

Individual assessment of children in conflict with the law

Baseline study for the PRACTICE project

Including Country studies of Belgium, England & Wales, Finland and the Netherlands

“Member States shall ensure that the specific needs of children concerning protection, education, training and social integration are taken into account”
(Article 7, paragraph 1 Directive on procedural safeguards for children).

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Table of Contents

I. Children’s rights standards and principles 3

II. The situation in Belgium, England and Wales, Finland and the Netherlands 13

Country report: Belgium 15

Country report: England & Wales 25

Country report: Finland 35

Country report: The Netherlands 40

Concluding observations 52

References 56



I. Children's rights standards and principles

As an essential principle of juvenile justice proceedings, children¹ in conflict with the law should be provided with at least the same procedural rights and safeguards as adults in order to guarantee their right to a fair trial.² Given the specific vulnerabilities of children and the impact of judicial proceedings and the outcomes on a child's life, it is therefore required to carry out an accurate assessment of a child's characteristics and circumstances, in order to meet his/her particular needs and protect his/her procedural rights.

When the assessment is carried out in a non-biased manner it is an essential step to safeguard accused children's effective participation in the juvenile justice proceedings,³ determine their best interests and protect them against discrimination, especially for the most marginalised groups of children. It is a key element to ensure as far as possible a positive experience for the child throughout the judicial proceedings,⁴ protect the child's rights and safety, evaluate possible risks of harm and re-offending⁵ and select interventions that match the needs of the child and facilitate its reintegration into society.

Several international and European instruments have established a set of principles and practical elements regarding the procedures to assess the individual circumstances of a child in conflict with the law (see further below). One of the most recently adopted instruments is the Directive (EU) 2016/800 on procedural safeguards for children suspected or accused in criminal proceedings, which – based on the vulnerabilities of each child – openly recognises the 'right to individual assessment' in its article 7 as part of the child-specific rights of children in conflict with the law.⁶ These instruments highlight that an individual assessment needs to be carried out at the earliest stage possible, preferably upon arrest and before the child appears in court. The assessment and its report should be the responsibility of trained professionals, such as social workers, psychologists, police and probation officers. Lawyers, parents and legal representatives can also be involved in the procedure. In article 7(4) it is outlined that the individual assessment serves the purpose of:

- determining whether any specific measures to the benefit of the child is to be taken;
- assessing the appropriateness and effectiveness of any preliminary measures;
- assisting in taking any decisions in criminal proceedings, including sentencing.

The assessment can thus be used for assessing if and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.⁷

¹ A child is defined as a person below the age of 18 (art. 1 CRC). In relation to the juvenile justice system, it is used to refer to children who are above the minimum age of criminal responsibility at the time of the commission of an offence but younger than 18 years (CRC/C/GC/24, para. 20).

² Stephanie Rap and Ido Weijers, 2014, ppp. 56.

³ ECtHR, *SC. v. United Kingdom*, paras. 28 -29.

⁴ Fair Trials, 2018, ppp. 52.

⁵ Penal Reform International, 2013, p. 41.

⁶ Valsamis Mitsilegas, 2019, p. 125. See also Dorris De Vocht and others, 2014, p. 500.

⁷ Para. 35 of the preamble to Directive (EU) 2016/800, Recital 35.

International legal framework

The international children's rights framework

The UN Convention on the Rights of the Child (CRC) established that every child in conflict with the law is entitled to be treated fairly, with respect for his/her human dignity, in a special and child-friendly way, while ensuring his/her right to a fair trial. Moreover, the aim should be to promote reintegration of the child into society and allow him/her to take a constructive role therein.⁸ Individual assessment may be beneficial to reaching these aims but only if it is carried out in compliance with the child rights-based approach.

Although not explicitly mentioned by the UN Committee on the Rights of the Child (CRC Committee) the child rights-based approach seems to play crucial role in ensuring that the individual assessment serves actually to promote the child's rights and the child's position of a rights holder and not of a mere object of care and protection or of punishment. The CRC Committee related the child rights-based approach to the child's dignity in its General Comment no. 13 on the right of the child to freedom from all form of violence. In the definition of the child rights-based approach the CRC Committee emphasized the need for a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection".⁹ Child rights-based approach thus requires respect, protection and fulfilment of all rights of the child as guaranteed under the CRC and its core principles are to develop the capacity of duty bearers to meet their obligations deriving from these rights as well as to develop the capacity of children to claim their rights.¹⁰

The child rights-based approach prohibits to interpret the rights of the child in a way that would result in a paternalistic intervention, that would approach the child as a mere object of the intervention, as an instrument to ensure his/her own rights. The concept of inherent rights requires that recognizing the child as a holder of these rights cannot be subjected to any further conditions. Ensuring respect, protection and fulfilment of these rights therefore cannot consist in requiring the child to change himself/herself; on the contrary it must be based on the principle that the duty bearers need to search for such a way to meet their obligations that would not impose conditions on the child.¹¹

It is this aspect of the child rights-based approach that constitutes a significant resemblance with the social (human rights) model of disability requiring to strictly differentiate between impairment and disability and to accept impairment as part of the individual's identity. Impairment therefore cannot constitute a legitimate ground for depriving the individual of the opportunity to enjoy his/her human rights and freedoms on equal basis with others.¹² The social (human rights) model of disability is

⁸ Art. 40 CRC.

⁹ CRC/C/GC/13, para. 59.

¹⁰ CRC/C/GC/13, para. 59.

¹¹ CRC/C/GC/13, para. 59: „(...) This child rights approach is holistic and places emphasis on supporting the strengths and resources of the child him/herself and all social systems of which the child is a part: family, school, community, institutions, religious and cultural systems.“

¹² The definition of the social (human rights) model of disability may be found, inter alia, in the General Comment of the UN Committee on the Rights of Persons with Disabilities no. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, para. 9. The requirement of strict distinction between impairment and disability was formulated in the Guidelines of the UN Committee on the Rights of Persons with Disabilities on Article 14 of the UN Convention on the Rights of Persons with Disabilities, A/72/55, 2017 para. 6: „Impairment in the present guidelines is understood as a physical, psychosocial, intellectual or sensory personal condition that may or may not come with functional limitations of the body, mind or senses.“ Impairment differs from what is usually considered the norm. Disability is understood as the social effect of the interaction between individual impairment and the social and material environment, as described in Article 1 of the Convention.

inherently connected with the concept of “inclusive equality” which was defined by the UN Committee on the Rights of Persons with disabilities as “a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity.”¹³ The UN Convention on the Rights of Persons with Disabilities is based on inclusive equality.

It is not inappropriate to relate the concept of inclusive equality to the child rights-based approach. The General Comment of the CRC Committee no. 21 (2017) on children in street situation gives good evidence in this regard, since it strictly refuses the idea of ensuring the rights of the child through forced interventions against the child and accentuates the need for searching for new ways how to ensure that the rights of the child are respected, protected and fulfilled even in the situation when the child does not want to change, i.e. in the context of the cited General Comment, when the child does not want to leave the street and his/her relations to street.¹⁴

The CRC Committee further specified in the General Comment no. 21 the definition of the child rights-based approach by strictly differentiating it from the repressive approach and the welfare approach and accentuated that to apply the CRC it was essential to use a child rights approach.¹⁵ The CRC Committee further highlighted that in the child rights-based approach the process of realizing children’s rights was as important as the end result.¹⁶

The individual assessment as a right of the child thus has to be interpreted and applied in strict compliance with the cited principles of the child rights-based approach, i.e. as a tool serving the child to promote all his/her rights as guaranteed under the CRC. As such it may be considered as a direct tool of promotion of inclusive equality as defined above for children in conflict with the law. On the contrary, individual assessment shall not be used as a tool justifying forced intervention against the child since such an approach would correspond, depending on the purpose of the intervention (to sanction the child or to protect the child) either to the repressive approach or to the welfare approach which, however, are not compatible with the CRC. To be compliant with the child rights-based approach, the individual assessment shall not be used either as a tool serving adults to override the obligations deriving from all rights of the child guaranteed under the CRC by their judgment about what is “in the child’s best interests”.¹⁷

Interpreted and applied in compliance with the child rights-based approach the individual assessment becomes an important guarantee that the child is ensured in the criminal proceedings taken against him/her the position of the subject of the proceedings and not of the mere object of the proceedings. This function of the individual assessment has both, substantive as well as procedural dimensions.

¹³ CRPD/C/GC/6, para. 11.

¹⁴ We may mention the call for refraining from forced removal of children from streets (CRC/C/GC/21, paras. 44-45) or for inventing new forms of education that would reach children directly in streets (CRC/C/GC/21, paras. 54-55). The call for applying harm reduction approach to children who use substances or are addicted to substances is another example of the principles of the child rights-based approach (CRC/C/GC/21, para. 53).

¹⁵ CRC/C/GC/21, para. 5.

¹⁶ CRC/C/GC/21, para. 10.

¹⁷ CRC/C/GC/13, para. 61; CRC/C/GC/14, para. 4.

In terms of guarantees of a fair trial, the CRC requires to determine the legal matter without delay and considering the child's age or situation, his/her parents or legal guardian.¹⁸ Likewise, as part of the assessment it is also essential to bear in mind the best interests of the child as a primary consideration in all actions concerning children including by courts of law,¹⁹ the evolving capacities of the child²⁰ and the right to be heard and express his/her views in all matters affecting him/her.²¹

The UN Committee on the Rights of the Child (CRC Committee) noted that in ensuring the child's right to be heard, states parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard.²² In this regard the CRC Committee refers expressly to children with disabilities and children belonging to a minority, indigenous and migrant background. Furthermore, the views of the child must be given due weight depending on the child's age and maturity. For this, the child's capacities need to be assessed and it should be communicated to the child how those views have influenced the outcome of the process.²³ In the context of the justice system, the CRC Committee has noted that safeguards against discrimination are needed from the earliest contact with the justice system, and that accommodation should be made specifically for children with disabilities.²⁴ This may include support for children with psychosocial disabilities, assistance in communication and reading of documents, and procedural adjustments for testimony. Moreover, contact with the justice system should not result in stigmatisation of the child, which leads to further harm. The CRC Committee has stated that diversion should be available from the earliest stages of the justice process and children's human rights and legal safeguards should be fully respected and protected.²⁵

Moreover, the CRC Committee has stated unequivocally that children with developmental delays or neurodevelopmental disorders or disabilities (which include autism spectrum disorders, fetal alcohol spectrum disorders and acquired brain injuries) should not be in the (juvenile) justice system at all; these children should be automatically excluded from the justice system or, otherwise, individually assessed.²⁶ Nevertheless, these conclusions of the CRC Committee may contravene obligations deriving from the UN Convention on the Rights of Persons with Disabilities, since they are built on medical (individual) rather than social (human rights) model of disability. The UN Committee on the Rights of Persons with Disabilities draws attention to the fact that the concept of insanity very often leads to establishing care systems in which the person found insane may be anyway deprived of his/her liberty but without adequate procedural as well as substantive safeguards ensured in the criminal justice system.²⁷ The diversion of the child from the criminal justice system due to his/her mental or psychosocial impairment shall not therefore result in deprivation of the child's liberty in different

¹⁸ Art. 40 (2)(i) (b)(i) (iii) CRC.

¹⁹ Art. 3 (1) CRC.

²⁰ Art. 5 CRC.

²¹ Art. 12 CRC.

²² CRC/C/GC/12, para. 21.

²³ CRC/C/GC/12, para 28.

²⁴ CRC/C/GC/24, para. 40.

²⁵ CRC/C/GC/24, paras. 14, 15 and 16.

²⁶ CRC/C/GC/24, para. 28.

²⁷ A/72/55, 2017, para. 14: „Persons with intellectual impairments are frequently considered dangerous to themselves and to others when they do not consent to or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with breaches of the obligation. Persons with disabilities are frequently denied equal protection under those laws by being diverted to a separate track of law, including through mental health laws. Those laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13, in conjunction with article 14, of the Convention.“

system, either in child protection and care system²⁸, or in mental health systems while the term “deprivation of liberty” should be interpreted in a broad sense²⁹ in order to cover all forms of forced removal from the person’s natural environment.³⁰

Furthermore, in order to respect the social (human rights) model of disability, the diversion of the child from the criminal justice system should not be strictly connected to specified mental health diagnoses. Not only that the diagnoses lack very often adequate empiric basis³¹, the reliance on them when approaching an individual human being may easily result in denying his/her individual identity and fighting diversity. The UN Special Rapporteur on the right to health, Dainius Pūras, points out that the strong reliance on mental health diagnoses and biomedical paradigm of mental health leads to ignorance of structural determinants of (mental) health³² and to emphasis put on individual interventions.³³ Structural problems remain unsolved while the individual are subjected to individualized mental health interventions, often (but not necessarily) without their informed and free consent. The UN Special Rapporteur calls this biomedical paradigm “reductionist”³⁴ and warns that

²⁸ In its General Comment no. 21 the CRC Committee emphasized that deprivation of liberty was never a form of protection in terms of Article 20 of the CRC. See CRC/C/GC/21, para. 44.

²⁹ In its General Comment no. 24 (2019) the CRC Committee defined deprivation of liberty as „any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.“ – See CRC/C/GC/24, para. 7.

³⁰ The definition of “confinement” seems to be very helpful in this context. The UN Special Rapporteur on the right to health, Dainius Pūras, defines confinement in his report on deprivation of liberty and the right to health as „a term widely used in health and social welfare settings to indicate the restriction of an individual within a limited area, following medical or social-welfare advice. It may occur with or without the consent of the person and may include some generally accepted health-grounded practices, such as those applied in the context of the recovery period after a woman has given birth.“ The UN Special Rapporteur on the right to health further emphasizes that „while some forms of confinement, including retention in hospitals and in psychiatric and other medical facilities, may constitute de facto deprivation of liberty, virtually all forms of confinement without informed consent represent a violation of the right to health.“ – See A/HRC/38/36, 2018, paras. 5-6.

³¹ The UN Special Rapporteur on the right to health, Dainius Pūras, highlights in its report on the right to mental health that “the biomedical model regards neurobiological aspects and processes as the explanation for mental conditions and the basis for interventions. It was believed that biomedical explanations, such as “chemical imbalance”, would bring mental health closer to physical health and general medicine, gradually eliminating stigma. However, that has not happened and many of the concepts supporting the biomedical model in mental health have failed to be confirmed by further research. Diagnostic tools, such as the International Classification of Diseases and the Diagnostic and Statistical Manual of Mental Disorders, continue to expand the parameters of individual diagnosis, often without a solid scientific basis. Critics warn that the overexpansion of diagnostic categories encroaches upon human experience in a way that could lead to a narrowing acceptance of human diversity.” – See A/HRC/35/21, 2017, para. 18.

³² Structural determinants of the right to health was defined in the General Comment of the UN Committee on Economic, Social and Cultural Rights no. 14 (2000) on the right to the highest attainable standard of health, E/C.12/2000/4, para. 4, as “underlying determinants of health” among which the Committee mentioned “food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and health working conditions, and a healthy environment”.

³³ The UN Special Rapporteur on the right to health, Dainius Pūras, highlights in his report on mental health and human rights: setting a rights-based global agenda that “there is a concerning tendency to use medicine as a means to diagnose and subsequently dismiss an individual’s dignity and autonomy within a range of social policy areas, many of which are viewed as popular reforms to outdated forms of punishment and incarceration. Medicalization deflects from the complexity of the context as humans in society, implying that there exists a concrete, mechanistic (and often paternalistic) solution. That reflects the unwillingness of the global community to confront human suffering meaningfully and embeds an intolerance towards the normal negative emotions everyone experiences in life. How “treatment” or “medical necessity” is used to justify discrimination and social injustice is troubling.” – See A/HRC/44/48, 2020, para. 30.

³⁴ A/HRC/35/21, 2018, para. 8.

“mental health diagnoses have been misused to pathologize identities and other diversities, including tendencies to medicalize human misery.”³⁵

The above-cited conclusions of the UN CRC Committee should be therefore read in light of all these standards from disability and mental health perspective. The requirement to be diverted from the criminal justice system should therefore apply not only with respect to children with a specified mental health diagnosis but with respect to all children who could not understand the unlawfulness of their act or control their behaviour. In addition, as mentioned above, the diversion of the child from the criminal justice system should not enable to deprive the child of his/her liberty in a different system as well as of procedural safeguards guaranteed in the criminal justice system. This corresponds to the conclusions drawn by the UN Committee on the Rights of Persons with Disabilities in its Guidelines on Article 14.³⁶

Additionally, in the context of the guarantees of a fair trial, the CRC Committee highlights the relevance of a systematic and continuous training of professionals. In its General Comment no. 24 the CRC Committee accentuates the need for professionals to be able to work in interdisciplinary teams and to be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.³⁷ Nevertheless, these conclusions may not be fully compatible with child rights-based approach. To ensure compliance with the child rights-based approach, it is crucial that the training is organised in such a way that eliminates the risk of stigmatization and discrimination. The information about physical, psychological, mental and social development of children and adolescent should not be therefore interpreted as reference to positivist/scientific approach to the child since such an approach would in fact correspond in principle to the medical model of disability that is strictly forbidden under the UN Convention on the Rights of Persons with Disabilities.³⁸ The training should therefore focus on developing the capacity of the professionals to meet their obligations deriving from the rights of child guaranteed under the CRC, i.e. to deepen their knowledge of the normative content of the rights of the child as well as strengthen their ability to apply these rights in practice. The General Comment of the CRC Committee no. 21 (2017) on children in street situation gives in this regard good guidelines on how training of professionals should be organized in order to be in compliance with the CRC.³⁹ Furthermore, it should be noted that including the child’s views and opinion is of eminent importance.⁴⁰

³⁵ A/HRC/35/21, 2018, para. 48.

³⁶ The UN Committee on the Rights of Persons with Disabilities recommends there that „all persons with disabilities who have been accused of crimes and detained in jails and institutions without trial be allowed to defend themselves against criminal charges, and be provided with the support and accommodation required to facilitate their effective participation, as well as procedural accommodations to ensure fair trial and due process.“ – See A/72/55, 2017, para. 16.

³⁷ CRC/C/GC/24, para 39.

³⁸ For definition of medical (individual) model of disability see CRPD/C/GC/6, para. 8.

³⁹ CRC/C/GC/21, para. 18: „States should invest in good quality initial and in-service basic training on child rights, child protection and the local context of children in street situations for all professionals who may come into direct or indirect contact with children in street situations, in such areas as policymaking, law enforcement, justice, education, health, social work and psychology. This training may draw on the expertise of non-State actors and should be integrated into the curricula of relevant training institutions. Additional in-depth training on a child rights approach, psychosocial support and child empowerment is required for professionals working with children in street situations as a dedicated part of their mandate, for example, street-based social workers and specialized child protection units of the police service. “Outreach walks” and “street walks” are an important on-the-ground training method. Basic and specialized training should include attitudinal and behavioural change, as well as knowledge transfer and skills development, and should encourage intersectoral cooperation and collaboration. (...).“

⁴⁰ Art. 12 CRC; A/72/55, 2017, paras. 23 and 24; CRC/C/GC/12, para. 57.

The right of children in conflict with the law to an individual assessment is enshrined in several other international instruments as well. First, the International Covenant on Civil and Political Rights (ICCPR) states that in the case of juvenile persons, procedures should consider the age of the child and the desirability for his/her reintegration.⁴¹ In the particular case of children, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), recommend considering the background and circumstances in which the juvenile is living before a competent authority provides a final disposition. To this end, adequate social services should be available to deliver reports.⁴² Moreover, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules') emphasise that the child needs to be interviewed as soon as possible after the admission to a place where he/she is detained, and a psychological and social report must be prepared identifying any factors relevant to the specific type and level of care and programmes that are required.⁴³

At the level of the Council of Europe, the acknowledgement of individual assessment and adapted procedures has started with a series of case law produced by the European Court of Human Rights (ECtHR) relating to the right to a fair trial for minors.⁴⁴ As part of this right, the Court evaluated whether the guarantees of the right of an accused to participate effectively were sufficiently safeguarded. In the specific cases of minors, in *T. and V. v. the United Kingdom* and *SC. v. United Kingdom*, the Court established that procedures for the individual assessment are required steps to promote children's understanding and effective participation during their criminal trial. For this purpose, the child charged with an offence needs to be dealt with in a way that considers its age, level of maturity and intellectual and emotional capacities.⁴⁵ Furthermore, in the case of *Blokhin v. Russia*, the Court has pointed out that authorities must deal with full consideration of the age, level of maturity and intellectual and emotional capacities of the child from the first stage of his/her involvement in a criminal investigation.⁴⁶

The procedures for assessing the individual circumstances have also been included in the Recommendation Rec (2003)20 of the Council of Europe, which notes that to determine whether to prevent re-offending by taking a child in remand, courts should carry out a comprehensive risk assessment based on the personality and circumstances of the child.⁴⁷ Furthermore, a full needs and risk assessment should be one of the steps towards reintegration of children previously deprived of their liberty. The assessment should include needs regarding education, health, family, social environment, etc.⁴⁸ The Council of Europe Recommendation CM/Rec (2008)11 requires individual assessment during the implementation of community sanctions and measures⁴⁹ and deprivation of liberty. In the latter case, institutions should implement an assessment system to place juveniles according to their educational, developmental and safety needs.⁵⁰

However, it should be noted that the cited Council of Europe Recommendation may not be fully compatible with the CRC and the UN Convention on the Rights of the Child. Actually, it is built on welfare rather than on child rights-based approach and the concept of inclusive equality. This is well documented for instance by rule no. 57 stipulating that "juveniles who are suffering from mental illness and who are to be deprived of their liberty shall be held in mental health institutions" which strongly

⁴¹ Art. 14 (4) ICCPR.

⁴² Art. 16.1 The Beijing Rules.

⁴³ Art. 27 The Havana Rules.

⁴⁴ Art. 6 European Convention on Human Rights.

⁴⁵ ECtHR, *V. v. the United Kingdom*, paras. 85-86; ECtHR, *SC. v. United Kingdom*, paras. 28 -29.

⁴⁶ ECtHR, *Blokhin v. Russia*, para. 195.

⁴⁷ Rule 18, Recommendation Rec (2003)20.

⁴⁸ Rule 19, Recommendation Rec (2003)20.

⁴⁹ Rule 39.1, Recommendation CM/Rec (2008)11.

⁵⁰ Rule 61, Recommendation CM/Rec (2008)11.

contravenes Article 14 of the UN Convention of the Rights of Persons with Disabilities (see above). From the CRC perspective even the requirement to establish a system of different institutions for children in order that children may be placed according their educational, developmental and safety needs, may seem problematic. The use of deprivation of liberty should be, according to the CRC, strictly limited and used only as a measure of last resort.⁵¹ States should therefore concentrate on strategies how to reduce reliance on deprivation of liberty as a reaction to the unlawful behaviour of children rather than on establishing a system of specialized institutions in which children could be deprived of liberty “according to their needs”.⁵² For those children, who are, in compliance with the last resort rule, deprived of their liberty, it is necessary to concentrate on building the capacity of the facilities in which children are detained to accommodate with individual needs of every child who is placed therein. The system of segregated facilities for children according with their “specific needs” seems to contravene the principle of inclusion and the model of inclusive equality (see above).

The 2010 Council of Europe Guidelines on Child-friendly Justice have also incorporated individual assessment as part of the general elements of child-friendly justice. The assessment allows one to obtain a comprehensive understanding of the child and information about the legal, psychological, social, emotional, physical and cognitive situation of the child.⁵³ Likewise, a common assessment framework should be established for a range of professionals working for and with children throughout all the proceedings that involve and affect the child.⁵⁴ As mentioned above, the crucial point about this framework is that the Framework corresponds to the principles of the child rights-based approach and not to those of positivist/scientific approach.

Although not related exclusively to juvenile justice, the Recommendation CM/Rec(2018) 8 concerning restorative justice in criminal matters should be mentioned as well, since the juvenile justice systems

⁵¹ CRC/C/GC/24, paras. 19, 73, 77, 82 – 84.

⁵² The CRC Committee itself reminds in its General Comment no. 24 the report of the UN Special Rapporteur on the right to health, Dainius Pūras, on deprivation of liberty and the right to health (CRC/C/GC/24, para. 82), in which the UN Special Rapporteur emphasizes that “The scale and magnitude of children’s suffering in detention and confinement call for a global commitment to the abolition of child prisons and large care institutions alongside scaled-up investment in community-based services. (...) The impact of penal institutions stretches far beyond the curtailment of children’s physical freedom; their mental well-being and potential for psychological and cognitive growth are all deeply and negatively affected. Research evidence shows that immigration detention aggravates pre-existing trauma in children. For some it is the worst experience of their lives. (...) The solitary confinement of children and the degrading and humiliating conditions in detention have been described as mental violence. Many other daily forms of “organized hurt” are perpetrated though no less pernicious means. Children’s creativity, communication, sleeping, waking, playing, learning, resting, socializing and relationships are compulsively controlled in detention and transgressions punished, while those administering the punishment enjoy impunity. Daily deprivations are often complemented by behavioural interventions in order to “treat” and “reform”. Such “treatment” approaches further entrench the idea of a troubled child “in need of repair”, ignoring that changes are needed to address right-to-health determinants, such as inequalities, poverty, violence and discrimination, especially among groups in vulnerable situations. This, in turn, leads to children living in forced confinement and fuels their struggles. Such oversimplified strategies are not in conformity with the right to health. Coping mechanisms employed by stressed and desperate children, which include assaults against themselves and others, are perceived by society and judicial and welfare systems as acts that are self-harming, anti-social and/or violent. The harm inflicted by institutions themselves too often goes unacknowledged. There can be no hesitation in concluding that the act of detaining children is a form of violence. The Convention on the Rights of the Child prohibits the use of detention as a default strategy. Looking forward, a child rights-based strategy must strengthen even further the presumption against detention of children with a view to abolition.” – See A/HRC/38/36, paras. 53, 62, 66 – 69.

⁵³ 16, Council of Europe Guidelines on Child-friendly Justice.

⁵⁴ 17, Council of Europe Guidelines on Child-friendly Justice.

compliant with the CRC should promote restorative justice as one of its fundamental principles.⁵⁵ The recommendation mentions „risk assessment“ in the context of preparation for the use of restorative justice measures.⁵⁶ This risk assessment is then related to the requirement to ensure impartiality, dignity of the parties and their effective participation.⁵⁷

European Union (EU) children’s rights framework

In the European Union, the EU Charter on Fundamental Rights prescribes among others that children have the right to protection and care, they may express their views freely and their best interests should be a primary consideration in all actions by public authorities and private institutions.⁵⁸ All EU legislation should be in conformity with the Charter. In May 2016, the European Parliament and the Council of the European Union adopted the *Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings* (hereinafter Directive on procedural safeguards for children or the Directive).⁵⁹ The Directive is part of the Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings across Europe⁶⁰ and it is one of six directives coming into force since 2010. It is legally binding on European Union member states and since June 2019 it should be transposed into national laws and regulations.⁶¹

The aim of the Directive on procedural safeguards for children is to ensure effective protection throughout the EU of the rights of children who are suspected or accused of having violated the law.⁶² Important underpinnings of the Directive are the recognition of children’s (procedural) rights and safeguards and encouraging trust among member states in that regard.⁶³ The Directive explicitly refers to the ‘right to an individual assessment’. Under Article 7, children who are suspects or accused in criminal proceedings should be subject to an individual assessment that allows a comprehensive view on the child’s needs, maturity and circumstances.⁶⁴ The assessment should be carried out in a timely

⁵⁵ CRC/C/GC/24, para. 74. The CRC Committee’s General Comment no. 10 (2007) on children’s rights in juvenile justice was even more explicit when it mentioned restorative justice as an integral part of the best interests of the child – See CRC/C/GC/10, para. 10.

⁵⁶ Rule 29, Recommendation CM/Rec(2018) 8.

⁵⁷ See especially Rules 46 and 47, Recommendation CM/Rec(2018) 8: „Restorative justice should be performed in an impartial manner, based on the facts of the case and on the needs and interests of the parties. The facilitator should always respect the dignity of the parties and ensure that they act with respect towards each other. Domination of the process by one party or by the facilitator should be avoided; the process should be delivered with equal concern for all parties.; Restorative justice services are responsible for providing a safe and comfortable environment for the restorative justice process. The facilitator should take sufficient time to prepare the parties for their participation, be sensitive to any of the parties’ vulnerabilities and, if necessary to ensure the safety of one or more parties, discontinue restorative justice.”

⁵⁸ Art. 24 (1)-(2) EU Charter on Fundamental Rights, 2012/C 326/02.

⁵⁹ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

⁶⁰ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01.

⁶¹ With the exception of the UK, Ireland and Denmark which did not take part in the adoption of the Directive and are not bound by it or subject to its application. See Directive (EU) 2016/800/EU, Recitals 69-70.

⁶² The Directive also applies to persons who have subsequently reached the age of 18 during the proceedings and to whom the application of the Directive or certain provisions thereof, in the light of all circumstances of the case, is appropriate (Directive (2016/800/EU) 2016/800, Art. 2 (3)). When the person concerned has reached the age of 21, Member States may decide not to apply the Directive.

⁶³ COM(2013) 822, Recital 72, 73; Directive (EU) 2016/800/EU, Recital 67.

⁶⁴ Arts. 7(.1) and 7(.2), Directive (EU) 2016/800

manner and at the earliest appropriate stage of the proceedings⁶⁵ and with the close involvement of the child by qualified personnel and if possible based on a multidisciplinary approach.⁶⁶ In the preamble to the Directive it is noted that the individual assessment should, in particular, take into account the personality and maturity of the child, the economic, social and family background of the child, and any specific vulnerabilities he/she might have, such as learning disabilities and communication difficulties.⁶⁷ In cases the assessment is derogated from, it must be proven that this is in accordance with the best interests of the child.⁶⁸ Moreover, it is noted that it should be possible to adapt the individual assessment according to the circumstances of the case (e.g. the seriousness of the alleged offence and the measures that could be taken) and that a recently conducted individual assessment could be used if it is updated.⁶⁹

Nevertheless, it should be noted, that in order to be in full compliance with the child rights based approach, the notions of “personality” and “circumstances” of the child when mentioning “risk assessment” should be interpreted in a way referring to the child’s environment rather than to the child himself/herself. In other words, the child’s personality and circumstances as risk factors should be understood as referring to the need to assess the capacity of the child’s environment to accommodate the child’s diversity and his/her individual needs. On the contrary, if the child’s personality and his/her circumstances were the primary subject matter of the risk assessment, i.e. if the child’s personality or circumstances could be considered as „risk factors“, then the risk assessment would be governed by the positivist approach which is, however, incompatible with the Convention on the Rights of the Child (see above).

⁶⁵ Art. 7(.5), Directive (EU) 2016/800

⁶⁶ Art. 7(.7), Directive (EU) 2016/800

⁶⁷ Para. 36 of the preamble to Directive (EU) 2016/800, Recital 36.

⁶⁸ Art. 7(.9), Directive (EU) 2016/800

⁶⁹ Para. 37 of the preamble to Directive (EU) 2016/800, Recital 37.

II. The situation in Belgium, England and Wales, Finland and the Netherlands

This comparative part focuses on identifying good practices in the area of individual assessment with emphasis on how countries prevent potential stigmatising effects of this tool and how they use it to promote the position of the child as a rights holder, his/her procedural rights and his/her right to be treated with dignity and respect. The following countries are analysed: Belgium, England and Wales, Finland and the Netherlands.

This part is based on desk research on how the Directive has been implemented in national legislation and a literature review on how individual assessment is carried out in practice in the juvenile justice systems of the four selected countries, and especially how it impacts the judicial procedures in which the child is involved. The desk research is complemented with interviews with experts from the respective countries. For Belgium, one interview was conducted with a youth lawyer. Another interview was conducted with the director of a children's rights NGO working, among others, in the field of juvenile justice, and who moreover had previously worked in an organisation providing legal aid to children and their parents. For Finland, two interviews were conducted with senior specialists of the Criminal Sanctions Agency. For England and Wales, one interview was conducted with two lawyers (one barrister and one solicitor) of the NGO Just for Kids Law and one interview with an Associate Professor of Clinical Neuropsychology at the University of Exeter. For the Netherlands, two interviews were conducted with youth lawyers, who both also work on occasion as deputy judge. These interviews were carried out through phone calls and video conferences between 20 May 2020 and 18 June 2020. They varied in duration between 46 minutes and 1 hour, 11 minutes.

In addition, through a collaboration with DCI-Netherlands, the data of several interviews conducted for the EU-project FOCUS could have been used through access to the written reports thereof.⁷⁰ These interviews include one with a youth judge (1 May 2020),⁷¹ and with a senior policy advisor of the Dutch Child Protection Board (6 May 2020). In total, 11 respondents participated in this study (see the Table below). The final drafts of the country reports have also been reviewed by a number of respondents, to identify factual errors and misinterpretations. The reports have been amended accordingly.

Table: Respondents

Country	Profession	Organisation	Date
Belgium	Youth lawyer	Private law firm	2 June 2020
Belgium	NGO director	Defence for Children Belgium	5 June 2020
England & Wales	Youth lawyers	Just for Kids Law	18 June 2020
England & Wales	Associate Professor of Clinical Neuropsychology	University of Exeter	18 June 2020
Finland	Senior specialist A	Criminal Sanctions Agency	3 / 11 June 2020
Finland	Senior specialist B	Criminal Sanctions Agency	3 June 2020
Netherlands	Youth lawyer / Deputy judge A	Private law firm	20 May 2020
Netherlands	Youth lawyer / Deputy judge B	Private law firm	27 May 2020
Netherlands	Youth judge	Court of Rotterdam	1 May 2020

⁷⁰ See for a description of the project (in Dutch) <https://www.defenceforchildren.nl/wat-doen-we/projecten/focus-on-my-needs/> or (in English) <https://tdh-europe.org/our-work/focus-on-my-needs-working-together-for-children-in-criminal-proceedings-/7144>.

⁷¹ Moreover, this written report was later read and supplemented by another juvenile judge.

Netherlands	Senior policy advisor	Child Protection Board	6 May 2020
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In the following sections the legal and practical implementation of the right to an individual assessment is outlined for Belgium, Engeland and Wales, Finland and the Netherlands.



Country report: Belgium

Introduction

Belgium is a federal state, consisting of three communities (the Flemish, French and German-speaking community) and regions (Flanders, Wallonia and Brussels).⁷² The juvenile justice system used to fall within the federal competence and was regulated by the Youth Protection Act of 1965 [*Jeugdbeschermingswet* or *Loi relative à la protection de la jeunesse*] (hereinafter: YPA).⁷³ During this time, the Belgian juvenile justice system could be characterised as a welfare system, in which the underlying ideas were that children are not capable of taking responsibility for their offences, that juvenile delinquency is a symptom of an underlying welfare problem, and that the (judicial) intervention following juvenile delinquency had to be of an educative rather than a punitive nature, i.e. using a rehabilitative and preventative approach.⁷⁴ This approach ‘created much room for manoeuvre for social work within the youth protection system’.⁷⁵ Indeed, it has been noted that ‘[t]he long tradition of welfare (or ‘treatment’) oriented youth justice (...) has produced an extensive network of social services and welfare agencies for family and child care, a range of residential care establishments and (some) facilities for (re)education. The network is characterised by close interaction between judicial institutions and a nexus of social workers, specialised educators, pedagogues, psychologists and psychiatrists.’⁷⁶ Moreover, under the YPA, the age of criminal majority was, at 18, the highest one of all countries in Europe; for children below the age of 18 at the time of the offence, in principle, only juvenile protection measures could be imposed.⁷⁷ While there was no minimum age under which the juvenile protection system did *not* apply, in practice the public prosecutor would not decide to prosecute minors under the age of 10 to 12.⁷⁸

It should be noted that quite soon after the adoption of the YPA in 1965, the welfare-oriented or ‘solely rehabilitate character’ of the law was criticised, since fundamental legal rights such as due process rights and legal guarantees such as proportionality, were not really safeguarded.⁷⁹ While ‘with regard to the rights of defence, the educational target and the finality of assistance of the judicial intervention was long said to make the introduction of a legal position of the minor unnecessary’,⁸⁰ in 1994 enhanced rights of defence were introduced under the YPA, making it obligatory – among other things – for the juvenile judge to hear the child from the age of 12 before taking a provisional measure (i.e. a measure taken during the preparatory phase of the proceedings), and ensuring that each time the child appears before the juvenile judge, he/she has to be assisted by a lawyer.⁸¹ In 2006, more legislative changes followed, resulting in what has also been named the Youth Justice Act 2006.⁸²

⁷² Johan Put and Lode Walgrave, 2006, p. 111.

⁷³ Over the time some relevant changes were made to this law, which will be mentioned further below.

⁷⁴ Lieve Bradt and Maria Bouverne-De Bie 2009, p. 116; Johan Put, 2007, p. 5.

⁷⁵ Lieve Bradt and Maria Bouverne-De Bie 2009, p. 116.

⁷⁶ Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 85.

⁷⁷ Johan Put, 2007, p. 6, 11.

⁷⁸ Johan Put, 2007, p. 6.

⁷⁹ Johan Put and Lode Walgrave, 2006, p. 114.

⁸⁰ Johan Put, 2007, p. 26.

⁸¹ Johan Put, 2007, p. 27.

⁸² Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 86. The Youth Protection Act was renamed the Law regarding the protection of the youth, the way minors having committed an act deemed to constitute an offence must be treated and the reparation that the victims are entitled to when the act has caused them damage [*Wet betreffende de jeugdbescherming, het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd en het herstel van de door dit feit veroorzaakte schade*]. As it did not constitute a completely new Act, in the rest of this chapter, in principle, the term ‘YPA’ will be used.

Among other things, this act set out ‘a framework for restorative justice measures’; indeed, the restorative justice responses were included in this legislation and prioritised.⁸³

However, quite recently, important reforms were made – again – to the Belgian juvenile justice system. Due to the sixth state reform of 2014 matters relating to the juvenile justice system now mainly fall within the legislative competence of the communities, although the procedural issues are still regulated at the federal level.⁸⁴

Recent developments

As of quite recently, the Flemish, French and German-speaking community, as well as the Common Community Committee (COCOM) of Brussels⁸⁵ can enact legislation in the area of juvenile justice. The German-speaking community has not yet issued legislation in this regard; however the French community adopted the Decree on Prevention, Youth Aid and Youth Protection [*Décret portant le code de la Prévention, de l’Aide à la jeunesse et de la Protection de la Jeunesse*] on 18 January 2018, the Flemish community enacted the Flemish Decree on Juvenile Delinquency [*Jeugddelinquentiedecreet*] on 15 February 2019 and the COCOM of Brussels ratified the Statute on Youth Care and Child Protection [*Ordonnantie betreffende de Jeugdhulpverlening en Jeugdbescherming*] on 16 May 2019.⁸⁶ Thus, many aspects of the juvenile justice system now fall within the competence of the communities, including the determination of measures that can be taken for children who have committed an offence, the organisation of (private and public) services to conduct the investigation and to implement the measures, and the functioning of the institutions for child protection (the Community institutions for child protection in Flanders [*Gemeenschapinstelling*] and the Public Institutions for child protection of the Wallonia-Brussels Federation, i.e. the French community [*Institut public de protection de la jeunesse*]) and closed facilities.⁸⁷ It should be noted that both respondents indicated that the most recent legislation in the Flemish community was not necessarily well received, for instance by the juvenile lawyers. One of the respondents noted that in both phases of the proceedings (i.e. the preliminary phase of the investigations and the final treatment by the juvenile court), the personality and environment of the child are no longer the paramount considerations; rather, the focus is now on the seriousness of the offence and the damage and consequences for the victim.⁸⁸ The other respondent also noted that in the Flemish community a more penal approach was taken, with the reforms in the French community taking a different direction – the legislation there, for instance, still refers to youth protection in its name.⁸⁹ However, he also pointed out the importance of implementation in practice by referring to research showing that judges in the French community actually were stricter in their decisions than the judges in the Flemish community; within the individualised approach taken in the Belgian juvenile justice system, the judges have a lot of freedom.

Regarding the relevant age limits, it should be noted that the Flemish Decree on Juvenile Delinquency applies to minors who are 12 years or older at the time of the offence, but younger than 18; from 18 years onwards, individuals fall under adult criminal law.⁹⁰ An exception to this, which already existed

⁸³ Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 86.

⁸⁴ Jantien Leenknecht, Johan Put, and Katrijn Veeckmans, 2020, p. 3. It should be noted that the youth lawyer that was interviewed for this country report, was especially knowledgeable regarding the legislation of the Flemish community, while the director of the NGO that was interviewed was especially well-informed of the legislation of the French community.

⁸⁵ The Common Community Commission regulates matters that are common to the two communities in the Brussels-Capital Region as both the Flemish and the French community have jurisdiction over this area.

⁸⁶ Jantien Leenknecht, Johan Put, and Katrijn Veeckmans, 2020, p. 3.

⁸⁷ Defence for Children International (DCI) - Belgium, 2017, p. 7, 20.

⁸⁸ Interview, Youth lawyer, 2 June 2020.

⁸⁹ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

⁹⁰ Art. 2(10) and Art. 4 of the Flemish Decree on Juvenile Delinquency.

prior to 2014, is the possibility of ‘waiver’ [*uithandengeving*], through which suspects of 16 or 17 years at the time of the offence may be transferred (provided that certain conditions are met) to a special chamber of the juvenile court where they fall within the scope of adult criminal law, both in terms of the procedure and of the disposition to be imposed.⁹¹ Moreover, when a child of 16 or 17 years of age commits a traffic offence, prosecution automatically takes place in the adult court, unless the latter considers a reaction under the Flemish Decree on Juvenile Delinquency more appropriate or when the traffic offence is linked to another offence.⁹² To a great extent, these age limits also apply under the French Decree on Prevention, Youth Aid and Youth Protection: it applies to children below the age of 18 at the time of the offence,⁹³ and the exceptions concerning the upper age limit – i.e. the possibility of waiver [*dessaisissement*]⁹⁴ and prosecution in adult court for traffic offences⁹⁵ – also apply. However, for the lower age limit the situation is different – and less straightforward – than under the Flemish Decree, as the French Decree ‘remains silent on the lower age limit. Even more so, article 101 (4) rules that minors under the age of 12 at the time of the offence can be subject to certain provisional measures (supervision, guidance and specialised guidance). As regards the final measures, article 109 states that a child below the age of 12 can be subject only to the measure of reprimand. These two provisions indicate that a child below the age of 12 can be held criminally responsible, but the FCD [*French Decree*] does not specify what the ultimate lower age limit should be, so that the latter remains undefined.’⁹⁶ Finally, the Statute on Youth Care and Child Protection of the COCOM of Brussels applies to children who are 12 years or older at the time of the offence,⁹⁷ but younger than 18.⁹⁸ Again, the exceptions regarding waiver⁹⁹ and traffic offences¹⁰⁰ also apply under the Statute of the COCOM of Brussels.

Notwithstanding these new competences of the communities, as mentioned before, important aspects of the criminal procedure still fall under the competence of the federal state as the latter is still responsible for the procedural issues.¹⁰¹ These issues include the organisation of the juvenile courts in the YPA. Moreover the procedures before the juvenile courts and the deprivation of liberty and the rules regarding the interrogation of minors are regulated at the federal level, in the Law of 1965 and the Code of Criminal Procedure [*Wetboek van Strafvordering*] (for the procedures before the juvenile court), and the Law of 20 July 1990 on pre-trial detention [*Wet betreffende de voorlopige hechtenis*] as well as the Code of Criminal Procedure (for the deprivation of liberty and interrogation).

Individual assessment

Before the sixth state reform and the subsequent changes to the juvenile justice system that were mentioned before, the situation could be summarised as follows: ‘The youth justice system comprises specialist bodies (youth division of the public prosecutor’s office, youth court and the social service for the youth court) and a two phase procedure (preparatory and judgment). The public prosecutor alone decides whether a case will be referred to the youth court. Other options are sending the case to youth care offices, dropping charges, issuing a warning (written or oral) or proposing mediation (...) (art. 45 up to 45quater YJA [YPA, ES]). At the preparatory phase, the public prosecutor refers the case to the youth court judge for an enquiry (executed by the social services) on the ‘personality and the social

⁹¹ Art. 38 of the Flemish Decree on Juvenile Delinquency.

⁹² Art. 5 of the Flemish Decree on Juvenile Delinquency.

⁹³ Arts. 55-56 of the French Decree on Prevention, Youth Aid and Youth Protection.

⁹⁴ Art. 125 of the French Decree on Prevention, Youth Aid and Youth Protection.

⁹⁵ Art. 56 of the French Decree on Prevention, Youth Aid and Youth Protection.

⁹⁶ Jantien Leenknecht, Johan Put and Katrijn Veeckmans, 2020, p. 3.

⁹⁷ Art. 17(2) of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

⁹⁸ Art. 18 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

⁹⁹ Art. 89 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹⁰⁰ Art. 19 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹⁰¹ Defence for Children International (DCI) - Belgium, 2017, p. 20.

circumstances' of the young person. He/she can also request the judge to take provisional measures (art. 50 and 52 YJA [YPA, ES]). In principle, this investigation phase must be completed within six months. The public prosecutor then has two months to decide whether to refer the case to the youth court or to drop the prosecution (art. 52bis YJA [YPA, ES]). The youth court judge is obliged to hear cases involving minors aged 12 and above, before taking a (provisional) measure. Each time the minor appears before the judge or the court, he/she has to be assisted by a lawyer (art. 52ter YJA [YPA, ES]).¹⁰²

Article 45 of YPA is still applicable,¹⁰³ stipulating in paragraph 2 that the case is brought before the juvenile court at the request of the public prosecutor. Moreover, article 50 and 52 are also still applicable. In article 50 it can be read that the juvenile court takes all measures and carries out the research necessary to know the personality of the child involved and the environment in which he/she is raised, and to determine what his/her interests are and which means are suitable for his education or treatment. It may conduct a social enquiry, through mediation of the competent social service, and subject the person concerned to a medical-psychological examination if it does not consider the file conveyed to be sufficient. If the juvenile court conducts a social enquiry, it may, except in urgent cases, only take or change its decision after having taken note of the advice from the competent social service, unless this advice does not reach it within the period set by it, which should not exceed seventy-five days. Very similar provisions can now be found in the Decrees that have been adopted so far by the communities.¹⁰⁴

Thus, the juvenile judge can determine that the necessary investigations should be conducted. These investigations are carried out by the social service of the juvenile court. With the passing of the YPA in 1965 the juvenile court was given its own social service, to conduct investigations before measures were to be taken and to follow-up on these measures afterwards.¹⁰⁵ In principle, the juvenile judge could only take a final decision after having taken note of this advice.

Availability of the report

While the juvenile judge would decide whether these investigations were necessary, as a rule, they would in fact be ordered.¹⁰⁶ In the interviews it was confirmed that these social enquiries are still requested in every case. One of the respondents indicated that sometimes, due to lack of time or the extensive workload of the social service, a report might be missing; often, a case will then be continued with the lawyer stepping in – i.e., to some extent, fulfilling the role of the social worker – and informing the judge about the relevant personal circumstances of the child.¹⁰⁷

Participation of the child and the parents

The child and parents seem to be included quite well in gathering information for writing the report. According to one of the respondents, the social service will contact the child in the preliminary phase

¹⁰² Johan Put, Inge Vanfraechem and Lode Walgrave, 2012, p. 87. Note, where 'YJA' is mentioned in this citation, that 'YPA' is mentioned in this chapter.

¹⁰³ Unless it is overwritten, on a certain point, by a piece of legislation of the communities; for this reason, there are some provisions that abolish art. 45bis and further (personal communication, Youth lawyer, 16 June 2020).

¹⁰⁴ See Art. 99 of the French Decree on Prevention, Youth Aid and Youth Protection and Art. 40 of the Statute on Youth Care and Child Protection of the COCOM of Brussels, although according to these provisions, the period set by the court to receive the advice should not exceed the period of *forty-five* days. For the Flemish community, see Art. 56-58 of the Decree on integrated youth assistance [*Decreet betreffende de integrale jeugdhulp*].

¹⁰⁵ Johan Put and Lode Walgrave, 2006, p. 113-114.

¹⁰⁶ Johan Put, 2007, p. 19.

¹⁰⁷ Interview, Youth lawyer, 2 June 2020

of the proceedings before he/she has to appear before the judge, and will also contact the parents.¹⁰⁸ During a later stage, most of the time, the reporter of the social service will visit the child's home.¹⁰⁹

Since ten to fifteen years ago, at least in the Flemish community, the social service is asked to provide the reports – both in the preliminary and in the definitive phase of the proceedings – at last five days in advance to the registry of the court, so that the lawyers of the children can consult the report.¹¹⁰ Moreover, in Antwerp, the registry of the court has recently begun sending the report digitally to the lawyer of the child upon reception.¹¹¹ It is most often the lawyer that discusses the report with the child, and responding to the report is mostly done during the discussion thereof before the judge.¹¹² One of the respondents noted that it is doubtful whether the parents and child know of their right to access (parts of) the file at the registry, and that it is important that they would be informed about and assisted in exercising their right of accessing the file to read and comment on the information, and to prepare for the hearing.¹¹³

In principle, at least in the Flemish community, the child and his/her lawyer are the only ones with the right of full access to the file.¹¹⁴ If another party has the right to access to the file – e.g. the parents, or a 'civil party' [*burgerlijke partij*] claiming damages in the criminal proceedings – the registry of the court will remove the part of the file relating to the personality of the child.¹¹⁵ Moreover, in practice, parties requesting access to the file via the public prosecutor may be denied this due to the right to privacy of the child.¹¹⁶ With regard to the right to privacy, one respondent noted that while safeguards might be in place, in practice information may nonetheless spread to the wrong persons.¹¹⁷ In an ideal situation, if this happens, the child would know how to file a complaint and do so, if necessary assisted by his/her lawyer.¹¹⁸

Quality of the report

Both respondents indicated that no standard instrument or format is used for the drawing up of reports by the social service. This leads to much variation in the quality and degree of detail of the reports, depending, among others, on the amount of time that the reporter of the social service has and the training and supervision that he/she receives.¹¹⁹ A decent report by the social service will be sufficiently long and address all relevant issues, such as the state of affairs at school, hobbies that the child has, the relationship with the parents and specific issues that arise with regard to the child itself, including specific vulnerabilities.¹²⁰ For the French-speaking community, it was noted by one of the respondents that after the most recent legislative changes, the reporters of the social service do work with a sufficiently specific list of issues that should be included in the report.¹²¹

He also pointed to the importance of differentiating between objective and subjective information in the report.¹²² There might be objective information in the report, e.g. on the kind of house the family

¹⁰⁸ Interview, Youth lawyer, 2 June 2020.

¹⁰⁹ Interview, Youth lawyer, 2 June 2020.

¹¹⁰ Interview, Youth lawyer, 2 June 2020.

¹¹¹ Interview, Youth lawyer, 2 June 2020.

¹¹² Interview, Youth lawyer, 2 June 2020.

¹¹³ Interview, NGO director, Defence for Children Belgium, 5 June 2020

¹¹⁴ Interview, Youth lawyer, 2 June 2020.

¹¹⁵ Interview, Youth lawyer, 2 June 2020.

¹¹⁶ Interview, Youth lawyer, 2 June 2020.

¹¹⁷ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹¹⁸ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹¹⁹ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹²⁰ Interview, Youth lawyer, 2 June 2020; interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹²¹ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹²² Interview, NGO director, Defence for Children Belgium, 5 June 2020

lives in, but there might also be more subjective information, e.g. phrases such as ‘the parents are not able to cope’.¹²³ The last kind of statements might come as a shock to the parents and/or child upon being informed of this, as they then believe that this is how they are perceived by others.¹²⁴

Impact of individual assessment

First contact with the justice system

Children that are suspected of having committed an offence are interrogated by the police, which – according to Defence for Children Belgium – has ‘in most cases but not systematically a youth section’.¹²⁵ The interviews with the respondents confirmed that most cases involving children, will be dealt with by the youth section of the police.¹²⁶ In principle, under Belgian legal procedure, the police must report every complaint concerning ‘offences, misconduct or so called “situations of danger”’ to the public prosecutor; however, in practice this is not possible and ‘[q]uite often, the police deliver warnings or mediate informally’.¹²⁷

When the child is a suspect, he is interviewed by the police under article 47bis of the Code of Criminal Procedure (CCP).¹²⁸ Based on this provision, the rights of access to and assistance by a lawyer vary depending on whether the child is deprived of liberty or not, and on the sanctions that may be imposed.¹²⁹ Defence for Children noted that the *Salduz*-jurisprudence of the ECtHR, led to an ‘active and participative role’ for the lawyer in Belgium, who may assist during the interrogation and, among other things, ‘can request that certain information is given or that certain questions are asked. He can ask for clarification on questions that are being asked. He can make observations about the investigation and the hearing. However, he is not authorised to respond to the questions instead of his client or to hinder the hearing.’¹³⁰

In the preamble to the YPA it is mentioned that one of the principles that has been recognised and is applicable in the administration of justice to minors, is the fact that the prevention of delinquency is essential to protect society in the long term; moreover, this requires that the competent authorities address the root causes of juvenile delinquency and develop a multidisciplinary action plan. Against this background it has been pointed out that multidisciplinary contacts between the child’s lawyer and (among others) social services is crucial, for instance when proposing a so-called ‘written project’, in which the child would propose (to the court) to take on certain commitments, such as following treatment at – for instance – a psychological or psychiatric service, or at a service with expertise in the field of alcohol or drug addiction.¹³¹

¹²³ Interview, NGO director, Defence for Children Belgium, 5 June 2020

¹²⁴ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹²⁵ Defence for Children International (DCI) - Belgium, 2017, p. 21.

¹²⁶ Interview, Youth lawyer, 2 June 2020; interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹²⁷ Johan Put, 2007, p. 17.

¹²⁸ Defence for Children International (DCI) - Belgium, 2017, p. 39.

¹²⁹ Defence for Children International (DCI) - Belgium, 2017, p. 39. For a child who is deprived of his liberty, the right of consultation with a lawyer before the interrogation and assistance by a lawyer during the interrogation can be found in article 47bis CCP in conjunction with article 2bis of the Law on pre-trial detention. Moreover, when the child is not deprived of his liberty but is interrogated regarding facts that are punishable with deprivation of liberty, he has the right to a confidential consultation with a lawyer before the interrogation and unlike adults, children do not have the possibility to waive their right of access to a lawyer (see also Defence for Children International (DCI) - Belgium, 2017, p. 41-42). Moreover, the child in these cases has the right to be assisted by a lawyer during the interrogation.

¹³⁰ See also Defence for Children International (DCI) - Belgium, 2017, p. 43.

¹³¹ Eric van der Mussele, 2007, p. 276. In the interview with the lawyer it was noted that for the Flemish community, the ‘written project’ has been replaced by the slightly different ‘positive project’, see interview, Youth lawyer, 2 June 2020.

Disposition by the public prosecutor or court

During the preparatory phase of the proceedings, the public prosecutor is in charge of the investigation. As stated before, the juvenile judge can determine that the necessary investigations to assess the personality and environment of the child are carried out; it used to be the case – before the legislative changes after 2014 – that ‘[b]asically, only the needs of the minor, defined on the basis of their personality and social environment, determine the nature of the measures to be taken’.¹³² After the investigations were conducted, the juvenile judge would close them and send the file back to the public prosecutor, who would then take a decision on how to proceed: by dismissing the case, by bringing the case before the juvenile court and asking the judge to order a definitive juvenile protection measure or by asking to refer the case to the criminal court (through the so-called ‘waiver’, as mentioned before).¹³³ The possibilities on the level of the public prosecution service are currently regulated in the Decrees of the communities that are mentioned above.¹³⁴

With respect to decisions taken by the court, in the Flemish Decree it is stipulated that the court, to take a decision, will consider the following factors (in accordance with the listed order): 1) the seriousness of the facts, the damage and the consequences for the victim; 2) the personality and maturity of the minor suspect or offender; 3) recidivism, or the risk of recidivism; 4) the safety of society; 5) the living environment of the minor suspect or offender; and 6) the safety of the minor suspect or offender.¹³⁵ Moreover it should be clear from the decision taken in which manner these factors were taken into account. Finally, a similar provision can be found in the French Decree, in which it is stipulated that during the preliminary investigations, in the context of making a restorative offer or when taking a (preliminary) measure, the juvenile court should take into account 1) the interest of the child; 2) his personality and degree of maturity; 3) his environment; 4) the seriousness of the facts, their repetition and their age, the circumstances in which they were committed and the damage and consequences for the victim; 5) previous measures that were taken with regard to the child and his behaviour during the execution thereof; and 6) public security.¹³⁶ Both in the context of provisional and final measures, the decision must be motivated in light of these factors.¹³⁷ A very similar provision can be found in the Statute on Youth Care and Child Protection of the COCOM of Brussels, although here also the security of the child is to be taken into account when the juvenile court takes a decision.¹³⁸

The decision of the juvenile court to refer a case to the common criminal court had, prior to the most recent legislative changes, based on the personal character of the minor. This meant that, in principle, a waiver would only be possible after the completion of a social and medical-psychological investigation.¹³⁹ This is also – again, in principle – the case after the legislative changes as discussed above have come into effect.¹⁴⁰ In the Flemish Decree on Juvenile Delinquency for instance, one can read: ‘The youth court can only waive the case after social and medical-psychological investigations have been carried out by a multidisciplinary team. The medical-psychological investigation is aimed at

¹³² Johan Put, 2007, p. 19.

¹³³ Johan Put, 2007, p. 19.

¹³⁴ See Arts. 8-13 of the Flemish Decree on Juvenile Delinquency, Arts. 95-97 of the French Decree on Prevention, Youth Aid and Youth Protection, and Arts. 23-33 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹³⁵ Art. 16 of the Flemish Decree on Juvenile Delinquency

¹³⁶ Art. 98 of the French Decree on Prevention, Youth Aid and Youth Protection.

¹³⁷ Art. 112 of the French Decree on Prevention, Youth Aid and Youth Protection.

¹³⁸ Art. 39 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹³⁹ Johan Put, 2007, p. 19.

¹⁴⁰ See Art. 38(3) of the Flemish Decree on Juvenile Delinquency, Art. 125(2) of the French Decree on Prevention, Youth Aid and Youth Protection and Art. 89(2) of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

evaluating the situation in light of the personality of the minor suspect, his environment and his degree of maturity. The nature, frequency and seriousness of the facts that he is charged with, are taken into consideration if they contribute to the evaluation of his personality.¹⁴¹ In addition to the requirement of a social and medical-psychological investigation, waiver is only possible if it concerns serious facts (which are mentioned more specifically in the Decrees) and if the child has previously been subjected to judicial interventions. It should be noted that the decision to retain the possibility of waiver during the latest legislative reforms, was heavily criticised.¹⁴²

Restorative justice

Already before the sixth state reform, it was noted that Belgium was the first country with a typical continental European civil law regime (as '[a]t first sight, restorative justice seems to prosper more easily in common law regimes') to go as far as it did in introducing restorative justice into the juvenile justice system.¹⁴³ The restorative provisions that were included in the YPA after the legislative reforms of 2006, were to a great extent inspired by informal practices that already existed.¹⁴⁴ These legislative changes prioritised restorative and reparative options: '[m]ediation (at the level of the prosecutor, the youth court judge and the youth court) and conferencing (at the judge or court level) are now considered to be primary responses to youth crime'.¹⁴⁵ This focus on restorative justice can nowadays be found in the Decrees of the communities. In the Statute on Youth Care and Child Protection of the COCOM of Brussels for instance it is noted that the public prosecutor [*Procureur des Konings*] informs the child, his parents, the persons who are in law or in fact taking care of the child and the victim of the possibility to participate in mediation.¹⁴⁶ Unless it is decided to drop the case, the decision *not* to propose mediation should be specifically motivated.¹⁴⁷ Also on the level of the court it is indicated in the Statute that preference should be given to a restorative offer (mediation or conferencing),¹⁴⁸ and that lack of such an offer should be explicitly explained with regard to the relevant circumstances.¹⁴⁹ In the French Decree on Prevention, Youth Aid and Youth Protection it is stipulated (in the context of the final decision) that the juvenile court should first consider a restorative offer and then examine the feasibility of a written project, proposed by the child.¹⁵⁰ In the written project, the child can propose to the court to take on one of the commitments included in the legislation, such as participating in a school reintegration programme, participating in activities as part of a learning and training project, or submitting oneself to the supervision of a mental health centre.¹⁵¹ Only if the restorative offer and the written project turn out to be impracticable or inappropriate, or if the restorative offer turns out to be insufficient, the judge can consider one of the other measures.¹⁵²

Also in the Flemish Decree on Juvenile Delinquency it is stipulated that the public prosecutor [*Procureur des Konings*] offers the persons involved to participate in mediation, if the following conditions are met: there are serious indications of guilt, the child does not deny the offence and a victim has been identified.¹⁵³ If the first two of these conditions have been met, it can also be proposed to the child to work out a so-called 'positive project', i.e. the possibility for the child to draft a proposal

¹⁴¹ Art. 38(3) of the Flemish Decree on Juvenile Delinquency [*unofficial translation by the authors*].

¹⁴² See for instance Johan Put, 2018, p. 110.

¹⁴³ Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 85.

¹⁴⁴ Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 88.

¹⁴⁵ Johan Put, Inge Vanfraechem, and Lode Walgrave, 2012, p. 88.

¹⁴⁶ Art. 26 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹⁴⁷ Art. 27 of the Statute on Youth Care and Child Protection of the COCOM of Brussels. A similar provision can be found in Art. 97(7) of the French Decree on Prevention, Youth Aid and Youth Protection.

¹⁴⁸ Arts. 41 and 50 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹⁴⁹ Art. 51 of the Statute on Youth Care and Child Protection of the COCOM of Brussels.

¹⁵⁰ Art. 108 of the French Decree on Prevention, Youth Aid and Youth Protection.

¹⁵¹ Art. 118 of the French Decree on Prevention, Youth Aid and Youth Protection.

¹⁵² Art. 108 of the French Decree on Prevention, Youth Aid and Youth Protection.

¹⁵³ Art. 12 of the Flemish Decree on Juvenile Delinquency.

himself in response to the acts committed.¹⁵⁴ This was a new addition following the latest legislative changes.¹⁵⁵ Also on the level of the juvenile court a restorative offer in the form of mediation or conferencing can be made, which is the preferred option and necessitates motivation if such an offer is not made.¹⁵⁶

Both respondents that were interviewed, were positive about the possibilities of restorative justice in the context of the Belgian juvenile justice system. One of the respondents was positive about the extensive involvement of juvenile lawyers in this regard, which already starts during the exploratory conversation.¹⁵⁷ According to her, it is important that the lawyer takes a critical look at the agreements made between parties, as the child and the parents might be inclined to comply too easily with requests of victims, e.g. demands for high amounts of compensation without sufficient substantiation thereof. The other respondent did note that there are still some difficulties pertaining to restorative justice options that could be addressed.¹⁵⁸ For instance, research conducted by DCI-Belgium has demonstrated that quite often, judges do not trust the restorative options as they think these are not serious enough or too lenient, that these will not be seen as a punishment, and/or because they fear they will lose influence over the case by referring it to a restorative justice option.¹⁵⁹ Moreover, while under the legislation of the French community the public prosecutor has few options in this regard, another limiting factor for referral by the public prosecutor might be the fact that it is 'easier' to simply send the case file to the judge, especially if the prosecutor is dealing with a great number of cases.¹⁶⁰

Vulnerable groups

Language problems

In a recent comparative report on the procedural rights of children suspected or accused in criminal proceedings in the European Union, it was concluded that in all countries investigated – including Belgium – the right to interpretation, as enshrined in Article 2(1) of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, was systematically applied and that 'efforts are made to assist suspects who do not understand or speak the language without delay by the provision of interpretation services in a timely manner'.¹⁶¹ However, it was also concluded that challenges do remain in this respect, also in Belgium, especially when it concerns lesser known languages. The report concludes: 'In such circumstances, an intermediary language, usually English, may be used. This is despite children and interpreters having limited understanding and lacking fluency in the intermediary language, according to both the France and Hungary reports, resulting in mis-communication. Also despite the generally good efforts to adhere to the right to interpretation in some form, there are inevitably exceptions to the rule, due to differences between regions or police stations meaning that the national studies did encounter cases of foreign children who did not have the assistance of an interpreter as required.'¹⁶²

While the right to interpretation should, according to Article 2(3) of Directive 2010/64/EU also include appropriate assistance for persons with hearing or speech impediments, the comparative report shows

¹⁵⁴ Art. 13 of the Flemish Decree on Juvenile Delinquency. In the interview with the lawyer it was noted that for the Flemish community, the slightly different 'positive project' replaced the previously existing 'written project', see interview, Youth lawyer, 2 June 2020.

¹⁵⁵ Johan Put, 2018, p. 108.

¹⁵⁶ Art. 29 of the Flemish Decree on Juvenile Delinquency.

¹⁵⁷ Interview, Youth lawyer, 2 June 2020.

¹⁵⁸ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹⁵⁹ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹⁶⁰ Interview, NGO director, Defence for Children Belgium, 5 June 2020.

¹⁶¹ PRO-JUS project, 2016, p. 20.

¹⁶² PRO-JUS project, 2016, p. 20.

that in all countries – including Belgium – ‘[t]here is lack of appropriate assistance (...) for persons who have speech or hearing impediments. The situation is further exacerbated for foreign children with such conditions as they require even more specialised support.’¹⁶³

Under Article 2(4) of Directive 2010/64/EU, it must be ensured ‘that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter’. However, in Belgium, such a systematic approach does not exist: ‘there is no official procedure at all to determine whether or not the person questioned needs an interpreter’.¹⁶⁴ A respondent in an interview in the comparative report mentioned before, explained the Belgian approach as follows: ‘There is no formal process aimed at determining whether the child needs an interpreter. We do that by gut feeling. Sometimes, however, to save time, at the front line we ask the person accompanying the child to translate. It does have to be an of-age adult, though. It’s an issue of the reality on the ground: it’s done on a case-by-case basis according to the circumstances’.¹⁶⁵

Migration background

Defence for Children noted in 2016 that ‘[w]hile minors are particularly vulnerable due to their age and maturity and their physical, psychological, material differences as well as their lack of experience which distinguishes them from adults, this vulnerability is often reinforced for a foreign minor due to their lack of connections, anchoring, support and referrals in Belgium. They may not share the same culture and language as the professionals involved in the judicial system. Consequently, as the Belgian legislation does not provide for a separate procedure if the minor who committed an ADCO [*an act deemed to constitute an offence*] is a foreigner, particular attention should be given to questions relating to the right to information, translation and interpretation.’¹⁶⁶ In this context, reference is made to the section ‘unaccompanied foreign minors’ that was set up in the Legal Aid Office of the French-speaking bar in Brussels.¹⁶⁷ This section consists of voluntary lawyers that are trained and specialised in assisting and defending unaccompanied foreign minors and that, when on call, can be contacted directly by the children, their guardians or social workers.¹⁶⁸

¹⁶³ PRO-JUS project, 2016, p. 20.

¹⁶⁴ PRO-JUS project, 2016, p. 21.

¹⁶⁵ PRO-JUS project, 2016, p. 21.

¹⁶⁶ Defence for Children International (DCI) - Belgium, 2017, p. 26.

¹⁶⁷ Defence for Children International (DCI) - Belgium, 2017, p. 26.

¹⁶⁸ Defence for Children International (DCI) - Belgium, 2017, p. 26.

Country report: England & Wales

Introduction

The United Kingdom is a union of four countries: England, Wales, Scotland and Northern Ireland. Each jurisdiction operates its own and different juvenile justice system. However, England and Wales share the same legal system known as English law. In England and Wales, the common law system applies, meaning that both judicial decisions and statutes are considered law.¹⁶⁹ Under the Children and Young Persons Act 1933, the age of criminal responsibility is established at 10 years¹⁷⁰ – one of the lowest in Europe.

The historical development of a separate juvenile justice system in England and Wales has shown a combination between the welfare and justice-based approach. Depending on the historical and political circumstances, the system has leaned more towards one approach or another. However, in the last two decades, a risk-oriented model has become dominant in the system, modifying its aims, structure, approach and planning based on this model.

This reform was introduced by the Labour government in 1997. Under this government, one of the most relevant developments included the adoption of the Crime and Disorder Act 1998, which in Section 37(1) states that the main aim of the juvenile justice system is to prevent young people from offending.¹⁷¹ This Act established the Youth Justice Board (YJB), a non-departmental public body that is responsible for overseeing the juvenile justice system of England and Wales.¹⁷² The YJB performs a variety of both operational and advisory functions, with statutory responsibilities including ‘commissioning youth custodial provision, promoting good practice and monitoring and advising ministers on the operation of the youth justice system’.¹⁷³ In the 2016 review of the juvenile justice system that was conducted by Charlie Taylor, the 1998 reforms were positively evaluated as they ‘provided leadership to the system, formalised partnership working and ensured an ongoing focus on a previously neglected area of the criminal justice system. (...) Through the establishment of guidance and national standards, supplemented by mechanisms for monitoring performance and the quality of services, the YJB brought rigour and professionalism to the operation of the nascent YOT [Youth Offending Team] model’.¹⁷⁴ However, it should be noted that less positive evaluations of these reforms can also be found, such as: ‘(...) the reforms introduced to youth justice in England and Wales with the Crime and Disorder Act 1998 were little more than ‘institutionalized intolerance’ of young people. In the name of managing and controlling the risk of re-offending, they represented a significant extension of punitive, rather than welfare-based, social controls, which in turn reflected broader shifts towards punitiveness across criminal justice. These shifts were achieved by the rise to dominance of a ‘new penology’ which privileges risk control and management in dealing with crime and organises criminal justice according to the principles of managerialism and audit’.¹⁷⁵

The Crime and Disorder Act 1998 also stipulated that all local authorities must establish a YOT,¹⁷⁶ multi-agency teams consisting of all the agencies and professionals that deal with young people that have come into contact with the justice system, including police and probation officers, social workers,

¹⁶⁹ Jacqueline Martin, 2016, p. 16-17.

¹⁷⁰ Section 50 of the Children and Young Persons Act 1933.

¹⁷¹ Section 37(1) of the Crime and Disorder Act 1998.

¹⁷² See <https://www.gov.uk/government/organisations/youth-justice-board-for-england-and-wales> (accessed on 16 June 2020).

¹⁷³ Charlie Taylor, 2016, p. 45.

¹⁷⁴ Charlie Taylor, 2016, p. 45.

¹⁷⁵ Jo Phoenix, 2010, p. 352 (references have been omitted from this citation to improve readability).

¹⁷⁶ See Section 39 of the Crime and Disorder Act 1998.

teachers and nurses.¹⁷⁷ The primary role of these teams is to coordinate the juvenile justice services at the local level and work with those young people who have come into contact with the police or have received a juvenile justice disposal.¹⁷⁸ Other responsibilities involve assisting the police with out-of-court disposals, providing reports and information required by the courts, and supervising children and young people who serve a community sentence or are released from custody.¹⁷⁹ According to Taylor, '[t]he YOT model was designed to achieve a more consistent approach to tackling youth offending, and to embed partnership working by bringing together the agencies that were seen as essential contributors to preventing youth crime. (...) Much progress has been made as a result of these reforms, and services work better together now than ever before.'¹⁸⁰ However, Taylor also raised some points of improvement: 'although the YJB has relaxed some of its requirements and expectations on YOTs in recent years, there is a sense from practitioners that the system is now overly centralised, and that their freedom to innovate is constrained. With fewer children in the system, the response to offending can and should be better tailored to local need, and it must be more effectively integrated with other services that are working with the same group of children and their families.'¹⁸¹

From 2010 to date, under the UK Coalition government and later the Conservative government, the juvenile justice system has changed somewhat, but the risk-oriented approach has remained dominant. In 2012, the government introduced the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act. The LASPO Act was built on *Breaking the Cycle*, a new policy introduced by the Coalition government which focused on prevention by intervening early for children at risk.¹⁸² Among the most significant changes introduced by this Act were the revision of the out-of-court sentencing system and the diversion approach (diversion from prosecution). Both changes aimed to turn the way young people would enter the juvenile justice system more flexible, on the basis of assessment and intervention.¹⁸³

Recent developments

Since 2015, the Conservative government initiated new policies and developments in the juvenile justice system. This includes, for instance, the (response to the) review conducted by Taylor that was mentioned before. Among other aspects, the review recommended adopting a system which focuses on child-first and education principles, in which the juvenile justice system is integrated with local services as a way to better respond to local needs, and which is developed as a more decentralised system in which local authorities would be able to use their own assessments tools.¹⁸⁴ The governmental response to the review mainly considered the recommendation on education-focused custodial services but did not include more structural changes such as the creation of children's panels, the abolition of the YJB and the decentralisation of assessment systems.¹⁸⁵ Related to this last point, as will be further explained below, between 2015 and 2017 the government implemented *Assetplus*, a risk and needs assessment tool that replaced a previous one known as *Asset*.

With regard to the Directive on procedural safeguards for children, it should be noted that following the 'Brexit' referendum in June 2016, the UK withdrew from the EU on 21 January 2020. While a transition period is still in place until 31 December 2020 (which might be extended) and most EU law

¹⁷⁷ Charlie Taylor, 2016, p. 6.

¹⁷⁸ Ministry of Justice, 2013, p. 5

¹⁷⁹ Charlie Taylor, 2016, p. 6, 45.

¹⁸⁰ Charlie Taylor, 2016, p. 6.

¹⁸¹ Charlie Taylor, 2016, p. 45.

¹⁸² Ministry of Justice, 2010.

¹⁸³ Stephen Case, 2018, p. 254-255.

¹⁸⁴ Charlie Taylor, 2016.

¹⁸⁵ Stephen Case, 2018, p. 272

still applies, this was never the case for the aforementioned Directive. Based on Protocol 21 to the Treaty of Lisbon of 2009, the legislation adopted in the area of freedom, security and justice did not apply in the UK, although there was a possibility to opt-in. The UK chose not to participate in the Directive.¹⁸⁶ The UK is, however, bound by a number of the other international instruments mentioned in the introduction, including the UN Convention on the Rights of the Child. In the subsequent sections, specific instants in the juvenile justice procedure will be described that entail an individual assessment of the young person, as during or following these moments the focus is on the specific characteristics, needs and vulnerabilities of the child involved and special measures may then be taken during the criminal proceedings.

Individual assessment

An important form of individual assessment in the juvenile justice proceedings in England and Wales is the preparation of a pre-sentence report by the YOT.

Availability of the report

It should be noted that pre-sentence reports are not prepared in every case of a child coming into contact with the justice system, but only if the child is found to be, or has pleaded guilty and before a sentence is imposed.¹⁸⁷ In Section 156 of the Criminal Justice Act 2003 it is stipulated that '[w]hen a court is considering whether to impose a discretionary custodial sentence and how long it should be, or whether to impose a community sentence and what restrictions to put on the offender's liberty as part of that sentence (...) the court must take into account all the information available to it, including information about the offence and about the offender. Before imposing such a sentence, the Court must obtain a pre-sentence report. (...) The pre-sentence report contains advice about what punishment might be appropriate and what rehabilitative work would be likely to prove effective with the offender in order to reduce the risk that he will re-offend'. This provision also stipulates that, while it is possible for the court to refrain from obtaining a pre-sentence report in the case of adults if it is unnecessary to do so in that individual case, children are protected in the sense that a pre-sentence report must be obtained – unless a report has already been prepared with regard to the child, which the court can access.

The pre-sentence report is prepared for the sentencing hearing. While not leading to written reports, there are other moments during the juvenile justice procedure which can be characterised as form of individual assessment that have an impact on the proceedings. These moments will be further discussed below.

Participation of the child and the parents

To draft the pre-sentence report, the YOT will involve the child and his/her parents.¹⁸⁸ The child will be interviewed with regard to the offence. The parental interview is necessary, not in the least because often it will have to be considered whether a parenting order should be imposed.¹⁸⁹ Besides the child and the parents, also the school and a social worker (if social services are already involved) will be approached.¹⁹⁰ As the report will often only be available at the day of the sentencing hearing, the response from the defence to (incorrect) information contained therein will take place during this

¹⁸⁶ European Union Committee, 2018.

¹⁸⁷ Interview, Youth lawyers, 18 June 2020.

¹⁸⁸ Interview, Youth lawyers, 18 June 2020.

¹⁸⁹ The parenting order was also introduced with the Crime and Disorder Act 1998 (see Sections 8 and 9). Such an order 'normally requires the parent(s) to attend counselling or guidance sessions on a weekly basis for three months. It can be made for up to twelve months and it might include additional requirements such as a duty to ensure their child's school attendance' (see Roberta Evans, 2012, p. 119).

¹⁹⁰ Interview, Youth lawyers, 18 June 2020.

hearing.¹⁹¹ While lawyers have an important role to play in this regard, their preparation for the sentencing hearing differs considerably. Some will merely respond to the pre-sentence report, while others will gather their own information, such as character references.¹⁹²

Quality of the report

As mentioned before, YOTs consist of professionals from different disciplines. The pre-sentence report will not necessarily be drafted by YOT members of a specific discipline.¹⁹³ Often, this report will be drafted by someone who holds social work qualifications, or by a probation officer that is seconded to the YOT.¹⁹⁴ A format is used to draft the pre-sentence report, which starts by looking at the offence and also includes personal circumstances such as those related to the family, education and the peer group.¹⁹⁵

The principal assessment tool used by the YOTs is *Asset*.¹⁹⁶ This is a set of tools used to carry out structured risk and needs assessment of young people that have come into contact with the justice system.¹⁹⁷ *Asset* was criticised for its excessive use of technicalities that led to the disengagement of professionals during the assessment process and the decontextualisation of the cases, especially among females and young people from an ethnic minority background.¹⁹⁸ Several experts criticised the system for being a tool of social control and institutional discrimination. They found that the tool led to the persistent labelling of children as ‘offenders’ and it was based on the assumption that all of them were at ‘risk’, thus ignoring the inequalities and discrimination faced by certain groups in society.¹⁹⁹ After ten years of using *Asset* and in reaction to these criticisms, an open consultation with juvenile justice stakeholders was established in 2010 by the government to evaluate *Asset* and propose adjustments. As a result, in 2013, *AssetPlus* was introduced by the YJB. The tool replaced *Asset* and a number of other tools²⁰⁰ used in the juvenile justice system in England and Wales and was progressively implemented in all the YOTs between 2015 and 2017.

Based on learned experiences from *Asset*, *Assetplus* was designed to be an assessment method that could be used throughout the proceedings, avoiding to create a new assessment for each court appearance or order. With this new input, the YJB intended to offer a comprehensive and integrated system that allowed to update information whenever needed and to facilitate communication among all stakeholders in the system.²⁰¹ Compared to *Asset*, some of the positive new features of *Assetplus* are a stronger emphasis on the child’s strengths and protective factors, a clearer distinction between the identification of needs and the likelihood of reoffending, more attention to the child’s and parent’s views, greater clarity regarding risk assessment and the inclusion of new topics – including language and communication skills and gang membership.²⁰² However, the focus on risk in the pre-sentence

¹⁹¹ Interview, Youth lawyers, 18 June 2020.

¹⁹² Interview, Youth lawyers, 18 June 2020.

¹⁹³ Interview, Youth lawyers, 18 June 2020.

¹⁹⁴ Personal communication, Youth lawyers, 25 June 2020.

¹⁹⁵ Interview, Youth lawyers, 18 June 2020. See below for further information on the sections that are included in the principal assessment tool (*AssetPlus*) that is used in this regard.

¹⁹⁶ Roberta Evans, 2012, p. 122.

¹⁹⁷ Youth Justice Board, 2002, p. 9

¹⁹⁸ Kerry Baker, 2005, p. 110.

¹⁹⁹ Tracy Almond, 2011, p. 140.

²⁰⁰ These tools include: Onset, final warning *Asset*, bail *Asset*, and risk and vulnerability management plans.

²⁰¹ Youth Justice Board, 2014.

²⁰² RAND-Europe, 2019, p. 10. See for an overview of the sections that are included in *AssetPlus* <https://www.gov.uk/government/publications/assetplus-assessment-and-planning-in-the-youth-justice-system/assetplus-assessment-and-planning-in-the-youth-justice-system> (accessed on 28 June 2020).

reports is still clear: the YOTs still use the ‘scaled approach’, in which the intensity of interventions is matched to the assessment of risk related to the child.²⁰³

Impact of individual assessment

First contact with the justice system

Already at the police station, modifications can be made to enhance the child’s effective participation if this is seen as necessary. For instance, on the website of the *Youth Justice Legal Centre* it is mentioned that at the police station, ‘[t]here may be support that can help the child, such as using an intermediary for help with communication’.²⁰⁴ However, the respondents indicated that this is primarily the case for child victims and witnesses and not for child suspects (see further below).²⁰⁵ Otherwise, at the police station, before the interrogation a very basic form of risk assessment will be carried out by the police: the child will be asked about problems with reading and writing, (mental) health problems, etc.²⁰⁶ In practice, these questions will be asked while standing at the custody desk, which is not ideal.²⁰⁷ Quite often the child will simply respond ‘no’ to these questions; however, if the child is assisted by a lawyer at that moment who already knows him/her, the lawyer may point out specific vulnerabilities to the custody sergeant.²⁰⁸

Questioning of child suspects

Furthermore, in the report following the Cleveland child abuse scandal,²⁰⁹ questioning children was recognised as ‘a specialist skill requiring training, preparation and appropriate execution’.²¹⁰ To assist police officers in obtaining sound evidence from child witnesses and victims, the *Achieving Best Evidence (ABE) guidance* was developed and published in 2011.²¹¹ In these guidelines, specific attention is paid to interviewing ‘disabled children and children with communication difficulties’, as well as ‘very young or psychologically disturbed children’.²¹² For child *suspects* that are interviewed by the police, however, an equivalent to the ABE guidance is missing.²¹³ It has been noted that this is in line with the wider picture of treating child suspects principally as offenders, and that independent inspections of the police forces ‘have repeatedly criticised (...) the inadequate provision of support by appropriate adults, and the unsatisfactory ways of assessing and recording risk to children’.²¹⁴ This is very unfortunate, as it has been noted that the police interview is, on the one hand, a crucial moment in the criminal proceedings (after all it is the first opportunity for the child to respond to the allegations and often is a source of important exculpatory or inculpatory evidence), but, on the other hand, might also very well be the moment in the proceedings at which the child’s vulnerability is greatest.²¹⁵

²⁰³ Roberta Evans, 2012, p. 351-352; see also interview, Youth lawyers, 18 June 2020.

²⁰⁴ See <https://yjlc.uk/effective-participation/> (accessed on 18 June 2020).

²⁰⁵ Interview, Youth lawyers, 18 June 2020.

²⁰⁶ Interview, Youth lawyers, 18 June 2020.

²⁰⁷ Interview, Youth lawyers, 18 June 2020..

²⁰⁸ Interview, Youth lawyers, 18 June 2020.

²⁰⁹ This scandal concerned a wave of suspected cases of child sexual abuse in Cleveland, England, resulting in many children being removed from their homes by social service agencies. The subsequent inquiry concluded that most of these diagnoses had been incorrect and thus the vast majority of children returned home (see for instance M.T. Haslam, 1991).

²¹⁰ Kate Gooch and Piers von Berg, 2019, p. 86.

²¹¹ Kate Gooch and Piers von Berg, 2019, p. 86.

²¹² Ministry of Justice, 2011, p. 172-177.

²¹³ Kate Gooch and Piers von Berg, 2019, p. 86.

²¹⁴ Kate Gooch and Piers von Berg, 2019, p. 86.

²¹⁵ Kate Gooch and Piers von Berg, 2019, p. 87-88.

The interviewing of suspects by the police in England and Wales is regulated by the Police and Criminal Evidence Act (PACE) of 1984 and the concomitant Codes of Practice.²¹⁶ Code C is the Code of Practice for the detention, treatment and questioning of persons by Police Officers and contains, in Annex G, guidance to help police officers and healthcare professionals assess the fitness of a suspect to be interviewed. This fitness to be interviewed can be paraphrased as ‘understanding the purpose of the interview, the questions asked and the significance of the answers given’.²¹⁷ Code C stipulates that if healthcare professionals are consulted with regard to the fitness for interview, it is essential that they ‘consider the functional ability of the detainee rather than simply relying on a medical diagnosis, e.g. it is possible for a person with severe mental illness to be fit for interview’.²¹⁸ Moreover, these healthcare professionals ‘should advise on the need for an appropriate adult to be present, whether reassessment of the person’s fitness for interview may be necessary if the interview lasts beyond a specified time, and whether a further specialist opinion may be required’.²¹⁹ Furthermore, in the Notes for Guidance on interviews that are included in Code of Practice C, it is noted that ‘[a]lthough juveniles or vulnerable persons are often capable of providing reliable evidence, they may, without knowing or wishing to do so, be particularly prone in certain circumstances to providing information that may be unreliable, misleading or self-incriminating. Special care should always be taken when questioning such a person, and the appropriate adult should be involved if there is any doubt about a person’s age, mental state or capacity. Because of the risk of unreliable evidence it is also important to obtain corroboration of any facts admitted whenever possible.’²²⁰ It has been noted that further definition of some of the terms used, i.e. ‘certain circumstances’ and ‘special care’, is lacking, as is specific guidance on the manner of questioning and organisation of the interviews.²²¹ The respondents indicated that in practice, a forensic medical examiner will examine a suspect’s fitness to interview, but this primarily concerns his/her *physical* fitness to interview; e.g. in case of drunkenness, an indication will be given of when sobriety will re-merge.²²² While this assessment is not carried out differently for child suspects, the assessment *is* in fact different for child victims and witnesses, and for these children an intermediary may be appointed already during this stage of the proceedings.²²³

The current (legal) situation is that based on Code of Practice C, ‘[o]fficers are (...) directed to consider any physical or mental state that might affect a detainee’s ability to understand the nature and purpose of the interview, to understand questions and make decisions about exercising their rights to silence’.²²⁴ However, room for improvement remains: ‘In some forces, this [*assessment, ES*] takes the form of 16 different questions and nine observational cues although this has been criticised as inadequate with detection rates of about 25 per cent for intellectual disability. It is not uncommon for police officers to proceed against advice not to interview in serious cases. The use of Annex G is also dependent on the ability of those present – whether police, legal representatives or appropriate adults – to identify the problems. (...) [C]ustody nurses report that the criteria for assessment are unclear and training insufficient and the Bradley Report (2009) called for greater access to information on an individual shared by various agencies. Therefore, despite the requirement for assessment, there are notable problems with the tools, guidance, level of training and access to information’.²²⁵

²¹⁶ Kate Gooch and Piers von Berg, 2019, p. 87.

²¹⁷ Kate Gooch and Piers von Berg, 2019, p. 88.

²¹⁸ Code C (revised), p. 84.

²¹⁹ Code C (revised), p. 84.

²²⁰ Code C (revised), p. 46.

²²¹ Kate Gooch and Piers von Berg, 2019, p. 90.

²²² Interview, Youth lawyers, 18 June 2020.

²²³ Interview, Youth lawyers, 18 June 2020.

²²⁴ Kate Gooch and Piers von Berg, 2019, p. 89.

²²⁵ Kate Gooch and Piers von Berg, 2019, p. 89-90 (references have been omitted from this citation to improve readability).

In the literature it has been noted that the difficulties that a child may experience during police interrogations (e.g. being prone to suggestibility, compliance and acquiescence, potentially leading to a risk of distorted or incomplete accounts or even false confessions) depend on age and maturation.²²⁶ If a child meets its developmental milestones, there would likely be a substantial degree of intellectual maturation at the age of 14; however, ‘developmental delay can result from factors such as abusive parenting or socio-economic deprivation, factors that are all too common with child suspects. These concerns about a child’s ability to provide a reliable and accurate account are heightened when one considers the complex welfare needs typically presented by children in the criminal justice system. These include emotional and mental health concerns, low IQ, low literacy levels, special educational needs, communication difficulties, experience of abuse, trauma, loss or neglect, mental health and substance misuse issues’.²²⁷ Those would thus be relevant factors for the interrogating officers to take into account. The Children Act of 2004 does impose a (general) obligation on the part of the police to act with regard to the need to safeguard and promote the welfare of children.²²⁸ However, ‘[i]nspections of custody find police officers tend to see child suspects as offenders, rather than children, ultimately overlooking their welfare needs. These concerns have led some to call for an independent assessment of child defendants and specialist training for all who work with them. Current policy and practice have not been effective in identifying and assessing the abilities of suspects in interview.’²²⁹

Diversion

Finally, regarding the phase of the proceedings during which the police is involved, it should be noted that diversion (also called ‘out of court disposals’) already plays an important role. The police have several possibilities to divert: no further action, community resolution (which is not statutorily regulated but depends on local discretion), the youth caution or the youth conditional caution, i.e. formal warnings that are kept on record and to which, in the latter case, conditions are attached.²³⁰ For the youth (conditional) cautions, put briefly, there must be sufficient evidence to charge the child with the offence and the child must admit the offence. Furthermore, there is an element of arbitrariness in this decision, as for instance also the remorse of the child is also taken into account in practice.²³¹ Lawyers can play a role in this regard, by making sure that the child is given the opportunity to give the relevant information and take the appropriate position to be eligible for a youth caution.²³² After the child has been given a youth (conditional) caution, he/she will be referred to the YOT. If the police charge the child, the case is put forward for prosecution in court and will fall within the competence of the Crown Prosecution Service (CPS).

Court hearing

Under the Youth Justice and Criminal Evidence Act of 1999, child witnesses and victims may be supported in court with ‘special measures’, including the assistance of an intermediary.²³³ In Section

²²⁶ Kate Gooch and Piers von Berg, 2019, p. 88.

²²⁷ Kate Gooch and Piers von Berg, 2019, p. 88-89 (references have been omitted from this citation to improve readability).

²²⁸ Kate Gooch and Piers von Berg, 2019, p. 89; section 11 of the Children Act 2004.

²²⁹ Kate Gooch and Piers von Berg, 2019, p. 89 (references have been omitted from this citation to improve readability).

²³⁰ The youth caution and youth conditional caution are regulated in Sections 135 to 138 of LASPO Act and Sections 66ZA to 66G of the Crime and Disorder Act 1998.

²³¹ Interview, Youth lawyers, 18 June 2020; personal communication, Youth lawyers, 25 June 2020. Indeed, in paragraph 16.1 of the Code of Practice for Youth Conditional Cautions it is mentioned that the authorised person should make it clear to the young person that an admission should never be made merely to receive a youth conditional caution.

²³² Interview, Youth lawyers, 18 June 2020.

²³³ Kate Gooch and Piers von Berg, 2019, p. 86. See for all special measures Sections 23-30 of the Youth Justice and Criminal Evidence Act 1999.

29 of this Act, it is stated that '[t]he function of an intermediary is to communicate (a) to the witness, questions put to the witness, and (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers as far as necessary to enable them to be understood by the witness or person in question'. As noted before, during the police phase, a child suspect will normally not be granted the assistance of an intermediary. During the court hearing this might be different: in Criminal Practice Directions 2015, it is noted that '[t]here is currently no statutory provision in force for intermediaries for defendants. Section 104 of the Coroners and Justice Act 2009 (not yet implemented) creates a new section 33BA of the Youth Justice and Criminal Evidence Act 1999. This will provide an intermediary to an eligible defendant only while giving evidence. A court may use its inherent powers to appoint an intermediary to assist the defendant's communication at trial (either solely when giving evidence or throughout the trial) and, where necessary, in preparation for trial'.²³⁴ The respondents explained that the lawyer will normally ask for the appointment of an intermediary; while the experience they have with the use of intermediaries is positive, it is problematic that the decision on the use of an intermediary for a child suspect is left to the discretion of the judge.²³⁵

A positive development is that since July 2019, an updated version of the Plea and Trial Preparatory Hearing (PTPH) form is used and has to be filled in by all relevant actors before the court proceedings; this form lists orders enhancing the effective participation of the child that may be made during the PTPH, including the use of an intermediary but for instance also the removal of wigs and gowns, and the use of clear language during the trial.²³⁶

Vulnerable groups

Although progress has been made in the last two decades – fewer children are now in the juvenile justice system – new challenges have emerged and others still persist. For instance, the YJB has highlighted that as the cohort has gotten smaller, it has become more concentrated with children with complex needs (including health and education needs) and challenging behaviours. Also, whilst fewer children are entering into the system, the rate of children who belong to the Black, Asian and Minority Ethnic (BAME) communities has increased. Similarly, children who have been in the local authority care are overrepresented in the system.²³⁷

A review of the policy guidance document *How to assess children in the youth justice system*,²³⁸ which is aimed at all YOT practitioners and YOT managers, does not provide any specific information regarding *gender, ethnicity and disabilities* within Assetplus. Rather, the document only refers to the term *diversity* to consider the diverse needs of young people, and to assess how they will continue within the probation service. Under the section *Diversity*, YOTs and the probation must identify individual needs and risks arising from: ethnicity, race, sex, religion, culture, language, communication, sensory impairment, disability, and/or sexual orientation. Moreover, YOT practitioners must indicate to the respective probation trust any management arrangements about diversity in relation to risk of harm. Furthermore, an analysis of the main standards and guidelines required during the proceedings show that the categories of *gender, ethnicity and disabilities* are only addressed in the document *Youth Offending Services Inspection Domain Three Case Assessment Rules and Evidence (2018)*, which is used at the stage of out-of-court disposals.

²³⁴ Criminal Practice Directions 2015, p. 16.

²³⁵ Interview, Youth lawyers, 18 June 2020.

²³⁶ Interview, Youth lawyers, 18 June 2020; see also <https://yjlc.uk/new-plea-and-trial-preparatory-hearing-form-includes-amendments-for-child-defendants/> (accessed on 19 June 2020).

²³⁷ Youth Justice Board, 2018, p. 4.

²³⁸ Youth Justice Board, 2019.

BAME communities

In 2017, a report was published containing the results of an independent review into the treatment of, and outcomes for BAME individuals in the criminal justice system.²³⁹ As noted before, ‘BAME’ stands for ‘Black, Asian and Minority Ethnic’ and is used to refer to non-white communities in the UK.²⁴⁰ In this review, the work by the CPS was generally positively evaluated: ‘[o]verall, the charging decisions taken by the CPS are broadly proportionate. Once arrested, suspects from different ethnic groups are charged at relatively similar rates, with the important exceptions of rape and domestic abuse’.²⁴¹ Given these exceptions, a recommendation is made to adopt ‘race-blind prosecuting’ when this is possible, meaning that identifying information (e.g. name, ethnicity) are redacted in the documents that are sent to the CPS by the police.²⁴² The ‘openness to external scrutiny, systems of internal oversight, and an unusually diverse workforce’ were described as assets in the context of the work of the CPS.²⁴³

The review also found that, while there are important incentives in the criminal justice system to admit guilt (e.g. reduction of sentences), ‘BAME defendants are consistently more likely to plead not guilty than White defendants. This means that, if found guilty, they are more likely to face more punitive sentences than if they had admitted guilt’.²⁴⁴ Before, it was already mentioned that to be eligible for diversion such as youth (conditional) cautions, admission of guilt is necessary. This finding of the review is thus important for actors in the (juvenile) justice system to take into account. The review recommends to invest in building trust among BAME suspects, and to learn from initiatives that emphasise the role of plea decisions to a lesser extent.²⁴⁵

Children with disabilities

With regard to children with disabilities, the use of intermediaries as discussed above might provide substantial benefits. In this regard, however, the statutory protection of the position of child suspects could be improved.

Neurodisabilities and traumatic brain injury

It has also been noted that within the juvenile justice system, ‘studies consistently suggest high levels of mental health and neurodevelopmental needs among juvenile offenders. These include attention-deficit/hyperactivity disorder (ADHD), learning disability, and speech and language disorders’.²⁴⁶ Moreover, in recent years, there has been increased attention for the high prevalence of individuals having suffered traumatic brain injury in the juvenile justice system.²⁴⁷ Some guidance has been and is being developed on how best to support juveniles with neurodisabilities and TBI.²⁴⁸

In addition there seems to be, to some extent, increased awareness around these issues among – for instance – judges; at the same time, awareness and training of judges, magistrates, lawyers and police officers could and should be improved.²⁴⁹ It has been noted, for instance, that ‘[o]n arrest, a child affected by neurodevelopmental disabilities might be especially disorientated, stressed, or overwhelmed, and can be at particular risk of waiving or misunderstanding rights, accepting plea agreements, and making false confessions impulsively, hastily, and without fully understanding the

²³⁹ David Lammy, 2017.

²⁴⁰ See <https://www.lexico.com/definition/bame> (accessed on 24 June 2020).

²⁴¹ David Lammy, 2017, p. 17.

²⁴² David Lammy, 2017, p. 17.

²⁴³ David Lammy, 2017, p. 17.

²⁴⁴ David Lammy, 2017, p. 25.

²⁴⁵ David Lammy, 2017, p. 25.

²⁴⁶ Prathiba Chitsaseban and others, 2015, p. 106-107.

²⁴⁷ Prathiba Chitsaseban and others, 2015, p. 106.

²⁴⁸ Prathiba Chitsaseban and others, 2015, p. 106; see als interview, Associate professor of clinical neuropsychology, University of Exeter, 18 June 2020.

²⁴⁹ Interview, Associate professor of clinical neuropsychology, University of Exeter, 18 June 2020.

consequences. All of these responses can negatively and unfairly affect the way in which the police respond. A failure to recognise underlying needs can lead to initial negative interactions with law enforcement officers, after which a child can become marked and subject to “repeated and increasingly frequent contact” with police, with the effect of “propelling young people deeper into the youth justice system”. Early identification of a child’s neurodevelopmental disabilities is therefore crucial.²⁵⁰ Therefore, police officers should be trained to recognise – if required with the assistance of brief screening tools – key difficulties related to neurodevelopmental disabilities.²⁵¹

Moreover, some interesting initiatives have been developed in this regard. For instance, the Comprehensive Health Assessment Tool (CHAT) measures four different dimensions (physical health, mental health, substance misuse and neurodisability) and ‘is a semistructured assessment tool developed to provide a standardised approach to health screening for all juvenile offenders admitted to secure facilities in England’²⁵² and has been introduced in all juvenile custodial institutions.²⁵³ Research has suggested that individuals who have suffered TBI ‘may find it more difficult to engage with offence-related rehabilitation due to information-processing difficulties or disinhibited behavior’.²⁵⁴ Thus, the education of prison staff around the impact thereof and strategies to support people affected may have positive effects for both the young people and the staff.²⁵⁵ In 2013, a ‘brain-injury linkworker service’ was introduced in two custodial secure facilities in England, specifically to provide support in the context of young people with TBI.²⁵⁶ While the (publication of the) evaluation thereof is still to be awaited, the respondent indicated that positive experiences were recorded, for instance in reducing agitation in a juvenile who was found to have severely impaired memory functions by having the staff use pictograms and a traffic light system.²⁵⁷

Enhanced Case Management based on the Trauma Recovery Model

Another interesting pilot was that of the Enhanced Case Management (ECM) approach that was used by three YOTs in Wales.²⁵⁸ In this pilot, the Trauma Recovery Model (TRM) was used as underpinning theory and, among other things, YOT professionals were provided with knowledge on and understanding of the impact of early attachment, trauma and adverse life events on the child’s ability to effectively engage in interventions in the context of juvenile justice.²⁵⁹ This pilot was positively evaluated; among other things, ‘[t]here was general agreement that YOT practice changed as a result of the ECM approach. YOT staff had a better understanding about young people’s underlying needs (...). Intervention plans were better tailored to the needs of young people. Improvements were also identified in the way staff engaged and supported young people. This improvement in relationships was seen as a particular benefit.’²⁶⁰

²⁵⁰ Nathan Hughes and others, 2020, p. 164

²⁵¹ Nathan Hughes and others, 2020, p. 165.

²⁵² Prathiba Chitsaseban and others, 2015, p. 107.

²⁵³ Prathiba Chitsaseban and others, 2015, p. 113.

²⁵⁴ Prathiba Chitsaseban and others, 2015, p. 110.

²⁵⁵ Prathiba Chitsaseban and others, 2015, p. 110.

²⁵⁶ Prathiba Chitsaseban and others, 2015, p. 110.

²⁵⁷ Interview, Associate professor of clinical neuropsychology, University of Exeter, 18 June 2020.

²⁵⁸ See Welsh government, 2017; see also interview, Associate professor of clinical neuropsychology, University of Exeter, 18 June 2020.

²⁵⁹ Welsh government, 2017, p. 1.

²⁶⁰ Welsh government, 2017, p. 3.

Country report: Finland

Introduction

Finland does not have a separate juvenile justice system. Instead, the country has adopted a community-based approach and a division of labour between the child welfare system and the adult criminal justice system. Like the other Nordic countries (Denmark, Iceland, Norway and Sweden), Finland focuses on child welfare and social service rather than criminal justice.

The functioning of this approach focuses on the balanced consideration of each systems' principles. On the one hand, the main criterion for all child welfare interventions is the best interests of the child. Within this system, there are a range of open-care measures and institutional interventions. These interventions aim to support and protect the child. On the other hand, the criminal justice system makes a limited distinction between suspects of different ages. This means that everyone of 15 years and older is sentenced under the same Criminal Code.²⁶¹ However, depending on their age, young people are treated differently from adults, given the mitigated sentences that are applied to young people up to the age of 21.

The minimum age of criminal responsibility was established under the Criminal Code of 1889 at 15 years. This age was kept, also in the most recent reform of the Finnish Criminal Code, which took place in 2000. Three age categories can be identified: children under 15 years of age, young persons between 15 and 17 years of age and young persons between 18 and 20 years at the time of the commission of the offence. Offences committed by children under 15 years of age are not considered by a court as criminal offences. However, these children may be ordered by the court to compensate for the damages they have caused and can be required to participate in mediation schemes to solve the damages.²⁶² Based on the Child Welfare Act, a child welfare notification can be filed and the case is then forwarded to social welfare authorities.²⁶³

The Finnish sentencing framework consists of the fine and prison sentence. Imprisonment can be ordered unconditionally and conditionally. Conditional imprisonment may include supervision by the probation service. Community service is mainly ordered instead of unconditional imprisonment. Moreover, it can be ordered as an ancillary to a conditional sentence if the conditional imprisonment sentence is eight months or longer.²⁶⁴

Compared to adults, children and young persons until the age of 21 receive mitigated sentences (3/4 of the punishment that be imposed to an adult). Also, children under 18 years are usually not sentenced to unconditional imprisonment. Only in case of very severe offences, such as life crimes, a child is given an unconditional prison sentence. Community service is not applied widely in case of young people either, because it is too demanding next to their education.²⁶⁵ The case can also be

²⁶¹ Tapio Lappi-Seppälä, 2019.

²⁶² Anette Storgaard, 2005, p. 194.

²⁶³ Tapio Lappi-Seppälä, 2010, p. 426; District Court, *Young offenders* (published 25 July 2019), available at: <https://oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/rikosasiat/nuoririkoksentakija.html> (accessed on 3 May 2020); District Court, *Criminal sanctions* (Published 25 July 2019), available at: <https://oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/rikosasiat/seuraamukset.html> (accessed on 16 June 2020).

²⁶⁴ Criminal Sanctions Agency, *Community service*, available at: <https://www.rikosseuraamus.fi/en/index/sentences/communitysanctions/communityservice.html> (accessed on 16 June 2020); Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁶⁵ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

discharged if the court considers that the criminal offence was the result of a lack of understanding or imprudence. This means that the person may have been found guilty, but no sentence is imposed.²⁶⁶

On 1 June 2020, only one young person between the age of 15 and 18 was serving a prison sentence and four young people were in pre-trial detention. In the age group of 18 to 20-year-olds, 37 persons were in pre-trial detention and 38 were serving a prison sentence. These young people stay in regular prison facilities, because no separate youth prisons exist in Finland.²⁶⁷ Remarkably, between 1950 and 1990 Finland has drastically reduced its adult and youth population in prison and this reduction was not related to the drop in the crime rates, which actually increased during that time. It was, however, the result of deliberately changed penal policies.²⁶⁸

In case of young people, the conditional prison sentence with supervision is still applied the most. Supervision is ordered if it is deemed justified in view of the rehabilitation of the young person and the prevention of further offences.²⁶⁹ Moreover, the juvenile punishment order exists for children below 18, which is an intense form of supervision that lasts between four months and one year. This sentence is, however, rarely applied.²⁷⁰ Furthermore, by law two types of diversion can be applied: unconditional waiver by the prosecutor and waiver of punishment in the courts (discharge).²⁷¹ In the first case the prosecutor can decide not to prosecute based on the pre-sentence report.²⁷²

Recent developments

As is the case in other EU countries the Directive on procedural safeguards for children was transposed in national legislation in Finland as per June 2019. This has not led to many major changes in the system, because it already complied with the majority of provisions of the Directive. Specifically, the Act on Investigating the Circumstances of Suspected Young Offenders (633/2010) fulfilled the requirements of Article 7 of the Directive.

An important feature of the Finnish system is that when children below the age of 15 display criminal behaviour, they are treated in the child welfare system. As a result, and in contrast with the low number of children deprived of liberty in the justice system, many more children reside in child welfare institutions.²⁷³

Individual assessment

In Finland, juvenile criminal procedure is based on cooperation between several actors including police, prosecutors, mediation offices, the probation service, social and child welfare services and the courts. The community sanctions offices of the Criminal Sanctions Agency (CSA, 15 community sanctions offices in total) are responsible for arranging supervision around the country. The preparation of pre-sentence reports and the communication with the courts and the prosecutors'

²⁶⁶ District Court, *Young offenders* (published 25 July 2019), available at: <https://oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/rikosasiat/nuoririkoksentakija.html> (accessed on 3 May 2020).

²⁶⁷ Personal communication, Senior Specialist A, Criminal Sanctions Agency, 12 June 2020.

²⁶⁸ John Pitts and Tarja Kuula, 2005, p. 150.

²⁶⁹ Criminal Sanctions Agency, *Supervision of conditionally sentenced young offenders*, available at: <https://www.rikosseuraamus.fi/en/index/sentences/communitysanctions/supervisionofconditionallysentencedyoungoffenders.html> (accessed on 16 June 2020).

²⁷⁰ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁷¹ Tapio Lappi-Seppälä, 2010, p. 436.

²⁷² Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 27.

²⁷³ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020. See also John Pitts and Tarja Kuula, 2005, p. 150.

offices are statutory duties of the community sanction offices and an essential part of their work.²⁷⁴ Probation officers are responsible for the work with clients in relation to the enforcement of community sanctions, such as supervision. This is done on the basis of the principle of case management, i.e., probation officers are responsible for the whole client process beginning from the pre-sentence reports to the completion of the community sanction. All officers are expected to be able and competent to carry out all the tasks included in probation work (write reports, make risk and needs assessments, draw up sentence plans, do individual work with clients, carry out programmes, co-work with other authorities and agencies and manage the administrative and judicial procedures).²⁷⁵

Availability of the report

In the Finnish justice system two types of reports can be prepared: a pre-sentence report for the court and a preliminary sentence plan. The pre-sentence report is requested by the prosecutor and he will forward it to the court. The preliminary sentence plan is part of the pre-sentence report and is drafted by the Assessment centre (three offices in Finland) when the probation officer assesses that a community sanction is appropriate or if the young person is in need of such sanction. The actual sentence plan is drafted after the sentence has been imposed.

During the pre-trial stage, probation officers, who work at the community sanctions offices of the Criminal Sanctions Agency, prepare pre-sentence reports at the request of prosecutors or judges (Act on the Enforcement of Community Sanctions 400/2015; Act on Investigating the Circumstances of Suspected Young Offenders (633/2010)).²⁷⁶ In case of young people up to the age of 20, it is mandatory for the prosecutor to request a report in case a more severe sanction than a fine is expected.²⁷⁷ Juvenile punishment always requires the preparation of a pre-sentence report (Act on Investigating the Circumstances of Suspected Young Offenders (633/2010, sections 5 and 6)).²⁷⁸

The assessment must be completed within a maximum of 30 days. The report aims to provide the court with detailed information about the background of the young person and the circumstances of the offence as well as to assess the risk of reoffending and the required measures to support the young person to live without crime.²⁷⁹ Also, recommendations are made regarding whether supervision is deemed necessary and if so, about the content of a supervision measure or a specific community sanction.²⁸⁰

Participation of the child and the parents

In order to prepare a pre-sentence report the child and his/her parents are invited to come to the community sanctions office or the social welfare organisation. The report is prepared by a probation officer. The presence of parents is not mandatory and children and parents can be heard separately. When the young person is in contact with the social welfare service already, a social worker is present as well to provide information. Most children who are sentenced to imprisonment are usually already in contact with the child welfare services and the view of the child's own social worker is seen as very important. The community sanctions office can also request information from other parties, such as mental health clinics and drug rehabilitation centres, with the consent of the young person.²⁸¹

²⁷⁴ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 21.

²⁷⁵ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 22.

²⁷⁶ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 28.

²⁷⁷ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020; Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁷⁸ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 12.

²⁷⁹ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 29.

²⁸⁰ Tapio Lappi-Seppälä, p. 4; Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 30.

²⁸¹ Personal communication, Senior Specialist B, Criminal Sanctions Agency, 10 June 2020; Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

When an unconditional prison sentence is imposed, also a sentence plan is prepared by the Assessment Centre. For minors in prison initial plans are drafted also before the final verdict of the court in order for the young person to have a meaningful time while on remand. When doing an assessment, the respondent always explains to the child what she is doing and why.²⁸² Children can ask questions and also choose not to answer some or any questions. The information in the report is also shared with the child's caretakers (parents and social worker of the child welfare service). This is mainly shared in a network meeting, so the child knows what information is shared and why. If the child or their parents do not speak Finnish, an interpreter is used.²⁸³

Quality of the report

Some years ago, in Finland, an assessment instrument was introduced that was developed in the Netherlands by the Child Protection Board, which was the forerunner of the instrument that is currently used in the Netherlands (see p. 39). In Helsinki, where most cases are dealt with, the Dutch assessment instrument is still used sometimes to guide the interview with the child and parents, but it is not systematically applied.²⁸⁴ The pre-sentence report is based on information about the young person's living conditions, in particular substance abuse and substance rehabilitation, mental health and the use of mental health services, and the need for various services and support measures.²⁸⁵

The Assessment Centre drafts personalised sentence plans for every prisoner. Based on the assessment, detainees receive an individual sentence plan, which aims to improve their abilities to live without crime. At the Assessment Centre of the Region of Southern Finland (Helsinki), approximately one or two individual assessments of minors are prepared per year, in order to draft a sentence plan. Usually, the same assessment tools are used for children as for adults, because most of the minors are 16 or 17 years old and turn 18 during the sentence. When the child has committed a violent crime the SAVRY (Structured Assessment of Violence Risk in Youth instrument) is also sometimes used.²⁸⁶

The sentence plan contains the following elements:

- the Assessment Centre determines the individual goals and means in the sentence plan in cooperation with the prisoner;
- the prison staff specifies the means to achieve the goals and decides in which activities the prisoner participates;
- the prison staff follow the prisoner's progress;
- the Assessment Centre updates the sentence plans for life-time sentenced prisoners and other prisoners serving long-term sentences.²⁸⁷

Impact of individual assessment

First contact with the justice system

As indicated before, very few children in Finland come in contact with the justice system. In case of an arrest and interrogation, the police can also ask a social worker to talk with the child. These social workers are, however, not available in every police station and in every city. The social worker does not make an official report and the communication with the young person is only saved in writing in their own registration system and is not automatically shared with the CSA. In Helsinki there is a special

²⁸² Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁸³ Personal communication, Senior Specialist B, Criminal Sanctions Agency, 10 June 2020.

²⁸⁴ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁸⁵ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 12.

²⁸⁶ Personal communication, Senior Specialist B, Criminal Sanctions Agency, 10 June 2020.

²⁸⁷ Criminal Sanctions Agency, *Criminal Sanctions Region of Southern Finland Assessment Centre* (power point presentation), 2017.

department within the police and in the local municipality that deals with minors under the age of 18 and they work closely with the Helsinki Community Sanctions Office (probation service).²⁸⁸

Disposition by the court

In Helsinki, there used to be special judges who dealt with the criminal cases of minors. Today, these cases are handled by general criminal court judges. The respondent does not know whether the judges make any adaptations to the procedure because of the minority of the child. In the pre-sentence report no recommendations are made regarding adaptations to the procedure. A social worker or probation officer is usually present at the court hearing, though, to support the child and to give explanations on the procedures.²⁸⁹ The pre-sentence reports do not legally bind the court but, in practice, they are used as a basis for the decision.²⁹⁰

Vulnerable groups

Migration background

In the larger cities in Finland more migrants reside and young people with various ethnic backgrounds come into contact with the justice system. Finland has a rather early history of migration from several countries (e.g., Chile, Vietnam, Somalia, Russia). Since 2015 there has been a steady rise in the number of migrants, also as clients of the CSA, for example coming from Iran, Iraq, North-Africa, Afganistan and Syria. Moreover, due to poor economic circumstances in other EU countries, people migrated to Finland, from Romania for example, who are found begging on the streets. Another minority that is of relevance to mention is the Finnish Roma population. The respondent indicates that Roma youth are overrepresented in the criminal justice system. The exact numbers are unknown, however, because the ethnic background of suspects is not registered.²⁹¹

Disabilities

The respondent indicates that the individual needs of children are assessed; however, no specific emphasis is laid on detecting certain disabilities or underlying problems. For example, learning disabilities are not structurally taken into account in the assessment.²⁹² When the child is in need of care, he/she can be sent to the child welfare system to be provided with support and help.

²⁸⁸ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁸⁹ Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

²⁹⁰ Henrik Linderborg, Pia Andersson, and Matti J Tolvanen, 2020, p. 29.

²⁹¹ Interview, Senior Specialist A, Criminal Sanctions Agency, 3 June 2020.

²⁹² Interview, Senior Specialist A, Criminal Sanctions Agency, 11 June 2020.

Country report: The Netherlands

Introduction

The character of the Dutch juvenile justice system is two-fold. The specific provisions of juvenile criminal (procedural) law are included in the (general) Dutch Criminal Code (hereinafter: CC) and Code of Criminal Procedure (hereinafter: CCP). Therefore, on the one hand, the Dutch juvenile justice system is very similar to the ‘adult’, general criminal justice system, with interventions justified by the culpability and responsibility of the child involved for committing the offence and with many of the same – procedural and substantive – provisions being applicable to both children and adults.²⁹³

On the other hand, the Dutch juvenile justice system has a distinct character with its clear pedagogical approach; indeed, it can be said that ‘[t]he primary objective of Dutch juvenile justice is (re-)education, reintegration and prevention of recidivism (special prevention), although retribution, general prevention (deterrence), protection of society and public order and compensation for victims and society can also be considered as objectives.’²⁹⁴ The specific character and focus of the juvenile justice system have various implications, including a separate penal system with different types and less severe sentences (Articles 77a-77gg CC) and a number of specific procedural provisions (Articles 486-500 CCP).²⁹⁵ A number of these distinct provisions has implications for the individual assessment that is to be conducted with regard to children in conflict with the law in the Netherlands.

At this point it should be noted that in principle, the provisions of the Dutch juvenile criminal (procedural) law apply to children from the age of 12 and older, but younger than 18, at the time of the offence (see Articles 486 and 488(2), CCP, and Article 77a CC). For children of 16 and 17 years at the time of the offence, an exception can be made to apply the substantive provisions (i.e. sanctions and measures) of the ‘adult’, general criminal justice system when the judge finds reason for this in the seriousness of the offence, the personality of the suspect or the circumstances under which the offence was committed (Article 77b CC). For young adults of 18 years and older, but younger than 23 at the time of the offence, sanctions from the juvenile justice system can be applied if a judge finds reason for this in the personality of the suspect or the circumstances under which the offence was committed (Article 77c CC). In principle the provisions of juvenile criminal *procedural* law always apply to children from the age of 12 and older, but younger than 18 at the time of the offence, even if one of the exceptions contained in Article 77b or 77c CC is requested by the public prosecutor or applied by the judge.²⁹⁶

²⁹³ Ton Liefwaard and Yannick van den Brink, 2014, p. 207.

²⁹⁴ Ton Liefwaard and Yannick van den Brink, 2014, p. 207. It should be noted that from the 1960s onwards the so-called ‘welfare approach’, according to which the function of the juvenile justice system was to ensure the protection and correction of children, started to become less dominant and attention for due process rights of children increased (see also Stephanie Rap, 2020, p. 78).

²⁹⁵ Ton Liefwaard and Yannick van den Brink, 2014, p. 207.

²⁹⁶ However, a new provision has been proposed in the context of the modernisation of the CCP which is currently taking place, which would make it possible for the judge to decide – either of his/her own accord or at the request of the public prosecutor or the defence – in any phase of the criminal proceedings to apply the provisions of juvenile criminal procedural law when he/she finds reason to do so in the personality of the suspect or the circumstances under which the offence was committed (see Art. 6.1.1.4.2 of the concept legislative proposal for Book 6 of the new CCP as available at <https://www.rijksoverheid.nl/documenten/kamerstukken/2017/12/05/wetsvoorstel-tot-vaststelling-van-boek-6-van-het-nieuwe-wetboek-van-strafvordering-bijzondere-regelingen> (accessed on 8 April 2020)).

Recent developments

In 2014, the Act on Adolescent Criminal Law [*Wet Adolescentenstrafrecht*] entered into force in the Netherlands, resulting in several relevant changes to the juvenile justice system. While an extensive discussion of the changes resulting from this Act falls outside the scope of this report, it should be noted that the upper age limit for the possibility to apply juvenile criminal law as discussed above (Article 77c CC) was expanded from 21 to 23 years of age, with the entering into force of the Act.²⁹⁷ In practice, however, only a small percentage of young adults is sentenced according to the juvenile criminal law.²⁹⁸

More recently, the Dutch legislation was amended to implement the Directive on procedural safeguards for children.²⁹⁹ The most relevant changes that were made during the implementation of the Directive will be discussed below.

Individual assessment

As will become clear in the subsequent sections, the Dutch legislation and practice regarding individual assessments has been changed over the last years, among other things by the implementation of the Directive. However, attention for the individual circumstances of the child in the Dutch juvenile justice system is hardly new. Indeed, it has been noted that already from the beginning of Dutch juvenile criminal procedural law – i.e. the entering into force of the Penal Child Act [*Strafrechtelijke Kinderwet*] in 1905 – information was collected about the personal circumstances of the child in order to take a decision that was tailored to that particular child.³⁰⁰ From the 1950s, information about the personal circumstances of children in conflict with the law was provided by the newly founded Child Protection Board [*Raad voor de Kinderbescherming*] (hereinafter: CPB). The public prosecutor, from that time onwards, always had to seek advice from the CPB regarding the personal circumstances of the child in order to assess whether a juvenile protection measure would suffice or whether criminal prosecution would be necessary.³⁰¹

While initially the Dutch juvenile judge had a central role in managing juvenile court cases, this role has been transferred to the CPB in 1995, who now shares the responsibility of managing juvenile justice cases together with the public prosecution service.³⁰² Moreover, it should be noted that the CPB is extensively (and perhaps increasingly) involved in juvenile justice cases, through new forms of consultations between the various professional parties involved.³⁰³ These consultations will be discussed further below.

As will also become clear below, the CPB is responsible for providing the public prosecutor (also in case of diversion) and court with reports regarding the child, i.e. an important form of individual assessment.³⁰⁴ This report contains information regarding the social background of the young person and his/her family as well as advice concerning the most appropriate disposition.

²⁹⁷ See for a full discussion Eva Schmidt, Stephanie Rap, and Ton Liefwaard, 2020.

²⁹⁸ C.S. Barendregt, M.G.C.J. Beerhuizen, and A.M. van der Laan, 2018, p. 102-104.

²⁹⁹ See Dutch House of Representatives, 2019a, and Dutch House of Representatives, 2019b.

³⁰⁰ Jolande uit Beijerse and Chantal van der Vis, 2019; Jolande uit Beijerse, 2019, p. 23-24.

³⁰¹ Jolande uit Beijerse, 2019, p. 25-28. 38.

³⁰² Stephanie Rap, 2020, p. 79, 83.

³⁰³ Stephanie Rap, 2020; Rino Verpalen, 2019.

³⁰⁴ Stephanie Rap, 2020, p. 87.

Availability of the report

It has been noted that the CPB ‘undertakes a systematic social investigation with regard to almost every juvenile defendant who has to appear before the prosecutor or judge’.³⁰⁵ Although the level of detail may vary due to the multitude and varying complexity thereof, in principle a report is always provided in all eligible cases. This was confirmed by one of the respondents, who stated that the case is not scheduled for a court hearing if a report is missing.³⁰⁶ If, in practice, a report is missing, this would not automatically mean that the hearing should be postponed while awaiting the report; rather, the judge should then weigh all relevant interests, including that of the progress of the case,³⁰⁷ but also that of the child and – if applicable – victims.³⁰⁸ Continuing the case could be an option if sufficient information is available through other means – for instance through input of the child or his/her parents – and if there are no major, underlying concerns.

Participation of the child and the parents

The CPB seems to include the parents of the child in an appropriate manner, for instance by posing follow-up questions.³⁰⁹ Reports made when the child is in police custody³¹⁰ are usually drafted under great time pressure (i.e. shortly before or even during the hearing regarding pre-trial detention), meaning that there will not be a prior opportunity for the child – or his/her lawyer or parents – to study or respond to the report.³¹¹ This is different for the reports that are prepared prior to the substantive court hearing in a case: these will always be shown in advance by the rapporteur of the CPB and will quite frequently include remarks, e.g. when the parents or child do not agree with the information or advice that is included.³¹² Also, factual errors can be corrected after the reading by the parents and child.³¹³ While the parents and the child can point out that there are errors in the report or that they do not agree with the content thereof, the CPB will not necessarily change their advice as a result thereof.³¹⁴ The CPB moreover has started to include a ‘child letter’ [*kindbrief*] with the report, a short summary which is addressed to the child as well as the parents and which is very clearly formulated.³¹⁵ Moreover, the hearing will usually provide an opportunity to respond to the reports.³¹⁶

Quality of the report

The lawyers that were interviewed were generally satisfied with the individual assessment as provided in the reports by the CPB and both stated that the quality of the reports has improved over the last years in terms of structure and standardisation, and by employing more extensive questioning. One of the respondents stated that the CPB seems to have a more critical approach towards their own

³⁰⁵ Stephanie Rap, 2020, p. 87.

³⁰⁶ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³⁰⁷ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³⁰⁸ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL).

³⁰⁹ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³¹⁰ Art. 490 CCP.

³¹¹ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³¹² Interview, Youth lawyer / Deputy judge B, 27 May 2020. See also interview, Youth Lawyer / Deputy Judge A, 20 May 2020, and personal communication, Senior policy adviser, CPB, 10 June 2020. The policy advisor indicated that it is preferred, but not obligated, for the rapporteur of the CPB to discuss the report with the parents and the child. Often, this discussion will be done by telephone; however, if there is not sufficient time before the court hearing, the report will be sent to the clients and usually five days will be given for them to respond.

³¹³ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³¹⁴ Personal communication, Senior policy adviser, CPB, 10 June 2020.

³¹⁵ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL); see also interview, Youth Lawyer / Deputy Judge A, 20 May 2020; and personal communication, Senior policy adviser, CPB, 10 June 2020.

³¹⁶ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

investigation.³¹⁷ In principle, at least two professionals of the CPB should have looked at the report before it is sent to the public prosecutor and judge.³¹⁸

The sources of information – such as the child, the parents, or a teacher at school – are explicitly mentioned.³¹⁹ This makes it possible for actors reading the report, such as the judge, to assess the information on objectivity.³²⁰ Two of the respondents stated that it is problematic that the CPB does not have (timely) access to the police files of the case during the first phase of the procedure, meaning that they will have to formulate an advice based on just the conversation with the child and his/her parents, which does not give a complete picture of the case.³²¹ To address this issue, access should be granted to the statement of the victim, the statement of the child, and other evidence, provided that the lawyer of the child would also be granted access already at this time.³²²

According to one of the respondents, specific vulnerabilities are not necessarily explicitly mentioned in the report by the CPB.³²³ However, as these reports include much information, it is possible to filter out relevant vulnerabilities upon reading. In addition, she mentioned the fact that several reports in the same case will often include much repetition and stated her wish for more specified reports, as this would improve the readability and also show the child the current issues or considerations in his/her case.³²⁴

Psychological or psychiatric report

Moreover, if research into the mental capabilities of the child seems necessary, the Netherlands Institute for Forensic Psychiatry and Psychology [*Nederlands Instituut voor Forensische Psychiatrie en Psychologie* or *NIFP*] is involved. This is done through the public prosecutor, at the request of the CPB – who will then also include the results of this personality investigation in their advice.³²⁵ More generally speaking, if there are concerns about the mental state of the child, the NIFP will engage a forensic behavioural expert (a psychologist and/or psychiatrist) to provide a report. This is done mostly at the request of the public prosecution service, but sometimes also at the request of the judge.³²⁶ Moreover, the lawyer can request a counter-expertise if there is disagreement about the conclusions of this report.³²⁷

Impact of individual assessment

There are various moments during which the individual assessment or advice issued with regard to a child may influence the proceedings. In the Dutch juvenile justice system, the so-called '*Landelijk Instrumentarium Jeugdstrafrechtkenen*' (LIJ) is used, which supports the structured collection and analysis of information about children who have come into contact with the juvenile justice system, and consists of guidelines and checklists for interviews, questionnaires for the child and his/her parents, score forms, scientifically based weighting and calculation models, and guidelines and formats

³¹⁷ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³¹⁸ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³¹⁹ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020; interview, Youth lawyer / Deputy judge B, 27 May 2020.

³²⁰ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³²¹ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL); interview, Youth lawyer / Deputy judge B, 27 May 2020.

³²² Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL).

³²³ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³²⁴ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³²⁵ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³²⁶ Fleur Leenderts, Iris Berends, Nils Duits, and Thomas Rinne, 2016, p. 5.

³²⁷ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL); interview, Youth lawyer / Deputy judge B, 27 May 2020.

for reporting.³²⁸ While previously all relevant actors in the juvenile justice system used their own instruments for (among other things) screening and risk assessment, the LIJ was developed to be used by all relevant partners in the juvenile justice system, including by the CPB in the reports that were discussed before.³²⁹

First contact with the justice system

If a child is suspected of a criminal offence, the police writes a report concerning this suspicion [*het Procesverbaal Minderjarigen*] and the first instrument of the LIJ, the so-called ‘preselection’ [*Preselectie*], is automatically filled in based on information in the police systems.³³⁰ With this instrument the general risk of recidivism (low, medium or high) is estimated, based on static (i.e. no longer changeable) criminogenic factors such as gender, age at the time of first police contact, and crimes committed in the past.³³¹ If a low risk of recidivism is established, no further instruments are used and the police settles the case or refers it to the multidisciplinary consultation that will be discussed further below. The lawyers that were interviewed stated that individual assessment could be improved during this phase of first contact with the justice system. One of these respondents noted that the individual assessment only takes place after certain important decisions have already been taken, such as the decision to arrest the child and to hold him/her in police custody.³³² Her experiences show the importance of conscious decisions during this phase, for instance by explicitly considering whether the circumstances of the case make it necessary for the child to be held in police custody as this will sometimes mean that he/she has to spend the night there. A first assessment or short checklist could point out vulnerabilities and, for instance, ensure that a lawyer – who will often have to see multiple children when on call – could go to the most vulnerable children first. Factors to include in such a preliminary checklist could be, among other things, whether social services are already involved and whether the child has already had contact with the justice system. Moreover, the attendants for the arrested persons [*arrestantenverzorgers*] should be aware of the age of the arrestees and the concomitant needs, e.g. by providing the child with the opportunity to telephone a parent.

During the police interrogation, attention is devoted to the personal circumstances during the phase of the interrogation that is called the social or person-oriented interrogation [*sociaal or persoonsgericht verhoor*]. One of the respondents stated that the idea of an individual assessment has not yet really landed with the police.³³³ According to him, usually a standard questionnaire will be administered and much depends on specific affinity with this area of work of the investigator involved.³³⁴ Another respondent also indicated that the decreased specialisation in the police and public prosecution service had a negative impact on awareness of the issues concerning children in the justice system.³³⁵ It should be noted that apart from the legislation mentioned in this report, there are no specific procedures or guidelines for the interrogation (e.g. related to the techniques used or the choice of interrogator) of children.³³⁶ It had already been advised on multiple occasions to incorporate quality requirements for (among others) police officers who handle cases with children in the Dutch

³²⁸ Ministerie van Veiligheid en Justitie [*Ministry of Safety and Justice – in the meantime renamed Ministry of Justice and Safety*], 2012.

³²⁹ L. Andries van der Ark, Julia L. van Leeuwen, and Terrence D. Jorgensen, 2018, p. 7.

³³⁰ Ministerie van Veiligheid en Justitie 2012; L. Andries van der Ark, Julia L. van Leeuwen, and Terrence D. Jorgensen 2018, p. 7; Iris J.L. Egberink and Rob R. Meijer, 2012, p. 5. See also interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³³¹ Iris J.L. Egberink and Rob R. Meijer, 2012, p. 5; see also interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³³² Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³³³ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³³⁴ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³³⁵ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³³⁶ Imke Rispens and Karina Dekens, 2015, p. 154, 156.

legislation.³³⁷ Moreover, the individual assessment by the police – in terms of attention for the personal circumstances – will be less extensive in cases concerning common offences (e.g. shoplifting) than in those concerning more serious or unusual offences (e.g. sex offences).³³⁸

Both lawyers stated that they are not always given all information that is known by the police about the personal circumstances of the child upon their arrival at the police station. One of these respondents mentioned an example of a boy who had seemed quite street-wise at first sight, but who turned out to have run away from a youth care institution and about whom major concerns existed.³³⁹ The police had known this but had not shared this information with her. Information about vulnerabilities such as these, or for instance intellectual impairments, could be very important in preparing the interrogation, or interpreting the questions asked and answers given during the interrogation, and should therefore be shared with the lawyer when possible.³⁴⁰ The other lawyer that was interviewed, mentioned in this regard that it is very helpful if the child is assisted by the same lawyer if he/she comes into contact with the justice system on multiple occasions.³⁴¹ Usually when assisting a child, the lawyer will just have met him/her while the child will usually not be inclined to share everything there is to share about him/herself. Upon a later occasion, it is much easier for the lawyer to point out to the police that a child has specific needs, for instance because of an (intellectual) impairment, a troubled relationship with his/her parents, or social services that are already involved.³⁴²

The police can dismiss the case and refer the child to voluntary social support, or to the CPB to investigate whether compulsory support is necessary. It should be mentioned that extrajudicial settlement plays an important role in the Dutch juvenile justice system, already at the level of the police. An organisation called Halt carries out restorative and educational projects of maximum 20 hours for children, in principle for first-time offenders of minor offences.³⁴³ Successful participation in one of these projects comes with the advantage of not resulting in a criminal record. In principle the police can refer a case to Halt if it concerns a ‘simple’ case concerning an offence that is specifically mentioned as being eligible for reference to Halt.³⁴⁴ Moreover, the public prosecutor can exercise discretion in referring other cases to Halt as well.³⁴⁵ It should be noted that the police officer explicitly explains (and also provides written information to this end) to the child that accepting to participate in the Halt project is not obligatory and informs him/her of the consequences of deciding not to participate.³⁴⁶ For children below the age of 16, the consent of the parents with regard to the referral to Halt is also necessary. At Halt, a specifically developed signalling instrument is administered [*Halt SI*], to determine whether the child is in need of care and thus should (also) be referred to, for instance, youth care (the so-called ‘certified institutions’ [*gecertificeerde instellingen*]).³⁴⁷ *Halt SI* is a shortened version of ‘LIJ-instrument 2a’ which is used by the CPB and will be discussed below.

Furthermore, in the context of the police interrogations it should be noted that audio-visual registration of the interrogation of suspects is obligatory if the suspect is ‘vulnerable’ *and* it concerns an offence with a victim that died, the offence carries a possible punishment of 12 years detention or

³³⁷ Jolande uit Beijerse and Chantal van der Vis, 2019; RSJ, 2018, p. 3, 8-9.

³³⁸ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³³⁹ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³⁴⁰ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³⁴¹ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³⁴² Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³⁴³ Art. 77e CC.

³⁴⁴ Art. 1 of the Decision regarding the indication of Halt-facts [*Besluit aanwijzing Halt-feiten*].

³⁴⁵ Art. 2 of the Decision regarding the indication of Halt-facts [*Besluit aanwijzing Halt-feiten*].

³⁴⁶ Art. 77e(2) CC; see also Directive and framework for criminal proceedings regarding youth and adolescents [*Richtlijn en kader voor strafvordering jeugd en adolescenten, inclusief strafmaten Halt*], para. 4.2.

³⁴⁷ Iris J.L. Egberink and Rob R. Meijer, 2012, p. 6.

more,³⁴⁸ the offence carries a punishment of less than 12 years detention and evidently resulted in serious bodily injury, or it concerns a sex offence which carries a possible punishment of 8 years or more or sexual abuse in a relationship of dependence.³⁴⁹ A ‘vulnerable’ suspect either means that he/she is younger than 16 years of age (victims, on the other hand, are qualified as ‘vulnerable’ if they are younger than 18 years of age) or apparently has an intellectual disability or cognitive impairment.

Since 2013, a fast track system has been put in place at the level of the police: the so-called ASAP [ZSM] meeting, where cases are assessed within nine hours after the arrest.³⁵⁰ To this end all relevant actors (police, CPB, public prosecution service, probation, the victim support service [*Slachtofferhulp*], and sometimes the youth care office) are present at a fixed location for seven days a week, sixteen hours a day.³⁵¹ For all cases involving children, i.e. all suspects between 12 and 18 that were either summoned or arrested, that are brought forward by the police a decision is taken to either settle the case or to decide on the trajectory to be followed (e.g. to forward the police report for further investigation or to forward the case for the purpose of the hearing regarding the order of pre-trial detention). This is also the level where the public prosecutor can, for instance, decide to refer a case to Halt. The information material on which this decision can be based depends on the circumstances of the case; sometimes this consists merely of the report of the criminal offence that was filed, the first interrogation and an overview of assistance/social work that is already ongoing.³⁵² During this phase of the procedure, a medium or high risk of recidivism as indicated by the preselection of the LIJ, would be a reason for further investigation by the CPB.³⁵³ If a low risk has been found and it does not concern a serious offence, usually the case will be dropped or the juvenile will be referred to Halt.³⁵⁴ More complex or serious cases which have not resulted in a decision within seven days after arrest through this fast track system, are discussed in the regional Safety Homes [*Veiligheidshuizen*] which – besides the partners from the fast track system that were mentioned above – also include other organisations such as the municipality, schools and the youth care service.³⁵⁵ The child him/herself and the lawyer are not present at the ASAP meeting, although the lawyer is informed afterwards. Both lawyers that were interviewed made clear that they still have an important role to play during this phase of the criminal procedure. When in doubt about the suitability of a certain decision, they see it as the task of the lawyer to reach out to the public prosecutor and provide more context or background information. One of these respondents gave the example of a lack of a (full) confession, which will usually mean that the case will not be diverted to Halt; according to him, in these cases it could be useful to explain that a child was in fact very contrite, and/or that the case had a major impact on him/her, and/or that he/she had already started addressing the underlying problem in a different manner, and/or that he/she is very willing to go to Halt.³⁵⁶

As mentioned, the LIJ is used by all relevant partners in the juvenile justice system. If the preselection by the police that was mentioned above indicates a medium or high general risk of recidivism, the CPB

³⁴⁸ For these rules, the punishment that is possible for adults is determinative, as for children in principle no more than 12 months (for those of 12 years or older but younger than 16 at the time of the offence) or 24 months (for those aged 16 or older at the time of the offence) of juvenile detention may be imposed following Art. 77i CC.

³⁴⁹ See the Prescription regarding auditory and audio-visual recording of interrogations of individuals reporting offences, witnesses and suspects [*Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten*].

³⁵⁰ E.M. Mijnaerends, 2014, p. 26; Stephanie Rap, 2020, p. 87.

³⁵¹ E.M. Mijnaerends, 2014, p. 26.

³⁵² E.M. Mijnaerends, 2014, p. 30.

³⁵³ Interview with policy adviser of the CPB, 6 May 2020 (conducted by DCI NL).

³⁵⁴ Interview with policy adviser of the CPB, 6 May 2020 (conducted by DCI NL).

³⁵⁵ Stephanie Rap, 2020, p. 87; Directive and framework for criminal proceedings regarding youth and adolescents [*Richtlijn en kader voor strafvordering jeugd en adolescenten, inclusief strafmaten Halt*], para. 3.

³⁵⁶ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

will start an investigation.³⁵⁷ Moreover, an investigation is always started when it concerns a serious offence. The CPB uses ‘LIJ-instrument 2a’ with which the risk assessment by the police is supplemented with information on dynamic (i.e. potentially changeable) criminogenic factors.³⁵⁸ To this end the investigator will look into the relevant files and he/she interviews the child and his/her parents. Instrument 2A will result in new scores for the general risk of recidivism and the risk of violence against persons; moreover, a dynamic risk profile is provided and evidence is collected that other care or support might be necessary. If the dynamic risk profile results in a score that is medium or high, ‘LIJ-instrument 2b’ is also administered, in which all dynamic risk and protective factors are assessed more in-depth. The LIJ-instrument is seen as helpful in drawing up an objective report, as it includes both protective and risk factors.³⁵⁹ The advice of the CPB is based on the outcomes of the LIJ-instrument, combined with the clinical judgment of the rapporteur.³⁶⁰

Suspension of the order for pre-trial detention

Another example of a moment during which the individual assessment may influence the proceedings is during the contemplation of the suspension of the order for pre-trial detention. When the public prosecutor asks for the order of pre-trial detention and the court in fact orders the pre-trial detention of a child, it is prescribed by law for the judge to consider whether the enforcement of this order may be suspended, either immediately or after a specific period of time.³⁶¹ If the order is suspended, this is done under certain general conditions that also apply to adult suspects,³⁶² as well as ones specific to the juvenile justice system (e.g. accepting intensive guidance, or following a learning project for a maximum of 120 hours).³⁶³ To determine these specific conditions, the judge will obtain advice from the CPB.³⁶⁴ Research has shown that a strong relationship exists between the advice of the CPB about whether or not to suspend the pre-trial detention order and the decision that is taken by the judge.³⁶⁵ Due to time restrictions,³⁶⁶ the advice of the CPB is based to a large extent on an interview with the child, who is in police custody, and a phone call with his/her parents.³⁶⁷ Moreover, during the hearing concerning the pre-trial detention the child him/herself is heard as well and is assisted by a lawyer.³⁶⁸ The child has to agree to the specific conditions that are established for the suspension of the pre-trial detention.³⁶⁹ This agreement has to be demonstrated through a statement that is signed by the child in which the nature and content of the conditions are described, or through the report of the court hearing [*proces-verbaal*].³⁷⁰ In this regard some difficulties may exist for children with a cognitive impairment; see below under ‘vulnerable groups’. One of the respondents noted that the juvenile probation service is sometimes late in providing reports in this context, and that it can be helpful for the judge to postpone the decision to suspend the order for pre-trial detention for one or two weeks while simultaneously asking the probation service to provide a report.³⁷¹

³⁵⁷ Ministerie van Veiligheid en Justitie, 2012, p. 12.

³⁵⁸ Iris J.L. Egberink and Rob R. Meijer, 2012, p. 6.

³⁵⁹ Interview, Youth Lawyer / Deputy Judge A, 20 May 2020.

³⁶⁰ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³⁶¹ See Art. 493(1) CCP.

³⁶² See Art. 80 CCP.

³⁶³ See Art. 493(6) CCP and Art. 2:6 of the Decision on the enforcement of criminal justice decisions [*Besluit tenuitvoerlegging strafrechtelijke beslissingen*].

³⁶⁴ See Art. 493(6) CCP.

³⁶⁵ Y.N. van den Brink and others, 2017.

³⁶⁶ The pre-trial detention hearing has to take place within three days and 18 hours from the arrest of the juvenile (Art. 59a(1) CCP).

³⁶⁷ Stephanie Rap, 2020, p. 81.

³⁶⁸ Yannick van den Brink, 2018, p. 183-185; see also Art. 60, Art. 63(3) and (4), and Art. 65(1) CCP.

³⁶⁹ Art. 493(6) CCP.

³⁷⁰ Art. 2:6(4) of the Decision regarding the enforcement of criminal justice decisions [*Besluit tenuitvoerlegging strafrechtelijke beslissingen*].

³⁷¹ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL).

Disposition by the public prosecutor or court

As is stipulated in the Directive, the individual assessment should also be used to provide information for taking decisions in the criminal proceedings, including when sentencing. Article 494(1) CCP contains the following obligation: ‘The public prosecutor obtains information from the CPB regarding the personality and living conditions of the suspect, unless he immediately and unconditionally terminates the prosecution. If the public prosecutor prosecutes the case before the single-judge division of the District Court [*kantonrechter*] or via a punishment order [*strafbeschikking*], he can obtain this information from the CPB.’³⁷² Moreover, to implement the Directive, new provisions were added to the CCP as well. In Article 494a CCP it is now stipulated that to execute the request for information as mentioned in Article 494, the CPB provides advice (paragraph 1); that when the advice is drawn up, specific vulnerabilities are mentioned if these are found to exist (paragraph 2); that the drawing up of the advice can be waived if an advice has already been issued in the year prior to the taking into police custody [*inverzekeringstelling*] (paragraph 3); and that the suspect, his parents or guardian or a trusted person [*vertrouwenspersoon*] are involved in the drawing up of the advice (paragraph 4).³⁷³

In the explanatory memorandum accompanying the legislation with which the Directive was implemented, it was explained that the intensity of the individual assessment is (partly) dependent on the seriousness of the offence and the consequences the criminal proceedings may have for the child.³⁷⁴ This was seen as being in line with Article 7(3) of the Directive. Thus, in addition to the generally formulated obligation to seek and use advice as mentioned before, more stringent requirements apply when imposing certain specific sanctions or measures.³⁷⁵

Finally, since the implementation of the Directive, it is mentioned in the newly added Article 494b CCP that if an advice as mentioned in Article 494a (i.e. an advice by the CPB as requested by the public prosecutor) has been issued, the punishment order or judicial verdict should mention the manner in which the advice is taken into account.

Vulnerable groups

Mild cognitive impairment

In recent years, individuals – both minors and adults – with a mild cognitive impairment have attracted increased attention in the justice system. In the Netherlands a ‘mild cognitive impairment’ [*licht verstandelijke beperking, LVB*] is usually defined as having an IQ-score between 50 and 85, combined with limited capacities to adapt, and experiencing additional problems in life.³⁷⁶ While the prevalence of individuals meeting this definition among different groups and in different stages of the criminal justice system has not been established with absolute certainty yet, prevalence does seem consistently higher among individuals in the justice system than in society at large, and higher among children than among adults in the justice system.³⁷⁷ In 2015, a validated Screening instrument for intelligence and

³⁷² Dutch House of Representatives, 2019a, p. 5 [*unofficial translation by the authors*]. The punishment order is a form of diversion in which the public prosecutor settles the case by declaring the defendant guilty and ordering a sanction (Art. 77f CC; see also Stephanie Rap, 2020, p. 82-83).

³⁷³ Dutch House of Representatives, 2019a, p. 5.

³⁷⁴ Dutch House of Representatives, 2019b, p. 9, 21-22.

³⁷⁵ For instance, the measure pertaining to the conduct of the child [*gedragsbeïnvloedende maatregel*] can only be imposed by the court after ‘a reasoned, dated and signed recommendation issued by the Child Protection Board, which is supported by at least one behavioural expert, has been submitted to it’ (Art. 77w CC). Moreover, the ‘measure of detention in an institution for juveniles’ [*PIJ-maatregel*] may only be imposed after a reasoned, dated and signed advice has been submitted to it by at least two behavioural experts of different disciplines, of which one must be a psychiatrist (Art. 77s CC).

³⁷⁶ Hendrien Kaal, 2016, p. 5.

³⁷⁷ Hendrien Kaal, 2016, p. 2, 7-19; Marigo Teeuwen, 2017, p. 92-95.

mild cognitive impairment [*Screener voor intelligentie en licht verstandelijke beperking, SCIL*] was developed, consisting of a short questionnaire that can be administered in approximately ten minutes to provide an indication of mild cognitive impairment.³⁷⁸ Two variants of this screening instrument have been developed: one for minors as well as one for adults. In 2018 the CPB has started administering the SCIL in the justice system. The aim is to administer this screening instrument as early in the proceedings as possible, i.e. prior to conducting further research based on the LIJ-instrument, for instance when reporting on a child that has been taken into police custody.³⁷⁹ In this manner it can be prevented that during the individual assessment by the CPB that follows, questions are posed that are too difficult and that no clear image arises of the child and the interventions that would be most effective for him/her. The SCIL is to be administered if the level of schooling provides an indication that this might be useful. However, as this still concerns a recent development, it is not yet systematically administered.³⁸⁰

Moreover, in training courses for professionals a Virtual Reality-experience is used to enable them to experience the consequences of having a mild cognitive impairment.³⁸¹ Awareness of the prevalence and characteristics of a (mild) cognitive impairment are important. Research into the decision-making practice regarding the suspension of the enforcement of the order for pre-trial detention as mentioned above, demonstrated that children with a (possible) cognitive impairment were overrepresented among the children for whom the enforcement of the order was not suspended (and who thus, in principle, had to stay within the juvenile justice institution).³⁸² Statistical analyses showed that a (possible) cognitive impairment also decreases the chance of a positive suspension advice by the CPB or a decision to suspend by the judge. The researchers state that a possible explanation could be the fact that communication with and participation of these children could be more difficult, resulting in a less clear or even a distorted view of the child. Another explanation could be that it is more difficult for the CPB or probation service to draw up a plan for the suspension, because it may be more difficult for these children to conform to certain agreements. The lawyers that were interviewed did not necessarily recognise these findings from their own practice. One of these respondents explained that the exact nature of the conditions for suspension of the order for pre-trial detention could potentially be less clear for these children, but that this is then adequately explained by the CPB and/or the lawyer.³⁸³ The juvenile judge that was interviewed did state – in general, not just in the context of decisions regarding pre-trial detention – that it is important for judges to be aware that children with a mild cognitive impairment might need more time during the hearing to understand the question and formulate an answer.³⁸⁴ The potential vulnerabilities of this group thus necessitate awareness and attention of the professionals involved.

Language problems

In addition, it has been pointed out that many children – both with and without a migration background – that come into contact with the justice system, very likely have undetected (i.e. not previously diagnosed) serious language problems.³⁸⁵ Like intelligence, language skills are measurable, leading some to recommend that a simple and validated screening instrument should be developed, similar to the SCIL that was mentioned above or the ‘language measure’ [*Taalmeter*] for the

³⁷⁸ Marigo Teeuwen, 2017, p. 94.

³⁷⁹ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³⁸⁰ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

³⁸¹ Information retrieved from <https://www.kinderbescherming.nl/over-ons/kijk-op-kinderbescherming/jongeren-met-lvb> (accessed on 9 April 2020).

³⁸² Y.N. van den Brink and others. 2017, p. 107-109. This research was based on 250 files of children who came before a judge regarding the matter of pre-trial detention between 1 April 2014 and 1 April 2015.

³⁸³ Interview, Youth lawyer / Deputy judge B, 27 May 2020.

³⁸⁴ Interview, Youth judge, Court of Rotterdam, 1 May 2020 (conducted by DCI NL).

³⁸⁵ K.G.M. van Dijk-Fleetwood-Bird, 2017, p. 752.

identification of problems with reading or writing.³⁸⁶ This screening should ideally be administered before the first police interrogation and in case of the identification of serious language problems, a further recommendation could be to involve an expert such as the ‘intermediary’ in England and Wales, that helps the child with communicating with the police or court.³⁸⁷ Moreover, awareness of the prevalence of children with serious language problems and the consequences thereof, especially for the communication during the police interrogation and the court hearing, among the professionals involved in the juvenile justice system could be beneficial, as well as relevant training of these professionals.³⁸⁸

Regarding the ability to understand and speak the *Dutch* language, it has been noted in this context that in principle the right of minors to assistance by an interpreter is fairly well guaranteed. Research by Defence for Children has shown that no distinction is made between the granting of rights (regarding interpretation and translation, information, and access to a lawyer) to minors with or without the Dutch nationality; thus, the assumption that not having the Dutch nationality leads to vulnerability in the criminal proceedings does not seem to hold.³⁸⁹ Defence for Children concludes that a language barrier does lead to vulnerability and that this language barrier exists more often among individuals without the Dutch nationality; however, it is not necessarily the case that every non-Dutch child has insufficient command of the Dutch language, or vice versa, that every Dutch child masters the Dutch language sufficiently.³⁹⁰ In the Dutch legislation, the right to assistance by an interpreter has been established for all suspects who have no or insufficient command of the Dutch language.³⁹¹ This right also encompasses assistance by someone capable of acting as interpreter, for a suspect who cannot, or who can only very poorly, hear or speak.³⁹² In principle, the police officer who conducts the interrogation decides to call an interpreter, based on the following criteria: the suspect understands the questions or statements that are directed towards him/her, the suspect is capable of giving his/her own account of the events for which a statement is required *and* the suspect is capable of adding nuances to this – for example, if the suspect is only able to answer the questions asked with ‘yes’ or ‘no’, he/she does not have sufficient command of the Dutch language.³⁹³ This can be seen as a systematic or standardised approach to this issue.³⁹⁴ In case of doubt or disagreement with the suspect regarding the necessity of an interpreter, the police officer will contact the (assistant) public prosecutor who will decide on this matter.³⁹⁵ In principle, in case of doubt, an interpreter is always contacted.³⁹⁶ The research by Defence for Children also shows that in practice, the police errs on the side of caution when it comes to deciding on calling an interpreter, also to ensure that the judge deciding on the case will not exclude evidence later on.³⁹⁷ While the consensus is that assistance by an interpreter is ensured in an appropriate manner for minors, interpretation for children who are deaf

³⁸⁶ K.G.M. van Dijk-Fleetwood-Bird, 2017, p. 754, 762.

³⁸⁷ K.G.M. van Dijk-Fleetwood-Bird, 2017, p. 760-762.

³⁸⁸ K.G.M. van Dijk-Fleetwood-Bird, 2017, p. 762.

³⁸⁹ Defence for Children International – The Netherlands, 2016, p. 50.

³⁹⁰ Defence for Children International – The Netherlands, 2016, p. 50.

³⁹¹ Art. 27(4) CCP.

³⁹² Art. 131b CCP.

³⁹³ Defence for Children International – The Netherlands, 2016, p. 22, Art. 3.3 Prescription regarding the assistance of interpreters and translators during the investigation and prosecution of criminal offences [*Aanwijzing bijstand van tolken en vertalers bij de opsporing en vervolging van strafbare feiten*].

³⁹⁴ PRO-JUS project, 2016, p. 21.

³⁹⁵ Defence for Children International – The Netherlands, 2016, p. 22. The assistant public prosecutor is not a member of the public prosecution service, but a police officer with several special authorisations in the context of the criminal justice system.

³⁹⁶ Art. 3.3 Prescription regarding the assistance of interpreters and translators during the investigation and prosecution of criminal offences [*Aanwijzing bijstand van tolken en vertalers bij de opsporing en vervolging van strafbare feiten*].

³⁹⁷ Defence for Children International – The Netherlands, 2016, p. 26.

or hard of hearing might be a different matter: for these children a family member or acquaintance is usually engaged, while a qualified and specialised interpreter also has knowledge of the language development of these children – which is different from that of children who can hear.³⁹⁸

Migration background

In the research into decision-making regarding potential suspension of pre-trial detention of children that was mentioned above, it was found that the factor of having a migration background³⁹⁹ decreases a child's chance of a positive suspension advice by the CPB as well as the chance that the enforcement of the order will actually be suspended by the judge, and further research into the underlying explanations for this finding was recommended.

In addition, it has been noted that in case of unaccompanied minor refugees, the investigation by the CPB is very difficult to conduct.⁴⁰⁰ While an interpreter can be used and a guardian can be involved as an informant, many of the questions – for instance those relating to school or the home situation – are not applicable.

³⁹⁸ Defence for Children International – The Netherlands, 2016, p. 27.

³⁹⁹ This variable was called 'non-Dutch background' and this meant that either the child or at least one of his/her parents was born outside of the Netherlands, see Y.N. van den Brink and others, 2017, p. 39.

⁴⁰⁰ Interview, Senior policy adviser, CPB, 6 May 2020 (conducted by DCI NL).

Concluding observations

In this part of the baseline study, it was aimed to identify good practices with regard to individual assessment as enshrined in the Directive on procedural safeguards for children. Specific attention was paid to the prevention of potential stigmatisation through this individual assessment, as well as the use of this provision to promote the position of child as a rights holder and strengthen his/her procedural rights. Moreover, efforts to address the position of specific groups of vulnerable children were investigated.

The Directive had to be implemented in the national legislation of Belgium, Finland and the Netherlands as per June 2019. The current study has shown that in none of these countries, the implementation of the Directive led to major changes in either legislation or practice, as an individual assessment of children in the justice system was already common practice. The Netherlands seems to have gone furthest in enshrining the right to an individual assessment explicitly in its national legislation by making specific amendments to its CCP to implement the Directive; however, this was not deemed to – and has not been found to – lead to any major changes in practice, but rather concerned a codification of already existing practices. Below, for each of these three countries it is briefly outlined to what extent Article 7 of the Directive is adhered to. In England and Wales the Directive is not implemented in the jurisdiction. Therefore, based on the analysis in this report, a short discussion is provided of useful forms of and developments related to individual assessment in the juvenile justice system.

Belgium

In Belgium, the social service of the juvenile courts prepares reports to inform the judge of the personality and the social circumstances of the young person, both to inform the provisional measures taken during the preparatory stage as well as for the final measures during the judgment on the merits. In that sense, an individual assessment is provided as stipulated in **Article 7(2)** of the Directive, which in accordance with **Article 7(4)** might be of use to inform precautionary measures, as well as to take other decisions in the criminal proceedings, including the sentencing. No standard format for these reports exists, meaning that there is much variation in the quality and detail in the reports. In principle, adequate reports would provide all information necessary to know the child's personality and maturity, his/her background, and specific vulnerabilities as mentioned in **Article 7(2)**.

For the drafting of the reports, the child and parents are included as mentioned in **Article 7(7)** of the Directive. Another commendable aspect of the Belgian juvenile justice system in this regard is the focus on restorative justice, which – generally speaking – accounts for the preferred interventions, both at the level of the prosecution and of the court. There are also clear possibilities for the child to be actively involved in this regard, as the child (together with his/her lawyer) is granted the possibility to propose projects him/herself.

England & Wales

Although the Directive was not implemented in England and Wales, in practice, different forms of individual assessment are applicable for children in the justice system as well. Determining whether Article 7 of the Directive is adhered to in this jurisdiction is therefore not necessarily useful. However, **Article 7(2)** does stipulate that specific vulnerabilities of the child should be taken into account. According to **Article 7(4)** the individual assessment might be useful in determining whether any specific measure to the benefit of the child should be taken and in assessing the appropriateness and effectiveness of any precautionary measures with respect to the child. In this regard it should be noted that in England and Wales, various possibilities exist to enhance the participation of the minor suspect

– especially during the court hearing – such as the appointment of an intermediary to improve communication.

Pre-sentence reports are only drafted for the sentencing hearing, i.e. if the child has been found to be, or has pleaded guilty. These reports are drafted by YOTs, using the principal assessment tool Assetplus. Assetplus is an updated version of the previous risk assessment tool, Asset, and includes – among others – a stronger emphasis on the child’s protective factors and on the views of the child and the parents. These are positive developments given the need to involve children and parents in the individual assessment as mentioned in **Article 7(7)** of the Directive. Moreover, in this assessment there is attention for new topics that can be seen as vulnerabilities of the child, such as language and communication skills.

Finland

Despite the fact that in Finland no separate juvenile justice system exists as such, the requirements following from Article 7 of the Directive were assessed to be in line with the current Act on Investigating the Circumstances of Suspected Young Offenders (633/2010). However, one amendment was made to the Act. According to the Act, the prosecutor did not have to request the Criminal Sanctions Agency to draw up a pre-sentence report in cases where the suspect was a foreign national who did not have a permanent residence in Finland (former section 4, subsection 2). This subsection was amended to be in line with **Article 7(9)** of the Directive. According to the current section 4, subsection 2 of the Act, the prosecutor does not have to request the Criminal Sanctions Agency to draw up a pre-sentence report where this is warranted by the circumstances of the case and compatible with the young person’s best interests, not specifically excluding young people who do not have a permanent residency in Finland.⁴⁰¹

Since in Finland pre-sentence reports were always drafted before a sentence was imposed, the content of **Article 7(2)** was already part of the national legislation. Pre-sentence reports must be requested for 15- to 20-year-olds by the prosecutor when the sentence is expected to be more strict than a fine. In all pre-sentence reports (i.e., for 15 to 20-year-olds and for people over 21 and in all kinds of sentences: supervision of conditional sentence, juvenile punishment, community service and electronic monitoring) a preliminary sentence plan is drafted as part of the pre-sentence report if the probation officer in charge estimates that the community sanction is necessary or suitable for the person in question, which can be said to be in line with **Article 7(4)**. The individual assessments apply both to preliminary measures while on remand as well as to measures that are implemented after sentencing. Also, the individual assessments are carried out by qualified probation officers, and involve the child as well as his/her parents in line with **Article 7(7)**.

A point of improvement for Finland is that the analysis shows that not always the same standard format is used for assessing the individual circumstances and needs of the child. It would be commendable to unify this procedure across the country.

The Netherlands

In the Netherlands, the most important instrument of individual assessment that is used in all cases involving children in the justice system is the ‘*Landelijk Instrumentarium Jeugdstrafrechtketen*’ (LIJ), which consists of different instruments that are used by all relevant partners in the justice system. The pre-selection instrument of the LIJ that is used that the level of the police is based on static criminogenic factors and mainly concerns the risk of recidivism. However, an important development

⁴⁰¹ Personal communication, Senior Adviser, Legislative Affairs, Department of Criminal Policy and Criminal Law, Ministry of Justice, Finland, 22 June 2020.

in this phase of the proceedings has been the development of the multi-agency ‘fast track system’ – already prior to the implementation of the Directive – where all relevant actors discuss all cases shortly after the arrest, extending the scope of the individual assessment already during this stage.

The Dutch legislation is thus largely in line with **Article 7(5)** of the Directive, which stipulates that the individual assessment is to be carried out at the earliest appropriate stage of the proceedings. However, the respondents did indicate some improvements that could be made when the child is brought to the police station. The prosecution and police should be aware that while the formal assessments are conducted after this moment, already during this stage, important decisions may be taken based on the personality and vulnerabilities of the child (e.g. with regard to the necessity of holding the child at the police station). Moreover, it is important that relevant information that the police has in this regard, is shared with the lawyer as soon as possible.

The LIJ is also used by the CPB, which provides reports for the judge during the criminal investigation (e.g. in the context of decisions on pre-trial detention) and for the hearing during which a sentence may be imposed. The LIJ is seen as a useful instrument, as it contains both risk and protective factors. In the reports of the CPB the sources of information are explicitly mentioned and sufficient information is included to cover the information mentioned in **Article 7(2)** of the Directive, including specific vulnerabilities related to a particular child. Moreover, in line with **Article 7(7)** of the Directive, the individual assessment is carried out by involving the child and the parents. A positive development in this regard has been the introduction of the child letter, in which CPB reports are briefly introduced to the child and the parents in clear language.

Recently in the Netherlands, there has been increased attention for individuals – including children – with a mild cognitive impairment in the justice system. A positive development in this regard has been the development of a short screening instrument, that should be administered by the CPB early in the proceedings (for instance when reporting on a child that has been taken into police custody) and that could subsequently influence the proceedings, e.g. by preventing asking the child questions that are too difficult, and by proposing and imposing interventions that would be most tailored to the needs of that particular child. While the CPB started administering this screening instrument in 2018, this is not yet done systematically.

To conclude

From the analysis of the countries included in this study it can be concluded that individual assessments are generally common practice for children below the age of 18 who come in contact with the law. In order to make a decision on the best appropriate sentence or measure, either in the pre-trial or post-trial stage, an assessment is required of the personal circumstances, individual needs and circumstances surrounding the alleged offence. An important component of this is to assess the risk that exists the child will re-offend. Juvenile justice professionals generally use the assessment in making a decision on the type and length of the disposition, based on individual needs and risk assessment. During the implementation of the sentence or measure juvenile justice workers make use of the individual assessments to tailor the intervention to the needs of the child, to curb future offending behaviour.

From the analysis it has also become clear that in general the overall aim of the assessment is not to take individual circumstances into account in the juvenile justice procedure. Procedural adaptations are made in general for all children and are mostly not tied to individual circumstances or personal characteristics. Positive developments in this regard are the heightened attention for children with cognitive disabilities (e.g., learning disabilities, speech and language disorders, traumatic brain injury, etc.) and children from different ethnic minority backgrounds. However, the extent to which their specific vulnerabilities and needs can be taken into account – both procedurally as well as

substantially – should be placed at the top of the agenda of all juvenile justice professionals. More awareness of the individual needs and circumstances of the child in the procedure would benefit the effective participation of children in these often highly complex and intimidating procedures.

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