

**EUROPEAN COUNCIL FOR JUVENILE JUSTICE**  
Academic Section

Measures of Deprivation  
of Liberty for young  
offenders: how to enrich  
International Standards  
in Juvenile Justice and  
promote alternatives to  
detention in Europe?

**IJJO Green Paper on Child-Friendly Justice**



**EUROPEAN  
JUVENILE JUSTICE  
OBSERVATORY**



# Measures of Deprivation of Liberty for young offenders: how to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe?

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## 1. Introduction and Aims

The International Juvenile Justice Observatory (IJJO) is conceived as an inter-disciplinary system of information, communication, debates, analyses and proposals concerning different areas of juvenile justice in the world. In November 2010, the IJJO held the second meeting of the European Council of Juvenile Justice and its Academic Section (members of academia from the 27 Member States of the EU), took the decision to develop a Green Paper on the deprivation of liberty for young offenders and the promotion of alternatives to detention.<sup>1</sup>

The aims of this Green Paper are two-fold. First, it aims to summarise the international standards on the use of detention and its alternatives with a view to providing a baseline of information on international standards in these two related areas. Second, the Green Paper aims to examine, insofar as this is possible, the extent to which these standards are being implemented in the Member States of the European Union.<sup>2</sup> In this regard, it presents an EU-wide snapshot of compliance with international standards in these areas, an important part of which is to identify what support or assistance the EU might provide to further their implementation. It then makes recommendations as to how the gap between the theory of the international standards and practice in Member States can be narrowed, including by activities of the European Commission itself.<sup>3</sup>

The purpose and objective of the Green Paper is to inform the development of policy in this area by the European Commission. It aims to contribute to discussions at EU level on how the rights of children in conflict with the law can be better protected in these areas and to articulate what role the EU can play in this regard.

## 2. Recent Developments and Context

It is important to set out the context and background of this Green Paper which aims to contribute to and enhance rather than duplicate the work of other bodies in this area. Although this Green Paper is designed to influence EU policy, it also takes into account and relies upon the work of other bodies at European and International level.

<sup>1</sup> See also the Green Papers developed by the Public Administration Section “*The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems*” and the NGO Section “*The social reintegration of young offenders as a key factor to prevent recidivism*”.

<sup>2</sup> On this approach see Kilkelly, ‘Youth Justice and Children’s Rights: Measuring Compliance with International Standards’ 8(3) *Youth Justice* (2008) 187-192.

<sup>3</sup> Divergence between theory and practice in juvenile justice more generally is dealt with in the Green Paper “*The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems*” of the Public Administration section.

## 2.1 EU

A whole range of developments has recently taken place or is currently in development at EU level making it timely to consider what more can be done to secure the rights of children who are deprived of their liberty and promote alternatives to detention.

In 2009, the European Council adopted a new multi-annual programme - *the Stockholm Programme - an open and secure Europe serving and protecting the citizen*<sup>4</sup> – for the period 2010-2014. On 20 April 2010, the European Commission adopted a Communication on an Action Plan implementing the Stockholm Programme, with concrete actions and clear timetables to meet current and future challenges.<sup>5</sup> A mid-term review of the implementation of the Stockholm Programme by the European Commission is foreseen by June 2012.

*The Stockholm Programme* contains important provisions concerning judicial cooperation in criminal matters, and it deals with a range of issues including sections, for present purposes, on individual rights in criminal proceedings (section 2.4) and on detention (section 3.2.6).

In November 2009, the European Council adopted a Roadmap for strengthening the procedural rights of suspected and accused persons in criminal proceedings and it invited the Commission to bring forward proposals on a step by step basis.

The Action Plan provides for measures to ensure the protection of fundamental rights where ‘all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union’.<sup>6</sup> To fulfil these priorities, the Commission advocates a ‘zero-tolerance’ approach to violations of the Charter and asserts that ‘[a]ll policy instruments available will be deployed to provide a robust European response to violence against women and children...to safeguard children’s rights’ and to ensure that ‘the needs of those in vulnerable situations are of particular concern.’<sup>7</sup> The rights of the child receive particular attention in the Action Plan. Other developments that are clearly relevant to youth justice are a Green Paper on pre-trial detention published in June 2011<sup>8</sup>, and legislative proposals with respect to suspects or accused persons who are

<sup>4</sup> Council document 17024/09, adopted by the European Council on 10/11 December 2009.

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Delivering an area of Freedom, Security and Justice for Europe’s Citizens. Action Plan Implementing the Stockholm Programme*. COM(2010) 171.

<sup>6</sup> Ibid, p 2.

<sup>7</sup> Ibid, p 3.

<sup>8</sup> European Commission, Green Paper, Strengthening mutual trust in the European Judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention. COM (2011) 327 final. 14 June 2011.

vulnerable due to be adopted in 2013. The Green Paper on pre-trial detention contains a short section on children, which reiterates the standards of the CRC. It asks whether there are specific alternative measures to detention that could be developed in this area.<sup>9</sup> More generally, the Green Paper addresses the monitoring of detention conditions by Member States and asks how the work of the Council of Europe and that of Member States could be better promoted in translating standards into practice.<sup>10</sup> These two questions are addressed in this paper also.

In fulfilment of its commitments under the Action Plan, the Commission published the EU Agenda for the Rights of the Child in February 2011.<sup>11</sup> The Agenda is a wide ranging document whose purpose is to 'reaffirm the strong commitment of all EU institutions and all of the Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies and to turn it into concrete results'.<sup>12</sup> The Agenda provides that 'in the future, EU policies that directly or indirectly affect children should be designed, implemented, and monitored taking into account the principle of the best interests of the child enshrined in the EU Charter of Fundamental Rights and in the UNCRC' (UN *Convention on the Rights of the Child*).<sup>13</sup> The Agenda provides that 'the child rights perspective' must be taken into account in all EU measures affecting children, and it identifies as general principles the need to ensure that legislative proposals are always in full compliance with the Charter of Fundamental Rights<sup>14</sup>, and to adopt measures to build the basis for evidence-based policy making including improving the lack of reliable, comparable and official data.<sup>15</sup> Making the justice system more child-friendly in Europe is a key action under the Agenda (where a commitment is made to promoting the use of the Council of Europe's Guidelines on Child Friendly Justice). The Agenda links in with the Commission's priorities in the Action Plan to the Stockholm Programme by highlighting the relevance to children of many of the action points there, including measures to protect the procedural rights of suspected or accused persons (tabled for 2012), and those deprived of their liberty.<sup>16</sup> The Agenda contains a commitment to supporting and encouraging the development of training activities for judges and other professionals at European level regarding the optimal participation of children in judicial systems.<sup>17</sup> Other specific action points address the protection of children from violence and highlight existing proposals to prohibit

<sup>9</sup>. Ibid, p. 11.

<sup>10</sup>. Ibid, p. 12.

<sup>11</sup>. European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Agenda for the Rights of the Child*, COM(2011).

<sup>12</sup>. Ibid, p 3.

<sup>13</sup>. Ibid.

<sup>14</sup>. Ibid, p 4. See also, European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* COM(2010) 573 final, 19 October 2010.

<sup>15</sup>. Ibid, p 5.

<sup>16</sup>. Ibid, p 7.

<sup>17</sup>. Ibid, p 8.

the detention of unaccompanied asylum seeking children and to limit the detention of other children in the asylum process to specific circumstances.<sup>18</sup> It is also relevant in the context of the Green Paper that the importance of education and training is emphasised, as is the need to ensure access to early childhood education.<sup>19</sup>

## 2.2 The Council of Europe

The Council of Europe is the region's leading international human rights institution. It engages in standard setting in a wide variety of areas, and in 2006 it launched its Programme 'Building a Europe for and with Children'. Within that Programme, its key objective is to help decision-makers and stakeholders implement comprehensive national strategies and policies to promote the rights of children and eradicate all forms of violence against children. It has adopted a number of instruments to this end, including instruments on violence against children, the treatment of juvenile offenders and most recently, on child-friendly justice. The Council of Europe has an especially strong reputation in the area of juvenile justice, having adopted numerous relevant instruments over the years emphasising the importance of education, social reintegration and prevention work with juvenile offenders. However, the most significant Council of Europe instrument in this area is the *European Rules for Juvenile Offenders subject to Sanctions and Measures* adopted in 2008.<sup>20</sup> This instrument builds on standards set out in both the *European Rules on Community Sanctions and Measures* and the *European Prison Rules* from the perspective of children who come into conflict with the Law. Importantly, the *European Rules for Juvenile Offenders subject to Sanctions and Measures* go further than these instruments and they are intended to be the first point of reference in this area. They are a significant addition to the international standards recognising best practice in juvenile justice. In 2009, the Council of Europe adopted the *Guidelines on Integrated National Strategies on the Protection of Children from Violence*.<sup>21</sup> This document is intended as part of the European response to the important work of the UN Secretary General's Study on Violence against Children undertaken by Sergio Pinheiro.<sup>22</sup> To this end, the Guidelines focus on the legal, policy and institutional frameworks required to fully protect children from violence, and the document contains practical support for the tools required to implement existing standards and goals, including the development of effective systems for data collection and

<sup>18</sup> Ibid, p 9.

<sup>19</sup> Ibid.

<sup>20</sup> Recommendation CM/Rec(2008)11. See also Recommendation Rec (2003) 20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice; Recommendation No R (92) 16 on the European rules on community sanctions and measures and Recommendation No R (87) 20 on social reactions to juvenile delinquency.

<sup>21</sup> Recommendation CM/Rec(2009)10 of the Committee of Ministers. See further <http://www.coe.int/child>.

<sup>22</sup> Report of the independent expert for the UN Study on Violence against Children (A/61/299).

analysis, the establishment of child-friendly resources and mechanisms and promoting the development of a culture of respect for children's rights. More recently, in November 2010, the Council of Europe adopted the *Guidelines on Child Friendly Justice*,<sup>23</sup> informed by a European-wide consultation with children and young people on their experiences and views of the justice system.<sup>24</sup> The Guidelines explain the concept of child-friendly justice and provide practical information as to how the justice system can be made more accessible to children, can take their needs into account and respect their rights. It is focused mainly on legal and administrative proceedings, in both criminal and civil law, but it also contains separate sections on detention and diversion.

In addition to its standard-setting activity, the Council of Europe plays a significant role in the monitoring and enforcement of human rights standards, with respect to juvenile offenders and more generally. Three particular institutions actively observe and promote the observance of human rights standards in the area of juvenile justice and detention and through their work they also articulate the measures that need to be taken to apply human rights standards in practice. First, the European Court of Human Rights receives complaints from individuals under the European Convention on Human Rights (ECHR) and it now has a substantial jurisprudence on the right to liberty, the use of detention and conditions in detention falling mainly under Articles 3 (prohibition on inhuman and degrading treatment), 5 (liberty) and 8 (private and family life, home and correspondence) of the ECHR.<sup>25</sup> Children, like adults, are entitled to petition the European Court for a remedy under the ECHR and this has led to the development of children's rights standards under the Court's remit.<sup>26</sup>

The second body with a monitoring role in this area is the Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT). The CPT inspects places of detention (for children and adults) throughout the 47 member states of the Council of Europe and its work sheds important light on the reality of detention at national level, with immense practical significance and impact. The publication of its findings, together with a response from government, means that the CPT is part of the ongoing dialogue and enforcement of human rights standards in places of detention. Although it is not specific to child or youth detention, it includes such places of detention in its remit, along with other detention centres including welfare institutions, mental health institutions and police stations.

<sup>23</sup> Recommendation CM/Rec (2010) 8.

<sup>24</sup> See Kilkelly, *Listening to Children about Justice: Report of the Council of Europe Consultation with Children on Child-Friendly Justice*, June 2010, CJ-S-CH (2010) 14 rev. Available at [www.coe.int/childjustice](http://www.coe.int/childjustice).

<sup>25</sup> For a detailed analysis of the case law in all these areas see Harris et al, *Law of the European Convention on Human Rights* OUP, 2009.

<sup>26</sup> See Kilkelly, *The Child and the ECHR*, Ashgate, 1999, 2nd edition forthcoming 2012.

The final Council of Europe body with a monitoring remit is the Commissioner for Human Rights, an independent non-judicial body mandated to promote awareness of and respect for human rights in the Council of Europe. The Commissioner fulfils this role through monitoring the human rights situation on the ground in member states, and he regularly publishes issue papers, opinions and recommendations highlighting where rights are not being respected and promoting the practical steps necessary for greater implementation at national level.<sup>27</sup> Since taking up office, the current Commissioner, Thomas Hammarberg, has made both children's rights and juvenile justice priorities of his office and in 2009, he published an issue paper on *Children and Juvenile Justice*, focusing inter alia on the use of and conditions in detention and the need for alternatives.<sup>28</sup>

In summary, therefore, the Council of Europe has important standard-setting and monitoring functions in the area of juvenile justice and its work should be acknowledged by, incorporated into and built upon by any initiative that the EU undertakes.

## 2.3 United Nations

The premier international law-making body in the area of human rights and youth justice remains the United Nations (UN). Through the General Assembly, the Secretary General and his Representatives and the treaty monitoring bodies, including the Committee on the Rights of the Child, the UN has been at the forefront of the adoption of international children's rights law of both a binding and a non-binding nature for decades. It has also played a lead role in monitoring its implementation. In youth justice, key instruments like the *Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules), the *UN Rules on the Deprivation of Juveniles deprived of their Liberty* (Havana Rules) and the *UN Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines), were adopted by the United Nations General Assembly in 1985 and 1990 respectively. The adoption of the *Convention on the Rights of the Child* in 1989 and the establishment of the Committee on the Rights of the Child have led to a further expansion in the range and depth of international standards on youth justice and detention. Particularly important General Comments have been adopted on *Children's Rights in Juvenile Justice* (2007)<sup>29</sup> and the *Protection of children from all Forms of Violence* (2011).<sup>30</sup> These two instruments and others add significantly to the wealth of

<sup>27</sup> See Hammarberg, 'A Juvenile Justice Approach built on Human Rights Principles' 8(3) Youth Justice (2008) 193-196.

<sup>28</sup> Commissioner for Human Rights, Children and Juvenile Justice: Proposals for Improvements, CommDH/Issue Paper (2009)1.

<sup>29</sup> Committee on the Rights of the Child, General Comment No 10, *Children's Rights in Juvenile Justice*. CRC/C/GC/10/2007.

<sup>30</sup> Committee on the Rights of the Child. Protection of Children from all Forms of Violence. General Comment No 13. CRC/C/GC/13/2011. See also Committee on the Rights of the Child. The Right of the Child to Protection from all forms of Corporal Punishment and other Cruel or Degrading Forms of Punishment. General Comment No 8. CRC/C/GC/8/2007.

best practice that now exists at international level.<sup>31</sup> Moreover, the monitoring function of the Committee produces country-specific conclusions on whether national law, policy and practice comply with the Convention. These Concluding Observations provide an insight into the extent to which children enjoy their CRC rights and they include recommendations as to how states can improve compliance with the CRC. This process has been augmented by the UN system of Universal Periodic Review.

In summary, it is clear that there are a number of bodies with the power to adopt international standards in juvenile justice and together they have produced a wide range of detailed and comprehensive standards relating to the treatment of juvenile offenders. Bodies charged with enforcing and monitoring the implementation of those standards are also active, in various ways, at both international and European levels.

The next section will outline the substance of the many standards that have been adopted in this area and consider the measures that need to be adopted to ensure their effective implementation. This will lead to section four which considers what remains to be done in this area and how the EU might fill the gaps that currently exist.

### 3. International Standards

As the above section highlights, a number of international bodies have the power to adopt instruments, rules and guidelines on children's rights. A significant number of these have focused on juvenile justice and detention and have additional roles in the monitoring of these standards. A brief summary of the most important instruments follows.<sup>32</sup>

The key instrument in this area is the *Convention on the Rights of the Child* (CRC), adopted by the General Assembly of the United Nations in 1989. The CRC contains two substantial provisions dealing with juvenile justice (Article 40) and detention (Article 37), and numerous other provisions – e.g. the best interest principle (Article 3); the right to be heard (Article 12); the right to protection from harm (Article 19) and the right to education (Articles 28 and 29) – are relevant in this context also. These are detailed below. First it is necessary to address the Convention's status and its relationship to EU law.

<sup>31</sup> See also General Comment No 5, *General Measures of Implementation*, CRC/C/GC/5 2003.

<sup>32</sup> For a detailed and comprehensive analysis of the UN Standards regarding children deprived of their liberty see T. Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, Antwerp/Oxford/Portland: Intersentia Publishing 2008.

The CRC enjoys very wide support worldwide and in Europe. It has been ratified by all Member States of the European Union and although a small number of EU member states entered either reservations or interpretive declarations on ratification, only two member states entered reservations to Article 37 (detention); one of these has since been removed.<sup>33</sup> No Member State has entered a reservation to the provision dealing with alternatives to detention, ie Article 40(4). It is to be assumed, therefore, that EU states are committed to the implementation of these provisions at national level. In addition to the duty on Member States – under Article 4 of the CRC – to take all measures necessary to implement the Convention’s provisions, the Convention also mandates international co-operation in a range of areas (e.g. Article 4 (on the implementation of economic, social and cultural rights), Article 17 (right to access appropriate information), Article 23 (rights of children with disabilities), Article 24 (right to an adequate standard of health and healthcare), Article 27 (right to an adequate standard of living) and Article 28 (right to education)). In addition, the Convention draws attention to the relevance of other international law and international instruments at numerous points including specifically in Article 40 (juvenile justice). More generally, Article 41 makes clear that nothing in the Convention can affect any provisions which are ‘more conducive to the realization of the rights of the child’ and which may be contained in either a state’s domestic law or international law in force for that state. Together, these provisions make clear that the Convention represents more than a unilateral contract with obligations undertaken by individual states. It also provides a framework for international co-operation in the implementation of the Convention’s provisions. It requires states to take existing international standards into account in that process while ensuring that states bound by higher standards do not lower them. This gives the EU role in this area further context.

The standing in which the CRC is held in the EU is reflected in the reliance on CRC principles in Article 24 of the EU Charter of Fundamental Rights (see below). It is also evident from the expression in the recent EU Agenda for the Rights of the Child of the EU’s commitment to the implementation of the CRC and its child-rights based approach.<sup>34</sup> Although the Agenda makes reference to children’s rights in the criminal justice system and in detention, the EU Charter makes no specific provision for children’s rights in these areas. Article 24 - the dedicated children’s rights provision - recognises the right of the child to be heard, the duty to ensure

<sup>33</sup> Belgium, Denmark, France and the Netherlands entered either reservation or declaration to Article 40 (2)(b)(v) concerning the right to appeal. The Netherlands and the UK entered reservations to Article 37. The UK removed its reservation in 2008. The Netherlands’ reservation provides that it ‘accepts the provisions of article 37 (c) of the Convention with the reservation that these provisions shall not prevent the application of adult penal law to children of sixteen years and older, provided that certain criteria laid down by law have been met’.

<sup>34</sup> For example, the agenda notes that ‘the standards and principles of the UNCRC must continue to guide EU policies and actions that have an impact on the rights of the child’, at p 3.



that actions concerning children be determined by their best interests and the right of the child to have contact with both parents. Although the right to liberty has general protection under Article 6 of the Charter and rights of due process are outlined in Articles 47-50, there is no explicit reference to children in these provisions. In this regard, it is vital that the obligations of the CRC, and associated guidance and instruments, provide leadership to the EU in the area of juvenile justice. The relevant principles and approaches of these instruments are summarised next.

### **Treatment of Juvenile Offenders – Core Principles**

The CRC makes extensive provision for the rights of children in juvenile justice and its provisions are particularly strong with respect to the kind of measures and sanctions imposed on children who come into conflict with the law and who are deprived of their liberty. A key principle under Article 37 (c) of the CRC is that:

*The arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*<sup>35</sup>

This establishes as a principle of international law that children should only be deprived of their liberty in accordance with law, as a measure of last resort and for the shortest duration of time considered appropriate. This principle is specific to children in recognition of the harm that detention inflicts on children and it shows a clear preference for non-custodial responses to children's behaviour and needs. Further principles are set out in Article 40 of the CRC which provides, in particular, that every child alleged as, accused of or recognised as having infringed the criminal law has a right to be treated 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the rights and freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. In this respect, an understanding that children are different to adults underpins the Convention's treatment of children in conflict with the law and informs its whole approach to this area of children's rights.<sup>36</sup> In addition, under Article 40(3) states agree

<sup>35</sup> The terms of Article 37 make clear that this provision goes beyond the criminal or penal context and applies to all forms of deprivation of liberty such as detention imposed as a welfare or protective measure. See further Schabas and Sax, 'Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty' in Alen, Vande Lanotte, Verhellen, Ang, Berghmans, Verheyde (eds) A Commentary on the *Convention on the Rights of the Child*. Martius Nijhoff Publishers, Leiden, 2006.

<sup>36</sup> On the vast evidence now underpinning the concept of a developmental model of juvenile justice see 'Scott and Steinberg, 'Adolescent Development and the Regulation of Youth Crime' 18(2) *The Future of Children* Special Issue on Juvenile Justice (Fall 2008) 15-33.

to ‘promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law’. In particular, they agree to establish measures for dealing with children without resorting to judicial proceedings, where that is appropriate and desirable. It is a governing principle here that such diversionary mechanisms must only be used provided that human rights and legal safeguards are fully respected.

### **The Application of Sanctions and Measures**

In advocating the establishment and application, where appropriate, of measures to deal with children without recourse to the judicial process, the Convention has highlighted diversion as one of the core principles and objectives of juvenile justice. Such diversion can take a number of different forms – diversion from detention, from court or from the entire criminal justice process – and it can occur at different points in the process of dealing with children in conflict with the law, including at the pre-trial stage or following conviction. The Committee on the Rights of the Child has also set down clear guidance as to what principles should determine the form such measures take and how they are to be applied in each individual case. This includes ensuring that the child’s rights are protected inter alia through the provision of legal advice and representation and by defining the scope of any discretion applied in relevant legislation.<sup>37</sup> More generally, the Committee on the Rights of the Child has established that it is ‘necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed’.<sup>38</sup> Particular attention is drawn in this context to the application of the best interests principle (Article 3 CRC), which when applied to juvenile justice means that ‘the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child’.<sup>39</sup> The fact that children differ from adults in their ‘physical and psychological development and their emotional and educational needs’ supports the case for a separate juvenile justice system and requires that they are treated in a way that takes this difference into account.<sup>40</sup> Moreover, Article 40(3) of the Convention requires that any alternative methods used to respond to children who offend should pay due regard to the

<sup>37</sup>. See in particular para 27 of the General Comment, *ibid*. Little is known about the rates at which children request or decline legal advice in police custody. One study suggests wide variations in the extent to which children request and receive legal advice when compared with adults, and also when compared with children of different ages. See Kemp, Pleasence and Balmer, ‘Children, Young People and Requests for Police Station Legal Advice: 25 years on from PACE’ 11(1) *Youth Justice* (2011) 28-46. This suggests the reasons why children access legal advice are complex and worthy of greater study.

<sup>38</sup>. Committee on the Rights of the Child, General Comment No 10, *Children’s Rights in Juvenile Justice*, para 23.

<sup>39</sup>. *Ibid*, para 10.

<sup>40</sup>. *Ibid*.

child's rights and legal safeguards, which should not be compromised in pursuit of what might be perceived to be more favourable treatment.

The *European Rules for Juvenile Offenders subject to Sanctions or Measures* set out important principles to be followed by states in their treatment of juveniles. They include a requirement that the imposition and implementation of sanctions or measures:

- Is based on the best interests of the juvenile,
- Is subject to the principle of proportionality, and
- Takes account of the child's age, physical and mental well-being, development, capacities and personal circumstances.<sup>41</sup>

The principles require that measures be tailored to individual young people, implemented without undue delay and follow the principle of minimum intervention. Juveniles must be able to participate effectively in proceedings whereby measures are imposed and implemented and be entitled to enjoy all their rights, including privacy, throughout the proceedings. A multi-disciplinary and multi-agency approach is necessary to ensure holistic treatment and continuity in the care of juveniles; staff working in this area must receive appropriate training and sufficient resources must be provided to ensure that intervention in juveniles' lives is meaningful. All sanctions imposed should be subject to regular inspection and monitoring. The Rules also provides extensive guidance on the conditions of detention which must be provided for by law, set out in policy and observed in practice in all member states.

The survey of Council of Europe states parties that accompanied the preparation of the Rules highlighted the amount of progress being made by member states in making community sanctions increasingly available. As Dünkel and Pruin note, '[m]any community sanctions are available all over Europe' although 'their use varies alot sometimes due to the lack of financial and organisational infrastructure at the local level'.<sup>42</sup> Although they note that due to the general lack of data on the use of community sanctions and measures it is not possible to compare sanctioning practices across the juvenile justice systems of Europe, they conclude from the information that is available that sanctioning practices vary considerably from one country to the next.<sup>43</sup> They also draw attention to two further concerns relating to the need for greater quality management and quality control mechanisms to be used in the implementation of community

<sup>41</sup> Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures, 5 November 2008.

<sup>42</sup> Council of Europe, *European Rules for Juvenile offenders subject to sanctions or measures* (Council of Europe, 2009), p 133. Chapter 3 of this publication includes an analysis of the national questionnaires.

<sup>43</sup> *Ibid*, p 128. See also the discussion at pp 126-128.

sanctions and concerning the failure to ensure scientific evaluation of the measures that are in place. These two factors point to the need for urgent comparative research in this area.<sup>44</sup>

In 2009, the Council of Europe Commissioner for Human Rights published a paper identifying the need for reform in juvenile justice with regard in particular to the use of detention and the availability of alternatives to detention. Although he identified the importance of alternatives to court proceedings – including diversion to health and social services and the use of police diversion mechanisms<sup>45</sup> – the Commissioner also highlighted the need to ensure that children’s rights are adequately protected in such processes. He recommended that the necessary structures and supports be put in place to ensure that diversion becomes properly integrated into the legal system, that measures are properly co-ordinated between agencies and that they are implemented by trained staff. These elements, he submits, are essential to ensure that decision-makers, including the judiciary, are aware of the merits of diversionary mechanisms and have the confidence in them to support their use.<sup>46</sup>

With respect to sanctions available following conviction by a court or other formal adjudication, the Commissioner for Human Rights has emphasised that the approach of the adjudicating body to sentencing is crucial in ensuring that the juvenile’s rights are respected as well as in preventing reoffending.<sup>47</sup> In this context, he has highlighted the importance of striking the correct balance, ensuring that the sentencing or adjudicating body has sufficient flexibility in the determination of the appropriate sanction in each individual case, while also ensuring that there is accountability at all stages in the exercise of this discretion. According to the Commissioner, ‘the provision of systematic ongoing training and the collection of detailed up-to-date data on the sentencing process are important ways of ensuring that it is transparent and adequately scrutinised.’<sup>48</sup> As Dünkel and Pruin’s study highlights, this data is sadly lacking.

According to Rule 17 of the *Beijing Rules*, four key principles should govern the sentencing of children:

<sup>44</sup> Ibid, see pp 131-133. Comparative criminology is not without its challenges however. See for example, Goldson and Hughes, ‘Sociological Criminology and Youth Justice: Comparative policy analysis and academic intervention 10(2) *Criminology and Criminal Justice* (2010) 211-230. See also Goldson and Muncie, ‘Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence’ 6(2) *Youth Justice* (2006) 91-106, and on the apparent risks of the comparative approach see Nelken, ‘Tolerance, Leniency and Indulgence?’ 6(2) *Youth Justice* (2006) 107-128.

<sup>45</sup> In this regard, he drew attention to the well established Irish police diversion programme as well as new initiatives in countries like Bosnia and Herzegovina (an educational recommendation), Finland (victim-offender mediation as a ground for waiving prosecution) and other countries, like Italy, where probation supports are offered as a pre-trial alternative. See Commissioner for Human Rights Issues Paper, *Juvenile Justice: Proposals for Reforms*, p 8.

<sup>46</sup> Ibid, p 9.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid, p 9.

- '(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
- (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
- (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
- (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.'<sup>49</sup>

As the Commissioner for Human Rights has noted, the effective application of these principles in practice requires public awareness and support for approaches to youth crime that is based on evidence and respect children's for rights.<sup>50</sup> He has also highlighted the importance of depoliticising the juvenile justice process 'in order to ensure that it is the result of impartial, evidence-based decision-making and not subject to the changeable influence of the media or political opinion.'<sup>51</sup>

Critical to the successful implementation of the commitment to sentencing that prevents re-offending and respects children's rights is the provision of support for those involved in the sentencing process. Implementation of alternatives to detention must be based on individualised assessments and best practice in social work and youth care.<sup>52</sup> Support for the sentencing process can also be achieved through judicial training and by ensuring input into the process by specialists whose purpose is to assist the court by providing information about which sanction is most appropriate in an individual case to meet both the child's needs and requirements of proportionality and minimal interference.<sup>53</sup> The participation of the child in this process is required by Article 12 of the *Convention on the Rights of the Child* (which recognises the right of the child to be heard in all matters affecting him/her)<sup>54</sup> the European Rules<sup>55</sup> and the *Guidelines on Child*

<sup>49</sup> Rule 17, The UN Standard Minimum Rules on the Administration of Juvenile Justice ('the Beijing Rules') 1985, Adopted by UN General Assembly Resolution 40/33 29 November 1985.

<sup>50</sup> Commissioner for Human Rights Issues Paper, *Juvenile Justice: Proposals for Reforms*, p 10.

<sup>51</sup> Ibid. The question of what 'evidence' means in this context has been the subject of much analysis especially in the area of risk assessment. See for example, Case, 'Questioning the "Evidence" of Risk that Underpins Evidence-led Youth Justice Interventions' 7(2) *Youth Justice* (2007) 91-105.

<sup>52</sup> See the European Rules. See for example, Haines and Case, 'Promoting Prevention A multi-agency initiative to prevent youth offending through Consultation in Swansea Schools' 4(2) *Youth Justice* (2004) 117-132.

<sup>53</sup> Ibid, pp 9-10.

<sup>54</sup> See Committee on the Rights of the Child, General Comment No 12, The Child's Right to be Heard, CRC/C/GC/12 (2010) , especially paras 57-64.

<sup>55</sup> See Rule 13.

*Friendly Justice*<sup>56</sup> and it is essential to ensure the fairness of the decision-making in this area. As the international standards suggest, child-friendly procedures and language should be used to ensure the child understands the process and its outcomes.<sup>57</sup>

As outlined in both the CRC and the European Rules for Juvenile Offenders subject to Sanctions or Measures, among other instruments, states must make available a range of sanctions and measures to ensure that deprivation of liberty is a measure of last resort and that children in conflict with the law receive the sanction that is appropriate to their circumstances and needs, and to the offence. The use of community-based measures should thus be the norm or default position, with detention only being used where they are not considered appropriate or effective. As the Commissioner for Human Rights has highlighted, a large variety of measures is necessary 'to allow for flexibility and a tailored response to each individual case'.<sup>58</sup> The European Rules recommend that national laws make specific provision for the sanctions that are available to juveniles, how these are to be defined and applied, what conditions will apply, whether the juvenile's consent is required, how the measure can be modified if required, which authorities are responsible and how the implementing authorities are to be scrutinised.<sup>59</sup>

The international standards reflect the extensive array of orders being made available at national level in this context; the list includes supervision orders, probation orders, community service orders, financial penalties and compensation, treatment and counselling orders, the provision of foster or residential care, educational placements, adult or peer mentoring, programmes to address addiction or mental health problems, placement in foster care, residential care or other educational settings. For the most part, it is clear that what is proposed here are not punitive sanctions, but rather measures designed to address holistically the factors that underlie a child's offending placed within the health, education and family context.<sup>60</sup> Different programmes place emphasis on different aspects of the disadvantage or difficulty to be addressed and this will depend on the child's individual circumstances and the family and other supports on which they can draw. Although children without family support, such as

<sup>56</sup> Participation is a general principle of the Guidelines and specific provision is also made for the child's participation in criminal proceedings. See further Weijers, 'Requirements for Communication in the Courtroom: a comparative perspective on the youth court in England/Wales and the Netherlands' 4(1) *Youth Justice* (2004) 22-31 and Kilkelly, 'Youth Courts and Children's Rights: An Irish Perspective' 8(1) *Youth Justice* (2008) 39-56.

<sup>57</sup> Ibid. See also the Council of Europe Guidelines on Child-friendly Justice, especially part IV.

<sup>58</sup> Commissioner for Human Rights Issues Paper, *Juvenile Justice: Proposals for Reforms*, p 11.

<sup>59</sup> See Rule 24.

<sup>60</sup> On mental health see the recent contribution of the IJJO, 'Opinion on Mental Health and Young Offenders: the need for a multidisciplinary and integrative approach', 2011 available at [www.ijjo.org](http://www.ijjo.org). See also Grisso, 'Adolescent Offenders with Mental Disorders' 18(2) *The Future of Children Special Issues on Juvenile Justice* (Fall 2008), 143-164.



those in the care of the state, face particular disadvantages in this respect, the duty remains on the state to apply the most appropriate measures for each individual child. Accordingly, the international standards reflect the evidence that measures that engage with the child – rather than purely treat him/her – within the broad family context and in a community setting are most likely to achieve success.<sup>61</sup> Emphasis is based on education and retraining, social integration and inclusion, rather than punishment.<sup>62</sup>

### **Deprivation of Liberty**

The CRC sets the baseline with regard to the deprivation of a child's liberty by providing that it must be a measure of last resort and for the shortest appropriate period of time – a test comprising two distinct elements. The combined objective of the parsimonious use of detention – in its use and its duration – reflects the research evidence that children's health and development are frequently harmed by detention and rarely benefit from it.<sup>63</sup>

With respect to deprivation of liberty for the shortest appropriate period of time, Liefwaard notes that this is 'a matter of enforcement in the sense that it requires tailor-made decisions in which both the interests of the child and other interests of the justice system are balanced'. He posits that this 'could be fostered by the legislator by providing the necessary legal framework including requirements and safeguards'.<sup>64</sup> Certainly, guidance is required to ensure that this element of the Article 37 principle is effectively implemented to ensure that children are not deprived of their liberty for any longer than is absolutely necessary in the circumstances.

Detention as a last resort implies that children should be deprived of their liberty in limited circumstances and that other community-based measures should be used in response to children's behaviour and circumstances. As the Pinheiro Study noted, 'detention should be reserved for child offenders who are assessed as posing a real danger to others, and significant resources should be invested in alternative arrangements, as well as community-based

<sup>61</sup> See Greenwood, 'Prevention and Intervention Programs for Juvenile Offenders' 18(2) *The Future of Children* Special Issues on Juvenile Justice (Fall 2008), 185-210.

<sup>62</sup> See the Commentary to Rule 2 of the European Rules for juvenile offenders subject to sanctions or measures, at pp 34-35. On the potential of social inclusion as an approach see Rutherford, 'Youth Justice and Social Inclusion' 2(2) *Youth Justice* (2002) 100-107. See also, Newburn and Shiner, 'Young People, Mentoring and Social Inclusion' 6(1) *Youth Justice* (2006) 23-42.

<sup>63</sup> The suffering inherent in detention for children is acknowledged in Rule 49.1 of the European Rules. Rule 52.1 notes that 'all juveniles deprived of their liberty are highly vulnerable'. On this issue see Cesaroni and Peterson-Badali, 'Understanding the Adjustment of Incarcerated Young Offenders: A Canadian Example' 10(2) *Youth Justice* (2010) 107-125. See also Goldson, 'Child Imprisonment: the Case for Abolition' 5(2) *Youth Justice* (2005) 77-90 and Bateman, 'Reducing Child Imprisonment: A Systemic Challenge' 5(2) *Youth Justice* (2005) 91-105.

<sup>64</sup> See Liefwaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, Antwerp/Oxford/Portland: Intersentia Publishing 2008, pp 392-393.

rehabilitation and reintegration programmes.<sup>65</sup> The Beijing Rules advocate that detention should only be used where the offence warrants it (i.e. as ‘a serious act involving violence against another person or of persistence in committing other serious offences’) and where there is no other appropriate response. It is apparent, therefore, that implementing the principle of detention as a last resort requires tight circumscription in the law of the power to have recourse to detention as a sanction in children’s cases. In other words, it should be available in limited, specific cases only, specific cases only. In addition, however, ensuring detention is a last resort also requires making provision in law and in practice of a sufficient array of alternative community-based measures. The sanctions identified above – probation, community service, treatment and counselling – are often described as alternatives to detention. But their virtue lies not only in what they are not, ie detention; they are also important and meaningful measures in their own right. In this regard, it is important that states establish community-based sanctions as the normal response to children in conflict with the law because research shows that such sanctions have the major benefit of allowing young people to remain in their families and in their communities to address the underlying problems of offending behaviour.<sup>66</sup> For this reason, they should become the first response to offending behaviour, with detention being the alternative.

The Commissioner for Human Rights has recommended that provision be made in national law for ordering and implementing community sanctions and measures.<sup>67</sup> In terms of decision-making, the European Rules recommend that the choice of measure should be determined by an individual multi-disciplinary assessment of what is in the child’s best interests.<sup>68</sup> Children must be involved in a meaningful way in the decision to impose a sanction and be informed, in a language and manner they understand, as to how the measure imposed is to be implemented and about their rights and duties with regard to its implementation.<sup>69</sup> It is also important to remember at this point that community sanctions or other measures used instead of detention must always respect the rights and legal safeguard of the child.<sup>70</sup>

The European Rules recommend that children are informed in language that they understand as to how the measure in question will be implemented, and about their rights and duties with regard to its implementation.<sup>71</sup> The concern that the promotion of community sanctions can lead to net-widening has led to the recommendation in the international standards that implementation of the sanctions should be based on a partnership with young people where

<sup>65</sup> Report of the independent expert for the UN Study on Violence against Children, p 112.

<sup>66</sup> Ibid.

<sup>67</sup> Commissioner for Human Rights, Issues Paper, p 12.

<sup>68</sup> See Rule 15.

<sup>69</sup> See Rule 13.

<sup>70</sup> See Article 40(3)(b) of the CRC. See also Committee on the Rights of the Child, General Comment No 10. *Children’s Rights in Juvenile Justice*.

<sup>71</sup> Rule 33.1.

they are encouraged to engage with the authorities on non-compliance on matters affecting the implementation of the measures.<sup>72</sup> It has also led to detailed provision in the European Rules for the consequences of non-compliance with special emphasis on communication and trust between children and their families and the encouragement to authorities responsible for overseeing implementation to exercise their discretion carefully when sanction conditions are breached.<sup>73</sup> Minor transgressions need not be reported to the authority deciding whether the measure has been complied with, and failure to comply should not automatically constitute an offence.<sup>74</sup> The European Rules and the Beijing Rules highlight the importance of ensuring that intervention is appropriate, even minimalist in certain circumstances, and this is consistent with recent Scottish research indicating that system contact – however well intended – may itself be harmful.<sup>75</sup> As the Beijing Rules highlight, responses to offending must take into account that for most children their offending is a phase that will pass as they mature. In those cases, no intervention – certainly no formal intervention – may be appropriate. This is particularly the case with respect to age related offences like drinking under the legal age.

Community sanctions are now part of European states' juvenile justice apparatus. Many states offer a range of measures; mediation and restorative justice measures are increasingly popular<sup>76</sup> and supervision by probation services and education and health authorities is now widespread.<sup>77</sup> At the same time, however, there is little information available on the success of these interventions and rigorous systematic evaluation of such interventions and sanctions needs to become a more urgent priority.<sup>78</sup> Attention must now turn to the mainstreaming of these initiatives in juvenile justice systems, their systematic and independent evaluation and the widespread dissemination of this information.

<sup>72</sup> Rule 31.2.

<sup>73</sup> Rules 46-48.5.

<sup>74</sup> Commissioner for Human Rights, Issues Paper, p 12.

<sup>75</sup> McAra, and McVie (2007) 'Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending', *European Journal of Criminology*, 4(3): 315-345.

<sup>76</sup> See Moore and Mitchell, 'Rights-based Restorative Justice: Evaluating compliance with International Standards' 9(1) *Youth Justice* (2009) 27-43. On the potential for greater use of restorative justice in custodial settings see Williams, 'Restorative Justice and Incarcerated Young Offenders' 4(3) *Youth Justice* (2005) 191-203. On the use of restorative justice and the arts in this area see Farrier, Froggett and Poursanidou, 'Offender-based Restorative Justice and Poetry: Reparation or Wishful Thinking' 9(1) *Youth Justice* (2009) 61-76.

<sup>77</sup> Commissioner for Human Rights, Issues Paper, p 12. See also Dünkel and Pruin, 2009.

<sup>78</sup> On the importance of rigorous research and evaluation of interventions see Greenwood, 'Prevention and Intervention Programs for Juvenile Offenders' 18(2) *The Future of Children Special Issues on Juvenile Justice* (Fall 2008), 185-210; Whyte, 'Effectiveness, Research and Youth Justice' 4(1) *Youth Justice* (2004) 3-21 and the observations of Newburn and Shiner, 'Young People, Mentoring and Social Inclusion' 6(1) *Youth Justice* (2006) 23-42 and also it is important to mention the research of the IJJO "Juvenile Justice Indicators for Europe: How to measure Juvenile Justice".

### Conditions in Detention

Although the CRC is clear that detention should be used only as a last resort, it is similarly clear that many CRC provisions continue to apply to children deprived of their liberty. Accordingly international standards make clear that children do not leave their rights at the detention centre gate<sup>79</sup> and children must continue to enjoy their rights even when in detention regardless of when, why or where this takes place. For instance, the CRC applies to children in detention before trial, detained following conviction or deprived of their liberty for the purposes of education, immigration, health or assessment.

The CRC makes explicit provision for the rights of children in detention in Article 37. Here paragraph (c) provides that every child deprived of liberty (again, for whatever purpose) shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. Crucially, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and every child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances. Furthermore, in paragraph (d), every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

In addition, several international standards set out the rights of children in detention; these include the *UN Rules for the Protection of Juveniles Deprived of their Liberty* (the 'Havana Rules'), the Committee on the Rights of the Child's General Comment No 10 and the *European Rules for Juvenile Offenders subject to Sanctions and Measures*. Together, these documents provide extensive guidance for states on best practice and the protection of children's rights in detention.

The 'detention of children' is traditionally associated with the administration of criminal justice as children are sentenced to a young offender facility or a prison following conviction for a criminal offence. In reality, children are deprived of their liberty in numerous ways and for various reasons, including police custody, detention awaiting trial, placement in a secure facility for protection, assessment or treatment, or detention as part of the immigration or asylum system. Across the EU, states use detention for different purposes and they use different nomenclature and terminology to describe children's deprivation of liberty detention and the

<sup>79</sup> See the case-law of the European Court of Human Rights on this point, e.g. *Golder v UK*, Series A 18, 1975 and *Dickson v UK*, ECHR 2007.

places in which children are detained.<sup>80</sup> The international standards make clear that regardless of how it comes about, whether through criminal or welfare proceedings, the purpose it serves or how the secure facility is described, placement of children in a setting from which they are not free to leave constitutes a deprivation of their liberty.<sup>81</sup> Thus, whether children are placed there for punishment, education or welfare reasons, the international rules and standards apply and children's rights and legal safeguards must be upheld. The European Rules play a particularly important role here in reinforcing the relevance of children's rights standards to their detention, regardless of its nature or purpose.<sup>82</sup>

A particular problem is posed by the fact that not all states record each incidence of a child's deprivation of liberty, nor do they register each individual child placed in a secure facility. Data on the use of detention is thus incomplete, making it impossible to compare trends across states, or to monitor or track changes within states over time.<sup>83</sup> This is a very serious problem, which needs to be addressed; states must acknowledge that the placement of a child in any form of secure setting constitutes a deprivation of his or her liberty and each such incidence must be fully recorded; more complete data collection is vital to creating an accurate picture of the number of children deprived of their liberty in Europe and the various forms that this takes.<sup>84</sup>

It is a basic right for children that when they are detained, they are accommodated separately from adults. This is recognised in Article 37, which permits children and adults to be detained together only where this is in the best interests of the child. The Committee on the Rights of the Child has explained that underpinning this right is 'abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate.'<sup>85</sup> Moreover, it has advised that the best interests exception in Article 37 must be narrowly interpreted, and as a result, states should establish 'separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.'<sup>86</sup> This principle is frequently breached both by states that detain large numbers of children, where children are detained in adult prisons, and those that detain small numbers where, it is argued, there is insufficient demand for a separate detention facilities for children.

<sup>80</sup> For example, see Pitts and Kuula, 'Incarcerating Young People: An Anglo-Finnish Comparison' 5(3) *Youth Justice* (2006) 146-164.

<sup>81</sup> See Rule 21.5 of the *European Rules for Juvenile Offenders subject to sanctions or measures*.

<sup>82</sup> *Ibid.* See also.

<sup>83</sup> Dünkel and Pruin (2009), pp 138-140.

<sup>84</sup> *Ibid.*, p 206.

<sup>85</sup> Committee on the Rights of the Child, General Comment No 10, para 85.

<sup>86</sup> *Ibid.*

More generally, it is clear that the CRC has widespread application to children in detention and indeed many CRC rights are acutely important to children deprived of their liberty notwithstanding the challenges children face in having these rights vindicated. The Committee on the Rights of the Child has summarized the international standards relevant to the treatment of children in all forms of detention as follows:

- ‘- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society<sup>87</sup>; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;
- Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community;
- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;
- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;
- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;<sup>88</sup>

<sup>87</sup>. Research shows that there are difficulties inherent in ensuring that children enjoy their right to education to the maximum extent in detention. See Lanksey, ‘Promise or Compromise? Education for Young People in Secure Institutions in England’ 11(1) Youth Justice (2011) 47-60.

<sup>88</sup>. See also Committee on the Rights of the Child, General Comment No 13, The Right of the Child to Freedom from All Forms of Violence, CRC/C/GC/13 (2011).

- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;
- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.<sup>89</sup>

In addition, both the Havana Rules and the European Rules make extensive provision for the regime that should apply to the deprivation of liberty and set out clearly that children in all forms of detention must enjoy the right to protection from harm, to health, to education and leisure and to contact with family and the outside world. Places of detention are not free from violence and the UN Study on Violence against Children noted that worrying levels of violence are suffered by children in detention centres at the hands of both staff and other young people.<sup>90</sup> On this basis, the *Havana Rules* note a preference for open institutions with a strong link to the community where such violence is less likely to take place.<sup>91</sup> The Council of Europe Commissioner for Human Rights has also recommended that ‘small facilities are likely to provide safe(r) environments for children’, and he has recommended the adoption of additional measures – to be set out in national law - to ensure that the rights of children in all facilities are protected. These include:

- Prohibiting physical punishment;
- Placing strict limits on the use of physical restraint and the methods that can be used (including the requirement that the practice be monitored and regularly reviewed) and prohibiting all forms of restraint designed to inflict deliberate pain on children;
- Prohibiting solitary confinement as a means of punishment and restricting its use to exceptional circumstances;
- Effective anti-bullying policies and transparent, clear codes of conduct/behaviour.<sup>92</sup>

The Committee on the Rights of the Child has concluded that children’s placement in solitary confinement, their isolation or their placement in humiliating or degrading conditions

<sup>89</sup>. Committee on the Rights of the Child, General Comment No 10, para 89. See also the recommendations of the *Report of the Independent Expert for the United Nations Study on Violence against Children*, at p 112.

<sup>90</sup>. *Report of the Independent Expert for the United Nations Study on Violence against Children*, A/61/99, 26 August 2006.

<sup>91</sup>. See Rule 30.

<sup>92</sup>. Commissioner for Human Rights, Issues Paper on Juvenile Justice, at pp 14-15.

of detention amounts to a breach of article 19 of the CRC.<sup>93</sup> Equally prohibited is violence used to extract a confession, extra-judicial punishment of children for unlawful behaviour or their forced engagement in activities ‘against their will, typically applied by police and law-enforcing officers, staff of residential and other institutions and persons who have power over children’.<sup>94</sup> Children in detention are acknowledged to be especially vulnerable because they lack the protection of adults responsible for defending their rights and best interests.<sup>95</sup>

International standards provide important guidance for states on issues to do with the placement of children in detention, the admission procedures that should govern that placement, and practical requirements relating to the nature and quality of the accommodation and the standards that should ensure that children stay clean and safe in detention. They highlight the importance of ensuring that such facilities are run according to the highest standards of governance and management, including confidential and modern systems of record-keeping and clear policies on admission, transfer and release.

Particular regard is had in international standards to the importance of planning for release and approaches to integration. In particular, this should be integrated into each child’s individual plan, which should be designed to ensure that children make the most of their time in detention and obtain the education, training, therapy and preparation for release that they need.<sup>96</sup> A comprehensive, multi-disciplinary assessment of the child’s needs should be undertaken on admission and used to determine the type of placement best suited to those needs and an individually tailored placement programme designed to maximise the potential of the placement.

Regard must be had to the particular circumstances of children in pre-trial detention and those placed in welfare or mental health facilities who may be additionally vulnerable. The indeterminate and lengthy nature of pre-trial detention has been highlighted<sup>97</sup> and concern has been expressed by the Commissioner for Human Rights and others about the poor regime and lack of standards that apply to pre-trial detention (at least compared to other forms of detention).<sup>98</sup> There are rarely dedicated facilities for this purpose. Accordingly, the Commissioner has recommended that ‘efforts must be made to improve the quality of pre-trial detention, ensure separation from convicted juveniles

<sup>93</sup>. Committee on the Rights of the Child, General Comment No 13, para 20.

<sup>94</sup>. *Ibid*, para 24.

<sup>95</sup>. *Ibid*.

<sup>96</sup>. See European Rules 77, 79 and 100-103 and see publication and opinion of European Comparative Analysis and Knowledge Transfer on Mental-Health resources for Young Offenders (MHYO) Daphne project JLS/2008/DAP/1461 led by IJJO.

<sup>97</sup>. Dünkel and Pruin, p 168.

<sup>98</sup>. Commissioner for Human Rights, Issues Paper, p 13.

and make sure that a range of measures and activities are available to children detained on remand, given that they remain innocent until proven guilty.<sup>99</sup> This duty to separate convicted from non-convicted persons is found also in Article 10(2) of the International Covenant on Civil and Political Rights.

Moreover, the Committee on the Rights of the Child has recommended that states have strict legal provisions requiring that the legality of pretrial detention to be regularly reviewed, preferably every two weeks.<sup>100</sup> Where conditional release of the child is not possible, the Committee recommends that the charges against the child are brought within a period of 30 days, with final decision on the charges take place within six months of presentation. States are recommended to introduce the necessary legal provisions to ensure that this is a reality.<sup>101</sup>

Children placed in secure welfare institutions or detained in psychiatric institutions for mental health reasons are sometimes seen as the poor relations in juvenile justice. Even though they may lose their liberty like children in youth detention for example, they are not always considered when the concerns of juvenile justice are discussed and reforms proposed.<sup>102</sup> Part of the reason for this is that their care may be the responsibility of the minister for health and so their treatment is neither conceptualised nor categorized as a youth justice issue.<sup>103</sup> Although few international standards (see only the limited detail in the European Rules) make specific provision for children placed in secure facilities for their own safety or for their treatment or care, international rules governing children's detention nonetheless cover these, as well as other forms of detention. Although it must be accepted that children, like adults, may have to be placed in secure facilities for their own protection from time to time, it is the lack of legal certainty – so central to the fairness of the criminal justice system - that can be missing when children are detained 'for their own good' or 'in their best interests', whether this is part of the welfare or the penal system.<sup>104</sup> It is often subjected to criticism therefore due to the fact that variations are found in the duration for which juveniles are placed in welfare institutions; because the best interests of the child is the determining factor, there is often no minimum or maximum term fixed by law.<sup>105</sup> As a result, the duration of time for which children are detained in such facilities varies greatly depending on whether the measure is considered a sanction or a welfare measure designed to protect the child. This disconnect between

<sup>99</sup> Ibid.

<sup>100</sup> Committee on the Rights of the Child, General Comment No 10, para 83.

<sup>101</sup> Ibid.

<sup>102</sup> See for example, Smith and Milligan 'The Expansion of secure accommodation in Scotland: in the Best Interests of the child?' 4(3) Youth Justice (2005) 178-190.

<sup>103</sup> For example, see Pitts and Kuula, 'Incarcerating Young People: An Anglo-Finnish Comparison' 5(3) Youth Justice (2006) 146-164.

<sup>104</sup> See Pösö, Kitinoja and Kekoni, 'Locking up for the Best interests of the Child – some preliminary remarks on "Special Care"' 10(3) Youth Justice (2010) 245-257.

<sup>105</sup> Dünkel and Pruin (2009) p 146.

youth detention and secure welfare placement appears to derive, inter alia, from the placement of the function in the social welfare, health or family departments. Appeal from these measures to a judicial body is not always possible, and inspections are seen to be internal, rather than external, independent mechanisms.<sup>106</sup> These measures aside, Dünkel and Pruin note that the Scandinavian countries are both the biggest user of welfare institutions and the countries where most best practice can be found.<sup>107</sup> An interesting human rights sensitivity has developed here, helped in particular by the interventions of judicial and welfare authorities.

## 4. Compliance with International Standards

This next section aims to evaluate the extent to which the above standards are observed in practice in EU Member States. A common regime applies here – in that all EU members are party to the *Convention on the Rights of the Child* and thus have their compliance with relevant CRC provisions – notably Articles 37 and 40 – monitored by the Committee on the Rights of the Child on a regular basis. Similarly, all EU member states are members of the Council of Europe and party to the Convention for the Prevention of Torture, whose monitoring body, the Committee for the Prevention of Torture (CPT) inspects and monitors conditions in detention. Despite the wealth of international standards and the fact that the CRC is binding international law if not also part of national law in many EU states, the Committee has routinely expressed concerns about the extent to which the rights of children in conflict with the law are upheld. Some of these concerns overlap with those of the CPT which despite not having a specific mandate to deal with juvenile detention, regularly expresses its concern about these issues. The principal concerns are common to many EU states and can be summarised as follows:

### Implementation of Standards

The Committee on the Rights of the Child has expressed a general concern in respect of most EU states about the extent to which the international standards – including the CRC, the Beijing Rules, the Riyadh Guidelines and the Havana Rules – are being implemented and in many if not all cases, the Committee has explicitly urged their full implementation at national level.<sup>108</sup> It has also recommended to numerous Member States that they establish a system of juvenile justice

<sup>106</sup>. See also Report of the independent expert for the UN Study on Violence against Children (A/61/299).

<sup>107</sup>. Ibid, pp 154-155.

<sup>108</sup>. This concern has been expressed in relation to Austria, Belgium, Bulgaria, Cyprus, Denmark, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Malta, Romania and Sweden.

that fully integrates the provisions of the CRC and other relevant international standards into legislation and practice<sup>109</sup> and it has urged the promotion of the reform of juvenile justice practices in the spirit of the Convention and relevant international rules.<sup>110</sup> It has strongly encouraged the development of specialised juvenile justice institutions, including youth courts and the full application of the juvenile justice protections to those under 18 years.<sup>111</sup>

### Use of Detention

The Committee on the Rights of the Child has expressed concern about the increasing numbers of children under 18 years being placed in detention in Austria,<sup>112</sup> and France<sup>113</sup> while in countries including Bulgaria,<sup>114</sup> Greece<sup>115</sup> and Lithuania<sup>116</sup> for example, it has expressed concern about the extent to which the deprivation of liberty is genuinely used as a measure of last resort. More specifically, it has highlighted the disproportionate number of children of foreign origin in detention in Austria,<sup>117</sup> and in Germany,<sup>118</sup> while also highlighting the particular stigma suffered by vulnerable categories of children, including children of foreign origin in Italy<sup>119</sup> and the Roma minority, in Bulgaria.<sup>120</sup> In the case of Greece, the Committee expressed concern about the large number of juveniles detained pending trial in apparent contradiction of national law and it has also noted that delays in judicial proceedings have led to long periods of pre-trial detention there and elsewhere.<sup>121</sup> The Committee has also noted with concern the detention of children in police stations and in detention centres before trial<sup>122</sup> and the length of time for which children are held in police detention is a concern in many EU states.<sup>123</sup> In some states, increasing sentences imposed on juveniles who may be tried as

<sup>109</sup>. See for example, Committee on the Rights of the Child, Concluding Observations: Belgium, CRC/C/15/Add.178, para 32 and Committee on the Rights of the Child, Concluding Observations: Finland, CRC/C/15/Add.272, para 55.

<sup>110</sup>. Committee on the Rights of the Child, Concluding Observations: Bulgaria, CRC/C/15/Add.66, para 19; Committee on the Rights of the Child, Concluding Observations: Czech Republic, CRC/C/15/Add.201, para 66; Committee on the Rights of the Child, Concluding Observations: France, CRC/C/15/Add.240, para 59.

<sup>111</sup>. See for example, Committee on the Rights of the Child, Concluding Observations: Malta, CRC/C/15/Add.129, para 50 and Committee on the Rights of the Child, Concluding Observations: Portugal, CRC/C/15/Add.199, para 62.

<sup>112</sup>. Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 53.

<sup>113</sup>. Committee on the Rights of the Child, Concluding Observations: France, CRC/C/15/Add.240, para 58.

<sup>114</sup>. Committee on the Rights of the Child, Concluding Observations: Bulgaria, CRC/C/15/Add.66, para 19.

<sup>115</sup>. Committee on the Rights of the Child, Concluding Observations: Greece, CRC/C/15/Add.170, para 79.

<sup>116</sup>. Committee on the Rights of the Child, Concluding Observations: Lithuania, CRC/C/LTU/CO/2, para 68.

<sup>117</sup>. Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 53.

<sup>118</sup>. Committee on the Rights of the Child, Concluding Observations: Germany, CRC/C/15/Add., para 60.

<sup>119</sup>. Committee on the Rights of the Child, Concluding Observations: Italy, CRC/C/15/add.198, para 51.

<sup>120</sup>. Committee on the Rights of the Child, Concluding Observations: Bulgaria, CRC/C/15/Add.66, para 19.

<sup>121</sup>. Committee on the Rights of the Child, Concluding Observations: Germany, CRC/C/15/Add 170, para 78. See also the concerns in relation to Netherlands and Poland and Romania below.

<sup>122</sup>. See for example Committee on the Rights of the Child, Concluding Observations: Lithuania, CRC/C/LTU/CO.2, para 68. This concern is commonly expressed by the CPT also. See for example, Poland - CPT/Inf (2006) 11, page 11.

<sup>123</sup>. Netherlands - CPT/Inf (2008) 2, page 22 and Poland - CPT/Inf (2006) 11, page 12. See further below.

adults is a cause for concern<sup>124</sup> and in the case of Slovakia, the Committee for the Prevention of Torture has called for the end of the life sentence on juveniles citing the CRC and guidance of the Committee on the Rights of the Child in support of its position.<sup>125</sup> The CPT has also recommended the abolition of incommunicado detention for juveniles on the grounds that it trumps any of the protections that this group are afforded under juvenile justice laws.<sup>126</sup>

### Separation of Children from Adults in Detention

Despite the clarity of Article 37 of the CRC, which prohibits the detention of children with adults, this is a serious problem in many EU Member States. The Committee on the Rights of the Child and the Committee for the Prevention of Torture have both expressed particular concern about this issue in respect of Austria,<sup>127</sup> Cyprus,<sup>128</sup> the Czech Republic,<sup>129</sup> Germany,<sup>130</sup> Greece,<sup>131</sup> Hungary<sup>132</sup> and Luxembourg<sup>133</sup> and have recommended that steps be taken to ensure such separation in these member states. In addition, in Belgium<sup>134</sup> Estonia,<sup>135</sup> Finland,<sup>136</sup> Ireland<sup>137</sup> and Romania<sup>138</sup> recommendations were made to end the practice while the dangers of accommodating children in cells with adults was highlighted to Portugal.<sup>139</sup> According to the CPT, notwithstanding perceived benefits of accommodating adults with juveniles (e.g. that it prevents gang formation), 'even in such cases ... the risks inherent in juveniles sharing cells with adults - whether they are sentenced or on remand - are such that such placement should

<sup>124</sup>. See for example, Committee on the Rights of the Child, Concluding Observations: Spain, CRC/C/15/Add.185, para 53 and Committee on the Rights of the Child, Concluding Observations: Greece CRC/C/15/Add.1790, para 78. On the risks of this punitive practice see Christiaens and Nuytiens, 'Transfer of Juvenile Offenders to adult Court in Belgium: Critical reflections on the Reform of a Moderate Practice 9(2) Youth Justice (2009) 131-142.

<sup>125</sup>. Slovakia - CPT/Inf (2010) 1, page 32.

<sup>126</sup>. Spain - CPT/Inf (2011) 11, page 23.

<sup>127</sup>. Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 53.

<sup>128</sup>. Committee on the Rights of the Child, Concluding Observations: Cyprus, CRC/C/15/Add.204, para 59. However, the CPT noted improvement in this situation following its visit in 2008. See Cyprus - CPT/Inf (2008) 17, para 23.

<sup>129</sup>. Committee on the Rights of the Child, Concluding Observations: Czech Republic, CRC/C/15/Add.201, para 66.

<sup>130</sup>. Committee on the Rights of the Child, Concluding Observations: Germany, CRC/C/15/Add., para 60. See the concerns of the CPT also. Germany - CPT/Inf (2007) 18, page 44.

<sup>131</sup>. Committee on the Rights of the Child, Concluding Observations: Greece, CRC/C/15/Add 170, para 78.

<sup>132</sup>. Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/HUN/CO, para 61.

<sup>133</sup>. Committee on the Rights of the Child, Concluding Observations: Luxembourg, CRC/C/15/Add.250, para 60.

<sup>134</sup>. Committee on the Rights of the Child, Concluding Observations: Belgium, CRC/C/15/Add.178, para 32.

<sup>135</sup>. Committee on the Rights of the Child, Concluding Observations: Estonia, CRC/C/15/Add.196, para 51. The CPT also expressed grave concern about the placement of children in adult cells in some Estonian facilities. See Estonia - CPT/Inf (2005) 6, page 17, although by now this issue has been solved as minors are placed in special units in prison; both inmates and those under preliminary investigation (Crime in Estonia 2009 – Ministry of Justice of Estonia. Tallinn: 2010 [www.just.ee](http://www.just.ee)).

<sup>136</sup>. Committee on the Rights of the Child, Concluding Observations: Finland, CRC/C/15/Add.272, para 55.

<sup>137</sup>. Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2, paras 72-73.

<sup>138</sup>. Committee on the Rights of the Child, Concluding Observations: Romania, CRC/C/Add.199, para 63.

<sup>139</sup>. Portugal - CPT/Inf (2009) 13, page 24.

not occur.<sup>140</sup> Separation of juveniles from adults in pre-trial detention and in police detention is also an ongoing concern in many EU states.<sup>141</sup>

### **Due Process - Children in Secure Care**

Although conditions in the secure/therapeutic units in the EU states which have such facilities can be good,<sup>142</sup> the Committee on the Rights of the Child has expressed concern about the use of this form of detention without judicial authority. In respect of France, it recommended the review of national legislation to ensure that punitive measures are taken only by judicial authorities, with due process, and legal assistance.<sup>143</sup> In Luxembourg, it criticised the fact that children who are in conflict are dealt with in the same structures as those who are having social or behavioural problems.<sup>144</sup> In respect of Denmark, the Committee on the Rights of the Child has expressed concern about the practice of confining to institutions children who display difficult behaviour and it has recommended in particular that Denmark fully implement international standards for children under 15 years to ensure that they are not deprived of their liberty without due process.<sup>145</sup> Similarly grave concern was expressed with respect to the practice, in Luxembourg, of confining a child under 18 years to solitary confinement as a disciplinary sanction.<sup>146</sup> This was a matter in Sweden also, where detention in isolation and the use of restraint were particular concerns according to the CPT.<sup>147</sup>

Ensuring that children are deprived of their liberty only as determined by law is thus a concern in a surprising number of EU states.<sup>148</sup> For others, concern has been expressed about the application of disciplinary rules and the perceived withdrawal of basic rights (contact with family, right to education and leisure) as punishment.<sup>149</sup>

<sup>140</sup>. Slovakia - CPT/Inf (2010) 1, page 41.

<sup>141</sup>. See for example, Slovenia - CPT/Inf (2008) 7, page 37.

<sup>142</sup>. Following its visit to Finland, the CPT noted in respect of one facility that 'The programmes available ... offered a wide range of therapeutic and rehabilitative activities (individual psychotherapy, support and group therapy, education, work therapy, life skills training, art, sports, etc.). Juvenile patients had access to a well-staffed and adequately equipped school, high-quality workshops and outside sports grounds (including a swimming pool and cross-country skiing tracks)'. Finland - CPT/Inf (2009) 5, page 52.

<sup>143</sup>. Committee on the Rights of the Child, Concluding Observations: France, CRC/C/15/Add.240, para 59.

<sup>144</sup>. Committee on the Rights of the Child, Concluding Observations: Luxembourg, CRC/C/15/Add.250, para 60.

<sup>145</sup>. Committee on the Rights of the Child, Concluding Observations: Denmark, CRC/C/DNK/CO/3, para 59.

<sup>146</sup>. Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/15/Add.250, para 32.

<sup>147</sup>. Sweden - CPT/Inf (2009) 34, page 53.

<sup>148</sup>. See for example, Committee on the Rights of the Child, Concluding Observations: Czech Republic CRC/C/15/Add.201, para 66 and Committee on the Rights of the Child, Concluding Observations: France, CRC/C/15.add.240, para 59.

<sup>149</sup>. Slovenia - CPT/Inf (2008) 7, page 35.

### Alternatives to Detention

Surprisingly little focus has been paid by the monitoring bodies to the need to develop measures that divert children from the formal justice system, although this has increased more recently. The Committee on the Rights of the Child made this recommendation in respect of Germany<sup>150</sup> and Austria,<sup>151</sup> for example, where it recommended the development of alternatives to juvenile justice proceedings as promoted by international standards. In Romania, it has criticised that very few children are dealt with by diversionary or alternative measures and noted also the lack within the judicial system to provide rapid intervention for juvenile offenders.<sup>152</sup> Similarly in respect of Greece, the Committee recommended that greater efforts be made to provide alternatives to detention, along with ensuring that detention, including pre-trial detention, is used only as a measure of last resort and with due consideration for the seriousness of the crime.<sup>153</sup> Pre-trial detention was also a concern in respect of Luxembourg, where the Committee recommended that measures be taken to reduce its use and to make this form of detention as short as possible by developing alternatives including community service orders and restorative justice.<sup>154</sup> In the case of Hungary, the Committee recommended that the state party take particular measures to implement alternatives to detention, such as probation, community service and suspended sentences<sup>155</sup> and it made a similar recommendation with regard to Lithuania.<sup>156</sup> In respect of Ireland, the Committee urged the state party to implement a set of alternative measures as a matter of priority to ensure that the deprivation of liberty is used only as a last resort and for the shortest possible time.<sup>157</sup> For Latvia, it recommended that alternatives to detention be developed and implemented, including ‘probation, mediation, community service or suspended sentences and measures to effectively prevent and address drug and/or alcohol related delinquency’.<sup>158</sup>

### Rights, Conditions and Treatment in Detention

Despite the range of international standards dealing with conditions and rights in detention, both the Committee on the Rights of the Child and the Committee for the Prevention of Torture regularly find fault with the conditions and regime of juvenile detention throughout Europe.<sup>159</sup> Some examples follow.

<sup>150</sup>. Committee on the Rights of the Child, Concluding Observations: Germany, CRC/C/15/Add., para 61.

<sup>151</sup>. Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 54.

<sup>152</sup>. Committee on the Rights of the Child, Concluding Observations: Romania, CRC/C/15.add.199, para 62.

<sup>153</sup>. Committee on the Rights of the Child, Concluding Observations: Greece, CRC/C/15/Add.170, para 79.

<sup>154</sup>. Committee on the Rights of the Child, Concluding Observations: Luxembourg, CRC/C/15/Add.250, para 61.

<sup>155</sup>. Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/HUN/CO, para 61.

<sup>156</sup>. Committee on the Rights of the Child, Concluding Observations: Lithuania, CRC/C/LTU/CO/2, para 69.

<sup>157</sup>. Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2, para 71.

<sup>158</sup>. Committee on the Rights of the Child, Concluding Observations: Latvia, CRC/C/LVA/CO/2, para 62.

<sup>159</sup>. For an assessment of best practice in this area see Irish Penal Reform Trust, Detention of Children: International Standards and Best Practice (Dublin: IPRT, 2009) available at [www.iprt.ie](http://www.iprt.ie).

In Hungary, the Committee on the Rights of the Child expressed serious concern about the ill-treatment of children by adult inmates due to mixed detention facilities and it recommended accordingly that measures be taken to protect children from all forms of ill-treatment.<sup>160</sup> Denmark has been criticised for its use of the practice of solitary confinement in youth detention for children with serious behavioural problems and here the Committee on the Rights of the Child has recommended that this practice be abolished.<sup>161</sup> Similarly, the CPT raised the length of time juveniles spend in solitary confinement with the government of Austria and recommended that a maximum period be placed on this practice.<sup>162</sup> This concern was also expressed in respect of certain facilities in Germany<sup>163</sup> and again in respect of the Netherlands<sup>164</sup> and Spain where it was recommended that material conditions be improved.<sup>165</sup> According to the CPT, following its visit to Cyprus, 'if juveniles are to be 'held separately from others, it should be for the shortest possible period of time and they should in all cases be guaranteed appropriate human contact.'<sup>166</sup>

Ensuring that juveniles can access a meaningful regime – with outdoor activity, education, vocational training and leisure opportunities – is critical to preventing the harm that prison can cause juveniles and to maximising the constructive nature of the experience. Both the CRC Committee and the CPT have criticised poor regime during their consideration of juvenile regimes in EU countries. The CPT expressed serious concern about the lack of a meaningful regime for juveniles following its visit to Cyprus in 2008 when it noted that 'while a lack of purposeful activity is detrimental for any prisoner, it is especially harmful for juveniles, who have a particular need for physical activity and intellectual stimulation.'<sup>167</sup>

In some states, like Finland, where the regime for sentenced prisoners is constructive, the CPT has expressed concern about the failure to ensure that an equivalent or appropriate regime of meaningful activities be made available to children on remand.<sup>168</sup> This group faces particular challenges, including those caused by uncertainty around the duration of their detention.<sup>169</sup> Particular challenges faced by the impoverishment of the remand regime in Slovakia was also criticised by the CPT.<sup>170</sup> In some countries, Lithuania in particular, the CPT has found conditions in which children are detained before trial to be 'appalling'.<sup>171</sup>

<sup>160</sup>. Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/HUN/CO, para 61.

<sup>161</sup>. Committee on the Rights of the Child, Concluding Observations: Denmark, CRC/C/DNK/CO/3, para 58.

<sup>162</sup>. Austria - CPT/Inf (2010) 5, page 43.

<sup>163</sup>. Germany - CPT/Inf (2007) 18, page 48.

<sup>164</sup>. Netherlands - CPT/Inf (2008) 2, page 40.

<sup>165</sup>. Spain - CPT/Inf (2011) 11, page 64.

<sup>166</sup>. Cyprus - CPT/Inf (2008) 17, page 37.

<sup>167</sup>. Cyprus - CPT/Inf (2008) 17, page 31.

<sup>168</sup>. Finland - CPT/Inf (2009) 5, page 39.

<sup>169</sup>. Freeman and Seymour, "'Just Waiting': the nature and effect of uncertainty on young people in remand custody in Ireland" 10(2) Youth Justice (2010) 126-142.

<sup>170</sup>. Slovakia - CPT/Inf (2010) 1, page 41.

<sup>171</sup>. Lithuania - CPT/Inf (2009) 22, page 28.

Protecting juveniles in detention from harm – that imposed by fellow prisoners and staff – can be challenging and both CPT and Committee on the Rights of the Child have expressed concern about the extent to which states are addressing this issue. For example, following its visit to Latvia, the CPT reported serious allegations of abuse by juveniles of prison staff.<sup>172</sup> At the same time, and in the light of the killing of a juvenile by fellow prisoners, CPT recorded the efforts made to reduce inter-prisoner violence in institutions in Latvia.<sup>173</sup> Conditions in detention – including levels of violence, bullying, self-harm and suicide – and the use of restraints and injuries resulting from their use were all serious concerns in respect of the United Kingdom.<sup>174</sup> The CPT has expressed concern about the systematic handcuffing of juveniles and the manner and duration of restraints used on those in detention in the Netherlands.<sup>175</sup> By contrast, the staff of one facility in Germany were applauded by the CPT for their substantial and successful efforts at reducing self-harm and suicide.<sup>176</sup> When the CPT visited Austria, it reported that several allegations had been received from juveniles in respect of physical ill-treatment and/or verbal abuse experienced during police questioning.<sup>177</sup> Similar concerns were expressed following the CPT's visit to Denmark,<sup>178</sup> Latvia,<sup>179</sup> Lithuania<sup>180</sup> Poland<sup>181</sup> and Slovenia.<sup>182</sup> In the latter case, the CPT expressed concern about the fact that those making the allegations had not been taken seriously, by the judiciary and others and it recommended that in all such cases 'these allegations [should] be recorded in writing, a forensic medical examination immediately ordered, and the necessary steps taken to ensure that the allegations are properly investigated'.<sup>183</sup>

In respect of Lithuania, the CPT found the conditions in which juveniles subject to police detention were inhuman and degrading.<sup>184</sup> Following a visit to Austria, CPT criticised the long periods of time during which children were held in police detention for questioning and expressed concern about the practice of allowing young people to sign statements in the absence of a parent or appropriate adult.<sup>185</sup> Indeed, this is a growing trend, it would appear, illustrated by the fact that it is a concern frequently expressed by the CPT. For example, it can be found in CPT reports

<sup>172</sup> Latvia - CPT/Inf (2009) 35, page 25.

<sup>173</sup> Latvia - CPT/Inf (2009) 35, page 25.

<sup>174</sup> Committee on the Rights of the Child, Concluding Observations: United Kingdom, CRC/C/15.Add.188, paras 33 and 59.

<sup>175</sup> Netherlands - CPT/Inf (2008) 2, pages 41-43.

<sup>176</sup> Germany - CPT/Inf (2007) 18, page 56.

<sup>177</sup> Austria - CPT/Inf (2010) 5, page 12.

<sup>178</sup> Denmark - CPT/Inf (2008) 26, page 14.

<sup>179</sup> Latvia - CPT/Inf (2009) 35, pages 15-17 and 25.

<sup>180</sup> Lithuania - CPT/Inf (2009) 22, page 12.

<sup>181</sup> Poland - CPT/Inf (2006) 11, page 12.

<sup>182</sup> Slovenia - CPT/Inf (2008) 7, pages 12-13.

<sup>183</sup> Slovenia - CPT/Inf (2008) 7, page 13.

<sup>184</sup> Lithuania - CPT/Inf (2009) 22, page 18.

<sup>185</sup> Austria - CPT/Inf (2010) 5, pages 19-20.

with respect to Bulgaria,<sup>186</sup> Germany,<sup>187</sup> Latvia<sup>188</sup> the Netherlands,<sup>189</sup> Slovenia<sup>190</sup> and Sweden.<sup>191</sup> In the latter case, the gravity of the failure to record the children's admission to detention for questioning was highlighted<sup>192</sup> while in respect of Slovakia, particular concern was expressed with regard to a high profile incident of police ill-treatment of a group of Roma children in 2009.<sup>193</sup>

Even within states, conditions in different facilities can be found to vary in quality. Different conditions were clearly found to exist at different detention facilities in Austria with some offering a favourable regime with good facilities for education, vocational training and recreation<sup>194</sup> while others were criticised for a poor regime with little out of cell time.<sup>195</sup> In Latvia, similarly, some excellent material conditions were noted although concerns were also expressed about the use of a system of self-governance (by juveniles) of the facility.<sup>196</sup> In respect of Austria, concern was expressed about the level of psychotropic medicine being administered to juveniles in certain facilities and this appeared, to the CPT at least, to be used as a means to alleviate the boredom associated with spending long periods of time in their cells.<sup>197</sup> In Greece, the failure to adapt the regime for adult female prisoners for juvenile female prisoners was criticised.<sup>198</sup>

In Latvia, the Committee on the Rights of the Child expressed concern about whether children have sufficient opportunity to have contact with their families and to access educational instruction while in detention<sup>199</sup> and the CPT recommended that the Latvian authorities abolish restrictions on contacts with the outside world in respect of juvenile prisoners.<sup>200</sup> Similarly, in Poland, it criticised the fact that not all juvenile detention centres guarantee the child's right to maintain contact with his/her family or provide adequate living standards.<sup>201</sup> Overcrowding was considered to be a cause of concern in Spain.<sup>202</sup>

<sup>186</sup>. Bulgaria - CPT/Inf (2010) 29, page 28.

<sup>187</sup>. Germany - CPT/Inf (2007) 18, page 22.

<sup>188</sup>. Latvia - CPT/Inf (2009) 35, page 25.

<sup>189</sup>. Netherlands - CPT/Inf (2008) 2, page 14.

<sup>190</sup>. Slovenia - CPT/Inf (2008) 7, page 16.

<sup>191</sup>. Sweden - CPT/Inf (2009) 34, page 20.

<sup>192</sup>. Sweden - CPT/Inf (2009) 34, page 21.

<sup>193</sup>. Slovakia - CPT/Inf (2010) 1, page 13.

<sup>194</sup>. Austria - CPT/Inf (2010) 5, pages 36-37.

<sup>195</sup>. Austria - CPT/Inf (2010) 5, pages 37-38.

<sup>196</sup>. Latvia - CPT/Inf (2009) 35, page 29.

<sup>197</sup>. Austria - CPT/Inf (2010) 5, page 42.

<sup>198</sup>. Greece - CPT/Inf (2010) 33, page 58. On this issue more generally see Burman and Batchelor, 'Between Two Stools? Responding to Young Women who offend' 9(3) Youth Justice (2009) 270-285.

<sup>199</sup>. Committee on the Rights of the Child, Concluding Observations: Latvia, CRC/C/LVA/CO/2, para 62.

<sup>200</sup>. Latvia - CPT/Inf (2009) 35, page 44.

<sup>201</sup>. Committee on the Rights of the Child, Concluding Observations: Poland, CRC/C/15/Add.194, para 50.

<sup>202</sup>. Committee on the Rights of the Child, Concluding Observations: Spain, CRC/C/15/Add.195, para 53.

### Inspection and Complaints

As noted in the international standards outlined above, independent complaints and monitoring mechanisms are an essential way to protect children from harm in detention and to secure their rights in practice. As noted above, the Committee on the Rights of the Child and the UN Violence Study have been particularly forceful on this point.<sup>203</sup> According to the CPT, juveniles should ‘have avenues of complaint open to them, both within and outside the establishments’ administrative system, and be entitled to confidential access to an appropriate independent authority (for example, a visiting committee or a judge) that is competent to receive – and, if necessary, act upon – juveniles’ complaints’.<sup>204</sup> Yet these mechanisms are clearly absent in many EU states.

In Italy, the Committee on the Rights of the Child noted the absence of independent structures to monitor conditions of detention of children<sup>205</sup> and it recommended that the state allow periodic visits to detention centres by independent bodies to ensure that every child deprived of his/her liberty has access to an independent, child-sensitive and accessible complaint procedure.<sup>206</sup> In the case of Ireland, it expressed concern that the Ombudsman for Children is excluded from investigating complaints emerging from a young offender institution where children are detained alongside young adults.<sup>207</sup> It went on to recommend that Ireland ‘make every effort to include in the investigation and inspection mandate of the Ombudsman for Children all places of detention where children are currently held’.<sup>208</sup> Similar concerns (and recommendations) were expressed in respect of Latvia,<sup>209</sup> Luxembourg<sup>210</sup> and Slovakia.<sup>211</sup> The existence of a mechanism of itself is not sufficient to ensure accountability; its mandate must also be exercised to ensure its maximum effect. Following its visit to Malta, for example, the CPT noted the appointment of a Commissioner for Children but lamented that the Office’s visits to places of detention were so infrequent.<sup>212</sup>

### Recovery and Reintegration

In respect of France, the Committee on the Rights of the Child has recommended that measures be taken to promote the recovery and social reintegration of the children involved

<sup>203</sup>. See the Committee on the Rights of the Child General Comments No 5, 8, 10 and 12. See also the *Report of the Independent Expert for the United Nations Study on Violence against Children*, para 112.

<sup>204</sup>. Cyprus - CPT/Inf (2008) 17, page 52.

<sup>205</sup>. Committee on the Rights of the Child, Concluding Observations: Italy, CRC/C/15/add.198, para 51.

<sup>206</sup>. Committee on the Rights of the Child, Concluding Observations: Italy, CRC/C/15/add.198, para 53.

<sup>207</sup>. Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2, para 72.

<sup>208</sup>. Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2, para 73.

<sup>209</sup>. Committee on the Rights of the Child, Concluding Observations: Latvia, CRC/C/LVA/CO/2, para 62.

<sup>210</sup>. Committee on the Rights of the Child, Concluding Observations: Luxembourg, CRC/C/15/Add.250, para 61.

<sup>211</sup>. Committee on the Rights of the Child, Concluding Observations: Slovakia, CRC/C/15/Add.140, para 51.

<sup>212</sup>. Malta - CPT/Inf (2011) 5, page 53.

in the juvenile justice system.<sup>213</sup> The Committee also recommended in respect of Finland that it take preventive measures, like supporting the role of families and communities in order 'to help eliminate the social conditions leading to problems of delinquency, crime and drug addiction'.<sup>214</sup> Otherwise, the Committee has appeared to focus little on reintegration measures.

### **Training and Specialisation**

By contrast, it is a frequent recommendation of the Committee on the Rights of the Child that juvenile justice and child rights training be conducted for the judiciary, police officers, detention officials and other personnel involved in the juvenile justice process. Specialised judiciary, policy and detention facilities are also strongly advocated. The CPT has recognised, in respect of Ireland, that working with those in juvenile detention is challenging. Accordingly, the CPT notes:

*The staff called upon to fulfil that task should be carefully selected for their personal maturity and ability to cope with the challenges of working with - and safeguarding the welfare of - this age group. More particularly, they should be committed to working with young people, and be capable of guiding and motivating the juveniles in their charge. All such staff should receive professional training, both during induction and on an ongoing basis, and benefit from appropriate external support and supervision in the exercise of their duties.*<sup>215</sup>

This was noted in respect of the Netherlands also where the CPT has noted that 'a high rate of staff turnover combined with the difficulty in recruiting new, well-trained staff, obviously has an impact on the quality of care provided'.<sup>216</sup>

In Spain, a similar point was made about needing to ensure that those who are responsible for the care of unaccompanied minors in detention receive training to ensure that they are sensitive to the multi-cultural needs of this group.<sup>217</sup>

Specialism is secured inter alia by ensuring that 'a rigorous selection and training programme is in place for all staff allocated to [juvenile facilities] with induction and regular in-service training'.<sup>218</sup> The Committee on the Rights of the Child also highlighted this in respect of

<sup>213</sup>. Committee on the Rights of the Child, Concluding Observations: France, CRC/C/15/Add.240, para 59.

<sup>214</sup>. Committee on the Rights of the Child, Concluding Observations: Finland, CRC/C/15/Add.240, para 59.

<sup>215</sup>. Ireland - CPT/Inf (2011) 3, page 25.

<sup>216</sup>. Netherlands - CPT/Inf (2008) 2, page 38.

<sup>217</sup>. Spain - CPT/Inf (2011) 11, page 66.

<sup>218</sup>. Ireland - CPT/Inf (2011) 3, page 25.

Romania,<sup>219</sup> Greece,<sup>220</sup> Italy,<sup>221</sup> and Lithuania for example where systematic training on children's rights was recommended for judges, penitentiary staff and social workers.<sup>222</sup> In respect of Austria, the Committee on the Rights of the Child recommended that measures be taken to ensure that staff in juvenile detention centres are well trained to deal in a proper and adequate manner with the relatively high number of persons who are of foreign origin.<sup>223</sup> A more general concern was expressed by the CPT in respect of Austria, i.e. that staff newly appointed to youth facilities receive insufficient specialised training to deal with juveniles.<sup>224</sup> The CPT also advocated the use of mixed-gender staffing, especially in prisons where juveniles were detained.<sup>225</sup> In Slovenia, the particular focus for this recommendation was the police.<sup>226</sup> In respect of Hungary, the Committee recommended that efforts to train those working in the juvenile justice system concentrate training on human rights and the problems of racism and discrimination in light of particular problems such as the overrepresentation of Roma Children within the justice system.<sup>227</sup>

## 5. Conclusions and Recommendations

It is clear that there is now a substantial body of international law setting out best practice and guidance on the treatment of children in conflict with the law, in particular regarding the sanctions and measures to which they are subjected and their treatment in detention. There are also a number of monitoring mechanisms that aim to ensure that standards are upheld either in places of detention (in the case of the CPT) or more generally (e.g. the UN Committee, Commissioner for Human Rights). However, although there has been some recent improvement in the availability of community sanctions, serious concerns remain about the gap between the theory of the international rules and the reality of practice. The absence of up-to-date data on the operation of the youth justice system across many Member States frustrates meaningful analysis and makes it difficult, if not impossible, to track trends or compare jurisdictions. At the same time, the monitoring work of the Committee on the

<sup>219</sup> Committee on the Rights of the Child, Concluding Observations: Romania, CRC/C/15/Add.199, para 61.

<sup>220</sup> Committee on the Rights of the Child, Concluding Observations: Greece, CRC/C/15/Add.170, para 79.

<sup>221</sup> Committee on the Rights of the Child, Concluding Observations: Italy, CRC/C/15/add.198, para 53.

<sup>222</sup> Committee on the Rights of the Child, Concluding Observations: Lithuania, CRC/C/LTU/CO/2, para 69.

<sup>223</sup> Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 54.

<sup>224</sup> Austria - CPT/Inf (2010) 5, page 34.

<sup>225</sup> Austria - CPT/Inf (2010) 5, page 34.

<sup>226</sup> Committee on the Rights of the Child, Concluding Observations: Slovenia, CRC/C/15/Add 230, para 59.

<sup>227</sup> Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/HUN/CO, para 61 and 60.

Rights of the Child makes clear that detention is not always a measure of last resort and there are insufficient measures to make detention as a last resort a reality in many EU states. Conditions in detention are still worrying in some EU Member States and the CRC prohibition on detaining children with adults is regularly flouted. The absence of independent inspection and complaints mechanisms is lamentable across the EU and greater emphasis needs to be placed on specialisation and training for all those working in juvenile justice. The lack of meaningful regimes for children – such as the provision of suitable education and leisure opportunities, and regular contact with the outside world – is a key problem. The treatment of children in police custody is also a matter of growing concern.

Substantial improvements need to occur in many Member States with regard to the collection, dissemination and analysis of data on the operation of the juvenile justice system and its impact on young people. There is particularly limited information available on the positive examples or best practices at work in the juvenile justice and criminal justice systems of many EU states. Best practice, it would appear, is rarely publicised (although the CPT reports do provide ample evidence of where the situation has improved) and as a consequence, possibilities for its replication elsewhere are minimal. The failure to ensure that the mechanisms and measures that are in place are properly evaluated and the outcomes of interventions widely disseminated means that those countries who have enjoyed success keep it largely to themselves.

The discussion above has highlighted that in addition to the standards themselves, there is now extensive guidance and advice available from international bodies on how greater and more effective implementation of the international rules can be achieved. Other than applying greater resources and political will to the problem – more of which are always required - it is clear that structural reforms are required to ensure that juvenile justice standards are implemented in a manner that brings benefits to children and society as a whole. The one recommendation to which all states should give serious consideration is to bring all relevant services concerning children within a single government department at national level. Ireland has recently established a new Department of Children and Youth Affairs of which the Youth Justice Service is a part. This should aim to significantly address the problems caused currently by inadequate co-ordination and co-operation between government departments and agencies. It should also ensure a coherent policy on youth justice, common across all departments, which drives delivery of services and maintains the highest children's rights standards throughout.

The following recommendations are also necessary:

- Systems must be established to ensure the timely and comprehensive collection

and analysis on the treatment of children in conflict with the law. This is particularly acute with respect to the sanctions and measures being applied as community sanctions, diversionary mechanisms or alternatives to custody where current information is patchy;

- Law and policy must be reviewed to ensure it fully incorporates and is consistent with international standards;
- Accredited training must be provided for all staff working with and for children who come into conflict with the law on juvenile justice, children's rights and youth criminology and development;
- Measures must be taken to ensure that the effective and independent evaluation of all interventions becomes the norm in juvenile justice;
- States should set up academic and inter-disciplinary networks to share information, research and expertise on the effectiveness of sanctions and measures for juvenile offenders;
- Independent systems must be put in place to provide for comprehensive and regular inspection of all facilities providing services to children, and responsible for their care and treatment in detention. These should be established at various levels including local level.
- All children must have access to an independent complaints mechanism with the power to advocate on children's behalf to have a problem resolved.

It is apparent from the recent EU Agenda on Children's Rights and from the Stockholm Agenda and Action Plan that the EU Commission is well placed to pursue juvenile justice reform in these areas. There is no doubt that there is a need for EU intervention to bring standards closer to practice. As to what form this intervention takes, the above analysis suggests that there is little scope or need for the adoption of further standards in the areas of detention and alternatives to detention. What is needed, however, is the introduction of a new imperative to drive reform and change at a European level and to bridge the gap between theory and practice throughout all Member States.

Although there are numerous monitoring bodies already in place in this area, it is notable that there is no single dedicated juvenile justice agency at either European or international level with the mandate to actively promote and pursue implementation of international standards. Nor is there an agency to disseminate evidence of best practice, to promote research and evaluation of sanctions and interventions and to showcase good examples for states to follow. Such an agency could play a pivotal role in closing the gap between theory and practice in juvenile justice and ensuring greater compliance by Member States with their obligations under international and EU law. The

Commission is thus urged to give serious consideration to implementing this recommendation as part of its activities in this area.

As part of such an initiative or separate to it, the following steps could also be considered:

1. Action needs to be taken to address the serious shortcomings in the available data on juvenile justice across the EU. For example, consideration should be given to establishing a database, establishing common language and terms and the barometers and indicators in accordance with which progress in the reform of youth justice can be measured over time and across jurisdictions;
2. The EU Commission could promote and support independent, scientific and rigorous evaluations of current juvenile justice interventions and ensure their wide dissemination.
3. Comparative research in youth justice across the EU should be facilitated, supported and funded by the EU Commission;
4. The Commission could actively support EU-wide training on international standards, best practice and children's rights and child development for all those working for and with children in juvenile justice;
5. The EU Commission could establish specific networks of the various professionals involved in the determination of sanctions or sentences for juvenile offenders at an EU level to share information, disseminate best practice and exchange ideas. Networks of specialist judiciary, probation officers, lawyers, social workers, police officers and academics could be set up to this end and to ensure the Commission's work remains rooted in the practice of Member States;
6. Consideration should be given to setting up a juvenile justice agency at EU level to ensure implementation, quality control and independent evaluation of international standards at national level. This could play a particularly important role in drawing together the inspection reports on the detention (all kinds) of children and would make it easier to track progress and disseminate evidence of best practice where it exists. It could drive all of the reforms proposed above and be used to support further study of the reciprocal and mutually beneficial relationship between international and European standards, and their implementation at national level.

## About IJJO and its EU branch, the EJJO

Children and young people all over the world are in need of protection and special care when they come into conflict with the law. This is the original inspiration for the International Juvenile Justice Observatory (IJJO), an international Foundation based in Brussels, which offers an inter-disciplinary system of information, communication, analysis and proposals concerning the different developments of juvenile justice in the world.

Based on the differentiating aspects and the common points that define all juvenile justice systems in Europe, the IJJO has set up its European Branch the European Juvenile Justice Observatory (EJJO), as a positive element in the process of combining strategies and good practices in Europe.

The European Juvenile Justice Observatory has created the European Council for Juvenile Justice as a European think-tank on Juvenile Justice. This is composed of European Experts in the field, who work for the development of initiatives and standards of good practice in relation to the education and inclusion of young people in conflict with the law in Europe. It also aims to develop the corresponding strategies and recommendations such as those set out in this Green Paper.



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