

Child-friendly justice Guidelines – a review process

Dialogue between Maria-Andriani Kostopoulou and Susanna Greijer about the review process of the Child-friendly justice guidelines

Intro

- The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice were adopted in November 2010, after a joint drafting process involving three Council of Europe Steering Committees (CDCJ, CDPC and CDDH) and various other stakeholders at national and international level.
- Since the adoption of the Guidelines, they have significantly influenced policy making, legislative initiatives and case-law of member states and have become a key reference.
- The adoption of the Guidelines also gave an important impetus for the re-conceptualisation of the needs and role of children involved in the justice system, and has prompted further progress and evolution on children's rights standards.
- Given the progress made on child-friendly justice over the last 14 years, and in view of the developments in international and regional standards and jurisprudence, the Council of Europe decided last year to proceed to a thematic review of the Guidelines.
- The thematic review aims to determine what adjustments or substantive amendments are needed to ensure the Guidelines remain relevant and up-to-date, and reflect recent developments.
- Links and references to other standards and tools that have been developed in Europe and internationally will contribute to a comprehensive picture of the evolution of child-friendly justice in the past decade.
- A report with a thorough analysis will be circulated among relevant stakeholders across the region in the framework of a targeted consultation process.
- The consultation process will serve to enrich the thematic review process by collecting and inserting expert input from key actors in the field.

Methodology

- The methodology follows a multi-layered approach, based on which it is assessed whether and to what extent adjustments or amendments are required to the Guidelines, ultimately resulting in specific proposals.
- The existing text of the Guidelines and their Explanatory Memorandum has been divided into sections and sub-sections, with a mapping and analysis of each section and sub-section.
- The analysis covers all different ways in which children come into contact with the justice system (as accused, convicted, victims, witnesses, plaintiffs, etc.), and all types of judicial proceedings, including criminal, civil and administrative justice.

- The suggestions for reformulating the Guidelines and their Explanatory Memorandum can be summarised as follows:
 - Amendments of terms relating to child-friendly justice in cases where there is a need to update the Guidelines in line with terminology and concepts used in more recent instruments.
 - Reformulating some parts to adapt the provisions of the Guidelines to more recent regional and international standards.
 - Inclusion of previously excluded issues that have received increased attention or grown more pressing since the adoption of the Guidelines, and now appear crucial to include.
 - Inclusion of recent promising practices in members States. Such suggestions will be discussed with relevant actors during the consultation process.
- The intention of the revision process is to take a minimalist approach, by analysing new developments carefully and assessing where change is needed. Any revision must go through the Committees that prepared the original Guidelines and, in fine, be approved by the Committee of Ministers.

Core part - Key issues or key guidelines in need of reflection and possibly revision

- Progress in the form of certain legal standards and of UN CRC General Comments.
- The recognition of children who witness violence, e.g. domestic violence, as victims. This is increasingly recognised in European standards (e.g. Istanbul Convention) and in the law of CoE member states.
- In general, when it comes to child victims and witnesses who enter into contact with the justice system, the original Guidelines recognise them as an important group of children, but the text does not provide detailed guidance on how these children should be addressed and protected within the justice system. With the expansion of Barnahus and similar Multidisciplinary and Interagency services for child victims and witnesses, significant progress has been made in that area.
- As an example, the sections of the Guidelines that concern children in contact with the Police focuses exclusively on children accused or suspected of having infringed the law.
- With regard to administrative proceedings, there is a gap in the 2010 version when it comes to children in migration contexts. Since 2015, the European context has changed, with an increase in children, many of who have been unaccompanied, arriving and going through immigration and asylum-seeking proceedings. The Guidelines apply in these circumstances, but the guidance is not very detailed.
- On this matter, the Court of Justice of the European Union has become another relevant actor, next to the ECtHR or the CRC Committee, with an expanding case law concerning children in migration proceedings.
- Although the Guidelines already have a focus on children alleged as, accused of or recognised as having infringed the criminal law, international jurisprudence and work of monitoring bodies has advanced considerably.

- In addition, developmental and neuroscience evidence shows that children's developing maturity directly affects their decision-making capacity and their ability to fully understand the consequences of their actions. Such considerations are useful to further shape, for example, alternatives to judicial proceedings.
- Measures and programs that divert children from formal criminal justice process and reflect an approach more conducive to their best interests should form an integral part of the child justice systems. Alternative options should be available as early as possible and should ensure the child's central role in these processes.
- With regard to deprivation of liberty, the Guidelines recommend that any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time, but do not address the issue of judicial review of detention measures, or the issue of detention conditions, if a child is exceptionally detained.
- With regard to civil proceedings and family law cases, the best interests of the child as well as the right of the child to be heard are considered key pillars and with the adoption of the Guidelines, specific guidance is provided on how to assess and determine the best interests of the child and how to ensure that the child is heard and that his/her views are duly taken into account. The Council of Europe is currently in the process of adopting two Draft Recommendations on the protection of the rights and best interests of the child in parental separation proceedings and in care proceedings, and the Guidelines should include aspects of this important practical guidance.
- In custody and visitation proceedings involving incidents of violence, the Istanbul Convention and recent jurisprudence of the European Court of Human Rights are also highly relevant. The Court emphasises that "the primary focus must be on the best interests of the child, and an assessment of any risks of violence or other forms of ill-treatment therefore has to form an integral part of such proceedings".
- In the area of access to court, the Guidelines do not address the issue of inflexible limitation periods for the institution of civil proceedings, such as parental proceedings, a topic which has been examined on several occasions by the European Court of Human Rights. Rigid time limits for bringing a case to the court that elapse before the age of majority of the child may deprive children of any realistic opportunity to find justice.

Transversal issues

- There are also some transversal issues that pertain to all proceedings and concern all children, irrespective of their role in proceedings. Addressing these issues can also contribute to shape child-friendly systems which can adapt to evolving situations and needs.
- In terms of child participation, which concerns all children independent of their role in the justice system, the current Guidelines and Explanatory Memorandum refer, with regard to a child's right to information and advice in

judicial, proceedings and alternatives to such proceedings, to “situations where information should not be provided to children. The way child participation models and theories have evolved since 2010, today the matter would rather be how, who, and when (timing and method of communication, as well as the training of the professional) to speak with a child and inform them about a process or decision, instead of refraining altogether from doing so.

- The current text of the Guidelines and the Explanatory Memorandum, while mentioning training of professionals in certain parts, is also silent with regard to the preparation of professionals providing information and advice to the child.
- The sections of the Guidelines relating to training of professionals, which is of course another transversal issue relevant to all justice proceedings and all groups of children in contact with the justice system, could be strengthened.
- Regarding child participation more broadly, the current version does not elaborate on all key aspects that would make participation effective. Effective participation goes beyond merely consulting and hearing the child. It means that children should be meaningfully involved every stage of the proceedings as full bearers of rights. This includes among others understanding the process, being informed of their rights, and having appropriate means to access justice.
- The Guidelines would also need to include more guidance on individual needs assessments, which have been recognised by international and regional standards as a distinct and specific requirement. Every child is unique and the way a child is involved in proceedings has to be adapted.
- Another transversal issue is the role of technology in the justice system. On the one hand, it may have several benefits for children and for example, may be used to lift barriers to accessing justice or to children’s participation. At the same time, the increasing reliance on digital technologies has introduced significant risks for the right to privacy and data protection for children. The CRC Committee has for instance stressed that “States parties should ensure that digital technologies, surveillance mechanisms, such as facial recognition software, and risk profiling that are deployed in the prevention, investigation and prosecution of crimes are not used to unfairly target children suspected of or charged with criminal offences and are not used in a manner that violates their rights, in particular their rights to privacy, dignity and freedom of association”.
- It is essential for the quality of the justice system that all relevant professionals have a more rounded understanding of the advantages and challenges arising from the use of technology in relation to the children involved.