

Response to the National Assembly for Wales consultation on the proposed Vulnerable Children and Child Poverty Legislative Competence Order 2007**Introduction and General Comments**

We welcome this LCO and support its objective to improve the wellbeing of vulnerable children and address child poverty which is at the very heart of the work of the Children's Commissioner for Wales. We also welcome the distinct rights based approach and the proposal to consolidate and simplify the law. However the success of the LCO and subsequent Measure(s) will be judged by whether they actually improve the quality of children's lives. At the same time as improving the legislative framework, there also need to be improvements in the implementation of the current and the proposed legislation, policy and guidance.

Poverty and violence are two of the main factors which impact negatively on children's lives. It is unclear whether the LCO as drafted would enable Welsh Assembly Government to take steps to prohibit physical punishment against children. We would urge that any amendments necessary are made to the LCO to enable this to be achieved.

In its call for evidence the Committee stated that it is 'very interested in the views of children and young people, and would be grateful if this could be reflected in any evidence submitted, where applicable'. The limited timescale provided has not given sufficient time to consult with children and young people. The questions themselves would require considerable time to put in a form that children and young people could access and respond to effectively. Without proper preparation, such a consultation would be tokenistic and not meet the Welsh Assembly Government's published National Participation Standards. There is however available research about how children and young people define their own well-being and their messages from groups such as Funky Dragon¹ and others². This may be a useful

¹ Report to the UN Committee on the Rights of the Child – to be published soon

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source of information against which to compare the definition of well-being within the proposed Legislative Competence Order.

Promoting the rights and welfare of children is a core value of our culture in Wales. Some six years ago we in Wales broke new ground in the United Kingdom in establishing a Children's Commissioner for Wales. Peter Clarke, our first Commissioner, achieved a great deal before his sad and untimely death. We welcome the inclusion in the LCO of the ability to review the Commissioner's powers. We attach a paper which makes detailed recommendations on how the powers can be improved to ensure Wales continues to lead the way in promoting and protecting the rights and welfare of children and young people. This paper addresses the current weaknesses in the legislation and compares best practice of the other UK commissioners and international human rights organisations and is based on our experiences over the past six years. The aim is to ensure that Peter's successor has the best the tools with which he can be a champion for all children in Wales .

Response

1. Would the terms of the proposed Order allow for the implementation of the policy agenda on vulnerable children and child poverty by means of Measures? If not, how would the proposed Order need to be re-drafted and why?

The terms of the proposed order are drafted in such a way that they provide the potential to allow for the implementation of the broad policy agenda on vulnerable children; however, when Measures are eventually drafted we would expect a clearer

² Promoting Young People's Wellbeing: A review of research on emotional health, Lynne Edwards, SCRC Centre, Glasgow University

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statement of the future policy agenda developments on vulnerable children from Welsh Assembly Government.

The draft Order and the accompanying memorandum contain very limited detail on the proposed Measures for the implementation of the child poverty agenda. This makes it difficult to comment as to whether the proposed Order is sufficiently broadly drafted.

2. Are the terms of the proposed Order drafted appropriately, too narrowly or too broadly. If necessary how should the proposed Order be re-drafted and why?

Definition of vulnerable children

We are concerned that the definition of a “vulnerable child” in the accompanying memorandum may be too narrow to include all groups of children who could legitimately be so described.

The National Assembly’s own Safeguarding Vulnerable Children Review made the following statement:

“All children are vulnerable by virtue of their age and inexperience but some are more vulnerable than others. Safeguarding children is the responsibility of all adults. It also has to be recognised that however effective the adult population becomes at safeguarding children, sadly, some children will still be hurt. Safeguarding goes much wider than the responsibilities of parents and the professional activities of teachers, social workers, health professionals and the police. It involves a wide spectrum of activity in all walks of life. Children are directly and often most profoundly, affected by how adults handle aspects of daily life; the quality of the environment and public safety, the quality of formal and informal activities such as sport, play; membership of organisations and faith groups

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and the quality of all the services provided by the welfare state such as health care, income support, family support, and education.

We would support this statement. However we would also highlight a number of children who in our experience are particularly vulnerable and some of these groups of children are effectively hidden and not given a high priority when services are planned. These children and young people may include those who:-

- are young carers
- are being bullied
- are particularly able or talented
- have experienced a bereavement
- are looked after
- are living with parents who are abusing substances
- are living with parents who have a mental health problem
- have mental health problems of their own, particularly those aged 16-18 and not in full-time school education
- have English or Welsh as an additional language
- are not attending school regularly
- have emotional and social difficulties, including those children with autistic spectrum disorders
- are children of prisoners
- are Gypsy or Traveller children
- are disabled
- are unaccompanied and accompanied asylum seekers
- children and young people in the secure estate in Wales and Welsh children in the secure estate in England

Is it the intention that these groups of children will be included within the scope of any Assembly Measure developed as a result of conferral of the powers within the proposed LCO?

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It is clear to us from our direct work with children and young people that statutory service providers are not the only people who can play a role in children's well-being and social care. We therefore support the wording of the LCO which refers to any person or body carrying out functions relating to the well being of children and young people or providing their social care

Matter 15.7 – An office or body concerned with safeguarding and promoting the well-being of children or young persons

As stated previously a paper is attached containing recommendations for reviewing the powers of the Children's Commissioner for Wales. This is in addition to the current powers. It is hoped this paper will help inform the Committee's scrutiny of the LCO and to ensure that the LCO is drafted to enable the powers to be **retained** and reviewed effectively and comprehensively.

To summarise the main points

- We are of the opinion the Children's Commissioner for Wales should report to the National Assembly and not the Welsh Assembly Government.
- The entire range of functions should be extended to include all public and private bodies in Wales and those bodies outside of Wales who provide services for children in Wales including those public bodies who provide services under non devolved powers.
- The Commissioner should have the power to bring, intervene in or assist in legal proceedings before any court or tribunal.

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- The commissioner should have the power to request information from all persons falling within his mandate for the purposes of undertaking any of his functions.
- The legislation should confer an express power to investigate the cases of individual children and consideration be given as to whether the Commissioner should be able to issue binding decisions when investigating the cases of individual children.
- The Commissioner should not be precluded from any function which by virtue of an enactment is also exercisable by a prescribed person.
- The Commissioner's powers in undertaking reviews should be identical irrespective of the issue under review.
- There should be an express power to work jointly with the Children's Commissioner for England.
- The Commissioner should be under a duty to establish a complaints procedure in respect of his actions or omissions.
- In undertaking reviews, the Commissioner should be under a duty to consider the extent to which such functions comply with the UN Convention on the Rights of the Child.

Within the context of the attached paper and the main points summarised above we comment on Matter 15.7 as it is currently drafted

Response to the National Assembly for Wales consultation on the proposed Vulnerable Children and Child Poverty Legislative Competence Order 2007**Accountability of the Office of the Children's Commissioner for Wales**

We consider that the proposals under Matter 15.7 for the “Continuance, dissolution or creation of, and conferral of functions on, an office or body concerned with safeguarding and promoting the well-being of children or young persons” provide an opportunity to review the accountability of the Children's Commissioner for Wales. We consider that an office or body concerned with safeguarding and promoting the well-being of children or young persons should be accountable to the National Assembly for Wales rather than to the Welsh Assembly Government.

The implications of the Government of Wales Act 2006 provide an opportunity to review the relationship between the Children's Commissioner for Wales and both the legislature and Government. Any office or body concerned with safeguarding and promoting the well-being of children or young persons would be able to carry out this role more effectively and independently if their budget is controlled by the National Assembly rather than a Government Department as it is now by the Department for Children, Education, Lifelong Learning and Skills.

Review and Monitoring of the arrangements for Whistleblowing and Advocacy

There is no reference within part (b) of Matter 15.7 to reviewing and monitoring whistleblowing and advocacy both of which are essential safeguards in promoting and safeguarding the rights and welfare of children. There have been many instances, most notably those reported in *Lost in Care*, where either children's or concerned employees' voices have been ignored. This demonstrates clearly the need for a body to undertake the review and monitoring of the arrangements for Whistleblowing and Advocacy. The report *Lost in Care* recommended that the Children's Commissioner for Wales has the function of carrying reviews of complaints, whistleblowing and arrangements for children's advocacy. Given the expansion in advocacy foreseen by the Welsh Assembly Government's draft Advocacy Strategy it is vital that the Children's Commissioner for Wales continues to have the power to the review these arrangements.

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Furthermore the Children's Commissioner for Wales is a prescribed regulator under the Public Interest Disclosure Act 1998 and it would not be appropriate if a prescribed regulator could not review the arrangements for whistleblowing. We have recently expressed concerns about the whistleblowing guidance for schools prepared by Welsh Assembly Government and it is vital that this function is retained within any new Measure.

Is it the intention of the National Assembly for Wales to withdraw these important functions or is it an oversight in the drafting of the LCO? If it is the intention to withdraw, who would have the power to independently review the arrangements for advocacy and whistleblowing arrangements in Wales?

Examining cases of particular children or young persons

The wording of Matter 15.7(c) is ambiguous. Is it the intention that this would mean only children or young persons, prescribed in regulations i.e. **those in care** or does this mean that an office or body concerned with safeguarding and promoting the well-being of children or young persons would be able to examine the cases of **any** child or young person in Wales?

At present, the legislation empowering this function of the Children's Commissioner for Wales limits it to children who receive regulated services in Wales. This means that the Children's Commissioner for Wales is unable to examine the cases of children or young people in receipt of non-devolved services, for example those in the youth justice or asylum system. As can be seen in the attached paper based on the practical experience of the past six years of supporting and assisting these children we would strongly advocate that this is expanded to all children. We would welcome clarification of the Assembly's intentions on this issue.

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The power of review of the Children's Commissioner for Wales is currently limited to regulated children's services in Wales, however Matter 15.7 (a) and (b) appear to widen this which we strongly feel is in children's best interests.

Would the proposed expansion of the power of review of an office or body concerned with safeguarding and promoting the well-being of children or young persons allow for such a body to intervene in the cases of children and young people in receipt of currently non-devolved services, for example youth justice and asylum?

Age range of children or young persons

We note the definition of young persons as set out in the LCO that

"young persons" means

- (a) persons who have attained the age of 18 but not the age of 24,*
- (b) persons who have attained the age of 24 and who are continuing a programme of education or training they were undertaking at the age of 21."*

At present the Children's Commissioner for Wales has a role and remit for care leavers up to age 25 but no other young people over the age of 18. We feel that this definition should be revised to be compatible with the Leaving Care Legislation. Also, is it the intention of the Committee to see the role and remit of an office or body concerned with safeguarding and promoting the well-being of children or young persons to be extended as is proposed within the draft LCO? This would, in our view, extend the remit and the range of issues considered by such an office or body and would require additional funding to enable the body or office to carry out all its new functions.

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We welcome the provision in Matter 15.6 which states that there are plans for

Strategic planning by local authorities for the discharge of functions relating to the well-being of children or young persons.

We also welcome the provision of Matter 15.8 for the

Promotion of equality between children or young persons in relation to their well-being.

We will be interested to see how this proposal is developed at the stage of an Assembly Measure.

3. Are the definitions of 'well-being' and 'social care' in the proposed Order appropriate? If not, how should they be re-drafted and why?

The ESRC Research Group on Wellbeing in Developing Countries has defined wellbeing as:

"Wellbeing is a state of being with others, where human needs are met, where one can act meaningfully to pursue one's goals, and where one enjoys a satisfactory quality of life."

Source: <http://www.bath.ac.uk/econ-dev/wellbeing/research/aims.htm>

However, we feel that the definition of 'well being' in the draft LCO is sufficiently broad to enable implementation of the policy agenda on Vulnerable Children.

The Committee may wish to consider whether the addition of a further category of "material well-being" needs to be added to enable implementation of the Child Poverty agenda.

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4. The proposed Order includes a table setting out certain exceptions from the scope of Matters 15.1-15.8. Are these exceptions appropriate? If not, how should they be re-drafted and why?

We understand the need for these exceptions but do not feel that we are best placed to comment further.

Maria Battle

Deputy/Acting Children's Commissioner for Wales

October 2007

Recommendations for strengthening the powers and functions of the Children’s Commissioner for Wales

The need for review

1. There is no doubt that promoting the rights and welfare of children is a core value of our culture in Wales. For generations, we have sought the best for our children. We have endeavoured to release our young people from the tyranny of disadvantage and to provide them with the means to achieve their ambitions. In a complex and fast-changing world where darker influences have come into play, we must redouble our efforts to foster the rights of each individual child to protection, encouragement and fulfilment.
2. Some six years ago, we in Wales broke new ground in the United Kingdom in establishing a Children’s Commissioner for Wales. Peter Clarke – our first Commissioner – achieved a great deal before his untimely and tragic death. We have a duty to his memory to review the powers that we accord to his successor so as to ensure that he or she has the authority to discharge his or her functions as effectively as possible in the light of changing circumstances and such consensus as may exist in relation to best practice elsewhere.
3. The conferral of enhanced law-making powers on the Assembly under the Government of Wales Act 2006 has provided the Welsh Assembly Government with the opportunity to once again lead by example, by ensuring that the powers of the Children’s Commissioner for Wales are at the forefront of global best practice. This report considers the current weaknesses in the Commissioner’s legal framework, and makes recommendations on how the legislation should be amended, to ensure that the Children’s Commissioner for Wales continues to lead the way in promoting and protecting the rights and welfare of children and young people.

Basis for the recommendations

4. The recommendations seek to address current weaknesses in the legislation relating to the Children’s Commissioner for Wales. Three main factors have been taken into account:
5. Firstly, comparisons have been drawn with examples of best practice in the legislation relating to similar institutions, in particular the Northern Ireland Commissioner for Children and Young People, the Children’s Commissioner for England and the Commissioner for Older People in Wales.
6. Secondly, there is international guidance relating to the powers and functions of national human rights institutions, including institutions charged with promoting and protecting children’s rights. This guidance, although it is in some respects inadequate, and far from comprehensive, sets out benchmarks against which the

adequacy of an institution's powers and functions may be measured. In so doing, the guidance sets out not aspirations, but minimum standards. Unless these standards are adhered to, the Children's Commissioner for Wales may not be considered a national human rights institution in the true sense of the term. The relevant guidance referred to in this report include the 'Paris Principles' drawn up by the United Nations,¹ the standards set out by the United Nations Committee on the Rights of the Child,² and the standards set out by the European Network of Ombudspersons for Children (the 'ENOC Standards').³

7. Thirdly, the experiences of the Children's Commissioner for Wales over the last six years have been taken into account. During that time, problems have arisen that have demonstrated the limitations of the current legal framework. Experience has shown that in some respects, the Commissioner has been unable to operate effectively due to various constraints. It is essential that these are overcome.

Consolidating the legislation

8. **It is recommended that the current legal framework relating to the Commissioner should be replaced by a Single Assembly Measure.**
9. Currently, the powers and functions of the Commissioner are set out in three different enactments,⁴ as amended.⁵ For the purpose of clarity, the existing legislation should be consolidated in one Assembly Measure, made under the relevant Legislative Competence Order.⁶

Mandate

10. **It is recommended that the Commissioner's entire range of functions should be extended to include all public and private bodies in Wales, and to those**

¹ 'Principles relating to the status and functioning of national institutions for protection and promotion of human rights.' These recommendations were endorsed by the Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993.

² UN Committee on the Rights of the Child General Comment No. 2: *The role of independent national human rights institutions in the promotion and protection of the rights of the child* (2002) CRC/GC/2002/2.

³ *European Network of Ombudspersons for Children Standards for independent human rights institutions for children.* <<http://www2.ombudnet.org/documents/Standards.htm>> (accessed 27 July 2007). It should be noted that the Commissioner is a member of the network, and that Peter Clarke was President in 2005-2006.

⁴ The Care Standards Act 2000, The Children's Commissioner for Wales Act 2001, and the Children's Commissioner for Wales Regulations 2001.

⁵ The Commissioner was provided with a power of entry under s 61 of the Children Act 2004.

⁶ At the time of writing, Matter 15.7 in the draft National Assembly for Wales (Legislative Competence) (No. 3) Order 2007 relates to the Children's Commissioner for Wales.

bodies outside Wales who provide services to children in Wales, including those public bodies who provide services under non-devolved powers.

11. The Commissioner's current mandate is extremely limited. His general functions apply only to persons set out in Schedule 2A to the Care Standards Act 2000, whilst his powers to undertake examinations, and reviews into complaints, whistleblowing and advocacy arrangements apply only to a narrower range of persons set out in Schedule 2B to the Act. If an issue arises in relation to any person not falling within the relevant Schedules, the Commissioner's only power is to make representations to the Assembly concerning the matter.⁷

12. The Commissioner's mandate in this respect does not meet the international standards relating to the functioning of national human rights institutions. The Paris Principles state that 'a national institution shall be given as broad a mandate as possible.'⁸ The ENOC Standards, meanwhile, state that an institution's mandate should include 'powers to have regard to the situation of children in the family, in schools and in all other institutions; powers to consider the promotion and protection of children's rights in relation not only to government but also to private bodies; the right to have access to children in all forms of alternative care and all institutions which include children; [and] the right to report freely and separately on the state of children's human rights.'⁹ Accordingly, it is essential that the Commissioner's mandate should be extended with the effect that he may exercise his entire range of functions in relation to all public and private persons in Wales.

13. A particular limitation on the Commissioner's effectiveness has been the fact that he may not exercise his functions with regard to non-devolved services – those services provided by central government which are outside the remit of the Assembly. Such services include the youth justice system, and asylum and immigration, with the effect that the Commissioner is precluded from acting on behalf of some of the most vulnerable children in Wales. This has been a contentious issue from the outset, and experience over the past six years has shown this to be a significant and unacceptable limitation.¹⁰ Whilst it must be acknowledged that the Children's Commissioner for England has the power to consider non-devolved matters as they apply to children in Wales,¹¹ this compromise has proven ineffective, as the English Commissioner does not have the power to consider the cases of individual children.¹² In addition, the English Commissioner does not have adequate resources to address matters relating to children in Wales in any meaningful manner.

⁷ The Commissioner may do this using his residual power set out under s 75A of the Care Standards Act 2000, as inserted by virtue of s 5 of the Children's Commissioner for Wales Act 2001.

⁸ *supra*, n. 1, Principle A.2.

⁹ *supra*, n. 3

¹⁰ See, for example, the views of the House of Commons Welsh Affairs Committee: *The Powers of the Children's Commissioner for Wales* (2004) HC 538.

¹¹ Children Act 2004, s 5.

¹² *ibid.*, s 2(7).

14. Under the provisions of the Government of Wales Act 2006, it is not possible for an Assembly Measure to confer functions on a Minister of the Crown.¹³ However, this may be achieved with the permission of the Secretary of State for Wales.¹⁴ Accordingly, the Welsh Assembly Government should take robust measures in order to secure the conferral upon the Commissioner of a mandate extending to non-devolved persons.

Co-operation with other Children's Commissioners

15. It is recommended that the Commissioner should have an express power to co-operate with other Children's Commissioners within the United Kingdom, and to work jointly with the Children's Commissioner for England.

16. It is inevitable that some non-devolved and cross-border matters will be relevant to the Children's Commissioner for Wales and the other Children's Commissioners in the United Kingdom. Accordingly, the Commissioner should be provided, in a similar manner to the Northern Ireland Commissioner for Children and Young People,¹⁵ with the express power to co-operate with the other Commissioners on matters of common concern. This would ensure clarity, and would help strengthen the links already made between the Commissioners.¹⁶
17. In particular, the Commissioner should have enhanced powers of co-operation so as to carry out joint reviews and inquiries with the Children's Commissioner for England, particularly where a non-devolved matter impacts upon the rights of children and young people in both England and Wales. Whilst such a power cannot be viewed as an alternative to extending the Commissioner's functions to include non-devolved matters, it would be preferable to the current position.

¹³ Government of Wales Act 2006, Schedule 5(1).

¹⁴ *ibid.*, Schedule 5(7).

¹⁵ See s 2 (2) of Schedule 2 of The Commissioner for Children and Young People (Northern Ireland) Order 2003, which states that the Commissioner's general powers include 'co-operating with other bodies exercising functions relating to children and young persons or their rights (whether in the United Kingdom or elsewhere).'

¹⁶ The Commissioners, along with their counterpart in the Republic of Ireland, have established the British and Irish Network of Ombudsmen and Children's Commissioners. See: <http://www.binocc.org/> (accessed 13 August 2007).

Access to information

18. **It is recommended that the Commissioner should have the power to request information from all persons falling within his mandate, for the purposes of undertaking any of his functions.**
19. Currently, the Commissioner does not have the power to request information from any person for the purposes of undertaking his functions, with the exception of examinations, and reviews into complaints, whistleblowing and advocacy arrangements. The legislation in this respect does not meet the international standards relating to the functioning of national human rights institutions. As is stated in the Paris Principles, an institution must have the power to ‘hear any person and obtain any information and any documents necessary for assessing situations falling within its competence.’¹⁷
20. It may be expected that persons falling within the Commissioner’s mandate would be willing to cooperate with the Commissioner without there being a need for the Commissioner to have the power to request the provision of information. However, a reliance upon what essentially amounts to goodwill is not acceptable, as there is a possibility that an uncooperative person may undermine the Commissioner’s effective discharge of his functions by refusing to provide information. The Children’s Commissioner for England has the power to request any information that he may reasonably require from any person exercising functions under any enactment for the purposes of undertaking his functions.¹⁸ The Children’s Commissioner for Wales should be provided with a similar power in this respect.

Individual cases

21. **It is recommended that the Commissioner’s role in addressing individual cases should be clarified. In particular, the Commissioner should have the power to investigate the cases of individual children, and a separate function of undertaking inquiries. Consideration should be given as to whether the Commissioner should be able to issue binding decisions when investigating the cases of individual children.**
22. Currently, the Commissioner has the power to provide advice and support to children in some proceedings,¹⁹ and, in limited circumstances, to undertake examinations.²⁰ These functions may be described as reactive in nature, that is, intervening in individual cases when problems have arisen.

¹⁷ *supra*, n. 1, Principle C.2.

¹⁸ Children Act 2004, s 2(9).

¹⁹ Care Standards Act 2000, s 76.

²⁰ *ibid.*, s 74.

23. There has been much debate, both in the United Kingdom and beyond, as to the extent to which such institutions should work in a reactive capacity, as opposed to proactively promoting children's rights by raising awareness of relevant issues. However, despite the fact that promoting children's rights is a key aim of the Commissioner, working in a reactive capacity is essential in order to protect children's rights, in line with the principal aim of the Commissioner. The importance of such working has been clearly demonstrated by the casework carried out by the Commissioner over the past six years. Such cases also inform decisions in relation to systemic advocacy and reviews. Furthermore, it is accepted at the international level that addressing individual cases is an essential role of any national human rights institution for children, and as the UN Committee on the Rights of the Child state, such institutions 'must have the power to consider individual complaints and petitions and carry out investigations.'²¹
24. Despite this, the Commissioner's current role in this respect, as defined in the relevant legislation, is unclear. As stated above, the Commissioner may only provide children with advice and support in making complaints or representations, that is advocate on their behalf, or conduct examinations, which essentially amount to public inquiries. Accordingly, in addition to these functions, the Commissioner should be given the specific function of investigating complaints made by or on behalf of individual children relating to any matter falling within his mandate. This should be in addition to the Commissioner's role of providing children with assistance in making complaints or representations. In undertaking such investigations, consideration should be given as to whether the Commissioner should be able to issue binding decisions on the persons concerned.
25. In the interests of clarity, examinations should be termed inquiries, as this better describes the nature of the function. Having the two distinct functions of undertaking investigations and inquiries would correspond well to the requirements of the UN Committee on the Rights of the Child, who state that institutions should 'undertake investigations into any situation of violation of children's rights, on complaint or on their own initiative, within the scope of their mandate; [and] conduct inquiries on matters relating to children's rights.'²²
26. Inquiries should continue to be governed as in the present framework relating to examinations; that is, they should only be undertaken into matters where there is a wider principle involved, terms of reference should be required, and there should be a power to compel the attendance of witnesses. However, further details or rules of procedure would be desirable insofar as the actual procedure for conducting inquiries is concerned, particularly in the light of difficulties experienced during the *Clywch* examination.

²¹ *supra*, n. 2, at paragraph 13.

²² *ibid.*, at paragraph 19.

Restrictions

27. **It is recommended that the Commissioner should not be precluded from exercising any of his functions in relation to a particular matter where another person has the authority to act in relation to that matter. Instead, there should be an expectation that the Commissioner and the relevant persons draw up memoranda of understanding.**
28. The Commissioner is currently precluded from exercising any function which by virtue of an enactment is also exercisable by a prescribed person.²³ This limitation conflicts with the requirement set out in the Paris Principles that ‘within the framework of its operation, the national institutions shall freely consider any questions falling within its competence, whether they are submitted by the government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner.’²⁴ Accordingly, the limitation should be removed from the legislation. Instead, there should be an expectation that the Commissioner and the relevant persons should draw up memoranda of understanding concerning their respective roles in dealing with relevant matters.

Reviews

29. **It is recommended that the Commissioner’s powers in undertaking reviews should be identical irrespective of the issue under review. The Commissioner should have the discretion as to whether or not to prepare a report following the undertaking of any review. Due to the importance of undertaking reviews into complaints, whistleblowing and advocacy arrangements, this should remain a distinct function.**
30. Currently, the Commissioner has the power to undertake two types of reviews: reviews of the exercise of functions of the Assembly and other persons (functions reviews),²⁵ and reviews of arrangements in relation to complaints, whistleblowing or advocacy (arrangements reviews).²⁶ The Commissioner may undertake functions reviews concerning any person falling within Schedule 2A of the Care Standards Act 2000, but may only undertake arrangement reviews concerning persons falling within Schedule 2B of the Act. When undertaking an arrangements review, the Commissioner has the power to request the provision of information,²⁷ when undertaking a functions review, he does not. Additionally,

²³ Care Standards Act 2000, s 77(2).

²⁴ *supra*, n. 1, Principle C.1.

²⁵ Care Standards Act 2000, s 72B, inserted by virtue of s 3 of the Children’s Commissioner for Wales Act 2001.

²⁶ Care Standards Act 2000, s 73.

²⁷ Children’s Commissioner for Wales Regulations 2001, Regulation 3.

when undertaking an arrangements review, the Commissioner *must* report his findings,²⁸ when undertaking a functions review, he *may* report his findings.²⁹

31. In the light of the recommendations regarding the Commissioner's mandate, as set out in paragraphs 10 above, and the Commissioner's power to access information, as set out in paragraphs 15 above, it is recommended that the Commissioner's powers in undertaking reviews should be amended with the effect that the Commissioner enjoys the same powers irrespective of the issue under review. In particular, the Commissioner should be able to review the actions or inactions of any person falling within the mandate of his office, and should be entitled to request information for this purpose.
32. The obligation placed upon the Commissioner to write a report following an arrangements reviews should be abolished, with the effect that he may report his findings after undertaking any review. This proposed amendment, which is similar to the position in relation to the Commissioner for Older People in Wales,³⁰ would prevent the Commissioner from being obliged to write reports where he considers that doing so would be of little or no value.
33. Despite the fact that the Commissioner's powers in undertaking functions reviews and arrangements reviews should be identical, arrangements reviews should remain as a distinct function. This would reflect the continuing importance of such reviews, as initially recommended in *Lost in Care*, as well as the ENOC Standards, which state that 'the institution must review whether children have access to advice and advocacy and complaints procedures and services, and make appropriate recommendations.'³¹

Guidance

34. **It is recommended that the Commissioner should have the function of issuing best practice guidance in connection with any matter relating to the interests of children and young people in Wales.**
35. The Commissioner for Older People in Wales has the function of issuing guidance on best practice in connection with any matter relating to the interests of older people in Wales.³² There is nothing to preclude the Children's Commissioner from issuing best practice guidance in relation to children and young people, and such guidance was issued following the Commissioner's first arrangements review.³³ It is nonetheless recommended that, for the avoidance of doubt, the

²⁸ *ibid.*, Regulation 13(1).

²⁹ *ibid.*, Regulation 13(2).

³⁰ The Commissioner for Older People in Wales Regulations 2007, Regulation 14(2).

³¹ *supra*, n. 3.

³² Commissioner for Older People (Wales) Act 2006, s 12.

³³ See: *Telling Concerns Practice Guides: Advocacy* (2004); *Telling Concerns Practice Guides: Complaints* (2004); and *Telling Concerns Practice Guides: Whistleblowing* (2004).

Commissioner should have such a function, which should be set out in similar terms to the provision in the Commissioner for Older People (Wales) Act 2006.

Legal proceedings

36. It is recommended that the Commissioner should have the power to bring, intervene in or assist in legal proceedings before any court or tribunal.

37. The Commissioner currently has no power to bring, intervene in or assist in legal proceedings. This is viewed by the UN Committee on the Rights of the Child as an essential function: ‘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.’³⁴

38. The Northern Ireland Commissioner for Children and Young People does have such a function, and may bring or intervene in proceedings involving law or practice concerning the rights and welfare of children and young persons before any court or tribunal, or act as *amicus curiae* in such proceedings. The Northern Ireland Commissioner may only do so with the leave of court, and is restricted to cases that raise a question of principle, or cases where there are special circumstances justifying the Commissioner’s intervention.³⁵

39. Having the power to bring, intervene in or assist in legal proceedings would significantly bolster the authority of the Children’s Commissioner for Wales. It would enhance the Commissioner’s role in assisting individual children, as well as the Commissioner’s enhanced investigative role as set out in paragraph 18 above, and would enable the Commissioner to challenge violations of children’s rights resulting from the actions or inactions of all the persons falling within the mandate of the office. Accordingly, it is essential that the legislation should include a provision identical to the corresponding function of the Northern Ireland Commissioner for Children and Young People. Due to the nature of the function, and in particular the resource implications, a similar restriction to cases that raise a question of principle or where there are special circumstances would be appropriate.

³⁴ *supra*, n. 2, at paragraph 14.

³⁵ The Commissioner for Children and Young People (Northern Ireland) Order 2003, a 14.

Research

40. It is recommended that the Commissioner should have the function of undertaking or commissioning research, and undertaking or commissioning educational activities.

41. Commissioning or undertaking research into human rights issues is recognised as an essential role of national human rights institutions. The Paris Principles state that such institutions should ‘assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles.’³⁶
42. Whilst there is nothing to preclude the Commissioner from commissioning or undertaking research, this is not a function set out in the current framework. This contrasts with both the Northern Ireland Commissioner for Children and Young People, and the Commissioner for Older People in Wales, both of which have research functions.³⁷ Indeed, shortly after the establishment of the institution, the Northern Ireland Commissioner commissioned a major research project into the rights of children and young people in Northern Ireland, based on the provisions of the UN Convention, which has subsequently informed the work of the Commissioner.³⁸
43. It is therefore appropriate that the Children’s Commissioner for Wales should have a specific research function. The function could be set out in similar terms to the corresponding provision in the Commissioner for Older People (Wales) Act 2006, which enables the institution to undertake or commission research; to give assistance, including financial assistance, to another to undertake or commission research; to carry out or commission the carrying out of educational activities; and to give assistance to another to carry out or commission the carrying out of educational activities. It may be worth considering whether a separate, additional budget should be made available to the Commissioner for the purposes of undertaking this function.

Non-governmental organisations

44. It is recommended that the Commissioner should be under a duty to develop effective links with non-governmental organisations.

45. The Commissioner is not currently required to develop links with non-governmental organisations, although does so in practice. Such links are viewed internationally as being of crucial importance to the functioning of national

³⁶ *supra*, n. 1, Principle A.3(f).

³⁷ The Commissioner for Children and Young People (Northern Ireland) Order 2003, a 8; Commissioner for Older People (Wales) Act 2006, s 9.

³⁸ See: Kilkelly, Ursula and others: *Children’s Rights in Northern Ireland: Research Commissioned by the NI Commissioner for Children and Young People* (2004).

human rights institutions, and as the Paris Principles state that: ‘in view of the fundamental role played by the non-governmental organisations in expanding the work of the national institutions, [such institutions should] develop relations with the non-governmental organisations devoted to protecting and promoting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialised areas.’³⁹ Accordingly, the Commissioner should be under a duty to develop links with such organisations.

Complaints procedure

46. It is recommended that the Commissioner should be under a duty to establish a complaints procedure in respect to his actions or omissions relating to the discharge of his functions.

47. Under the Commissioner for Older People (Wales) Act 2006, the Commissioner for Older People is under a duty to establish a procedure for the investigation of complaints made in respect of his actions or omissions relating to the discharge of his functions.⁴⁰ Although there is no corresponding duty in relation to the Children’s Commissioner, a procedure has been established. Nonetheless, it is essential that, in the interests of transparency and accountability, the Commissioner should be under an explicit duty to establish a complaints procedure. Such a procedure should be accompanied by a child friendly version.

UN Convention on the Rights of the Child

48. It is recommended that the Commissioner, in undertaking reviews of the exercise of the functions of the Assembly and other persons should be under a duty to consider the extent to which such functions comply with the UN Convention on the Rights of the Child.

49. The Commissioner is currently under a duty to have regard to the provisions of the UN Convention on the Rights of the Child in exercising his functions.⁴¹ Promoting the implementation of the UN Convention is viewed internationally as being a key objective of any national human rights institution for children. As the ENOC Standards state, institutions should ‘promote and ensure harmonisation of national legislation with the Convention on the Rights of the Child and all other international human rights instruments relevant to children’s rights to which the state is a party, and promote their effective implementation.’⁴² Accordingly, the Commissioner’s role in this respect should be made more explicit, in particular when reviewing the exercise of the functions of the Assembly.

³⁹ *supra*, n. 1, Principle C.7.

⁴⁰ Commissioner for Older People (Wales) Act 2006, s 20.

⁴¹ Children’s Commissioner for Wales Regulations 2001, Regulation 22.

⁴² *supra*, n. 3.

Term of office

50. **It is recommended that consideration should be given as to whether to retain the Commissioner's non-renewable term of seven years in office, or whether the Commissioner should be appointed for a shorter, once-renewable term in office.**
51. Currently, the Commissioner is appointed for a non-renewable term of seven years in office. This contrasts with the Northern Ireland Commissioner for Children and Young People and the Commissioner for Older People in Wales who may be appointed for a four year once-renewable term,⁴³ and the Children's Commissioner for England, who may be appointed for a five year once-renewable term.⁴⁴
52. Initially, a non-renewable term of seven years in office was a sensible choice, due to the continuity that is needed when setting up a new institution. However, a shorter, renewable term may be a more appropriate option in the future, as it could lead to the institution being more dynamic in nature. There is, nonetheless, a potential disadvantage to having a once-renewable term of office, due to the fact that a Commissioner may be viewed as working with the objective of securing re-appointment. This may compromise the perceived integrity and independence of the institution. Accordingly, careful consideration should be given to this matter before coming to a decision.

Deputy Commissioner

53. **It is recommended that the role of the Deputy Commissioner should be clarified.**
54. The current legal framework stipulates that the Commissioner must appoint a Deputy, and that when there is a vacancy in the office of Commissioner or when the Commissioner is unable to act, the Deputy shall exercise his functions.⁴⁵ As a result of Peter Clarke's illness and subsequent death, a number of practical issues have arisen in this respect. Firstly, there is no express provision in the legislation for the Deputy Commissioner to be referred to as the Acting Commissioner whilst exercising the Commissioner's functions, although the powers and duties have been transferred. This has led to confusion in some quarters as to who has the responsibilities, duties and powers during this period. Secondly no remuneration level for the Deputy Commissioner, whilst exercising the Commissioner's functions, is set in the legislation. Thirdly, there is no provision for a person to be appointed to carry out the Commissioner's functions in the absence of the Deputy

⁴³ The Commissioner for Children and Young People (Northern Ireland) Order 2003, Schedule 2(3); The Commissioner for Older People in Wales (Appointment) Regulations 2007, Regulation 3.

⁴⁴ Children Act 2004, Schedule 1(3).

⁴⁵ Care Standards Act 2000, Schedule 2, s 4.

Commissioner. Accordingly, so as to ensure that the institution operates as effectively as possible in the absence of the Commissioner, the legislation should address these matters.

Reviewing the legislation

55. It is recommended that the Commissioner should be under a duty to review the effectiveness of his powers and functions on a three-yearly basis.

56. Deficiencies in the legal framework of any public body may become apparent over time. The Children's Commissioner for Wales has been no exception. Accordingly, so as to ensure that the Commissioner's functions remain in keeping with best practice at the international level, and continue to be fit for purpose in the day-to-day functioning of the institution, the legal framework should be reviewed on a regular basis. The Northern Ireland Commissioner for Children and Young People is under a duty to review the adequacy and effectiveness of the relevant Order on a three-yearly basis, and to make recommendations as to any amendments which the Commissioner deems necessary or desirable.⁴⁶ A similar provision should be included in any Assembly Measure amending the powers and functions of the Children's Commissioner for Wales.

Dr O Rees
Commissioned by Maria Battle

⁴⁶ The Commissioner for Children and Young People (Northern Ireland) Order 2003, a 24.

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