

**DRAFT COMMISSIONER FOR CHILDREN AND YOUNG
PEOPLE (NORTHERN IRELAND) ORDER 2003**

EXPLANATORY MEMORANDUM

INTRODUCTION

1. This draft Commissioner for Children and Young People (Northern Ireland) Order 2003 (“the Order”) will be made under Paragraph 1(1) of the Schedule to the Northern Ireland Act 2000 subject to approval by each House of Parliament.

BACKGROUND AND POLICY OBJECTIVES

2. On 29 January 2001, the First Minister and Deputy First Minister announced the intention of the Northern Ireland Executive to establish a Commissioner for Children for Northern Ireland as part of a wider children’s strategy. They considered that there was a need for Northern Ireland to have a “champion for children” – a strong, independent voice to promote and protect their rights and to represent their interests; someone to advise the authorities and challenge them when necessary.
3. Ultimately, the intended outcomes of the policy are:
 - a society in which children’s views are respected and their fundamental human rights are promoted, protected and upheld;
 - a co-ordinated and holistic approach to children’s rights across all Government Departments and public authorities;
 - the active participation of children and young people on matters affecting their rights; and
 - more effective ways for children and young people to obtain help if their rights have been denied.

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OVERVIEW

4. The draft Order has 27 Articles and three Schedules. *Articles 1 to 4* deal with the title and commencement as well as general interpretation and the interpretation of the phrases “child or young person” and “relevant authority”. *Articles 5 and 6* establish the Office of the Commissioner for Children and Young People and set out the principal aim of the Office. *Articles 7 to 15* set out the functions (duties and powers) of the Commissioner. This includes provision for three different types of investigation:
- informal general investigations (*Article 8*). These can be used in relation to any of the Commissioner’s functions, but there are no set procedures or associated formal powers to enter premises or obtain evidence;
 - investigation of the adequacy and effectiveness of the law and practice relating to children’s rights and welfare; or of the adequacy and effectiveness of services (*Article 7 and Schedule 3*) or general reviews of arrangements for advocacy, complaints, inspection or whistle-blowing relating to authorities that are not the responsibility of the devolved administration (*Article 9*). These authorities are listed in *Part II of Schedule 1* to the Order. This intermediate type of investigation has set procedures, but few associated formal powers;
 - formal investigations (*Articles 16 to 23*). These relate to the investigation of complaints, or the review of arrangements for complaints, inspection, whistle-blowing or advocacy, either in relation to individual cases or general reviews where they relate to authorities which are the responsibility of the devolved administration. These authorities are listed in *Part I of Schedule 1* to the Order. There are set procedures; formal powers of entry and evidence gathering; sanctions to deal with obstruction; and safeguards on the disclosure of information.

Article 24 provides for reviews of the Order and *Articles 25 to 27* deal with supplementary matters such as privilege and application of the Order to relevant authorities with mixed functions and in relation to matters arising before commencement. *Schedule 1* further defines the term ‘relevant authorities’. *Schedule 2* provides for the staffing, funding and other procedural arrangements and *Schedule 3* sets out the procedures in relation to investigations under *Article 7(2) and (3) and 9(6)*.

More detailed information in relation to each Article is provided at the Annex.

CONSULTATION

5. Since the Ministers’ announcement in January 2001, there has been widespread consultation on the role and remit of the Commissioner and on the necessary appointment and accountability mechanisms. This culminated in the publication

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of a formal consultation paper on 9 August 2001, with consultation running until 8 November 2001. Special versions were produced including one for young people and a facilitator's version. Over 300 responses were received from a variety of individuals and organisations, including children and young people themselves, with almost all warmly welcoming the proposals. A copy of the consultation paper and summary of responses can be found on the website www.allchildrenni.gov.uk

CONSIDERATION BY THE ASSEMBLY

6. The Commissioner for Children and Young People Bill was well advanced through Committee Stage of the Assembly before suspension and was proceeding without difficulty. The Committee of the Centre had already indicated those amendments which it wished to make and these had been considered by devolved Ministers. Officials had also confirmed to the Committee which amendments Ministers were prepared to accept. These amendments, including the extension of the remit of the Commissioner to disabled young people under 21 together with a number of additional minor and technical drafting amendments, have been incorporated into the draft Order. In addition, two further policy changes have been incorporated:
 - the provisions preventing the Commissioner from investigating a complaint and then subsequently bringing, intervening in or assisting a child in relation to legal proceedings in relation to the same case have been removed as being unduly restrictive; and
 - provisions have been inserted so that the Commissioner can only review inspection arrangements where he is satisfied that no other body or person has the statutory power to do so (Articles 9(4) and 10(3)). This is to avoid duplicating the roles of, for example, Social Services Inspectorate and Education and Training Inspectorate.

FINANCIAL EFFECTS

7. Financial costs in relation to the establishment of the Office of the Commissioner and recruitment of staff have been estimated at £1.5 million, based on the Office being operational for 6 months in 2003-4. Ongoing annual costs are projected to be in the region of £1.9 million. There are no identifiable costs to the public.

EUROPEAN CONVENTION ON HUMAN RIGHTS

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8. The provisions of the Order are compatible with the Convention on Human Rights.

EFFECTS ON EQUAL OPPORTUNITY

9. The impact of these proposals has been assessed in accordance with section 75 of the Northern Ireland Act 1998. The policy is likely to have a differential impact in relation to children and young people; people with dependent children; disabled children. The differential effect will, however, be positive, in relation to the promotion, protection and upholding of children's rights. It is not likely to be discriminatory either directly or indirectly. The policy will impact on children and young people, both male and female, irrespective of sexual orientation, and the impact will be positive in relation to the promotion, protection and upholding of their rights. A full copy of the Equality Impact Assessment is available from the Children and Young People's Unit, Room A5.1, Castle Buildings, Stormont Estate, Belfast, BT4 3SR or on the unit's website at www.allchildrenni.gov.uk

SUMMARY OF THE REGULATORY APPRAISAL

10. Any costs to relevant authorities, businesses, the voluntary sector or charities, arising from the proposals in the Order are expected to be *de minimis*.

COMMENTARY ON ARTICLES

Article 1 – Title and commencement

This Article provides for the title of the Order and for a number of the provisions of the Order to come into operation two weeks after the Order is made at Privy Council, namely, this Article, and Articles 2 to 5 together with schedules 1 and 2, which deal with interpretation and which establish the office of the Commissioner and funding and staffing arrangements). It provides for the other provisions to come into operation on such day or days as the Office of the First Minister and Deputy First Minister may by order appoint.

Article 2 – Interpretation: general

This Article defines a number of terms used throughout the Order including the reference to the United Nations Convention on the Rights of the Child.

Article 3 - Interpretation: 'child or young person'

This Article defines the use of the words 'child or young person' to mean a person under the age of 18, or a person under the age of 21 if he or she has been looked after by a public authority or is mentally or physically disabled within the meaning of the Disability Discrimination Act. The Article also provides that a parent or other person may act on behalf of the child or young person. It also makes clear that an adult may, in exceptional circumstances, rely on the legislation in relation to something which happened when that person was a child or young person.

Article 4 - Interpretation: 'relevant authority'

This Article defines the term 'relevant authority', for the purposes of the Order. It includes any authority which falls within the purview of the Assembly Ombudsman or the Commissioner for Complaints. It also includes the bodies specifically listed in *Schedule 1*, which includes a number of bodies in the areas of health, education and in the reserved field such as justice and policing. The Article provides that it is possible for the Office of the First Minister and Deputy First Minister to amend *Schedule 1* to add, modify or remove a body or person from the list or move a body or person from one Part to the other.

Article 5 - The Commissioner for Children and Young People for Northern Ireland

This Article provides that there will be a Commissioner for Children and Young People for Northern Ireland (the Commissioner) who will be appointed by the First Minister and Deputy First Minister jointly. It also activates the provisions in *Schedule 2* which deal with, for example, general powers, finances, staffing matters and accountability.

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Article 6 - Principal aim of the Commissioner

This Article sets out the main aim of the Commissioner, which will be to safeguard and promote the rights and best interests of children and young persons. The term 'rights,' is not defined in the Bill, but will include all the rights recognised by the law of Northern Ireland. The term 'children and young person' is defined in Article 3.

This Article also sets out a number of guiding principles for the Commissioner. The Article makes it clear that, in deciding whether or how to act in relation to a particular child, the best interests of that child is to be the Commissioner's main consideration. The Commissioner must also have regard to the views of the child and give them weight depending on the child's age and level of understanding. The provision also requires the Commissioner, when deciding whether or how to use his functions, to have regard to the role of parents and it obliges the Commissioner to have regard to any provision in statute or rule of law which requires a body or person to act in a way, or have regard to any factor, other than the rights of a child. It provides that the Commissioner must specifically take into account the relevant rights contained in the United Nations Convention on the Rights of the Child which the UK ratified in 1991. Some of the rights in the UN Convention, for example, those relating to matters outside the remit of the Commissioner or those relating to obligations between states, are not relevant.

Article 7 - Duties of the Commissioner

This Article sets out the five duties of the Commissioner, namely:

- promoting an understanding and awareness of the rights and best interests of children and respect for the rights of others;
- reviewing the adequacy and effectiveness of law and practice relating to the rights and welfare of children;
- reviewing the adequacy and effectiveness of services provided for children by public authorities;
- providing advice on matters concerning the rights or best interests of children;
- ensuring that children and young people and parents are aware of the functions of the Commissioner; and that they can access and contact the Commissioner; and that the Commissioner communicates effectively with them.

Article 8 - General powers of the Commissioner

This Article sets out the general powers of the Commissioner. They include:

- undertaking, commissioning or providing assistance for research or educational activities concerning the rights or best interests of children;
- issuing guidance on best practice in matters relating to the rights or best interests of children;
- conducting general informal investigations in relation to any matter;

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- conducting investigations into the adequacy and effectiveness of the law and practice in relation to the rights and welfare of children, and services provided by relevant authorities;
- compiling, providing and publishing information on matters relating to the rights and best interests of children; and
- making representations or recommendations to any body or person, whether public or private, on matters concerning the rights or best interests of children.

Article 9 - General review of advocacy, complaint and whistle-blowing arrangements of relevant authorities.

This Article sets out the general reviewing and monitoring functions of the Commissioner in relation to the operation of advocacy, complaints, inspection and whistle-blowing arrangements made by a relevant authority. The purpose of any such reviews or monitoring is to enable the Commissioner to determine whether, and to what extent, the arrangements have been effective in promoting and safeguarding the rights and best interests of children. However, a ‘reasonable grounds’ test must be satisfied before the Commissioner can act and in relation to inspection arrangements, the Commissioner must be satisfied that no other body or person has a statutory power of review. Relevant authority is defined in *Article 4* and *Schedule 1* to the Bill. In relation to those authorities listed in *Part I* of *Schedule 1*, the Commissioner can use the full range of formal investigative powers; however in relation to those authorities listed in *Part II* of *Schedule 1*, that is, those authorities which are the responsibility of the Northern Ireland Office or other Whitehall Departments, the Commissioner can only use the procedure set out in *Schedule 3* without the formal powers set out in *Articles 16-23*.

Article 10 - Review of advocacy, complaints and whistle-blowing arrangements of relevant authorities in individual cases

This Article sets out the reviewing and monitoring functions of the Commissioner in relation to an authority’s advocacy, complaints, inspection or whistle blowing arrangements, insofar as they apply to a particular child or young person, or particular premises. Again, the power is subject to a ‘reasonable grounds’ test, and regardless of which relevant authority is being reviewed, the full powers of formal investigation set out in *Articles 16-23* are available.

Articles 11-13 reflect the intended role of the Commissioner in relation to complaints, which is to provide assistance, ensure that complaints arrangements work effectively, and to plug any gaps.

Article 11 - Assistance with complaints to relevant authorities

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This Article sets out the power of the Commissioner to assist a child to make a complaint against a relevant authority. This includes acting on behalf of a child both in making the complaint and in any investigation or other proceedings conducted by that authority following the complaint. However, the Commissioner may assist or act on behalf of a child only if there is no other body or person likely to do so. This is to ensure that the Commissioner does not duplicate the role of other authorities.

Article 12 - Investigation of complaints against relevant authorities

This Article sets out the power of the Commissioner to conduct an investigation into a complaint made by a child against a relevant authority that his rights have been infringed or his interests adversely affected. The Commissioner is limited to investigating those cases where he is satisfied that the complaint raises a point of principle and cannot be investigated under another statutory complaints system.

Article 13 - Actions which may be investigated: restrictions and exclusions

This Article explains that the Commissioner shall not conduct an investigation into any matter where the complainant has or had a right of appeal, complaint, reference or review to a tribunal or court, or remedy by way of court proceedings, unless he is satisfied that it would not have been reasonable to expect the complainant to have resorted to that remedy. In addition, the Commissioner shall not investigate the commencement of criminal proceedings, or the commencement of civil proceedings (other than by a relevant authority); or the conduct of civil or criminal proceedings; or any matter that is or has been the subject of a local or public inquiry; or if he considers that there has been unreasonable delay in making the complaint. This will enable the Commissioner to refuse to investigate very old complaints.

Article 14 - Power to bring, assist in, or intervene in, legal proceedings

This Article sets out the power of the Commissioner to bring civil proceedings relating to the law or practice relating to the rights or welfare of children, and to assist in, or intervene in any legal proceedings which relate to the rights or welfare of children. The Commissioner must be satisfied that the case raises a question of principle or that there are other special circumstances, for example, there is no other body capable of bringing or intervening in proceedings which make it appropriate for the Commissioner to do so.

This power is subject to the general requirement of the Human Rights Act 1998 that in proceedings brought by or against a public authority involving an allegation that the authority has acted in a manner incompatible with the European Convention on Human Rights, there must be a 'victim', that is, child or young person whose rights have allegedly been infringed. It does not allow the Commissioner to take hypothetical cases.

Article 15 - Assistance in relation to legal proceedings

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This Article sets out the scope of the Commissioner's power to assist a child in relation to certain legal proceedings, that is proceedings which involve law or practice concerning the rights or welfare of children. The Article limits the power to those cases which raise a question of principle and where it would be unreasonable to expect a child to deal with the case without assistance, for example, because of its complexity, or where there are special circumstances which make it appropriate for the Commissioner to provide assistance. The types of assistance which may be granted may include the provision of legal advice, legal representation or other assistance as appropriate.

Article 16 - Formal investigations

This Article relates to formal investigations carried out by the Commissioner. This Article makes clear that it is for the Commissioner, at his own discretion, to decide which investigations he will initiate, continue or discontinue. The Commissioner can only carry out a formal investigation relating to:

- a general review of advocacy, complaint, inspection or whistle-blowing arrangements made by a relevant authority in relation to those authorities listed in *Article 4(1)(a)* and *(b)* and *Part I of Schedule 1 [Article 9]*;
- a review of advocacy, complaints, inspection or whistle blowing arrangements made by a relevant authority in relation to individual cases [*Article 10*]; and
- a complaint made by a child that his rights have been infringed or that his interests has been adversely affected by an action taken by a relevant authority [*Article 12(1)*].

The Article sets out the procedures which must be followed such as the sending of notice of the investigation and the terms of reference to any authority concerned and giving them an opportunity to comment.

Article 17 – Formal Investigations: exclusions

This Article prevents the Commissioner from carrying out a formal investigation into a matter in respect of which he has previously brought, intervened in, or provided assistance with, legal proceedings. This is to ensure that there is no conflict between the Commissioner's advocate and ombudsman roles.

Article 18 - Report on formal investigation

This Article provides that, having conducted a formal investigation, the Commissioner must prepare a report of his findings and send a copy of that report to any relevant authority concerned and other persons as appropriate. The clause contains a confidentiality requirement in that the Commissioner's report must not identify the name of any person or contain any details which might help to identify any person, unless the Commissioner believes it is necessary to do so. In relation to a report following an investigation into how a complaint made by a child was actually handled

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by an authority, the Commissioner may recommend that the relevant authority consider the complaint again. The Commissioner, however, cannot substitute his views for that of the authority, nor can he quash or reverse any decision that has been taken. The Article also imposes a duty on relevant authorities to consider a recommendation made by the Commissioner and to decide what action, if any, to take in response to it.

Article 19 - Further action following report on formal investigation

This Article relates to follow-up action which the Commissioner can take after he has published a report on a formal investigation. It provides that he may issue a notice requiring an authority to provide, within 3 months of the date of the notice, information which will enable him to determine whether the authority has complied with a recommendation he has made, or will be complying with it. Alternatively, the authority may provide a statement of its reason for not complying with the recommendation. If the Commissioner considers that the authority's response is inadequate, he can issue a further notice requiring the authority to reconsider the matter and to respond within one month of the date of the notice. The Commissioner may publish the fact that an authority fails to respond to a notice, or responds inadequately to a second notice. The Article also provides that the Commissioner will maintain a register, which will be open for inspection by the public, containing the recommendations of his reports of investigations, the action taken by the Commissioner and the results of any such action.

Article 20 - Evidence in formal investigations

This Article sets out the type of evidence or information which the Commissioner may have access to in order to conduct a formal investigation. He can require the disclosure of any document or the attendance of any witness which the High Court is entitled to require.

Article 21 - Powers of entry and inspection for purposes of formal investigation

This Article provides for the Commissioner to have a power of entry into premises run by a relevant authority in which a child or young person lives, is looked after, is detained or where services are provided where the Commissioner believes it is necessary for the proper conduct of the formal investigation. The power may be used in relation to a general review of arrangements in respect of certain relevant authorities (*Article 9*) reviews of arrangements in individual cases (*Article 10*), or the investigation of a complaint (*Article 12*). The Article provides that the Commissioner can examine the premises, inspect records and interview an employee or child on the premises, but also contains the additional safeguard that the parent of a child/young person must be informed of the Commissioner's intention to interview the child. The Article gives parents the right to be present at the interview unless this would not be in the child's interests, or would not be practicable, or would be against the child's wishes, having regard to the child's age and understanding.

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Article 22 - Obstruction and contempt in relation to formal investigation

This Article provides a sanction against obstruction of the Commissioner as he conducts a formal investigation. If anyone, without lawful excuse, impedes the Commissioner in the conduct of the investigation or acts in a way which would otherwise constitute contempt of court, the Commissioner can report the matter to the High Court, and it can be dealt with as contempt of court.

Article 23 - Disclosure of information by the Commissioner

This Article provides for restrictions on the disclosure of information obtained by the Commissioner during a formal investigation. He can only disclose such information for:

- the purposes of the investigation and the report of the investigation;
- any proceedings for a criminal offence;
- any inquiry with a view to the taking of proceedings for a criminal offence;
- any proceedings related to obstruction of the Commissioner; or for
- health and safety reasons of a person at risk.

Article 24 - Review of this Act

This Article provides that three years after the passing of this legislation, and no earlier than every three years after that, the Commissioner is required to make a report to the First Minister and Deputy First Minister. A report should contain his views as to the adequacy and effectiveness of the legislation and may contain his recommendations for improvement.

The First Minister and Deputy First Minister are required to lay a copy of every such report sent to them before the Assembly.

Article 25 - Privilege for certain publications

This Article provides that any report which the Commissioner is required or permitted to publish is exempt from challenge under the law of defamation.

Article 26 – Application of this Order: relevant authorities with mixed functions

This Article provides that in relation to relevant authorities as defined in the Order, the provisions of the Order which refer to relevant authorities only apply in relation to those authorities' public functions. They do not apply in relation to exercise of the authorities' private functions.

Article 27 – Application of this Order: matters arising before commencement

This Order provides for the retrospectivity of the Order.

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Schedule 1 – Relevant Authorities

This Schedule sets out a number of specific bodies which are defined as ‘relevant authorities’ by virtue of *Article 4(1)(c)*. It is divided into two parts, Part I lists bodies which are the responsibility of the devolved administration; Part II lists bodies which are the responsibility of the Northern Ireland Office or other Whitehall Departments.

Schedule 2 – The Commissioner for Children and Young People for Northern Ireland

This Schedule provides for the status, general powers, tenure of office and general staffing and procedural arrangements of the Commissioner. It provides for a tenure of 4 years with eligibility for one further term of 4 years and provides for accountability to the Office of the First Minister and Deputy First Minister and the Assembly in relation to Accounts and to the Office of the First Minister and Deputy First Minister, the Assembly and the Secretary of State in relation to an Annual Report.

Schedule 3 – Investigations under Article 8(4) or 9(6)

This Schedule sets out the procedures to be followed when the Commissioner conducts an investigation for the purpose of his functions of:

- keeping under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons; (*Article 7(2)*);
- keeping under review the adequacy and effectiveness of services provided for children and young persons by relevant authorities (*Article 7(3)*); and
- carrying out a general review of advocacy, complaints, inspection or whistle-blowing arrangements in relation to the relevant authority listed in *Part II* of *Schedule 1* (*Article 9(6)*).

It provides for the procedure which must be followed such as the sending of notice of the investigation and the terms of reference to any authority concerned and giving it the opportunity to comment; and it provides for the Commissioner to prepare a report of his findings and recommendations and for the subsequent action which he can take.