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IMPACT JUSTICE PROTOCOL SERIES:

Working with Children in the Eastern Caribbean
Justice System



**No. 1: Protocols for Defence Counsel:
International Standards and Best
Practices
2018**

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Eastern Caribbean Justice System**

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PREFACE

The Convention on the Rights of the Child and related international instruments, standards and best practices recognise children as a distinct class of persons who, by reason of their physical and mental immaturity, are in need of specialized support and assistance, commensurate with their respective needs and interests. Importantly, the provision of support and assistance is not restricted to children in need of care and protection, but extends to children in conflict with the law.

The Convention, standards and best practices envisage a fair system of justice by all States, including the Eastern Caribbean States. This system of justice must respect, fulfil and protect the rights of all children who come into contact with the justice system, having regard to the best interests of the child principle. This principle prescribes that in all matters which touch and concern children who come into contact with the justice system, the following values should be observed:

- the adoption of early intervention strategies to prevent children who exhibit traits likely to lead to criminal behaviour from committing infractions against the law;
- the promotion of methodologies to allow children the fullest opportunity to participate in all proceedings in relation to which they are participants;
- the adoption of fair, independent and sufficiently flexible strategies in all matters which concern children;
- the provision of timely, comprehensive and individualised support and assistance to all children who come into contact with the justice system;
- the adoption of diversion measures at the earliest possible opportunity to direct children in conflict with the law away from the formal, penal justice system;
- the adoption of specialised measures to ensure that children are afforded a fair trial;

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- the adoption of measures aimed at reducing the institutionalization of children;
- the provision of timely and comprehensive rehabilitative services to all children who come into contact with the justice system; and
- the adoption of sufficiently robust measures aimed at ensuring the successful reintegration of children who formerly came into contact with the justice system into their families and wider communities.

IMPACT Justice recognises that although these values are foundational to any fair and efficient justice system, they have not always been observed by some practitioners who work with children within the context of the justice system in the Eastern Caribbean. To this end, and, having regard to the need for harmonisation of policies and practices with regard to the protection of the rights of children who come into contact with the justice system in the Eastern Caribbean, these protocols have been drafted in keeping with international standards and best practices, including:

- the *United Nations Convention on the Rights of the Child* (“the CRC”);
- the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (“**the Beijing Rules**”);
- the *United Nations Standard Minimum Rules for Non-Custodial Measures* (“**the Tokyo Rules**”);
- the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (“**the Havana Rules**”);
- the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (“**the Riyadh Guidelines**”); and
- the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*.

The *Protocols for Practitioners Working with Children in the Eastern Caribbean Justice System* are a series of guidelines that constitute specific instructions, consistent with international best practices and standards, designed to guide and regulate the interactions between children who



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come into contact with the justice system in the Eastern Caribbean and the following stakeholders:

- Defence Counsel (Booklet No. 1)
- Education Officers (Booklet No. 2)
- Judicial Officers (Booklet No. 3)
- The Police (Booklet No. 4)
- Prosecutors (Booklet No. 5)
- Social Workers, Probation Officers and Childcare Board Officers (Booklet No. 6)
- Staff at detention centres/residential facilities (Booklet No. 7); and
- Staff employed at NGOs that work with children (Booklet No. 8).

The Protocols represent an ongoing commitment by IMPACT Justice to engender the principles of integrity, excellence, accountability and professionalism in dealing with children who come into contact with the justice system.

Although the Protocols do not have the force of law, to be effective, all stakeholders should endeavour to do their utmost to adhere to the guidelines and directions prescribed therein, as, after all, these guidelines and directions represent international standards and best practices. Such adherence will help to ensure that the delivery of justice to children in the Eastern Caribbean is efficient, objective and fair, in keeping with the rule of law.

Finally, to remain relevant, the Protocols must remain current. In this regard, the Protocols should not be regarded as fixed in time, but should rather be treated as living documents; perpetual works in progress. To this end, the Protocols should be subject to continuous review and, in collaboration with relevant stakeholders, should be updated as necessary, as new issues and challenges invariably require new policies or revisions to existing ones. All practitioners working with children in the justice



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system should be conscious of this, and are encouraged to suggest changes where policies are unclear or out-dated.

IMPACT Justice is pleased to introduce this series: *Protocols for Practitioners Working with Children in the Eastern Caribbean Justice System*. Another series, for practitioners working with persons with disabilities, will also be published. IMPACT Justice trusts that the protocols in the two series will be an invaluable resource for all stakeholders.

As the Regional Director of IMPACT Justice, I thank the Government of Canada for funding the series, and Dr. Jason Haynes, attorney-at-law, for conducting the necessary desk research, interviews in the OECS and preparing the booklets.

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PROTOCOLS FOR DEFENCE COUNSEL

BACKGROUND AND CONTEXT

Defence counsel have an extremely important role to play in advancing the fair trial rights to which children are entitled. The research, which involved interviews with some 107 stakeholders across the seven Eastern Caribbean States of Antigua and Barbuda, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines, found that although defence counsel generally understood the importance of their role, a number of challenges nonetheless arise in practice, which require attention. For instance:

- there is, at times, insufficient special attention, sympathy or concern by some defence counsel for the fact that children are vulnerable, and thus require an extra measure of assistance.
- although defence counsel generally strenuously advocate for bail on behalf of children and persons with disabilities who are in conflict with the law, there are times when counsel need to be more proactive in their approach to persuading the court that conditions of bail imposed do not advance the best interests of children because of their prohibitive nature. There is hesitation in making successive bail applications, and encouraging the court to begin to consider diversion measures;
- defence counsel are generally willing to provide their services to children who are in conflict with the law, but there are times when, notwithstanding the court's invitation to counsel to provide their assistance, there has been reluctance by some to

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do so. This has meant that there is currently only a small cadre of defence attorneys who are willing to provide their assistance to children who are in conflict with the law. There needs to be a greater effort on the part of defence counsel to make their services available through the legal aid department and/or through pro bono efforts;

- defence counsel should be proactive in encouraging that court orientation sessions be carried out in respect of children who come into contact with the justice system;
- defence counsel should advocate for the utilisation of various forms of diversion in respect of children in conflict with the law;
- defence counsel should be proactive in their approach to diversion by, at the very least, reminding prosecutors, the police and the court as to what the available options for diversion are;
- defence counsel should advocate for the imposition of rehabilitative measures so as to enable children in conflict with the law to be effectively reintegrated into society upon their release from detention and even after the case or diversion has ended;
- defence counsel are encouraged to follow up on the conditions under which children are held, especially when their client specifically brings adverse conditions to their attention.



FORMAL POLICY AND PROCEDURES

THE RIGHT TO BE HEARD AND TO PARTICIPATE IN LEGAL PROCEEDINGS

Defence counsel are required to ensure that children who are capable of forming their own views are afforded the right to fully participate in matters affecting them within the context of the justice system. Children's right to participate in legal proceedings is not only an important element of their broader fair trial right, but also an important aspect of their autonomy (**Article 12 Convention on the Rights of the Child**).

The right to participate in legal proceedings is not restricted to children. Parents or guardians or other support persons must be afforded the opportunity by Defence Counsel to play an active role in legal proceedings whenever their children come into contact with the justice system.

This right should only be curtailed in the most exceptional circumstances, such as where the participation of the child's parents, guardians or support persons is deemed to be antithetical to the best interests of the child (**Rule 15(2) the United Nations Standard Minimum Rules for the Administration of Juvenile Justice - "the Beijing Rules"**).

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SPECIFIC GUIDELINES

Defence counsel should seek to:

- enquire, at the earliest possible opportunity, about the age of the child, and solicit any information which could assist in determining his or her level of maturity and capacity to give evidence;
- explain to the child in an age-appropriate manner the nature of the legal proceedings in relation to which he or she is involved as a party;
- explain to the child how he or she may participate in the legal proceedings;
- give the child the opportunity, depending on his or her age and level of maturity and the rules of evidence, to express his or her views and concerns through a suitably conducted examination-in-chief;
- assist the child in identifying a suitable support person, where parents or guardians are not involved. Where no support person exists, defence counsel should consider requesting the assistance of probation services;
- explain to the parents, guardians or support persons, of the child how they could effectively participate in legal proceedings which concern the child, and the limits beyond which their participation will be curtailed;
- give the parents, guardians or support persons of the child the opportunity to participate in legal proceedings through not only informing them of the date and time of court hearings, but also through allowing them to voice their concerns in all matters that relate to the child, to the extent that the rules of evidence allow; and



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- keep the child, his or her parents, guardians or support persons fully abreast as to the progress of proceedings in which they are involved.

SCHEDULING PRACTICES AND THE REASONABLE EXPEDITION OF MATTERS

Although the Convention on the Rights of the Child does not specify a timeframe within which matters involving children who come into contact with the justice system must be dispensed with, it nonetheless recognises that professionals working in the justice system, including defence counsel, should be “prompt” in dealing with all issues which concern children (**Article 37(d) Convention on the Rights of the Child**).

The Committee on the Rights of the Child has repeatedly explained that because of the delicate age of children and attendant inherent vulnerabilities, actions taken by defence counsel which touch and concern children must be swiftly taken, though, of course, without denying anyone their due process guarantees. In other words, the reasonable expedition of matters involving children is inherently part and parcel of the right to fair trial, a fact recognised by the Committee on the Rights of the Child, which has emphatically observed that, “(...) the time between the commission of the offence and the final response to this act should be as short as possible (...) the longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized.”¹

¹ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 51.



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This view has also been countenanced by the Inter-American Court on Human Rights, which has held that, “an unjustified delay in deciding cases against children is contrary to the international norms that protect them.”²

SPECIFIC GUIDELINES

Defence counsel should seek to:

- be fully cognisant of the importance of making best efforts to expedite matters that concern children;
- request that the police and/or prosecutor provide him or her with all relevant materials, including necessary evidentiary material, at the earliest possible opportunity;
- decide upon whether to offer one’s services to children in conflict with the law at the earliest possible opportunity after receiving all information relevant to the case;
- ensure that the evidentiary material is read and explained to the child, in a child sensitive manner, to ensure their full participation in the proceedings.
- implore the court to hear matters involving children at the earliest possible opportunity, and to hear the proceedings in camera.
- encourage the court to schedule matters involving children outside of the school term or after school hours;
- encourage the court to conduct the proceedings in a manner that facilitates the inclusion of the child.

² I/A Court H.R. Case of the Juvenile Re-education Institute v. Paraguay, Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, paras. 215 and 226.



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- avoid asking the court to adjourn matters involving children, unless the justice of the case demands otherwise;
- disclose all necessary documentation required in the interest of justice at the earliest possible opportunity; and
- where paper committals exist, that process should be encouraged.

BAIL

The Convention on the Rights of the Child requires that children who are in conflict with the law be considered for the granting of bail at the earliest opportunity, provided that the Court considers that the circumstances so demand that bail be granted (**Article 37(b) of the Convention on the Rights of the Child**).

In the Eastern Caribbean, a child's entitlement to bail does not only arise under international law, but is a general common law, and in some cases, statutory requirement.

SPECIFIC GUIDELINES

Defence counsel should seek to:

- examine the precise circumstances of the case in order to effectively apply for bail on behalf of the child. In this connection, Defence Counsel should be informed by:
 - the offence allegedly committed by the child;
 - whether there exists any substantial grounds for not granting bail, such as the possibility that if the child is released on bail, he or she would not surrender to custody or would commit an offence while on bail or would interfere with witnesses or otherwise obstruct the

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course of justice, whether in relation to himself or herself or any other person.

- encourage the court to grant bail to the child, where appropriate, subject to certain requirements, such as:
 - that a suitable surety be provided;
 - that the child be prohibited from possessing a firearm, ammunition or any part of the same;
 - that the child reside at a specified address;
 - that the child be subject to home detention;
 - that the child be subject to a curfew;
 - that the child be subject to supervision by a community corrections officer/police officer;
 - that the child report to the police station at certain defined times;
 - that the child surrender his or her passport;
 - that the child enrol in an education assistance programme to assist in its reintegration into society;
 - that the child be subject to other conditions aimed at protecting the victim from any interference by the child.
 - the child be granted bail on his or her own recognisance, where no parent, guardian or support person is available.
- request that the court consider diversion measures as possible conditions to the grant of bail.
- apply for the reviewing and/or variation of bail conditions, in appropriate circumstances, having regard to any subsequent developments.



LEGAL REPRESENTATION

International law makes provision for children who come into contact with the justice system to be afforded the right to a fair trial, which includes the right of defence. Adherence to this right not only presupposes that children benefit from the presumption of innocence, but also necessitates that they are fully informed of their rights and of the nature of proceedings within which they are participants, as well as any likely approaches that they should take in response to any charges laid (**Articles 37 and 40 of the Convention on the Rights of the Child; Rule 15.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“the Beijing Rules”); Rule 18(a) of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“the Havana Rules”)**).

The Inter-American Commission on Human Rights has observed that the right of defence includes, among other things, the right to adequate legal representation, an element of which is the provision of a state appointed attorney (legal aid) if the child has not engaged private legal representation.³

SPECIFIC GUIDELINES

Defence counsel should seek to:

- ascertain all relevant information relative to the child, his or her family and social background and educational background. Information should also be ascertained with respect to the alleged offense in question, and any previous/pre-existing

³ IACHR, Report No. 41/99, Case 11.491 (Honduras), Admissibility and Merits, Minors in detention, March 10, 1999, para. 152.

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infractions against the law, and to give such information to the prosecution;

- enquire, at the earliest possible opportunity, into whether a child in conflict with the law has already retained counsel or received adequate legal advice;
- enter into suitable arrangements to represent the child on conditions that respect the best interests of the child and the proper administration of justice;
- provide robust legal representation on behalf of a child who is in conflict with the law throughout the course of all legal proceedings;
- seek the assistance of other competent counsel if he or she is unable to fully represent the child due to prior commitments or a lack of specialist knowledge;
- raise any issue with the judge that will advance the child's case or which is deemed to be prejudicial to the child; and
- be flexible enough to at least consider offering his or her services on a pro bono basis or at a reduced fee.

COURT ORIENTATION

Professionals working in the justice system, including defence counsel, are obliged to guarantee the effective participation of children in legal proceedings (**Article 40 (2) (b) (iv) of the Convention on the Rights of the Child**).

Effective participation, among other things, demands that children be afforded practical and child-sensitive court orientation session(s) so as to familiarise them, as inherently vulnerable participants in the justice



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system, with the Court’s distinctive and often intimidating language, procedures, environment and personnel.

The importance of this right was averred to by the Committee on the Rights of the Child, in the context of General Comment No. 10, which underscored the importance of court orientation as an element of a fair trial,⁴ affirming **Rule 14(2) of the Beijing Rules**, which calls on States to conduct legal proceedings “in an atmosphere of understanding.”

The UN Office on Drugs and Crime (UNODC) has noted that,
“the preparation [of children for court] is crucial to avoid [them] being destabilized or unnerved once they appear before the court and, especially, during the challenging experience of their cross-examination. The party calling the witness, be it the prosecution or the defence, has a clear interest in explaining what the [child] can expect during his or her appearance, double-checking the witness’ self-confidence and his or her memory of his or her statements. It also serves to prepare him or her to face and answer cross-examination and attempts made by the other parties to undermine the value of the evidence. Such a step is even more crucial in the case of vulnerable witnesses.”⁵

⁴ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras. 44 and 46.

⁵ ‘Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime’ (United Nations Office on Drugs and Crime, 2009) 70-71



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SPECIFIC GUIDELINES

Defence counsel should seek to:

- enquire, at the very outset, into whether a child who comes into contact with the justice system has received court orientation;
- provide court orientation to the child who indicates that he or she has not already received court orientation. This exercise should enable the child to have a firm appreciation of the court's physical environment, personnel, language and procedures;
- remind the child of the court's willingness to listen to his or her concerns, and that he or she should let the court know of any discomfort which is experienced during the formal proceedings; and
- remind the child that the court is willing to transform itself into a child sensitive environment so that the child could achieve his or her best evidence.

SPECIAL MEASURES

Children who come into contact with the justice system, because of their age and situational vulnerabilities, stand a high chance of being secondarily victimised by the very justice system that is meant to protect them. In order to militate against this possibility, Defence Counsel are obliged to treat every child in a manner that is “consistent with the promotion of the child's sense of dignity and worth” (**Article 40(1) of the Convention on the Rights of the Child**).

The Committee on the Rights of the Child has interpreted this provision to mean that the child must be free from a court environment that is

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“intimidating, hostile, insensitive or inappropriate for her or his age.”⁶ According to the Committee, this necessitates, among other things, the provision of appropriately designed court rooms, sight screens, and separate waiting rooms. These “special measures”, according to the Inter-American Court on Human Rights, are intended to “enable [children] to effectively enjoy those rights guaranteed by the Convention.”⁷

SPECIFIC GUIDELINES

Defence counsel should seek to:

- closely monitor the cross-examination of the child in order to indicate to the court when such examination amounts to harassment or intimidation;
- ensure that the language used within the context of court proceedings is child-sensitive;
- suggest that the court adopts an informal and child-friendly atmosphere for the hearing of matters involving the child;
- remind the judicial officer of the need to limit, in appropriate circumstances, the duration of a child’s stay in court or the number of questions put to him or her;
- suggest to the judicial officer when rest breaks might need to be taken by the child;
- monitor the appearance of the child to ensure that the child is not unduly tired, distressed or otherwise suffering undue discomfort; and

⁶ Committee on the Rights of the Child, General Comment No. No. 12, The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 34.

⁷ I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 98



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- suggest to the court appropriate circumstances when the use of special measures (such as screens/live links) to protect particularly young and vulnerable children might be required, such as the accused child is charged with an overly intimidating adult offender or where the accused child claims to be a victim himself or herself.

DIVERSION

Defence counsel are obliged to consider appropriate measures for “dealing with children without resorting to judicial proceedings” (**Article 40(3) of the Convention on the Rights of the Child**). **Rule 11 of the Beijing Rules** also addresses the issue of diversion.

Although diversion does not attempt to deny the relative culpability of children who are in conflict with the law, it nonetheless seeks to give these children a second chance so that they are not stigmatised or victimised by formal, penal legal proceedings, whilst providing them with a suitable opportunity to be sufficiently rehabilitated.⁸

Notwithstanding the rapid growth of various diversion programs in recent years, the Committee on the Rights of the Child has warned that diversion,

“should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the

⁸ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, paras. 24 and 25.

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admission will not be used against him/her in any subsequent legal proceeding.”⁹

Additionally, the Committee has stated that,

“The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure.”¹⁰

Moreover, the Committee appears to be of the view that,

“The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular, to protect the child from discrimination. In addition, the child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure. The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as ‘criminal records’ and a child who has been previously diverted must not be seen as having a previous conviction.”¹¹

⁹ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 27.

¹⁰ Ibid

¹¹ Ibid

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Providing that the aforementioned safeguards are afforded children, a range of measures are contemplated by the Convention on the Rights of the Child to give effect to the principle of diversion. These include

- care, guidance and supervision orders;
- counselling;
- probation;
- foster care;
- education and vocational training programmes; and
- other alternatives to institutional care.¹²

These diversion measures are not only envisaged to be used without resorting to judicial proceedings, but also in the context of judicial proceedings which have already commenced.

In short, diversion is intended to serve a dual purpose: to encourage the child to be accountable for the harm which he or she has caused, whilst simultaneously meeting his or her particular needs, which include rehabilitation and reintegration. Diversion provides an opportunity to those affected by the harm caused by the child to express their views on its impact on them; encourages the child to render to the victim some symbolic benefit or some object as compensation for harm caused; promotes reconciliation between the child and the person or community affected by the harm caused by the child; prevents the stigmatisation of the child; and, ultimately, prevents the child from having a criminal record.

In principle, the application of diversion measures is dependent upon:

- the age and developmental needs of the child;

¹² Article 40(4) Convention on the Rights of the Child; Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 24

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- the background of the child;
- the educational level, cognitive ability and the general circumstances of the child;
- the proportionality of the measure in question to the circumstances of the child; and
- the nature of the offence and the interests of society.

SPECIFIC GUIDELINES

Defence counsel should seek to:

- access and carefully examine the assessment report submitted by the social worker for the Child Justice Board/Committee;
- inform the child and his/her parents, guardians or support person, in a language in which they could understand, of the nature of the proceedings, and any necessary options available with respect to a plea in the matter;
- attend the initial inquiry held by the Child Justice Board/Committee;
- make informed recommendations on whether a matter involving a child coming before the Board/Committee should be diverted and, if so, suggest appropriate diversion measures;
- ensure that the child, his/her parents, guardians or support persons, are aware of what decision is taken by the Board/Committee, and the time/date for the plea/trial if the matter proceeds to a plea and trial;
- inquire into the reasons for the failure of the child to comply with the diversion order, and, where appropriate, suggest a renewed diversion;
- attend court with the child, his or her parents, guardians or support persons, if the child does not acknowledge responsibility for the offence which he or she is alleged to have committed;

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- suggest, in appropriate cases, the adoption of restorative justice practices, including family group conferences.

REHABILITATION

Defence counsel are obliged to take necessary steps to ensure that every child who is in conflict with the law is “treated in a manner consistent with the promotion of the child’s sense of dignity and worth”, having regard to “the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society” (**Article 40 of the Convention on the Rights of the Child**).

In short, the Convention on the Rights of the Child recognises the importance served by rehabilitation to reforming young offenders,¹³ a view shared by the Hon. Mr. Justice Aziz, High Court Judge in the jurisdiction of Grenada, when he recently emphasized in **R v Joshua Mitchell**¹⁴ the need for first time offenders to receive “the most appropriate rehabilitation and treatment which would enable them, upon reintegration into society, to become productive members of their communities.”¹⁵

SPECIFIC GUIDELINES

Defence counsel should seek to:

- explore the range of rehabilitative programs available in his or her jurisdiction;

¹³ IACHR, Report No. 62/02, Case 12.285, Merits, Michael Domingues (United States), October 22, 2002, para. 83.

¹⁴ GDA HCR 2015/0042

¹⁵ Ibid para [21]

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- suggest to the Judicial Officer which rehabilitative programs are best suited to be applied to a child who comes into contact with the justice system, having regard to the nature of the offence for which the child has been found guilty; the age of the child and level of maturity; and the educational, social and developmental needs of the child. The following rehabilitative programs could be suggested:
 - *a substance abuse awareness and recidivism prevention programme*, which aims to encourage child offenders with substance abuse problems to receive necessary intervention and to facilitate their reintegration into the community;
 - *a violence prevention programme*, whose aim it is to provide violent child offenders with comprehensive psychological treatment services to reduce violent reoffending, tailored according to an evidence-based, specialized risk needs assessment;
 - *an offending behaviour programme for young offenders*, which helps child offenders to develop positive attitudes and skills instrumental to their successful rehabilitation;
 - *a relapse prevention course for inmates undergoing drug addiction treatment*, which aims at improving child inmates' efficacy in dealing with problems of substance abuse and minimizing relapse through increasing their motivation to change their drug-taking behaviour, identifying high risk situations relating to drug-taking, and developing skills to deal with these high-risk situations;
 - *a sex offender evaluation and treatment programme*, which aims to provide comprehensive and systematic psychological evaluation and treatment services for sex

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- offenders in a therapeutic environment with a view to enhancing their motivation for treatment;
- *an educational Programme*, whose aim it is to provide child offenders with opportunities to better themselves through education and to assist them in participating in examinations at various levels.
- *a vocational training*, which aims to assist child offenders in acquiring vocational skills which may help them seek gainful employment after discharge and thus start a new healthy life; and
- encourage the use of *mentorship programs*.

REASONABLE ACCOMMODATION

Defence counsel are obliged to ensure that no child is deprived of his or her liberty unlawfully or arbitrarily and that the arrest, detention or imprisonment of a child be in conformity with domestic law and used only as a measure of last resort (**Article 37(b) of the Convention on the Rights of the Child**).

The principle of last resort, which is also provided for under **Rule 19 of the Beijing Rules** and **Rule 2 of the Havana Rules**, effectively means that deprivation of liberty, whether in the context of pre-trial detention or as a sentence, must only be applied in the most exceptional circumstances, and be proportionate to the nature of the offence in question.

This principle recognises that there are adverse consequences associated with depriving a child of his or her liberty whilst he or she is still maturing, and seeks to mitigate these consequences by placing an obligation on

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Defence Counsel to carefully assess the specific circumstances of each child against the backdrop of the best interests of the child.

SPECIFIC GUIDELINES

Defence counsel should seek to:

- suggest to the judicial officer that appropriate directions be made so that children who are detained at detention centres or residential facilities receive supervised visitation from parents, guardians, caretakers or legal representatives, since "isolation from the outside world causes moral suffering and emotional trauma, makes them particularly vulnerable and increases the risk that they will be mistreated and abused";¹⁶
- suggest to the Judicial Officer that appropriate directions be given so that every child deprived of his or her liberty be accommodated separately from adults, since "it is absolutely impossible to achieve reform and social rehabilitation in penal institutions where children are forced to live alongside adult criminals";¹⁷
- suggest to the Judicial Officer that appropriate directions be made so that, as far as is reasonably practicable, boys and girls be accommodated in separate facilities;
- remind staff at detention centres that it is not an automatic rule that a child placed in a detention/residential facility for children has to be moved to a facility designated for adults immediately

¹⁶ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

¹⁷ IACHR, Report N° 41/99, Case 11.491 (Honduras), Admissibility and Merits, Minors in Detention, 10 March 1999, paras. 125 and 126



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after he/she turns 18, as much depends on whether this is in his/or her best interests;¹⁸

- remind staff at detention centres/residential facilities that children deprived of their liberty should live in conditions compatible with their personal dignity and physical integrity.¹⁹ This effectively means that Defence Counsel should at the very least suggest that the physical space that accommodates children be sufficient as to ensure respect for their privacy, dignity and health, and allow the development of intervention proposals for assisting them;²⁰
- remind staff at detention/residential centres to take positive measures to ensure that children accommodated at detention or residential facilities effectively enjoy all their rights, including the right to suitably prepared and presented food at normal meal times; the right to physical and mental health; the right to an education; and the right to suitable recreation;²¹
- encourage staff at detention centres/residential facilities to ensure that the facilities which accommodate children are

¹⁸ Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, *CRC/C/GC/10*, 25 April 2007, para. 86.

¹⁹ I/A Court H.R., Case of Neira Alegria et al. v. Peru, Merits. Judgment of January 19, 1995, Series C No. 20, para. 60

²⁰ Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, *CRC/C/GC/10*, 25 April 2007, para. 89

²¹ IACHR, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, document approved by the Commission at its 131st regular session, held March 3 to 14, 2008, Principle X; I/A Court H.R. Case of the Juvenile Re-education Institute v. Paraguay, Preliminary Objections, Merits, Reparations, Costs. Judgment of September 2, 2004, Series C No. 112, para. 161; I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 84



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appropriately configured to accommodate children with special physical needs; and

- remind staff at residential/detention centres to take all security, evacuation and emergency measures necessary to safeguard the rights of children deprived of their liberty.²²

REINTEGRATION

International standards and best practices require that defence counsel give due consideration to the reintegration of children who come into contact with the justice system (**Article 40 of the Convention on the Rights of the Child**). This position is countenanced not only by the Convention on the Rights of the Child, but also **Rule 79 of the Havana Rules**, which provides that all children should “benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end.” Rule 80 of that instrument goes on to make it clear that stakeholders in the justice system, including Defence Counsel, should suggest the provision of specialised services to assist children in re-establishing themselves in society and to lessen prejudice against them. These services should ensure, to the greatest extent possible, that the child is provided with suitable residence, employment and clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration.

²² I/A Court H.R., Matter of Urso Branco Prison regarding Brazil, Provisional Measures. Order of the Inter-American Court of Human Rights of July 7, 2004, point number thirteen

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Reintegration programs must be tailored to the age and particular needs of each child, and must include the family and the community to which the child belongs. For children who have no family, or whose family is unable to support them, child protection services should be ready to step in to offer the support that will enable these children to provide for their social and economic needs. Children who are on the verge of attaining their adulthood, or who have already attained it, may require guidance to enrol in educational or vocational training programs, and support to obtain housing, a job and connect with other resources in the community. While these support programs should be available to all children who have been released, it is important to note that reintegration into the community ought not to begin when the child is released; instead, reintegration is a process that should begin as soon as the child is sentenced and continue to be implemented the entire time that the child is serving his or her sentence.

Any program or service whose purpose is to assist children deprived of their liberty with their re-assimilation into the community must make every effort to fight the discrimination and stigmatization that these children tend to suffer for having been offenders. It is therefore imperative that the confidentiality of the records of children either accused or convicted of violating the criminal law be maintained.

SPECIFIC GUIDELINES

Defence counsel should seek to:

- explore the range of reintegration programs available for children who come into contact with the justice system;
- suggest which reintegration programs best align with the child's needs, such as the issuance of reintegration permits, which allow children to leave detention centres or other such facilities to

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participate in educational, rehabilitative or job activities in the community before being formally released;

- suggest that children benefit from educational and vocational services, counselling, reasonable follow-up evaluations and monitoring; and
- suggest the implementation of measures aimed at preventing the child from being discriminated against or stigmatised.
- encourage the court to order that the confidentiality of the record of a child accused of or convicted of a crime be maintained.

MEDICAL CARE, COUNSELLING AND RELATED FORMS OF ASSISTANCE

Children who come into contact with the justice system suffer a variety of harms, some of a physical nature, others of a psychological nature. In recognition of these harms, and in an effort to enhance the protection of these especially vulnerable persons, international law requires that all appropriate measures be taken to promote the “physical and psychological recovery” of children in an environment that fosters their “health, self-respect and dignity” (**Article 40(I) of the Convention on the Rights of the Child**). These principles are further countenanced by the *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, which speak to the need for the provision of “health care, counselling, physical and psychological recovery services and other services necessary for the child’s reintegration.” The Guidelines further indicate that all such assistance should address the child’s needs and enable him or her to participate effectively at all stages of the justice process, and that any support afforded the child should be provided by “professionals”, commencing “at the initial report and continuing until

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such services are no longer required.”²³ The rationale for these specialised measures, as pointed out by the UN Office on Drugs and Crime (UNODC), lies in the fact that children need to be protected from victimisation within the context of the justice system, as victimisation has “far-reaching effects on [children’s] psychological development, on relationships with caregivers, siblings and peers, on their ability to learn, and so forth.”²⁴

SPECIFIC GUIDELINES

Defence counsel should seek to:

- assist the court in determining the physical and psychological needs of the child;
- consider the range of medical, counselling, support services or intervention measures available, in light of the child’s immediate and long term needs;
- suggest that appropriate medical, counselling or other support or intervention services be afforded the child for a specified duration;
- regularly review the extent to which the court’s order with respect to the provision of support services to the child has been complied with;
- suggest, where appropriate, the variation of any orders made with regard to the provision of medical, counselling support

²³ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, chapter III, Principles, paragraph 8, and chapter IX, The right to effective assistance, paragraphs 22-24

²⁴ Handbook for Professionals and Policymakers on Justice Matters involving Child Victims and Witnesses of Crime (United Nations Office on Drugs And Crime, 2009) 49



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services or intervention to the child, where the circumstances so demand.

PRIVACY AND CONFIDENTIALITY

Although legal proceedings are generally of a public nature, international law requires that the privacy of a child who comes into contact with the justice system be fully respected at all stages of legal proceedings in relation to which he or she is a participant (**Article 40(2)(vii) of the Convention on the Rights of the Child**). This position is confirmed by **Rules 8(1) and 21(1) of the Beijing Rules** and **Rule 3(12) of the Tokyo Rules**.

According to the Inter-American Court on Human Rights, the protection of a child’s privacy within the context of the justice system “takes into account the best interests of the child, insofar as it protects him or her from opinions, judgments or stigmatization that may have a substantial bearing on his or her future life.”²⁵ As pointed out by the Committee on the Rights of the Child, this effectively means that in camera hearings should be held in all appropriate cases involving children,²⁶ and that no information should be published that may lead to the identification of a child because of its “effect of stigmatization, and possible impact on his/her ability to have access to education, work, housing or to be safe.”²⁷

²⁵ I/A Court H.R., Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 134.

²⁶ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 66.

²⁷ Committee on the Rights of the Child, General Comment No. 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 64.

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SPECIFIC GUIDELINES

Defence counsel should seek to:

- suggest that the judicial officer make an order that persons not directly involved in the proceedings be excluded from the court while a matter involving a child is being heard;
- suggest that the judicial officer make an order restricting the media from publishing any information that may specifically identify a child who comes into contact with the justice system;
- take all appropriate measures to keep any documents/records relating to a child who comes into contact with the justice system confidential;
- suggest that the judicial officer make an order that the court list (of cases to be heard) be published in a manner that does not expose the child to undue public attention;
- suggest that the judicial officer direct court staff to not shout the child's name when bringing attention to the fact that his or her case is about to be heard;
- suggest that the judicial officer give directions that a child who is awaiting the hearing of his or her matter be accommodated in a room(s) at court that is away from the public's view; and
- suggest that the child enter through/exit from discreet areas of the court so that he or she is not unduly exposed to the public.

INTIMIDATION/HARASSMENT

International law requires that all appropriate measures be taken to promote the physical and psychological recovery and social reintegration of children who come into contact with the justice system (**Article 39 of the Convention on the Rights of the Child**). This obligation necessitates the implementation of measures that protect children from



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any form of intimidation, harassment or torture or any other form of cruel, inhuman or degrading treatment or punishment.

Professionals should be trained in recognizing and preventing intimidation, threats and harm to children and that where children may be the subject of intimidation, threats or harm, appropriate conditions should be put in place to ensure their safety.

SPECIFIC GUIDELINES

Defence counsel should seek to:

- suggest that the court impose restrictions which prevent a person or persons from taking retaliatory action against an accused child;
- encourage the use of court orders to prevent the police, staff at detention centres and other stakeholders from engaging in conduct which amount to discrimination, harassment, intimidation or vilification of an accused child; and
- suggest that the police provide sufficiently comprehensive security and other safeguards in order to protect children who are in conflict with the law from being abused or victimised.²⁸

CHILDREN'S PROPERTY

Children in conflict with the law have a right, according to the Convention on the Rights of the Child, to be treated “in a manner consistent with the promotion of [their] sense of dignity and worth” (**Article 40(1) of the Convention on the Rights of the Child**). According to **Rule 35 of the Havana Rules**, this right entails a recognition that the possession of

²⁸ *UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, chapter XII, The right to safety, para. 34

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personal effects is a basic element of the juvenile's right to privacy and essential to the psychological well-being of the juvenile.”

SPECIFIC GUIDELINES

Defence counsel should seek to:

- insist that children's personal effects be placed in safe custody;
- suggest to staff at police stations or detention centres that an inventory accounting for these personal effects be signed by the child;
- suggest to staff at police stations or detention centres that steps be taken to keep children's personal effects in good condition; and
- insist that all personal effects and money be returned to the child on release, except where these articles need to be withheld for legal purposes.

CRIMINAL RECORDS

As a matter of international law, in order to prevent stigmatization of children who come into contact with the justice system, provision should be made by States to ensure that the details of any convictions which may have been recorded whilst these persons were under the age of majority are automatically expunged once they attain adulthood. While exceptions to this general principle are permitted by the Convention on the Rights of the Child in respect of certain limited, serious offences, such as homicide, the Committee on the Rights of the Child has called for the eventual expungement of these records, possibly subject to certain conditions, for example, where the person does not commit an offence

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within two years after his or her last conviction.²⁹ Moreover, the details of any criminal records in respect of children in conflict with the law should not, in principle, be disclosed to third parties, the only legally justifiable exception being where such disclosure serves a legitimate, objective and reasonable end. Furthermore, as required by the Beijing Rules, information contained in the records of child offenders with respect to convictions recorded while these offenders were yet children should not be used in adult proceedings in subsequent cases involving the same offenders.³⁰

SPECIFIC GUIDELINES

Defence counsel should seek to:

- make applications on behalf of former child offenders to have their criminal records expunged in appropriate cases;
- suggest to the police or other relevant official that they should expunge the records of child offenders, where the circumstances of the case so demand;
- suggest that the police or other relevant official provide children previously in conflict with the law with clean records for employment, vocational and related purposes;
- remind stakeholders of the (limited) circumstances under which the criminal records of children could be disclosed; and
- remind stakeholders of the need to avoid using the records of child offenders when suggesting an appropriate sentence in adult proceedings involving the same offenders.

²⁹ Committee on the Rights of the Child, General Comment No. 10, Children's rights in juvenile justice, CRC/C/GC/10, 25 April 2007, para. 67.

³⁰ Beijing Rules, Rules 21.1 and 21.

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TRAINING

The spirit and context of the Convention on the Rights of the Child³¹ and the Beijing Rules³² require that those who exercise authority at the various stages of the administration of child justice, including defence counsel, are to be specifically trained and qualified in the human rights of the child, in order to avoid any abuse of authority, and to ensure that the measures ordered in each case are suitable, necessary and proportional. The obligation to engage in adequate training applies to all stakeholders who work directly in the justice system as well as at its periphery.³³ Training, in this context, is intended to equip stakeholders with the necessary knowledge base so as to enable them to properly exercise their discretionary authority with respect to children in a manner consistent with all relevant principles of human rights, including the best interests of the child.³⁴

SPECIFIC GUIDELINES

Defence counsel should seek to:

- engage in regular and comprehensive training on the following issues:
 - relevant human rights norms, standards and principles, including the rights of the child;
 - principles and ethical duties of their office;
 - signs and symptoms that indicate crimes against children;

³¹ Convention on the Rights of the Child, Article 40(4)

³² Beijing Rules, Rule 6.3.

³³ Committee on the Rights of the Child, General Comment No. No. 12, The right of the child to be heard, CRC/C/GC/12, 20 July 2009, para. 34.

³⁴ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, chapter XV, Implementation, para. 40

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- crisis assessment skills and techniques, especially for making referrals, with an emphasis placed on the need for confidentiality;
- impact, consequences, including negative physical and psychological effects, and trauma of crimes against children;
- special measures and techniques to assist children in the justice process;
- cross-cultural and age-related linguistic, religious, social and gender issues;
- appropriate adult-child communication skills;
- interviewing and assessment techniques that minimize any trauma to the child while maximizing the quality of information received from the child;
- skills to deal with child victims and witnesses in a sensitive, understanding, constructive and reassuring manner; and
- roles of, and methods used by, professionals working with children.

STAKEHOLDER COLLABORATION

The proper administration of justice demands that all stakeholders who are actively engaged in the field of child justice not only individually contribute to the protection and support of children, but also collectively do so, in light of the fact that issues which touch and concern children often raise multi-disciplinary or multi-dimensional challenges. It should thus come as no surprise that the Convention on the Rights of the Child

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contemplates that, to achieve the full potential of its myriad provisions, stakeholder collaboration is not only desirable, but essential.³⁵

SPECIFIC GUIDELINES

Defence counsel should seek to:

- collaborate with a wide cross-section of the professionals working in the justice system including so as to enable the efficient delivery of justice to children who come into contact with the justice system, including:
 - judicial officers, who decide upon matters involving children who come into contact with the justice system, having regard to the evidence presented;
 - police officers, who investigate matters involving children, transmit relevant findings, and present relevant evidence to the court;
 - social workers, who provide counselling, support and related assistance to children, thereby enabling them to fully participate in legal proceedings;
 - education officers, who not only provide evidence in appropriate cases, but also appropriate support and

³⁵ Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, chapter XV, Implementation, para [43] (“Professionals should make every effort to adopt an interdisciplinary and cooperative approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services. This approach may include protocols for the different stages of the justice process to encourage cooperation among entities that provide services to child victims and witnesses, as well as other forms of multidisciplinary work that includes police, prosecutor, medical, social services and psychological personnel working in the same location.”)

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- assistance to children, including rehabilitative and reintegration services;
 - staff at detention centres/residential facilities, who oversee the provision of accommodation and related assistance to children at the direction of the court; and
 - representatives of NGOs, who provide material, social, educational, vocational and related assistance to children, and who also facilitate the implementation of various court-directed diversion, rehabilitative and reintegration programs.
- ensure that he or she is clear about his or her distinctive role in the diverse web of stakeholders, as well as the role of other practitioners; and
 - ensure that conflicts of interest which arise between stakeholders are resolved at the earliest possible opportunity.

■ WHAT IS IMPACT JUSTICE?

- The IMPACT Justice Project is a collaboration between the Canadian Government and the University of the West Indies Cave Hill Campus for enhancing access to justice benefitting men, women, youth and businesses in CARICOM. Its components are: the drafting of gender and environmentally sensitive model legislation and training legislative drafters; provision of an enhanced gender-responsive legislative framework of lawyers which includes upgrading of their skills, the establishment and expansion of legal databases and increasing access to training and delivery of Alternative Dispute Resolution and community-based peace-building services in CARICOM Member States.

■ What are the “Protocols for Practitioners Working with Children in the Eastern Caribbean Justice System”?

- The Protocols are a series of guidelines produced by the IMPACT Justice Project that constitute specific instructions, consistent with international best standards and practices, designed to guide and regulate the interactions between children who come into contact with the justice system in the Eastern Caribbean, and authorities such as judicial officers, prosecutors and defence counsel, police, social workers, and staff at detention centres/residential facilities.
- Although the Protocols do not have the force of law, it is hoped that all stakeholders will do their utmost to adhere to the guidelines and principles described. This will help to ensure that the delivery of justice to persons with disabilities in the Eastern Caribbean is efficient, objective and fair.

**Improved Access to Justice in the Caribbean
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