



Championing Children and Young People in England

Office of the Children's Commissioner (OCC):

**Submission to the United Nations Human
Rights Council Universal Periodic Review**

13th session 2012 – United Kingdom

November 2011

www.childrenscommissioner.gsi.gov.uk

1. Introduction

- 1.1 In accordance with the remit of the Office of the Children's Commissioner (OCC) this submission 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. Developments since previous review

- 2.1 We highlight the following developments as being of particular importance to children's rights:

Normative and institutional framework:

- 2.2 The Government has set up an independent **Commission on a Bill of Rights** in order to consider the case for the creation of a domestic Bill of Rights. The Commission's terms specifically refer to a Bill of Rights that would 'incorporate and build on' the UK's obligations under the European Convention on Human Rights (ECHR). **We recommend that any UK Bill of Rights should include specific children's rights guaranteed by the UN Convention on the Rights of the Child (UNRCR), in addition to general rights not incorporated by the Human Rights Act 1998 (HRA), including justiciable socio-economic rights and the right of access to a tribunal where rights have been violated.**

Legislation

- 2.3 The **Equality Act 2010** protects people from discrimination (direct and indirect), related harassment or victimisation and sexual harassment in a range of settings by reference to a range of protected characteristics. In relation to goods, facilities, services and public functions, however, its age discrimination protections do not apply to discrimination against children under 18. The Act also imposes a general duty on public authorities to eliminate discrimination, advance equality and foster good relations between groups. However, this duty does not apply in relation to age to schools and children's homes and the 'elimination of discrimination' strand of the duty does not apply at all in relation to age discrimination against children. **We recommend that children be given the full protection of the Equality Act against age discrimination, with specific exceptions as appropriate.**

National jurisprudence

- 2.4 In ***EM (Lebanon) v Secretary of State for the Home Department*** [2008] UKHL 64 the House of Lords (prior to the creation of the UK Supreme Court) prevented the removal of a non-EU national child and his mother where removal would have

resulted in the mother losing custody of the child in favour of a father whom he did not know. Their rights under Article 8 ECHR would have effectively been nullified by the removal. **We welcome this decision.**

- 2.5 The 'best interests of the child' principle was applied to the immigration removal of a non-EU national whose children were UK citizens in **ZH (Tanzania) v Secretary of State for the Home Department** [2011] UKSC 4, where the UK Supreme Court found that the best interests of the child had to be a primary consideration in deciding whether the removal was proportionate under Article 8 ECHR.
- 2.6 In **Re E (Children)** [2011] UKSC 27, the Supreme Court also applied the best interests principle, finding that the best interests of the child had to be the primary consideration in cases under the Hague Convention on the Civil Aspects of International Child Abduction 1980.
- 2.7 **We welcome the Supreme Court's use of the 'best interests of the child principle' but recommend that in all actions and decisions concerning children the welfare and best interests of the child shall be the paramount consideration.**
- 2.8 In **A v Essex County Council** [2010] UKSC 33 the Supreme Court, in relation to the right to education of a disabled child, did not agree that the right to education under Art 2, Protocol 1 ECHR imposed a positive obligation to provide education catering for the special needs of those who could not profit from mainstream education, but merely to provide access to the mainstream education system without discrimination.

Human Rights infrastructure including NHRIs

- 2.9 The Public Bodies Bill, currently before Parliament, will allow Ministers to modify the constitutional and funding arrangements and modify or transfer functions of the UK's NHRI, the **Equality and Human Rights Commission (EHRC)**, by secondary legislation which Parliament will be able to reject but not to amend. The Government has also consulted upon removing the EHRC's duty to promote a more equal and human-rights respecting society and good relations between groups, and has decided to stop funding some of the EHRC's activities including the EHRC's information and advice helpline.¹ In our view these developments are inconsistent with the EHRC's status as an independent NHRI.
- 2.10 The Dunford Review of the **Office of the Children's Commissioner**² has recommended that legislation make the Children's Commissioner responsible for promoting and protecting children's rights in line with the UNCRC and that the new

¹ Government Equalities Office, *Building a Fairer Britain: Reform of the Equality and Human Rights Commission*, March 2011.

² Department for Education, CM 7981, December 2010.

Office should be compliant with the Paris Principles.³ We support the strengthening of OCC and the focus of its mandate upon children's rights. However we have growing concerns regarding threats to our independence from increasing government imposed controls.

Scope of international obligations

- 2.11 The **EU Charter of Fundamental Rights and Freedoms (the Charter)** became directly effective in UK law in December 2009 when the Lisbon Treaty came into force, in all matters in which EU law is engaged. The Charter gives specific protection to children's rights in Article 24, and also includes civil/political and socio-economic rights including the right to education and the prohibition on child labour. The UK entered a protocol to the treaty aimed at limiting the effect of the Charter in the UK;⁴ however, the effect of this protocol awaits clarification in the European Court of Justice case of *NS v Secretary of State for the Home Department (Principles of Community law)*⁵.
- 2.12 We welcome the removal of the UK's reservations as of 18 November 2008 to the **UNCRC** regarding immigration and citizenship and the accommodation of children in custody separately from adults.
- 2.13 We also welcome the UK's ratification, on 20 February 2009, of the **Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography**. However, the UK maintains its declarations to the **Optional Protocol to the UNCRC on the involvement of children in armed conflict**.

3. Promotion and Protection of human rights on the ground

- 3.1 The Government's record on promotion and protection of human rights on the ground is mixed. Frequent ministerial criticism of the HRA, domestic human rights judgments and the European Court of Human Rights (ECtHR) has continued. The UK government has stated that one priority of its newly-assumed chairmanship of the Committee of Ministers of the Council of Europe is to 'strengthen subsidiarity – new rules or procedures to help ensure that the Court plays a subsidiary role where member states are fulfilling their obligations under the Convention'.⁶ **We are concerned that any such measures should not weaken the role of the court in protecting and promoting the rights of children where these are not respected by the domestic system.**

³ See General Assembly Resolution 48/134 of 20 December 2003.

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF>.

⁵ [2011] EUECJ C-493/10 (22 September 2011).

⁶ Council of Europe Committee of Ministers, *Priorities of the United Kingdom chairmanship of the Committee of Ministers of the Council of Europe*, CM/Inf(2011)41, 27 October 2011.

Implementation of international human rights

- 3.2 In relation to the implementation of UN treaty body recommendations and particularly those from the Committee on the Rights of the Child (CRC): the Government in 2009 published a 'Priorities for action' document 'summarising the priorities for England to take forward the Concluding Observations' of the 2008 session of the CRC.⁷ However, following the General Election and change of government in 2010, the new Government is not committed to this plan and no new plan has been published. **We recommend that following the publication of Concluding Observations by the CRC and other treaty bodies, the Government publish comprehensive national action plans detailing how their recommendations will be implemented.**
- 3.3 In Wales, the devolved administration has passed the Rights of Children and Young Persons Wales (Measure) 2011 which requires all Welsh Ministers to have due regard to the rights and obligations in the UNCRC and its Optional Protocols when carrying out their functions. The Scottish Government in September 2011 published its Consultation on Rights of Children and Young People Bill which would have the same effect in Scotland. These developments have not been mirrored in England although the Minister for Children Sarah Teather has made a public commitment that the government will give 'due consideration' to the UNCRC when making new policy and legislation. **We recommend that the UK incorporate the rights in the UNCRC and its Optional Protocols, in particular those rights not already incorporated by the HRA.**
- 3.4 We also recommend that Government departments be subject to a statutory duty to carry out and publish **Child Rights Impact Assessments** in relation to proposed policies and legislation.

Cooperation with human rights mechanisms

- 3.5 The Government has failed to implement the final judgment of the Grand Chamber of the ECtHR relating to prisoner voting.⁸ While this does not affect children directly, it is a worrying precedent. **We recommend that the Government comply with all final judgments of the ECtHR, as required by the ECHR.**
4. **Identification of achievements, best practices, challenges and constraints in relation to implementation of accepted recommendations and development of human rights situations in the state**

Implementation of accepted recommendations

⁷ Department for Children, Schools and Families, *UN Convention on the Rights of the Child: priorities for action*, 2009.

⁸ *Hirst v UK (No 2)*, app no 74025/01, Grand Chamber judgment of 6 October 2005.

- 4.1 We here highlight the Government's progress on accepted recommendations from the 2008 UPR session specifically relating to the rights of children within our remit.

Recommendation 2: Consider removal of its reservations to the Convention on the Rights of the Child and the Optional Protocol on the involvement of children in armed conflict.

Recommendation 25: Withdraw its reservation against the Convention on the Rights of the Child, concerning the provision that detained children be separated from adults while in detention, as well as the withdrawal of their reservation concerning refugee and asylum seeking children.

- 4.2 See above at paragraphs 2.13 – 2.14. In relation to immigration and asylum, we welcome the statutory duty in s55 Borders, Citizenship and Immigration Act 2009 for immigration functions to be carried out with regard to the need to safeguard and promote the welfare of children in the UK. We also welcome the closure of the Yarl's Wood immigration removal centre to children, although we note that children are still detained while awaiting deportation/removal at Pease Pottage and Tinsley House and on arrival at ports in short term holding facilities.

Recommendation 10: Consider going beyond current legislation to protect children from violence and ban corporal punishment also in the private sector...

- 4.3 Corporal punishment of children in England remains lawful in the home and in private foster care: the defence of 'reasonable punishment' remains available to parents/carers provided that the level of violence is not sufficient to amount to the offences of actual or grievous bodily harm or to child cruelty. The CRC has repeatedly recommended the outlawing of corporal punishment against children, most recently in its 2008 Concluding Observations on the UK. **We recommend that the 'reasonable punishment' defence is repealed to offer children the same protection from violence as adults.**

Recommendation 11: Provide further information with regard to efforts to reduce poverty among children by half by 2010.

- 4.4 The commitment to reduce child poverty by half by 2010 has not been achieved. In addition, a recent report suggests that instead of meeting the 2020 target to eradicate child poverty, the likely outcome is that child poverty in 2020 will be higher than at present.⁹

⁹ Institute for Fiscal Studies, *Child and Working Age Poverty from 2010 to 2020*, IFS Commentary C121, October 2011.

4.5 The UK Children's Commissioners have recently highlighted their concern regarding child poverty and the impact of the government's economic and social reforms on the number of children living in poverty. Their report made a number of recommendations including the need for **the Child Poverty Act 2010 to be fully implemented**.¹⁰ Further, recent social security reforms including the Welfare Reform Bill currently before Parliament have the potential to drive more children into poverty. The passage of this Bill without due reference to its impact on children's rights provides further evidence of the need for Child Rights Impact Assessments (see paragraph 3.4 above).

4.6 Insufficient financial resources have been dedicated to tackling child poverty across the UK. **We recommend that additional financial resources be allocated to this goal, and clearly identified within government budgets to allow appropriate monitoring, and that child rights impact assessments be applied to new policies and programmes affecting child poverty.**

Recommendation 18: (i) Address the high incarceration rate of children, and (ii) ensure that the privacy of children is protected and to put an end to the so-called 'painful techniques' applied to children.

4.7 There has been a reduction in recent years in both the number of children entering the youth justice system and being sentenced to custody, in England and Wales.¹¹ However, we are disappointed that England and Wales still have one of the highest rates of child imprisonment in Western Europe. We recommend that the Government act upon the significant body of evidence that demonstrates how contact with the formal criminal justice system and acquiring a criminal record has a significant negative impact on a child's entire life, and is ineffective in terms of re-offending.¹² **We therefore recommend that the government implement the principle in Article 37 UNCRC that a child shall only ever be arrested or put in prison as a last resort and for the shortest possible time.**

4.8 Children in trouble with the law in England and Wales are still not guaranteed privacy at all stages of criminal proceedings, as required by Article 40(2)(v) UNCRC. In the youth courts, where most criminal cases against children take place, reporting restrictions can be lifted by the court following conviction if it is 'in the public interest' to do so. Children tried for serious offences in the adult Crown Court are not granted anonymity unless the judge makes an order to that effect. Extensive and damaging media reporting including photographs of children frequently follows their identification. Following the extensive public disorder in England in August 2011, guidance from the Crown Prosecution Service was issued

¹⁰ Office of the Children's Commissioner, *UK Children's Commissioners Mid Term report to the State Party on the UN Convention on the Rights of the Child* (November 2011)

http://www.childrenscommissioner.gov.uk/content/publications/content_542

¹¹ Youth Justice Board (YJB), *Youth Justice Annual Workload Data 2009/10, 2011, D126.*

¹² See Prison Reform Trust/Out of Trouble (2011), *Reducing Child Imprisonment* conference papers, www.outoftrouble.org.uk/learn/library/publications/reducing-child-imprisonment-conference.

to prosecutors as to when to make representations that reporting restrictions to be lifted and listed cases of significant public disorder as one type of case where this would be appropriate. We are extremely concerned at the effect that the identification of children in trouble with the law may have on their safety and life chances. **We recommend that the government prohibit the reporting of details that may identify any child involved in criminal proceedings at any stage of those proceedings.**

- 4.9 Pain-inflicting restraint techniques remain in use in the juvenile secure estate in England and Wales despite the risk of serious injury and danger to children.¹³ **We recommend that the law and institutional rules should provide that, in accordance with the CRC's 2008 Concluding Observations, restraint should be used 'exclusively to prevent harm to the child or others'.** Further, in accordance with CRC's General Comment no 8, **we recommend that the 'deliberate use of pain as a force of control' be prohibited and that non-pain-compliant methods of restraint be used, as a last resort and proportionately when necessary to prevent injury to the child or others.**

5. Area of special concern – mental health

- 5.1 We wish to highlight an area of special concern that is not addressed in the recommendations to the UK from the 2008 UPR session, relating to the mental health of children and young people. Work by OCC in 2010 including a programme of visits and interviews with children found that there is a lack of consistency and wide variation in the support for children in the youth justice system and in particular, in juvenile detention, to maintain good mental health as required by, inter alia, Article 24 UNCRC.¹⁴ This includes practices such as the inappropriate use of strip searching and segregation/solitary confinement, the lack of an efficient and effective health screening process for all children entering custody, the use of prison-style accommodation for most children in custody (Young Offenders Institutions) which cannot meet children's mental health needs, and a lack of information sharing between public authorities regarding children in the system.
- 5.2 In particular, the inappropriate use of strip searching and segregation/solitary confinement is likely to violate the right to freedom from inhuman or degrading treatment or punishment as guaranteed by Article 37 UNCRC and other instruments.¹⁵ While there is widespread variation in practice across the juvenile

¹³ See HL Deb, 9 November 2011, c71W: 29 instances of 'warning signs'/serious injury requiring hospital treatment in private Secure Training Centres so far in 2011, and 61 in 2010.

¹⁴ OCC, *'I think I must have been born bad': Emotional wellbeing and mental health of children and young people in the youth justice system*, June 2011. See also Ministry of Justice/Department of Health, *Government Response to the Office of the Children's Commissioner's Report: 'I think I must have been born bad' – Emotional well-being and mental health of children and young people in the youth justice system'*, November 2011.

¹⁵ The HRC's Special Rapporteur on Torture has recently called for the absolute prohibition of solitary confinement for 22 hours or more per day for children, and a prohibition on its use for more than 15 days for adults: see UNGA A/66/268.

secure estate, in some institutions children are segregated for long periods.¹⁶ We are further concerned at the use of bare/strip cells for children in segregation. **We believe that the use of solitary confinement and bare cells for children constitutes cruel, inhuman or degrading treatment and recommend that they be absolutely prohibited.**

- 5.3 In relation to in-patient mental health treatment, work by OCC investigating the experiences of children accommodated on adult mental health wards where they were unsafe and received poor levels of care¹⁷ resulted in the Department of Health's commitment, underpinned by s31 Mental Health Act 2007, to end the inappropriate admission of children to adult wards by April 2010.¹⁸

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¹⁶ E.g. 73 days and 68 days: HM Prisons Inspectorate, *Report on an announced inspection of HMYOI Hindley, 19-23 October 2009*.

¹⁷ OCC, *Pushed into the Shadows: Young people's experience of adult mental health facilities*, Jan 2007.

¹⁸ See 'DH response to *Pushed into the Shadows*', OCC website, and OCC, *Out of the Shadows? A review of the responses to recommendations made in Pushed into the Shadows: Young people's experience of adult mental health facilities*, October 2008.