Commissioner for Children and Young People Bill
Committee Stage

Written Submission of the
Northern Ireland Human Rights Commission
to the
Committee of the Centre

29 August 2002

Introduction

The Northern Ireland Human Rights Commission welcomes the opportunity to comment on the Commissioner for Children and Young People Bill. The Commission is aware of the considerable work undertaken to date by both officials and Members of the Legislative Assembly in producing this Bill and commends the commitment of the Executive to establish this important office designed to ensure the protection and promotion of the rights and best interests of all of the children of Northern Ireland.

The Commission's comments on the draft Bill are informed by its response of November 2001 to the consultation document which preceded this Bill and by the review of our own powers which we submitted to the Secretary of State for Northern Ireland in February 2001 (and which is the subject of a current consultation by the Northern Ireland Office). As ever, the benchmark against which the Commission tests proposals for policy and legislation is the set of internationally agreed rules and principles for the protection of human rights, which in this case include the United Nation's Paris Principles of 1993 regarding the status of National Human Rights Institutions.[1] Due to the haste with which these comments have had to be prepared the Commission is not asserting that they represent the Commission's final view on the points at issue. We reserve the right to alter our preferred position after further internal discussions and if we do that we will inform the Committee accordingly.

[1] The Principles Relating to the Status of National Institutions, approved by the General Assembly of the United Nations in Resolution 48/134 of 1993.

The proposed Office of Commissioner for Children and Young People – should it have adequate powers and guarantees of independence – will join the ever-growing, world-wide network of National Human Rights Institutions. The importance of the work of such bodies in protecting the rights of children and young people has been recognised by the United Nations Committee on the Rights of the Child, which is currently preparing a General Comment on the Role of Independent Human Rights Institutions in the Protection and Promotion of the Rights of the Child. This Commission has submitted comments to the UN Committee on a draft of that General Comment.

As a Human Rights Institution which is seeking to expand its statutory powers and enhance its guarantees of independence in line with UN Paris Principles, the NIHRC is keen to see the establishment of an Office of Commissioner for Children and Young people in Northern Ireland (OCCYP) which is truly reflective of international standards and best practice. It is our experience that, when a body is established which lacks all of the necessary powers and guarantees of independence, it not only has an uphill struggle to establish its credibility but it is also obliged to spend a disproportionate amount of time either lobbying for additional powers or identifying ways in which to overcome the limitations on its effectiveness.

The amendments to the Bill which we propose below are designed to ensure that the OCCYP can operate effectively to promote and protect, equally, the rights and best interests of all the children of Northern Ireland.

The Commission has had sight of the comments on the Bill submitted jointly by the Children's Law Centre and Save the Children and has found a number of the concerns raised by those organisations to be reflective of the Commission's own concerns about the Bill.

Proposed Amendments

Clause 1(2)

The UN Paris Principles on the Status of National Institutions stress the importance of guarantees of independence in the appointment of members of such bodies. It is vital that the process of appointment of the Commissioner not only be independent and transparent but that it be seen to be so. The NIHRC has itself recognised the importance of such a clear requirement in its founding legislation and has, accordingly, sought an amendment to section 68(3) of the Northern Ireland Act 1998.[2]

The NIHRC therefore recommends that in line 6, after "appointed", there should be inserted "following an independent, transparent and competitive recruitment process."

Clause 2(2)(a)

Clause 2 (1) of the Bill states that the principal aim of the Commissioner in exercising his or her functions under the Act is to safeguard and promote the rights and best interests of children and young persons. The NIHRC considers this to be the appropriate standard to inform the work of the OCCYP and that this should be referred to where relevant throughout the Bill (see our comments on clauses 3(2), 10(1)(a), 10(1)(b) and 11(10(a) below). Such a standard reflects the standard guaranteed by Article 3 of the UN Convention on the Rights of the Child, which the UK has agreed to uphold within its jurisdiction. It also reflects the jurisprudence of the European Court of Human Rights and of Northern Ireland's own courts. Clause 3(b) states that the Commissioner shall have regard to any relevant provisions of the UN Convention on the Rights of the Child in determining whether and how to

[2] See the NIHRC's Review of Powers, February 2001, Chapter 11, Recommendation 1: in section 68(3) of the Northern Ireland Act 1998, the following underlined words should be inserted: "In making appointments under this section, the Secretary of State shall establish an independent selection process, complying with the requirements of section 75 of this Act and of the Principles Relating to the Status of National Institutions, approved by the General Assembly of the United Nations in Resolution 48/134

exercise his or her functions. This reinforces the need for the standards established in the Bill to reflect that of the UN Convention.

The NIHRC therefore recommends that in line 15, after "rights", there should be inserted "and best interests".

New Sub-Clause 2(3)(c)

Sub-clauses 2(3)(a) and (b) prescribe those matters which the Commissioner shall have regard to in exercising his or her functions under the Act. No such limitation is placed on the NIHRC by the Northern Ireland Act 1998. The NIHRC's Mission Statement commits it to measure law, policy and practice in Northern Ireland against "internationally accepted rules and principles for the protection of human rights."[3]

The UK has a range of obligations to children under international human rights law which extend beyond those rights guaranteed under the UN Convention on the Rights of the Child, for example in the UN Economic, Social and Cultural Rights Covenant; the European Social Charter; the European Framework Convention for the Protection of National Minorities and relevant Conventions of the International Labour Organisation.

The NIHRC therefore recommends that an additional sub-clause 2(3)(c) should be inserted to ensure that the Commissioner has regard to the full range of relevant international human rights standards.

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of 1993, and as far as practicable secure that the Commissioners as a group a re representative of the community in Northern Ireland."

[3] "Internationally accepted rules and principles for the protection of human rights" are those which Governments around the world have agreed to include in treaties, declarations and resolutions, together with those which over the years have become part of custom and practice between states (known now as customary international law).

Clause 3(2)

The rationale outlined in respect of clause 2(2)(a) above applies to this sub-clause also.

The NIHRC therefore recommends that in line 17, after "and", the word "welfare" should be deleted and the words "best interests" should be inserted.

Clause 3(4)

The comparable duty on the NIHRC, under section 69(3) of the Northern Ireland Act 1998 requires the Commission to advise "of legislative and other measures which ought to be taken to protect human rights…". A duty to advise on the particular steps which ought to be taken is more specific than the duty imposed by this Bill and it would allow for a more objective measurement of the response by Government to the OCCYP's advice.

The NIHRC therefore recommends that in line 22, after "matters concerning", there be inserted "and measures which ought to be taken to protect".

New Sub-Clauses 3(4A) and (4B)

The NIHRC has a duty under section 69(4) of the Northern Ireland Act 1998 to advise the Northern Ireland Assembly whether a Bill is compatible with human rights after receipt of a request for such advice or on such other occasions as the Commission considers appropriate. While no formal request for advice has been received since the Commission's establishment in March 1999, the fact that the Commission has such a duty requires us to monitor all legislation introduced into the Assembly for potential incompatibility with international human rights standards. Such a role in respect of Assembly legislation should also, we consider, be a duty of the OCCYP in terms of monitoring legislation for compatibility with relevant international human rights standards and with the best interests of the child.

The NIHRC therefore recommends that a new sub-clause 3(4A) should be inserted into the Bill as follows to mirror section 69(4) of the Northern Ireland Act:

> ***"The Commissioner shall advise the Assembly whether a Bill is compatible with the rights and best interests of children and young persons -***
> ***(a) as soon as reasonably practicable after receipt of a request for advice; and***
> ***(b) on such other occasions as the Commissioner thinks appropriate."***

We would argue that the existence of this statutory duty has bolstered the Commission's case for the agreement of a Protocol with all the Northern Ireland Government Departments to ensure that the NIHRC will have a pre-publication opportunity to comment on all policy and legislative proposals.[4] The Commission's experience has, however, shown that a "protocol approach" can be a rather protracted means of ensuring early input into policy making. Consequently, we have recently sought an amendment to our powers so that a statutory duty is placed on the Secretary of State and the Northern Ireland Executive to refer all draft laws and policies to the NIHRC. A similar amendment is set out below in respect of the current Bill, the aim being to ensure that policy makers make good use of the resources of the OCCYP at the earliest possible stage of policy development.

The NIHRC therefore recommends that a new sub-clause 3(4B) should be inserted into the Bill as follows:

> ***"The Secretary of State and the Executive Committee of the Assembly shall refer to the Commissioner all draft laws and policies proposed for Northern Ireland as early as practicable and before they are introduced to Parliament or the Assembly or made available to the general public."***

[4] The final version of the proposed Protocol is expected to be agreed in September 2002.

New Sub-Clause 3(4C)

Since its establishment in March 1999 the NIHRC has on a number of occasions found that its advice has been totally ignored by Government. On some occasions the Commission's advice was dismissed in such a manner as to lead us to believe that it could not have been given due regard. We therefore sought in our Review of Powers the insertion of a new sub-section 69(4) into the Northern Ireland Act 1998 to ensure that due regard be given to the Commission's advice. In our view such a duty should also be added to the current Bill.

The NIHRC therefore recommends that a new sub-clause 3(4C) should be inserted into the Bill as follows:

> ***"The Secretary of State and the Executive Committee of the Assembly shall have due regard to the Commissioner's advice."***

Clause 5(1)(b)

As presently worded, clause 5 would not permit the Commissioner to review complaint arrangements in situations where there has been a complaint made to a relevant authority by adults or organisations acting on behalf of a child or young person, which could well be the majority of cases.

We therefore recommend that in line 40, after "by", there should be inserted "or on behalf of".

Clauses 7(3) and 7(4)

Both of these sub-clauses seem to the Human Rights Commission to restrict unduly the discretion of the Commissioner for Children and Young People. There is obviously merit in not duplicating assistance and supportive action to children and young people, especially if public money is being spent in the process, but the

Commissioner for Children and Young People should not be relegated to the very back of the queue of those available to provide such assistance and action. That is what these clauses, as at present worded, provide. There is no similar provision, nor should there be, restricting the remit of other important watchdog institutions, such as the Assembly Ombudsman, the Northern Ireland Human Rights Commission or the Equality Commission and we do not see why it is required vis-à-vis the Commissioner for Children and Young People.

The NIHRC therefore recommends that clauses 7(3) and 7(4) should be deleted. Alternatively, they should be replaced with a single clause 7(3), which should read as follows:

> ***"Before providing assistance to a child or young person under sub-section (1), and before taking any action on behalf of a child or young person under subsection (2), the Commissioner shall take into account the possibility that assistance may be provided or action taken by some other statutory body."***

Clause 8(2)(a)

As presently worded, this paragraph precludes the Commissioner from conducting an investigation unless the complaint raises a question of principle. In our view this is an unhelpful provision which could lead to unseemly and costly argument over whether a particular alleged abuse is a question of principle or not. The legislative provisions governing the provision of assistance by bodies such as the Equality Commission and the Human Rights Commission contain a similar constraint. In practice it means virtually nothing and it has been widely criticised (in Great Britain also) as being unnecessary and diversionary.

The NIHRC therefore recommends that clause 8(2)(a) should be deleted. The Commissioner is obviously not going to investigate entirely trivial matters.

Clause 9(1)

This sub-clause at present excludes the Commissioner from conducting an investigation in virtually every situation. We believe it is vital that the exclusion be softened by allowing the Commissioner to investigate, even if other remedies were or would have been available (and whether or not they have been availed of), if he or she is reasonably of the view that a further investigation by the Commissioner is nonetheless justifiable. It is often only after a tribunal or court case has concluded that the need for a further investigation into how a child has been treated comes to light and it would therefore be wrong to disqualify the Commissioner from investigating at that stage.

The NIHRC therefore recommends that lines 24-26 should be deleted and replaced with: "unless the Commissioner is reasonably of the view that a further investigation is nonetheless justifiable".

Clauses 10(1)(a) and 10(1)(b)

The NIHRC recommends that in lines2 and 4 respectively the word "welfare" should be replaced with "best interests". See the commentary to the proposed amendments to clauses 2(2)(a) and 3(2) above.

New Clause 10(1A)

To allow the Commissioner to bring proceedings in which he or she can rely on European Convention rights, it is necessary to create an exception to section 7 of the Human Rights Act 1998, which precludes any such reliance except by persons who are themselves "victims" of alleged human rights violations.

The NIHRC therefore recommends the insertion of a new clause 10(1A) as follows:

"When bringing proceedings in accordance with subsection (1)(a) the Commissioner shall be deemed to be a victim of the alleged abuse of human rights for the purposes of section 7 of the Human Rights Act 1998"

Clause 10(3)

The NIHRC recommends that, in line 12, the words "(a) the case raises a question of principle" should be deleted (see the commentary to clause 8(2)(a) above) and, in line 13, "(b)" and "other" should be deleted.

Clause 10(4) and (5)

We do not see any justification for the restrictions imposed by these sub-clauses on the powers of the Commissioner to bring proceedings or to apply to intervene in any proceedings. Just because the Commissioner may have already conducted an investigation into a case does not in any way mean that the Commissioner is an unsuitable person to take such further steps. Indeed in many people's eyes these are exactly the further steps which the Commissioner would be expected to be able to take if his or her investigation revealed matters that needed to be addressed by a court. The NIHRC can certainly bring proceedings or apply to intervene in proceedings even though they relate to a matter already investigated by the Commission. Of course the NIHRC does not have the same powers to compel the production of information as the Commissioner for Children and Young People will have, and therefore it is not as likely that the NIHRC will seek to use such information at a later date for the purposes of legal proceedings. But in legal proceedings information can in any event usually be obtained through applications for discovery, so we see no undue advantage in the Commissioner having access to that information prior to the proceedings beginning. Given the watchdog role of the Commissioner, it is reasonable to allow him or her to make use of information compulsorily required in later legal proceedings if he or she deems that to be necessary to protect the rights or best interests of children or young people. This is precisely what other watchdogs or inspectorates (such as DTI Inspectors) can do in different contexts.

The NIHRC therefore recommends that clause 10(4) and (5) should be deleted.

Clause 11(1)(a)

The NIHRC recommends that in, line 35, "welfare" should be deleted and "best interests" should be inserted. See the commentary to clauses 2(2)(a) and 3(2) above.

Clause 11(2)(a), (b) and (c)

The wording of these paragraphs is virtually identical to that used in the comparable provisions governing bodies such as the Equality Commission and the NIHRC (and the equality bodies in Great Britain). In our experience the wording is very unhelpful. It basically allows assistance to be granted if this is reasonable, but it uses very convoluted language. Much more clarity is required here.

The NIHRC recommends that the Commissioner should be able to grant assistance where he or she reasonably deems this to be appropriate.

Clause 11(3)

The NIHRC recommends that this sub-clause should be deleted. The Commissioner should be left to draw up his or her own criteria as to when it would be appropriate to grant assistance when there are other potential sources for assistance. Otherwise there is a danger of the applicant for assistance falling between all stools and not getting assistance from anywhere.

Clauses 11(4) and 11(5)

The same reasoning as we employed in relation to clauses 10(4) and (5) above applies here. **We recommend that these sub-clauses should be deleted.** They are at best redundant and at worst discriminatory.

Clause 12(1)

The NIHRC does not understand why this sub-clause so restricts the Commissioner's powers of investigation. They can be exercised only in relation to certain functions of the Commissioner (those under sections 5, 6 and 8) and in relation to section 5 there is a further restriction in that investigations cannot take place into the actions of non-devolved public bodies in the fields of justice and policing (including the Juvenile Justice Board and the Probation Board). This drives a coach and horses through the Bill and very greatly diminishes the role of the Commissioner. It would certainly destroy any claim that the Bill is amongst the best in the world as regards protecting the rights of children and young people.

The NIHRC therefore recommends that clause 12(1) should be deleted and replaced with a much simpler provision modelled on the one which is found in section 69(8) of the Northern Ireland Act 1998 regarding the NIHRC, namely:

> ***"For the purpose of exercising his or her functions under this Act the Commissioner may conduct such investigation as he or she considers necessary or expedient".***

Clause 13

For the reasons given above in relation to clauses 10(4) and (5) the NIHRC does not see the need to draw such a definite dividing line between the role of the Commissioner as investigator and his or her role as litigator. The two roles can, indeed should, co-exist in a watchdog body. If there is any alleged unfairness in the

same body exercising both functions in relation to the same incident or body, this can be tested through judicial review proceedings. It is not necessary for the Bill to be so precise in separating the two roles. It will cause confusion and, possibly, unequal treatment. One child might benefit from the assistance of the Commissioner but not from his or her investigative powers, yet a child in a similar situation might benefit from the latter but not from the former. All will depend on what power is exercised first. This is anomalous.

The NIHRC therefore recommends that clause 13 should be deleted

Clause 16

The NIHRC recommends that failure to supply the information or documents referred to in this clause should be made a criminal offence. This will make it much more likely that the requirement to supply the information or produce the documents will be complied with and will avoid the necessity for complex and lengthy contempt of court proceedings. In its most recent submissions to the Government on its review of powers, the NIHRC has recommended a similar provision in relation to failures to comply with the Commission's requirements to supply information. This is already the position vis-à-vis requests made by the Irish Human Rights Commission (see section 9(17) of the Human Rights Commission Act 2000).

Clause 18

The NIHRC recommends that obstruction of the Commissioner or of any of his or her officers should *ipso facto* be an offence. The reasoning used in relation to clause 16 above applies here too.

Clause 25(1) and Schedule 3

It is not clear to the Commission that the definition of "relevant authority" is comprehensive enough. At present it would seem to exclude providers of services who are not health and social services bodies or general health services providers. While it would not be appropriate for the Commissioner to have powers in relation to purely private arrangements for the care of children, it may be necessary to amend the Bill to make sure that all persons or bodies exercising functions of a public nature are caught by its provisions, in the way that the Human Rights Act 1998 catches all such bodies.

The NIHRC recommends that the definition of "relevant authority" be amended to ensure that it embraces all public authorities exercising functions in relation to children and young people.

Northern Ireland Human Rights Commission
Temple Court, 39 North Street
Belfast BT1 1NA.
Tel: 028 9024 3987. Fax: 0-28 9024 7844.
E-mail: nihrc@belfast.org.uk. Web: www.nihrc.org.