



Championing Children and Young People in England

Office of the Children's Commissioner (OCC):

**Parliamentary briefing on the Legal Aid,
Sentencing and Punishment of Offenders Bill
for House of Lords Report Stage
(Legal Aid provisions)**

March 2012

www.childrenscommissioner.gov.uk

Office of the Children's Commissioner

The Office of the Children's Commissioner 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.

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 1991.¹ 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, ratification of the UNCRC makes it bound by the Vienna Rules, and therefore legally binding in its totality. 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 by the Dunford Review and accepted by the Secretary of State.

¹ 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

In December 2010 Children's Minister Sarah Teather committed the Government to give 'due regard' to the UNCRC when making new policy and legislation and, in so doing, will always consider the recommendations of the UN Committee on the Rights of the Child.² The key UNCRC rights engaged by the Bill are:

- Article 2:** The right to enjoy all human rights, without discrimination
- Article 3:** That the best interests of the child must be a primary consideration
- Article 4:** The obligation to take all appropriate legislative, administrative and other measures to implement the rights in the UNCRC (for economic, social and cultural rights, to the maximum extent of available resources)
- Article 6:** The right to life and to develop "to the maximum extent possible"
- Article 9:** The right for children not to be separated from their parents against their will
- Article 10:** Applications for entry for family reunification to be dealt with in a positive, humane and expeditious manner
- Article 12:** The right for children to participate and express their views
- Article 16:** The right to private and family life
- Article 19:** The right to protection from child maltreatment
- Article 22:** The right of refugee and asylum seeking children to appropriate protection and humanitarian assistance
- Article 23:** The right for disabled children to enjoy a "full and decent life", and their right to "special care" and assistance
- Article 24:** The right to enjoy "the highest attainable standard of health"
- Article 26:** The right to benefit from social security
- Article 27:** The right to a standard of living adequate for the child's development

² Department for Education, Written Ministerial Statement, *Publication of the Independent Review of the Children's Commissioner*, 6 December 2011, CM 7981.

Article 28: The right to education

Article 34: Protection of the child from sexual exploitation and sexual abuse

Article 39: Obligation to take all appropriate measures to promote the physical and psychological recovery and social reintegration of child victims

All UNCRC rights should be read in the context of the four general principles of the UNCRC: non-discrimination; the best interests of the child being a primary consideration; the right to survival and development to the maximum extent possible; and the right for the child's views to be heard and given respect.

Legal Aid

1. In accordance with the remit of the Office of the Children's Commissioner (OCC) this briefing will focus upon children's rights in England and, in relation to non-devolved issues, other relevant parts of the United Kingdom. 'Children' refers to persons aged under 18 but our remit also includes young people aged 18-20 inclusive who have been in the care of a local authority when aged 16 or over or who have a learning disability.
2. In a letter to the Secretary of State for Justice dated 6 January 2012 the Children's Commissioner for England said:

I share the concern of the Joint Committee on Human Rights³ that the ability of the Director of Legal Aid Casework to grant exceptional funding is insufficient to make rights practically effective due to the need for expedition. Further, children without legal advice and assistance will encounter difficulties even in accessing a determination by the Director. Failure to afford children effective access to justice in cases engaging their civil rights and obligations will be in violation of Article 6 ECHR [European Convention on Human Rights]. It will also – even in immigration cases that do not benefit from the protections of Article 6 – prevent them from being afforded their substantive rights and an effective domestic remedy for breaches of those rights.

The Children's Commissioner therefore called on the Secretary of State to accept an amendment to the Bill (tabled at House of Lords Committee stage) that would put child parties back into scope.

3. An amendment that would restore cases with child parties to scope under Schedule 1 to the Bill has been tabled at Report Stage by Baroness Benjamin, Baroness Eaton, Lord Newton of Braintree, and Lord Kennedy of Southwark (numbered **46*** in the Marshalled List). We support this amendment since it would help to ensure that children's rights under Article 6 ECHR and Articles 3 and 12 UNCRC remain effective. Article 12 UNCRC provides that States Parties:

[s]hall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child...in particular [the child shall] be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body.

Legal advice and representation will often be required in order for this right to be effective and for the best interests of the child to be identified in order that in all

³ *Twenty-Second report of session 2011-12: Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill*

actions concerning the child, including by 'courts of law', they can be a primary consideration, as required by Article 3 UNCRC.

5. The areas of law that will be removed from scope by the Bill engage substantive rights crucial to children's development and wellbeing, including the rights to social security and an adequate standard of living (social welfare law, housing and debt); to family life (immigration); to recovery from abuse (criminal injuries compensation); to education (other than SEN); and to health (clinical negligence). In her letter to the Secretary of State the Children's Commissioner indicated her support for an amendment bringing back into scope clinical negligence cases for children, due to her "serious concerns at the adequacy of remedies for children who have suffered serious injuries and damage to health by medical negligence if these cases are removed from scope and support". While emphasising that respect for children's rights demands that legal aid be available in a wide range of cases with child parties, or where children's rights and interests are affected, we therefore support the amendment tabled by Baroness Eaton, Lord Crisp, Lord Newton of Braintree, and Lord Cormack (numbered **31*** in the Marshalled List) that would restore clinical negligence cases to scope where the negligence took place against a child under 18 (rather than the more limited Government amendment 68 which applies only to unborn and very young babies).
6. As indicated above, the Children's Commissioner's remit covers vulnerable young people aged 18 to 20 who are care leavers or who have a learning disability. These circumstances generate particular needs for these young people, for example regarding welfare and housing, and also particular vulnerabilities in acting without legal advice and assistance. We therefore support the amendment numbered **21*** in the Marshalled List, tabled by Baroness Howe of Idlicote and Baroness Benjamin, which would retain cases in scope where the client is a vulnerable young person under the age of 25, including those with a disability, care leavers and victims of trafficking.
7. Finally, the Children's Commissioner on 6 January indicated that she shared the concerns of the JCHR that 'the Bill as currently drafted will not achieve the Government's laudable aim of continuing to ensure access to legal aid for victims of domestic violence is practically effective' and echoed the JCHR's recommendations that the wider Association of Chief Police Officers (ACPO) definition of domestic violence be substituted for the one in the Bill; that broader forms of evidence be accepted to establish that a person is a victim of domestic violence in recognition of the barriers for victims in reporting abuse and taking formal action; and that the 12 month time limit after previous proceedings for eligibility be removed.⁴ These changes are necessary in order to provide effective protection for children from violence and abuse in our legal system, as required by Article 3 ECHR and Article 19 UNCRC.

⁴ See JCHR, *ibid*, para 1.38.

8. We therefore support the amendments numbered **41** and **43** in the Marshalled List, tabled by Baroness Scotland of Asthal, Baroness Butler-Sloss, Lord Blair of Boughton, and The Lord Bishop of Leicester. We welcome the Government amendments 40 and 42 which would extend the definition of domestic violence in the Bill (although we would prefer that amendment 42 included reference to neglect, maltreatment, exploitation, and acts of omission), but crucially these amendments do not extend the types of evidence available to establish domestic violence for the purposes of legal aid, nor do they remove the time limit after previous proceedings. They therefore fail to meet the concerns expressed by the Children's Commissioner on 6 January and by the JCHR.

Office of the Children's Commissioner
March 2012

For more information, contact:

Sally Ireland, Principal Policy Adviser (Children's Rights)
sally.ireland@childrenscommissioner.gsi.gov.uk
Tel: 020 7340 7037
www.childrenscommissioner.gov.uk