

A Submission to the United Nations Human Rights Council Universal Periodic Review 2007 from the Family Commission

This submission relates to the United Kingdom

1.0 Introduction to the Family Commission

1.1 The Commission on Families and the Wellbeing of Children (the Commission) was established in April 2004 to consider the relationship between the state and the family in providing children with a humane and caring upbringing in the 21st century. It was established by the Family and Parenting Institute and NCH (previously known as the National Children's Home), with support from the Joseph Rowntree Foundation.

2.0 Aims of the Family Commission

2.1 The Commission's brief was to seek to promote the wellbeing of children through addressing some of the core issues and dilemmas faced by society in managing the relationship between the state and the family.

2.2 In order to achieve its aims the Commissioners considered the developing boundaries between the state and the family, examining what is supportive on the one hand and insufficiently supportive or detrimental to human rights on the other.

2.3 In undertaking its review of family policy and in developing its recommendations, the Commission was guided by a set of values which recognise the scope and limitations of the state's locus in family life together with society's obligations to support the care and upbringing of children.

2.4 In determining the dividing line between family autonomy and legitimate state intervention at a range of levels and in a variety of forms, and the scope of the state's obligations to support families, the Commission was guided by two internationally accepted instruments establishing the dimensions of human and children's rights – the Human Rights Act 1998 and the United Nations Convention on the Rights of the Child 1989.

3.0 The Family Commission's submission to the UN Human Rights Council Universal Periodic Review into the UK

3.1 The Commission would like to draw the Review's attention to a central problem arising from recent developments in juvenile justice within the UK. The effective *lowering* of the age of criminal responsibility to 10, which implies that children over the age of nine have the same knowledge of what constitutes crime as a mature adult, and the simultaneous *raising* of the presumption of parents' responsibility for their children's offences has produced a contradiction within the UK's justice system. In particular the abolition of *doli incapax* and the coercive nature of parenting orders have created, in effect, a questionable new reality of dual responsibility for juvenile crime. This inconsistency goes beyond existing forms of parental liability for the conduct of children, and blurs the crucial distinction between the duty of care and

responsibility for conduct. The Commission is of the view that the lines of criminal responsibility should be redrawn to achieve a proper balance of legal and moral obligation.

4.0 Parental responsibility in the UK

4.1 The UK government's supposition underlying its enforcement of parental responsibility is that parents are able to control their children's behaviour in most circumstances.

5.0 Parenting Orders in the UK

5.1 Parenting Orders were brought in by the Crime and Disorder Act 1998, and subsequently expanded by the Anti-Social Behaviour Act 2003, the Education and Inspections Act 2006 and the Police and Justice Act 2006. The parenting order gives magistrates the opportunity, where a child has committed an offence or has truanted, of directing the parent to engage in some form of guidance or counselling, including the possibility of attending a residential course. It also enables the magistrate to impose requirements on the parent encouraging exercise of control over the child, for example, attending school regularly or avoiding certain places.³ Despite the supportive thrust of parenting orders, there are doubts around the efficiency of compulsion and human rights concerns arising from the attribution of blame for the conduct of one person to another; parents are in effect criminalised without their having committed a crime.

6.0 Parenting Contract in the UK

6.1 The Anti-Social Behaviour Act also introduced the parenting contract for use where a child has been excluded from school for disciplinary reasons, either permanently or for a fixed period, or has regularly played truant. If parents refuse to sign such a contract or to comply with it, this will be taken into account by magistrates when deciding whether to impose a parenting order. The imposition of such an order can be made on application by the Local Education Authority (LEA) following a child's exclusion from school on disciplinary grounds or repeated truancy. There is no requirement here that the child should have become formally involved in the criminal justice system. The parenting contract comprises a statement by the parent the s/he agrees to comply with specified requirements designed to improve the child's conduct (possibly involving attendance at a counselling or guidance programme), and a statement by the LEA or school governing body that it "agrees to provide support to the parent for the purpose of complying with those requirements".

¹ Under the Crime and Disorder Act 1998, Parenting Orders can be issued when:

- The child has been made the subject of a Child Safety Order.
- The child or young person has committed an offence.
- An Anti-Social Behaviour Order or Sex Offender Order has been made.
- An adult has been convicted under sections 443 or 444 of the Education Act 1996 for the non-attendance of a child at school.

This is not an equitable contract. It is an involuntary process and there are no means established by which parents can enforce the authorities' side of the bargain.⁴

7.0 Crime prevention responsibilities

7.1 The enhancement of parents' liability for their children's actions under these provisions is not unprecedented. It continues a trend that can be traced back to the 1933 Children and Young Person's Act.⁵ There has, however, been a quickening of the pace of extending responsibility for children's offending to parents. The justification in the *No More Excuses* White Paper of 1997 was that while "parents may not be directly to blame for the crimes of their children...[they] have to be responsible for providing their children with proper care and control". These developments signify a far-reaching shift in the nature of criminal responsibility. They rest on a justification which amounts, despite the disclaimer in the White Paper, to a presumption of dual responsibility for the offending behaviour of children up to the age of 16. This presumption is based on an interpretation of parental duties for the care and control of children that now includes crime prevention.

8.0 Legal inconsistency

8.1 The legal inconsistencies associated with dual responsibility for the anti-social behaviour of children need to be addressed. If parents' duties are to include crime prevention and responsibility for the acts of their children up until the age of 16, this can only be logically defensible if children under 16 are defined as being below the age of criminal responsibility. However, in the UK, the trend is quite the reverse.

9.0 The age of criminal responsibility and *doli incapax*

9.1 The age of criminal responsibility in England and Wales is 10 despite the recommendations in the Ingleby Report (1960) and by others that it be raised to 12 or 14 in line with most Western European societies.⁴ In Scotland it is eight, but in the context of a welfare rather than a judicial model of youth justice. One argument for retaining the relatively low age of 10 was that the system protected 10-13 year old children inclusive by the presumption of *doli incapax*, a long established principle that children of this age were "incapable of crime" due to their immaturity, unless proven otherwise. Unless criminal intent could be established, therefore, offenders under the

² The Anti-Social Behaviour Act 2003 states that "A parenting contract does not create any obligations in respect of whose breach any liability arises in contract or tort."

³ "There has been a progressive shift towards ensuring that parents accept responsibility for exercising appropriate control over their children. Thus, section 55 of the Children and Young Persons Act 1933 first enabled courts to require parents to pay financial penalties imposed on their children. Section 26 of the Criminal Justice Act 1982 went further to require courts to impose any fine, award of costs or compensation on the parents unless they could not be found or it would be unreasonable to do so. In 1991 the Criminal Justice Act introduced a presumption that courts should bind over the parents of a child under the age of 16 and convicted of an offence to 'take proper care of him and exercise proper control over him'. This provision was extended in 1994 by empowering courts to include within any such bind over a requirement on the parents to ensure that the child complied with the conditions of any community sentence." (NACRO, 2004).

⁴ The average age of criminal responsibility in other European countries is 14-15 years.

age of 14 were subject, broadly speaking, to welfare disposals rather than criminal prosecution. *Doli incapax* was abolished by the Crime and Disorder Act 1998. This was done without a review of the law relating to children's behaviour, which had been recommended by the Law Lords in *C vs. DPP* 1995; the Law Lords had anxieties over the impact of the low age of criminal responsibility operating without the protection of *doli incapax*. (Appendix A summarises the history of its abolition.)

10.0 A balanced and consistent policy

10.1 The Commission is of the view that an effective and credible criminal justice system requires that the rights and interests of victims, offenders and communities be held in appropriate equilibrium. This balance is not being met in current criminal justice policy exemplified by the Crime and Disorder Act 1998 and the Anti-Social Behaviour Act 2003.

10.2 A central problem arising from recent developments in juvenile justice is the growing contradiction between the effective *lowering* of the age of criminal responsibility to 10, which implies that children over the age of nine have the same knowledge of what constitutes crime as a mature adult, and the simultaneous *raising* of the presumption of parents' responsibility for their children's offences. In particular the abolition of *doli incapax* and the coercive nature of parenting orders have created, in effect, a questionable new reality of dual responsibility for juvenile crime. This inconsistency goes beyond existing forms of parental liability for the conduct of children, and blurs the crucial distinction between the duty of care and responsibility for conduct. The Commission is of the view that the lines of criminal responsibility should be redrawn to achieve a proper balance of legal and moral obligation.

- When children commit offences it is right for them to be accountable for their actions, according to their age and understanding. Account should be taken of what is known of the psychological development of children in establishing the age of criminal responsibility. The Scottish Law Commission's (2002) recommendation that the age be set at 12, with restrictions on the prosecution of young people under the age of 16, is reasonable in this regard.
- The extension of coercive measures to parents amounts to a form of "participatory liability" that is properly invoked only in cases where some element of parental *mens rea* can be proven. Parenting support should be offered to all parents whose children have come to the attention of the criminal justice system, but coercion should be restricted to those cases where the child is not held to be criminally responsible.
- More broadly in the social environment, consideration should be given to ways of enhancing informal social controls.

11.0 In conclusion

11.1 The Commission is of the view that there should be an emphasis within parenting support services on encouraging parents to take broad responsibility for the actions of their children and on imparting to them proven strategies to help them in handling children's difficult behaviour. However, policies for reducing anti-social behaviour and truancy in children should seek to divert parents and children away

from prosecution, with due consideration given to identifying and dealing with the underlying causes of behavioural issues.

11.2 Offers of support, rather than coercion, should be the initial response to families coping with children's behavioural difficulties. However, where such support is declined, and dependent on the seriousness of the case, coercion to accept support, for example through parenting orders, may be required.

12.0 Recommendations

- The age of criminal responsibility should be raised to 12.
- A *doli incapax* presumption until the age of 16 should be reintroduced. This would allow for the gradual and highly variable process of moral development in children. A system should be adopted, as recommended by the Scottish Law Commission, of normal immunity from prosecution until the age of 16, with an equivalent to the Scottish Children's Hearings introduced based on the principles of, and the experience gained from family conferencing, restorative justice and youth offender panels.⁹ A range of supportive and remedial services to work with these children and their families should be available for deployment. The criminal prosecution route should be the exception rather than the rule. One option for a "sliding scale" of maturity would be for the presumption of incapacity to stand, unless proven otherwise, for children aged 12-13, but reversed for those aged 14-15.
- Parenting orders and other legal sanctions of parents for the behaviour of their children should be restricted to parents of children who are below the age of criminal responsibility and parents of children found to be incapable of criminal intent.

Appendix A

13.0 The age of criminal responsibility and *doli incapax*

13.1 The age of criminal responsibility in England and Wales remains where it has been since the 1963 Children and Young Persons Act raised it to 10. It had been minimally raised to eight by the 1933 Children and Young Persons Act, the first change since the Middle Ages regarded seven as the crucial divide. This slight increase had been enacted despite strong arguments in the 1960s from the Ingleby Report (1960) onwards to raise it to either 12 or 14, in line with most Western European societies. In Scotland, the age of eight was retained, but in the context of a radically reformed welfare form of Children's Hearings emanating from the 1964 Kilbrandon Report.

13.2 One argument for retaining the relatively low age of 10 was that the system protected 10-13 year-old children inclusive by the presumption of *doli incapax*, a long established principle that children of this age were "incapable of crime" due to their immaturity, unless proven otherwise. The same principle is in effect applicable to mentally ill offenders of any age. Unless criminal intent could be established, therefore, offenders under the age of 14 were subject, broadly speaking, to welfare disposals rather than criminal prosecution and sentencing.

13.3 *Doli incapax* proved irksome to substantial voices among the police, the media, the magistrates and the judiciary in general, particularly as the crime rate rose steeply in the late 1980s and early 1990s. It was suggested that it provided *carte blanche* for young offenders to break the law with near impunity, and presented evidential problems in proving *mens rea* on grounds apart from the nature of the offence itself. Something of a climax was reached in the House of Lords judgment [*C vs. DPP* 1995] which overturned a Divisional Court ruling against the invocation of *doli incapax* by a 12 year old appellant who had been found guilty of attempted motorcycle theft. The terms of that ruling would have in effect abolished the principle without parliamentary legislation. The Law Lords upheld *doli incapax* and rebutted the earlier judgement that the nature of the offence sufficed to obviate its relevance to the case. However, they argued for it to be reviewed in the context of a thorough inquiry into the character of juvenile justice.

13.4 Among other points raised by the Law Lords' judgement, of particular importance is their rebuttal of the view that the rule had relevance only in an earlier era, when children needed its protection against barbaric punishments, such as execution for minor theft. Lord Lowry commented: "Better formal education and earlier sophistication do not guarantee that the child will more readily distinguish right from wrong." As Cavadino (1997), Chair of the Penal Affairs Consortium, commented, substantial rates of truancy and school exclusion show that "better formal education" falls short of engaging large numbers of children most at risk of delinquency. There is also the greater sophistication of high intensity marketing to match against the allegedly greater sophistication of children: arguably juvenile impulse control is under sustained assault in contemporary consumer society.

13.5 Despite his defence of *doli incapax* on these and several related grounds, Lord Lowry concluded that the time had come "to examine further a doctrine which appears to have been inconsistently applied and which is certainly capable of producing inconsistent results." However, he pointed out that simple abolition of the presumption "could expose children to the full criminal process at an earlier age than in most countries of Western Europe." He therefore concluded that there should be a

review, which should include a study of other systems, and that any change “should only come...after taking account of the effect which a change would have on the whole law relating to children’s behaviour.” In the event it was abolished in the Crime and Disorder Act 1998, without any accompanying upward change to the age of criminal responsibility.