



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# Reform of the Office of the Children's Commissioner: draft legislation

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**Sixth Report of Session 2012–13**

*Report, together with formal minutes and  
written evidence*

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## Joint Committee on Human Rights

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# Summary

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## ***Background***

In July 2012, the Government published draft legislation on the reform of the Office of the Children's Commissioner in England. The draft legislation follows the recommendations made in the Dunford Review, an independent review which was laid before Parliament in December 2010. We have undertaken pre-legislative scrutiny of these draft clauses for their compatibility with the relevant international standards for independent human rights institutions for children. A bill containing provisions relating to the Office of the Children's Commissioner for England is expected to be introduced into Parliament early in 2013.

We welcome the content of the draft clauses in principle as constituting a significant human rights enhancing measure and a step-change in the UK's implementation of the UN Convention on the Rights of the Child (UNCRC). In our Report we comment on some areas of concern.

## ***Mandate***

We welcome the proposed change in the Commissioner's primary function, from one of 'promoting awareness of the views and interests of children in England' to one of 'promoting and protecting the rights of children in England'.

We recommend, however, that the Bill should expressly define "the rights of children in England" to include the rights in the UNCRC and the rights of children in any other international treaty ratified by the UK for the purposes of defining the Commissioner's primary function. In addition, we expect the Government to ensure that the definition of the UNCRC rights in the Bill include the rights in the Optional Protocols ratified by the UK. We also consider that the Children's Commissioner should be required to have regard to all relevant international standards concerning the rights of children. We recommend that the draft clauses should be amended so that it is plain on the face of the Bill that the Commissioner is responsible for promoting and protecting children's rights or interests in domestic law or statutory guidance where these are more extensive than those in the UNCRC.

We welcome the Government's clear indication that systematically monitoring the implementation of the UNCRC in the UK and reporting on progress is to be within the scope of the Commissioner's primary function. However, we also believe that the draft clauses should be amended so as to include an explicit reference to the Commissioner's function of monitoring the UK's implementation of the UNCRC.

We recommend that the title of the Commissioner be changed to include "young people" as well as "children", both in order to encourage older teenagers to consider the Commissioner of relevance to them, and to reflect the fact that the Commissioner will have functions in relation to certain 18–24-year-olds.

## ***Powers***

We welcome the Government's permissive approach to the Commissioner's powers, but it is

important for there to be clarity about the specific powers which the Commissioner has.

We accept that it would be unrealistic for the reformed Children's Commissioner to take on the role of an ombudsperson with jurisdiction to hear individual complaints without a substantial increase in the resources available to the office. However, we welcome the Commissioner's power to consider or research the availability and effectiveness of both complaints procedures and advocacy services, and we encourage the Commissioner to make early use of these powers.

We recommend that the Commissioner should have express power to advise persons exercising functions or engaged in activities affecting children how to act compatibly with children's rights. We also recommend that it should be made clear on the face of the Bill that the Commissioner has the power to carry out investigations. The Commissioner should expressly be given the power to investigate any issue which raises important questions of compatibility with children's rights. This express power should be in addition to the proposed powers to "consider and research".

The Commissioner should have the power to initiate legal proceedings, including judicial review, in the Commissioner's own name, and also to intervene as a third party where appropriate, equivalent to the power of the Equality and Human Rights Commission. We acknowledge that the use of such a power could be resource intensive and we would expect it to be used sparingly in practice.

In addition, the obligations to respond to the Children's Commissioner's recommendations and to provide information reasonably requested by the Commissioner should not be confined to persons exercising statutory functions, but should be extended to include persons exercising "functions of a public nature" within the meaning of the Human Rights Act.

### ***Independence and accountability***

The independence of the Commissioner from Government, both perceived and real, is of central importance to the effectiveness of the new Office. We recommend that the Bill contain clear statutory underpinning for the independence of the Commissioner from the Government, by including clauses which impose a clear duty on the Minister not to interfere with the independence of the Commissioner and an obligation to ensure sufficient funding to enable the Commissioner to perform its primary function. We also recommend that the Government reconsider the appropriateness of the Non-Departmental Public Body model for the Commissioner's Office and make available for scrutiny the proposed new Framework Agreement between the Government and the Commissioner.

The Bill should provide that the Commissioner should decide whether requests for advice made by the Secretary of State to the Commissioner, and any advice from the Commissioner in response to such requests, be made public. We also recommend that the Bill should expressly provide that the Children's Commissioner is not obliged to respond to and can decline a request for advice from the Secretary of State. This will ensure accountability and transparency, and prevent the risk of a perception of a lack of independence.

We recommend that the Children's Commissioner's functions should include an explicit reference to advising Parliament, so as to provide the foundation for the 'effective co-

operation' envisaged by the Paris Principles, and to formalise what already happens in practice.

We recommend that the Government give an undertaking to ensure that Parliamentary time is made available for an annual debate in Government time centred on the Children's Commissioner's annual report; and that the Government explore ways of securing greater Parliamentary involvement in the selection, appointment and removal of the Children's Commissioner, having regard to other models for appointment and removal of independent office holders.

### ***Devolution***

We are not persuaded that there is any evidence of a need to change the current arrangements concerning the relationship between the English Commissioner and the devolved Commissioners. We recommend that the draft clauses allowing the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill.



# 1 Background

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## Introduction

1. In July 2012, the Government published draft legislation on the reform of the Office of the Children's Commissioner in England (Cm 8390).<sup>1</sup> The draft legislation follows the recommendations made in the Dunford Review.<sup>2</sup> John Dunford, the General Secretary of the Association of School and College Leaders, was appointed by the Secretary of State in July 2010 to lead an independent review, focusing on the Commissioner's powers, remit and functions; relationship with other Government-funded organisations carrying out similar functions; and value for money. The Dunford Review was laid before Parliament by the Secretary of State in December 2010.

2. The Government states in its foreword to the draft legislation that the proposed changes will ensure that the Children's Commissioner will be able to focus on promoting and protecting the rights of children, in line with the UN Convention on the Rights of the Child (UNCRC). In doing so, the Government has proposed changes to the role of the Commissioner so as to enable the Commissioner to take an active role in assessing the impact of new policies and legislation on children, greater powers of investigation and independence from Government.

3. The ministerial foreword indicates that the Government intends to introduce these measures as part of a package of children and families legislation announced in the Queen's Speech. According to the Department for Education, the Children and Families Bill is expected to be introduced in early 2013.<sup>3</sup>

## The Office of the Children's Commissioner

4. The Office of the Children's Commissioner was created by the Children Act 2004. The current function of the role is to promote awareness of the views and interests of children in England. Under the existing legislation, the Commissioner may:

- Encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests;
- Advise the Secretary of State on the views and interests of children;
- Consider or research the operation of complaints procedures so far as relating to children;
- Consider or research any other matter relating to the interests of children;
- Publish a report on any matter considered or researched by him or her under this section.

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1 *Reform of the Office of the Children's Commissioner: draft legislation* (CM 8390) (July 2012).

2 Dunford Review, Cm 7981, accessible online at: <https://www.education.gov.uk/publications/eOrderingDownload/Cm-7981.pdf>

3 Press Release, Department for Education, 9 May 2012, accessible online at: <http://www.education.gov.uk/inthenews/inthenews/a00208753/childrens-bill-family-support>

5. The Commissioner is required by statute to have regard to the requirements of the UNCRC when exercising her functions.

### The Dunford Review recommendations

6. The Dunford Review made a total of 46 recommendations in relation to reform of the Office of the Children's Commissioner. The Review recommended the strengthening of the remit, powers and independence of the Commissioner, as summarised below:

- *A strengthened remit:* a new rights-based Children's Commissioner for England, so that the basis for the work of the Children's Commissioner becomes to promote and protect the rights of children as set out in the UNCRC;
- *Greater independence from Government:* the Children's Commissioner should report direct to Parliament, rather than just the Department for Education, and should not have to consult the Secretary of State before undertaking an inquiry;
- *Increased powers:* advising Government on new policies and undertaking an assessment of the impact of new policies on children's rights, and a duty upon Government and local services to issue a formal response to concerns raised by the Children's Commissioner;
- A merger between the Office of the Children's Commissioner and the Office of the Children's Rights Director in Ofsted: the creation of a new Office of the Children's Commissioner for England.

7. In addition, the Review recommended that Parliament should become more engaged with the work of the Commissioner. In particular, the Review made the following recommendations in relation to appointment, scrutiny of performance and reporting:

- *Appointment:* Parliament should consider how it might have a role in the appointment process. The relevant select committee should be consulted on the job description and have the opportunity to make recommendations at the pre-appointment stage. The Secretary of State must have regard to the committee's recommendations;
- *Scrutiny:* Parliament should lead on scrutinising the Commissioner's performance, and the Review makes reference to both appearances before select committees by the Commissioner and annual reports as the focus of Parliamentary debate;
- *Reporting to Parliament:* the Commissioner should submit reports simultaneously to Parliament and the relevant Secretary of State. The Government should respond within a reasonable timescale with a written statement to Parliament on the action to be taken in response to the recommendations.

8. Finally, the Dunford Review recommended that the new Office of the Children's Commissioner in England should be compliant with the Paris Principles and should meet the Cabinet Office tests of technical expertise, impartiality and independence.

## Government response to the Dunford Review

9. The Government welcomed the recommendations of the Dunford Review, with the then Minister for Children and Families, Sarah Teather MP, setting out the Government's position and plans for a consultation on legislative changes in light of the Review in a Written Ministerial Statement. Information on the consultation, which ran from 7 July to 29 September 2011, is available on the DfE website. A summary of responses was published, and subsequently a Government response to the consultation was also produced.<sup>4</sup>

## Our scrutiny of the draft clauses

10. We and our predecessor committees have had a longstanding interest in the human rights of children and the institutional machinery for their protection and promotion.<sup>5</sup> Our predecessor committees in the previous two Parliaments were consistent advocates of the case for an independent, effective Office of the Children's Commissioner for England (OCCE) with clearly defined powers and functions. In 2003, for example, in *The Case for a Children's Commissioner for England (Ninth Report, Session 2002–2003)*,<sup>6</sup> the Committee argued that given the size of the child population in England, a separate Commissioner was necessary to protect and promote the rights of the child. The Committee also made recommendations about the effectiveness of the Commissioner in its reports on the Children Bill 2004.<sup>7</sup>

11. In March 2012, we issued a call for evidence for a short inquiry into the role and independence of the Children's Commissioner for England, with a deadline for submissions of 11 April 2012. We received written evidence from eight NGOs, including UNICEF UK, Children England, Save the Children, and from the Department for Education.<sup>8</sup> We also took oral evidence on 24 April 2012 from Dr Maggie Atkinson, the Commissioner, Sue Berelowitz, Deputy Commissioner, and the then Minister for Children and Families, Sarah Teather MP. Both the written and oral evidence we took in that short inquiry are available on our website.<sup>9</sup> We did not report on the matter at that point as the draft clauses were published in July. However, we have taken the evidence we received in that inquiry into account in our scrutiny of the draft clauses.

12. We identified the Bill as one of our priorities for legislative scrutiny in this session and called for evidence in relation to it.<sup>10</sup> We received written evidence from the Association of the Directors of Children's Services, the Association of School and College Leaders, the

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4 A full chronology of the process of consultation can be found in Standard Note, SN/SP/6347

5 See e.g. Ninth Report of Session 2002–03, *The Case for a Children's Commissioner for England*; Tenth Report of Session 2002–03, *The UN Convention on the Rights of the Child*.

6 <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/96/96.pdf>

7 Twelfth and Nineteenth Reports of Session 2003–04.

8 [http://www.parliament.uk/documents/joint-committees/human-rights/Children's\\_Commissioner\\_Inquiry\\_Written\\_Evidence.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/Children's_Commissioner_Inquiry_Written_Evidence.pdf)

9 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/> and <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/previous-sessions/Session-2010-12/>

10 See Press Notice on the Committee's Legislative Scrutiny Priorities 2012–13 <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/jchr-legislative-scrutiny-priorities-for-2012-13/>

Children's Commissioner Review NGO Co-ordinating Group, the Children's Rights Alliance for England, the Children's Rights Director, Every Disabled Child Matters, the National Children's Advocacy Consortium, Participation Works, Rights of the Child UK and Save the Children. We also received correspondence from the current Children's Commissioner and from the devolved Children's Commissioners. All of the written evidence and correspondence we received is available on our website. We are grateful to all those who have assisted with our pre-legislative scrutiny of the draft clauses.

## Relevant international human rights standards

13. In our scrutiny of the draft clauses, our aim has been to ensure that the opportunity is taken in the legislation to meet all of the current international standards and to draw all of the relevant lessons from the experience of other children's commissioners, including those which have been established in the devolved jurisdictions in the UK.

14. We have therefore scrutinised the draft clauses for compatibility with the following international standards:

- the UN Convention on the Rights of the Child (in particular Articles 3, 4, 12 and 42);
- relevant General Comments of the UN Committee on the Rights of the Child, in particular General Comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child ("General Comment No. 2"), explaining the scope of the obligations under Article 4 UNCRC to "undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention";
- the Paris Principles relating to the status of national institutions for the promotion and protection of human rights (1993) ("the Paris Principles");
- the European Network of Ombudsmen for Children's Standards for independent human rights institutions for children (2001) ("the ENOC Standards");
- the General Observations of the International Co-ordinating Committee's Sub-Committee on Accreditation; and
- the Belgrade Principles on the relationship between national human rights institutions and parliaments (2012) ("the Belgrade Principles").

## The information provided by the Department

15. The DfE has provided a draft assessment of the compatibility of the draft proposals with the UNCRC. Although previous human rights memoranda have included consideration of the UNCRC, this is the first time that a dedicated UNCRC memorandum has been provided to us since the Government committed itself (in December 2010) to assess all legislative proposals for UNCRC compatibility.

16. The quality of the analysis in the assessment is good: it considers most of the relevant Articles of the UNCRC and also some aspects of the Paris Principles. Disappointingly, however, it does not contain any consideration of the UNCRC Committee's General Comment No. 2 which is highly relevant to these draft proposals. The UNCRC assessment has been provided to us to assist in our scrutiny, but does not appear to have been made publicly available. **We welcome the Government's UNCRC assessment as a good precedent.**

17. We wrote to the Government on 12 September 2012 asking 26 detailed questions, seeking further clarity about certain aspects of the draft clauses, and focusing on possible ways of improving the draft legislation in the light of the relevant international human rights standards and best practice.<sup>11</sup> A response was requested by 26 September 2012 to enable us to report in time for our conclusions and recommendations to be taken into account by the Government when it draws up the actual clauses for inclusion in the Children and Families Bill which is expected to be introduced in January 2013. After requesting extensions, the Government responded by letter from Edward Timpson MP, Parliamentary Under Secretary of State for Children and Families, dated 10 October 2012.

18. The Government's response is disappointingly brief and does not purport to answer most of the detailed questions we asked in our letter. Instead, the response says that our letter "provides some helpful suggestions which [...] [the Minister] [...] will be happy to reflect on further when [...] [he has] [...] received the Committee's substantive report." The response goes on to make some general points about the overall approach adopted by the Government in the development of the legislation, before dealing with some of the specific questions we asked.

**19. We were disappointed by the brevity of the Minister's response to our detailed questions. The Department agreed to our taking the lead in Parliament on the pre-legislative scrutiny of the draft clauses, but that task is made more difficult when the Government does not answer the questions which such scrutiny requires. We expect the Government's formal response to this Report to include answers to those questions which were not responded to.**

## A significant human rights enhancing measure

20. In our view, the proposed reforms constitute a very significant development with the potential to transform the Office of Children's Commissioner into a national human rights institution capable of becoming an international example of best practice if sufficiently well-resourced.

21. When the Office was established in the Children Act 2004, the then Joint Committee on Human Rights expressed a number of serious reservations about the ability of the Children's Commissioner to operate as a national human rights institution of the sort expected by international standards.<sup>12</sup> Our predecessor Committee was particularly concerned about the lack of a human rights-based mandate grounded in the UNCRC,

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<sup>11</sup> Ev 1.

<sup>12</sup> Nineteenth Report of Session 2003–04, *Children Bill*.

significant omissions from the Commissioner's powers, and the Commissioner's lack of independence from the Secretary of State.

22. The reforms contained in the draft clauses directly address many of those concerns and therefore represent a step-change in the UK's implementation of the UNCRC. In particular, giving the Commissioner a rights-based mandate, within the framework of the UNCRC; providing the Commissioner with the stronger powers necessary to fulfil that mandate; the focus on vulnerable children; the strengthened independence from the Secretary of State; and the potential for a stronger and more direct relationship with Parliament are all significant improvements on the existing Office which are likely to enhance the UK's implementation of the UNCRC. **We welcome the draft provisions in principle as constituting a significant human rights enhancing measure.**

23. Nevertheless we do have some concerns; and the purpose of this Report is to identify possible ways of improving the draft legislation in the light of those international standards and best practice.

### Public sector duty

24. We received a number of submissions advocating the adoption of a public sector duty to have regard to the UNCRC similar to that which has recently been introduced in Wales.<sup>13</sup> The purpose of our Report is to identify possible ways of improving the draft legislation in the light of those international standards and best practice.

25. The Government indicated in its response to our letter that it has no plans to introduce a public sector duty to have regard to the UNCRC in England. The Welsh Assembly Government has already introduced a UNCRC public sector duty, requiring Welsh Ministers to have due regard to the Convention when planning and developing new legislation, and the Scottish Government is consulting on a proposal for another form of UNCRC duty.<sup>14</sup> The Government has indicated that it will be noting any developments in Scotland and Wales with interest, but in the meantime its focus is on ensuring Government policies are consistent with the Articles of UNCRC and raising awareness and understanding of UNCRC across Whitehall.

**26. We will be seeking evidence on the practical operation of the new Welsh duty on ministers to have regard to the UNCRC, and on the proposed duty in Scotland, to help inform our scrutiny of the Bill when it is published.**

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13 See e.g. the evidence of the evidence of the Children's Commissioner Review Co-ordinating Group, the Children's Rights Alliance and Rights of the Child UK.

14 As far as we are aware there is no equivalent development in Northern Ireland.

## 2 Mandate

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### The primary function: promoting and protecting children's rights

27. The Dunford Review concluded that the Children's Commissioner's current remit of promoting awareness of children's views and interests<sup>15</sup> is too limited and one of the main weaknesses of the current legislative framework.

28. The draft clauses would change the primary function of the Children's Commissioner, from one of "promoting awareness of the views and interests of children in England" to one of "promoting and protecting the rights of children in England".<sup>16</sup>

29. This change in the Commissioner's primary function is intended by the Government to create a new role for the Children's Commissioner. The draft Explanatory Notes which accompany the draft clauses explain what the terms "promoting" and "protecting" children's rights are intended to mean.<sup>17</sup> They say that the role of promoting children's rights will entail raising awareness of children's rights and how they should be applied, while the role of protecting children's rights will mean that the Commissioner will be able to challenge any policy or practice which may lead, or has led, to an infringement or abuse of children's rights.

**30. We welcome the proposed change in the Commissioner's primary function, from one of 'promoting awareness of the views and interests of children in England' to one of 'promoting and protecting the rights of children in England'. A statutorily explicit rights-based remit represents a significant strengthening of the Commissioner's mandate, and is an important step in the transformation of the office into a fully fledged human rights institution for children. A mandate to "promote and protect" human rights is the first requirement in the international standards for a body to be recognised as a national human rights institution.**

### Which "rights of children"?

31. The scope of the Commissioner's new rights-based mandate clearly depends on what is included within the definition of "the rights of children in England" which it is the Commissioner's primary function to promote and protect. The draft clauses do not, however, define "the rights of children" which the Commissioner is charged with promoting and protecting.

32. The draft clauses do, however, provide that the Commissioner must "have regard to the UNCRC" in considering what constitute the rights and interests of children for the purposes of the Commissioner's primary function.<sup>18</sup> The UNCRC is defined for these purposes as the treaty adopted by the General Assembly of the UN on 20 November 1989,

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15 Section 2(1) Children Act 2004.

16 Proposed new s. 2(1) Children Act 2004.

17 Draft Explanatory Notes, paras 13 and 14.

18 Proposed new s. 2A(1) Children Act 2004.

subject to any reservations, objections or interpretative declarations by the UK which are in force.<sup>19</sup>

### *The UN Convention on the Rights of the Child*

33. The Dunford Review envisaged that the Commissioner's new rights-based remit would be rooted in the UN Convention on the Rights of the Child: it recommended that the basis for the work of the Children's Commissioner should be the promotion and protection of the rights of children "as set out in the UNCRC".

34. This is also the Government's clear intention. As the then Minister of State for Children and Families said in her written statement to the House of Commons when laying the draft legislation before Parliament:<sup>20</sup>

The draft legislation laid before the House today would create a new role for the Children's Commissioner, focused on promoting and protecting the rights of children, in line with the articles of the UN Convention on the Rights of the Child, to which the Government are a committed signatory.

35. The draft Explanatory Notes also make reference to the UNCRC when explaining the Commissioner's new role. They state, for example, that in practice the Commissioner's role of promoting children's rights should include raising awareness of the UNCRC among children and proactively encouraging other organisations to develop policies and practices that comply with the UNCRC.<sup>21</sup>

36. As drafted, however, the draft clauses do not give effect to the Government's intention that the Children's Commissioner should be charged with the task of promoting and protecting the rights set out in the UNCRC. Requiring the Commissioner merely to "have regard" to the UNCRC when considering what constitute the rights and interests of children for the purposes of the Commissioner's primary function<sup>22</sup> is a relatively weak and circuitous way of giving effect to the Government's intention.

37. The reasoning behind the approach in the draft clauses is not apparent from any of the information which has been provided by the Government. It may be driven by a concern to avoid giving the impression that the Act is incorporating the UN Convention on the Rights of the Child directly into the law of England Wales. In our view, however, the Government's intention can be achieved without going so far. The Bill could simply define "the rights of children in England" to include the rights in the UNCRC for the purposes of the definition of the Commissioner's primary function.

**38. We recommend that, in order to give effect to the recommendation of the Dunford Review and the Government's intention that the reformed Children's Commissioner should have a rights-based remit grounded in the UNCRC, the Bill should expressly define "the rights of children in England" to include the rights in the UNCRC for the**

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19 Proposed new s. 2A(2).

20 HC Deb 9 July 2012 col 3WS.

21 Draft Explanatory Notes, para. 13.

22 Proposed new s. 2A(1) Children Act 2004.

**purposes of defining the Commissioner's primary function.** We recommend below an amendment to the draft clauses which would give effect to this recommendation.

### *The Optional Protocols to the UNCRC*

39. The international standards concerning national human rights institutions require that the Commissioner's mandate should effectively cover all of the human rights of children, including not only those in the UNCRC itself but also those in the Optional Protocols to the UNCRC.<sup>23</sup>

40. As we indicated above, the draft clauses define the UNCRC in a way which does not expressly include the Optional Protocols ratified by the UK. The UK has ratified two Optional Protocols to the UNCRC.<sup>24</sup> As the draft clauses stand, therefore, the rights of children which have been accepted by the UK under those Optional Protocols would not be included in the rights which it is the Commissioner's task to protect and promote.

41. We asked the Government why the definition of the UNCRC rights in the draft clauses does not include the Optional Protocols to the UNCRC which the UK has signed and ratified, and whether there is any reason why they should not be expressly referred to in the Bill, but the Government did not answer this question. We therefore do not know the Government's reasons for not including reference to the Optional Protocols in the draft clauses.

**42. We expect the Government's intention to be that the definition of the UNCRC rights in the Bill includes the rights in the Optional Protocols ratified by the UK, especially given the clarity required by the relevant international standards on this question. We cannot see any reason why this should not be made explicit on the face of the Bill. We recommend that the definition of the UNCRC in the draft clauses be amended to include an express reference to the Optional Protocols ratified by the UK. We recommend below an amendment to the draft clauses which would give effect to this recommendation.**

### *Other relevant international human rights instruments*

43. The international standards concerning national human rights institutions further require that the Commissioner's mandate should effectively cover not only the human rights of children in the UNCRC itself and its Optional Protocols, but also those in other relevant international human rights instruments.<sup>25</sup> The draft clauses refer only to the UNCRC and make no reference to other relevant international human rights instruments. We asked the Government if there is any reason why the Commissioner should not also be required to have regard to any other relevant international human rights instrument concerning the rights of children which the UK has signed and ratified, but again the Government's response did not include an answer. We therefore do not know the reason

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<sup>23</sup> See e.g. General Comment No. 2 para. 8.

<sup>24</sup> Optional Protocol on the involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

<sup>25</sup> See e.g. General Comment No. 2 para. 8.

why the rights of children are not defined to include the rights of children in other relevant international human rights instruments.

44. One possible reason is that such an open-ended reference on the face of the statute might introduce uncertainty for the Children's Commissioner about which rights in which instruments they are required to promote and protect. We have some sympathy with this as a reason for proceeding with caution in defining this aspect of the Commissioner's mandate. The phrase "international human rights instruments" is a vague one, and on its face it is capable of including both legally binding international treaties and so-called "soft law" standards which are agreed to and accepted by the UK Government but which are not legally binding.

45. In our view the statutory framework establishing the Children's Commissioner should include reference to the human rights of children in other relevant international human rights instruments, but should distinguish between rights contained in legally binding international treaties and those contained in other, non-binding standards. International treaties contain some important human rights of children which it ought to be the role of the Children's Commissioner to promote and protect. For example, the UN Convention on the Rights of Persons with Disabilities, which post-dates the UN Convention on the Rights of the Child, includes an important provision<sup>26</sup> concerning children with disabilities. That provision includes the following:

States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

46. The right of children with disabilities to be provided with disability-appropriate assistance to enable them to realize their right to express their views freely on all matters affecting them is both more specific and more extensive than the general right of children in the UNCRC itself to have their views taken into account. We can see no reason in principle why such rights contained in international treaties, which are legally binding on the UK, should not be included in the definition of the rights which it is the Commissioner's function to promote and protect. It is a relatively easy task for the Government and the Commissioner to compile an exhaustive list of children's rights contained in international treaties which the UK has ratified.

**47. We recommend that the draft clauses be amended to include in the definition of the rights of children required to be promoted and protected by the Commissioner under their duty, not only the rights in the UNCRC but any human rights of children contained in international treaties.** We suggest below an amendment which would give effect to this recommendation.

48. We acknowledge that the position is more difficult in relation to non-binding international human rights instruments. As well as being more numerous and wide-ranging in their subject-matter, these have less normative force than legally binding international treaties, but nevertheless are a useful source of standards. The UN Standard Minimum Rules for the Administration of Juvenile Justice (the so-called "Beijing Rules"),

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<sup>26</sup> Article 7.

for example, which were adopted by the UN General Assembly in 1985, contain some useful guidance on the principle of “diversion”, according to which the use of the formal criminal justice system should only ever be a last resort for children. We do not consider it unreasonable to expect the Children's Commissioner, who is responsible for promoting and protecting the rights of children, to identify and have regard to the international instruments which are of most relevance to the discharge of that function.

**49. In our view, non-binding international standards do not give rise to rights which it should be the function of the Children's Commissioner to promote and protect, but they do provide a useful source of standards and guidance to the Commissioner in the discharge of their primary function. We are sure that it is the Government's intention that the Commissioner should be permitted to take such international standards into account in the exercise of their functions. We consider, however, that the Children's Commissioner should be required in the Bill to have regard to all relevant international standards concerning the rights of children and we recommend that the draft clauses be amended to that effect.** We suggest below an amendment which would give effect to this recommendation.

### *Children's rights in domestic law*

50. Although the draft clauses require the Children's Commissioner to have regard to the UNCRC when considering what constitute the rights and interests of children, there is nothing in the draft clauses requiring the Commissioner to have regard to children's rights or interests in domestic law or statutory guidance where those are more extensive than those in the UNCRC. The draft Explanatory Notes state that “where domestic law or statutory guidance afford children greater protection than the UNCRC, the Commissioner should take account of them, as required”,<sup>27</sup> but there is nothing in the draft clauses to suggest that the rights of children that the Commissioner is charged with promoting and protecting include the rights of children under domestic law.

51. The current Children's Rights Director for England, Dr Roger Morgan, has suggested in written evidence to us that in his experience it is frequently the case that UK domestic law or guidance promotes and protects children's rights either better, or more specifically, than the UNCRC. The current Children's Commissioner gave oral evidence to the same effect.<sup>28</sup> In particular the Children Act 1989 and guidance which has been developed under that Act in some respects goes beyond the protection provided by the UNCRC.

52. The current Children's Rights Director regards it as a significant omission that the Bill does not make clear that the rights of children in England include domestic law rights. He recommends that the Bill should be amended to include “a provision on the face of the legislation to the effect that ‘where the Commissioner considers domestic UK law or statutory guidance more effective in promoting or protecting the rights of children than the United Nations Convention on the Rights of the Child, the Commissioner must have regard to that law or guidance’.

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<sup>27</sup> Draft Explanatory Notes, para. 21.

<sup>28</sup> Evidence of Dr Maggie Atkinson, 24 April 2012, Q. 7.

53. The concern of the Children's Rights Director appears to be that, without such a provision, the Commissioner's remit will be constrained in practice because proposed new section 2A(1) may be interpreted as defining "the rights of children in England" exhaustively in terms of UNCRC rights for the purposes of the Commissioner's remit. This would mean, for example, that the Commissioner has no jurisdiction to investigate a policy or practice that appears to be in breach of a right protected by the Children Act but not by the UNCRC.

54. We asked whether the Government intends that "the rights and interests of children in England" include rights and interests arising under domestic law and guidance which go beyond those in the UNCRC. The Government did not, however, answer this question in its response.

**55. We welcome the Government's apparent intention, implicit in paragraph 21 of the draft Explanatory Notes, that the rights of children that the Children's Commissioner is charged with promoting and protecting include rights which children have in domestic law where these are more extensive than those in the UNCRC. We agree with the concern of the Children's Rights Director that the lack of a clause making this intention explicit on the face of the Bill may give rise to uncertainty about the scope of the Commissioner's mandate. Such uncertainty would be both undesirable in practice and inconsistent with the relevant international standards which require specificity in the statutory definition of the Commissioner's mandate. We recommend that the draft clauses should be amended so that it is plain on the face of the legislation that the Commissioner is responsible for promoting and protecting children's rights or interests in domestic law or statutory guidance where those are more extensive than those in the UNCRC. We suggest below an amendment to the draft clauses which would give effect to this recommendation.**

### ***Recommended amendments to proposed new s. 2A Children Act 2004***

56. To give effect to the recommendations we make in this section of our Report concerning which rights of children it is the Commissioner's functions to promote and protect, we recommend that proposed new s. 2A of the Children Act 2004 be amended to read as follows:

'2A The rights of children

2A(1) For the purposes of s. 2(1) above the rights of children include—

- (a) the rights in the United Nations Convention on the Rights of the Child,
- (b) the rights of children in any other international treaty ratified by the UK, and
- (c) the rights of children in the law applicable in England.

2A(2) The reference in subsection (1)(a) to the United Nations Convention on the Rights of the Child is to the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20<sup>th</sup> November 1989, and any Optional Protocols thereto ratified by the United Kingdom, subject to any reservations,

objections or interpretative declarations by the United Kingdom for the time being in force.

2A(3) The Children's Commissioner must, in the discharge of the primary function, have regard to any other relevant international standards concerning the rights of children which have been accepted by the UK Government, whether legally binding or not.<sup>29</sup>

## Monitoring implementation of UNCRC

57. The draft clauses, after setting out the primary function of the Children's Commissioner as the promotion and protection of the rights of children, go on to set out a permissive but non-exhaustive list of additional activities that the Commissioner may undertake in the exercise of the primary function.<sup>29</sup> Those additional activities include the power to consider the effect of legislation, future and existing, and of policy proposals, on the rights of children,<sup>30</sup> but there is no express provision for systematically monitoring the implementation of the UNCRC in the UK.

58. We asked the Government if it intended the Children's Commissioner to systematically monitor and report on the UK's implementation of the UNCRC. If so, we asked whether the Government would include in the legislation's definition of the Commissioner's primary function an express reference to the Commissioner's role in monitoring and reporting on the UK's implementation of the Convention.

59. The Government in its response stated that to set out the types of activities which the Children's Commissioner could undertake would overload the Bill unnecessarily. In particular, the Government noted that it would be unnecessary to include an express reference to monitoring and reporting on the implementation of the UNCRC, as this activity falls within the scope of the primary function—to promote and protect the rights of children in England—and “doesn't therefore need to be referred to separately on the face of the Bill.” The Government highlighted the fact that the existing Children's Commissioner already fulfils this role, for example, using her powers under the Children Act 2004 to publish a mid-term progress report on the UK's implementation of the UNCRC.

60. The relevant international standards, however, require that national human rights institutions should be given as broad a mandate as possible: both the Paris Principles and General Comment No. 2 to the UNCRC require that the mandate of national human rights institutions should be “clearly set forth in a [...] legislative text specifying its [...] sphere of competence.”<sup>31</sup> The relevant international standards concerning children's rights NHRIs, moreover, are clear that the institution's functions should include monitoring the implementation of the UNCRC. Such monitoring is treated in the international standards as a separate function alongside protection and promotion of UNCRC rights.<sup>32</sup>

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29 Proposed new s. 2(3)(a)-(h) Children Act 2004.

30 Proposed new s. 2(3)(c) and (d) Children Act 2004.

31 Paris Principles para. 2; General Comment No. 2 para. 8 (“the legislation should include provisions setting out specific functions, powers and duties relating to children linked to the Convention on the Rights of the Child”).

32 See e.g. UNCRC General Comment No. 2 paras 1 and 7 and the ENOC Standards.

61. If monitoring the implementation of the UNCRC were an explicit part of the Commissioner's primary function it would require the Commissioner to keep under systematic review the extent to which law, policy and practice are compatible with children's rights. The devolved Children's Commissioners are already under such a duty to keep law, policy and practice under review for UNCRC compliance. During the passage of the Children Act 2004 the evidence of the devolved Commissioners to our predecessor Committee was that the absence of such a duty made the English Commissioner's mandate far too weak. The Equality and Human Rights Commission is also explicitly required to monitor both the effectiveness of the equality and human rights enactments and the progress being made in society in advancing equality and human rights.<sup>33</sup> That monitoring function will remain even after the scope of the EHRC's mandate has been reduced by the amendments to the Equality Act currently proposed in the Enterprise and Regulatory Reform Bill.

**62. We welcome the Government's clear indication of its intention that systematically monitoring the implementation of the UNCRC in the UK and reporting on progress is within the scope of the Commissioner's primary function. We understand the Government's reluctance to overload the Bill with unnecessary detail and its preference for setting out the types of activity that the Commissioner may undertake rather than listing each specific activity.**

**63. However, we are mindful of the requirements in the relevant international standards that the Commissioner's mandate be set out clearly in legislation which specifies the Commissioner's functions. Monitoring the implementation of the UNCRC is not merely a particular activity of the Children's Commissioner, it is an important function of any independent human rights institution for children. To ensure that there is no scope for uncertainty about Parliament's intention in relation to such an important matter, we therefore recommend that the draft clauses should be amended so as to include an explicit reference to the Commissioner's function of monitoring the UK's implementation of the UNCRC. We recommend the following amendment to draft clause 1 to give effect to this recommendation:**

In proposed new s. 2(3) Children Act 2004, before sub-paragraph (a) insert new sub-paragraph—

(aa) monitor the implementation of the UN Convention on the Rights of the Child in the United Kingdom;

## **Raising awareness and understanding of children's rights**

64. The draft clauses expressly include within the Commissioner's primary function "promoting awareness of the views and interests of children in England."<sup>34</sup> As the draft Explanatory Notes explain, this is no longer the primary function of the Children's Commissioner, but it is retained as "an aspect of the primary function of promoting and protecting children's rights".<sup>35</sup> However, the primary function is not defined to include

<sup>33</sup> Equality Act 2006 sections 11 and 12.

<sup>34</sup> Proposed new s. 2(2) Children Act 2004.

<sup>35</sup> Draft Explanatory Notes, para. 15.

promoting awareness and understanding of children's rights (as distinct from their views and interests), nor is the power to do so included in the indicative list of powers in proposed new s. 2(3).

65. Promoting such awareness and understanding of rights is one of the most important functions of a national human rights institution. Article 42 of the UNCRC requires that States Parties "undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike." General Comment No. 2 recognises the importance of this function of raising awareness about rights, referring to "the important role NHRIs play in promoting and protecting human rights and enhancing public awareness of those rights."<sup>36</sup> Other NHRIs are expressly accorded this function in their founding legislation. The Scottish Children's Commissioner, for example, is required to "promote awareness and understanding of the rights of children and young people".<sup>37</sup> The Northern Irish Commissioner has a very similar duty.<sup>38</sup> The functions of the Equalities and Human Rights Commission also include promoting awareness and understanding of rights under the equality legislation.<sup>39</sup>

66. The draft Explanatory Notes suggest that the Government sees raising awareness and understanding of children's rights as included within the Commissioner's primary function.<sup>40</sup> As currently drafted, however, it is far from clear that the draft clauses give effect to this intention. A number of provisions in the draft clauses carry forward provisions from the 2004 Act referring to the "views and interests of children" but extend them to cover "rights" as well, to reflect the change to the Commissioner's primary function. Proposed new s. 2(3)(a), for example, envisages the Commissioner encouraging people to take account of children's "rights" as well as their "views and interests". Proposed new s. 2(3)(b) similarly envisages the Commissioner advising the Secretary of State on children's "rights" as well as their "views and interests".

67. It would appear from the Government's UNCRC Assessment that the same extension was intended in relation to raising awareness of children's rights as well as their views and interests: under the analysis of compatibility with Article 12 UNCRC, the assessment states "The proposed legislation would make clear that the Children's Commissioner's role includes 'promoting awareness of the rights, views and interests of children'".<sup>41</sup> In fact, as drafted, proposed new s. 2(2) says that the Commissioner's primary function includes 'promoting awareness of the views and interests of children': the intended reference to rights has been omitted.

68. This omission of a reference to children's rights in an important sub-section is potentially interpretatively significant, given the inclusion of such a reference in other provisions in the draft clauses. It also risks failing to give effect to what appears (from the

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36 General Comment No. 2 para 3 and see also para. 19(l) and (m).

37 Section 4(2)(a) Commissioner for Children and Young People (Scotland) Act 2003.

38 The Commissioner has an explicit duty under Article 7(1) of the Commissioner for Children and Young People (Northern Ireland) Order 2003 to promote (a) an understanding of the rights of children and young persons; (b) an awareness of the importance of those rights and a respect among children and young persons for the rights or others; and (c) an awareness of matters relating to the best interests of children and young persons.

39 Equality Act 2006 s. 8(1).

40 Draft EN para. 13.

41 UNCRC Assessment, p. 3.

UNCRC Assessment) to be the Government's intention. Such uncertainty in the definition of the Commissioner's primary function is also inconsistent with the relevant international standards, which require clarity and specificity about the Commissioner's mandate in the legislation establishing the institution. An express power to promote awareness and understanding about rights would also meet the concerns of the outgoing Children's Rights Director, who recommends that the Commissioner should be given express power to produce and publish information for children about their rights.

**69. We recommend that the draft clauses should be amended so as to include promoting awareness and understanding of rights, as well as the views and interests of children in England, in the mandate of the Commissioner. The relevant clause, as currently drafted, does not give effect to the Government's intention that the Commissioner's mandate be rights-based. In its present form, it replicates the current function without extending that function to include promoting awareness of rights. In our view, such a change would ensure clear legislative drafting of the mandate and functions of the Commissioner, as required by the relevant international standards. We recommend that proposed new s. 2(2) be amended as follows so as to give effect to this recommendation:**

(2) The primary function includes promoting awareness and understanding of the rights, views and interests of children in England.

## Title

70. We consider the proposed title of the Children's Commissioner in this chapter of our Report because in our view the title sends an important signal about the scope of the Commissioner's mandate.

71. The draft clauses do not propose any change to the title of the Commissioner, which will remain the Children's Commissioner for England. In Wales, similarly, the Commissioner is called the Children's Commissioner for Wales. Northern Ireland, however, has the Northern Ireland Commissioner for Children and Young People and Scotland similarly has Scotland's Commissioner for Children and Young People.

72. We asked the Government to explain why it decided not to rename the office the Commissioner for Children and Young People as in Scotland and Northern Ireland, but it did not respond to this question.

73. We note with interest that Amplify, the advisory group to the Children's Commissioner comprising children and young people, support the inclusion of "young people" in the Commissioner's title on the grounds that without it a lot of older teenagers might be put off from contacting or engaging with the Commissioner, assuming it to be relevant only to younger children.<sup>42</sup> The Office of the Children's Commissioner, however, having considered the views of its advisory group of children and young people, disagreed. Although sympathetic to the argument that the name should not deter young people's engagement, it believes that the name should mirror the language used by the UN

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<sup>42</sup> Response of the Office of the Children's Commissioner to the consultation on establishing a new Office of the Children's Commissioner for England (OCCE) (September 2011), p. 4.

Convention on the Rights of the Child, which covers all children and young people up to the age of 18.

74. In our view this is an issue on which the views of young people should be given particular weight. One of the most important functions of the title of an institution which exists to be a champion of the rights of a vulnerable group is that it accurately describes its mandate in order to encourage the members of that vulnerable group to engage with it. Evidence from older teenagers that they are deterred from engaging with an institution called a Children's Commissioner, rather than a Children and Young People's Commissioner, must be taken very seriously. Otherwise, in our view, there is a risk that those young people who are closer in age to 18 will not consider the Commissioner to be of relevance to them and will not seek to contact or engage with the Commissioner.

75. We also note that the Children's Commissioner will in future have functions in relation to a group of 18–24-year-olds, who currently fall under the remit of the Children's Rights Director, namely young people who are receiving care leaving support from a local authority under the Children Act 1989.<sup>43</sup> Indeed, we note that one consequence of this is to make necessary a provision which states “a person who is not a child is to be treated as a child” for the purposes of the part of the Act which establishes the Children's Commissioner.<sup>44</sup>

76. We understand the technical necessity for such a deeming provision, given the chosen nomenclature of a “children's commissioner”, but in our view a 24-year-old who is receiving care leaving support from a local authority is unlikely to be encouraged to seek advice or assistance from the Children's Commissioner by a statutory framework which explicitly says that they will be “treated as a child”. It would be better, in our view, to dispense with the need for such a provision by changing the Commissioner's title to include “young people”.

**77. We recommend that the title of the Commissioner be changed to include “young people” as well as “children”, both in order to encourage older teenagers to consider the Commissioner of relevance to them, and to reflect the fact that the Commissioner will have functions in relation to certain 18–24-year-olds.**

78. We express no view as to whether the title should be Children's and Young People's Commissioner for England or England's Commissioner for Children and Young People, but we suggest the following new clause which would give effect to this recommendation:

In section 1(1) of the Children Act 2004 after ‘Children's’ insert ‘and Young People's’

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43 Proposed new s. 8A Children Act 2004, inserted by draft clause 8, defining the children and young people aged 18–24 who currently fall within the remit of the Children's Rights Director.

44 Proposed new s. 8A(6) Children Act 2004.

## 3 Powers

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### The Government's approach

79. The Government intends the Commissioner to have the necessary powers to carry out its new role effectively, including new powers where existing powers are not strong enough for the new mandate.

80. The draft clauses contain in proposed new s. 2(3) Children Act 2004 a list of what the draft Explanatory Notes describe as “additional activities that the Commissioner may undertake in the exercise of the primary function.”<sup>45</sup> Some of these carry forward similar provisions in the existing Act, extended in some cases to reflect the new mandate to promote and protect rights, while others are additions to the existing powers.

81. The international standards require specificity about the Commissioner's powers in the legislation establishing the office. They also contain detailed indicative lists of the sorts of activities such institutions are recommended to carry out<sup>46</sup> and must therefore have the necessary powers to do. We asked the Government whether its intention is that the Commissioner should have the power to carry out all the activities recommended by the UN Committee on the Rights of the Child in paragraph 19(a) to (t) of General Comment No. 2 and all of the competences and responsibilities set out in the ENOC standards; and, if not, to identify which the Commissioner is not intended to have and why.

82. The Government's response does not directly answer these questions, but says that the overall approach to the draft legislation has been to be generally permissive rather than prescriptive, and not to overload the draft Bill with unnecessary detail. The Minister's preference is to avoid setting out a long list of activities in legislation. The response does not refer to any of the relevant international standards in detail but makes the general assertion that “having considered the documents in the round, I am confident that under our proposals the reformed OCC would possess all the appropriate characteristics.”

83. We welcome the Government's “generally permissive” approach in the draft legislation—giving the Commissioner the powers to carry out certain activities but not requiring them to do so. We also understand the Government's desire not to overload the Bill with unnecessary detail and preference for setting out the broad types of activity that the Commissioner may undertake, rather than listing each specific activity.

84. We accept that the “additional activities” spelled out in proposed new s. 2(3) are not intended to be an exhaustive list of the Commissioner's powers. The Commissioner already has a general power to “do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions,”<sup>47</sup> and that general power will be retained by the Commissioner. We accept that the Commissioner may therefore have certain powers which are not spelt out on the face of the

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45 Draft Explanatory Notes, para. 16.

46 General Comment No. 2 para. 19(a).

47 Schedule 1, para. 2 Children Act 2004.

draft clauses but which are implicit in the undoubtedly wide general power to promote and protect children's rights.

85. Our approach, however, is grounded in the international standards which makes a virtue of specificity when it comes to setting out the Commissioner's powers. **We recommend that the Commissioner be invested with the power to undertake all of the activities recommended by the UN Committee on the Rights of the Child in paragraph 19(a) to (t) of General Comment No. 2. If the Government does not intend to grant the power to undertake any of those activities, it should make that clear on the face of the Bill; in doing so, the Government should identify which specific activities the Commissioner is not intended to undertake. Including more specific activities in the Bill, though, does not make the general approach any less permissive. It should be made clear that, whatever the final list of additional activities in the proposed new s. 2(3), it is not to be considered exhaustive.**

### No power to hear individual complaints

86. The Government's response does make clear, however, that the remit of the Children's Commissioner will not include a quasi-judicial role in relation to complaints, because this would detract from its strategic role. This has the support of the current Children's Commissioner who has expressed, in correspondence with us, her view that it would be inappropriate to confer ombudsperson status on the Commissioner. She takes the view that to perform this ombudsperson function would require a larger operation, with a larger budget, which is neither necessary nor feasible at present. It is also consistent with the view of our predecessor Committee when it reported on the case for establishing both an equality and human rights commission and a children's commissioner.

87. **We accept that it would be unrealistic for the reformed Children's Commissioner to take on the role of an ombudsperson with jurisdiction to hear individual complaints without a substantial increase in the resources available to the office. Assuming that increased resources are not an option in the current economic climate, we agree that there is a risk that the Commissioner would become overwhelmed by the sheer volume of complaints and that this would detract from their strategic role. We welcome, however, the Commissioner's power to consider or research the availability and effectiveness of both complaints procedures and advocacy services,<sup>48</sup> and we encourage the Commissioner to make early use of these powers.**

### Power to advise on how to act compatibly with children's rights

88. A number of the "additional activities" in proposed new s. 2(3) are carried forward from the 2004 Act as originally enacted, but extended to cover children's "rights" as well as their "views and interests". During the 2004 Act's passage through Parliament, concern was expressed by the then Joint Committee on Human Rights, the devolved Commissioners and others that the language in which the Commissioner's powers were couched was too weak for the new office to be effective: the vocabulary of "encouraging", "taking into account" and "considering or researching", for example, was considered symptomatic of the weakness of the Commissioner's proposed mandate and reflected the essentially

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48 Proposed new s. 2(3)(e) and (f) Children Act 2004.

procedural nature of the scheme, whereby the Commissioner's role was merely to promote the views and interests of children as merely relevant considerations to be taken into account in the policy process.

89. In our view, the retention of some of this language in the list of powers in proposed new s. 2(3) sits uneasily with the Commissioner's more robust and proactive function of protecting and promoting children's rights. In particular, the power in proposed new s. 2(3)(a), to encourage persons exercising functions or engaged in activities affecting children to take account of their rights, views and interests, is based on a similar provision in the 2004 Act, but merely extended to cover "rights".

90. We believe the statutory language would be improved if reference to 'encouragement' and 'taking rights into account' were replaced with more robust language, so as to reflect the new primary function of the Commissioner, i.e. to protect and promote children's rights. A consistent criticism of the current Commissioner has been lack of effectiveness, and we are concerned that this may persist if the Government retains the same language of the previous, weaker legislative framework.

**91. We recommend that the essentially procedural provision in Clause 2(3)(a) should be reformulated so as to reflect not only the new primary function of the Commissioner, but also the desire to make the Office of Commissioner as effective as possible.** A suggested reformulation is set out below:

2(3) In the discharge of the primary function the Children's Commissioner may, in particular—

- (a) encourage persons exercising functions or engaged in activities affecting children to take account of their views and interests; and
- (aa) advise persons exercising functions or engaged in activities affecting children how to act compatibly with children's rights.

## Power to investigate

92. It is the Government's intention that the Children's Commissioner should have the power to carry out investigations: this is expressly included in the list of powers which the Minister told Parliament the Commissioner must have "in order to carry out the role effectively".<sup>49</sup> It is also clear that this is intended to be an additional power to the power to "undertake research", which is mentioned separately in that list of necessary powers. As presently drafted, however, the draft clauses do not achieve the Government's intention.

93. Express provision is made in the draft clauses for "considering and researching" certain matters,<sup>50</sup> and there is also an existing power to hold an inquiry into the case of an individual child if it raises issues of public policy of relevance to other children.<sup>51</sup> However

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49 Written Ministerial Statement, HC Deb 9 July 2012 col 3WS. See also the reference in the draft Explanatory Notes to "investigations [...] that he or she has undertaken in carrying out the primary function."

50 Proposed new s. 2(3)(e)-(g).

51 Section 3(1) Children Act 2004.

there is no express power to investigate an issue which the Commissioner considers to raise a question of compatibility with children's rights.

94. We asked the Government whether the reference to "research" in the draft clauses is intended to include "investigate", and whether the power to investigate should be expressly included in the list of permissive powers in the Bill, but the Minister did not respond to this question.

95. We welcome the Government's clear intention that the Children's Commissioner should have the power to carry out full and robust investigations. Investigating is an important function of national human rights institutions, as the international standards make clear. Investigating is different from researching, and may also differ from conducting a full inquiry into the case of an individual child which raises wider issues, and in our view there is therefore a potentially significant gap in the Commissioner's powers.

**96. We recommend that it should be made clear on the face of the Bill that the Commissioner has the power to carry out investigations. The Commissioner should expressly be given the power to investigate any issue which raises important questions of compatibility with children's rights, in order to give effect to the Government's clear intention, and this express power should be in addition to the proposed powers to "consider and research".** The following amendments to the draft clauses would give effect to this recommendation.

Proposed new s. 2(3) should include after sub-paragraph (g) a new sub-paragraph:

'(gg) investigate any issue which raises questions of compatibility with children's rights.'

Proposed new s.2(3)(h) would require consequential amendment to read:

'(h) publish a report on any matter considered, researched or investigated under this section.'

## Power to initiate and intervene in legal proceedings

97. The draft clauses make no provision for the Commissioner to initiate or intervene in legal proceedings. General Comment No. 2 states<sup>52</sup> that NHRIs should have the power to support children taking cases to court, including the power (a) to take cases concerning children's issues in the name of the NHRI and (b) to intervene in court cases to inform the court about the human rights issues involved in the case.

98. We asked the Government if it intends that the Commissioner should have the power to bring judicial review proceedings in the name of the Commissioner, and to intervene as a third party in legal proceedings. The Government's response states that this is not the Government's intention: the OCC will not have "a statutory role in relation to initiating and intervening in legal proceedings." The reason given for this position is that the Government is "concerned that establishing a [...] statutory role in relation to initiating

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52 Para. 14.

and intervening in legal proceedings could lead to the Commissioner being swamped with requests to take forward individual cases, which would detract from its strategic role”.

99. However, the Government's position appears somewhat equivocal, as the Minister also said in his response to our letter that “the reformed OCC may, as at present, seek to bring judicial review proceedings or to offer independent advice to the courts on matters relating to children's rights in certain circumstances.”

100. This ambiguity in the Government's position leaves scope for confusion and uncertainty. Clarity and specificity are particularly important in relation to this particular power: the Northern Ireland Human Rights Commission, for example, was once held by courts to lack the power to intervene as a third party in litigation because it was not expressly authorised in its parent statute.<sup>53</sup> We note that the Equality and Human Rights Commission has an express power in its parent statute to institute or intervene in legal proceedings.<sup>54</sup>

101. We agree with the Government's concern to shield the Commissioner from being swamped with requests to take forward individual cases, which would clearly detract from its strategic role. We do not agree, however, that the mere existence of a power to initiate and intervene in legal proceedings necessarily has that consequence. On the contrary, we consider that an appropriately tailored power to do so is an important tool in support of that strategic role, as the international standards recognise. The Commissioner might be uniquely placed, for example, to intervene in or even initiate legal proceedings in relation to a matter of general public interest and concern such as the use of restraint on children in secure training centres, or other matters in which the Commissioner has built up particular knowledge and expertise. In our view, the Government's concern can be accommodated by drafting the power in such a way as to make it compatible with the Government's intention that the Commissioner should concentrate on strategic issues that affect a large number of children rather than provide advice and assistance to individual children.

**102. We recommend that the Commissioner should have the power to initiate legal proceedings, including judicial review, in the Commissioner's own name, and also to intervene as a third party where appropriate, equivalent to the power of the Equality and Human Rights Commission in s. 30 of the Equality Act 2006. We acknowledge that the use of such a power could be resource intensive and we would expect it to be used sparingly in practice.** We suggest an amendment below which would give effect to this recommendation.

New clause:

‘( ) The Children's Commissioner shall have the power to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commissioner that the proceedings are relevant to the discharge of the Commissioner's primary function.’

<sup>53</sup> See *In re Northern Ireland Human Rights Commission* [2002] UKHL 25.

<sup>54</sup> Section 30 Equality Act 2006.

## Private providers

103. Some of the powers conferred on the Children's Commissioner by the draft clauses appear not to be available in relation to private providers. Given the increasing involvement of private providers in children's services, such as children's homes for example, this leaves a potentially significant gap in the Commissioner's powers which could seriously affect the ability to discharge in a practical and effective way the primary function of promoting and protecting children's rights.

104. For example, the draft clauses impose a requirement to respond to recommendations made in reports by the Commissioner, within a time period reasonably specified by the Commissioner, specifying in writing what action the person who is the subject of the recommendations is taking or proposing to take in response to those recommendations.<sup>55</sup> This is a welcome and necessary power which will help the Commissioner to perform their new function more effectively. As currently drafted, however, the requirement to respond to the Commissioner's recommendations only applies to persons "exercising functions under an Act or an instrument made under an Act."

105. The same problem exists in relation to the important power of the Commissioner to obtain information. The draft clauses place a duty on bodies with statutory functions to provide the Commissioner with information that he or she requests, as long as the request is reasonable and it is information that the body is able to disclose lawfully to the Commissioner.<sup>56</sup>

106. We asked the Government whether, in light of the increase in contracted-out children's services, the obligations to respond to the Children's Commissioner's recommendations and to provide information to the Commissioner should include persons exercising "functions of a public nature" within the meaning of the Human Rights Act. The Government did not answer this question. In our view, confining the scope of these important powers to persons exercising statutory functions is too narrow an approach in an era of increasing resort to private providers. It means that as the use of private providers increases, so the Children's Commissioner's powers shrink. We cannot believe that this is the Government's intention.

**107. We recommend that the obligations to respond to the Children's Commissioner's recommendations and to provide information reasonably requested by the Commissioner should not be confined to persons exercising statutory functions, but should be extended to include persons exercising "functions of a public nature" within the meaning of the Human Rights Act.**

108. We also note that the important power to enter premises for the purpose of interviewing a child, or for the purpose of observing the standard of care provided to children accommodated or cared for there,<sup>57</sup> is subject to an exception for "a private dwelling". We accept that there are strong human rights reasons for making sure that intrusive powers such as powers of entry are not exercised in a way which has a disproportionate impact on important rights such as the right to respect for private life and

55 Proposed new s. 2C(3) Children Act 2004, which broadly replicates existing s. 2(10) Children Act 2004.

56 Proposed new s. 2F(1) Children Act 2004, which broadly replicates existing s. 2(9) Children Act 2004.

57 Proposed new s. 2E(2) Children Act 2004.

home in Article 8 ECHR. We note, however, that some important children's services such as foster care and child-minding are, by their very nature, provided in private dwellings. The Children's Commissioner has a legitimate interest in the provision of such services and we believe that a question arises as to whether a wholesale exemption for private dwellings, rather than more detailed safeguards, is compatible with the effective discharge of the Commissioner's primary function.

109. We did not ask the Government about this in correspondence and therefore, rather than make a substantive recommendation, we would like the Government to respond to this point and explain its thinking on this issue.

**110. We recommend that the Government explain how the exception for "private dwellings" from the power to enter premises and conduct interviews affects the ability of the Commissioner to perform their function in relation to services such as foster care and child-minding which take place in such settings.**

## 4 Independence and accountability

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### The Government's approach in the draft clauses

111. The Dunford Report found that there is a perception that the Children's Commissioner is not sufficiently independent from Government and that this has affected the Commissioner's credibility with children's organisations. It also found that to date there has only been limited parliamentary scrutiny of the Children's Commissioner's work, or assessment by Parliament of the impact that the Children's Commissioner has had on improving children's lives.

112. We welcome the Government's commitment to address both of these significant findings. The draft clauses go a long way towards addressing the concern that the current Office of the Children's Commissioner falls short of the UNCRC requirements in its degree of independence from Government, and they also take some steps towards strengthening the institution's relationship with Parliament. We welcome, for example, the removal of the requirement that the Children's Commissioner consult the Secretary of State before holding an inquiry,<sup>58</sup> and the repeal of the Secretary of State's power to direct the Children's Commissioner to hold an inquiry.<sup>59</sup>

113. The relevant international standards have long been clear about the requirement of independence from Government.<sup>60</sup> Indeed this is a central requirement of the Paris Principles which date from 1993. The Paris Principles also state that NHRIs should establish an "effective co-operation" with their national Parliament. The international standards concerning the relationship between NHRIs and Parliament are only more recently emerging. The Belgrade Principles were agreed at independent expert level in February 2012 and are awaiting approval by the General Assembly of the UN. However, they provide useful guidance as to how the relationship between human rights institutions such as the Children's Commissioner can strengthen and deepen their relationship with Parliament.

114. Against the background of these international standards we have considered whether there is further scope both for strengthening the Commissioner's independence from the Government, and for increasing the Office's accountability to and engagement with Parliament.

### Independence from Government

#### *Financial control and independence*

115. The Paris Principles state that a National Human Rights Institution should have "adequate funding [...]" to enable it to have its own staff and premises, in order to be

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<sup>58</sup> Schedule 1, para 1(2), omitting s. 3(3) Children Act 2004.

<sup>59</sup> Schedule 1, para 2(1), repealing s. 4 Children Act 2004.

<sup>60</sup> See the recent UNICEF Report, *Championing Children's Rights: A global study of independent human rights institutions for children—summary report*, pp. 16–18.

independent of the Government and not subject to financial control which might affect its independence.”

116. In the Government's response to our letter, this is an area where the Government believes that, in general, the Commissioner meets the relevant international standards, “but with a caveat.” The Children's Commissioner will have a great deal of latitude in deciding how best to use its resources, but as a Non-Departmental Body (NDPB) it will be required to meet certain conditions that have been imposed on all NDPBs, in order to ensure accountability for spending public money—in particular in relation to expenditure on appointments, marketing and communications. The Government says that, while respecting the Children's Commissioner's independence, the Commissioner cannot and should not be immune from the constraints that apply to other NDPBs. The Framework Agreement Document between the Department for Education and the Children's Commissioner (dated 1 April 2012) therefore subjects the Children's Commissioner to the same set of rigorous financial controls as apply to all other NDPBs.

117. We accept that the principle of independence recognised in the Paris Principles should not be used to shield national human rights institutions such as the Children's Commissioner from accountability for their expenditure of public money. As publicly funded bodies they receive money from the taxpayer and independent human rights institutions must be accountable for how they spend it. The difficulty lies in devising satisfactory arrangements for such accountability which do not destroy the independence of such institutions by making them effectively subject to the control of the Government which provides the funding.

118. We have concerns as to whether the NDPB model being used by the Government, which entails a Framework Agreement between the Department and the Commissioner, is an appropriate model for national human rights institutions. The degree of financial control exerted by the Government through the Framework Agreement can give rise in practice to real inconsistencies with the requirement in the Paris Principles that National Human Rights Institutions should not be subject to financial control which might affect their independence. To give one example, we understand that, through the Framework Agreement, the Children's Commissioner is subject to the current requirement across the public sector to try and recruit to vacant posts in the first instance from the current civil service pool. This would mean, for example, that recruitment to a key staff post within the office of the Children's Commissioner, such as legal adviser, would have to be from the pool of Government lawyers, unless an exemption were obtained from the Secretary of State. This has clear implications both for the actual and the apparent independence of the Commissioner.

119. We are aware that other models of financial control exist which might be more compatible with the Commissioner's independence, while still ensuring full accountability for the expenditure of public money. We understand that in Scotland, for example, the budget of the Scottish Children's Commissioner is set annually by the corporate body of the Scottish Parliament (along with other human rights bodies such as the Scottish Human Rights Commission). We are also aware that models of financial control involving a committee of Parliament, rather than a Government department, have also been

considered in the past in relation to the Equality and Human Rights Commission and are currently being discussed in the context of possible reforms to that body.<sup>61</sup>

**120. We recommend that the Government think again about the appropriateness of the NDPB model for human rights institutions such as the Children's Commissioner. We also recommend that the Bill contain clear statutory underpinning for the independence of the Commissioner from the Government, by including clauses which impose a clear duty on the Minister not to interfere with the independence of the Commissioner and an obligation to ensure sufficient funding to enable the Commissioner to perform its primary function.**

**121. We also ask that the proposed new Framework Agreement between the reformed Office of the Children's Commissioner and the Department for Education be made available in draft as soon as possible to enable it to be scrutinised for compatibility with the Paris Principles requirement of effective independence from executive control.**

### *Government requests for Commissioner's advice*

122. The draft clauses provide that the Commissioner may advise the Secretary of State on the rights, views and interests of children.<sup>62</sup> According to the draft Explanatory Notes, it is intended that the Commissioner will give such advice on his or her own initiative, but it is also envisaged that any Secretary of State may request the Commissioner's advice.<sup>63</sup> Retaining such a Government advisory role for the Commissioner may be thought to give rise to a risk that the Commissioner will be perceived as not sufficiently independent from the Government, especially if the requests for advice and the advice provided in response are not published. We asked about the Government's intentions in this respect but this question was not answered in the Government's response.

**123. We recommend that the Bill should provide that the Commissioner should decide whether requests for advice made by the Secretary of State to the Commissioner, and any advice from the Commissioner in response to such requests, be made public, so as to ensure accountability and transparency, and to prevent the risk of a perception of a lack of independence.**

124. Whether the Commissioner is obliged to respond to Government requests for advice is an important question. Just as a power in the Secretary of State to direct the Children's Commissioner to hold an inquiry is incompatible with the requirement for independence, so the possibility of requests for advice by a Secretary of State gives the Government a means of influencing the priorities and agenda of the Commissioner in a way which is equally incompatible with the requirement of independence. The draft Explanatory Notes suggest that whether and how the Commissioner chooses to respond to requests for advice from any Secretary of State "will be entirely a matter for his or her judgement".<sup>64</sup> There is

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61 See e.g. the advice of Professor Anthony Bradley QC to the Equality and Human Rights Commission in connection with the Enterprise and Regulatory Reform Bill.

62 Proposed new s. 2(3)(b) Children Act 2004.

63 Draft Explanatory Notes para. 16.

64 Draft Explanatory Notes, para. 16.

nothing in the draft clauses, however, which makes this clear. Our question on this point was not answered by the Government.

**125. We recommend that the Bill should expressly provide that the Children's Commissioner is not obliged to respond to and can decline a request for advice from the Secretary of State, so as to ensure that the Office of the Children's Commissioner is seen to be, and is in practice, sufficiently independent from Government.**

### **Website and premises**

126. As all the international standards make clear, and as the Dunford Report explicitly recognised, the appearance of independence from Government is for an independent human rights institution such as the Children's Commissioner very important. Perceptions of independence can be fragile and easily affected by what might seem to be relatively minor administrative arrangements concerned with costs and efficiency. Parliament must remain vigilant to ensure that the appearance of independence of human rights institutions is not undermined by administrative decisions.

127. The current Children's Commissioner, in her letter to us dated 3 October 2012, expressed serious concerns about being required to move the Children's Commissioner's website onto the unified ".gov.uk" domain, so that anybody searching for the Commissioner's webpage will have to enter through a Government portal. We agree with the Commissioner's concern that this is potentially damaging to the Commissioner's appearance of independence from Government, because it gives the impression that the Commissioner is an agency of Government. We note that the website of the Equality and Human Rights Commission does not have ".gov.uk" domain.<sup>65</sup> We also note that the Independent Reviewer of Terrorism Legislation has adopted an email address which includes the words "independent reviewer" in the address.

**128. We recommend that the Children's Commissioner's website be hosted outside of the ".gov.uk" domain and that consideration be given to including the word "independent" in the Commissioner's web address. We also think it is important to the independence of the Children's Commissioner that its premises should continue to be independently located.**

### **Engagement with Parliament**

129. The draft clauses make some provision to give effect to the Government's wish to encourage greater parliamentary engagement with the Commissioner's work and to increase the Commissioner's accountability to Parliament for the impact of the Commissioner's work on the lives of children. As the draft Explanatory Notes acknowledge, this is more a matter for Parliament than the Government. However, we have considered whether there is more that can be done both in the Bill and in commitments the Government can make about guaranteeing parliamentary time for certain business. **We intend to help strengthen Parliament's engagement with the Children's Commissioner, for example by holding evidence sessions on the Commissioner's Annual Report.**

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<sup>65</sup> [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

### *Advising Parliament*

130. The draft clauses provide that the Children's Commissioner may, in the discharge of the primary function of protecting and promoting children's rights, "advise the Secretary of State".<sup>66</sup> The international standards envisage that children's commissioners should advise not only the Government but also Parliament,<sup>67</sup> and that children's rights need to be "main-streamed" in both policy-making and law-making. According to the evidence of the current Children's Commissioner, the Office already frequently provides advice to Parliament and to individual parliamentarians in relation to issues concerning children. It would therefore better reflect not only international standards but existing practice if the legal framework were explicit about this. In our view, such a role for the Commissioner could help facilitate an effective dialogue with Parliament, at the same time as improving implementation of the UNCRC by equipping parliamentarians with the expertise and knowledge to scrutinise the UK's performance.

**131. We recommend that the Children's Commissioner's function should include an explicit reference to advising Parliament, so as to provide the foundation for the 'effective co-operation' envisaged by the Paris Principles, and to formalise what already happens in practice.**

### *Parliamentary debates on the Commissioner's reports*

132. We welcome the fact that the content of the Commissioner's annual report is prescribed by the draft clauses with the object of Parliament scrutinising the Commissioner's activities and impact, and the draft clauses provide for the Commissioner to lay the annual report before both Houses of Parliament, rather than through the Secretary of State.<sup>68</sup>

133. According to General Comment No. 2, "States parties must ensure that an annual debate is held in Parliament to provide parliamentarians with an opportunity to discuss the work of the NHRI in respect of children's rights and the State's compliance with the Convention."<sup>69</sup>

134. This is clearly not a matter for inclusion in the draft clauses, but a matter for Parliament. Whether time is made available for such a debate, however, is effectively in the hands of the Government's business managers. Although the Government may now regard such matters in the House of Commons to be in the hands of the Back Bench Business Committee, the international standards are clear that it is the State's responsibility to secure an annual debate.

**135. We recommend that the Government give an undertaking to ensure that parliamentary time is made available for an annual debate centred on the Children's Commissioner's annual report. Such a debate should take place in the Government's own parliamentary time, rather than the time available for back bench business.**

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66 Proposed new s. 2(3)(b).

67 See e.g. Paris Principles para. 3(a).

68 Proposed new s. 8(3)(b) Children Act 2004.

69 Para. 18.

### *Appointment and removal*

136. One of the areas most relevant to the independence of the Commissioner from Government and the Office's accountability to Parliament is the statutory framework and practical arrangements for appointment and removal of the post-holder. The draft clauses seek to address concerns that have been addressed about the Commissioner's perceived lack of independence by providing for a single, non-renewable term of six years instead of a renewable five year term.<sup>70</sup> This is a welcome improvement in terms of strengthening the Commissioner's independence, although the rationale for choosing a six year term, rather than the more usual term of seven years for a non-renewable public office such as this (see, most recently, the single seven year term for the Information Commissioner introduced by the Protection of Freedoms Act) has not been made clear by the Government.

137. However, the Commissioner is still appointed by the Secretary of State,<sup>71</sup> and can be removed by the Secretary of State if satisfied that the Commissioner has become unfit or unable properly to discharge his functions, or behaved in a way that is not compatible with his continuing in office.<sup>72</sup> Although in practice there may be a pre-appointment hearing of the Secretary of State's chosen candidate (which is obviously not a matter for statutory regulation), the draft clauses make no provision for any parliamentary involvement in the Commissioner's appointment or removal. As the joint submission from children's NGOs argues, such an arrangement clearly has the potential to undermine the independence of the Office.

138. We note that in Scotland, both the Commissioner for Children and Young People and the Scottish Human Rights Commissioner are appointed by the Scottish Parliament and can only be removed by the Scottish Parliament. There are other office holders in the UK who are appointed by Her Majesty the Queen only following approval of the appointment by the House of Commons, and can only be removed by Her Majesty the Queen following an address from both Houses. The Parliamentary Ombudsman perhaps provides the closest analogy. In addition to the statutory provision of a role for Parliament, the appointments process for the recent appointment of a new Ombudsman was designed in such a way as to involve both the Government and a senior parliamentarian (the Chair of the Public Administration Select Committee).

**139. We recommend that the Government explore ways of securing greater parliamentary involvement in the selection, appointment and removal of the Children's Commissioner, having regard to other models for appointment and removal of independent office holders including the Scottish Children's Commissioner and the Parliamentary Ombudsman.**

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70 Proposed new paras 3(4) and (5) of Schedule 1 to the 2004 Act.

71 Para 3(1) of Schedule 1.

72 Para 3(7) of Schedule 1.

## 5 Devolution

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140. One of the concerns identified by the Dunford Report was that the UK-wide role of the Children's Commissioner for England in respect of non-devolved matters means that there are concerns about how effectively the Commissioners in the devolved administrations are able to respond to non-devolved issues that are raised by children living in Scotland, Wales and Northern Ireland. At present, children who live in Scotland, Wales or Northern Ireland may have to be referred to the Children's Commissioner for England where the issue they have raised relates to a non-devolved matter. The Government wants to remove this confusion and enable the devolved Commissioners to deal with an issue raised by a child in their area, even if it concerns a non-devolved matter.

141. The draft clauses seek to deal with this problem by providing for the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners.<sup>73</sup>

142. We asked the Government whether the devolved Commissioners have indicated that the solution proposed in the draft clauses meets their concerns about how effectively they can respond to non-devolved issues raised by children in the devolved jurisdictions. The Government did not answer our question, but the devolved Commissioners themselves and the English Commissioner have made clear in joint correspondence with us that the proposed solution in the draft clauses would make matters worse than they currently are. This is because each of the devolved Commissioners has a different set of authorities and accountability arrangements, and the model of the English Commissioner delegating authority to them introduces new layers of complexity and uncertainty. All four Commissioners, including the English Commissioner, are of the view that this would be a retrograde step. They currently operate with a Memorandum of Understanding within the current legislative framework, and all of them would prefer to continue with this arrangement than have to deal with the complexities that the draft clauses would introduce.

**143. In light of the unanimous view of the four commissioners, we are not persuaded that there is any evidence of a need to change the current arrangements concerning the relationship between the English Commissioner and the devolved Commissioners. We recommend that the draft clauses allowing the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill. We also recommend that the four Commissioners consider whether the Memorandum of Understanding could be improved and make that document publicly available.**

# Conclusions and recommendations

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## Background

1. We welcome the Government's UNCRC assessment as a good precedent. (Paragraph 16)
2. We were disappointed by the brevity of the Minister's response to our detailed questions. The Department agreed to our taking the lead in Parliament on the pre-legislative scrutiny of the draft clauses, but that task is made more difficult when the Government does not answer the questions which such scrutiny requires. We expect the Government's formal response to this Report to include answers to those questions which were not responded to. (Paragraph 19)
3. We welcome the draft provisions in principle as constituting a significant human rights enhancing measure. (Paragraph 22)
4. We will be seeking evidence on the practical operation of the new Welsh duty on ministers to have regard to the UNCRC, and on the proposed duty in Scotland, to help inform our scrutiny of the Bill when it is published. (Paragraph 26)

## Mandate

5. We welcome the proposed change in the Commissioner's primary function, from one of 'promoting awareness of the views and interests of children in England' to one of 'promoting and protecting the rights of children in England'. A statutorily explicit rights-based remit represents a significant strengthening of the Commissioner's mandate, and is an important step in the transformation of the office into a fully fledged human rights institution for children. A mandate to "promote and protect" human rights is the first requirement in the international standards for a body to be recognised as a national human rights institution. (Paragraph 30)
6. We recommend that, in order to give effect to the recommendation of the Dunford Review and the Government's intention that the reformed Children's Commissioner should have a rights-based remit grounded in the UNCRC, the Bill should expressly define "the rights of children in England" to include the rights in the UNCRC for the purposes of defining the Commissioner's primary function. (Paragraph 38)
7. We expect the Government's intention to be that the definition of the UNCRC rights in the Bill includes the rights in the Optional Protocols ratified by the UK, especially given the clarity required by the relevant international standards on this question. We cannot see any reason why this should not be made explicit on the face of the Bill. We recommend that the definition of the UNCRC in the draft clauses be amended to include an express reference to the Optional Protocols ratified by the UK. (Paragraph 42)
8. We recommend that the draft clauses be amended to include in the definition of the rights of children required to be promoted and protected by the Commissioner

under their duty, not only the rights in the UNCRC but any human rights of children contained in international treaties. (Paragraph 47)

9. In our view, non-binding international standards do not give rise to rights which it should be the function of the Children's Commissioner to promote and protect, but they do provide a useful source of standards and guidance to the Commissioner in the discharge of their primary function. We are sure that it is the Government's intention that the Commissioner should be permitted to take such international standards into account in the exercise of their functions. We consider, however, that the Children's Commissioner should be required in the Bill to have regard to all relevant international standards concerning the rights of children and we recommend that the draft clauses be amended to that effect. (Paragraph 49)
10. We welcome the Government's apparent intention, implicit in paragraph 21 of the draft Explanatory Notes, that the rights of children that the Children's Commissioner is charged with promoting and protecting include rights which children have in domestic law where these are more extensive than those in the UNCRC. We agree with the concern of the Children's Rights Director that the lack of a clause making this intention explicit on the face of the Bill may give rise to uncertainty about the scope of the Commissioner's mandate. Such uncertainty would be both undesirable in practice and inconsistent with the relevant international standards which require specificity in the statutory definition of the Commissioner's mandate. We recommend that the draft clauses should be amended so that it is plain on the face of the legislation that the Commissioner is responsible for promoting and protecting children's rights or interests in domestic law or statutory guidance where those are more extensive than those in the UNCRC. (Paragraph 55)
11. We welcome the Government's clear indication of its intention that systematically monitoring the implementation of the UNCRC in the UK and reporting on progress is within the scope of the Commissioner's primary function. We understand the Government's reluctance to overload the Bill with unnecessary detail and its preference for setting out the types of activity that the Commissioner may undertake rather than listing each specific activity. (Paragraph 62)
12. However, we are mindful of the requirements in the relevant international standards that the Commissioner's mandate be set out clearly in legislation which specifies the Commissioner's functions. Monitoring the implementation of the UNCRC is not merely a particular activity of the Children's Commissioner, it is an important function of any independent human rights institution for children. To ensure that there is no scope for uncertainty about Parliament's intention in relation to such an important matter, we therefore recommend that the draft clauses should be amended so as to include an explicit reference to the Commissioner's function of monitoring the UK's implementation of the UNCRC. (Paragraph 63)
13. We recommend that the draft clauses should be amended so as to include promoting awareness and understanding of rights, as well as the views and interests of children in England, in the mandate of the Commissioner. The relevant clause, as currently drafted, does not give effect to the Government's intention that the Commissioner's

mandate be rights-based. In its present form, it replicates the current function without extending that function to include promoting awareness of rights. In our view, such a change would ensure clear legislative drafting of the mandate and functions of the Commissioner, as required by the relevant international standards. (Paragraph 69)

14. We recommend that the title of the Commissioner be changed to include “young people” as well as “children”, both in order to encourage older teenagers to consider the Commissioner of relevance to them, and to reflect the fact that the Commissioner will have functions in relation to certain 18–24-year-olds. (Paragraph 77)

## Powers

15. We recommend that the Commissioner be invested with the power to undertake all of the activities recommended by the UN Committee on the Rights of the Child in paragraph 19(a) to (t) of General Comment No. 2. If the Government does not intend to grant the power to undertake any of those activities, it should make that clear on the face of the Bill; in doing so, the Government should identify which specific activities the Commissioner is not intended to undertake. Including more specific activities in the Bill, though, does not make the general approach any less permissive. It should be made clear that, whatever the final list of additional activities in the proposed new s. 2(3), it is not to be considered exhaustive. (Paragraph 85)
16. We accept that it would be unrealistic for the reformed Children's Commissioner to take on the role of an ombudsperson with jurisdiction to hear individual complaints without a substantial increase in the resources available to the office. Assuming that increased resources are not an option in the current economic climate, we agree that there is a risk that the Commissioner would become overwhelmed by the sheer volume of complaints and that this would detract from their strategic role. We welcome, however, the Commissioner's power to consider or research the availability and effectiveness of both complaints procedures and advocacy services, and we encourage the Commissioner to make early use of these powers. (Paragraph 87)
17. We recommend that the essentially procedural provision in Clause 2(3)(a) should be reformulated so as to reflect not only the new primary function of the Commissioner, but also the desire to make the Office of Commissioner as effective as possible. (Paragraph 91)
18. We recommend that it should be made clear on the face of the Bill that the Commissioner has the power to carry out investigations. The Commissioner should expressly be given the power to investigate any issue which raises important questions of compatibility with children's rights, in order to give effect to the Government's clear intention, and this express power should be in addition to the proposed powers to “consider and research”. (Paragraph 96)
19. We recommend that the Commissioner should have the power to initiate legal proceedings, including judicial review, in the Commissioner's own name, and also to intervene as a third party where appropriate, equivalent to the power of the Equality

and Human Rights Commission in s. 30 of the Equality Act 2006. We acknowledge that the use of such a power could be resource intensive and we would expect it to be used sparingly in practice. (Paragraph 102)

20. We recommend that the obligations to respond to the Children's Commissioner's recommendations and to provide information reasonably requested by the Commissioner should not be confined to persons exercising statutory functions, but should be extended to include persons exercising "functions of a public nature" within the meaning of the Human Rights Act. (Paragraph 107)
21. We recommend that the Government explain how the exception for "private dwellings" from the power to enter premises and conduct interviews affects the ability of the Commissioner to perform their function in relation to services such as foster care and child-minding which take place in such settings. (Paragraph 110)

### Independence and accountability

22. We recommend that the Government think again about the appropriateness of the NDPB model for human rights institutions such as the Children's Commissioner. We also recommend that the Bill contain clear statutory underpinning for the independence of the Commissioner from the Government, by including clauses which impose a clear duty on the Minister not to interfere with the independence of the Commissioner and an obligation to ensure sufficient funding to enable the Commissioner to perform its primary function. (Paragraph 120)
23. We also ask that the proposed new Framework Agreement between the reformed Office of the Children's Commissioner and the Department for Education be made available in draft as soon as possible to enable it to be scrutinised for compatibility with the Paris Principles requirement of effective independence from executive control. (Paragraph 121)
24. We recommend that the Bill should provide that the Commissioner should decide whether requests for advice made by the Secretary of State to the Commissioner, and any advice from the Commissioner in response to such requests, be made public, so as to ensure accountability and transparency, and to prevent the risk of a perception of a lack of independence. (Paragraph 123)
25. We recommend that the Bill should expressly provide that the Children's Commissioner is not obliged to respond to and can decline a request for advice from the Secretary of State, so as to ensure that the Office of the Children's Commissioner is seen to be, and is in practice, sufficiently independent from Government. (Paragraph 125)
26. We recommend that the Children's Commissioner's website be hosted outside of the ".gov.uk" domain and that consideration be given to including the word "independent" in the Commissioner's web address. We also think it is important to the independence of the Children's Commissioner that its premises should continue to be independently located. (Paragraph 128)

27. We intend to help strengthen Parliament's engagement with the Children's Commissioner, for example by holding evidence sessions on the Commissioner's Annual Report. (Paragraph 129)
28. We recommend that the Children's Commissioner's function should include an explicit reference to advising Parliament, so as to provide the foundation for the 'effective co-operation' envisaged by the Paris Principles, and to formalise what already happens in practice. (Paragraph 131)
29. We recommend that the Government give an undertaking to ensure that parliamentary time is made available for an annual debate centred on the Children's Commissioner's annual report. Such a debate should take place in the Government's own parliamentary time, rather than the time available for back bench business. (Paragraph 135)
30. We recommend that the Government explore ways of securing greater parliamentary involvement in the selection, appointment and removal of the Children's Commissioner, having regard to other models for appointment and removal of independent office holders including the Scottish Children's Commissioner and the Parliamentary Ombudsman. (Paragraph 139)

## Devolution

31. In light of the unanimous view of the four commissioners, we are not persuaded that there is any evidence of a need to change the current arrangements concerning the relationship between the English Commissioner and the devolved Commissioners. We recommend that the draft clauses allowing the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill. We also recommend that the four Commissioners consider whether the Memorandum of Understanding could be improved and make that document publicly available. (Paragraph 143)

# Formal Minutes

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**Tuesday 4 December 2012**

Members present:

Dr Hywel Francis, in the Chair

Rehman Chishti

Rt Hon Simon Hughes

Mr Virendra Sharma

Richard Shepherd

Baroness Berridge

Baroness Kennedy of the Shaws

Baroness Lister of Burtersett

Baroness O'Loan

Draft Report (Reform of the Office of the Children's Commissioner: draft legislation), proposed by the Chair, brought up and read.

*Ordered*, That the Chair's draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 143 read and agreed to.

Several papers were appended to the Report.

*Resolved*, That the Report be the Sixth Report of the Committee to the House.

*Ordered*, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

*Ordered*, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence reported and ordered to be published on 24 April, 3 July, 10 July, 11 September, 23 October, and 30 October was ordered to be reported to the House.

[Adjourned till Tuesday 11 December at 2.00 pm]

## Declaration of Lords' Interests

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No Lords' members present declared interests.

A full list of members' interests can be found in the Register of Lords' Interests:  
<http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm>

## Witnesses

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**Tuesday 24 April 2012**

**Dr Maggie Atkinson**, Children's Commissioner for England, and **Sue Berelowitz**, Deputy Children's Commissioner

**Sarah Teather MP**, Minister of State for Children and Families, Department for Education

## List of written evidence published on the Internet

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- 1 UNICEF UK
- 2 Children England
- 3 Save the Children
- 4 Every Disabled Child Matters
- 5 Children's Rights Alliance for England (CRAE)
- 6 Participation Works Partnership
- 7 Children's Commissioner
- 8 Roger Morgan, Children's Rights Director for England
- 9 4 Children
- 10 Consortium for Street Children
- 11 Children's Commissioner Review NGO Co-ordinating Group
- 12 Children's Society
- 13 Family Law Bar Association
- 14 Department for Education
- 15 Letter from the Chair, to Edward Timpson MP, Parliamentary Under-Secretary of State for Children and Families, Department for Education
- 16 Letter to the Chair, from Edward Timpson MP, Parliamentary Under-Secretary of State for Children and Families, Department for Education
- 17 Letter to the Chair, from Keith Towler, Children's Commissioner for Wales, on behalf of Patricia Lewsley-Mooney, Northern Ireland Commissioner for Children and Young People, and Tam Baillie, Scottish Commissioner for Children and Young People
- 18 Letter to the Chair, from Maggie Atkinson, Children's Commissioner for England, Patricia Lewsley-Mooney, Northern Ireland Commissioner for Children and Young People, Keith Towler, Children's Commissioner for Wales, and Tam Baillie, Children's Commissioner for Scotland
- 19 ADCS

- 20 Rights of the Child (ROCK)
- 21 Association of School and College Leaders (ASCL)
- 22 ADCS
- 23 National Children's Advocacy Consortium

# List of Reports from the Committee during the current Parliament

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## Session 2012–13

|               |   |                    |
|---------------|---|--------------------|
| First Report  | Draft Sexual Offences Act 2003 (Remedial) Order 2012: second Report   | HL Paper 8/HC 166  |
| Second Report | Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee's Twenty-third Report of Session 2010–12 | HL Paper 23/HC 429 |
| Third Report  | Appointment of the Chair of the Equality and Human Rights Commission  | HL Paper 48/HC 634 |
| Fourth Report | Legislative Scrutiny: Justice and Security Bill   | HL Paper 59/HC 370 |
| Fifth Report  | Legislative Scrutiny: Crime and Courts Bill   | HL Paper 67/HC 771 |
| Sixth Report  | Reform of the Office of the Children's Commissioner: draft legislation  | HL Paper 83/HC 811 |

## Session 2010–12

|                   |   |                      |
|-------------------|---|----------------------|
| First Report      | Work of the Committee in 2009–10  | HL Paper 32/HC 459   |
| Second Report     | Legislative Scrutiny: Identity Documents Bill   | HL Paper 36/HC 515   |
| Third Report      | Legislative Scrutiny: Terrorist Asset-Freezing etc. Bill (Preliminary Report)                           | HL Paper 41/HC 535   |
| Fourth Report     | Terrorist Asset-Freezing etc Bill (Second Report); and other Bills                                      | HL Paper 53/HC 598   |
| Fifth Report      | Proposal for the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010    | HL Paper 54/HC 599   |
| Sixth Report      | Legislative Scrutiny: (1) Superannuation Bill; (2) Parliamentary Voting System and Constituencies Bill  | HL Paper 64/HC 640   |
| Seventh Report    | Legislative Scrutiny: Public Bodies Bill; other Bills   | HL Paper 86/HC 725   |
| Eighth Report     | Renewal of Control Orders Legislation   | HL Paper 106/HC 838  |
| Ninth Report      | Draft Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2010—second Report | HL Paper 111/HC 859  |
| Tenth Report      | Facilitating Peaceful Protest   | HL Paper 123/HC 684  |
| Eleventh Report   | Legislative Scrutiny: Police Reform and Social Responsibility Bill                                      | HL Paper 138/HC 1020 |
| Twelfth Report    | Legislative Scrutiny: Armed Forces Bill   | HL Paper 145/HC 1037 |
| Thirteenth Report | Legislative Scrutiny: Education Bill  | HL Paper 154/HC 1140 |
| Fourteenth Report | Terrorism Act 2000 (Remedial) Order 2011  | HL Paper 155/HC 1141 |
| Fifteenth Report  | The Human Rights Implications of UK Extradition Policy  | HL Paper 156/HC 767  |

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|----------------------|--|----------------------|
| Sixteenth Report     | Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill                                 | HL Paper 180/HC 1432 |
| Seventeenth Report   | The Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion (second Report) | HL Paper 192/HC 1483 |
| Eighteenth Report    | Legislative Scrutiny: Protection of Freedoms Bill  | HL Paper 195/HC 1490 |
| Nineteenth Report    | Proposal for the Sexual Offences Act 2003 (Remedial) Order 2011  | HL Paper 200/HC 1549 |
| Twentieth Report     | Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill (Second Report)                 | HL Paper 204/HC 1571 |
| Twenty-first Report  | Legislative Scrutiny: Welfare Reform Bill  | HL Paper 233/HC 1704 |
| Twenty-second Report | Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill                               | HL Paper 237/HC 1717 |
| Twenty-third Report  | Implementation of the Right of Disabled People to Independent Living                                       | HL Paper 257/HC 1074 |
| Twenty-fourth Report | The Justice and Security Green Paper   | HL Paper 286/HC 1777 |