EUROPEAN COMMISSION GREEN PAPER ON THE
APPLICATION OF EU CRIMINAL JUSTICE LEGISLATION IN
THE FIELD OF DETENTION

Submitted by:

The International Juvenile Justice Observatory

In collaboration with

The Academic Section of its European Council for Juvenile Justice

As part of the IJJO research:

Measures of Deprivation of Liberty for young offenders:
How to enrich International Standards in Juvenile Justice
and promote alternatives to detention in Europe?
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1. About the International Juvenile Justice Observatory (IJJO) and its European Council on Juvenile Justice

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

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

The European Juvenile Justice Observatory has set up, in 2008, the European Council for Juvenile Justice as a European think-tank on Juvenile Justice. Composed by more than 81 European Experts, The European Council for Juvenile Justice develops initiatives and exchanges good practice concerning education and inclusion of young people in conflict with the law in Europe. It also aims at developing the corresponding strategies and recommendations such as those submitted in the IJJO answer to The EC Green Paper on the Application of EU Criminal Justice Legislation in the Field of Detention.
2. Introduction

This submission has been compiled by the International Juvenile Justice Observatory in the context of a wider publication on *Measures of Deprivation of Liberty for young offenders: how to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe?*, which results of the research done by Dr. Ursula Kilkelly of University College Cork – Ireland - and the Members of the Academic Section of The European Council For Juvenile Justice (see acknowledgment). This report aims at summarising the international standards on the use of detention and its alternatives, in view of providing a baseline of information on international standards in these two related areas. Second, the Paper aims at examining, insofar as this is possible, the extent to which these standards are being implemented in the Member States of the European Union. In this regard, it presents an EU-wide snapshot of compliance with international standards in these areas, an important part of which is to identify what support or assistance the EU might provide to further their implementation. It then makes recommendations as to how the gap between the theory of the international standards and practice in Member States can be narrowed, including by activities of the European Commission itself.

The aims of the IJJO with this publication was to contribute to discussions at EU level on how the rights of children in conflict with the law can be better protected in the European juvenile justice systems and to make recommendations to the EU, on this regard. In this context, on the 9th of June 2011, The IJJO has organised an official presentation and discussion
around this publication with the support of the European Economic and Social Committee in presence of Representative of the European Council, European Commission, the Committee of Region, as well as actors of civil society and juvenile justice stakeholders.

This publication has been conceived as a specific and complete answer of The International Juvenile Justice Observatory to the Question n°8 On Children: *Are there any specific alternative measures to detention that could be developed in respect of children?* of the EC Green Paper *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*.

Finally, The IJJO would like to strengthen its preoccupation concerning the augmentation of restrictive measures taken against children; it is indeed regrettable that the law becomes more and more restrictive against them. Besides, more restrictive laws imply more children in detention even if detention had to remain the very last resort. To this extent, there should have a change of paradigm: **detention should be considered the exception rather than the rule.**
3. Question nº 1 On Pre-trial detention: What non-custodial alternatives to pre-trial detention are available? Do they work? Could alternatives to pre-trial detention be promoted at European Union level? If yes, how?

As an international organization promoting the respect of children rights and the implementation of positive juvenile justice systems throughout the world, the International Juvenile Justice Observatory (IJJO) especially advocates in favor of a greater compliance with international standards dealing with the overall well-being of children, in particular the CRC which states that deprivation of a child’s liberty (all sorts of detention) must be a measure of last resort and for the shortest appropriate period of time.

In this way, diversion processes and alternatives approaches should be promoted and given priority. Diversion ways should indeed be implemented at all intervention levels with minor offenders to allow the resolution of conflicts caused, and as far as possible to keep children away from the criminal justice system.

Appropriate non-custodial measures, such as being integrated within the public or private social welfare programmes, probation services or home monitoring programmes, should be implemented for all juvenile offenders in particular for the more vulnerable ones. A mainstreaming of such non-custodial measures as alternatives to pre-trial detention may foster a greater use of such measures when it comes to children, and thus enhance children rights and support the work undertaken by the International Juvenile Justice Observatory.
As a result, the IJJO supports and wishes for a greater use of non-custodial alternatives to pre-trial detention, and urges the European Commission to take into consideration all the alternatives to pre-trial detention quoted by the Open Society Institute—Brussels in its submission to the present Public Consultation.

3. Question nº 8 On Children: Are there any specific alternative measures to detention that could be developed in respect of children?

a. Detention as measure of last resort

The Convention on the Right of the Child sets the baseline with regard to the deprivation of a child’s liberty by providing that it must be a measure of last resort and for the shortest appropriate period of time—a test comprising two distinct elements. Kilkelly notes that the combined objective of the parsimonious use of detention—in its use and its duration—reflects the research evidence that children’s health and development are frequently harmed by detention and rarely benefit from it.¹

With respect to deprivation of liberty for the shortest appropriate period of time, Liefaad notes that this is ‘a matter of enforcement in the sense that it requires tailor-made decisions in which both the interests of the child and other interests of the justice system are balanced’. He posits that this ‘could be fostered by the legislator by providing the necessary

legal framework including requirements and safeguards’. Certainly guidance is required to ensure that this element of the Article 37 principle is effectively implemented to ensure that children are not deprived of their liberty for any longer than is absolutely necessary in the circumstances.

b. Alternatives to detention

Detention as a last resort implies that children should be deprived of their liberty in limited circumstances and that other community-based measures should be used in response to children’s behaviour and circumstances. As the Pinheiro Study noted, ‘detention should be reserved for child offenders who are assessed as posing a real danger to others, and significant resources should be invested in alternative arrangements, as well as community-based rehabilitation and reintegration programmes.’ The Beijing Rules advocate that detention should only be used where the offence warrants it (i.e. as ‘a serious act involving violence against another person or of persistence in committing other serious offences’) and where there is no other appropriate response. It is apparent, therefore, that implementing the principle of detention as a last resort requires tight circumscription in the law of the power to have recourse to detention as a sanction in children’s cases. In other words, it should be available only in limited, specific cases only. In addition, however, ensuring detention is a last resort also requires making provision in law and in practice of a sufficient array of alternative community-based measures. The sanctions identified above – probation, community service, treatment and counselling – are often described as alternatives to detention. But their virtue lies not only in

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3 Report of the independent expert for the UN Study on Violence against Children, p 112.
what they are not, ie detention; they are also important and meaningful measures in their own right.

In this regard, it is important that states establish community-based sanctions as the normal response to children in conflict with the law because research shows that such sanctions have the major benefit of allowing young people to remain in their families and in their communities to address the underlying problems of offending behaviour. For this reason, they should become the first response to offending behaviour, with detention being the alternative.

Surprisingly little focus has been paid by international human rights monitoring bodies to the need to develop measures that divert children from the formal justice system, although this has increased more recently. The Committee on the Rights of the Child made this recommendation in respect of Germany and Austria, for example, where it recommended the development of alternatives to juvenile justice proceedings as promoted by international standards. In Romania, it has criticised that very few children are dealt with by diversionary or alternative measures and noted also the lack within the judicial system to provide rapid intervention for juvenile offenders. Similarly in respect of Greece, the Committee recommended that greater efforts be made to provide alternatives to detention, along with ensuring that detention, including pre-trial detention, is used only as a measure of last resort.

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4 Ibid.
5 Committee on the Rights of the Child, Concluding Observations: Germany, CRC/C/15/Add., para 61.
6 Committee on the Rights of the Child, Concluding Observations: Austria, CRC/C/15/Add.251, para 54.
7 Committee on the Rights of the Child, Concluding Observations: Romania, CRC/C/15.add.199, para 62.
and with due consideration for the seriousness of the crime.\textsuperscript{8} Pre-trial detention was also a concern in respect of Luxembourg, where the Committee recommended that measures be taken to reduce its use and to make this form of detention as short as possible by developing alternatives including community service orders and restorative justice.\textsuperscript{9} In the case of Hungary, the Committee recommended that the state party take particular measures to implement alternatives to detention, such as probation, community service and suspended sentences\textsuperscript{10} and it made a similar recommendation with regard to Lithuania.\textsuperscript{11} In respect of Ireland, the Committee urged the state party to implement a set of alternative measures as a matter of priority to ensure that the deprivation of liberty is used only as a last resort and for the shortest possible time.\textsuperscript{12} For Latvia, it recommended that alternatives to detention be developed and implemented, including ‘probation, mediation, community service or suspended sentences and measures to effectively prevent and address drug and/or alcohol related delinquency’.\textsuperscript{13}

It is also important to remember that community sanctions or other measures used instead of detention must always respect the rights and legal safeguard of the child.\textsuperscript{14} Indeed, children placed in secure in welfare institutions or detained in psychiatric institutions for mental health reasons are sometimes seen as the poor relations in juvenile justice and yet their rights deserve equal protection.

\textsuperscript{8} Committee on the Rights of the Child, Concluding Observations: Greece, CRC/C/15/Add.170, para 79.
\textsuperscript{9} Committee on the Rights of the Child, Concluding Observations: Luxembourg, CRC/C/15/Add.250, para 61.
\textsuperscript{10} Committee on the Rights of the Child, Concluding Observations: Hungary, CRC/C/HUN/CO, para 61.
\textsuperscript{11} Committee on the Rights of the Child, Concluding Observations: Lithuania, CRC/C/LTU/CO/2, para 69.
\textsuperscript{12} Committee on the Rights of the Child, Concluding Observations: Ireland, CRC/C/IRL/CO/2, para 71.
\textsuperscript{13} Committee on the Rights of the Child, Concluding Observations: Latvia, CRC/C/LVA/CO/2, para 62.
\textsuperscript{14} See Article 40(3)(b) of the CRC. See also Committee on the Rights of the Child, General Comment No 10. \textit{Children’s Rights in Juvenile Justice}. 
c. Deprivation of liberty within the welfare and health system

Even though they may lose their liberty like children in youth detention for example, children in welfare or health institutions are not always considered when the concerns of juvenile justice are discussed and reforms proposed.\textsuperscript{15} Part of the reason for this is that their care may be the responsibility of the minister for health and so their treatment is neither conceptualized nor categorized as a youth justice issue.\textsuperscript{16} Although few international standards (see diverse COE European Rules) make specific provision for children placed in secure facilities for their own safety or for their treatment or care, international rules governing children’s detention nonetheless cover these, as well as other forms of detention. Although it must be accepted that children, like adults, may have to be placed in secure facilities for their own protection from time to time, it is the lack of legal certainty – so central to the fairness of the criminal justice system - that can be missing when children are detained ‘for their own good’ or ‘in their best interests’, whether this is part of the welfare or the penal system.\textsuperscript{17} It is often subjected to criticism therefore due to the fact that variations are found in the duration for which juveniles are placed in welfare institutions; because the best interests of the child is the determining factor, there is often no minimum or maximum term fixed by law.\textsuperscript{18} As a result, the duration of time for which children are detained in such facilities varies greatly depending on

\textsuperscript{15} See for example, Smith and Milligan ‘The Expansion of secure accommodation in Scotland: in the Best Interests of the child?’ 4(3) Youth Justice (2005) 178-190.
\textsuperscript{16} For example, see Pitts and Kuula, ‘Incarcerating Young People: An Anglo-Finnish Comparison’ 5(3) Youth Justice (2006) 146-164.
\textsuperscript{17} See Pöösö, Kitinoja and Kekoni, ‘Locking up for the Best interests of the Child – some preliminary remarks on “Special Care”’ 10(3) Youth Justice (2010) 245-257.
\textsuperscript{18} Dünkel and Pruin (2009) p 146.
whether the measure is considered a sanction or a welfare measure designed to protect the child.

This disconnection between youth detention and secure welfare placement appears to derive, *inter alia*, from the placement of the function in the social welfare, health or family departments. Appeal from these measures to a judicial body is not always possible, and inspections are seen to be internal, rather than external, independent mechanisms.¹⁹ These measures aside, Dünkel and Pruin note that the Scandinavian countries are both the biggest user of welfare institutions and the countries where most best practice can be found.²⁰ An interesting human rights sensitivity has developed here, helped in particular by the interventions of judicial and welfare authorities.

d. IJJO Recommendations

Although there has been some recent improvement in the availability of community sanctions, serious concerns remain about the gap between the theory of the international rules and the reality of practice. The absence of up-to-date data on the operation of the youth justice system across many Member States frustrates meaningful analysis and makes it difficult, if not impossible, to track trends or compare jurisdictions. At the same time, the monitoring work of the Committee on the Rights of the Child makes clear that detention is not always a measure of last resort and there are insufficient measures to make detention as a last resort a reality in many EU states.

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¹⁹ See also Report of the independent expert for the UN Study on Violence against Children (A/61/299).
Conditions in detention are still worrying in some EU Member States and the CRC prohibition on detaining children with adults is regularly flouted. The absence of independent inspection and complaints mechanisms is lamentable across the EU and greater emphasis needs to be placed on specialisation and training for all those working in juvenile justice. The lack of meaningful regimes for children – such as the provision of suitable education and leisure opportunities, and regular contact with the outside world – is a key problem. The treatment of children in police custody is also a matter of growing concern.

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

The following general recommendations are also necessary:
- Systems must be established to ensure the timely and comprehensive collection and analysis on the treatment of children in conflict with the law. This is particularly acute with respect to the sanctions and measures being applied as community sanctions, diversionary mechanisms or alternatives to custody where current information is patchy;
- Law and policy must be reviewed to ensure it fully incorporates and is consistent with international standards;
- Accredited training must be provided for all staff working with and for children who come into conflict with the law on juvenile justice, children’s rights and youth criminology and development;
- Measures must be taken to ensure that the effective and independent evaluation of all interventions becomes the norm in juvenile justice;
- States should set up academic and inter-disciplinary networks to share information, research and expertise on the effectiveness of sanctions and measures for juvenile offenders;
- Independent systems must be put in place to provide for comprehensive and regular inspection of all facilities providing services to children, and responsible for their care and treatment in detention. These should be established at various levels including local level.
- All children must have access to an independent complaints mechanism with the power to advocate on children’s behalf to have a problem resolved.
It is apparent from the recent EU Agenda on Children’s Rights and from the Stockholm Agenda and Action Plan that the EU Commission is well placed to pursue juvenile justice reform in these areas. There is no doubt that there is a need for EU intervention to bring standards closer to practice. As to what form this intervention takes, the above analysis suggests that there is little scope or need for the adoption of further standards in the areas of detention and alternatives to detention. What is needed, however, is the introduction of a new imperative to drive reform and change at a European level and to bridge the gap between theory and practice throughout all Member States.

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

The IJJO recommendations concerning alternatives to deprivation of liberty:

1) Diversion, alternative measures and restorative juvenile justice should not be limited to minor offences or first offenders only. The IJJO encourages in particular the development of mediation and reparation measures.

2) The IJJO urges the EC to promote alternatives to deprivation of liberty as well as restorative processes as a priority in the development of juvenile justice in the EU, at all stages of the administration of juvenile justice.

As part of such an initiative the following priority in Juvenile Justice could also be considered:

1) Promote Data Collection:

- Action needs to be taken to address the serious shortcomings in the available data on juvenile justice across the EU. In this regard, the International Juvenile Justice Observatory is welcoming the latest initiative of the European Commission that is to say the ambitious data gathering process it presented on November the 23rd at the 6th European Forum on the Rights of the Child. The IJJO truly hopes that this project, carried out in the context of the Pilot Project supported by the European Parliament, will provide juvenile justice professionals and other relevant stakeholders with a thorough database on the situation of children in conflict with the law. The IJJO recognize that the latter should take into account, inter alia, the number of children heard (as perpetrators/victims/witnesses) in criminal proceedings, the number and age of girls/boys involved in criminal proceedings as victims of violent crimes (e.g. sexual,
physical abuse), the number and age of girls/boys involved as perpetrators in criminal acts of violence and the type of sentencing of perpetrators over the criminal age of responsibility, in order to have the best possible understanding of the situation of children in contact with criminal justice systems. Nevertheless, it should be taken into account, as well, that this process should not only be used to organize an European mapping of the situation of children in conflict with the law but should primarily help EU Member States to evaluate and monitor their own juvenile justice systems according to the international Standards.

- Regarding the difficulties encountered so far, the International Juvenile Justice Observatory encourages the European Commission to promote the **harmonization of national statistical systems** between EU Member States.

2) **Develop European analysis and evaluation:**

- The International Juvenile Justice Observatory also encourages the European Commission to conduct a **biannual report on the state of children rights throughout the European Union**. The latter, to be as thorough as possible and in order to enhance interdisciplinary work, should be realized in collaboration with the twenty-seven Member States and the UN Committee on the Rights of the Child, as well as include a specific section on the situation of children rights within the criminal justice systems.
• The EU Commission could promote and support independent, scientific and rigorous evaluations of current juvenile justice interventions and ensure their wide dissemination, as well as financially support comparative research in juvenile justice in order to facilitate its understanding and enhance research-based initiatives.

• Consideration should be given to setting up a juvenile justice agency at EU level to ensure implementation, quality control and independent evaluation of international standards at national level. This could play a particularly important role in drawing together the inspection reports on the detention (all kinds) of children and would make it easier to track progress and disseminate evidence of best practice where it exists. It could drive all of the reforms proposed above and be used to support further study of the reciprocal and mutually beneficial relationship between international and European standards, and their implementation at national level.

3) EC support

• The European Commission could foster the establishment of specific networks of professionals involved in juvenile justice at an EU level to share information, disseminate best practices and exchange ideas. Other networks of specialist judiciary, probation officers, lawyers, social workers, police officers and academics could be set up as well and ensure that the Commission’s work remains rooted in the practice of Member States.
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