

Information sheet number two: The rights framework



International conventions, rules and standards

Introduction

The youth justice system in England and Wales has developed over a long period of time. For example, special courts for children date back around a hundred years. A framework for children's human rights in youth justice has developed more recently, most importantly with the United Nations Convention on the Rights of the Child (the UNCRC) in 1989. Under the umbrella of the UNCRC, there are a number of other important international rules and standards about youth justice matters. And more recently, the Human Rights Act 1998 has made the European Convention on Human Rights enforceable in the UK.

Some countries in the world which have set about designing, or re-designing, youth (or 'juvenile') justice systems for themselves, have made the UNCRC a starting point, building on its principles from the start. But the current youth justice system in England and Wales was not designed around current international conventions, rules and standards and, in some ways, does not always comply with them.

However, it is important that those who work in youth justice, as well as all children and young people, are aware of children's human rights principles and provisions and, as necessary, are properly trained in applying them.

Home Office guidance on the Human Rights Act, for example, makes clear that a 'culture' of human rights should be developed, and should be taken seriously by each individual in public services:

This places new responsibilities on all of us who work in public authorities, which includes central government, the courts, the police, local government and many bodies who carry out functions which the Government would otherwise have to undertake. We all have a vital role to play in building a new human rights culture.¹

So it is up to all organisations and agencies in the youth justice arena, as well as each individual working in it, to take children's human rights seriously in all aspects of work. But, as has been stated, it cannot be assumed that current law, policy or practice does not infringe rights. In every action, it is important to take account of this issue.

This briefing provides only a starting point to introduce the most relevant matters. For further study, the website contains links to detail of the UNCRC and other relevant documents and to literature, training materials and other sources of information.²

The most important instrument is the UNCRC, but it is helpful to first think about, and distinguish, the Human Rights Act 1998, which has received more public and media attention in recent years.

¹ Home Office, 2000.

² For a more detailed introduction, see Monaghan G (2005) Children's Human Rights and Youth Justice, in Bateman T. and Pitts J. (eds) RHP Companion to Youth Justice. Lyme Regis. Russell House Publishing.

The Human Rights Act 1998

For detail on the Human Rights Act (HRA), please use the links on this site.

The HRA was brought into force in 2000. What it does is make the European Convention on Human Rights (ECHR) law, and enforceable, in our 'domestic' courts (previously, individuals had to resort to the European Court of Human Rights to make a challenge). The ECHR was drafted (written) after the second World War to protect people from the sort of treatment that had occurred such as 'genocide'. It is applicable to all humans including children, but has little detail that applies specifically to children. So for example, it does say that people have a right to privacy and a fair trial.

It is no substitute for the UNCRC (see below). Increasingly, courts hearing cases to do with the ECHR/HRA and that involve a child have turned to the UNCRC and other rules and treaties to help make a judgement. In any case, and in any court, it is correct to consider the UNCRC if the law as it stands is not clear enough to make a decision.

UN Convention on the Rights of the Child

The UNCRC should be seen as the flagship for children's human rights (see link to detail and commentary on the convention). It contains 54 numbered sections, called 'articles'. Some articles are to do with youth justice directly, but these should be considered as a part of the whole – most of the articles apply to children, including those held in custody in prison service facilities.

The following points are intended to introduce some important points about the UNCRC, but the reader should use the links provided in section six to seek out more detail and explanation.

- The UNCRC has been 'ratified' by almost all of the world's countries ('states'). By ratifying the convention, the UK has agreed to comply with it. Having done this in 1991, the UNCRC became legally binding – and therefore must be implemented. But although it is binding, there is no means by which compliance can be enforced (a young person cannot go to court to challenge against a denial of his or her rights under the UNCRC directly). This is in contrast to what can be done under the Human Rights Act (see below).
- Although some articles are to do with what the government must do (for example, it must ensure that people know about the UNCRC and that professionals are trained properly), most lay out the rights of the child in all aspects of their lives. And with relevance to youth justice, it must put in law a minimum age of criminal responsibility, a justice system that is distinct from that applying to adults and should take steps to divert children from formal criminal justice systems and use custody as a last resort.
- The UNCRC is written to apply to all children in the world. So it includes some provisions that might be taken for granted in the UK (for example, that there shall be no death penalty for children, that they must not be sold or traded, or that a child must have a name and have it written down). So the convention gives us principles as well as detail of rights.

- Some rights are 'absolute'. These must be respected in all circumstances for example, there must be no torture or cruel or inhuman degrading treatment of children. There is no permitted excuse or justification for example, for punishment or to protect the public from harm or to prevent offending.
- Other rights are 'limited'. This means that some rights can be denied, or at least partly denied or restricted, if there is justification (this is detailed in the UNCRC). For example, a child has a right to privacy, and to have freedom to associate and meet with friends, but such rights can be restricted if it is absolutely necessary to prevent public disorder or serious offending. But it is only permitted to restrict such rights to the extent that is necessary and no more. To quote the government in relation to human rights – you should not use a sledgehammer to crack a nut.
- One of the main themes of the UNCRC is that children and young people have a right to be heard and be taken seriously. A principle of participation in whatever affects them. Other main themes include the primary consideration of the child's welfare in all decisions about them, protection from harm and ensuring development (education, play, arts and culture).

The articles that are specially to do with the youth justice system can be interpreted as saying the child has the right to:¹

- not be subject to penal action for behaviour that was not prohibited in law when it occurred (this could include 'preventive' action)
- be presumed innocent until proven guilty according to law (this could include 'diversionary' and 'preventive' practices as well as formal criminal proceedings)
- be informed promptly of charges, through a parent/guardian when appropriate
- be provided with legal and other appropriate assistance
- be processed without delay, in a fair hearing according to law (this is not restricted to a 'court' – allowing for processes such as a Scottish Children's Hearing or a Youth Offender Panel), in the best interests of the child and with account taken of age, parents etc.
- not be compelled to give evidence or confessions and to have witnesses for and against, equally, with review/appeal available
- the availability of interpreters
- the full respect of privacy at all stages of proceedings (a matter attracting debate currently).

Other aspects have to do with obligations on the State, to:

- promote the establishment of a distinct youth justice system specifically for children
- establish a minimum age of criminal responsibility
- provide measures for dealing with children without resort to judicial proceedings, so long as rights and legal safeguards are respected ('diversion')

¹ This summary is taken from RHP Companion to Youth Justice, articles 40 and 37.

- provide a variety of dispositions as alternatives to 'institutional care' (including foster care, supervision orders etc) that are proportionate not only to the offence, but to circumstances.

But other aspects of the UNCRC are crucial to a youth justice system. To illustrate, the best interests of the child must be a primary consideration in all actions, courts and law (art. 3 – the 'welfare principle'), the child's views must be sought and given due weight, particularly in judicial proceedings (art. 12), separation from families must only be according to law and when in the best interests of the child (art. 9), appropriate assistance must be given to parents (art. 18) and children must be protected from cruel, degrading or inhumane punishment or treatment and from abuse (arts. 37 and 19). Other rights and State obligations are relevant to greater or lesser degrees but, particularly as disproportionately high use is made of custody in England and Wales (referenced in other chapters), the provisions of article 37 UNCRC are of importance. These oblige the government to ensure that:

- no child shall be deprived of liberty unlawfully or arbitrarily
- the arrest (and holding), detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time
- every child deprived of liberty shall be separated from adults (unless that is not in his or her best interests) and has the right to family contact.

Other rules, guidance and treaties relating to youth justice

The UNCRC gives us a comprehensive framework as introduced above. But for more detail of how to provide services for children and young people in the youth justice system (or the 'diversion' system) there are a number of other rules and standards that apply. These do not have the same legally binding nature of the UNCRC, but we are obliged to take them into account and not to act in contrary ways.

The most important are:

- The 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as the Beijing Rules)
- The 1990 United Nations Guidelines for the Prevention of Juvenile Delinquency (known as the Riyadh Guidelines)
- The 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (known as the Havana Rules).

These apply specifically to children. Other important instruments include:

- The 1990 Standard Minimum Rules for Non-custodial Measures (known as the Tokyo Rules)
- The 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The 1990 Basic Principles on the Treatment of Prisoners

- The 1957 Standard Minimum Rules for the Treatment of Prisoners (known as the Standard Minimum Rules)
- The 1966 International Covenant on Civil and Political Rights.

It is beyond the scope of this briefing to detail the content of these instruments but, with regard to custodial measures, the main principles of the Havana Rules can be outlined as follows.¹

Human rights standards and custody

- Deprivation of liberty should be a disposition of last resort and for the minimum period, and should be limited to exceptional cases.
- Juveniles should only be deprived of their liberty in accordance with the principles and the procedures of international law.
- The establishment of small open facilities is encouraged to enable individualised treatment and to avoid the additional negative effects of deprivation of liberty.
- Deprivation of liberty should only be in facilities which guarantee meaningful activities and programmes promoting the health, self-respect, and sense of responsibility of juveniles. The facilities should also foster their skills to assist them in developing their potential as members of society.
- The detention facilities should be decentralised to enable access and contact with family members and to allow for integration into the community.
- The care of juveniles deprived of their liberty is a social service of great importance.
- All juveniles deprived of their liberty should be helped to understand their rights and obligations during detention and be informed of the goals of the care provided.
- Juvenile justice personnel should receive appropriate training including child welfare and human rights.
- All juveniles should benefit from arrangements designed to assist them in returning to society.

The detail of the rules includes sections on arrest and awaiting trial; management of juvenile facilities; records; admission, registration, movement and transfer; classification and placement; physical environment and accommodation, education, vocational training and work; recreation; religion; medical care; notification of illness, injury and death; contacts with the wider community; limitations of physical restraint and the use of force; disciplinary procedures; inspection and complaints; return to the community and personnel.

To illustrate this, and give opportunity to reflect on how a participative approach with better communication with the child or young person can improve outcomes, the 'Contacts with the Wider Community' states:

'Every means should be provided to ensure that juveniles have adequate communication with the outside world, which an integral part of the right to fair and humane treatment

¹ Taken from Meuwese S. (2003) Kids Behind Bars. Amsterdam. Defence for Children International.

and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organisations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence.

Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel.

Every juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted, and should be assisted as necessary in order effectively to enjoy this right. Every juvenile should have the right to receive correspondence.

Juveniles should have the opportunity to keep themselves informed regularly of the news by reading newspapers, periodicals and other publications, through access to radio and television programmes and motion pictures, and through the visits of the representatives of any lawful club or organisation in which the juvenile is interested.¹

The youth justice system and compliance with children's human rights

The extent to which the youth justice system complies with the UN Committee on the Rights of the Child has been the subject of much attention in recent years. The main reason for that has been the criticism of the UNCRC which periodically considers reports on each of the world's countries and makes comment and recommendations.

The most recent report of the committee found much to praise in the UK as a whole, but with regard to youth justice was quite scathing, finding that in terms of the UNCRC the situation had been worsening in recent years.

Summing up the shortcomings, a coalition of children's charities and reform organisations reported:

- the convention as a whole is not incorporated into all law relating to children and, specifically, into youth justice
- the youth justice system does not comply with other international rules and guidelines
- the age of criminal responsibility is too low and should be raised 'considerably'
- the 'best interests of the child' principle is not reflected in all legislation and policies for children, notably in the youth justice system
- children can still be tried in adult courts
- deprivation of liberty is not being used as a measure of last resort and for the shortest appropriate period of time. It is being used for younger children, more children, lesser offences, for longer periods than appropriate
- children may still be detained with adults

¹ Havana Rules, 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Contacts with the Wider Community.

- young people of 17 years are considered as adults for arrest and remand purposes
- [there are] numerous [extreme] concerns relating to the treatment of children in detention
- the principle of non-discrimination is not fully implemented and unequal enjoyment of rights still exists.¹

The challenge for practitioners is therefore complex. But it is important to recognise the value of a children's human rights approach (or 'culture') and the particular application of Article 12 of the UNCRC to:

...assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Taking this further with regard to youth justice, the Riyadh Guidelines, for example, state:

For the purposes of the interpretation of these guidelines, a child-centred orientation should be pursued. Young persons should have an active role and partnership within society and should not be considered as mere objects of socialisation or control.²

1 Monaghan G, Hibbert P and Moore S (2003) *Children in Trouble: Time for Change*. London. Barnardo's.

2 For a fuller consideration of participatory rights and their relevance in youth justice, see also – Hodgkin R and Newell P (2002) *Implementation Handbook for the Convention on the Rights of the Child*. New York. UNICEF.