

**FAIR TRIALS  
INTERNATIONAL**

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Children's  
Rights Alliance  
for England

**Joint Position Paper**

**Joint position paper on the proposed directive on procedural safeguards for children suspected or accused in criminal proceedings**

**September 2014**

## **About CRAE**

Children's Rights Alliance for England (**CRAE**) is a membership body for organisations and individuals committed to our overarching aim: the full implementation of the UN Convention on the Rights of the Child (UNCRC). CRAE's vision is of a society where the human rights of all children are recognised and realised.

CRAE is the leading organisation working to promote children's rights in England. It protects the human rights of children by lobbying government and others who hold power, by bringing or supporting test cases, and by using national and international human rights mechanisms.

CRAE provides free legal information, raises awareness of children's rights, and undertakes research about children's access to their rights.

CRAE mobilises others, including children and young people, to take action to promote and protect children's human rights.

Each year CRAE publishes a review of the state of children's rights in England. This provides a non-governmental perspective on the progress made in England towards implementing the UNCRC.

## **About Fair Trials International**

Fair Trials International (**Fair Trials**) is a non-governmental organisation that works for fair trials according to internationally recognised standards of justice and provides advice and assistance to people arrested across the globe. Our vision is a world where every person's right to a fair trial is respected, whatever their nationality, wherever they are accused. Fair Trials pursues its mission by helping people to understand and defend their fair trial rights; by addressing the root causes of injustice through our law reform work; and through targeted training and network activities to equip lawyers to defend their clients' fair trial rights.

Working with the Legal Experts Advisory Panel ("LEAP") – a network of over 120 criminal justice and human rights experts including defence practitioners, NGOs (including JUSTICE) and academics from 28 EU countries - Fair Trials has contributed to the negotiations surrounding the adoption of the first three Roadmap Directives. In 2013, Fair Trials held a series of five meetings, including in London in July 2013, at which the challenges surrounding the implementation of the Roadmap Directives were discussed with over 50 members of LEAP. Fair Trials has also contributed to the implementation of the Roadmap Directives by training lawyers in the UK and other EU Member States at a series of courses during 2013.

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## Executive Summary

1. Criminal proceedings are a daunting prospect for all suspects. However, children are especially likely to be overwhelmed and damaged by the experience. They may be unable to follow or fully participate in the proceedings, which can seriously undermine their ability to receive a fair trial. They may also be subject to inappropriate treatment during the proceedings, which breaches their rights to be free from harm and can have long term impact on children's well-being. The proposed EU Directive establishing procedural safeguards for children suspected or accused in criminal proceedings (the "Children's Directive") provides a crucial opportunity to ensure that the basic rights of children are adequately protected.
2. The Children's Directive has the potential to clarify and adapt the rights protections currently being developed under the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the "Roadmap") for the most vulnerable class of suspects and defendants. This is necessary because:
  - a. law and practice regarding the treatment of children in criminal proceedings vary widely between EU Member States, and frequently do not comply with international standards;
  - b. the protection of child and other vulnerable suspects has been insufficiently developed in the context the adoption and implementation of the Roadmap; and
  - c. consistent compliance with international standards on such rights is key to the effective functioning of mutual recognition instruments and the free movement of people within the EU.
3. We warmly welcome the EU's commitment to ensure that "[s]uspects or accused who are children are recognised and treated with respect, dignity, professionalism, in a personal and non-discriminatory manner[...]"<sup>1</sup> In order to achieve this, however, the Children's Directive must provide more effective protection for important rights. We recommend in this paper a number of reforms to the text published by the European Commission on 27<sup>th</sup> November 2013<sup>2</sup> (the "Proposed Directive") and respond in detail to some of the proposals in the Council of the European Union's General Approach published on 22 May 2014<sup>3</sup> (the "General Approach"). These recommendations concern the following issues.
  - a. The **scope** of the Children's Directive should be maintained as broad as possible (see paras 14-15).
  - b. **Information** on rights, procedures and charges provided to children must be given in a child-friendly format (see paras 16-18).

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<sup>1</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM (2013) 822/2, para 6, available at: [http://www.ecba.org/extdocserv/projects/ps/20131127\\_PropEC\\_Children.pdf](http://www.ecba.org/extdocserv/projects/ps/20131127_PropEC_Children.pdf) (the "Proposed Directive").

<sup>2</sup> See note 1 above.

<sup>3</sup> Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings – General approach, 2013/0408 (COD), available at: <http://register.consilium.europa.eu/doc/srv?!=EN&f=ST%2010065%202014%20INIT/> (the "General Approach").

- c. **Parents or other appropriate adults** should be allowed a key role throughout the criminal proceedings (see paras 19-23).
  - d. Children's mandatory right to **access a lawyer** should be protected without derogations such as those proposed in Article 6a of the General Approach, and with sufficient legal aid (see paras 24-32).
  - e. Further detail should be provided regarding the required **individual assessment**, which should be protected from the proposed proportionality derogation. Member States should furthermore not be permitted to refuse requests for a medical exam as provided for in Article 8 (see paras 33-39).
  - f. All questioning of child suspects should be **audio-visually recorded** and this safeguard should not be limited on the basis of proportionality or the fact that the child has not been deprived of liberty (see paras 40-44).
  - g. Children's full **rights in detention** should be respected regardless of the length of that detention, and any exception to the prohibition on detaining children with adults should be interpreted narrowly and always in the best interests of the child (see paras 45-50).
  - h. Children's cases should be conducted not only with diligence and timeliness, but also with sensitivity to their assessed needs in order to allow them to **participate effectively** throughout the criminal proceedings (see paras 51-54).
  - i. Children's **privacy** in criminal proceedings should be protected and their best interests considered paramount in any decision to open criminal proceedings to media or other interested parties. This requires that any details that could identify a suspect must be kept confidential in any circumstance, and privacy protections should endure after the child reaches the age of 18 (see paras 55-58).
  - j. No child should be forced to attend a trial against his or her will, but the Proposed Directive should establish a clear framework with which Member States must comply following **in absentia trials** (see paras 59-60).
  - k. The entirety of the Children's Directive should also apply during **European Arrest Warrant** proceedings (see paras 61-63).
  - l. Member States should be required to collect all **data** necessary to assess whether or not the Children's Directive is being complied with, irrespective of whether such data is already being collected (see paras 64-65).
  - m. **Costs** incurred in order to comply with the Children's Directive should be borne by Member States and should not in any circumstances be passed on to child suspects or their families, irrespective of the outcome of the proceedings (see paras 67-68).
  - n. **Remedies** for violations of the Children's Directive should be made explicit (see paras 69-70).
4. With the adoption of these recommendations, the Children's Directive will have the power to function as a key safeguard of international standards on children's rights in the EU, and will contribute to the effective operation of mutual recognition based on mutual trust and free movement within an area of freedom, justice and security.

## Introduction: The need for legislation

5. While over 1 million children are estimated to be facing criminal justice proceedings in the EU each year,<sup>4</sup> the strength of the procedural safeguards upon which they can depend varies significantly between Member States. EU-wide action to address these inadequate and unequal protections for children is becoming increasingly necessary given the growing reliance on mutual recognition measures such as the European Arrest Warrant (**EAW**), which results in the extradition of thousands of EU citizens, including those under the age of 18, each year.
6. In this context, the Children's Directive represents an important next step in the EU's attempt to ensure adequate protection for defence rights under the Roadmap for strengthening procedural rights (the "Roadmap")<sup>5</sup> which has already delivered important protections through directives on the right to interpretation and translation (the "Interpretation and Translation Directive"),<sup>6</sup> the right to information on charges and rights (the "Right to Information Directive")<sup>7</sup> and the right of access to a lawyer in criminal proceedings (the "Access to a Lawyer Directive").<sup>8</sup> Strong Roadmap measures will help to avoid some of the injustice that otherwise results from continued participation in mutual recognition instruments such as the EAW without minimum defence safeguards in place across the EU. As the General Approach states, the law "should strengthen the trust of Member States in the criminal justice systems of other Member States and can thus help improve mutual recognition of decisions in criminal matters [...and] should also remove obstacles to the free movement of citizens throughout the territory of the Member States."<sup>9</sup>
7. We welcome the Children's Directive as having the potential to enhance significantly children's rights in criminal proceedings. The Roadmap states that "in order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for

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<sup>4</sup> European Commission, Impact Assessment accompanying the document Proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, SWD(2013) 480 final, available at:

[http://ec.europa.eu/justice/criminal/files/swd\\_2013\\_480\\_en.pdf](http://ec.europa.eu/justice/criminal/files/swd_2013_480_en.pdf).

<sup>5</sup> 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), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.

<sup>6</sup> 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, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:EN:PDF>.

<sup>7</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>.

<sup>8</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:EN:PDF>.

<sup>9</sup> General Approach, Recital 2.

example, to their age, mental or physical condition.”<sup>10</sup> This is of the greatest importance, given that the children involved in such proceedings tend to be society's most vulnerable and disadvantaged children, who face significant barriers in understanding proceedings and participating effectively, undermining their right to a fair trial, who can be traumatised by proceedings and the conditions they face during them, and for whom the ongoing impact of such proceedings can be immense - affecting their sense of self and future life chances.

8. The UN Committee on the Rights of the Child (the “UN Committee”) recognises the particular vulnerability of children in conflict with the law, and their very distinct situation, which demand that they be treated differently from adults in criminal proceedings. It has stated:

*“Children differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law. These and other differences are the reasons for a separate juvenile justice system and require a different treatment for children. The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”*<sup>11</sup>

9. Despite the importance of the protection of children’s rights in criminal proceedings, the standard of such protection varies considerably across the EU. A study recently published by the European Commission (the “Commission”)<sup>12</sup> has highlighted the following concerns:

- Despite the recommendation of international bodies, including the UN Committee and the Council of Europe, training of professionals on child-friendly justice rarely extends to defence lawyers. Further, in some Member States, there is no provision for training of professionals working with children in criminal justice proceedings.
- Not all Member States give child suspects the right to contact their parents or another person of trust when apprehended by the police.
- In some Member States, mandatory provision of legal representation is provided for children, while in others, the right to legal representation does not even apply at all stages of the proceedings.
- There is a significant variation in the maximum duration of pre-trial detention of child suspects across Member States, ranging from 3 months to 10 years.
- The protection measures available to children during interviews are not consistent across Member States. In several countries, there is no provision for adaptations to the physical environment in which the child is interviewed or for children to be accompanied by a parent or person of trust during interviews.

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<sup>10</sup> See note 5 above, Annex, Measure E.

<sup>11</sup> UN Committee on the Rights of the Child. *General Comment 10: Children’s Rights in Juvenile Justice*, April 2007, para 10, available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

<sup>12</sup> European Commission, Directorate-General for Justice, *Summary of contextual overviews on children’s involvement in criminal judicial proceedings in the 28 Member States of the European Union*, June 2014, available at: <http://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-criminal-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0313659/>.

- There are significant differences in the approach to balancing the right to privacy of children in criminal proceedings against the protection of freedom of information, with some countries making it obligatory for court hearings involving child suspects to be held in private while others restrict such privacy obligations to serious cases involving child victims and witnesses.
  - Member States adopt different approaches to the use of alternatives to formal judicial proceedings, such as victim-offender mediation, and the decision-making process leading to the use of such alternatives.
10. The existence of regional and international standards on safeguards for children in criminal proceedings has not resulted in robust protections for child suspects and accused in practice. As identified by the Commission in its Impact Assessment accompanying the Proposed Directive, international protections provided by the UN Convention on the Rights of the Child, are “very general and relate only to a limited extent to criminal proceedings” and “are rarely directly applicable”. Further, it points out that “[c]ensures of Member States by international monitoring bodies [...] have not been able to change the practice of Member States”.<sup>13</sup>
11. The European Court of Human Rights (the “ECtHR”) has found that Member States must ensure that children are able to “effectively participate” in their trial, by ensuring that the accused has a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed.<sup>14</sup> Further, the ECtHR has found that “[t]he right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police” and that “[t]he authorities must take steps to reduce as far as possible his feelings of intimidation and inhibition”.<sup>15</sup>
12. The Commission has, however, recognised that the application of the European Convention on Human Rights (the “ECHR”) and the judgments of the ECtHR have “developed in a piecemeal and ad hoc way and results in diverging interpretations” resulting in standards protecting children remaining “legally uncertain and difficult to access”. The standards established by the ECtHR in relation to the treatment of children in conflict with the law are not comprehensive – they only address some aspects of a child’s experience. Furthermore, the absence of any effective enforcement mechanism means that rulings of the ECtHR are not always implemented. Taken together, the Commission suggests that these issues emphasise “the insufficiency of relying only on the ECtHR to ensure sufficient protection of vulnerable persons in the EU criminal justice area as being developed under the Roadmap”.<sup>16</sup>

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<sup>13</sup> See note 4 above, page 13.

<sup>14</sup> *SC v the United Kingdom*, App. No. 60958/00, 15 June 2004, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61826>.

<sup>15</sup> *Panovits v Cyprus*, App. No. 4268/04, 11 March 2009, para. 67, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-90244>.

<sup>16</sup> See note 4 above, page 14.

13. Rights that are enshrined in law are simply not being respected on the ground. The Children's Directive stands to fill the gap in existing legal instruments by reinforcing the message that the right to a fair trial, both in law and in practice, must include the ability of children and other vulnerable suspects to participate effectively in criminal proceedings, and must establish minimum standards to protect children from the unnecessarily harmful treatment which would breach their other human rights.

## **Comments on the Proposed Directive and the General Approach**

### ***Scope and Definition***

14. We welcome the comprehensive scope of the Proposed Directive, applying from the very start of a child's engagement with the criminal justice system, for all offences and for all children under the age of 18 and some beyond the age of 18.
15. We are however concerned by the Council's suggestions in the General Approach that the scope of the Proposed Directive should be narrowed so that:
  - a. It applies from when children are "made aware by the competent authorities that they are suspected or accused" rather than when they actually become suspected or accused, meaning that there is no obligation upon the competent authorities to give consideration to the rights of the child and the most appropriate course of action from the moment the child becomes a suspect or accused (Article 2(1), General Approach).
  - b. Its scope ends specifically with "the final determination of the question whether the suspect or accused person has committed the offence", meaning that the safeguards would not apply to the communication of the final determination to the child which should be done in such a manner so as to ensure that the child has fully understood the outcome (Article 2(1), General Approach).
  - c. Member States are merely encouraged, but not required, to ensure that the safeguards provided by the Proposed Directive are available to suspects over the age of 18 in circumstances where suspects were children when proceedings were begun (Article 2(3) and Recitals 8 and 10, General Approach).
  - d. It does not apply to minor offences, meaning that despite the impact that all criminal proceedings and sanctions may have, the protections in the Proposed Directive would only apply in relation to more serious offences (Article 2(5a) and 2(6) and Recitals 11a to 11d, General Approach). This is entirely inappropriate, given that none of the existing human rights standards setting out children's fair trial rights or rights to be protected from harm make any distinction between different categories of offence.

***We recommend that the safeguards to be guaranteed under the Proposed Directive which ensure that children are able to participate effectively in any criminal proceedings and protected from harm are so important that limitations on the scope of those safeguards proposed in the General Approach should be resisted.***

### ***Provision of Information***

16. The provision of information about rights and charges is crucial to the ability of all suspects to exercise their fair trial rights and to prepare an effective defence. We therefore welcome the inclusion of a specific right to information for children in Article 4 of the Proposed Directive, particularly in light of the obligations with which all Member States must now comply under the Right to Information Directive.
17. We are however surprised by the lack of reference to certain additional safeguards which are required when providing information to child suspects so as to ensure that such information is delivered in a format suitable to their age and abilities and is fully understood (provided that this does not delay the provision of information). Article 3(2) of the Right to Information Directive requires that the provision of information must take into account the “particular needs of vulnerable suspects”. The UN Committee has been clear that “[t]he child should be informed in a language he/she understands. This may require a presentation of the information in a foreign language but also a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand”.<sup>17</sup> The Committee of Ministers of the Council of Europe’s Guidelines on child friendly justice (“Committee of Ministers’ Guidelines”) provide that “information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture- sensitive”.<sup>18</sup> By way of example, according to the recent Commission report, 12 Member States require that information is provided in a “child-friendly format”.<sup>19</sup>
18. In addition to the rights listed in Article 4, child suspects should also be informed of their rights to have adaptations to the way court proceedings are conducted, to access appropriate support services, and how to complain about their treatment during criminal proceedings.

***We recommend that more detail should be included in Article 4 of the Proposed Directive so as to ensure that there is an obligation to provide information to a child suspect in a manner that he or she can understand.***

### ***Role of parents and/or appropriate adult***

19. Holders of parental responsibility (or another adult where appropriate) have a key role to play in supporting children facing criminal proceedings. Indeed, the UN Committee has suggested that “[p]arents or legal guardians should [...] be present at the proceedings because they can provide general psychological and emotional assistance to the child” and that it recommends that States parties should “explicitly provide by law for the maximum possible involvement of parents or legal guardians in the proceedings against the child”.<sup>20</sup> It is therefore encouraging

<sup>17</sup> See note 11 above, para 47.

<sup>18</sup> Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, November 2010, Para A(1)(2), available at: [http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20\\_4\\_.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf).

<sup>19</sup> See note 12 above, page 21.

<sup>20</sup> See note 11 above, paras 53-54.

that the Proposed Directive recognises the importance of having a parent or appropriate adult involved in proceedings.

20. While we welcome the provisions of the Proposed Directive which require that holders of parental responsibility (or another adult where appropriate) are provided with information (Article 5) and entitled to accompany the child to court hearings (Article 15), the Proposed Directive should provide for the right of a child to meet with the holder of parental responsibility promptly following arrest or detention and to have such adult present during interviewing. The Committee of Ministers' Guidelines provide that "[s]ave in exceptional circumstances, the parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody and be asked to come to the station [...] A child who has been taken into custody should not be questioned in respect of criminal behaviour, or asked to make or sign a statement concerning such involvement, except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child trusts".<sup>21</sup>
21. We are also concerned by the Council's attempts to weaken the safeguard in Article 5 of the General Approach by suggesting that information need only be provided to the holder of parental responsibility (or another adult where appropriate) "as soon as possible" rather than the less ambiguous "promptly" suggested by the Commission in the Proposed Directive.
22. The Council's amendments to Articles 5 and 15 set out in the General Approach are useful to the extent that they provide a framework within which a determination should be made as to whether the holder of parental responsibility or rather another appropriate adult should be provided with information and/or entitled to accompany the child to court hearings. The proposed framework is, however, incomplete, as neither Article 5 nor Article 15 of the General Approach specifies who should be responsible for making this determination and what level of involvement the child has in the decision-making process.
23. We are also concerned by the Council's inclusion of an exception from providing information to the holder of parental responsibility where such provision "could jeopardise the criminal proceedings" (Article 5(2)(c), General Approach). While it is conceivable that there might be situations in which the holder of parental responsibility is suspected of being involved in the commission of the offence in question, this exception is too broad and could also be used to justify a decision not to inform the holder of parental responsibility where to do so could delay the proceedings or impact on the child's decision to exercise the rights to which he is entitled. Similarly, we have concerns about the broad discretion given to the court in Recital 29a of the General Approach to determine that the adult chosen by the child to accompany them to the hearing "is not acceptable".

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<sup>21</sup> See note 18 above, Para C(29)-(30).

**We recommend that: (a) the role of the holder of parental responsibility (or another adult where appropriate) should be extended to ensure that child suspects have the right to meet with the adult in question at key stages during the proceedings and be accompanied by them during questioning; (b) further detail is provided as to who is responsible for making the decision that it should be another appropriate adult rather than the holder of parental responsibility who becomes involved in the proceedings; and (c) inappropriate restrictions on the right for the holder of parental responsibility to be involved in the proceedings should be removed.**

### ***Access to a lawyer and legal aid***

#### **a) Absolute Right to Access a Lawyer**

24. For all suspects and accused, prompt access to legal advice upon arrest is crucial in order to ensure that fair trial protections are effective in practice and that any period of detention in custody is lawful. The presence of a lawyer at the police station and during police interrogation not only guarantees that suspects are aware of and able to exercise their rights; it also helps ensure that those rights are not infringed through ill-treatment or threatening behaviour by police officers. Further, the presence of a lawyer offers a protection for the police from unfounded complaints of rights violations.
  
25. Access to a lawyer should be provided throughout the proceedings and, at the very least, at every moment during which the Access to a Lawyer Directive requires access to be provided. We are therefore concerned about the derogations proposed by the Council in Article 6a of the General Approach which serve to limit the right of access to a lawyer when:
  - a. the grant of access to a lawyer would be disproportionate;
  - b. any deprivation of liberty is only likely to last for a short period of time;
  - c. there is an unreasonable delay in the lawyer's attendance;
  - d. there is an urgent need to avert serious adverse consequences for life, liberty or physical integrity of a person; and
  - e. immediate action is imperative to prevent substantial jeopardy to the criminal proceedings.
  
26. Despite the Council's claim in Recital 16 that "[i]n no way this Directive can limit the rights provided for in [the Access to a Lawyer] Directive", the derogations set out in Article 6a certainly provide a lower level of protection of the right of access to a lawyer for child suspects. The proposed proportionality derogation, in particular, does not exist in the Access to a Lawyer Directive. This creates a clearly unacceptable and inappropriate situation for a specifically vulnerable class of suspects who benefit from the rights guaranteed by the Access to a Lawyer Directive in any event, and in fact should enjoy enhanced rights protection. Furthermore, the Council's proposed "delay" derogations contravene the CPT Standards, which require that any

### Case study: Lithuania

In April 2013 two Afghan boys were apprehended crossing the Lithuanian border from Belarus. Both boys claimed to be minors and sought asylum. Despite a specific clause in the Criminal Code which prevents prosecution of asylum-seekers, the boys were charged with illegal border-crossing and placed in pre-trial detention.

As non-Lithuanian speakers the boys were classified as a mandatory defence case and received a state funded legal representative. However, the case demonstrates the need for specialist training for counsel defending children. The state-appointed lawyer did not appeal the boys' placement in pre-trial detention at any point (the detention was twice extended). The boys were also encouraged not to challenge the charges, resulting in their conviction under summary proceedings.

Fortunately at this stage the case was taken over by the Lithuanian Red Cross Organisation who appealed the court decision. The boys were acquitted at the end of September 2013. Both boys spent over 100 days in pre-trial detention in an adult remand prison which is known for having the worst conditions of all remand centres in Lithuania, as the test, which is known to be unreliable, indicated their age at 20-24 years.

practice.

possible delay to the ability of a suspect to exercise the right to a lawyer "should be clearly defined and their application strictly limited in time."<sup>22</sup>

27. While the ECtHR has left open the possibility that derogations from the obligation to grant access to a lawyer may be permissible where "compelling reasons" exist,<sup>23</sup> it is notable that no such "compelling reasons" have been found by the ECtHR to date and we consider it unlikely that such a situation would be found to exist in the case of a child given their particular vulnerability. We therefore fear that the Council's proposals would entrench a lower legal position in EU law than will ultimately be clarified to exist under the ECHR.

#### **b) Mandatory representation by a qualified lawyer**

28. Article 6 of the Proposed Directive requires that children should have mandatory access to a lawyer, subject to the limitations set out in Recitals 17 and 18, and that this right cannot be waived. We agree that child suspects' right of access to a lawyer is inalienable and that there are no situations in which Member States should be able to refuse this access.

29. There are widespread and well-founded concerns regarding the pressure exerted on suspects to waive their right of access to a lawyer in order to ensure that proceedings are brought to a swift conclusion and the special vulnerability of children to the coercive power of police and prosecutorial authorities. In light of the extensive challenges involved in ensuring that a child's waiver of the right to a lawyer is valid, we agree with the Commission's view that mandatory representation is the best way of ensuring that the right to access a lawyer, and indeed many other rights, are safeguarded in

<sup>22</sup> European Committee for the prevention of torture and inhuman or degrading treatment or punishment, CPT Standards, para 37, available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>

<sup>23</sup> *Salduz v Turkey*. App. No. 36391/02, 27 November 2008, para 55, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89893>.

30. In order to ensure that such mandatory representation does not itself pose a threat to rights protection due to inadequate legal assistance, it is imperative that child suspects have access to qualified defence lawyers with specialist training in defending children wherever possible (as discussed in more detail in paragraphs 62-63 below). Resources should be devoted to training defence lawyers in particular issues related to the defence of children in conflict with the law and where possible, court-appointed representation of children should be restricted to lawyers who have received such training.

### **c) Legal aid**

31. We welcome Article 18 of the Proposed Directive, which ensures that children will have access to legal aid sufficient to guarantee their rights of access to legal representation provided by Article 6. The Commission's proposal for a directive on legal aid, published simultaneously with the Proposed Directive, reflects a growing recognition of the need to create minimum standards, particularly for legal aid in the earliest stages of the criminal proceedings.

32. In light of this, Article 18 of the General Approach, which states that it is "without prejudice to national law with regard to legal aid," is of great concern, given that it suggests that the Charter and the ECHR are sufficient to guarantee this crucial right while the Commission's Impact Assessment on the proposed directive on legal aid clearly states that:

*"The existence of these common standards in the ECHR has proved not be sufficient to achieve the necessary level of mutual trust between EU Member States that is required for a smooth functioning of the area of justice. In fact, despite common European and international standards, the national rules and practices on legal aid in criminal proceedings still display such divergences so that there are considerable shortcomings in the protection of the right to legal aid."<sup>24</sup>*

**We recommend that: (a) child suspects' right to access a lawyer should be absolutely protected, and the derogations to the right of access to a lawyer proposed by the Council should be strongly resisted as they fall below the standards set in the Access to a Lawyer Directive; (b) child suspects should be entitled to waive the right to legal representation on the basis that they are provided with mandatory access to legal consultation and any such waiver is established in an unequivocal manner and attended by minimum safeguards; and (c) the Council's proposal to allow Member States to determine the extent to which child suspects are entitled to legal aid should be resisted.**

### ***Individual assessment and medical examination***

#### **a) Individual assessment**

33. The appropriateness of criminal proceedings, the way in which proceedings are conducted and the support and treatment provided to children throughout such proceedings should be based

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<sup>24</sup> European Commission, Impact Assessment accompanying the proposal for measures on legal aid for suspects or accused persons in criminal proceedings, page 6, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0476&from=en>.

on a thorough and multidisciplinary assessment of their circumstances and needs, including any medical needs. We therefore welcome the inclusion in the Proposed Directive of obligations for Member States to ensure that children have the right to both an individual assessment (Article 7) and a medical examination in circumstances where they are deprived of their liberty (Article 8). These assessments are a crucial step in determining what adaptations to the proceedings are required in order to ensure that the child in question can participate effectively and to identify other specific needs of the child which must be met in order to keep the child safe and protect the child from harm. Where a child is in conflict with the law, this is a strong indicator that the child is likely to be in need of support and protection from the authorities. For example, a high proportion of children who are in conflict with the law [in England] have experienced neglect, abuse and/or bereavement in the past.<sup>25</sup>

34. While the purposes of the individual assessment are well-articulated in Recital 19, we recommend that Article 7 should provide further detail regarding the obligation to conduct an individual assessment, including by:

a. specifying who has responsibility for carrying out the assessment, which in our view should be a multidisciplinary team involving professionals from different sectors, including education and social services representatives and not just those responsible for the conduct of the investigation and/or prosecution.<sup>26</sup> The UN Committee has said that:

*“Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.”<sup>27</sup>*

b. identifying the scope of such assessments, which should at the very least take into consideration the age, maturity, personal characteristics, intellectual and emotional capabilities, economic and social background of the child; and

c. explaining how the results of the individual assessments should be used and by whom, which we think should be restricted to being used solely for the purpose of protecting the best interests of the child both during and following the criminal proceedings and should

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<sup>25</sup>See, e.g. “Punishing Disadvantage: a Profile of Children in Custody,” Penal Reform Trust 2010, pp 47-73. Available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/PunishingDisadvantage.pdf>.

<sup>26</sup>Examples of best practice in this regard can be found in several Member States, including the use of District Councils on Youth Assistance/Committees for Special Youth Support in Belgium and the use of Youth Offending Teams in the UK, as set out in the report at note 11 above, page 16.

<sup>27</sup>UN Committee on the Rights of the Child, *General Comment 14: on the right of the child to have his or her best interests taken as a primary consideration*, May 2013, para 94, available at: [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

prohibit the use of any evidence collected during the course of the individual assessment as evidence against them in the merits trial.

35. We are concerned by the Council's proposed amendment to Article 7(3) in the General Approach, which would enable the individual assessment to be delayed until such time as it could still be "taken into account by the court when sentencing". This demonstrates a fundamental misunderstanding of the purpose of the assessment, clearly stated in Recital 19 of the Proposed Directive, which includes facilitating the determination of "if and to what extent they would need special measures during the criminal proceedings" and whether or not the child needs support to protect him or her from harm, which would come far too late if only made in time for sentencing. We therefore recommend that the Council's proposal regarding the timing of the individual assessment be strongly resisted.
36. The suggestion in Article 7(7) of the Proposed Directive that there may be no need to carry out an individual assessment in certain circumstances where it is not considered to be proportionate is a cause for concern. Given the importance of such an assessment for determining the appropriate manner in which to proceed with the case and to protect the rights of the child to be protected, it is difficult to conceive of a situation when this would ever be disproportionate. Further, the Proposed Directive does provide that the "extent and detail" of the assessment may be varied according to the circumstances of the case which should be sufficient to address proportionality concerns while still ensuring that an assessment still takes place in every case. The UN Committee has been clear that an individual assessment of a child's circumstances and needs is essential in order to comply with the child's rights to make his or her best interests a primary consideration.<sup>28</sup> We therefore recommend that the proportionality derogation is removed.

**b) Medical examination**

37. Article 8 of the Proposed Directive requires that child suspects should have "access" to a medical examination but does not specify whether such an examination should be carried out as a matter of course. While it is important for the competent authorities to be alert to indications that a particular child may be in need of medical attention, as reflected in the Council's proposed drafting in Article 8(2) of the General Approach, this must be balanced by an ability of the child or his/her lawyer to refuse such an exam.
38. The suggestion in the General Approach that a request for a medical examination may be refused "if it is obvious that such request has been made with the sole purpose of delaying the criminal proceedings" is of concern, particularly in light of the CPT Standards, in which the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment requires that:

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<sup>28</sup> See note 27 above, para 48.

*“Persons in police custody should have a formally recognised right of access to a doctor. In other words, a doctor should always be called without delay if a person requests a medical examination; police officers should not seek to filter such requests.”<sup>29</sup>*

39. The Council’s proposal makes no reference to who would be responsible for making the almost impossible determination that a request is for the sole purpose of delaying proceedings, not least because a child’s medical needs may not be immediately apparent and because a medical examination is intended, as per the Commission’s proposal, to “assess the general mental and physical condition of the child with the aim to determine the capacity of the child to face questioning or other investigative or evidence gathering acts or any measures taken or envisaged against the child”. It is therefore in the interest of the authorities as well as the child that such examinations take place. The Council’s proposal in this regard should be strongly resisted.

**In relation to individual assessments, we recommend that: (a) further detail should be provided on who conducts them, their scope and how the findings are to be used, (b) the Council’s suggestion that individual assessments can be conducted later in the proceedings provided they are completed in time to inform sentencing should be resisted, and (c) the proportionality derogation from the obligation to conduct an individual assessment should be deleted.**

**In relation to medical examinations, we recommend that: (a) the best interests and wishes of the child should always be taken into consideration when determining whether to conduct a medical examination, particularly where the child is resisting such examination, and (b) the Council’s proposal that requests for medical examinations may be refused where deemed to have been made with the “sole purpose of delaying criminal proceedings” should be resisted.**

#### ***Questioning and Audio-visual recordings***

40. The process of questioning is one during which children are potentially most vulnerable and therefore robust safeguards must be in place to protect them at this stage in the criminal proceedings. Article 9 of the Proposed Directive is therefore welcome.
41. The suggestion that audio-visual recording is not necessary where it would be disproportionate, however, is concerning, not least because once facilities are in place for such recording to take place, it is difficult to conceive of a situation in which its use would be disproportionate. Derogations based on proportionality have not been deemed appropriate in relation to other rights which the Roadmap Directives have guaranteed, such as the right to interpretation, the right to information and the right of access to a lawyer so we consider that it would be unacceptable to limit this important safeguard in this way.
42. In order to strengthen the protection offered by Article 9 of the Proposed Directive, we recommend that:
- a. where possible, the audio-visual record should be expanded to include discussions which take place before and after the interview with law enforcement officials which may influence

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<sup>29</sup> See note 22 above, para 42.

the child's behaviour during the questioning, in order to obtain a comprehensive record of the proceedings; and

- b. the reference in Recital 23 to the need to ensure that "questioning of children should be carried out in a manner that takes into account their age and level of maturity" should be incorporated into Article 9 as an operative provision upon which children and their representatives can rely, and should also refer to any specific needs of the child (e.g. learning disabilities). Adaptations to the manner of questioning may be deemed necessary, in light of the individual assessment conducted in Article 7, and might include a change in the layout of the interviewing room, the language used by those conducting the interview and the presence of the holder of parental responsibility or another appropriate adult. As such, there should be a clear obligation on Member States to take any such necessary action.
43. We are concerned by the Council's proposed amendments to Article 9 in the General Approach which seek to limit the obligation for Member States to audio-visually record interviews with children such that:
- a. there is no obligation upon Member States to audio-visually record interviews when the child is not deprived of liberty, provided that the facilities are available (Article 9(1), General Approach);
  - b. Member States are only required to audio-visually record interviews when the child is detained and when (i) it would not be disproportionate to do so (Article 9(2), General Approach), and/or (ii) a lawyer is present;
  - c. Member States may derogate from the requirement to audio-visually record interviews when "an unforeseeable technical problem renders it impossible to make such recording" and questioning is imperative to prevent "serious adverse consequences for the life, liberty or physical integrity of a person" or "to prevent substantial jeopardy to criminal proceedings"; and
  - d. there is no reference, even in the Recitals, to the need for questioning to be carried out "in a manner that takes into account their age and level of maturity".
44. These derogations should be resisted for the following reasons:
- a. when considering the audio-visual recording of interviews with children, the distinction between children who have been deprived of their liberty and those who have not is an arbitrary and irrelevant one, given that any such questioning places the child in a vulnerable situation (albeit more so when accompanied by the deprivation of liberty) and once the facilities have been put in place, it is unclear why there should be any need to limit their use in this way;
  - b. comments regarding the proportionality derogation in paragraph 39 above apply equally to the General Approach; and our
  - c. the quality of legal representation, and particularly state-provided legal representation, varies significantly both between and within Member States. Furthermore, particular expertise may be required in order for criminal lawyers to effectively assist juveniles. The right of access to a lawyer is meaningless if the legal assistance provided is ineffective. Children should therefore be entitled to audio-visual recording during interviewing, not only as a means of protecting them from infringements of their rights by the interviewers but also from the impact of inadequate advice from their legal representatives. This will help to avoid

a situation in which a child may become even more vulnerable in the presence of a lawyer of poor quality due to the absence of an audio-visual record.

**We recommend that: (a) the proportionality derogation from the obligation to audio-visually record questioning with children should be removed, (b) the audio-visual recording, where possible should capture not only the period of questioning but also law enforcement contact which takes place prior to and following the interview in order to present a complete record of the proceedings, (c) the requirement for the manner of questioning to be tailored to the particular needs of the child should be included as an operative provision in Article 9 rather than in the recitals, and (d) the Council's proposed limitations to the audio-visual recording of questioning should be resisted.**

### ***Deprivation of liberty***

45. Articles 10, 11 and 12 of the Proposed Directive provide crucial protections for children against the harmful impact of detention. In particular, we welcome the provisions emphasising that detention is a measure of last resort and that alternatives to detention should be taken wherever these are in the best interests of the child. These protections could and should, however, be strengthened.
46. While the Proposed Directive, like the UN Committee, allows for detention with adults where in the child's best interests, we recommend that this exception should be interpreted in line with the UN Committee's guidance that this exception should be interpreted narrowly, and not for the convenience of the Member State in question.<sup>30</sup> We are concerned by the proposed weakening by the Council of the obligation regarding separate detention which would allow for children to be detained with young adults (undefined but for a weak suggestion in Recital 24a that it should include individuals up to the age of 24) in certain circumstances. This should only be permitted where in the best interests of the child, in line with the derogation included in Article 12(1) of the Proposed Directive, and not for any other reason such as convenience for the Member State authorities.
47. Further, that section of the Proposed Directive that deals with children's ongoing rights when deprived of their liberty should cover a broader set of goals than are currently listed in Article 12(2), which should be expanded. The UN Committee has set out the minimum standards in relation to the conditions in which children may be deprived of their liberty. These provide that,
  - a. the child should be placed in a facility that is as close as possible to the place of residence of his/her family;
  - b. children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;
  - c. restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted;

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<sup>30</sup> See note 11 above, at para 85.

- d. any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned; and
- e. children should have access to accessible, child-friendly, timely and effective complaints mechanisms when deprived of their liberty and places in which children are deprived of their liberty should be subject to independent inspection.<sup>31</sup>

48. The Committee of Ministers' Guidelines also provides that:

*"In addition to other rights, children in particular should have the right to...receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport;... access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status."*<sup>32</sup>

49. In light of these standards and guidelines, the list of aims in Article 12(2) should also include measures to, for example:

- a. prevent violence and treatment which undermines the child's dignity (including strip-searching, the use of handcuffs and restraints, corporal punishment or solitary confinement);
- b. ensure the right to play;
- c. ensure that children have access to appropriate complaints mechanisms and that places

where children are detained are subject to independent inspection; and

- d. ensure respect for the freedom of religion.

**Case study: Hungary**

A 16 year old boy was held in pre-trial detention for more than four months on allegations of burglary (theft of an iron and food from empty houses and yards). O.G. has explained that he stole the items to help support his pregnant girlfriend, and the thefts were committed together with his girlfriend's father. He was arrested in the hospital where he was visiting his newborn child. He had no prior offences. In addition to his detention, O.G. was prohibited by the court from contacting his girlfriend, which kept him from having contact with their child as well, resulting in total isolation from his family ties.

50. The Council's proposed limitations to the protections provided by Articles 10 and 12 of the Proposed Directive should be resisted as follows:

- a. a child should always retain the right to request a review of his or her detention, irrespective of whether a periodic review "is already being carried out *ex officio* by the court" (Recital 25a, General Approach) as part of the commitment to ensure that every opportunity is provided for consideration of whether or not detention remains "a measure of last resort" and has not extended beyond "the shortest appropriate time";

- b. children should only be detained with young adults where such detention complies with the

<sup>31</sup> See note 11 above, para 89.

<sup>32</sup> See note 18 above, Para A(21).

requirements of Article 12(1) of the Proposed Directive by being in the child’s best interests; and

- c. the right for children to receive treatment which respects their rights when deprived of liberty should not be restricted where deemed disproportionate or inappropriate given the vulnerability of children in all situations of detention and the fact that these are human rights which a child does not lose when deprived of their liberty, including the provision of education, medical support, communication with family members and the need to consider future integration into society, even when the child is detained only for a short period. The UN Committee confirms that special treatment for children in detention should be “observed in **all** cases of deprivation of liberty” (emphasis added).<sup>33</sup>

**We recommend that: (a) any exception to the prohibition on detaining children with adults should always be interpreted narrowly and always be in the best interests of the child, (b) children should always have the right to request a review of their detention, irrespective of whether the Member State provides for periodic review, (c) the list of special treatments provided by Article 12(2) should be expanded, and (d) children in detention should enjoy treatment which respects their rights irrespective of the length of that detention.**

#### ***Timely and diligent treatment of cases***

51. Article 13 of the Proposed Directive recognises the need for criminal proceedings involving children to be treated as a matter of urgency and with due diligence. It also requires that Member States treat children in a manner appropriate to their individual needs and circumstances which is critical to ensuring effective participation. Given that the child’s needs and circumstances will be determined through an individual assessment, we recommend that Article 13 should make reference to the outcome of the assessments conducted in accordance with Articles 7 and 8.
52. The Council’s deletion of Article 13(2), which requires that children be treated in a manner appropriate to their individual characteristics and needs, demonstrates a failure to recognise the importance of adapting the manner of the criminal proceedings as necessary so as to guarantee effective participation. While we note that this provision has been moved to Recital 27a of the General Approach, the centrality of the

#### **Case study: Malta**

James Milton (not his real name), then a 16 year old from the UK who had recently moved with his mother to Malta, was arrested and taken to a police station where he was questioned aggressively for over four hours, without a lawyer or other appropriate adult present. His mother was refused entry to the interview room despite her presence at the police station and her frequent requests to see her son. Before James was released from the police station his passport was seized and held for over a year.

James’ trial did not commence for a year. He was acquitted of all charges, the Court finding that his accuser’s testimony was “filled with doubts and half truths” and the evidence to support the prosecution case was “grossly lacking”. Nonetheless, the police appealed and retained possession of his passport until the case was eventually dropped.

<sup>33</sup> See note 11 above, para 89.

principle of “effective participation” to the ECtHR’s jurisprudence of the protection of the fair trial rights of child suspects dictates that this should remain within the operative provisions of the Proposed Directive. Without this right, a child involved in proceedings stands no chance of a fair trial.

53. International and regional bodies support this approach. The UN Committee has emphasised the importance of this right, saying

*“A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Article 14 of the Beijing Rules provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself/herself freely. Taking into account the child’s age and maturity may also require modified courtroom procedures and practices.”<sup>34</sup>*

54. The Committee of Ministers’ Guidelines additionally explain that cases involving children should be dealt with in non-intimidating and child-sensitive settings and using specialist courts, procedures, and institutions wherever possible; that court sessions involving children should anticipate regular breaks and a minimum of disruption and distraction so as to facilitate child suspects’ attention and understanding; that children should be familiarised with the layout of the court and the roles and identities of involved officials; and that interviewing and waiting rooms should be arranged in a child-friendly environment.<sup>35</sup>

**We recommend that (a) Article 13 should make reference to the findings of the individual assessment in Article 7 and the medical examination in Article 8, and (b) the requirement for children to be treated in a manner appropriate to their special needs, maturity and level of understanding should remain within the operative provisions of Article 13 and should not be relegated to a Recital.**

### ***Protection of privacy***

55. We welcome Article 14 of the Proposed Directive, which recognises child suspects’ right to privacy and the need to protect child suspects from the harms and prejudices of undue publicity. At the same time, we also recognise the importance of open justice as a fundamental element of the rule of law and public integrity, and a principle that often functions not to prejudice, but to safeguard the rights of suspects when courts and prosecutors act in overbearing or unlawful ways. However, we also note that openness must sometimes be subjected to other interests, such as children’s ability to effectively participate in the trial without being intimidated by media or public interest, and the interest in the eventual rehabilitation of child suspects. As noted in the Proposed Directive, the need for a heightened

<sup>34</sup> See note 11 above, para 46.

<sup>35</sup> See note 18 above, paras 54-63.

level of protection for the right to privacy with regard to child suspects has been acknowledged by the ECtHR<sup>36</sup> and the Beijing Rules.

**Case study: United Kingdom**

'Sean' has been living with the consequences of being 'named and shamed' as a member of teenage gang that was terrorising a neighbourhood for over 5 years. The publicity of Sean's identity and picture not only caused him to experience hostility in his community and from his own family members but he has been attacked in the street and harassed on multiple occasions. His grandmother was door stopped with press and when she moved home to avoid the harassment, Sean was left homeless as she wouldn't take him with her for fear the press would follow. His dysfunctional life was made considerably harder through the publicity surrounding his ASBO and he does not want other young people to experience such hardship. In his experience, 'naming and shaming makes everyone against you'.

56. The drafting of Article 14 of the Proposed Directive could be improved to better reflect the balance that must be struck between the importance of open justice and the need to protect the privacy of child suspects. The Proposed Directive's requirement that all criminal proceedings involving children, save exceptional cases, should be held in private, is overbroad and does not fully recognise the important role that open justice plays in the protection of rights and a fair criminal justice system. However, the Council's General Approach is unacceptably weak, leaving it to Member States to determine how best to ensure the protection of the privacy of children during criminal proceedings. Recital 28 of the General Approach, which recommends a "balancing approach" that could involve measures short of the total closure of proceedings to the public, such as protecting the personal characteristics, images and identity of the child, goes some way in guiding Member States, but is neither sufficiently clear nor enforceable.

57. We therefore recommend that the drafting of Article 14 reflect a general principle of confidentiality of juvenile court proceedings, while acknowledging that the public interest may be served in some limited circumstance by opening proceedings (or some portion of the proceedings) to the media or interested third parties (such as NGOs, researchers and monitoring groups), where doing so is in or does not conflict with the best interests of the child. For example, where the best interests of the child dictate, the examination and cross-examination of a child suspect should be carried out in closed proceedings while other parts of the proceedings might be conducted in public.

58. However, even where some portion of proceedings are open or reported on by media, Article 14 should make clear that protection of the best interests of the child always requires an explicit ban on publication (including publication by media and third parties) of any details that make it possible to identify the child, and by the confidentiality of court records relating to the proceedings. The confidentiality of such records should endure after the child turns 18.

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<sup>36</sup> *T v. UK*, App. No. 24724/94, 16 December 1999, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58593>.

**We recommend that (a) criminal proceedings involving child suspects should, as a rule, take place in the absence of the public, except in limited circumstances where opening proceedings to the media or other interested parties is in the best interests of the child, (b) Article 14 should specifically prohibit third parties from publicising details capable of identifying child suspects, (c) the privacy protections should endure after the child reaches the age of 18, and (d) the Council's suggestion that the competent authorities should be permitted to disseminate public information about the child suspect in certain circumstances should be strongly resisted.**

#### ***Right to appear in person at the trial***

59. We acknowledge the overriding importance of the right of child suspects to be present at trial as well as their right to waive that presence with appropriate safeguards. This is particularly important given the potential harm which could be caused to the child by participating in court-based procedures. We therefore welcome the Council's proposal in Article 16(1) of the General Approach that children should have the right to be present at trial and such presence should be promoted and facilitated, but that they will not be forced to attend against their will.
60. We do, however, have concerns about the Council's proposal in Article 16(2) of the General Approach that the remedies for failure by a Member State to comply with the requirements of Article 16(1) should be determined by Member States themselves. The widespread concerns surrounding trials conducted *in absentia* have already been addressed through EU legislation, in the EAW Framework Decision and the proposed directive on the presumption of innocence and the right to be present at trial in criminal proceedings,<sup>37</sup> and as such there exists a framework which could be used to determine the obligations for Member States in this regard.

**We recommend that (a) child suspects should not be required to attend their own trial against their will, and (b) precise guidance should be provided by the Children's Directive on the remedy to be available to child suspects who are subjected to a trial *in absentia*.**

#### ***European Arrest Warrant proceedings***

61. The purpose of the Children's Directive, as with other Roadmap Directives, is to improve mutual trust so as to bolster the effective functioning of mutual recognition. It is therefore disappointing that Article 17 of the Commission's proposal excludes the following rights from being applied in European Arrest Warrant cases in which children are particularly vulnerable due to the threat of removal to another country:
- a. the requirement for an individual assessment;
  - b. the requirement for questioning to be audio-visually recorded;
  - c. the timely and diligent treatment of cases; and
  - d. the obligations for professionals coming into contact with child suspects to be adequately trained.

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<sup>37</sup> Available at: [http://ec.europa.eu/justice/criminal/files/com\\_2013\\_821\\_en.pdf](http://ec.europa.eu/justice/criminal/files/com_2013_821_en.pdf).

62. The Council has gone even further, removing the right to assistance by a lawyer, the protections relating to detention, the right to be accompanied by an adult during court hearings and the right to legal aid from children involved in European Arrest Warrant proceedings.
63. It is imperative that children are provided with adequate safeguards due to the particular vulnerability associated with extradition proceedings and as such we recommend that all rights protected by the Proposed Directive apply in European Arrest Warrant cases.

**We recommend that all of the rights guaranteed by the Proposed Directive should be granted to children facing European Arrest Warrant proceedings.**

### ***Training***

64. We welcome the Commission’s proposal in Article 19 of the Proposed Directive that judicial authorities, law enforcement authorities and prison staff who deal with cases involving children should be specialists in this field, and that along with lawyers who deal with cases involving children, they should receive training enabling them to fill this role. This reflects the position of the UN Committee which states that “[t]he training of professionals, such as police officers, prosecutors, legal and other representatives of the child, judges, probation officers, social workers and others is crucial and should take place in a systematic and ongoing manner.”<sup>38</sup>
65. It is disappointing that the Council has chosen to dilute the requirement for police and prison staff. Given the critical importance of training for, and specialisation of, all personnel within the criminal justice system who come into contact with child suspects, we hope that this provision will remain robust in its final form.

**We recommend that the provisions requiring professional specialisation and training of all those who come into contact with child suspects should be kept robust and that the Council’s attempts to dilute Article 19 should be resisted.**

### ***Data Collection***

66. In its recent report, the Commission highlighted the “significant data gaps” which made it impossible to assess fully the nature of children’s involvement in criminal proceedings and the implementation of safeguards intended to protect their interests.<sup>39</sup> The proposed data collection obligations set out in the Commission’s proposal at Article 20 are therefore crucial to enabling both Member States and the EU institutions to identify whether the safeguards in the Proposed Directive are implemented effectively in due course. The Council’s suggestion that Member States should only collect data that is already available would fail to improve the situation and pose significant challenges for the crucial monitoring of implementation of the Proposed Directive, without which it might never become more than words on a page.

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<sup>38</sup> See note 11 above, Para 40.

<sup>39</sup> See note 12 above, page 4.

**We recommend that the Children’s Directive should require Member States to collect all data necessary to assess whether or not its provisions are being complied with, irrespective of whether the Member States are collecting such data already or not.**

### **Costs**

67. Children should not be penalised by having to pay any of the costs associated with the safeguards provided by the Proposed Directive, including the individual assessment, medical examination and/or audio-visual recording of questioning. States are obliged, under international and regional commitments, to protect the rights of children in criminal proceedings irrespective of cost. Furthermore, the presumption of innocence of criminal suspects requires that prosecuting State authorities prove guilt in a fair trial before a conviction is established; therefore responsibility for the proceedings necessary to establish guilt does not lie with defendants but with States. It is inappropriate in light of these legal obligations for the financial impact to be passed on to the rights-holders. We therefore have major concerns about the Council’s proposed amendments to Article 21 in the General Approach. Furthermore, it is difficult to imagine a situation in which it would not be the case that “the reimbursement of costs would jeopardise the child’s further development.”
68. It has been clearly stated in other Roadmap Directives that suspects and defendants should not be liable of the costs associated with exercising their rights, including the costs of interpretation and translation<sup>40</sup> and the costs of gaining access to the case-file.<sup>41</sup> Similarly, all costs incurred by Member States in implementing the Children’s Directive should be met by the Member State.

**We recommend that all costs incurred in order to comply with the obligations of the Children’s Directive should be borne by the Member States and should not in any circumstances be passed on to child suspects or their families.**

### **Remedies**

69. Unlike other Roadmap Directives, the Proposed Directive makes no provision for what remedies a child would have if the authorities fail or refuse to uphold the safeguards it creates. A ‘one-size-fits-all’ approach is unlikely to be appropriate, given the different types of safeguards included in the Proposed Directive, but the EU institutions should certainly consider what remedies should apply if, for example, (i) no individual assessment or medical examination is carried out, (ii) a parent or appropriate adult is not provided with the relevant information or permitted to attend court hearings, (iii) the questioning is not recorded in circumstances when it should have been, (iv) the privacy of the child suspect is not protected, or (v) adaptations are not made which allow the child to participate effectively.
70. We recommend that child suspects should have the right to challenge the failure or refusal to provide the safeguards set out in the Children’s Directive and an effective remedy under national law in the event of a breach of the rights it seeks to guarantee. Further, the

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<sup>40</sup> See note 6 above, Article 4.

<sup>41</sup> See note 7 above, Article 7(5).

exclusionary rule established in the *Salduz* judgment should apply, so as to ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their rights or in cases where a derogation was authorised in accordance with the provisions of the Proposed Directive, the rights of the defence and the fairness of the proceedings are respected.

**We recommend that, in line with the existing Roadmap Directives, the Children’s Directive should set out the remedies which should be available to children in criminal proceedings who are not able to enjoy each or all of the rights which it guarantees. These remedies should include a right to challenge failures to comply with the Children’s Directive before a judicial authority in a timely manner during the course of proceedings (including during the pre-trial or investigatory stage), together with the exclusion of evidence obtained in breach of the Children’s Directive.**

## **Conclusion**

71. The importance of the Children’s Directive is clear. Currently the rights of child suspects throughout the European Union are not consistently protected, and Member States frequently fail to comply with relevant international standards. Likewise, the protection of children and other vulnerable suspects has been insufficiently developed in the context of the adoption and implementation of the Roadmap. The effective functioning of mutual recognition instruments and the free movement of people within the EU requires consistent compliance with international standards on fundamental rights. The Children’s Directive therefore stands to significantly improve both the situation of children’s rights in the EU, and to contribute substantially to the strengthening of mutual trust between Member States.
72. The Proposed Directive makes a positive and crucial first move toward a comprehensive and effective instrument to protect child suspects’ rights, though it stands to be strengthened through the provision of additional detail in several aspects. Unfortunately, the General Approach represents a significant step backwards on several key points and requires urgent course correction. The onus is now on the European Parliament to produce a position that will lead discussions in the direction of a robust and rights-respecting final version.