

Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings

4 April 2014

Introduction

The CCBE has examined the proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings. The CCBE has the following comments to make:

CCBE comments on the Explanatory Memorandum

10. We appreciate the difficulty in establishing a common definition of *vulnerable adult persons* and we appreciate why a recommendation (instead of a Directive) is being proposed by the Commission in this area.
14. We would welcome the age of 18 being the age to define a child.
18. We welcome that there is going to be an enhanced letter of rights for children.
23. We note the central role being given for a person who holds parental responsibility.
25. We would acknowledge that in certain circumstances it is necessary to have another appropriate adult.
26. We strongly welcome the mandatory access to a lawyer.
27. We strongly welcome that the right cannot be waived.
29. We are concerned that certain offences which are considered minor in an adult context might not be minor in the context of a child, and if the issues are being diverted from the court system it is still undesirable that children do not have a lawyer.
31. We welcome that individual assessment is carried out in each case.
32. We strongly welcome special attention being given to children "*involved in criminal activities which they have been compelled to commit as victims of trafficking in human beings.*"
37. We welcome the fact that the lawyer can call for a medical examination.
41. We note that the general rule that interviews with children should be audio/visually recorded is to be subject to exceptions in minor offences, but not where children are deprived of their liberty. This could give rise to a facility for a cynical investigator to conduct an initial interview leading to admissions "off camera". The CCBE raises the

question as to why would audio/visual recording be disproportionate given the prevalence of smart phone technology etc.

46. We welcome that alternative measures should be considered before deprivation of liberty.

49. We welcome that children are to be detained separately from adults.

51. We welcome the protection of privacy.

52. We welcome that only in exceptional circumstances would cases be heard in public. While open justice is a fundamental general principle, we welcome the recognition that an exception to that principle is justified in the case of children.

57. We welcome the presence of the child during the case.

61. In Arrest Warrant cases we welcome the emphasis on limiting the duration of the deprivation of liberty.

63. We note that the issue of legal aid is not being dealt with in this Directive but will be dealt with on the proposal for a Directive on the right to provisional legal aid. We urge caution in this regard as it is dangerous to de-couple such an important constituent element and it is imaginable that there will be a risk that the Directive on the right to provisional legal aid could be significantly delayed.

64. We welcome that training is envisaged for lawyers and in this regard national training systems should be taken into account.

Comments on the Recitals

8. We welcome the fact that the protection for children applies if they are a child at the date that they are first suspected (Recital 8) or if their current offence is inextricably linked to an offence where proceedings started before they were 18 (Recital 9).

10. We note the recommendation that member States are encouraged to apply the procedural safeguards until people reach 21.

13. We welcome the enhanced Letter of Rights.

15. We welcome the right to have a holder of parental responsibility informed.

16. We welcome that a child cannot waive their right of access to a lawyer.

17. We have reservations in relation to the exclusions for mandatory access "*where the law of a member State provides for the imposition of a penalty regarding minor offences by such an authority and there is either a right of appeal or the possibility for the case to be otherwise referred to a court having jurisdiction in criminal matters, mandatory access to a lawyer should therefore apply only to the proceedings before that court following such an appeal or referral*" as, by that stage the damage might very well have been done.

18. We have the same concern with regard to the following provision "*where the law of a member State provides that deprivation or liberty cannot be imposed as a penalty in respect of minor offences, the right of mandatory access to a lawyer should therefore only apply to proceedings before a court having jurisdiction in criminal matters.*"

We note that if the provision is only excluded where imprisonment is impossible then the guarantee is a strong one. If however this moves to where imprisonment is unlikely or not usual then the protection is vague.

22. We repeat our concerns about the exceptions from audio/visual recording.

26. We welcome the separate detention of juvenile offenders being continued after they reach 18.

27. We welcome training, and in this regard national training systems and training obligations should be taken into account.

Comments on the Articles

2. We welcome that the Directive applies from the initial suspicion or the time of arrest in Arrest Warrant cases.

2.5. The Directive does not affect national rules determining the age of criminal responsibility.

3. We understand this means a child below the age of 18 years.

4. We note that children shall be informed promptly about their rights and the rights are set out at Nos. 1 to 9 including the right to a lawyer No. 2 and the right to legal aid No. 9.

6. Article 6 (1) provides that that *"Member States shall ensure that children are assisted by a lawyer throughout the criminal proceedings in accordance with Directive 2013/48/EU. The right to access to a lawyer cannot be waived"*.

We strongly welcome the Commission's proposal that ensures mandatory access to a lawyer for children who are suspected or accused in criminal proceedings. We welcome that the right cannot be waived and that access to a lawyer shall be guaranteed from the outset of the proceedings and during police questioning.

8.2. C. We welcome that the lawyer can request medical examination.

9.1. Article 9 (1) provides that *"Member States shall ensure that any questioning of children by police or other law enforcement or judicial authority carried out prior to the indictment is audio-visually recorded, unless it is not proportionate taking into account the complexity of the case, the seriousness of the alleged offence and the potential penalty that can be incurred."*

We particularly appreciate that Member States are obliged to ensure that children questioned by the police have to be audio-visual recorded. This ensures that questions concerning circumstances of questioning and accusations against the police are to be met effectively. We have strong concerns in regard to the exemptions from audio-visual recording and we strongly oppose them.

We do observe and note the provisions in 9.2 that specify that: *"In any event the questioning of children shall be audio/visually recorded where the child is deprived of liberty, irrespective of the stage of criminal proceedings."*

10.1 We note that deprivation of liberty only as a measure of last resort.

10.2 We note that this is subject to periodic review by a court.

11. With regard to the provision that *"Member States shall ensure that where the conditions for deprivation of liberty are fulfilled, the competent authorities have recourse to alternative measure, wherever possible"*, we welcome the fact that even in serious cases that alternatives are sought – see five examples set out at 11.2.

13.1. We welcome the provision that *"Member States shall ensure that criminal proceedings involving children are treated as a matter of urgency and with due diligence."* We believe that contact with the criminal justice system itself is a source of significant risk to children and effective legal assistance is important in this context.

14.1 We welcome *“that criminal proceedings involving children take place in the absence of the public unless after due consideration for the best interests of the children exceptional circumstances justify derogation.”*

14.2. We welcome Member States ensuring that they protect the privacy of the child.

17.1 We note that all these rights apply to children who are arrested under a European Arrest Warrant in the executing member State.

17.2 We note that executing authorities *“shall take all measures to limit the duration of the deprivation of liberty or children subject to European Arrest Warrant proceedings”.*

We do not understand why some of the rights identified cannot apply in both States for the protection of the children.

Rights that would be appropriate.

Article 4 right to information.

Article 5 right of the child to have holder of parental responsibility involved.

Article 6 right to mandatory access to a lawyer.

Article 10 right to liberty.

Article 11 alternative measure.

Article 12 right to specific treatment in case of deprivation of liberty.

Article 13 timely and diligent treatment of cases

Article 14 right to protection of privacy.

Article 15 rights of access to court hearings of the holder of parental responsibility.

Article 18 right to legal aid.

18. With regard to the following provision *“Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to access to a lawyer as referred to in Article 6”, the phrases “shall ensure” and “effective exercise” are critically important. If they were to be diluted the Article would be of limited effect.*

19.2 *“Member States shall ensure that lawyers defending children also receive such training.”*

We welcome this proposal warmly and look forward to practical suggestions for how it might be advanced in conjunction with the training systems and training obligations that exist in the Member States.