

# 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;

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- 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.

## ***Section 108: Provision by Commissioner of advice and assistance to certain children***

444. New section 2D (inserted into the 2004 Act by section 80) provides for a new power that enables the Commissioner to provide advice and assistance to children and young people defined in new section 8A. This enables the role previously carried out by the Children's Rights Director to be carried forward under the new arrangements. Section

116 provides for the abolition of the office of Children's Rights Director, alongside relevant transfers to the Commissioner's office.

445. In practice, it is not envisaged that this will involve providing a full casework function. The advice and assistance role will normally entail signposting the individual to an existing complaints process, or making representations on their behalf to the relevant organisation, with a view to resolving the matter informally.

### ***Section 109: Commissioner's power to enter premises***

446. This section inserts a new section 2E into the 2004 Act. This broadly replicates the Commissioner's previous power to enter premises where children are accommodated or cared for, in order to interview children, and applies to the exercise of the primary function and new section 2D. This provision does not extend to private dwellings, but applies in respect of any part of a premises which is not a private dwelling. New section 2E(2)(b) and 2E(4) provide that the Commissioner or his or her representative can observe the facilities and standards of care provided and interview persons working at the establishment. These provisions have no impact on the Commissioner's capacity to interview children in situations other than where the power to enter premises is being used.

### ***Section 110: Provision of information to Commissioner***

447. This section inserts a new section 2F into the 2004 Act, which broadly replicates the previous provision. It places a duty upon persons exercising functions of a public nature to provide the Commissioner with information that the Commissioner requests as long as: the request is reasonable; and it is information that the body is able to disclose lawfully to the Commissioner. The effect of section 2F is, for example, that where a person exercising functions of a public nature has discretion to disclose confidential information under other legislation, it must do so, so long as the request is reasonable. However, it does not create a legal gateway that overrides other legislation, for example, where that legislation restricts disclosure of confidential information to certain specified persons or for certain purposes.

### ***Section 111: Advisory board***

448. New section 7A (inserted into the 2004 Act by section 111) imposes a new requirement on the Children's Commissioner to appoint an advisory board, the purpose of which is to provide advice and assistance to the Commissioner. It is for the Children's Commissioner to decide who to appoint to the board, but subsection (2) requires the board's membership, when taken together, to represent a broad range of interests that are relevant to the functions of the Children's Commissioner. The role of the board is advisory only and ultimately it will be the responsibility of the Children's Commissioner (rather than the advisory board) to determine how to exercise his or her functions. The aim of the advisory board is to make the Commissioner's business planning processes more transparent and to ensure that his or her activities add value, rather than duplicate, the work of other organisations with an interest in children's rights. It is for the Children's Commissioner to determine whether to appoint a separate chairperson from among the members of the advisory board, or to chair the advisory board him or herself. Subsection (3) requires the Commissioner to publish details of the process through which appointments to the advisory board will be made and the criteria used to select members. The intention is to ensure that the process by which individuals are selected is open and transparent.

### ***Section 112: Business plans***

449. New section 7B (inserted into the 2004 Act by section 112) imposes requirements on the Children's Commissioner to consult on, and then publish, a business plan. Subsection (1) sets out what should be included in the business plan. Subsections

(2) and (3) set out the time period that the business plan should cover and when it should be published. Subsection (4) requires the Commissioner to consult children and bodies which represent a range of relevant interests and other persons who the Commissioner considers appropriate on the content of the business plan before it is published. Subsection (5) provides that when consulting children, the Commissioner should, in particular, take steps to consult children falling within section 8A and other children who do not have adequate means to make their views known.

### ***Section 113: Annual reports***

450. This section amends section 8 of the 2004 Act, which is concerned with the Commissioner's annual report. The annual report provides a key mechanism through which Parliament has the opportunity to scrutinise the Commissioner's activities and impact. The annual report provides an overview of the Commissioner's activities rather than being a vehicle through which the Commissioner makes recommendations for change in specific areas; which will be contained in the separate reports that the Commissioner chooses to publish following his or her investigations or inquiries.
451. Accordingly, section 8 requires the Commissioner to report annually on the main activities that he or she has undertaken and what impact these activities have had on the promotion and protection of children's rights. New subsection (2)(b) and (c) require the Commissioner to include in the annual report information on: the actions that he or she has taken to support children falling within section 8A; and an account of how the Commissioner has consulted or otherwise involved children in the discharge of his or her functions.
452. *Subsection (2)(a)* of the section amends section 8(1) of the 2004 Act to provide that the annual report must address how the Commissioner has discharged all his functions. New subsection (2)(d) has been included to ensure that actions the Commissioner takes as a result of consulting or otherwise involving children are also summarised in the annual report. *Subsections (4) and (5)* provide for the Commissioner to lay the annual report before both Houses of Parliament, rather than through the Secretary of State, as was previously the case. The Commissioner is responsible for publishing, publicising and disseminating the report, as appropriate. *Subsection (6)* requires the Commissioner to ensure that a child-friendly version of the annual report is available.

### ***Section 114: Children living away from home or receiving social care***

453. This section inserts a new section 8A which defines, for the purposes of the Commissioner's functions, specific groups of children and young people whom the Commissioner:
- Should have particular regard to, when discharging the Commissioner's primary function (as set out in section 2(4));
  - Should have particular regard to, when taking steps to involve children in the discharge of the Commissioner's primary function (as set out in section 2B);
  - Can provide advice and assistance to (as set out in section 2D);
  - Should have particular regard to, when consulting on the Commissioner's business plan (as set out in section 7B(5)).
454. The annual report must also set out how the Commissioner has had particular regard to this group, in exercising his or her functions.
455. The children defined by this section includes all those children and young people who previously fell under the remit of the Children's Rights Director.

### **Section 115 and Schedule 5: Minor and consequential amendments**

456. [Schedule 5](#) makes minor and consequential amendments to Part 1 of the Children Act 2004, and a consequential amendment to the Criminal Justice and Courts Services Act 2000.

#### **Inquiries**

457. [Paragraph 1\(2\)](#) of Schedule 5 removes the requirement on the Commissioner to consult the Secretary of State before holding an inquiry under section 3 of the 2004 Act; and [paragraph 2\(1\)](#) removes the Secretary of State's power to direct the Commissioner to conduct an inquiry. [Paragraph 2\(2\)](#) makes consequential amendments to provisions in the 2004 Act that remove the power of the Secretary of State to direct the Commissioner to undertake an inquiry into the case of an individual child in Wales, Scotland or Northern Ireland. The purpose of these changes is to address concerns raised by John Dunford and others which called into question the Commissioner's independence from Government which had potentially damaged the Commissioner's credibility. It will be for the Commissioner to determine how to respond to a request from the Secretary of State to undertake a particular activity.

#### **Functions of Commissioner in respect of Wales, Scotland and Northern Ireland**

458. [Paragraphs 3, 4 and 5](#) amend sections 5, 6 and 7 of the 2004 Act to apply (with certain modifications) the changes to the Commissioner's functions to his or her functions in respect of non-devolved matters in Northern Ireland, Scotland and Wales.

#### **Young persons**

459. [Paragraph 6\(1\)](#) substitutes a new section 9 in the 2004 Act. Its purpose is to enable the Commissioner to exercise his or her functions in relation to young persons in England who are aged 18 or over for whom an EHC plan is maintained by a local authority (as to which, see Part 3 of the Act); who are aged 18 or over and under 25 and to whom services have been provided by a local authority under any of sections 23C to 24D (which relates to certain children and young people defined in section 8A) of the Children Act 1989.
460. New section 9(3) makes provision in respect of the Commissioner's functions in Wales, Scotland and Northern Ireland. In this case, a child includes a young person who is aged 18 or over and under 25 who has a learning disability (as defined); or who has been looked after by a local authority in Wales, Scotland or Northern Ireland at any time after the age of 16.
461. [Paragraph 6\(2\)](#) is intended to preserve the effect of section 9 as it applied before substitution under this Act.

#### **Appointment and tenure of the Children's Commissioner**

462. [Paragraph 7](#) of Schedule 5 amends paragraph 3(2) of Schedule 1 to the 2004 Act, strengthening the requirement on the Secretary of State to involve children in the Commissioner's appointment, by requiring him or her to "take reasonable steps" to involve them.
463. Provision is also made to address a concern raised in John Dunford's report, "Review of the Office of the Children's Commissioner (England)", namely that the ability for a Commissioner to be appointed for a second term might compromise his or her independence. The Children's Commissioner will be now appointed for a single, six-year term. There is no longer an option to renew the Commissioner's appointment at the end of his or her term of office.

## **Interim Appointments**

464. *Paragraph 8* inserts a new paragraph 3A into Schedule 1 to the 2004 Act, which makes provision for appointing an interim Children's Commissioner and sets out the process that should be followed. This provision is introduced as a consequence of removing the requirement on the Commissioner to appoint a Deputy Children's Commissioner and will apply where the current Children's Commissioner resigns, is dismissed (in line with the provisions set out in paragraph 3(7) of Schedule 1 to the 2004 Act), or is otherwise unable to continue in post.
465. Where such a situation arises, a recruitment exercise to appoint a new substantive Children's Commissioner should begin at the earliest opportunity. However, it is possible that recruiting a new substantive Children's Commissioner could take some time and *paragraph 8* therefore provides for the Secretary of State to appoint an interim Children's Commissioner to provide continuity and stability in the intervening period. *Sub-paragraph (2)* provides that the terms and conditions of any interim appointment will be determined by the Secretary of State.
466. *Paragraph 3(3)* provides that the interim appointment should cease either:
- At the point that a new substantive Commissioner is appointed; or,
  - If sooner, 6 months after the date that the interim appointment is made.
467. If, for any reason, the recruitment of a new substantive Commissioner cannot be completed within 6 months, *sub-paragraph (4)* enables the Secretary of State to renew the interim appointment for up to a further 6 months. *Sub-paragraph (4)* also provides that a person who has been appointed as the interim Children's Commissioner can subsequently be appointed as the new substantive Commissioner (following the process required under *paragraph 3* of Schedule 1).
468. *Paragraph 3(5)* and *(6)* make provision in relation to resignation and removal from office of the interim Children's Commissioner which is equivalent to the provision for the Children's Commissioner.

## **Deputy Children's Commissioner**

469. *Paragraph 9* amends paragraph 5 of Schedule 1 to the 2004 Act, so as to remove the requirement on the Commissioner to appoint a deputy. It will be for the Commissioner to determine his or her office's staffing structure. *Paragraph 9(2)* makes consequential amendments.

## ***Section 116: Repeal of requirement to appoint a Children's Rights Director***

470. *Subsection (1)* repeals the provision in the Education and Inspections Act 2006 which required the Chief Inspector to appoint a Children's Rights Director.
471. *Subsection (2)* amends provisions in that Act to take account of this change and, in particular, to place requirements on the Chief Inspector and the Office for Standards in Education, Children's Services and Skills (Ofsted) to have regard to any matters raised by the Children's Commissioner. In general, the purpose of these provisions is to ensure that the views and interests of children within the Children's Rights Director's remit continue to inform the work of the Chief Inspector and the Office for Standards in Education, Children's Services and Skills but they will also extend more generally to cover any matters raised by the Children's Commissioner.
472. *Subsection (3)* introduces Schedule 6, which provides for the Secretary of State to make a scheme enabling certain staff and property to be transferred from Ofsted to the staff of the Children's Commissioner.

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(c.6) which received Royal Assent on 13 March 2014*

***Schedule 6: Repeal of requirement to appoint a Children’s Rights Director:  
Transfer schemes***

- 473. *Paragraph 1* contains a power for the Secretary of State to make a scheme in relation to designated members of staff who are members of staff of Ofsted to become members of staff of the Children’s Commissioner. The Schedule provides that the scheme may contain provisions as to continuity of employment.
- 474. *Paragraph 2* contains a power for the Secretary of State to make a property transfer scheme, transferring to the Children’s Commissioner any property, rights and liabilities of Ofsted.
- 475. *Paragraph 3* provides that for the purposes of the transfer schemes, references to “the Office” (i.e. Ofsted) include, so far as relevant, the Chief Inspector.