

Establishing A New Office Of The Children's Commissioner For England (OCCE): Consultation On Legislative Proposals

Consultation Response Form

The closing date is: 29 September 2011
Your comments must reach us by that date.

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Please tick if you want us to keep your response confidential.

Reason for confidentiality:

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If your enquiry is related to the policy content of the consultation you can contact the Department on;

Telephone: 0370 000 22 88

e-mail: childrenscommissioner.consultation@education.gsi.gov.uk

If you have a query relating to the consultation process you can contact the Consultation Unit on:

Telephone: 0370 000 22 88

e-mail: consultation.unit@dcsf.gsi.gov.uk

Please mark an X in one box below that best describes you as a respondent

<input checked="" type="checkbox"/> Children and/or Young People's Organisation	<input type="checkbox"/> Parent	<input type="checkbox"/> Local Authority
<input type="checkbox"/> Children's Workforce	<input type="checkbox"/> Young Person	<input type="checkbox"/> Other

Please Specify:

Under the new legislation, the function of the Children's Commissioner will be to promote and protect the rights of all children and so will encompass those children who fall under the CRD's current remit. The legislation will specify that, in discharging his or her functions, the Children's Commissioner should have particular regard to the children and young people who are currently covered by the CRD's remit (see annex 1). While we recognise that there are other children and young people who are vulnerable for a variety of reasons, what defines and distinguishes the groups we are intending to identify separately in legislation, is the fact that they do not have a parent or guardian to whom they have regular access, who can advocate on their behalf.

Q1) Do you agree with the proposals to ensure that the functions of the Children's Rights Director continue to be provided for in legislation'?

X Yes

No

Not Sure

Comments:

We wholeheartedly agree with the proposals to ensure that the functions of the Children's Rights Director are transferred to the new Children's Commissioner. It is essential that children living away from home, without regular access to a parent or guardian, can continue to have their rights promoted and protected by an independent national statutory body. Indeed, we believe that the "particular arrangements" duty should be broadened to include all children in this position as currently, vulnerable groups such as children seeking asylum who have no legal guardian, runaways, children in hospital and the majority of children in custody have no access to this support.

John Dunford did not comment on the title of the Children's Commissioner, but stakeholders have queried whether the title 'Children's Commissioner' resonates with young people. We are interested in your views on this point.

Q2) Should the Children's Commissioner's title be amended to 'The Children's and Young People's Commissioner', so that it more clearly covers the full age range?

Yes

X No

Not Sure

Comments:

We have received mixed feedback from our members on this suggestion. However, on balance, we believe that for the sake of simplicity and on the basis that the term 'children' is recognised in domestic and international law as meaning people under the age of 18, that it is unnecessary to include the words 'young people' in the title. However, given that the principal role of the OCCE will be to promote and protect children's rights, we suggest that the position be renamed 'Children's Rights Commissioner'.

Whatever name is eventually chosen, it is essential that it has authority and durability. It must also not cause confusion. With this in mind, we believe that the Government should scrap the Deputy Children's Commissioner role which not only gives the organisation two figureheads but is also inefficient and not conducive to clear leadership. While we understand the need for the Commissioner to be able to delegate their functions, this does not require a Deputy position (a senior administrative role such as a Chief Executive would be more appropriate). Such a system has worked well in Scotland and Northern Ireland and we see no reason why it should not be adopted in England.

John Dunford's report said that 'corporation sole' status had led to a weakness in the strategic planning of the Commissioner and a detachment between the Commissioner and the Office. The report highlighted the fact that the existing and former Children's Commissioners both felt that corporation sole status had left them feeling isolated. The report argued that the Children's Commissioner should be indivisible from the OCCE and be responsible for all of the OCCE's functions and for how the office operates. For the reasons above, he concluded that the Children's commissioner should not have corporation sole status.

We have examined the possibility of models other than 'corporation sole' - such as a 'body corporate' - but are not convinced that they represent a preferable model for the new OCCE. We believe that we can address the weaknesses that John Dunford identified through other changes that will be introduced, in particular the proposal to appoint an advisory board to provide support and challenge to the Children's Commissioner. The advantages of giving the Commissioner 'corporation sole' status, supported by an advisory

board, are that: he or she will have full responsibility for the objectives and operation of the OCCE; and it allows arrangements to be made legally for the office and role to continue in the event of the Commissioner being unable to continue to carry out his or her functions.

Q3) Do you agree with the proposal to create the new OCCE as a corporation sole, supported by an advisory board?

Yes

X No

Not Sure

Comments:

We agree that corporation sole status is the correct legal model for the new OCCE and in keeping with the legal set up of similar positions such as the Information Commissioner and the Children's Commissioners in Wales and Northern Ireland. While we recognise that the Commissioners have felt isolated, we are sceptical that this was primarily a result of corporation sole status or that the creation of a statutory advisory board is the best way to solve the problem. Indeed, we are concerned that a statutory advisory board would have a number of significant drawbacks. Firstly, its very existence could obscure or even challenge the primacy of the Commissioner (as mentioned above, the existing Deputy Commissioner position also has this fault). As a result, there is a risk that the independence and actions of the commissioner could be constrained. Secondly, a statutory advisory board is likely to require significant resources in order to operate effectively. These resources would be better deployed in delivering the Commissioner's daily work. Thirdly, members of such boards are normally selected from a rather narrow group of people and rarely represent the diversity of the children's rights sector. This would most likely limit the number of external voices sought for some consultations, reduce buy in from the rest of the sector and consequently weaken the organisation.

It has been argued that a statutory advisory board would make the OCCE compliant with the Paris Principles. However, these principles relate not to child specific human rights organisations but to generic ones. The key for the children's human rights model is that the post holder is a high profile children's rights champion known and seen by children to be tirelessly promoting and protecting their rights. As explained above, we believe that the board would put this at risk.

The Commissioner already has the power to establish a non-statutory advisory board. If additional support for the role is essential, then we suggest that this would be a more inclusive, light touch and economical approach to take.

The Government could also consider placing a duty on the Children's Commissioner to develop a strategic plan after consultation with children and

children's rights organisations. This would mirror the duty on the EHRC and could help build ongoing relationships.

John Dunford reviewed the existing powers of the Children's Commissioner (including whether there was a case for him or her to be given additional powers); as well as the requirements that were placed on the Children's Commissioner. In general, he felt that the Children's Commissioner already had sufficient powers, but argued that a new power should be included in the legislation - to allow the Children's Commissioner to carry out assessments of the impact on children of new policies and proposed legislation.

We do not intend to deviate in substance from the recommendations in this area that were included in John Dunford's report. The statutory powers that we are therefore proposing the Children's Commissioner should have are the powers to:

- investigate cases of individual children where the case has wider significance for the rights of children;
- carry out inquiries on issues that have wider significance for the rights of children; and
- carry out assessments on the impact of new policies and legislation on the rights of children in relation to the UNCRC.

We are considering whether it is necessary to specify separately in the new legislation that the Children's Commissioner has the power to: undertake research on issues relating to children's rights; and monitor the effectiveness of complaints and advocacy services as they relate to children and young people, or whether these activities are already encompassed by the powers set out above. It is not intended to dilute the Children's Commissioner's existing powers. Our aim is to avoid adopting details from the existing legislation that do not need to be specified in the new legislation.

Q4 a) Do you agree that the powers proposed for the new Children's Commissioner are the right ones?

Yes

X No

Not Sure

Comments:

We agree with the powers proposed for the Children's Commissioner and are particularly pleased with the new power to carry out impact assessments. This should be coupled with a new corresponding duty on public authorities to officially respond to the Commissioner's assessments (like the existing duty in Section 3(7) of the Children Act 2004)

Given that the Office of the Children's Rights Director is being subsumed by the OCCE, we believe that it is essential for new Commissioner to have specific powers regarding the provision of child-friendly complaints procedures and independent advocacy for vulnerable children living away from home.

Limiting investigations and inquiries to matters that have wider significance for children's rights was recognised by John Dunford as an important safeguard, designed to ensure that the OCCE does not become bogged down in dealing with individual casework. We support this view that the OCCE's role should be strategic. We also support his view that the OCCE should not duplicate the work undertaken by existing complaints and advocacy services for children and young people. At the same time, John Dunford recognised that the CRD did carry out a form of casework in support of individual children and young people within his remit, where there may not be issues of wider significance. This role has involved different responses according to the circumstances of the case - for example, ascertaining children's wishes and feelings; advising children and professionals; challenging, or recommending the 'freezing' of decisions; and referring cases for review and response to the relevant Director of Children's Services or other bodies. John Dunford felt this function should continue to be allowable.

We are proposing, therefore, to design the legislation in a way that allows the OCCE to carry out a similar role to the CRD in respect of individual cases, but only in relation to children who fall under the CRD's current remit. As at present, the power would not enable the OCCE to appeal decisions or to determine the outcome of individual cases. The current role of the Children's Commissioner in carrying out investigations of individual cases would continue, but only where there are wider implications for children's rights

Q4 b) Do you agree that the Children's Commissioner should be able to undertake a limited form of casework for children who fall under the CRD's remit?

Yes

X No

Not Sure

Comments:

We wholeheartedly agree that the Children's Commissioner should be able to undertake casework and welcome this power being put on a statutory footing. However, we and our members believe that the limits of this power should be determined by the operational capabilities and strategic priorities of the OCCE rather than being set down in legislation. This would be in keeping with the powers of the Children's Commissioners in Wales and Northern Ireland, the Equality and Human Rights Commission and the Office of the Children's Rights Director, all of which developed their own mechanisms for taking on casework.

As with the power to carry out impact assessments, we believe that the power to undertake casework should be coupled with a new corresponding duty on public authorities to officially respond to the Commissioner's reports.

When considering what duties/requirements should be placed on the Children's Commissioner, John Dunford was clear that the purpose of imposing duties was not to try to dictate the way in which the Commissioner carried out his or her role. Rather, it was to ensure that the Children's Commissioner is more accountable to Parliament for the impact the OCCE has in promoting and protecting children's rights; and to ensure financial propriety. On that basis, the duties we want the legislation to place on the Children's Commissioner would be:

- a duty to submit an annual report to Parliament each year, which includes: a report on action the OCCE has taken to implement the activities set out in its business plan; recommendations made in light of these activities to better promote and protect children's rights; work done specifically in relation to those groups to which the Commissioner is to have particular regard; and a budget statement/annual accounts to demonstrate how funding has been used; and
- a requirement to have an advisory board that provides support and challenge to the Children's Commissioner. The advisory board will be 'Paris Principles' compliant. In relation to the advisory board, compliance means that its constitution and membership is consistent with Paris Principles. This will ensure that all key interests are represented on the board and that it is sufficiently independent.

We are intending to replicate the existing provisions in the Children Act 2004, which require the Children's Commissioner in the exercise of his or her functions to:

- take steps to make children aware of his/her role and how they can communicate with him/her;
- seek out and report on the views of children, especially children who do not have other adequate means of making their views known.

Q5) Do you agree that the duties and requirements set out above are the right ones for the new Children's Commissioner?

Yes

X No

Not Sure

Comments:

As noted in response to question 3, we do not support the creation of a statutory advisory board. Other than that, we support the proposals.

The appointment of the Children's Commissioner will be in line with the general principles for all public appointments. Within these arrangements, we want to ensure that Parliament (most likely through the relevant Select Committees) has an opportunity to contribute at important stages of the process. We will work with parliamentary clerks to develop a process that involves:

- an opportunity for parliamentarians to consider and comment on the job description for the post of Children's Commissioner, prior to it being advertised;
- an opportunity for parliamentarians to make recommendations on one or more candidates at the pre-appointment stage; and
- an opportunity for parliamentarians to raise any concerns directly with the relevant Secretary of State if he or she chose not to accept their recommendations.

Q6) Do you agree with our proposals for the appointment of the Children's Commissioner?

Yes

X No

Not Sure

Comments:

We would like the appointment of the Children's Commissioner to be made by Parliament with as much input from children and young people and children's rights organisations as possible. We believe that this would greatly increase the chances of the successful candidate retaining the confidence of Parliament, the children's rights sector and children and young people for the length of their term.

With regard to the Children's Commissioner's term of office, in recommending a single 7 year term John Dunford was intending to avoid the potential conflicts of interest for the Commissioner that might arise during the period before his or her possible re-appointment.

We are aware, however, that a 7 year term is a long period for a Commissioner to remain in office if he or she is having little impact. We do not intend to change the circumstances in which the Secretary of State can remove the current Children's Commissioner, as set out in Schedule 1 of the Children Act 2004.

These give the Secretary of State the power to remove the Children's Commissioner if he is satisfied that: the Children's Commissioner has become unfit or unable to properly discharge his or her functions; or has behaved in a way that is not compatible with him or her continuing in office. The arguments for a single 7 year term or retaining a 5 year term with the option of re-appointment are, therefore, finely balanced and we would welcome your views on this issue.

Q7) Do you agree that the Children's commissioner should be appointed for a single, fixed term, without the possibility of reappointment?

X Yes

No

Not Sure

Comments:

We agree with John Dunford that a single, long term is the best way of guaranteeing the independence of the Children's Commissioner.

Q8) Should the duration of the Children's Commissioner's appointment be i) seven years, ii) six years or iii) five years. Please explain the reasons for your preference?

Seven Years

Six Years

Five Years

Other

Comments:

Given that Parliaments are to be of a fixed, five year length, we believe that seven years would be the best duration as it would allow the Children's Commissioner to operate without becoming ensnared by short term political concerns, further guaranteeing the independence of the office.

In considering the governance arrangements for the Children's Commissioner, the challenge for John Dunford was to balance the competing demands for the OCCE to be both: more visibly independent from government (see above); but also more accountable for the impact it has. John Dunford recommended that there should in future be more parliamentary scrutiny of the extent to which the OCCE had achieved its objectives. He also suggested that an

appropriate Select Committee should call the Children's Commissioner to give evidence on its achievements and to set out which areas they intended to focus on in future.

As indicated in the section on 'Powers and Duties', we are proposing to place a duty on the Children's Commissioner to submit an annual report to Parliament. It will then be open to Parliament to scrutinise the OCCE's annual report. John Dunford argued that submitting reports direct to Parliament would raise its profile and envisaged that one or more Select Committees might want to debate the issues raised in the Children's Commissioner's report. He also envisaged that the Children's Commissioner might be asked to appear before Select Committee(s) to discuss the OCCE's performance, or to give evidence in other inquiries where children's rights issues were relevant.

DfE Officials will work with the parliamentary clerks to achieve a clearer understanding of how these arrangements might work in practice. Parliament's response will necessarily depend on the nature and volume of other parliamentary business and so may vary from session to session. For this reason it is not appropriate to prescribe the arrangements in legislation.

An important part of the new governance arrangements is the establishment of an advisory board. The board would serve a number of purposes. First, it would protect the Children's Commissioner from the sense of isolation that John Dunford identified. Second, it would help the Children's Commissioner to identify what the OCCE's key objectives (and supporting performance indicators) should be in the coming year, bringing greater transparency to the OCCE's business planning processes. And third, it would provide a greater degree of challenge to the decisions made by the Children's Commissioner - although John Dunford was clear that the board should not be able to direct the Children's Commissioner, as this would compromise his or her independence.

John Dunford recommended that the membership of the board should comply with Paris Principles and that Parliament should have a role in the process. Our proposal is that while the Secretary of State should formally appoint the chair and members, others should have a say in the make-up of the board. We are not intending to set out how appointments to the board will be made in legislation, but propose that the Secretary of State would invite:

- Parliament to nominate the chair (thus bringing a greater degree of independence/accountability) and two other members;
- NGO organisations to nominate two members ;
- Children and young people to nominate two members;
- The Children's Commissioner to nominate two members.

The Secretary of State would appoint two further representatives and the Children's Commissioner would also be a member of the advisory board in his or her own right. We also propose that one or more members of the advisory board should have expertise in the needs and interests of children in care. The questions at the end of this section seek views on how best to manage the nominations process set out in the paragraph above.

We are proposing that the members of the advisory board would not have executive functions and the Children's Commissioner - rather than the board - would be responsible for the OCCE's performance. Nevertheless, the members of the board could bring expert knowledge and experience that would help to improve the decisions made by the Children's Commissioner.

Q9 a) Do you agree that the proposals set out are the right ones for making the new Children's Commissioner more accountable?

Yes

X No

Not Sure

Comments:

As noted above, we are opposed to the creation of a statutory advisory board.

We support the proposals for making the Commissioner more accountable to Parliament. However, given that those under the age of 18 are not able to vote for Members of Parliament, it is important that they are able to hold the Commissioner to account in other ways. To this end, we suggest that a child friendly annual report is distributed to schools and other venues.

With regard to funding, while we recognise that the Government has had to make tough spending decisions, surely a country as wealthy as the UK should be able to spend more than 14p per child (the second least in the world) on a Children's Commissioner. We believe that legislation should require Parliament to set a budget that allows the OCCE to carry out its functions over a specified period (three years would be most sensible). The budget setting process should include contributions from across Government departments as well as from children and children's rights organisations. We suggest that the Government learns from the Republic of Ireland and New Zealand where Parliaments are already involved in setting budgets.

Q9 b) Do the proposals represent a fair and balanced approach to determining the membership and role of the advisory board?

Yes

X No

Not Sure

Comments:

As noted above, we are opposed to the creation of a statutory advisory board which we believe would be confusing, expensive and unrepresentative of the wider sector.

Rather than limiting consultations to a small advisory board, it would be far better to require the Children's Commissioner to consult with children and children's rights organisations on the development of a strategic plan. In addition, the Government should retain the duty in Section 2(4)(b) that requires the Commissioner to consult with children's organisations and children on matters they propose to consider or research.

Q9 c) What should the process be for nominating the two NGO representatives?

Comments:

As noted above, we are opposed to the creation of a statutory advisory board which we believe would be confusing, expensive and unrepresentative of the wider sector.

Q9 d) What should the process be for nominating the two children and young people representatives?

Yes

No

Not Sure

Comments:

As noted above, we are opposed to the creation of a statutory advisory board which we believe would be confusing, expensive and unrepresentative of the wider sector.

It would be far better to harness the expertise of Children England's members and other organisations that have decades of experience in engaging children and young people in governance arrangements and would be more than happy to support the new OCCE.

John Dunford argued that, in principle, the four Children's Commissioners in the UK should each be responsible for all matters relating to the rights of children and young people who normally reside in their countries - in other words, that the role of the Commissioners in Northern Ireland, Scotland and Wales should extend to non-devolved matters. This could potentially cover a wide range of matters but is most likely to include, for example, rights issues in relation to asylum and border controls, policing, youth justice and custody arrangements and the armed forces.

We accept the principle behind this recommendation, although we are still working out the most practical way to proceed. There is not an obvious legislative solution, as each of the four Children's Commissioners has a slightly different set of functions and powers. It is for Parliament in Westminster to legislate on non-devolved matters rather than the devolved administrations, and any transfer of powers could impact on the terms of the devolution settlements. Discussions are continuing with the devolved administrations to identify a workable solution. Meanwhile, the four Commissioners are already working together and integrating their activities more closely so that some of the practical difficulties John Dunford reported are already being addressed.

Q10) Can you give us any practical examples of children's rights issues that have arisen in the context of non-devolved matters, where the involvement of the Children's Commissioner for Northern Ireland, Scotland or Wales might have been helpful?

Comments:

We wholeheartedly support the proposal to give the Children's Commissioners in Northern Ireland, Scotland and Wales responsibility for non-devolved issues. This is undoubtedly in the best interests of children and to some extent, reflects what is already happening in practice. Although the Commissioners have generally been able to work on non-devolved issues without too much hindrance, it would clearly be better for these powers to be placed on a statutory footing.

Northern Ireland

The Northern Irish Commissioner has made recommendations to the UK Border Agency (UKBA) based on work she has undertaken in relation to "newcomer children".

Scotland

Similarly, the Scottish Commissioner has worked closely with the UKBA on cases related to asylum seeking children in Scotland. The Commissioner has also recently published a report on child trafficking in Scotland which made a number of recommendations to the UK Government.

Wales

The Welsh Commissioner has also been able to deal with non-devolved issues despite responsibility for these technically residing with the English Commissioner (though with only limited powers).

More generally, the four UK Commissioners have developed a good working relationship and have made joint statements on specific issues, including making a joint submission to the UN Committee on the Rights of the Child during the last inspection in 2008.

John Dunford argued that having an independent Children's Commissioner for England, with a statutory role of promoting and protecting children's rights, was essential in order for the Government to be compliant with the UNCRC. The new OCCE legislation will ensure that the Children's Commissioner's role meets those conditions. It is important, however, that we do not view the changes we are proposing to make through the OCCE legislation as the only action that could be taken to strengthen the Government's implementation of the UNCRC

Q11) What other practical steps could the Government take to demonstrate its commitment to the UNCRC?

Comments:

We believe that the Government should start by analysing the progress it has made in implementing the 118 recommendations made by the UN Committee on the Rights of the Child in 2008. According to CRAE's 2010 report, significant progress has been made on only 19 of these.

The Government should also be mindful of the impact that its deficit reduction strategy will have on children. By reducing spending on public services and benefits, it is inevitable that those vulnerable groups that rely most on this support will experience the greatest negative consequences. Similarly, moves to free local authorities from regulations have also hurt the cause of children's rights. For example, local authorities are no longer required to reflect the UNCRC in their Children and Young People's Plans.

Although this is by no means a comprehensive list, we believe that the implementation of the following three policies would show the Coalition's commitment to the UNCRC:

- A public sector children's rights duty that requires public authorities to have regard to the need to do the following when carrying out their functions:
 - uphold children's rights
 - actively seek and give due weight to the views of children in all matters affecting them
 - take such steps as are appropriate to promote knowledge and understanding amongst children and adults of the Convention on the Rights of the Child and its Protocols
 - ensure mechanisms are in place to investigate and rectify any violations of children's rights without undue delay
 - ensure children are provided information and assistance about making representations and protecting their rights
 - inform children of the role and function of the Children's Rights Commissioner
- A duty on the OCCE to publish a statutory code of practice in relation to the public sector children's rights duty
- A power for the Commissioner to require a response to their recommendations following a children's rights impact assessment (modelled on the existing power in Section 3(7) of the Children Act 2004 in relation to inquiries)

Thank you for taking the time to let us have your views. We do not intend to acknowledge individual responses unless you place an 'X' in the box below.

Please acknowledge this reply

Here at the Department for Children, Schools and Families we carry out our research on many different topics and consultations. As your views are valuable to us, would it be alright if we were to contact you again from time to time either for research or to send through consultation documents?

X Yes No

All DfE public consultations are required to conform to the following criteria within the Government Code of Practice on Consultation:

Criterion 1: Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2: Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3: Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4: Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5: Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6: Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7: Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

If you have any comments on how DfE consultations are conducted, please contact Carole Edge, DfE Consultation Co-ordinator, tel: 01928 438060 / email: carole.edge@education.gsi.gov.uk

Thank you for taking time to respond to this consultation.

Completed questionnaires and other responses should be sent to the address shown below by 29 September 2011

Send by post to:

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