

**Office of the Children's  
Commissioner's response to the  
Inquiry by Parliamentarians into  
the operation and effectiveness  
of the youth justice system**

**November 2013**

# About the Office of the Children's Commissioner

The Office of the Children's Commissioner (OCC) is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The United Nations Convention on the Rights of the Child (UNCRC) underpins and frames all of our work.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. She also has a duty to speak on behalf of all children in the UK on non-devolved issues which include immigration, for the whole of the UK, and youth justice, for England and Wales. One of the Children's Commissioner's key functions is encouraging organisations that provide services for children always to operate from the child's perspective.

Under the Children Act 2004 the Children's Commissioner is required both to publish what she finds from talking and listening to children and young people, and to draw national policymakers' and agencies' attention to the particular circumstances of a child or small group of children which should inform both policy and practice.

The Office of the Children's Commissioner has a statutory duty to highlight where we believe vulnerable children are not being treated appropriately in accordance with duties established under international and domestic legislation.

## **Our vision**

A society where children and young people's rights are realised, where their views shape decisions made about their lives and they respect the rights of others.

## **Our mission**

We will promote and protect the rights of children in England. We will do this by involving children and young people in our work and ensuring their voices are heard. We will use our statutory powers to undertake inquiries, and our position to engage, advise and influence those making decisions that affect children and young people.

# The United Nations Convention on the Rights of the Child

The UK Government ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1991.<sup>1</sup> This is the most widely ratified international human rights treaty, setting out what all children and young people need to be happy and healthy. While the Convention is not incorporated into national law, it still has the status of a binding international treaty. By agreeing to the UNCRC the Government has committed itself to promoting and protecting children's rights by all means available to it.

The legislation governing the operation of the Office of the Children's Commissioner requires us to have regard to the Convention in all our activities. Following an independent review of our office in 2010 we are working to promote and protect children's rights in the spirit of the recommendations made in the Dunford report and accepted by the Secretary of State.

In relation to the current consultation, the articles of the Convention which are most relevant to this area of policy are:

- Article 2:** The Convention applies to everyone, whatever their ethnicity, gender, religion, abilities, whatever they think or say, whatever type of family they come from.
- Article 3:** The best interests of the child must be a top priority in all things that affect children.
- Article 12:** Every child has the right to say what they think in all matters affecting them, and to have their views taken seriously.
- Article 37:** No child shall be tortured or suffer other cruel treatment or punishment. A child should be affected only as a last resource and for the shortest possible time. Children must not be put in a prison with adults and they must be able to keep in contact with their family.
- Article 39:** Children neglected, abused, exploited, tortured or who are victims of war must receive special help to help them recover their health, dignity and self-respect.

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<sup>1</sup> You can view the full text of the United Nations Convention on the Rights of the Child on the Office of the United Nations High Commissioner for Human Rights website at: <http://www2.ohchr.org/english/law/crc.htm>. A summary version, produced by UNICEF, is available at: [http://www.unicef.org/crc/files/Rights\\_overview.pdf](http://www.unicef.org/crc/files/Rights_overview.pdf)  
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**Article 40:** A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to help from a lawyer and a fair trial that takes account of their age or situation. The child's privacy must be respected at all times.

The response below has therefore been drafted with these articles in mind. We do not propose to respond separately to every consultation question. Rather, we will respond where we feel the UNCRC gives us a locus to do so, and where our existing evidence base gives us a perspective.

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The Office of the Children's Commissioner welcomes this inquiry and the opportunity to submit evidence. The UN Convention on the Rights of the Child provides in Article 40 that children in trouble with the law should be treated 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' While we are not recommending a specific design of court or tribunal system for determining children's responsibility for offences and sentencing or other outcomes, we highlight the following requirements for the system dealing with children who offend, deriving from the UN Convention on the Rights of the Child. This is a non-exhaustive list but we believe these principles are of particular relevance to this inquiry. We do not deal here specifically with sentencing or conditions of detention as we understand that this inquiry is focused on the criminal courts system.

### **1. Judicial proceedings to be a last resort**

According to Article 40(3) UNCRC states should wherever appropriate and desirable deal with children who offend without resort to judicial proceedings (in a manner that respects their human rights and legal safeguards). The age of criminal responsibility should be raised to at least 12: the UN Committee on the Rights of the Child has said that an age below 12 (as exists in England and Wales) is not 'internationally acceptable' and encourages states to increase it to 12 as the absolute minimum and to continue to increase it to a higher level.<sup>2</sup> Article 37 UNCRC emphasises that arrest and detention of children by the police should be a measure of last resort.

### **2. Judicial proceedings appropriate to the child's age and capacity**

Where judicial proceedings are necessary, procedures should be within the context of a specific system for children and should be appropriate to the child's age and developmental capacity. The child should be able to participate effectively in them, as is required by Article 40(2)(b)(iv) UNCRC and Article 6 of the European Convention on Human Rights.<sup>3</sup> As the European Court of Human Rights said in *S.C. v United Kingdom*, concerning the Crown Court trial of an 11 year old boy with a learning disability (emphasis added):

...when the decision is taken to deal with a child ... who risks not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than some

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<sup>2</sup> UN Committee on the Rights of the Child, General Comment No 10, Children's rights in juvenile justice, CRC/C/GC/10, para 32.

<sup>3</sup> See *T v UK*; *V v UK* (2000) 30 EHRR 121 and *S.C. v UK* (2005) 40 EHRR 10.

other form of disposal directed primarily at determining the child's best interests and those of the community, **it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.**

We therefore agree with the UN Committee on the Rights of the Child that the age of criminal responsibility should be raised to at least 12, as we believe that most 10-11 year old children will not have sufficient capacity to participate effectively in an adversarial criminal trial.

Further, we would welcome reinstatement of the principle of *doli incapax* in order that children under 14 are not criminalised where they have not understood that their behaviour was seriously wrong as opposed to merely naughty. In practice, many minor cases where the principle might apply will now be dealt with by pre-court diversion in all events. However, *doli incapax* could play an important role both in relation to younger children and children who lack sufficient capacity to appreciate the seriousness of their actions due to neurodevelopmental disability. The OCC report '*Nobody made the connection: the prevalence of neurodisability in young people who offend*' (London, 2012), which is appended to this submission, describes the high levels of neurodevelopmental disability in children in the youth justice secure estate.

### **3. The best interests of the child should be a primary consideration at all stages**

The best interests of the child should be a primary consideration at all stages, as is required by Article 3 UNCRC. Both judicial and non-judicial procedures and sentences/other measures to address offending behaviour should promote the child's rehabilitation and reintegration into society. Children should be comprehensively assessed before trial or sentencing in order that their needs and vulnerabilities are properly taken into account. An assessment process focused only on offending behaviour, risk to others and criminogenic factors is unlikely to be able to meet these objectives. Information outside the criminal process including that held by the family court, local authority social services departments and other agencies should be made available to the court before trial/sentence in order that as full a picture as possible of the child is before the relevant tribunal. Appropriate safeguards should be put in place to prevent prejudicial information from compromising the fairness of trials.

### **4. The child's privacy should be protected at all stages of proceedings**

Article 40 (2)(b)(vii) UNCRC requires that the child's privacy be respected from the initial contact with the police up until the final decision by a competent authority or release from supervision, custody or detention. The UN Committee on the Rights of the Child have explained that this is intended

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to prevent ‘stigmatisation, and possible impact on his/her ability to have access to education, work, housing or to be safe.’<sup>4</sup> The current system in criminal cases in England and Wales, which presumes publicity for cases in the Crown Court and allows reporting restrictions to be lifted in the youth courts,<sup>5</sup> is at odds with this requirement.

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<sup>4</sup> General Comment no 10, paras 64-67.

<sup>5</sup> Sections 39 and 49, Children and Young Persons Act 1933.

