

CHILDREN ACT 2004

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 - Children's Commissioner

Section 1: Establishment

16. *Subsection (1)* establishes the office of the Commissioner. *Subsection (2)* gives effect to Schedule 1.

Schedule 1: Children's Commissioner

17. This Schedule makes provision concerning the status, general powers, appointment, and remuneration of the Commissioner. It provides for the staffing of his office, and accounting procedures. It also adds the Commissioner and members of his staff to the list of office holders who are disqualified from being members of the House of Commons or the Northern Ireland Assembly.
18. *Paragraph 3(2)* of Schedule 1 places a duty on the Secretary of State to involve children in the appointment of the Commissioner to the extent he feels is appropriate and in a manner he chooses.
19. *Paragraph 11* of Schedule 1 amends the Criminal Justice and Court Services Act 2000. Section 35 of the Act makes it an offence for someone who is disqualified under the Act from working with children knowingly to apply for, offer to do, accept or do any work in a regulated position as defined in section 36. *Paragraph 11* adds the Commissioner and his deputy to the list of regulated positions in section 36.

Section 2: General function

20. The general function of the Commissioner is set out in *subsection (1)*. The Commissioner is to promote awareness of the views and interests of children in England. As well as those under 18, the term 'children' includes persons aged 18, 19 and 20 who have been looked after by a local authority at any time after attaining the age of 16 or who have a learning disability. He will be expected to raise the profile of the issues that affect and concern children in England, and promote awareness and understanding of their views and interests among all sectors of society, both public and private. The Commissioner will therefore be expected actively to gather and understand the views of children from all backgrounds. However, the Commissioner will also be expected to use his own judgement in determining the interests of children, which may not always be the same as their own expressed wishes, especially with younger children.
21. *Subsection (2)* provides more detail of what the Commissioner may do in the exercise of his function. The Commissioner, under *subsection (2)(a)*, may encourage persons exercising functions or engaged in activities affecting children, to take account of their views and interests. In exercising that power, it is intended that he will encourage them, for example by sharing best practice, to ensure that the views and interests of children inform the development and delivery of their policies and practices. Not only will the

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Commissioner want to represent the views of children, he will encourage such persons to be proactive in gathering children's views themselves.

22. Under *subsection (2)(b)* the Commissioner is to be able to give advice to the relevant Secretary of State on matters affecting children, such as the development of policy or legislation. It is intended that the Commissioner will give advice on his own initiative and respond to requests for advice from any Secretary of State, but due to constraints on time and resources this may not always be possible, and the Commissioner will be expected to use his own judgment to prioritise requests.
23. In considering or researching the operation of complaints procedures under *subsection (2)(c)* the Commissioner will want to see that they are effective and quick and easy for children to access and follow. The Commissioner will be able to look at any services, procedures or arrangements relevant to children, both public and private. It is envisaged that in doing this the Commissioner will work with the relevant Ombudsmen and statutory bodies as appropriate.
24. Under *subsection (2)(d)* the Commissioner will have wide discretion over other matters relating to the interests of children that he chooses to consider or research.
25. Under *subsection (2)(e)* the Commissioner will be able to publish a report on any matter considered or researched by him while carrying out his section 2 function.
26. In carrying out his general function the Commissioner should have particular regard to the aspects of well-being set out in *subsection (3)(a) – (e)*. These reflect the five outcomes which, during the development of the Green Paper *Every Child Matters*, children identified as being the most important to them. It is intended that they form the framework for the Commissioner's activities. Through carrying out his general function the Commissioner will monitor and stimulate progress towards achieving these outcomes for all children.
27. *Subsection (4)* places a duty on the Commissioner to take reasonable steps to involve children in all of his work. This will ensure that his work is informed by the views of children. In particular the Commissioner has to make sure that children know what he does and how to contact him. He must also consult children and organisations which work with them on the work to be undertaken by him. It will be for the Commissioner to determine how he does this as is appropriate to the circumstances. The intention is that the views of children drive the work of the Commissioner.
28. *Subsection (5)* requires the Commissioner, when publishing a report made under this section, to publish the report in a version that is suitable for children or a particular group of children, as the Commissioner feels is appropriate.
29. The intention behind *subsection (6)* is that the Commissioner should pay particular regard to disadvantaged children who are most vulnerable or may need extra support in making their views known. It is intended that the Commissioner will be proactive in seeking and reflecting the views of children whose voices might not otherwise be listened to.
30. *Subsection (7)* prohibits the Commissioner from conducting investigations into individual cases. The intention is that this will allow him to concentrate on the broader issues that affect children.
31. *Subsection (8)* is intended to ensure that the Commissioner can get access to children for the purpose of getting their views. It ensures that the Commissioner can access children accommodated or cared for outside their homes (for example, in young offender institutions, children's homes or residential schools) and gives him access to such establishments and the right to speak to a child in private if the child consents to this.

32. To assist the Commissioner further, *subsection (9)* places a duty upon bodies with statutory functions to provide him with information that he requests as long as it is information that they already hold and can be disclosed lawfully to the Commissioner.
33. *Subsection (10)* gives the Commissioner the power to follow up recommendations made by him in any of the reports he produces when carrying out his duties under section 2. Bodies with statutory functions that are subject to recommendations must inform the Commissioner, in writing, in any time period dictated by the Commissioner, what action they are taking or proposing to take in response to these recommendations.
34. Under *subsections (11) and (12)* the Commissioner must have regard to the relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC) in his consideration of what the interests of children are. The Commissioner's work will be driven and shaped by the views and interests of children. The UNCRC provides a set of principles to which the Commissioner may wish to refer and upon which he may wish to draw as he carries out his function.

Section 3: Inquiries initiated by the Commissioner

35. This section permits the Commissioner to initiate inquiries into individual cases that meet certain criteria. It applies to all matters relating to children in England.
36. *Subsections (1) and (2)* set out the criteria that the Commissioner must consider before starting an inquiry. The case concerned must raise issues of public policy that would be relevant to other children. This would for example mean that the Commissioner could hold an inquiry into the case of a child in a children's home or a residential school if the issues involved were relevant in general to children in such an establishment, but not if they were only relevant to children in that particular establishment. The Commissioner must satisfy himself that an inquiry would not duplicate the work that was the function of another person and to this end he must consult others who might have such a function. The Commissioner could carry out an inquiry if after conducting the appropriate consultation he had established that a person who might carry out an inquiry was not going to do so; or that his inquiry would be looking at an aspect of a case which was different from the aspect that someone else's inquiry would look at so his inquiry would not amount to a duplication of work. The aim of the inquiry must be to investigate the public policy issues arising from the case and make recommendations relating to them.
37. *Subsection (3)* requires the Commissioner to consult the Secretary of State before holding an inquiry. The Secretary of State may offer guidance, but has no power to veto an inquiry: the final decision is for the Commissioner. *Sub-section (4)* allows the Commissioner to decide whether to hold all or part of an inquiry in private.
38. *Subsection (5)* requires the Commissioner to publish a report and send a copy of it to the Secretary of State as soon as possible after completing the report. *Subsection (6)* permits the Commissioner to protect a child's identity in the inquiry report.
39. *Subsection (7)* gives the Commissioner the power to follow up recommendations made by him in any report he produces after conducting an inquiry that he himself has initiated. Bodies with statutory functions that are subject to recommendations must inform the Commissioner, in writing, in any time period dictated by the Commissioner, what action they are taking or proposing to take in response to these recommendations.
40. *Subsection (8)* gives the Commissioner a range of powers to assist him in carrying out an inquiry under this section. By virtue of the application of subsections (2) and (3) of section 250 of the Local Government Act 1972 the Commissioner will, when conducting an inquiry in England, be able to summons people to attend to give evidence or to produce documents and to administer oaths and take evidence on oath and it will be an offence to disobey a summons by for example refusing to give evidence or by tampering with documentary evidence.

Section 4: Other inquiries held by the Commissioner

41. *Subsection (1)* enables the Secretary of State to direct the Commissioner to hold an inquiry into the case of an individual child, where the Secretary of State considers the case to be of wider relevance or have implications for other children. In contrast to the power under section 3, the Commissioner could under this section carry out an inquiry into a case which only has implications for a small group of children. So, for example, he could hold an inquiry into the case of a child in a children's home or a residential school if the issues involved were relevant in general to children in such an establishment, or if they were only relevant to children in that particular establishment. It is envisaged that the Commissioner will play a role in determining whether a case is relevant, for example through his ability to offer advice to the Secretary of State.
42. The Commissioner may hold the inquiry in private (*subsection (2)*) and he must make and send to the Secretary of State a report in relation to the inquiry as soon as possible after he has completed it (*subsection (3)*).
43. *Subsection (4)* requires that in most cases the Secretary of State publish the report as soon as possible. Under *subsection (5)*, however, where he thinks it would be undesirable for the identity of the child to be made public, he may publish an edited version of the report (making only those amendments necessary to protect the identity of the child), or, if it is not possible to publish a version of the report without identifying the child, withhold publication altogether. *Subsection (6)* requires the Secretary of State to lay a copy of each report published by him before each House of Parliament.
44. *Subsection (7)* gives the Commissioner a range of powers to assist him in carrying out an inquiry under this section. By virtue of the application of subsections (2) to (5) of section 250 of the Local Government Act 1972 the Commissioner will, when conducting an inquiry in England, be able to summons people to attend to give evidence or to produce documents and to administer oaths and take evidence on oath; it will be an offence to disobey a summons by for example refusing to give evidence or by tampering with documentary evidence; the Secretary of State can direct parties to the inquiry to pay his costs and make orders for parties to pay the costs of other parties to the inquiry.

Section 5: Functions of Commissioner in Wales

45. *Subsection (1)* gives the Commissioner the function of promoting awareness of the views and interests of children in Wales, but only in relation to those matters which do not already fall within the remit of the Children's Commissioner for Wales under section 72B, 73 or 74 of the Care Standards Act 2000. The functions given to the Children's Commissioner for Wales by those sections (the review of the exercise of functions of the Assembly and other specified bodies, the review and monitoring of various arrangements made by specified bodies, and the examination of particular cases) extend to bodies that have statutory functions in Wales or that provide statutory services that come within the functions of the Assembly. *Subsection (2)* gives the Commissioner the same powers and duties in relation to this function as he has for his function under section 2.
46. *Subsection (3)* places a duty on the Commissioner to take account of the views of and any work undertaken by the Children's Commissioner for Wales when he is carrying out his function under subsection (1).
47. *Subsections (4) and (6)* give to the Commissioner the power to undertake inquiries, at his own initiation and at the direction of the Secretary of State respectively, in relation to the case of an individual child in Wales, so long as it does not fall within the remit of the Children's Commissioner for Wales as described in subsection (1). *Subsections (5) and (7)* import to those inquiry functions the powers and duties given to the Commissioner in respect of inquiries carried out under sections 3 and 4.

Section 6: Functions of Commissioner in Scotland

48. *Subsection (1)* gives the Commissioner the function of promoting awareness of the views and interests of children in Scotland in relation to reserved matters. *Subsection (2)* gives the Commissioner the same powers and duties in relation to this function as he has for his function under section 2.
49. *Subsection (3)* places a duty on the Commissioner to take account of the views of, and any work undertaken by, the Commissioner for Children and Young People in Scotland when he is carrying out his function outlined in subsection (1).
50. *Subsections (4) and (7)* give to the Commissioner the power to undertake inquiries, at his own initiation and at the direction of the Secretary of State respectively, in relation to the case of an individual child in Scotland so long as the issues raised by it relate to a reserved matter.

Section 7: Functions of Commissioner in Northern Ireland

51. *Subsection (1)* gives the Commissioner the function of promoting awareness of the views and interests of children in Northern Ireland in relation to excepted matters. *Subsection (2)* gives the Commissioner the same powers and duties in relation to this function as he has for his function under section 2.
52. *Subsection (3)* places a duty on the Commissioner to take account of the views of, and any work undertaken by, the Commissioner for Children and Young People for Northern Ireland when he is carrying out his function outlined in subsection (1).
53. *Subsections (4) and (7)* give to the Commissioner the power to undertake inquiries, at his own initiation and at the direction of the Secretary of State respectively, in relation to the case of an individual child in Northern Ireland so long as the issues raised by it relate to an excepted matter.

Section 8: Annual reports

54. *Subsection (1)* requires the Commissioner to report annually on what he has done, what he has found and what he intends to consider or research in the coming year.
55. The Commissioner will send his annual report to the Secretary of State who must lay the report, unchanged, and as soon as possible, before both Houses of Parliament. The Commissioner will be responsible for publishing, publicising and disseminating the report.
56. The Commissioner must as he thinks appropriate produce a child-friendly version of his annual report.

Section 9: Care leavers and young persons with learning disabilities

57. This section extends the definition of children in relation to all the Commissioner's functions. As well as those under 18, it is to include persons aged 18, 19 and 20 who have been looked after by a local authority at any time after attaining the age of 16 or who have a learning disability.
58. *Subsection (3)* defines 'looked after by a local authority' and 'learning disability'.
59. In the exercise of his functions under Part 1 therefore the Commissioner is to be concerned with all people under the age of 18 and those over 18 but under 21 who come within one of the two specified groups. However, the extension of the definition of children does not apply for the purposes of section 2(11) and 2(12) so that the Commissioner only has to have regard to the United Nations Convention on the Rights of the Child when he is determining what constitutes the interests of those under the age of 18.