

*Why Children Need to Know their Rights**

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Underlying Assumptions

The Office of London Children's Rights Commissioner is a non-government 'children's rights commissioner' established to make the case for effective government institutions for children, by a consortium of children's groups (the Children's Rights Alliance for England). It is funded by charities¹ and by three of the leading children's groups: the National Society for the Prevention of Cruelty to Children, The Children's Society and Save the Children Fund (UK). It is meant to demonstrate that a children's rights commissioner has a useful role to fill in making government effective for children.

In other European countries, independent offices – children's ombudsmen or commissioners – have been established under statute. Their role is to involve children in government decision-making and to act as watchdogs over children's human rights. The Office of Children's Rights Commissioner for London was established to fulfill a similar function for the Greater London Authority, the new regional government for London established in May 2001. The Office has no statutory powers: it had to work to be accepted by and work in association with the Greater London Authority.

The Office is premised on the principle that children should participate in the decisions that affect them most deeply. It was intended that they be involved in decision-making about the Office from the beginning and

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¹ National Lottery Charities Board, the Calouste Gulbenkian Foundation, Bridge House Estates Trust Fund.

to model children's participation. In fact the Office was created when its Advisory Board of children and young people was appointed in October 1999.

It is often asked how the children were selected, and whether, and if so how, the creation of an 'elite' and self-referential group was avoided.

As to the first, London children were invited to create the Office. About 15,000 leaflets about the Office and the Board were circulated to all groups and projects working directly with children and young people in London known to the sponsoring groups, inviting children to nominate themselves for the Board. Members of Article 12 (a child-led advocacy group) and representatives of London-based children's charities selected the Board in October 1999. The Board members were then trained in children's rights, meeting procedures, the duties of an Advisory Board, and recruitment and selection processes. They then helped develop the selection criteria and job descriptions, to select the staff and find and fit out the premises. They continued to meet at least monthly and are directly involved in all the Office's work. It has been a learning curve: how much can volunteer children be expected to 'give' to the realities of a campaigning office?

The 11 young people aged between 8 and 17 originally selected who were still on the Board (four moved out of London and off the Board) were joined in October 2001 by another 15 youngsters, who had already worked with the Office and expressed an interest in developing their involvement. They come from all over London and every ethnic and faith group. They have also been trained in how to be a consultant on children's rights and children's participation; dealing with media, presentation skills and techniques (some of the children deliver workshops and seminars to professional and interest groups, sometimes for a fee, which is shared among all Board members) and research techniques. Board meetings are held out of school hours in accessible central London venues.

As to the perception of elitism, the Board itself foresaw this. That is why in 2001 further recruitment of more children, using the database of the thousands of children consulted or worked with or written to over the last year and a half, on to the Advisory Board was undertaken. The Office was particularly keen on including younger children and children who can 'seed' other child participation opportunities (projects, consultations, school councils etc.) as well as keep the office child-centred.

What does the Office of Children's Rights Commissioner for London do?

The Office has a values base: the *UN Convention on the Rights of the Child*, and a commitment to children's involvement in the decisions that affect them the most deeply.

- Monitor what governments (at all levels) do for children and critically analyse their performance in implementing the *UN Convention on the Rights of the Child*.
- Seek to ensure that children's voices – their *own* voices – are heard in strategic policy development and planning and thereby to raise awareness of children's rights at every level. For example the Office published the results of its first major consultation with 3,000 children on their priorities for their London in July 2001. The *Sort It Out!* Report will help to shape the Greater London Authority's Children's Strategy and helped to structure and inform the first ever 'snapshot', from all available research and epidemiological and data base, of what it is like to be a child in London, the *State of London's Children Report* (discussed below).
- Accounts to children. For example, the Office reported back on its work at a *Big Meeting* on 30th May 2001, when about 550 children came together to talk about their rights and their government and what the Office – and others – have been doing with and for them.
- Seek to bring children's groups throughout London together as an effective voice for children with government.
- Researched and published the first (of what is hoped to be an annual) *State of London's Children Report*, putting together for the first time the information, research data and demographic information about what it is like to be a child in London – and highlighting the needs arising from this report and the messages for government and opportunities for further research. It is hoped that this will be of real value to decision-makers and those who plan to consider the impact on children of their policies. The Office acts on the assumption that effective planning and government for children requires an effective model of assessing the impact on children of planning and programs, and such a resource is essential to genuine goal setting and evaluation with children in mind.
- The Office was engaged by the Mayor of the Greater London Authority to help develop his Children's Strategy, based on its initial policy, committing the Greater London Authority to respect children's human rights in all of the its work. As part of his commitment to children's participation the Office helped the Greater London Authority to consult with children on the Mayor's economic development and transport strategies, turning them into 'child-friendly' language (which adults found much more accessible as well).

Children's Status

In the last thirty years of the 20th century professionals have begun to recognise new, tighter focus on childhood as a specific stage of life that requires protection. We have been rightly concerned to avoid the

victimisation and debasement of childhood, and at what kind of community structures and societal rules are required to ensure this.

We have also discovered, to our distress, that often what was intended to be 'protective', such as child welfare procedures and institutions, inadvertently increased vulnerability and the realisation of risk. We have also found real evidence of a link between children's vulnerability, and denying children a voice and the opportunity to participate in decision-making about them.²

As a result, since 1975 there has been much more talk of children's rights, if not quite a whole hearted commitment to implementing it.

Several streams feed the 'rights' tributary.

- *International treaties.* One is the growing significance of internationally agreed human rights standards and treaty obligations, which have implications for government decisions and legislative programmes for children. If children possess rights, then they cannot be passive participants in social systems, including families. International human rights instruments may not be enforceable, but their language does challenge cultural assumptions about children and adult decision-making affecting them.
- *Professional evolution.* Another is due to changes in professional behaviour. Over the last three decades lawyers have increasingly been involved in decision-making affecting children, once left to parents, police and child protection authorities and 'real courts'. Thirty years ago, as a lawyer I could be dismissed by a judge who thought it improper for me to seek to appear on the instructions of a child or to advocate the child's wishes in the face of social work and parental opinions (and was). Now, both the UK and Australia have developed specialist courts and tribunals and structural and professional standards, even requiring lawyers to act on the instructions of their client, or at least the articulate child (though the assumption of expertise to override this in the child's perceived 'best interests' is hard to eradicate). The professions are also more inclined to work in an interdisciplinary way on policy bodies and tribunals.
- *Management theory.* A third is the growing body of marketing and managerial writing that identifies customer-driven service delivery as more efficient and effective and more likely to match demand/supply and expectations with outcomes.
- *Participatory democracy.* A fourth is the increasing fragility of democratic structures and faith in them, and a growing understanding that civil society (and good government) depends on the quality of democratic

² Such as the Woodford Royal Commission report into institutionalised child abuse in Welsh institutions, 1999, which recommended the establishment of a powerful children's commissioner to ensure that children's complaints were not overlooked.

conversations among citizens and with their government³ and that ‘even’ children are, albeit non-voting, citizens:⁴ that if children don’t learn to express a view and participate in decisions and experience some benefit from doing this, they won’t do it as adults, which has political ramifications.⁵

Children are the most powerless of all groups. As

‘... a large uninfluential section of the community [t]hey do not have access to the means of exerting power, or protecting their own vulnerability. They are restricted in the extent to which they can make decisions about their own lives. They do not play any part in the processes which determine the policies which affect them. They, unlike other subjects of discrimination, are peculiarly unable to organise themselves politically.’⁶

The only way that they gain power is by losing their unique quality: they have to grow up. Perhaps we do not take children seriously simply because their status is ephemeral, and because we can foresee what they will become – ‘like us’ – we do not value what they are, now.

But as Janusz Korczak said:

‘Children are not the people of tomorrow, but people today. They are entitled to be taken seriously. They have a right to be treated by adults with courtesy and respect, as equals.’⁷

Korczak is not well known outside Poland. For those of my generation who go to the cinema he may be remembered for a simple heroic act. As a very famous paediatrician, well-loved writer and public intellectual he could have escaped from the Warsaw Ghetto where he was caring for orphaned and dying children. He refused to leave them. On 6th August 1942 he led

³ Putnam R. *Making Democracy Work: Civic Traditions in Modern Italy*. Princeton University Press, 1993.

⁴ John Ralston Saul: “DEMOCRACY. Democracy is not intended to be efficient, linear, logical, cheap, the source of absolute truth, manned by angels, saints or virgins, profitable, the justification for any particular economic system, a simple matter of majority rule or for that matter a simple matter of majorities. Nor is it an administrative procedure, patriotic, a reflection of tribalisms, a passive servant of either law or regulation, elegant or particularly charming. Democracy is the only system capable of reflecting the humanist premise of equilibrium or balance. The key to its secret is the involvement of the citizen.’ However, ‘CHILDREN. See: FACTORIES and WAR.’ Saul, John R. *The Doubter’s Companion*. Ontario: Penguin, 1995, pp. 61, 94.

⁵ Alderson P. *Young Children’s Rights: Exploring Beliefs, Principles and Practice*. Part of a Series, *Children in Charge 10*. London and Philadelphia: Jessica Kingsley Publishers, 2000, pp. 130-137.

⁶ Rayner, M. *Taking Seriously the Child’s Right to be Heard*, in Alston P. and Brennan G (ed.s) *The UN Children’s Convention and Australia*. Sydney: Human Rights and Equal Opportunity Commission, 1991.

⁷ Joseph, S. (Ed.) *A Voice for the Child: the inspirational words of Janusz Korczak*. London: Thorsons (Harper Collins), 1999.

a procession of 200 children, marching behind the orphanage flag as if they were going on a picnic, to cattle trucks destined for Treblinka.⁸

Korczak's example was far more complex and important than this act of self-sacrifice. He was a remarkable advocate of children's rights to be taken seriously. He set up and ran democratic orphanages, making adults as well as children subject to the same rules and to the judgments of courts run by children. He championed an early charter of children's rights. It was in his name that the Polish government urged the UN to establish the *International Year of the Child* and start the work that resulted in the *UN Convention on the Rights of the Child*, (UNCRC) now ratified by every country but the USA and its strange moral partner, Somalia.

Janusz Korczak inspires many, including the author, as does his fearless use of the language of human rights as a place from which to critique children's continued powerlessness, low status, unjust treatment, abandonment, neglect and maltreatment, after a quarter century of reform. The *UN Convention on the Rights of the Child* may be an aspirational document, but it is also a benchmark of the value we really place on children in public life: not very high, and not very dear.

Ethical Considerations in Making Rules about Dependent People

Adults exercise unimaginable power over children but do not think of it in terms of 'power' but something possessory. If they are not 'ours' – as parents or kin – when as *UNCRC* assumes we will put their best interests ahead of our own, we need rules about how those decisions should be made.

As Robert Goodin⁹ wrote:

'[S]ome dependency or vulnerability relationships impose greater risks of exploitation than do others. The risk of exploitation arises, and the dependency or vulnerability relationship therefore becomes morally objectionable, only insofar as the relationship displays the following characteristics:

1. The relationship embodies an asymmetrical balance of power.
2. The subordinate party needs the resources provided by the relationship in order to protect his vital interests.
3. For the subordinate party, the relationship is the only source of such resources.
4. The superordinate party in the relationship exercises discretionary control of those resources.'

⁸ Lifton BJ. *The King of Children. The Life and Death of Janusz Korczak*. New York: St. Martin's Griffin, 1988.

⁹ Goodin Robert E. *Protecting the Vulnerable: a Re-Analysis of Our Social Responsibilities*. University of Chicago Press, 1985, pp. 195-6.

That is as good a definition of the dependency of childhood as I can imagine.

So what should the 'rules' be? There are moral rules that one should not be cruel to children. There are legal prohibitions on their neglect or abandonment. There is a body of professional literature and research on what 'good' parenting is and where the state may or should intervene in children's lives. But there is also nearly thirty years or more of experience of Royal Commissions and Inquiries into the failure of those laws, professional standards and procedures, and the reform initiatives.

It is necessary to reconsider the moral status of children, and base societal rules for decision-making about them, on their entitlements: to the *provision* of a decent quality of life; to *protection* from harm and maltreatment, and to *participate* and influence the outcome.¹⁰ Only when their rights are as important as ours will the adult community take seriously its responsibility to resolve conflicts of interest, and exercise fiduciary powers over vulnerable people in their interests, at sacrifice of the preferences of the powerful. Children, too, need to know that they are the possessors of rights. To realise the fundamental human right that underlies successful community life, equal respect for human dignity, it must be linked to a power: to help make choices. This right alarms adults, because it means that children have a right to self-determination.

Do Children have Rights?

It is not possible to give proper attention to children's autonomy rights until children's well being is sufficiently assured. Until recently, this was the entire focus of the legal system. Though there is a respectable history of courts acknowledging the autonomy rights of even unconscious, vegetative human beings¹¹ they do not consistently respect the human rights of children.

No right without a remedy?

Some argue that if there is no effective remedy for the breach of a 'right' it does not really exist. What point is there in using the language, if the right may be safely ignored? A child may be so young that she is unable to choose to claim or renounce a right. Nobody may have a responsibility or

¹⁰ These are the three general groupings of rights under the UN Convention on the Rights of the Child.

¹¹ See, for example, the 1992 Massachusetts case of *Care and Protection of Beth*, 587 N.E. 2d. 1377, 1382 (Mass. 1982). The court asserted that a ten month old baby in a vegetative state was "entitled to the same respect, dignity, and freedom of choice as competent people" in relation to a do-not-resuscitate order – which the court assumed she would have supported had she been competent.

duty to do so in his or her place – for example, an unaccompanied refugee infant who then becomes the responsibility of the Minister for Immigration, whose priority is minimising the entry of ‘illegals’. Sometimes a ‘right’ is so vague as to be unenforceable, such as the right to a decent quality of life in Article 27. (UNCRC)

But as MacCormick¹² has pointed out, sometimes a ‘right’ is so clearly ‘... of such importance that it would be wrong to deny it or withhold it from any member’ of our human society – such as the right to life – that it must exist and a remedy must be found, and the person who ought to fulfil the duties attached to it should be identified.

No right without responsibility?

There is also a popular and superficial view that children can’t possess rights unless they possess a balancing responsibility. If they are ‘not responsible’ – in law, or because they are dependent, or because they have not proved that they are mature – then they do not possess rights, either.

This is an old argument which is trotted out often enough to require debunking. It is probably based on a Readers’ Digest understanding of Hohfeld’s¹³ mechanistic view of rights. It is inconsistent with the MacCormick view, just mentioned, which is obviously preferable. It is also logically inconsistent. Adults possess moral and human rights even when they are thoroughly irresponsible, merely because of their age and status. Children possess rights, even when they are flouted. It is a community and legal responsibility to protect them.

Feral children?

The right that causes the greatest worry and has the greatest capacity to improve the quality of children’s lives, is the child’s right to be consulted, included in decision-making and to have their views taken seriously. This finds expression in Article 12 of the *UN Convention on the Rights of the Child* and can be described as participation, consultation, autonomy, or ‘the right to be heard,’ depending on the context.

What do we mean by autonomy rights? A fully autonomous individual would, when having to make a choice, be able to understand what other people can and ought to do; to analyse, in a rational way, whether it would be right to act in one way or another against some standard, bearing in

¹² MacCormack N. *Children’s Rights: a Test-Case*, in *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*. Clarendon Press, 1982, Chapter 8 pp. 154-6.

¹³ Hohfeld W.N. *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. New Haven: Yale University Press, 1919.

mind that she should only act as she would want others to act, and as they can act; and then can do what she has decided is right. This moral powerhouse would be fully autonomous, entitled to be treated with dignity and as a person. On that definition, the author is not autonomous nor most adults and certainly not many or most children.

Something less is more usually intended. If I, as a human being, have a preference and at least some capacity to act to satisfy it; or if I can adapt my choices when my circumstances change; or if I have wishes or beliefs and can draw at least some inferences from them, or if I can make choices, even if I can't evaluate whether they are really in my own 'best interests,' I have some degree of autonomy. If, as a child, I am allowed to indicate who I would prefer to live with when Mum and Dad split, or whether I would enjoy and benefit from music classes at school, or carpentry, or get to see the school nurse for medical advice in private, I am exercising some degree of autonomy. Yet when 'children' and 'autonomy' are bracketed together, many adults assume that it means children having their decisions – however 'mad' – respected and followed.

At the least, and most usually, the autonomy of children means the right to be consulted and to influence a decision that affects them. The more it affects the child's life, the more important it is that the procedural requirement, that they have that opportunity, is respected and coupled with a duty to explain or feed back the outcome of the process, especially if the child's wishes are not put into effect.

Parents' rights

Recognising children as the owners of rights is sometimes seen as a challenge to parents' rights over them and vis a vis the State. This is not the case. It would be absurd and dangerous to ignore the fact that children *gradually* develop competence and confidence and judgment about protecting their own interests, and that they are vulnerable and entitled to special protection while they do. The differences between childhood and adulthood are real, and the risks of forcing children into 'adult' roles before they are mature are obvious, too. Families are the natural environment for children: good families, that is, with an environment of love and understanding where children can develop these views.

There is general agreement now that even quite young children can differentiate among and make informed choices, sometimes better than adults if time and care is taken to explain and enable those choices. That is why they can give evidence on their own behalf, now, as the victims or witnesses of crime.

Nor are parental powers quite so absolute. They have been characterised as 'trust powers' that they may defend against third parties, but must use for the benefit of the child, to whom in some way they

are accountable.¹⁴ Because of the argument – put a long time ago by J. S. Mill¹⁵ – that it would be unjust to punish children for their parents' irresponsibility, poor judgment or simple poverty, simple justice requires some degree of social oversight of family functioning and the performance of parental duties. No one wants excessive and damaging state interference in the parenting role.¹⁶ However, it is also an important parental task to ensure that children develop their capacity for decision making, in circumstances where they do not have to take on full adult responsibilities for the mistakes they make, so that they can make mature adult judgments when the time comes.¹⁷

Children as Moral Equals

Children are the possessors of rights, morally and in some significant cases, legally too.

Under international human rights law:

Children are the beneficiaries of international treaty obligations ratified by world governments, some of which have 'remedies' processes, though not the *UN Convention on the Rights of the Child*, which is just one international instrument that 'grants' rights to children.

Children are equally 'entitled' to the human rights asserted in generalist human rights instruments, such as the *Universal Declaration of Human Rights*; the UN's 'special' Conventions, such as the *Convention on the Elimination of All Forms of Discrimination Against Women*, and under the *European Convention on Human Rights* which is now part of the law of the United Kingdom with the full implementation of the *Human Rights Act* in 2000.

Under domestic law:

Children are as entitled to live in a society ruled by law, with rules that govern human behaviour as adults, and without discrimination.

¹⁴ See Rayner, M. *Children's Participation in Medical Decision-Making: Policy Considerations in Adopting 'Legal' Solutions*. Murdoch University, 1990. Unpublished dissertation in completion of the requirements for the degree of Master of Arts in Public Policy, 1989.

¹⁵ Mill, J.S. *On Liberty*. London: Everyman's Library, 1906.

¹⁶ E.G. Goldstein, J. Freud and Solnit. *Beyond the Best Interests of the Child*. New York: Free Press, 1973. *Before the Best Interests of the Child*. Burnett Books Limited, 1980.

¹⁷ For example see Dingwall R. & Eekelaar J. *Rethinking Child Protection*, in *The State, the Law and the Family, Critical Perspectives*, Ed. Freeman M.D.A, Tavistock Publications, Sweet and Maxwell, 93, 106.

- Though that is the principle, there is an exception that proves the rule. It is one of the Common Law's basic rules that nobody is allowed to touch another person without their consent, let alone hurt or hit them. But English Common law (and more recent statutes and child care guidance) make an exception for children, and enable parents and sometimes strangers to inflict pain and humiliation on children in terms of 'reasonable chastisement'. The European Court of Human Rights pointed out at the end of 1998 that this is inadequate to protect children's rights from cruel treatment under the *European Convention on Human Rights*.¹⁸
- Children sometimes have specific rights under legislation – for example in Scotland (under the *Children (Scotland) Act 1995* S.6) parents are required to consult children of 12 or more about major plans to do with their upbringing – or administratively. Consultation with children is demanded in UK government programmes such as *Quality Protects*.
- Sometimes children's rights are unexpectedly revealed through the courts. One such example is the way courts have begun to interpret laws after the *Human Rights Act* was passed. This requires courts to interpret British laws so that, if possible, it is consistent with the rights protected by the *European Convention on Human Rights*.
 - In one case decided on 13th February 2001¹⁹ the law about a convicted person's right to have 'spent convictions' overlooked was interpreted to give effect to all children's rights to be protected from abuse and harm, whose starting point was *Article 19* of *UNCRC* by which, it could be assumed, the UK government intended to be bound when it ratified the Convention.
 - Another example is the law of natural justice. A person can challenge a government decision as unfair if a consideration that they 'legitimately expect' will be taken into account by a government decision-maker is not, and they had no opportunity to argue that it should be. For example, in 1995,²⁰ the Australian High Court said it was procedurally unfair for an immigration official who planned to deport the father of dependent, Australian-born children not to tell him that he did not intend to take into account Australia's promise not to separate a child from their parent without their consent, a *UNCRC* right. It was a 'legitimate expectation' that a government decision-maker would consider Australia's international obligations under Convention, and unfair not to tell them he wasn't going to, to enable representations to be made.
 - A third is the development of unwritten Common Law. For example,

¹⁸ See *A v. UK*. Details in www.endcorporalpunishment.org (cases on the legality of hitting children)

¹⁹ *R v. Governor of Dartmoor Prison*. Unreported decision, AD of the QBD, Turner J. 13 February 2001.

²⁰ *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 304

the House of Lords decided to develop the concept of 'the mature child' in the case of *Gillick v West Norfolk and Wisbech Area Health Authority*,²¹ which expressly recognised an older child's developing 'right' to make binding decisions about their own medical advice and treatment as they became more mature, without parental intervention.

The practical benefits of 'rights' recognition

It is important to recognise the rights of children, and it is also in children's best interests to both recognise them as the possessors of rights, and teach them how to use them.

- Adults on their behalf must generally claim children's legal, procedural, social and moral rights. Sometimes these are least able or willing; for example, only parents have the right to challenge children's school exclusion, but what if the children are neglected or abused and their problems are directly related to the rights abuse implicit in this situation? What if parents refuse to challenge the decision? Recognition of a fundamentally important right requires finding someone to protect it, rather than throwing up hands in defeat.
- We can focus on the skills necessary to claim or protect children's rights. Most children do not possess them in great measure. An exchange with 'stop and search' police, fed-up teachers or an infuriated parent won't be much progressed by a child's blunt claim of a Convention right. Children need skills to claim rights effectively, and sensitivity to the rights of others. They also need, as adults do, ways of identifying and resolving the conflicts that may arise, between some rights (autonomy/protection from harm) and between a particular child's rights and parents' duties not only to protect their best interests but also the rights of other children in the same family.
- Rights ownership and resilience are closely linked. Resilient children are *competent*, able to seek out and take comfort, support and resources from other people — parents, friends, teachers and other supportive adults — that they need, using Goodin's definition of dependency relationships. Seligman²² described resilient children as thoughtful, optimistic, *capable* children: Goleman²³ called them 'emotionally intelligent.' Such children have, in one way or another experienced what it is to be recognised as the possessor of rights. We cannot praise a child into being resilient, but healthy attitudes can be encouraged from

²¹ *Gillick v Wisbech Area Health Authority* [1986] AC 112

²² Seligman, M.A. *The Optimistic Child: A Revolutionary Program that Safeguards Children Against Depression and Builds Lifelong Resilience*. Sydney: Random House, 1995.

²³ Goleman, D. *Emotional intelligence*. Bloomsbury/Allen & Unwin, 1995.

positive challenges. The key resilience factor appears to be a child's sense that they can control their own destiny. This arises from real experiences that let young people make realistic judgments of their own skills and develop the confidence for future challenges.

In respecting children's rights, *we* remind *ourselves* that children are important. We also change the way we do things. If 'the other' has rights, our relationships subtly metamorphose. A rights-owner has to be taken seriously, and cannot be 'dealt with'. Rights ownership implies respect and equality: that children are an integral part of our world, and all of it, and now.