

# CHILDREN AND FAMILIES ACT 2014

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part 6 - the Children's Commissioner

##### *Section 107: Primary function of the Children's Commissioner*

432. **Section 107** replaces section 2 of the Children Act 2004 ("the 2004 Act") with new sections 2 to 2C, and changes the primary function of the Commissioner from one of "promoting awareness of the views and interests of children in England" to one of "promoting and protecting the rights of children in England". The Commissioner's remit also covers non-devolved matters in Scotland, Wales and Northern Ireland as set out in *paragraph 3* of Schedule 5.
433. The role of promoting children's rights entails raising awareness of children's rights and how they should be applied.
434. The role of protecting children's rights should, in practice, mean that the Commissioner is able to challenge any policy or practice which he or she considers may lead, or has led, to an infringement or abuse of children's rights, and provide evidence of any negative impact of those policies and practices on children's rights to those who are responsible and have sufficient standing to bring about change. The Commissioner does not have the power to require a change to that policy or practice.
435. Promoting awareness of children's views and interests continues to form part of the primary function, as it remains important that children's views inform any comments or recommendations that the Commissioner makes. Section 2(2) achieves this by providing that the function of promoting awareness of the views and interests of children is an aspect of the primary function of promoting and protecting children's rights.
436. **Section 2(3)** lists some of the activities that the Commissioner may undertake in exercising the primary function. The list is not exhaustive and therefore does not place a limit on the activities the Commissioner may undertake. Many of the activities listed are carried forward from the previous legislation and updated to reflect the new primary function:
- Paragraph (a) concerns the provision of advice to relevant persons on how to act compatibly with children's rights. This aspect of the primary function is likely to involve making recommendations to change policies or practices that the Commissioner considers have infringed or may infringe children's rights;
  - Paragraph (b) sets out that the Commissioner may also encourage relevant persons to take account of children's views and interests. This aspect of the Commissioner's role could include providing both general guidance on how best to involve children in the decision-making processes of organisations; and highlighting specific examples of points children have raised in the course of a particular investigation that the Commissioner has undertaken;

*These notes refer to the Children and Families Act 2014  
(c.6) which received Royal Assent on 13 March 2014*

- Paragraph (c) carries forward a similar provision from the 2004 Act and extends it to cover “rights” (as well as views and interests) to reflect the change to the Commissioner’s primary function;
  - Paragraph (d) makes clear that in the discharge of the primary function, the Commissioner can assess the potential impact that proposed new policies or legislation may have on children’s rights. It will be for the Commissioner to determine whether to carry out such assessments and on which issues;
  - Paragraph (e) makes it clear that the Commissioner may, in particular, bring any matter to the attention of Parliament. Relevant matters could be raised, for example, through the Commissioner’s annual report to Parliament or by writing to the chair of a relevant Select Committee;
  - Paragraphs (f), (g) and (h) reflect similar provisions in the 2004 Act. In each provision, the words “consider or research” have been replaced with “investigate”. In addition, paragraph (g) contains a new provision, linked to paragraph (f), that concerns investigations of the availability and effectiveness (rather than “operation”) of advocacy services for children. In carrying out these activities, the Commissioner will want to be satisfied that there is adequate provision in place, and that services are easily accessible, and respond effectively to the issues raised by children;
  - Paragraph (h) broadly replicates a provision from the 2004 Act, clarifying that the Commissioner has wide discretion over other matters that he or she chooses to investigate, but provides for this to cover the rights (as well as the interests of) children – to reflect the change to the Commissioner’s primary function;
  - Paragraph (i) makes clear that the Commissioner’s primary function of promoting and protecting rights may include reporting on the implementation of the United Nations Convention on the Rights of the Child (UNCRC) in England (and, under sections 5 to 7, in Wales, Scotland and Northern Ireland, as regards non-devolved matters). Formal reporting to the UN Committee remains the responsibility of the State Party, but this provision makes it clear that the Commissioner may carry out his or her own independent assessments;
  - Paragraph (j) confirms that the Commissioner is able to publish a report on any matter that he or she has considered or investigated under the Commissioner’s primary function. It will be for the Commissioner to determine whether to publish a report.
437. [Section 2\(4\)](#) requires the Commissioner - when exercising the primary function - to have particular regard to promoting and protecting the rights of: the categories of children defined in new section 8A (certain vulnerable children); and other children whom the Commissioner determines are at particular risk of their rights being infringed. The definition of children in section 8A (inserted into the 2004 Act by section 114) covers children and young people who previously fell within the remit of the Children’s Rights Director, whose general functions are incorporated into those of the Commissioner by this Act. This includes children receiving social care services or who live away from home for significant periods of time, such as children in residential special schools, residential FE colleges and boarding schools.
438. In addition, there are other groups of children who may be at particular risk of having their rights infringed – for example children in custody. Section 2(4) therefore also requires the Commissioner to give particular attention to groups of children who are at particular risk of their rights being infringed. It is for the Commissioner to determine which other groups of children fall within this subsection, and how to act in order to promote and protect their rights.

439. **Section 2(5)** provides that the Commissioner continues to be prohibited from conducting investigations into the case of an individual child. The intention is that the Commissioner will concentrate on strategic issues that affect a number of children, rather than provide a general ombudsman service for individual children. There may be circumstances however where the Commissioner could properly respond to queries from or about individual children that are relevant to the exercise of the primary function. The Commissioner will be able to provide advice and assistance (as set out in section 2D) to children defined in section 8A.

## **2A United Nations Convention on the Rights of the Child (UNCRC)**

440. Section 2A(1) (inserted into the 2004 Act by section 107) provides that the Commissioner must have particular regard to the UNCRC and any Optional Protocols which are in force in relation to the United Kingdom (subject to any reservations, objections or interpretative declarations by the United Kingdom), when considering what constitutes children's rights and interests. As Article 41 of the UNCRC makes clear, where other rights exist in domestic law or international law applicable to that State, which afford children greater protection than the UNCRC, these should apply.

## **Section 2B: Involving children in the discharge of the primary function**

441. Section 2B (inserted into the 2004 Act by section 107) requires the Commissioner to take reasonable steps to involve children in his or her work, and to provide children with information about the Commissioner's role and how they can raise issues with him or her. Provision is made for children to be consulted on the activities that the Commissioner intends to undertake in the discharge of the primary function. Section 2B(3) requires the Commissioner (when involving children in the discharge of the primary function) to have particular regard to children within new section 8A, and children who do not have other adequate means to make their views known. It will be for the Commissioner to determine which children fall into the latter category.
442. It is for the Commissioner to decide how best to make children aware of his or her role and activities, and to put in place arrangements that allow children to contact the Commissioner and comment on his or her proposed work programme. The Commissioner may also wish to use other organisations which have an interest in children's rights as a conduit for seeking the views of children, to avoid duplication and to make best use of available resources.

## **Section 2C: Primary function: reports**

443. New section 2C (inserted into the 2004 Act by section 107) relates to reports that the Commissioner publishes following any investigations that he or she has undertaken in carrying out the primary function. Subsection (2) requires the Commissioner to publish a report in a child-friendly format where the Commissioner considers it appropriate to do so. Under subsection (3), it is open to the Commissioner to require persons exercising functions of a public nature to set out in writing, within a time period specified by the Commissioner, what action they are taking or proposing to take in response to recommendations. A person is not obliged to accept recommendations that the Commissioner makes, but if they do not intend to implement a recommendation, they should set out in writing the reasons for not doing so.