to ask to me.’

‘If you want to talk to me again, you can call me at this phone number.’

The conversation can be closed by asking the child whether they have additional information they would like to disclose to their lawyer.

5.2.3 Communication guidelines

It is not always easy to talk to children, as they may be hostile and/or unwilling to talk to their lawyer and to other adults. This section identifies common problems that lawyers might encounter when communicating with children, and some guidance on how these challenges can be overcome.

Negative behaviour

Sometimes it is particularly difficult to have a conversation with a child because of their behaviour. This is the case, for example, when a child is indifferent, if they deny the problem, or if they are aggressive. The box below provides some guidance on how to overcome behaviour that often prevents lawyers from having constructive conversations with their child clients.

²⁴² Erickson et al., 2005.

Key points when talking with children

If a child displays a lackadaisical, indifferent attitude:

- show interest in their personal life
- explain the consequences of their behaviour
- continue to ask questions
- tell the child something about yourself
- ask what is going well
- ask indirect questions (e.g. instead of *'where do you live?'*, ask *'could you let me know where you live?'*)
- use humour
- make clear that the child is responsible for communicating with you (e.g. *'if you are not interested we can stop this conversation'*)
- focus on talking about the child's interests
- give the child the opportunity and responsibility to talk. Do not fill silences quickly.

If the child denies the problem:

- try to find the cause of the denial
- prompt the child to take responsibility for communicating about the problem (e.g. *'we can just stop if there really is no problem'*)
- Alternatively, show amazement at the denial of the problem
- confront the child with the facts
- let the child take the initiative
- ask about the child's perception of the situation
- make sure you also talk with the child about positive things or things they are dealing with well.
- emphasise the child's own interests in talking

If the child is uncooperative, and needs motivation:

- make clear that the child needs to communicate to make progress: *'well then we are stuck, so we just have to give up'*
- explain the consequences of not cooperating to the child
- explain the 'benefits' of cooperating
- compliment the child, where appropriate

If the child gives contradictory messages (e.g. the child says that nothing is wrong but you see irritation in his behaviour):

- point out the inconsistencies (e.g. *'I see that you are angry'*)
- challenge them to be more honest (e.g. *'I don't believe that'*)

If the child displays aggressive behaviour:

- explain rules of the conversation: *"I don't want you to talk to me like that!"*;
- stay calm; and
- ask for the reason why the child is angry.

If a child has strong external locus of control (i.e. they blame everything on others), or a strong internal locus (i.e. they blame everything on themselves):

- work to promote understanding (sketch the situation);
- confront the child; and
- help them to empathise.

If a child is very closed:

- be careful not to fill in everything for the child;
- look for the cause of their reticence (e.g. anxiety);
- think of subjects to talk about from his personal life (e.g. clothes, music, hobbies); and
- involve the child's immediate support system (e.g. parents, teachers, trusted person).

If a child has anti-social personality disorder or conduct disorder:

- keep the conversation and the questions short and restricted;
- do not lose the direction or the goal of the conversation;
- distinguish carefully between the child and their behaviour. Make clear that even though the behaviour is not acceptable, that does not affect your support and empathy for them as a person.
- hold the child accountable and have them come up with his own solution;
- confront the child with the consequences of his behaviour;
- give little room to negotiate; and
- be consistent.

If a child has been abused or mistreated:

- take the child seriously, acknowledge their pain, give them space to tell his story;
- support the child;
- respect the child's boundaries; and
- be aware of strongly '*misplaced*' loyalty to certain people.

Adapted from: Van Rheeën, 2016

Intellectual disabilities

The following guidelines should be kept in mind when a lawyer talks to a child with intellectual disabilities.

1. The rapport-building phase should be extended, because higher levels of anxiety and confusion can be experienced by children;
2. The child should be accompanied by a trusted person, at least during the start of the conversation;
3. Interviewers should focus on one incident at a time, when multiple incidents are discussed;
4. Interviewers should use short questions using simple vocabulary and sentence construction to accommodate the limited attention span and verbal capacities;

5. Interviewers should slow down the pace of the interview and make their pronunciations as clear as possible.²⁴³

Goal-Oriented Matrix: Listening to Children

The matrix presented below is designed to help professionals structure their conversation by presenting different steps from the beginning to the end of the conversation.

Goal-oriented matrix: Listening to children and children	
I. Introduction	
• How do you ensure that you yourself are at ease? • How do you ensure that the child is at ease (think of contact and contract)? • Explain your own role (if necessary, refer to the invitation letter) and ask about the expectations of the child • Make the framework clear	
II. Facts/ experience (focusing on the past)	THINKING
• What led to you being here; what happened? • How do you see your situation?	
III. Conviction/ interpretation/ significance (focusing on the present)	FEELING
• What is your problem now? • How do you feel about it; what does this mean for you?	
IV. Decision/ goal (focusing on the future – needs/‘dream’)	WANTING
• What is needed to solve your problem? • What would you want/ desire?	
V. Reaction/ behaviour (focusing on the future – action (short-term)/ expectation (long term))	DOING
• What do you intend to do? • What do you think will happen?	
VI. Rounding off	
• What has been said – summarise? • What are you going to do with it/ what are you going to write down/ what are you going to decide to do about it? • Make the transition with the child/ child to the present moment – bring the conversation to a close	
Freely adapted from Kouwenhoven’s coaching matrix, Hendriks & Van Rheeën, 2016	

5.3 Use of Language

²⁴³ Lamb et al., 2008.

In order to help children to understand the information they are provided with, and to ensure that they are able to participate effectively in the proceedings, it is important for lawyers to be aware of how their language can be adapted so that they can be understood more clearly. Lawyers may also need to identify instances where child-friendly language is not being used by police officers, judges, and prosecutors, so that proper adjustments are made.

Simplifying the Language

In general, when talking to children, especially those who have intellectual disabilities and those who have less experience with the justice system, you should use short sentences and simple grammatical constructions, instead of complex and lengthy sentences. Below are some suggestions on how to simplify your language:

Tips – How to simplify language

1. Use short sentences and simple grammatical constructions: Avoid using too many conjunctions, embedded and relative clauses (e.g. ‘*Did the boy who lives across the road tell you to do that?*’), double negatives (e.g. ‘*But you didn’t have nothing in your pocket, did you?*’), conditionals (e.g. ‘*Would you have gone to school, if you had done your homework?*’), and in certain languages, subjunctives.
2. Use simple tenses: (e.g. was, did, has, what happened?) Avoid multi-word verbs (e.g., ‘*might have been*’).
3. Repeat proper names: avoid pronouns (e.g. him, her, she, they).
4. Use the active voice: (‘*Did your mother visit you?*’) Avoid the passive voice (‘*Were you visited by your mother?*’).
5. Avoid jargon and unclear references: (e.g. ‘*Did you see those things again?*’) Avoid prepositions, referents and relational terms (above, below, around, more, less). Repeat the antecedent instead.
6. Be cautious with legal terms, especially those that have more than one meaning. To young children, “a ‘court’ is a place to play basketball”, “a ‘hearing’ is something you do with your ears”, and “a ‘minor’ is someone who digs coal.

(Saywitz et al., 2010)

Jargon and judicial terms

Children involved in judicial procedures are often confronted with legal terms they do not understand. Research shows that children do not always understand what is discussed during a court hearing.²⁴⁴ Consequently, they can feel anxious and insecure during the hearing and they can have unrealistic fears about the hearing and its consequences.²⁴⁵ For example, children may assume that the term

²⁴⁴ Hazel et al., 2002; Plotnikoff & Woolfson, 2002.

²⁴⁵ Saywitz et al., 2010; Crawford & Bull, 2006; Grisso et al., 2003.

'sentence' refers necessarily to a prison sentence. When discussions are held between the professionals in court, which the child does not understand, they could lose interest, and they could give up trying to participate in the hearing. Relying on the child to indicate verbally when they do not understand anything that is being discussed cannot be considered sufficient.

Chapter 6: Interaction with Other Actors in Juvenile Justice

In the previous chapters, it became clear that lawyers assisting children should be regarded as specialist practitioners. Their field of work requires a complex skillset. However, lawyers cannot possess all the necessary skills and expertise for working with children, and they also need to know which other actors to involve, as well as how and when to do so. This chapter explores how defence lawyers can best engage with other actors in the juvenile justice process.

Summary

- International and regional standards on juvenile justice recognise a significant role for parents and holders of parental responsibility in juvenile justice.
- The presence or involvement of parents in juvenile justice procedures are not always in the best interests of children, and they can interfere with their ability to participate effectively.
- The Children Directive gives recognition to the role of ‘appropriate adults’ other than the holder of parental responsibility who may take on the role of the parent during the proceedings, in cases where the parents cannot be found, or if their presence would have a negative impact on the child’s best interests or on the proceedings.
- Social workers, medical professionals, and school teachers can also play a helpful role, particularly for assessing the needs of children.

6.1 Parents and appropriate adults

6.1.1 Parents and holders of parental responsibility

International and regional standards on juvenile justice attribute to parents²⁴⁶ a substantive role in assuring justice for children in conflict with the law. Parents are responsible for providing the child, in a manner consistent with their evolving capacities, with appropriate direction and guidance in the exercise of their rights as recognised in the CRC.²⁴⁷ The upbringing and development of the child is the parent’s primary responsibility.²⁴⁸ States have to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child,²⁴⁹ and assist the parents in their responsibilities.²⁵⁰ The CRC Committee urges states to strengthen the participation of parents in the judicial process.²⁵¹

The Children Directive designates important roles for ‘holders of parental responsibility’ in juvenile justice proceedings, which are explained in further detail below. Parental responsibility is defined by

²⁴⁶ Any reference made to ‘parents’ is meant to include holders of parental responsibility, legal guardians and caregivers as well.

²⁴⁷ Article 5 CRC

²⁴⁸ Article 18(1) CRC

²⁴⁹ Article 18(1) CRC

²⁵⁰ Article 18(2) CRC

²⁵¹ General Comment 10, para. 40

the Directive as all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effects, including rights of custody and rights of access.²⁵²

Children have the right to be accompanied by their parents during proceedings²⁵³ and during stages of the proceedings other than court hearings where the competent authority considers that (a) it is in the child's best interests and (b) the presence of that person will not prejudice the criminal proceedings,²⁵⁴ such as through the destruction or alteration of the evidence, or interference with witnesses.²⁵⁵ If presence of the child's parent is not possible, or not desirable because it is not in the best interests of the child, or because it could interfere with criminal proceedings, the child has the right to be accompanied by another 'appropriate adult', whose role is explained in more detail below.²⁵⁶

Member States have the following obligations under the Directive regarding parents:

- Parents should be given information about the rights that the child has the right to receive;²⁵⁷
- Parents should be given access the child deprived of their liberty;²⁵⁸
- Where appropriate, parents should be involved in the individual assessment;²⁵⁹ and
- Parents should be able to request a medical examination of the child.

Although not made explicit in the Directive, the CRC Committee has suggested that parents must also be notified of the child's apprehension or detention as possible.²⁶⁰ According to the European Rules, parents are entitled to legal advice and assistance in all matters related to the imposition and implementation of sanctions or measures to their child.²⁶¹ These standards reflect a familiar reality for lawyers – that parents are often involved in decisions regarding their children. Children often look to parents for guidance in navigating the criminal justice system.²⁶²

As mentioned above, lawyers should try to determine on a case-by-case-basis to what extent children are capable of understanding the legal implications of their own decisions. The more the child knows and understands, the more the lawyer should be guided by the views of the child in determining its best interests. This client-directed approach to advocacy may prove difficult when parents are heavily involved in proceedings.

On the one hand, parents will (usually) know more about the child (such as their medical condition, school attendance, family situation) than the lawyer. Lawyers may need the parent's involvement to get to know the child integrally. On the other hand, lawyers should be alert to the fact that parents

²⁵² Article 3(3), Children Directive

²⁵³ Article 15(1) Children Directive. See also General Comment 10, para. 53, Beijing Rules 15.2,

²⁵⁴ Article 15(4) Children Directive. See also European Rules 14

²⁵⁵ Recital 58, Children Directive

²⁵⁶ Article 15(2) Children Directive

²⁵⁷ Article 5(1) Children Directive

²⁵⁸ Article 12(6) Children Directive. See also Beijing Rules 26.5, Guideline 21 (a)

²⁵⁹ Article 7(7) Children Directive

²⁶⁰ General Comment 10, para. 54, 10.1 Beijing Rules, see Havana Rules 22 for detained children

²⁶¹ European Rules 120.1

²⁶² Henning 2006, 837

may be involved in the crime, try to pursue an agenda contrary to the best interests of the child, and advise the child in a way that could be harmful. Children may feel they have to choose between the advice of parents, who they have known and trusted all their lives, and the advice of a lawyer whom they are meeting for the first time in a moment of crisis.²⁶³

Practical guidance

Lawyers must bear in mind that under the Children Directive, it is the child who bears the right to legal assistance, and that the assistance should be practical and effective. Moreover, the Guidelines make clear that during the judicial process, children have the right to their own legal counsel and representation in their own name, including in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.²⁶⁴ Adequate representation, and the right to be represented independently from the parents, should be guaranteed.²⁶⁵

Whenever a child is pressured by their parents to pursue a strategy that may be detrimental for their case, lawyers should try to persuade the child to follow a different strategy. They should remember that it is their obligation to keep matters between them and their clients confidential, also applies with respect to requests made by the parents. When parents contact the lawyer and seek to acquire information related to the child's proceedings, the lawyer should be careful not to disclose information that is not publicly available.²⁶⁶

In order to be able to agree upon a feasible legal strategy with the child, it is advisable that lawyers meet the child without the parents being present. If the parents are present, the child may be afraid to speak truthfully about their participation in the crime, either because they are afraid of the that they will be punished, or because they feel embarrassed. Even children who admit involvement in front of the parents may minimise their involvement and distort the facts in order to present the best picture. The parents on the other hand may intrude on the interviewing process, making it impossible for the lawyer to take an accurate account of the events by the child.²⁶⁷

Lawyers should act diplomatically and not bluntly request for the parents to leave the room. they could begin the interview by meeting briefly with the child and parents together. During this meeting, the lawyer could give the information the parents are entitled to.²⁶⁸ The lawyer could thereafter describe their role in the case and explain that they are the lawyer for the child and not for the parent or for the family as a whole.²⁶⁹ Having laid that groundwork, the lawyer could invite the parents to leave the room, because they need to meet with the child alone to discuss the case.²⁷⁰

6.1.2 Appropriate adults

²⁶³ Henning 2006, 838

²⁶⁴ Guideline 37

²⁶⁵ Guideline 43

²⁶⁶ Guideline 10, CCBE 2016, 9

²⁶⁷ Hertz et al. 2012, 112

²⁶⁸ Children Directive, Article 5.

²⁶⁹ Hertz et al. 2012, 113-114

²⁷⁰ Hertz et al. 2012, 114

The Children Directive gives recognition to the role of ‘appropriate adults’ other than the holder of parental responsibility, who may take over the role of the parent during the proceedings in cases where the parents cannot be found, or if their presence would have a negative impact on the child’s best interests or on the proceedings. More specifically, the child has the right to be accompanied by an appropriate adult during court hearings, and at other stages of the proceedings,²⁷¹ and the right to have the appropriate adult informed of the child’s rights and charges.²⁷² An appropriate adult could take on the role of the parent if presence of the parents during court hearings or providing them with information (a) would be contrary to the child’s best interests, (b) is not possible because the parents cannot be reached or their identity is unknown or (c) could jeopardise the criminal proceedings.²⁷³ The latter situation could occur where evidence might be destroyed or altered, witnesses might be interfered with, or the parents might have been involved in the alleged criminal activity together with the child.²⁷⁴ Appropriate adults may be involved in the individual assessment²⁷⁵ and may moreover request a medical examination of the child.²⁷⁶

The Children Directive does not provide a clear definition of appropriate adults, but it allows the child to nominate a potential candidate, who can be approved by a competent authority. If a child is unable to nominate an appropriate adult, or if the choice is unsuitable, the competent authority may designate one on its own accord. That person could be a representative of an authority or an institution that is responsible for promoting the welfare of children.²⁷⁷

In some jurisdictions (e.g. the United Kingdom), an appropriate adult may assist the child during specific stages of the legal proceedings. The appropriate adult’s role, according to UK legislation and for the purposes of juvenile justice, is to safeguard young suspect’s rights during the police investigation process (including police interrogation) and protect their interests in police custody.²⁷⁸ An appropriate adult should, among other things:

- Support and assist the child while detained or interviewed by the police
- Ensure that the child understands their rights; and
- Observe whether police are acting properly.²⁷⁹

This role clearly overlaps substantially with the lawyer’s role as defined by the international and European standards on juvenile justice.

An appropriate adult in the United Kingdom may be – among others – a parent, a social worker or an appropriate worker of a local youth offending team.²⁸⁰ The appropriate adults in local youth offending

²⁷¹ Article 15(2) and (4) Children Directive

²⁷² Article 5(2) Children Directive

²⁷³ Article 5(2) and 15(2) Children Directive

²⁷⁴ Children Directive, Recital 23

²⁷⁵ Article 7(7) Children Directive

²⁷⁶ Article 8(3)(b) Children Directive

²⁷⁷ Article 5(2) and 15(2) Children Directive

²⁷⁸ Pierpoint 2000, 49-50

²⁷⁹ Guide for youth justice professionals 2014

²⁸⁰ Guide for youth justice professionals 2014

teams may be volunteers without specific knowledge, experience or qualifications to provide such assistance.

Given the potential involvement of the appropriate adult in the proceedings, the lawyer may wish to, as is the case with regards to parents, speak with the client in the absence of the appropriate adult. The remarks made regarding the involvements of parents hold true for appropriate adults. See for further clarifications paragraph 6.1.1. under ‘Practical guidance’.

6.2 Collaboration with other actors

Obtaining the best possible outcomes for child suspects and accused persons will often require expertise that even a well-trained lawyer does not have. Lawyers working with children should seek advice (where appropriate) from other professionals including social workers, judges and prosecutors, if they are able and willing to assist. Social workers in particular are likely to have far better knowledge than lawyers about the circumstances affecting a particular child, and it is essential for the lawyer to be able to get to know ‘the person behind the crime’.

Where a child has special educational needs or other difficulties, other expert assistance may be necessary to understand the child’s needs, contextualise their behaviour for the court, or even to obtain basic information. If parents are unwilling or unable to provide a lawyer with insight into a child’s life, input from other sources becomes more important. In many jurisdictions, a social worker or probation officer will be required to make a statement to the courts in all cases involving a child suspect or accused person, so it is essential for the child’s lawyer to develop a working relationship with them, if at all possible.

6.2.1 Social workers

Social services can be an essential resource for lawyers. They may, for instance, already have been notified by the police in order to make a recommendation to the public prosecutor or judge about conditional release from pre-trial detention, possibilities for diversion or a possible sanction or measure. Their role may therefore require extensive knowledge of programmes and services providing for conditional release, diversion and disposition.²⁸¹

As mentioned in paragraph 4.2. EU Member States are obliged to carry out an individual assessment of the child with involvement of qualified personnel.²⁸² The term ‘qualified personnel’ is not further defined, but lawyers may wish to encourage authorities to consult with social workers (if they have not already done so) in order to comply with Article 7 of the Children Directive.

Easy access to the knowledge and expertise of relevant social workers is likely to save the lawyer considerable time. Their insight is often helpful, especially when the lawyer is not conversant with the full range of programmes and services that might make up a diversion or dispositional plan in a

²⁸¹ Hertz et al. 2012, 796

²⁸² Children Directive, Article 7.

particular case. Social workers may moreover be of help when the lawyer needs advice in interviewing techniques, crisis intervention and referrals to other social agencies.²⁸³

Social workers may already have been in contact with the child and parents in relation to an earlier offence or problems related to the family sphere such as domestic violence or divorce. In that case, the lawyer should check the statutes regulating the confidentiality of files of social workers and seek to acquire a copy of the file related to their juvenile client (if necessary with help of an explicit authorisation of the child to request such information on their behalf). Usually the clients of social workers have the right to inspect their own files.

6.2.2 Child psychologists and other medical professionals

An assessment of a child's best interests must factor into consideration their psychological and physical well-being.²⁸⁴ When a child appears to have mental or physical health problems, disabilities or emotional difficulties, lawyers should consider retaining – with the child's consent – a psychiatrist, psychologist and/or another medical professional to evaluate the child. This may assist in determining whether the child's mental or physical problems supply a predicate for specific defences, and/or help to determine appropriate procedural adaptations. These experts may also be useful in helping the lawyer to find an appropriate diversion or disposition plan appropriate for the child's mental or physical state.

The lawyer may want to request the expert to draw up a report that can be submitted to the authorities to substantiate a certain legal strategy,²⁸⁵ and to assess the maturity of the child which is needed to establish the weight that should be given to the views of the child. Some children may be traumatised, making it difficult (or even harmful) for them to participate in interrogations. And medical examinations could be required to prove the existence of such circumstances. If the child does not appreciate the benefit of such a report, the lawyer should try to persuade the child to undergo the medical examination using child-friendly language. The lawyer should act very carefully here. Using words as "being sick" or "nuts" obviously will not persuade the child to undergo the examination.

If the child already has a medical record related to their mental and/or physical health, the lawyer should ask them permission to acquire those files. They could be used to the child's advantage, e.g. if the child is successfully attending a programme for their mental problems. This may be relevant information for authorities and/or courts deciding on measures or sanctions.²⁸⁶

Even when no signs of a mental or physical impairments arise, a lawyer should always request such a medical examination in accordance with Article 8 (1) of the Children Directive whenever a child is deprived of their liberty. A medical examination is generally a good deterrent against ill-treatment as it may provide proof of a deteriorating health condition while deprived of liberty (see para. 4.3).

²⁸³ Galowitz 1999, 2126

²⁸⁴ Guidelines, B.2(c)

²⁸⁵ Hertz et al. 2012, 250

²⁸⁶ Hertz et al. 2012, 250

6.2.3 School teachers

It may be useful for the lawyer to contact the child's schoolteachers. Their perspective and knowledge may be useful in the assessment of the child's maturity and their capabilities (which are necessary to establish the weight that should be given to the child's views, and for the purpose of determining appropriate procedural adaptations). Records regarding school attendance and grades may also provide the lawyer with valuable information that may be used to advocate for an individualised plan for diversion or disposition. Again, the child's consent should be obtained in order to request these records.

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