

Northern Ireland Human Rights Commission

Response to Consultation Paper on A Commissioner for Children in Northern Ireland

November 2001

Introduction

The Northern Ireland Human Rights Commission appreciates this opportunity to respond to the proposals for a Commissioner for Children in Northern Ireland. We welcome the commitment from the Office of First Minister and Deputy First Minister to give the Commissioner “a full range of functions and powers set down in legislation; a team with the necessary skills and expertise; and the necessary financial resources.” We believe that if the proposals contained in the consultation paper are enacted in legislation, together with some additions and refinements suggested below, then the Northern Ireland Commissioner for Children would be recognised as a model of best practice in the protection of children’s rights.

As should be clear from the draft Bill of Rights published by the Commission in September 2001, the Commission takes the human rights of children very seriously. In that draft, we have proposed that public bodies should carry out their functions in relation to children in accordance with the provisions of the UN Convention on the Rights of the Child and should take all reasonable steps to ensure that all children have the right to express their views and have them taken into account, in accordance with the age and maturity of the child in question. We have also proposed rights in relation to health care, education, economic rights, the right to play and other detailed rights relating to children who are in conflict with the law. In particular, we propose that the age of criminal responsibility be raised from 10 to 12 years.

In the absence of a dedicated Ombudsman or Commissioner for Children, the Human Rights Commission has sought to act in some way as an independent watchdog for children’s rights. We look forward to diminishing our role in that regard once the new Commissioner for Children has been appointed. Our experience in carrying out work relating to children’s rights has informed our response to the consultation on the Commissioner, as will become clear from our replies to some of the questions posed in the consultation document.

Nature of the Children’s Commissioner

Above all, the Commissioner for Children must be independent of government. This is one of the most fundamental of the United Nations’ “Principles relating to the Status of Independent National Human Rights Institutions”, otherwise known as the *Paris Principles* (1993). Those *Principles* indicate that the institution must have adequate funding: “The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not to be subject to financial control which might affect its independence.” Without this independence, the Commissioner would be unable to fulfil his or her functions and would not be recognised as a watchdog for children’s rights.

The Commission believes that the ethos and culture of the Children’s Commissioner must be different from that of, for example, the Equality Commission or the Human Rights Commission itself. The offices of the Commissioner for Children will have to be child-friendly and easily accessible to children and young people, as indicated by the young people whose views are quoted in the consultation paper. The comment that the Commissioner should be “young and able to dance” may be taken metaphorically to suggest that he or she should be young at heart and do things differently from other institutions. This means that

suggestions that the Commissioner for Children might be attached in some way to the Human Rights Commission would not be acceptable to children and young people themselves, nor to children's organisations.

In relation to any potential overlap between this Commission, the Equality Commission, the Northern Ireland Office and the Commissioner for Children, we are confident that Memoranda of Understanding can be drawn up to ensure that there is no duplication of effort.

Functions

Do you think that the Commissioner should carry out the functions in section 3.3? Are there functions which you believe should be omitted or added?

The Commission believes that the Children's Commissioner should carry out all the functions listed in section 3.3. Some independent offices for children established elsewhere carry out functions not included in section 3.3 and, while it is possible to argue that these functions *could* be implied from the functions suggested, it would be useful to make these explicit in line with the UN Convention on the Rights of the Child. The additional functions we would propose are¹:

- to promote a higher priority for children and a higher visibility of children, in central, regional or local government and in civil society, and to improve public attitudes to children;
- to promote effective use of financial and other resources for children;
- to promote proper co-ordination of government for children at all levels;
- to ensure that the proposed Children's Strategy is based on the UN Convention on the Rights of the Child;
- to ensure that public bodies carry out their functions in relation to children in accordance with the provisions of the UN Convention on the Rights of the Child and take all reasonable steps to ensure for children the other rights detailed in the proposed Bill of Rights for Northern Ireland.

In relation to the functions listed at section 3.3, we would agree that the Commissioner should not act as an "appeal" body for decisions on the outcome of complaints investigated by other organisations. However, we would emphasise that this depends on the Commissioner – and a new, publicly-funded body (see under "Legal Proceedings" below) - being given the power to provide assistance to children in connection with legal proceedings and to bring proceedings in his or her own right. This would ensure that where there is no recourse to appeal within current legislation, the Commissioner could support a child to take a judicial review about a bad decision or could take a judicial review in his or her own right.

Should the Commissioner for Children have a role in promoting rights generally, and also in acting as an ombudsman, or should it be one or the other?

The Commission believes that it is not useful to separate the role of promoting rights and of ensuring that children and young people have effective means of redress when their rights are disregarded. The role of ombudsman is, therefore, a necessary part of the Commissioner's role of promoting policies which protect children's rights. To separate the roles would undermine both.

¹ All the additional functions suggested here are, for example, included in Norway's legislation on the Ombudsman for Children (as amended 17 July 1998). The role of Sweden's Ombudsman for Children includes two of them, as does Denmark's National Council for Children.

If the Commissioner is to have both sets of functions, what should the balance be between them?

As suggested in the previous reply, the Commission believes that both sets of functions are complementary. We would expect that from time to time the balance between them will change according to circumstances, government initiatives and representations from children.

Complaints

Should the Commissioner for Children have a role in investigating complaints?

If so, what should that role be:

- * *all complaints; or*
- * *complaints which cannot be dealt with by other authorities.*

We believe that the Commissioner should have the role in investigating complaints outlined in section 3.3 – to investigate a complaint where there is no other appropriate authority to investigate it. The Commissioner, however, should have the additional power to investigate a complaint where the appropriate authority makes it clear that it will not deal with it, whether for reasons of prioritisation, lack of resources or some similar ground. This power is clearly necessary if children and young people are to have effective means of redress when their rights have been denied.

Legal Proceedings

Should the Commissioner have a role in legal proceedings?

The Commission believes it is vital that the Children's Commissioner should have a role in legal proceedings. Such a role is particularly important in promoting and defending children's rights, for several reasons:

- children's developmental state makes them particularly vulnerable to breaches of their human rights by adults and governments;
- children have only recently begun to be recognised as right-holders and there is still a level of suspicion and misunderstanding in relation to the human rights of children;
- children are excluded from playing any real part in the democratic structures of society, most notably they cannot vote;
- there are serious problems for children, especially younger children, in using the legal system to assert their human rights or to seek remedies for breaches of their rights;
- there is considerable scope for using the European Convention on Human Rights to develop children's rights but because children themselves are in practice not able to bring a case to the European Court, this development has not proceeded.

Should the Commissioner have a role in any or all of the following:

- * *assisting children to take cases, including financial assistance;*
- * *taking cases in his or her own name where he or she believes that there has been a denial of children's rights;*
- * *intervening in legal proceedings as a third party from a children's rights perspective;*
- * *acting as an amicus curiae in proceedings from a children's rights perspective;*
- * *representing children in legal proceedings.*

We welcome proposals that the Commissioner should have the power to take proceedings in his or her own name, to intervene in legal proceedings as a third party from a children's rights perspective, to act as an *amicus curiae* in proceedings and to represent children in legal proceedings.

Our own experience within the Human Rights Commission leads us to believe that the Children's Commissioner should have a role in all of the above and that the power to adopt such roles should be explicit in legislation to establish the Commissioner. Sections 69 and 70 of the Northern Ireland Act 1998 appeared to confer such powers on the Human Rights Commission, since section 69(5)(b) of the Act stated that the Commission may "bring proceedings involving law or practice relating to the protection of human rights" and section 70 sets out the grounds on which such proceedings may be taken. However, Sir Robert Carswell, the Lord Chief Justice, ruled on 8 December 2000 that the Commission did not have the power to intervene in legal proceedings because it is a statutory corporation and there is no express mention of such a power in the governing legislation. He added that such a power could not be taken as reasonably incidental to or consequential upon any of the specific powers expressly conferred upon the Commission. This decision was upheld by the Court of Appeal of Northern Ireland in April 2001 (by a majority of two to one) and leave was granted by the House of Lords in November 2001 for an appeal to be heard there next year.

In our report to the Secretary of State on the effectiveness of the Human Rights Commission (February 2001), we recommended that this deficiency in our powers be addressed by an amendment to the Northern Ireland Act (although if we win our appeal in the Lords this amendment will not be so crucial). In the light of our experience with the courts, it is clearly necessary to elucidate in detail *all the powers* which the Children's Commissioner will need in order to fulfil the functions of his or her office.

In relation to the powers to intervene as a third party or to serve as an *amicus curiae*, these would be useful in the context of defining appropriate residential placements and secure accommodation for children who are looked after or are in conflict with the law. There are regular court cases where this issue is raised, with magistrates sometimes demanding that more secure accommodation places be provided, while the Department of Health, Social Services and Public Safety argues that there are sufficient such places for the size of our population. There are clear children's rights issues here, covered by the UN Convention on the Rights of the Child and the European Convention on Human Rights. The Children's Commissioner could intervene to present a children's rights perspective on the issues, putting the rights of the child ahead of the needs of either social services or the police service.

In relation to the power to represent children in legal proceedings, some Commissioners are of the view that an additional way of securing the protection of the human rights of children would be to create a new publicly-funded body to undertake this role in all cases. This body would operate in private law cases in much the same way as the Guardian Ad Litem Agency currently operates in relation to public law cases. It would mean that all children involved in court proceedings would be entitled to separate legal representation (whereas the Children's Commissioner would represent children in only some cases).

Powers

Bearing in mind the functions that you think a Commissioner should carry out, which of the powers set out in section 3.4 (or other powers) do you think a Commissioner should have?

We believe that the Commissioner needs to have all the powers set out in section 3.4 if it is to meet the minimum requirements for national human rights institutions set out in the *Paris Principles*. Those *Principles* state that:

“within the framework of its operation, the national institution shall...hear any person and obtain information and any documents necessary for assessing situations falling within its competence”.

As well as the points made above relating to the powers to take and intervene in legal proceedings, we would also urge clarity in relation to the powers of investigation which the Children's Commissioner will have. We welcome the proposed power to "call for persons and papers". As we detailed in our February 2001 report to the Secretary of State, this Commission has been obstructed in carrying out investigations because, although we have the power to conduct investigations, we do not have the power to call for persons or papers.

In an investigation which aimed to ensure that children's rights were being upheld within Juvenile Justice Centres, the absence of these powers severely hampered our work. Access to reports by the Human Rights Commission was refused by the Northern Ireland Office, St. Patrick's Juvenile Justice Centre and the Western Health and Social Services Board on the grounds of confidentiality. Requests for other documents resulted in protracted discussion over ownership of the documents between different statutory agencies. The Commission was also refused access by a voluntary organisation to its files relating to child protection cases, while most care staff at Juvenile Justice Centres declined to be interviewed by the Commission's fieldworker.

In short, the Human Rights Commission's status is treated as more limited than that of other cognate bodies such as the Social Services Inspectorate. Indeed, we are informed by academic researchers who have undertaken other studies in the Juvenile Justice Centres, that they have not encountered most of the obstructions experienced by this Commission. We are further informed that it is common practice within statutory agencies to allow researchers who are approved by the Department of Health and Social Services access to highly confidential information about children without the consent of parents or children.²

Even if this Commission had not encountered such obstruction, it would be inappropriate, and contrary to the *Paris Principles*, for the Children's Commissioner to have lesser powers than the Social Services Inspectorate and even some researchers. In the light of our experience, it is crucial that the Children's Commissioner have the full powers detailed in 3.4.2 and that the proviso that "the Commissioner should only be allowed to have access to confidential information about children with the consent of parents and children where appropriate" be removed. The statement about the right of children and parents to confidentiality at 3.4.3 ensures that confidentiality is protected, without inviting the possibility of its being used as a pretext for obstruction.

Again, in the light of our experience in the Human Rights Commission and taking account of evidence from many inquiries into the abuse of children in the care of public authorities, particularly the Waterhouse Tribunal of Inquiry,³ we suggest that the power of the Commissioner to gain access to all public and private institutions for children be explicit and that it include the power to interview any child within those institutions. We agree that such powers must be exercised having due regard to the wishes and right to privacy of the children concerned, but we are also aware that the Waterhouse Inquiry showed the extent to which adults can manipulate and control children whom they are abusing. This can lead to children

² See, for example, G. Horgan and R. Sinclair (1997), *Planning for Children in Care in Northern Ireland*, National Children's Bureau, London. Here, the National Children's Bureau researcher carrying out a DHSS-funded study was granted full access to confidential reports and files about children in both the public care and the juvenile justice systems without the consent of parents or children having to be sought. According to the report, the consent of parents was not required for the researcher to talk to even very young children who were part of the sample, although the consent of the children themselves to the interview was, of course, sought (and sometimes refused).

³ See *Lost in Care* (the Waterhouse Report), Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974, London, The Stationery Office, 2000).

withdrawing complaints of abuse or refusing to pursue legitimate, often serious, complaints. It would, then, be wise to include the proviso that, while having due regard to the wishes and privacy of the children concerned, the best interests of the children must be paramount.

Guidance and regulations in relation to the Children Order, issued by the Department of Health and Social Services, make it clear that confidentiality does not preclude the sharing of confidential information between agencies. Sections 3.14 to 3.22 of Volume 6 of the Children Order Guidance and Regulations, *Co-operating Together to Protect Children*, deal with “Ethical Considerations” in regard to information sharing.

Section 3.17 states that:

Those working with a child and family should make clear to all parties involved in the investigation that information will have to be shared on a ‘need to know’ basis in the interests of the child. Promises of secrecy should not be given.

Section 3.18 states that:

Giving information to others, either for the health of the patient or the protection of others, is not a breach of confidentiality.

Should it be a specific criminal offence to obstruct the Commissioner in carrying out his or her functions or should obstruction be treated as contempt of court?

The Commission agrees that there should be an effective and proportionate sanction to prevent wilful obstruction of the Children’s Commissioner in the performance of his or her duties. The creation of a specific criminal offence of obstruction of the Commissioner would seem to us to be the best way of sending a strong signal that such obstruction will not be tolerated. We recognise that this is a strong sanction. However, there is recent precedent in the legislation governing the work of the Human Organs Inquiry. The Inquiry has the power to subpoena witnesses and discover documents and it is a criminal offence to obstruct it. To date, the Inquiry has had no need to invoke this sanction as the very existence of such a criminal offence has sent such a strong message to all concerned. National Human Rights Institutions with such powers have tended to also find it unnecessary to use such powers-their existence alone generally ensuring co-operation.

Remit

Should the Commissioner's remit cover all children up to the age of 18 years or just those considered at risk or in need?

The Human Rights Commission believes that if the remit of the Children’s Commissioner is to comply with international human rights standards, including the *Paris Principles* and the UN Convention on the Rights of the Child, it must cover all children up to the age of 18 years.

Should the Commissioner's remit include young people who have been looked after by public authorities, up to the age of 21 years?

The Commission agrees that the Children’s Commissioner’s remit should include young people who have been looked after by public authorities up to the age of 21 years. We would add, however, that there is another group of young people who are also more vulnerable and have greater needs than most of their peers – young people with a significant disability. There is considerable evidence that disabled young people, because of developmental delay, time spent in hospital and discrimination, make the transition to adulthood some years later than non-disabled young people. In light of this, we believe that the Commissioner’s remit

should include young people who are on the disability register, up to the age of 21 also. (Only young people with a significant disability will be on the disability register.)

Should the Commissioner's remit extend to disputes between a child and his/her parents/guardian or between parent/guardian in relation to the exercise of parental responsibility?

The Commission believes that the Children's Commissioner should not become involved in disputes between a child and his/her parents/guardian or between parent/guardian in relation to the exercise of parental responsibility generally. However, where such disputes raise broad questions of children's rights or where the best interests of the child demands such involvement, the Commissioner – or the new, publicly-funded body mentioned as a possibility above - should be empowered to become involved.

The very rare situations where the Commissioner might become involved in disputes between a child and his or her parents/guardian or between a parent/guardian in relation to the exercise of parental responsibility generally are likely to be quite extreme cases. Disputes over medical treatment are the clearest example of such cases. For instance, a parent may want to refuse a child an operation because it involves a blood transfusion and this is against his or her religion. A child with a life threatening illness who has had repeated treatments may decide that he or she wishes to refuse further treatment, while the parent is desperate to continue treatment. In this situation, the Children's Commissioner could become involved to present a children's rights perspective and ensure that the best interests of the child are promoted.

Should the Commissioner's remit include children living here temporarily?

Several articles of the UN Convention on the Rights of the Child, including Articles 2, 3 and 4, make it clear that the remit of the Children's Commissioner must include children living temporarily in Northern Ireland.

Should the Commissioner's remit include children in the juvenile justice system and the children of refugees and asylum seekers who come to Northern Ireland?

If the remit of the Children's Commissioner is to comply with international human rights standards, then children in the juvenile justice system and the children of refugees and asylum seekers who come to Northern Ireland must be included in that remit. Article 22 of the UN Convention on the Rights of the Child imposes a duty on the state to give special protection to children who are refugees or seeking refugee status. Articles 37 and 40 of the same Convention recognises the human rights of children who are deprived of liberty and who have committed, or are alleged to have committed, an offence. There should be no question, therefore, of children within the juvenile justice system being excluded from the Commissioner's remit. In Wales, where juvenile justice similarly has not been devolved, the Children's Commissioner for Wales Act 2001 conferred on the Commissioner a statutory role in relation to *all* children, including those within the juvenile justice system.

Appointment and Accountability

Who should appoint the Commissioner for Children?

In line with the principles enshrined in the Belfast (Good Friday) Agreement, the Human Rights Commission believes that the Children's Commissioner should be appointed by the Executive Committee of the Northern Ireland Assembly in accordance with the guidelines governing ministerial appointments to public bodies. If the Assembly is suspended

indefinitely, then the Secretary of State should make the appointment after consultation with the political parties that make up the Executive.

Should young people be involved in the appointment arrangements, and if so, how should this be done?

In order to meet international human rights standards, and particularly to comply with the UN Convention on the Rights of the Child, young people must be involved in the appointment of the Commissioner. The Commission would suggest that advice on the mechanics of involving young people in the appointment should be sought from the NGO Forum, members of which have considerable experience in involving young people in appointing staff.

How long should the term of appointment be?

The Norwegian Ombudsman for Children is appointed for a period of four years, while the Welsh Commissioner for Children is appointed for a period of seven years. The unsuccessful private member's bill introduced in July 1999 by Hilton Dawson MP and others to create a Children's Rights Commissioner for England suggested a five-year term of appointment. Five years is a reasonable term, long enough to allow a Commissioner to make progress, but not so long to allow him or her to become complacent about the rate of progress.

Should a Commissioner be eligible for reappointment?

While we believe a Commissioner should be eligible for reappointment, we consider that the number of terms of office a Commissioner can hold should be limited to two.

To whom should the Commissioner be accountable and how?

The Commissioner should be accountable to the Northern Ireland Assembly. A standing all-party Committee on children should be established by the Assembly to oversee the implementation of the Children's Strategy and to hold the Children's Commissioner to account. The Commissioner would, of course, also be accountable to the Assembly's Public Accounts Committee on expenditure and, assuming that he or she is based within the Office of the First Minister and Deputy First Minister, to the Committee of the Centre. The Commissioner should present an annual report to the Assembly detailing the extent to which he or she, as well as the Assembly itself and other public bodies, have worked to uphold children's rights.

Should children and young people be involved in the accountability arrangements, and if so, how might this be done?

A young people's committee or panel should be established to which the Commissioner should be accountable to the same degree as he or she would be to Assembly committees. The annual report presented to the Assembly by the Commissioner should be presented first to the young people's panel and agreed by the panel before it is presented to the Assembly.

Who should deal with complaints about the Commissioner for Children?

As a statutory body, all decisions of the Commissioner would be subject to judicial review. However, given children's lack of access to the Courts, the proposed young people's panel should have a role in dealing with complaints from children and young people about the Commissioner for Children. This panel could then take advice from the agencies involved in the NGO Forum about treatment or decisions which they feel might require judicial review. Those agencies could then assist the complaining child or young person in taking the judicial review.

Conclusion

In conclusion, the Human Rights Commission would like to emphasise again the importance of the office of the Commissioner for Children being independent of government, adequately funded and with the functions and powers needed to protect and develop the rights of children in Northern Ireland. We believe this consultation paper shows the desire of the Office of First Minister and Deputy First Minister and the Northern Ireland Executive to develop a Commissioner's office which would truly represent best practice in the protection of children's rights. We trust our comments contribute to that development.