

**A Review of the  
Duties and Powers of the  
Northern Ireland Commissioner  
for Children and Young People**

**by  
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## Contents

02	<b>Executive Summary</b>
05	<b>Introduction</b>
05	<b>Methodology</b>
06	<b>The history of the 2003 Order</b>
07	<b>The history of NICCY</b>
07	<b>Children’s Commissioners elsewhere in the UK and Ireland</b>
09	<b>Other human rights bodies in Northern Ireland</b>
09	<b>The Commissioner for Children and Young Persons (NI) Order 2003</b>
10	<b>Duplication clauses in the 2003 Order</b>
12	<b>The evolution of duplication clauses in the 2003 Order</b>
13	<b>Other duplication clauses in Northern Ireland</b>
13	<b>The powers of GB Commissioners</b>
13	<b>Wales</b>
16	<b>Scotland</b>
17	<b>England</b>
18	<b>‘Functions’ in Northern Ireland</b>
19	<b>The use of powers by NICCY</b>
21	<b>Discussion on duplication clauses and three scenarios</b>
22	<b>General issue duplication clauses</b>
27	<b>Personal issue duplication clauses</b>
28	<b>Remit duplication clauses</b>
33	<b>The Northern Ireland Ombudsman</b>
37	<b>Consideration of duplication clauses in the legislation of the GB Commissioners</b>
39	<b>Conclusions on duplication clauses</b>
40	<b>A cooperation model</b>
43	<b>Memoranda of Understanding</b>
45	<b>A duty to consult</b>
46	<b>A power to cooperate</b>
47	<b>A duty to cooperate</b>
47	<b>Recommendations on duplication clauses</b>
48	<b>Powers of investigation</b>
50	<b>Article 3 – ‘child or young person’</b>
52	<b>Article 4 – ‘relevant authority’</b>
53	<b>The position concerning non-devolved matters</b>
58	<b>Rights versus best interests</b>
60	<b>NICCY’s power to bring cases to court</b>
61	<b>NICCY’s power to intervene in court proceedings</b>
61	<b>Access to material made available in court proceedings involving children</b>
62	<b>Imposing a duty on government to respond to NICCY’s reports</b>
64	<b>Independence, the Paris Principles and the ENOC standards</b>
67	<b>Summary of recommendations</b>

## **Executive summary**

We were commissioned by the Northern Ireland Commissioner for Children and Young People (NICCY) in September 2012 to conduct a review of her organisation's duties and powers. The review is intended to inform the report which the Commissioner will be submitting to the Office of the First Minister and Deputy First Minister (OFMDFM) in compliance with Article 24 of the Commissioner for Children and Young People (NI) Order 2003. Our report is a sequel to the one we submitted in 2006, which in turn informed the Commissioners' Article 24 report in 2008.

We conducted the review by talking to a range of people, including the Commissioner and some of her staff, the Commissioners in England, Scotland and Wales, NICCY's Youth Panel, and representatives of children's sector organisations in Northern Ireland. We also consulted a range of documents, including NICCY's own publications, legal advice it has previously received, regional and national legislation, and international standards on human rights and on human rights institutions.

After summarising the history of both the 2003 Order and NICCY itself, as well as the main features of the other Children's Commissioners in these islands and other human rights bodies in Northern Ireland, the review closely analyses a range of Articles in the 2003 Order and assesses whether they confer clear and effective duties and powers on the Northern Ireland Commissioner.

The review examines at length the 'duplication clauses' in Articles 9, 10, 11, 12, 13 and 15 of the 2003 Order. We distinguish between 'remit duplication clauses' in Articles 9, 10 and 12, 'general issue duplication clauses' in Articles 11 and 15, and 'personal issue duplication clauses' in Articles 13 and 15. Collectively they mean that in many situations the Northern Ireland Commissioner cannot exercise her powers if some other person or body has the same powers. We compare the provisions with those found in the legislation governing the work of the Children's Commissioners in England, Scotland and Wales. We assess their effect on NICCY's work in setting strategic objectives (the first type of scenario), in collaborating with other bodies (the second type of scenario), and in reacting to work carried out by other oversight bodies (the third type of scenario).

In relation to all three types of duplication clause we conclude that they render the work of NICCY much less effective than it could otherwise be in all three types of scenario. We therefore recommend that the 2003 Order be amended so as to delete the duplication clauses in Articles 9, 10, 11, 12, 13 and 15. In addition we suggest that the Order should be amended so as to allow NICCY to cooperate with other public bodies charged with the protection of children's rights and interests. We recommend that NICCY should enter into more Memoranda of Understanding with these bodies (such as the Equality Commission for Northern Ireland) and that when it is exercising its powers under Articles 9, 10 and 12 it should have both a duty to consult (or possibly a power to consult) and a power to cooperate with other relevant bodies (such as the Northern Ireland Ombudsman and the Police Ombudsman). We repeat our 2006 recommendation that the Commissioner's powers of formal investigation (under Articles 16-23 and Schedule 3) should apply across the range of the Commissioner's

investigatory and complaint assistance powers, and that the relevant authorities listed in Part II of Schedule 1 should also be subject to the full range of the Commissioner's formal investigation powers.

Given the variety of ways in which young people aged 18 to 20 can become vulnerable, we recommend that NICCY's powers be extended to allow it to at least give advice to any young person up to the age of 21 who is in a vulnerable situation in Northern Ireland. We also suggest that the Commissioner should *consider* exercising her powers under Articles 3(6)–(8) of the 2003 Order in order to assist adults who wish to provide information about the abuse they suffered as children to the Inquiry into Historical Institutional Abuse in Northern Ireland. We accept, however, that she may conclude that adequate assistance to such adults is already available through other sources.

We have considered the list of 'relevant authorities' in the 2003 Order and have concluded that it needs to be reviewed and redrafted in order to reflect the effects of the devolution of justice and policing to the Northern Ireland Assembly and to ensure that no child or young person can slip through the protective net of NICCY's powers and duties.

As regards NICCY's need to work on matters that are 'reserved' or 'excepted' under the Northern Ireland Act, we accept that this may best be provided for, for the time being at least, by an enhanced Memorandum of Understanding between the four Children's Commissioners in the UK. But to cater for the possibility that such a Memorandum may at some future date prove inadequate, we recommend that the 2003 Order should in due course be amended so that it makes clear that NICCY's remit extends to all children and young people residing in Northern Ireland. This would be in line with the wishes of the current UK coalition government. In the event that such an amendment proves unacceptable to the UK government, NICCY should be empowered to seek the consent of the Children's Commissioner for England to undertake work relating to the activities in Northern Ireland of UK-wide authorities such as the UK Border Agency or the Home Office, and the 2003 Order should require the Children's Commissioner for England not to unreasonably withhold such consent.

To help improve its effectiveness, and to emphasise that NICCY's prime concern is the human rights of children and young people, the 2003 Order should be amended to require the Commissioner to have regard to the full range of international human rights treaties which have been ratified by the UK. In respect of Convention rights – which are guaranteed by the Human Rights Act 1998 – we strongly recommend that the 2003 Order be amended so as to permit NICCY to take cases to court concerning the Convention rights of children and young people even though NICCY itself is not a 'victim' of a violation of those rights. This is a long overdue reform which would put NICCY on the same playing field as the Northern Ireland Human Rights Commission. We do not think any change needs to be made to NICCY's power to intervene in court proceedings, but we would urge NICCY to write to the Rules Committees for various courts in Northern Ireland asking them to issue rules exempting NICCY from

contempt of court laws if specified information relating to family proceedings held in private is disclosed to NICCY.

We recommend that the 2003 Order should be amended so as to require NICCY to produce an Annual Report on the progress being made by the Northern Ireland Executive as regards the protection of the rights and best interests of children in Northern Ireland. The 2003 Order should also be amended so as to require the Northern Ireland Executive to lay before the Northern Ireland Assembly a response to each of the points raised in these annual reports.

We reiterate the 14 recommendations made in our 2006 report which are designed to ensure that the 2003 Order is fully compatible with relevant international standards concerning children's rights institutions. We do not consider any of those recommendations to be inconsistent with recommendation made in this report; indeed they complement them.

## **Introduction**

Article 24 of the Commissioner for Children and Young People (NI) Order 2003 requires the Commissioner to make a report on the working of the Order to the Office of the First Minister and deputy First Minister (OFMDFM) as soon as practicable after the third anniversary of the Order being made, which was on 27 February 2003. In 2006 the authors of the present report were asked to prepare a review of the Order which later became part of the Commissioner's report under Article 24 that was forwarded to the OFMDFM in 2008. Despite several requests made by NICCY to the OFMDFM for a response to its 2008 Report, none was ever issued.

The 'Putting Children First' Alliance, a group established in 2000 to campaign for (amongst other things) the creation of an independent human rights institution for children, also fed into that review process: in 2002 it commissioned a report from Professor Christopher McCrudden on the compatibility of the then draft Commissioner for Children and Young Persons Bill with the UN's Paris Principles on National Human Rights Institutions, and in 2006 it published an independent review of the 2003 Order written by Ms Deena Haydon.

Article 24 also requires the Commissioner to make a subsequent report to OFMDFM at some time after the elapse of three years since the making of the first report. The present review has been prepared at the Commissioner's request to assist her in making that subsequent report, which Junior Ministers in the OFMDFM have suggested is now required. We were appointed in September 2012 and contracted to submit our review by the end of 2012. Principally on account of delays we encountered in trying to arrange interviews and meetings with various consultees, the report was not submitted until February 2013.

We were asked to take into account the views of the Commissioner and of relevant senior staff regarding those provisions in the Order which frustrate NICCY's work or prevent it from making the best use of its powers. In addition we were asked to compare the 2003 Order with the legislation governing Children's Commissioners elsewhere in the United Kingdom and other human rights bodies in Northern Ireland. We were directed as well to consider the UN's Paris Principles and NICCY's status as a non-departmental public body (NDPB). Finally, we were also asked to include measures that we considered necessary to reinforce NICCY's unique remit. We interpreted our brief to be to focus on the adequacy of the legislation governing NICCY, not on the ways in which NICCY has chosen to make use of that legislation to date.

## **Methodology**

The starting point for this review is the review which we undertook in 2006. There, we conducted a comprehensive analysis of NICCY's powers, both generally and particularly from the perspective of the Paris Principles. In the current review, we have been asked to concentrate on a range of matters. The first key issue is what we described in the 2006 review as the 'residual clauses' in the 2003 Order, such as those in Articles 11, 12, 13 and 15. In light of our comparative work, we have renamed these Articles as 'duplication clauses' to reflect the fact that they endeavour to reduce

or prevent the use of NICCY's powers where there is perceived duplication with the duties and powers of other bodies. We have also re-examined NICCY's powers of formal investigation under Articles 16, 17 and 18 of the Order.

In addition we have looked at a range of other issues which have affected NICCY's work during the past six years. These include the meaning of the term 'relevant authorities' in the Order, the position of NICCY in relation to 'victim status' under the Human Rights Act 1988 and the respective roles of NICCY and the English Commissioner concerning 'excepted matters'. A further point is the requirement in Article 6(2)(b) of the Order that 'the Commissioner's paramount consideration shall be the rights of the child or young person' in situations where the 'best interests' of children or young people may not appear to coincide with their rights. We have also been asked to examine NICCY's power to bring, and intervene in, court proceedings under Article 14 of the Order, a specific issue around access to family proceedings and a possible duty on government to respond to NICCY's reports.

As part of this review, we have interviewed the Commissioner and NICCY's Chief Executive and other officers across the three teams in the Office. We have also held workshops with the children's sector and with NICCY's Youth Panel. We have visited the Offices of the Scottish, English and Welsh Commissioners and held interviews with the Scottish Commissioner, the English Commissioner and Deputy Commissioners and senior officers of the Office of the Welsh Commissioner. We also attended NICCY's inaugural Annual Children's Rights Event in November 2012. We have of course considered NICCY's Annual Reports and its Corporate Plan for 2011-14, as well as numerous other documents generated by the organisation. The staff and Commissioner at NICCY have been extremely helpful in providing us with all the information we asked for. We would like to record our particular appreciation to Colette McIlvanna, who has been exceptionally cooperative throughout.

### **The history of the 2003 Order**

Following the Belfast (Good Friday) Agreement of 10 April 1998, devolution formally occurred in Northern Ireland on 2 December 1999, when the Northern Ireland Executive was constituted. One of the departments created as part of the Executive was the Office of the First Minister and deputy First Minister, and one of the responsibilities allocated to that Office was the rights of children. Around the same time a campaign was established within civil society for the creation of an independent office – though funded by the Executive – to oversee the extent to which children's rights are protected in Northern Ireland. A Private Members' Bill to that effect was brought before the Northern Ireland Assembly by Professor Monica McWilliams, an MLA representing the Women's Coalition, but soon afterwards that Bill was superseded.

On 29 January 2001 the OFMDFM announced that the Executive itself intended to establish a Commissioner for Children for Northern Ireland as part of a wider children's strategy. Following discussions within non-governmental forums on the role and remit of the Commissioner, and on the appropriate appointment and accountability mechanisms, a formal consultation paper was issued by the OFMDFM on 9 August 2001, with responses due by 8 November 2001. In reaction to the



responses to that paper, the Executive agreed to publish a draft Assembly Bill on the matter, together with explanatory notes on the Bill's 28 clauses and three Schedules. This was introduced to the Assembly on 24 June 2002 but unfortunately did not complete its stages in the Assembly before the Northern Ireland Executive was suspended in October 2002. When it appeared that the suspension might continue for some time, the Northern Ireland Office decided, as part of the direct rule mechanism which operated in place of the Executive, to make provision for the proposed Commissioner through an Order in Council at Westminster instead. The content of the Order, however, was almost identical to that of the draft Bill. The Order was briefly debated in the House of Lords in early 2003; in the House of Commons it was agreed without debate; it was officially made on 27 February 2003.

### **The history of NICCY**

The first Commissioner for Children and Young People was Mr Nigel Williams, who took up the post in October 2003. He was previously the Chief Executive of Childnet International, an organisation he founded in 1995. Very sadly, Mr Williams died of cancer just two-and-a-half years into his role, in March 2006. NICCY's then Chief Executive, Mr Barney McNeany, served as Acting Commissioner until a permanent replacement was appointed in January 2007, Ms Patricia Lewsley (now Lewsley-Mooney). Ms Lewsley-Mooney, a former MLA who represented the Social Democratic and Labour Party, was reappointed for a second four-year term in March 2011.

We have already explained that NICCY was subjected to a review in 2008. In addition, in 2010 PricewaterhouseCoopers prepared a review of NICCY for the OFMDFM, in compliance with Treasury Guidance that a comprehensive review of Executive NDPBs should be conducted at least once every three years. An earlier such review had taken place in 2007. We have been provided with a copy of the 2010 review, which focuses on the impact the current Commissioner had made since taking up the post in 2007. More particularly, it considers how effectively the Commissioner has performed against aims, objectives, impact assessments and key targets, and how the Commissioner's services should be delivered in the future. The 2010 review did not specifically address the adequacy of the Commissioner's legislative powers and duties.

As of 1 January 2013 NICCY employed 26 full-time equivalent staff. Its budget for 2012-13 is £1,475,000.

### **Children's Commissioners elsewhere in the UK and Ireland**

There are similar bodies to NICCY in other parts of the United Kingdom and in the Republic of Ireland. But the extent of their duties and powers differs in each case, and in each of the jurisdictions, consideration is currently being given to how children's rights can be more effectively protected through law.

The Children's Commissioner for Wales was the first to be appointed in the United Kingdom. The office was created as a result of a recommendation made by Sir Ronald Waterhouse in the report of his inquiry into child abuse in north Wales, published in 2000. The governing legislation is the Care Standards Act 2000, as amended by the



Children's Commissioner for Wales Act 2001. Peter Clarke, the first Commissioner, took up the post in 2001. After his death in 2007 he was succeeded in 2008 by Keith Towler, who is still in office. In 2004 the Welsh Assembly resolved to make the UN Convention on the Rights of the Child its overall framework for children and young people's policy. Exercising its new devolved powers resulting from the Government of Wales Act 2006 and from the referendum on increased powers for the Assembly in March 2011, the Welsh Assembly passed the Rights of Children and Young Persons (Wales) Measure 2011, which imposes a duty on all Welsh Ministers to have due regard to the UN Convention on the Rights of the Child. A Scheme indicating how this duty will be implemented was approved by the Welsh Assembly on 27 March 2012. From 1 May 2012 to 30 April 2014 the duty will apply when Ministers are planning and developing new legislation or policy, or reviewing existing legislation or policy. Thereafter it will apply to all ministerial functions. On 31 January 2013 the Welsh Government issued its first report on how its Ministers have exercised their duty so far.

In Scotland the Commissioner for Children and Young People is governed by the Commissioner for Children and Young People (Scotland) Act 2003. The first Commissioner was Kathleen Marshall, who served from 2004 to 2009. She was succeeded in May 2009 by Tam Baillie, whose term was renewed in 2011 until 2017. With an eye to what had taken place in Wales, in September 2011 the Scottish government issued a consultation paper in which it proposed the introduction of legislation placing a duty on all Scottish Ministers to have due regard to the UN Convention on the Rights of the Child and its Optional Protocols.<sup>1</sup> The current position of the Scottish government, according to its website, is to introduce a Bill in the Scottish Parliament early in 2013 which will 'embed the rights of children and young people across the public sector in line with the United Nations Convention on the Rights of the Child'. The Bill will impose duties on the Scottish government to take steps to further the rights of children and young people and to promote and raise awareness of the UN Convention. It will also require the wider public sector to report on what it is doing to take forward realisation of the rights set out in that Convention. And it will extend the powers of Scotland's Commissioner for Children and Young People to undertake investigations on behalf of individual children and young people. There is also a Children's Commissioner for England, who exercises functions conferred by the Children Act 2004. The first Commissioner, who served from 2005 to 2009, was Professor Sir Al Aynsley-Green. He was followed by Dr Maggie Atkinson. In 2010 a review was conducted of the English Commissioner's office by Dr John Dunford.<sup>2</sup> He pointed out that the Commissioner ought to have greater powers to undertake inquiries and to demand responses from the governments to its recommendations. He also recommended that the Commissioner should make statements about children's issues only if there is evidence to substantiate what is said. The UK government announced that it would be accepting most of the recommendations in the Dunford Review and it has since published proposals to that end which were introduced in the House of Commons on 4 February 2013 in the form of the Children and Families Bill.

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<sup>1</sup> *Consultation on the Rights of Children and Young People Bill*, para 73.

<sup>2</sup> *Review of the Office of the Children's Commissioner (England)*, Cm 7981.

In Ireland there is an Ombudsman for Children, appointed under the Ombudsman for Children Act 2002. Ms Emily Logan was appointed as the first such Ombudsman in 2004 and in 2009 she was re-appointed for a second six-year term. On 12 November 2012 the people of Ireland voted by 58% to 42% to amend the country's Constitution so as to strengthen the rights of children.

### **Other human rights bodies in Northern Ireland**

There are at least three other statutory bodies which have a human rights remit in Northern Ireland: the Northern Ireland Human Rights Commission (NIHRC), the Equality Commission for Northern Ireland (ECNI) and the Commissioner for Older People in Northern Ireland.

The NIHRC is a body provided for by the Belfast (Good Friday) Agreement of 1998. It was established on 1 March 1999 and is governed by provisions in the Northern Ireland Act 1998 (sections 68-72 and Schedule 7). After considerable lobbying by the Commission from 2001 onwards, the Northern Ireland Office eventually agreed to extend its powers, doing so through amending the 1998 Act by provisions in the Justice and Security (NI) Act 2007. On 1 January 2013 the NIHRC had one full-time Chief Commissioner, seven part-time Commissioners (devoting, on average, one day per week to their Commission responsibilities) and 16 full-time equivalent staff. In 2012-13 its grant from the UK government is £1,548,000.

The ECNI is also a body which emerged out of the Belfast (Good Friday) Agreement. It performs functions associated with the equality duties imposed on public authorities by the Northern Ireland Act 1998 (section 75 and Schedule 9) and it merges the anti-discrimination functions formerly carried out by the Equal Opportunities Commission for Northern Ireland (on gender equality), the Fair Employment Commission of Northern Ireland (on discrimination based on religious belief or political opinion/community background), the Commission for Racial Equality of Northern Ireland, and the Northern Ireland Disability Council (section 73 and Schedule 8). On 1 January 2013 the ECNI had a full-time Chief Commissioner, one part-time deputy Chief Commissioner, and 14 part-time Commissioners (also devoting, on average, one day per week to their responsibilities). In the financial year 2011-12 the Commission employed 142 staff and had a budget from the OFMDFM of £6,525,000.

The Commissioner for Older People for Northern Ireland is the newest of the statutory bodies. The office was created by the Commissioner for Older People (NI) Order 2011 and the first Commissioner (Ms Claire Keatinge) was appointed in November 2011. Her principal function is to safeguard and promote the interests of older people and in doing so she must have regard to the UN Principles for Older Persons of 1991. On 1 January 2013 the office comprised a full-time Commissioner and 12 temporary full-time staff. Its budget for 2012-13 is £988,000 and within that budget it is seeking approval from the OFMDFM to increase its complement of staff to 17 later this year.

### **The Commissioner for Children and Young People (NI) Order 2003**

The 2003 Order comprises 27 Articles and three Schedules. After some introductory and interpretative provisions (arts 1-4), there are provisions establishing the Commissioner and stating his or her principal aim (arts 5-6), setting out the

Commissioner's functions (arts 7-15), providing for formal investigations (arts 16-23), and requiring a review of the Order and making some supplementary points (arts 24-27). Schedule 1 expands upon the term 'relevant authorities'; Schedule 2 gives more details on the status, powers, tenure of office, salary and staff etc of the Commissioner; Schedule 3 contains additional provisions relating to some non-formal investigations.

### **Duplication clauses in the 2003 Order**

In our 2006 review we examined in some detail what we are now calling the 'duplication clauses' in the 2003 Order. Nearly every statutory power in the Order is subject to such a clause. Article 6 sets out the 'Principal aim of the Commissioner'. Under the heading 'Functions of the Commissioner', Article 7 sets out the 'Duties of the Commissioner' and Article 8 sets out the 'General powers of the Commissioner'. The first substantive set of powers is out in Article 9 which covers 'General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities'. This is reciprocated in Article 10 on 'Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases'. Article 9(4) provides:

*The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements. (emphasis added.)*

Article 10(4) repeats this formulation. We will refer to this category of duplication clause as a 'remit duplication clause', because it precludes NICCY from conducting either a general or an individual review of inspection arrangements if such a review is within the remit of another public body. The test is largely subjective, in that the Commissioner must be 'satisfied' on this remit issue, but there is little room for manoeuvre in this regard given the transparency of statutory arrangements. It is important to note that there are no duplication clauses on reviews of advocacy, complaint or whistle-blowing arrangements, only of inspection arrangements.

Article 11 of the Order covers 'Assistance with complaints to relevant authorities'. Article 11(3) provides:

*The Commissioner shall not provide any assistance to a child or young person under paragraph (1) unless it appears to the Commissioner that there is no other person or body likely to provide such assistance. (emphasis added.)*

Here we have a more limited form of duplication clause in that the Commissioner must establish, again on a largely subjective test, that another person or body is not likely to act on the particular complaint. We are therefore describing these clauses as 'general issue duplication clauses'. However, in one sense, this clause is wider than the remit duplication clauses in Articles 9 and 10. Here, the Commissioner has to consider whether any 'other person or body' is likely to act. These can include not just other public bodies but also advocacy groups, lawyers, advice workers and even concerned individuals.

Perhaps the most significant power at the Commissioner's disposal is set out in Article 12, 'Investigation of complaints against relevant authorities', but here again we find a remit duplication clause. Article 12(2) provides:-

*The Commissioner shall not exercise his power under paragraph (1) in relation to a complaint unless he is satisfied that—*  
*(a) the complaint raises a question of principle; and*  
*(b) the complaint does not fall within an existing statutory complaints system.*

As with Articles 9(4) and 10(4), this is a remit duplication clause, based on the remit of other public bodies acting under statutory complaints systems and it therefore imposes a severe restriction on the Commissioner's powers of investigation.

Article 13, 'Actions which may be investigated: restrictions and exclusions', sets out a series of restrictions associated with legal and tribunal proceedings. Here too there is a duplication clause which states that actions cannot be investigated 'unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the complainant to resort to or have resorted to the right or remedy.' We are terming this a 'personal issue duplication clause', a variation on 'issue duplication' clauses, as the duplication is personal to the potential complainant. Here, the issue for the Commissioner, in exercise of her powers, is whether, on a subjective basis, she comes to the view that a complainant will or will not resort to legal proceedings.

Article 14 involves 'Power to bring, intervene in or assist in legal proceedings'. It is important to appreciate, subject to the issue of 'victim status' under the Human Rights Act, considered below, that there are no duplication clauses in relation to these significant powers.

Article 15, 'Assistance in relation to legal proceedings', provides more significant powers for the Commissioner. Here, there is both a personal issue duplication clause and a general issue duplication clause. In Article 15(2)(b), the Commissioner has to be satisfied that '(b) it would be unreasonable to expect the child or young person to deal with the case without assistance because of its complexity, or because of his position in relation to another person involved, or for some other reason'. This is not a difficult hurdle for the Commissioner to negotiate. Nonetheless, there is also a wide issue duplication clause in Article 15(3), which provides:

*The Commissioner shall not grant an application for assistance under paragraph (2) unless it appears to him that there is no other person or body likely to provide such assistance.*

As with Article 11, the test here is subjective and relates to the particular issue in question, but it is very wide in relation to duplication with other persons or bodies. So we can see, from this brief audit of NICCY's powers, that it is not subject to any duplication clauses in relation to general or individual reviews of advocacy, complaint, and whistle-blowing arrangements of relevant authorities under Articles 9 and 10 of the Order; nor is it subject to any duplication clauses under Article 14, in relation to its power to bring, intervene in or assist in legal proceedings.

NICCY is subject to personal issue duplication clauses in Article 13, ‘Actions which may be investigated: restrictions and exclusions’, and in Article 15(2)(b), ‘Assistance in relation to legal proceedings’.

It is subject to relatively wide-ranging general issue duplication clauses in Article 11(3), ‘Assistance with complaints to relevant authorities’, and Article 15(3), ‘Assistance in relation to legal proceedings’.

The widest remit duplication clauses can be found in Articles 9(4) and 10(4) in relation to NICCY’s powers to conduct general reviews and individual reviews of the inspection arrangements of relevant authorities. We also find a very wide remit duplication clause in relation to NICCY’s powers under Article 12 to investigate complaints against relevant authorities, a function which ought to be central to its work.

### **The evolution of duplication clauses in the 2003 Order**

As already mentioned, the first attempt at Children’s Commissioner legislation in Northern Ireland was a Private Members’ Bill, the Children’s Commissioner Bill 2001, proposed by Monica McWilliams MLA. The Bill set out, in clause 2, ‘Duties and guiding principles’, a wide-ranging remit for the Commissioner, including:

*(b) to seek to ensure that the rights and interests of children are properly taken into account by Ministers of the Northern Ireland Assembly, government departments, local authorities, other public bodies and voluntary and private organisations when decisions affecting children are taken;*

*(c) to promote compliance with the United Nations Convention on the Rights of the Child and other international human rights standards as ratified by Her Majesty’s Government and subject to such reservations as Her Majesty’s Government made on ratification, unless subsequently withdrawn.*

Clause 4 set out ‘Recommendations and compliance notices’, the latter applying, according to clause 4(3), ‘[i]f it appears to the Commissioner that a person is not complying with the provision of the United Nations Convention on the Rights of the Child and other international human rights standards as ratified by Her Majesty’s Government...’

Clause 5 set out powers in relation to ‘Following up recommendations’ and Clause 6 dealt with ‘Investigations’. Clause 8, ‘Other powers and functions’, included the power to:

*(c) give assistance to a child or person acting on behalf of a child, which may include giving advice (including legal advice) or arranging for legal advice or for legal representation.*

Clause 9, ‘Legal proceedings and inquiries’, allowed the Commissioner to make representations to public inquiries.

It is significant that the 2001 Private Member’s Bill contained no duplication clauses of any kind.



The Private Members' Bill did not make progress in the Assembly but was replaced by a Bill put forward by the OFMDFM. This Bill was structured in a similar fashion to the 2003 Order. An audit of the duplication clauses in the Bill reveals that the personal issue duplication clauses in Articles 13 and 15 of the Order were set out in the equivalent provisions of the Bill (clauses 9 and 11). General issue duplication clauses equivalent to those in Articles 11 and 15 of the Order were also contained in the Bill (clauses 7 and 11). The remit duplication clause in Article 12 of the Order was already set out in clause 8 of the Bill, but, in clauses 5 and 6 of the Bill, there were no remit duplication clauses in relation to the power to review inspection arrangements, now set out in Articles 9 and 10 of the Order.

### **Other duplication clauses in Northern Ireland**

The most obvious piece of legislation to compare with the 2003 Order is the Commissioner for Older People Act (NI) 2011. Indeed the wording of the 2011 Act was largely based on the 2003 Order. Although there are some minor differences between the two, as far as duplication clauses are concerned they are identical.

The powers of the ECNI and the NIHRC were previously analysed in the review we conducted in 2006. There are some similarities between NICCY's powers and those of the ECNI and NIHRC, particularly on the issue of legal assistance. For example, Article 75(1) of the Sex Discrimination (NI) Order 1976 provides:

*Where, in relation to proceedings or prospective proceedings either under this Order or in respect of an equality clause, an individual who is an actual or prospective complainant or claimant applies to the Commission for assistance under this Article, the Commission shall consider the application and may grant it if it thinks fit to do so on the ground that –*

- (a) the case raises a question of principle, or*
- (b) it is unreasonable, having regard to the complexity of the case or the applicant's position in relation to the respondent or another person involved or any other matter, to expect the applicant to deal with the case unaided, or*
- (c) by reason of any other special consideration.<sup>3</sup>*

Article 75(1) is the basis for Article 15(2) of the 2003 Order. Section 75(1)(b) can be seen as a personal issue duplication clause in this context but not one which is likely to limit those making legal assistance decisions in any of the three bodies. However there are no issue, let alone remit, duplication clauses in the statutory provisions governing the powers of either the ECNI or the NIHRC. Both are creatures of Westminster legislation, the Northern Ireland Act 1998, but some of the predecessors of the ECNI were creatures of devolved legislation and most of its powers are today still derived from devolved legislation.

### **The powers of GB Commissioners**

#### Wales

The first Children's Commissioner legislation emerged in Wales, under the Care Standards Act 2000, amended by the Children's Commissioner for Wales Act 2001.

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<sup>3</sup> For an almost identical provision governing the NIHRC, see the Northern Ireland Act 1998, s 70(2).

Both pieces of legislation are largely enabling statutes, conferring powers to make further regulations. It is therefore not always easy to establish precisely what powers the Welsh Commissioner enjoys, as opposed to powers which the Welsh Assembly may bestow upon him.

The ‘principal aim’ of the Welsh Commissioner is set out in section 72A of the 2000 Act, as amended:

*The principal aim of the Commissioner in exercising his functions is to safeguard and promote the rights and welfare of children to whom this Part applies.*

This is therefore a rights-based approach, augmented by reference to the ‘welfare of children’ as opposed to the reference to the ‘rights and best interests of children and young people’ in the 2003 Order.

The Welsh Commissioner’s powers are set out by Rees,<sup>4</sup> a member of the Thomas Review panel, which conducted a review of the Commissioner’s office in 2008:

*To provide a succinct overview, the Commissioner has an overarching aim of promoting and safeguarding the rights and welfare of children in Wales,<sup>5</sup> and has a range of powers and functions to facilitate this. These include a general power to review the exercise of the functions of devolved bodies so as to consider the extent to which the rights and welfare of children are taken into account (function reviews);<sup>6</sup> a specific power to review the adequacy of complaint, whistleblowing and advocacy procedures of certain public authorities in Wales (arrangement reviews);<sup>7</sup> a power to provide advice and*

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<sup>4</sup> Rees, O, ‘Devolution and the Children’s Commissioner for Wales : Challenges And Opportunities’, Contemporary Wales, 2010, vol 23, pp 52-70, at 56.

<sup>5</sup> Section 72A of 2000 Act, as amended.

<sup>6</sup> Section 72B covers ‘Review of exercise of functions of Assembly and other persons’. It provides:

*‘(1) The Commissioner may review the effect on children to whom this Part applies of – (a) the exercise or proposed exercise of any function of the Assembly, including the making or proposed making of any subordinate legislation; or (b) the exercise or proposed exercise in relation to Wales of any function of any person mentioned in Schedule 2A.’* Schedule 2A sets out a wide range of public bodies in Wales.

<sup>7</sup> *‘(1) The Commissioner may review, and monitor the operation of, arrangements falling within subsection (2), (3) or (4) for the purpose of ascertaining whether, and to what extent, the arrangements are effective in safeguarding and promoting the rights and welfare of children to whom this Part applies.*

*(2) The arrangements falling within this subsection are the arrangements made by the providers of regulated children’s services in Wales, or by the Assembly, for dealing with complaints or representations in respect of such services made by or on behalf of children to whom this Part applies.’*



*assistance to individual children;<sup>8</sup> and a power to undertake inquiries (termed ‘examinations’),<sup>9</sup> where a matter is exceptionally serious, provided that the matter in question raises a question of principle which has a more general application or relevance to the rights or welfare of relevant children than in the particular case concerned. In undertaking examinations, the Commissioner has powers analogous to those of the High Court. Following an amendment made under the Children Act 2004, the Commissioner has the power to enter any premises, other than a private dwelling, for the purposes of interviewing any child accommodated or cared for there. Along with these powers, the Commissioner may consider, and make representations to the Assembly about any matter affecting children’s rights in Wales.*

The Welsh Commissioner therefore has a range of review powers, upon which many of NICCY’s powers may be based. These include ‘service reviews’ under Article 7(3) of the 2003 Order, referred to by Rees as ‘function reviews’, review powers in Articles 9 and 10 (but not over inspection arrangements), powers of assistance as in Articles 11 and 15, and powers of investigation as in Article 12, with formal investigation powers as set out in Articles 16-23.

Section 77 of the 2000 Act covers ‘Restrictions’. Paragraph (1) sets out a ‘legal proceedings’ exclusion:

*This Part does not authorise the Commissioner to enquire into or report on any matter so far as it is the subject of legal proceedings before, or has been determined by, a court or tribunal.*

A key duplication clause is set out in section 77(2) of the 2000 Act:

*This Part does not authorise the Commissioner to exercise any function which by virtue of an enactment is also exercisable by a prescribed person.*

Section 77(2) is therefore a remit duplication clause, but unlike the remit duplication clauses in the 2003 Order, it focuses on the ‘functions’ of other ‘prescribed bodies’ under statutory enactment.

As Rees sets out,<sup>10</sup> “Over the past eight years, all of the Commissioner’s powers and functions have been utilized. A number of reviews have been carried out. These include arrangement reviews into local authority social services departments (2003),

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<sup>8</sup> Section 76 covers ‘Further functions’, including assistance in making complaints and representation. It provides: ‘(1) Regulations may confer power on the Commissioner to assist a child to whom this Part applies – (a) in making a complaint or representation to or in respect of a provider of regulated children’s services in Wales; or (aa) in making a complaint or representation to or in respect of a person mentioned in Schedule 2B or section 73(2B)’.

<sup>9</sup> Section 74 governs ‘Examination of cases’. It states: ‘(1) Regulations may, in connection with the Commissioner’s functions under this Part, make provision for the examination by the Commissioner of the cases of particular children to whom this Part applies’.

<sup>10</sup> Rees, *op cit*, pp 22-23.

and into education departments (2005). In addition, reviews have been carried out relating to the condition of school toilets (2004), disabled children's access to play facilities in local authorities in Wales (2008), unofficial school exclusions (2007), and a scoping exercise on child and adolescent mental health services (2007b). The office has also commissioned research into children trafficked in Wales (2009), and into problems faced by young carers (2009).

Rees comments,<sup>11</sup> "Soon after, however, the Commissioner's powers and functions were broadened under the Children's Commissioner for Wales Act (2001), which amends the provisions of the Care Standards Act (2000). This was the first Wales-only Act to be passed subsequent to the Government of Wales Act (1998), making it constitutionally significant, as well as innovative in its effect. In this sense, as Rawlings points out, the Commissioner 'has served as a flagship of territorial initiative and invention' (Rawlings, 2003<sup>12</sup>)."

It is an interesting point that, in some senses, the establishment of NICCY also reflected "a flagship of territorial initiative and invention" for the NI devolved legislature and administration. Its genesis was a Private Member's Bill by Monica McWilliams MLA, which was developed into a more elaborate regime than the Welsh model in the OFMDFM Bill, albeit that it was an Order in Council which was eventually enacted.

It might therefore be suggested that the NI Assembly and Executive should take pride in the achievement of the establishment of NICCY and take on board proposals to make sure that NICCY can properly exercise its functions.

### Scotland

The Scottish Commissioner's Office is established by the Commissioner for Children and Young People (Scotland) Act 2003. The general function of the Commissioner is set out in section 4(1) of the Act, 'Promoting and safeguarding rights':

*The general function of the Commissioner is to promote and safeguard the rights of children and young people.*

The key power is set out in section 7(1) of the Act, 'Carrying out investigations':

*The Commissioner may carry out an investigation into whether, by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people.*

Therefore, the Scottish Commissioner also has a rights-based mandate. The power of investigation involves 'the rights, interests and views of children and young people'

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<sup>11</sup> Rees, op cit, at p. 23.

<sup>12</sup> Rawlings, R. (2003). *Delineating Wales: Constitutional, Legal and Administrative Aspects of National Devolution*, Cardiff: University of Wales Press.

but is actually a power to investigate ‘due process’ rather like in section 75 of the Northern Ireland Act 1998 or the public sector equality duties in England, Scotland and Wales.

This power of investigation is subject to the following duplication power in section 7(2):

*The Commissioner may carry out such an investigation only if the Commissioner, having considered the available evidence on, and any information received about, the matter, is satisfied on reasonable grounds that*

–  
*(b) the investigation would not duplicate work that is properly the function of another person.*

This is another remit duplication clause but it is broader than that in the Welsh legislation in that it refers to the ‘function of another person’. This is very wide, because it covers the functions of any ‘person’, which could be another public body, whether or not acting under statutory provisions but also any voluntary or private body.

The Scottish Commissioner has made a wide range of significant initiatives but not formally in exercise of his powers. For example, his report, ‘Final report: a RIGHT blether’ (2012) involved an extensive consultation on children’s rights in Scotland. There is also ‘a RIGHT wee blether’ (2012) which focused on the views of younger children in Scotland.

### England

The English Commissioner’s Office is established by the Children Act 2004. The ‘general function’ of the Commissioner is set out in section 2(1) of the Act, which states:

*The Children’s Commissioner has the function of promoting awareness of the views and interests of children in England.*

The English Commissioner’s mandate is therefore not rights-based per se but focuses on ‘the views and interests of children’.

The Commissioner has a specific power under section 3 of the Act, ‘Inquiries initiated by Commissioner’. Section 3(1) provides:

*Where the Children’s Commissioner considers that the case of an individual child in England raises issues of public policy of relevance to other children, he may hold an inquiry into that case for the purpose of investigating and making recommendations about those issues.*

However, this power is also subject to a remit duplication clause in section 3(2), modelled on the Scottish duplication clause:

*The Children’s Commissioner may only conduct an inquiry under this section if he is satisfied that the inquiry would not duplicate work that is the function*

*of another person (having consulted such persons as he considers appropriate).*

As in Scotland, this remit duplication clause is very wide, applying to ‘another person’ rather than just to a public body. However, a significant variation in this remit duplication clause is a requirement to consult with appropriate persons.

Once again, the English Commissioner has made impressive use of her powers. However, there is no explicit recognition of the powers under which she operates. A highly-publicised use of the Commissioner’s powers was the report of the Deputy Commissioner, “I thought I was the only one. The only one in the world The Office of the Children’s Commissioner’s Inquiry into Child Sexual Exploitation In Gangs and Groups” (2012). This report shows that the English Children’s Commissioner can make use of her powers but, even here, it is not clear upon what powers the Deputy Commissioner has exercised her powers.

#### ‘Functions’ in Northern Ireland

It is interesting that the Northern Ireland Executive and Assembly did not adopt this ‘function’ approach in either the issue duplication or remit duplication clauses in the Bill which led to the 2003 Order. Key to the extent of the duplication clauses in the legislation applying in Wales, Scotland and England is the scope of the term ‘function’. This is a classic ‘residual’ approach to duplication clauses. It is not the functions of the respective Commissioners which are at issue but the functions of other bodies, and indeed, other persons.

‘Functions’ is a term included in section 75(1) of the Northern Ireland Act 1998, which states:

*(1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –*

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;*
- (b) between men and women generally;*
- (c) between persons with a disability and persons without; and*
- (d) between persons with dependants and persons without. (emphasis added)*

Section 98(1) of the Act states that ‘functions’ includes ‘powers and duties’ of a public authority. The ECNI’s publication, ‘Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities’ (2010) states at page 29:

*The expression ‘carrying out’ also embraces a wide range of activity. For example, a health authority is carrying out its powers, duties and other functions not just when its employees are performing surgical procedures but also when it is recruiting nursing or medical staff to perform the procedures and procuring the equipment and facilities to enable them to do so. Therefore, the functions covered by section 75 statutory duties include employment and procurement.*

Consequently, the adoption of a ‘function’ approach to remit duplication clauses in the legislation setting up the three GB Commissioners appears to be very wide, although the remit duplication clauses in the Scottish and English legislation appear to be even wider than that in the Welsh legislation, as they refer to the functions of ‘persons’ as opposed only to public bodies operating under statutory provisions.

Nonetheless, the term ‘functions’ is used in different contexts in the Northern Ireland Act and in the legislation governing the GB Commissioners. In section 75, the term ‘functions’ is a key element in the scope of the duty and therefore we can expect it to be interpreted widely. In contrast, the term ‘functions’ in the GB legislation is a key element in a restriction on the use of powers and ought therefore to be interpreted narrowly.

These restrictions are therefore not necessarily a complete impediment to the use of powers by the GB Commissioners. But the inclusion of ‘another person’ in the Scottish and English legislation appears to be unjustifiably extensive, as we explain below in relation to general issue duplication clauses in the 2003 Order.

### **The use of powers by NICCY**

It is clear that, since our previous review in 2006, NICCY is still obstructed in the exercise of the apparently extensive powers in the 2003 Order by the perceived limitations of the various duplication clauses in the Order. The powers of the Commissioners in Great Britain are significantly more limited than those of NICCY but they too are subject to extensive remit duplication clauses.

NICCY’s Corporate Plan for 2011-14 sets out some general objectives. For the purpose of this discussion, the most significant objective is Objective 3: Use of the Commissioner’s powers to challenge breaches of children and young people’s rights. This states as follows:

*The Commissioner has been vested with powers to ensure that the rights of children can be protected through legal challenge if necessary. The Commissioner has the power to bring, intervene in or provide assistance with legal proceedings. In addition our legislation gives us powers of investigation to be used in circumstances where no other statutory body can perform such a role.*

*We will do this through:*

- *Identifying gaps in service provision or legal loopholes through casework.*
- *Scoping child rights abuses to inform SMT decision making on areas for potential investigation if appropriate*
- *Intervening in legal cases which concern children’s rights where we can add value*
- *Taking strategic legal cases, as appropriate to highlight and invoke challenge*
- *Conducting or commissioning research, consultations and/or investigations*
- *Taking or funding legal proceedings as appropriate.*

The 2011-12 Business Plan is no more specific on how NICCY proposes to achieve this objective. Under 'Actions', it states that NICCY will:

*3.1 Continue to seek to identify matters appropriate for investigation by identifying gaps in service provision or legal loopholes through legal and casework function.*

Under 'Targets', it states that NICCY will:

*Continue to maintain an active casework service to provide advice, opinion, direction, analysis and resolution regarding potential breaches of children and young people's rights, which are referred to us by children and young people, parents, carers and others via our casework function and use powers of investigation as and where it is appropriate*

*Intervene where appropriate in legal cases which concern children's rights*

*Take strategic legal cases where appropriate, to highlight potential breaches of children's rights and challenge same.*

In its Annual Report for 2011-12, NICCY sets out its activities in relation to 'Challenging Breaches in Children's and Young People's Rights' as follows:

*One of our key functions is to protect and uphold the Rights of Children, Young People and Parents through our Legal and Casework department – intervening where necessary and appropriate, in line with our legislative remit. In our work we continue to highlight breaches of their rights, identify gaps in service provision and scope 'child rights abuses' to inform NICCY decision making.*

*During this business year the team dealt with 594 enquiries in total. Clients were provided with legal expertise, assistance and advice in addition to resolution where possible through our case work function. In some cases external legal opinions were obtained to help inform clients if/where legal proceedings may have been necessary/appropriate and we also supported clients to take matters forward through the court system.*

The Annual Report goes on to state:

*Issues which arose through casework were also presented to Senior Management Team for joint policy work to advise and influence government as necessary on legislation and policy. An evaluation of our casework function carried out this year revealed a 93% satisfaction rate.<sup>13</sup>*

NICCY has general powers of investigation under Articles 7 and 8 and specific powers of reviews of various arrangements under Articles 9 and 10, powers of assistance in Articles 11 and 15, and powers of investigation under Article 12.

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<sup>13</sup> Annual Report 2011-12, December 2012, p 18.



Reviewing NICCY's publications since 2006, there appear to be three reports based either directly or indirectly on Article 7. These are 'Play and leisure policy and the work of councils in Northern Ireland',<sup>14</sup> 'Barriers to effective government delivery for children',<sup>15</sup> and 'Review of Transitions to Adult Services for Young People with Learning Disabilities',<sup>16</sup>

One report is based on Article 9, 'Who speaks for us? Review of Advocacy Arrangements for Disabled Children and Young People with Complex Needs'.<sup>17</sup>

The powers of investigation under Schedule 3 of the 2003 Order were not invoked in any of these reports. These relate to investigations conducted under Articles 7(3) and 7(11) [see Article 8(4)] or under Article 9 [see Article 9(7)].

Other activities of NICCY are mostly directed towards casework, without the formal invocation of powers, and some limited interventions in, and assistance for, legal proceedings. The following discussion of duplication clauses will show that NICCY encounters significant obstacles and barriers to the formal use of its powers.<sup>18</sup>

#### **Discussion on duplication clauses and three scenarios**

Our recommendation in our 2006 Report on what we then called 'residuary clauses' was as follows:

*It is recommended that all residuary clauses be removed from the NICCY Order and that NICCY be encouraged to enter into Memoranda of Understanding with other agencies responsible for investigations and complaint arrangements to avoid duplication of such arrangements.*

This discussion will focus on what we are now calling 'duplication clauses' in the 2003 Order, with some reference to those in the legislation applying in England, Scotland and Wales. Whatever the extent of powers enjoyed by any of the Commissioners in the UK, there appear to be three types of scenario in which the powers might be exercised. In our 2006 review, we supported the idea that NICCY should be a 'holistic, strategic body' protecting the rights and interests of children and young people. Other reviews of NICCY's work (e.g. by PriceWaterhouseCoopers)

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<sup>14</sup> June 2010.

<sup>15</sup> November 2011

<sup>16</sup> Professor Laura Lundy, Dr Bronagh Byrne and Dr Paschal McKeown, September 2012.

<sup>17</sup> February 2008.

<sup>18</sup> The Scottish Commissioner has not made formal use of his powers under section 7(1) of the 2003 Act. These powers only refer to "children and young people". As stated above, there is a proposal to extend this power to include individual children. However, the Commissioner's powers are subject to an extensive duplication clause and hence it may be difficult for the Commissioner to find circumstances in which he can exercise his powers of investigation.



also believe that NICCY should have clear strategic objectives. We again endorse the view that in all that it does NICCY should be able to exercise its powers in order to achieve its strategic objectives. In terms of what is 'strategic' from NICCY's perspective, we have set out above extracts from its Corporate Plan 2011-14, its 2011-12 Business Plan and its Annual Report for 2011-12.

As regards the type of scenario where NICCY seeks to be proactive in its work, we can see that NICCY's strategic objectives are not subject- or sector-specific. It has not made use of its powers on reviews of various arrangements under Articles 9 and 10, its powers of investigation under Article 12 or its powers of assistance in Article 15. A second type of scenario envisages a combined proactive/reactive situation where NICCY determines that, either in order to achieve its strategic objectives, or in any event, its objectives will be best advanced by way of cooperation or collaboration with other investigatory or regulatory bodies or bodies (and persons) minded to give assistance to children and young people. We will highlight below that NICCY already has a range of Memoranda of Understanding with other bodies. But although they involve cooperation on issues such as coordination of policy formation, they do not involve cooperation on use of powers.

A third type of scenario, which is largely reactive, is where NICCY determines that an investigation or other inquiry by a different body can form the basis for further use of NICCY's powers in order to achieve its objectives.

We will now seek to show that both remit and issue duplication clauses inhibit NICCY from using its powers in each of these three scenarios.

#### General issue duplication clauses

NICCY finds itself in a position whereby many of its powers are residual in nature. This can be as a result of personal issue duplication clauses, discussed below, which may inhibit NICCY in exercise of its powers. However, general issue duplication clauses do severely inhibit the ability of NICCY to pursue its objectives in any of the three scenarios.

NICCY has a unique aim, namely 'to safeguard and promote the rights and best interests of children and young persons'. Where general issue duplication clauses apply, namely in Article 11(3), 'Assistance with complaints to relevant authorities', and in Article 15(3), 'Assistance in relation to legal proceedings', it is difficult to rationalise the basis upon which the powers of assistance should be curtailed by general issue duplication clauses requiring the Commissioner to determine whether any other person is likely to provide such assistance.

NICCY has particular expertise in issues concerning the rights and best interests of children and young people. In the first type of scenario, if the issue upon which NICCY wishes to give assistance lies within its strategic objectives, it is difficult to see upon what basis NICCY should be expected to enter into extensive inquiries, possibly on the basis of Memoranda of Understanding, in order to determine whether some other body is 'likely' to provide such assistance. We cannot see why, if the

ECNI and the NIHRC are not subject to duplication clauses in exercise of their powers of assistance, NICCY should be subject to such clauses.

One way for NICCY to deal with issue duplication clauses in relation to assistance is to enter into a Memorandum of Understanding with other potential providers of assistance. For example, NICCY already has a Memorandum of Understanding with the NIHRC. This does not deal with assistance on complaints to relevant authorities, which is an unlikely activity for the NIHRC, but it does deal with legal assistance.

Paragraph 8 of the Memorandum of Understanding states as follow:

*Where a complaint (or other case work issue, e.g. potential intervention) received by the NIHRC relates wholly or mainly to the human rights or legal rights of a child, the NIHRC will normally advise the complainant to contact NICCY, and may itself contact NICCY to offer its views on the human rights standards engaged. Equally when a complaint received by NICCY relates wholly or mainly to the human rights of adults, or to children's human rights in areas falling outside NICCY's jurisdiction or priorities, NICCY will normally advise the complainant to contact the NIHRC, and may itself contact the NIHRC to offer its views on any issues arising.*

So it can be seen that the NIHRC will normally direct a complaint (or other casework issue) to NICCY, either through advice to the complainant or directly, if 'it relates wholly or mainly to the human rights or legal rights of a child'. In reciprocation, NICCY will do likewise if the complaint 'relates wholly or mainly to the human rights of adults, or to children's human rights in areas failing outside NICCY's jurisdiction or priorities'.

This appears to be a sensible way for both statutory bodies to deal with potential duplication of resources. However, there is no 'equality of arms' between the two bodies. The NIHRC has (virtually) unfettered discretion whether to grant assistance in legal proceedings, whereas NICCY can only do so once a 'likelihood' assessment has been made. Technically speaking, the Memorandum does not cover situations in which the complainant comes to NICCY on a matter which is within the remit of the NIHRC, but, given the undertaking from the NIHRC that it will 'normally' refer children's rights issues to NICCY, it is implicit that NICCY that can make a 'likelihood' assessment on that basis.

The establishment of this Memorandum of Understanding begs a question. If two statutory bodies are able to enter into this sensible arrangement, subject to their respective strategic objectives, financial resources and appropriate oversight of their activities, what is the point of having a general issue duplication clause which inhibits NICCY from carrying out its statutory functions?

NICCY does not, at present, have a Memorandum of Understanding or protocol with the ECNI. In terms of age discrimination, the ECNI has a remit over discrimination in terms of employment and training (including further and higher education). There are proposals to extend the scope of age discrimination legislation into the areas of non-employment, such as goods, facilities and services and the carrying out of public

functions. This extension has already occurred in Great Britain, but unlike under the Equality Act 2010 there, the proposed changes in Northern Ireland may also include young people within their scope.

There are therefore opportunities for an overlap of remit between the ECNI and NICCY on these issues. It might appear that, if the issues are ‘wholly or mainly’ concerned with discrimination, the ECNI might be the more appropriate body to grant assistance. However, in practice, many cases encountered by NICCY are ‘mixed’ issues, and it is arguable that NICCY should not be precluded from including discrimination issues amongst those issues upon which it may wish to grant assistance. There is also an opportunity to develop cooperative working with a body such as the ECNI in these circumstances.

In any event, these are matters upon which NICCY and the ECNI should be able to enter into a Memorandum of Understanding. As with the relationship with the NIHRC, two statutory bodies should be able to develop such a relationship without one of them being inhibited by a general issue duplication clause.

Nor does the ECNI or the NIHRC have to establish whether or not an applicant for legal assistance has obtained, or is likely to obtain, legal aid from the Northern Ireland Legal Services Commission. The ECNI did, at an early stage, take into account the issue of legal aid but decided, as a strategic equality body, that this was not a criterion which should influence its decisions. We are informed that refusal of legal aid is the main criterion taken into account by NICCY in determining the likelihood of other bodies assisting an applicant. However we argue that this is an unnecessary restriction on NICCY’s legal assistance powers.

NHRIs, such as the ECNI and the NIHRC, are frequently seeking to protect the rights of vulnerable members of society and do so without the impediment of duplication clauses. But NICCY is frequently seeking to protect the rights and interests of vulnerable children and young people, who may not be in a position to ‘speak for themselves’. They may be in the criminal justice system, in care or in abusive situations. NICCY may wish to become involved in the issue as a matter of urgency. In these situations, it is difficult to justify a situation where NICCY has to go through the assessments which general issue duplication clauses require, let alone step aside if any other ‘body or person’ is ‘likely’ to provide the assistance. NICCY should be able to pursue its strategic objectives unhindered, taking into account its overall and legal assistance budgets and subject to the scrutiny of its Audit Commission and departmental oversight.

This difficulty is accentuated by the inclusion in general issue duplication clauses of ‘persons’ as well as public bodies. We are left in a situation in which the Commissioner cannot pursue her strategic objectives if a voluntary sector body in the children and young person sector, or an advice body, or even a firm of solicitors, a community group or a ‘concerned individual’ is ‘likely’ to provide such assistance. No doubt bodies such as Law Centre (NI) and the Children’s Law Centre have their own strategic objectives. A charitable or voluntary group such as Barnardos or Include Youth may have strategic objectives which coincide, or not as the case may

be, with those of NICCY. And yet there is understandable concern amongst such groups that NICCY is perceived as not exercising its powers to their full extent.

While NICCY has entered into Memoranda of Understanding with public bodies such as the NIHRC, it appears unrealistic to expect it to do so with voluntary and private bodies and persons, let alone having to do so when it is subject to issue duplication clauses to which other bodies are not subject. In particular, the current arrangements devalue the position of NICCY, in the eyes both of applicants (and their parents and guardians) and of the wider community. On the one hand, NICCY is a statutory body with responsibility for providing forms of assistance to children and young people, yet on the other hand it is effectively placed ‘at the back of queue’ in terms of providing such assistance.

As a strategic body, NICCY ought to be able to utilise its experience and expertise to provide this assistance. In this way, it can set its own agenda and retain control over the exercise of such assistance. In the alternative, if it loses what the Memorandum of Understanding with the NIHRC legalistically calls ‘carriage’ of a case, it may be difficult for it to gain any information on how the case proceeds or its outcome, or to retain an interest in, let alone any influence over, the case. Indeed, it is difficult to see how NICCY can gain a strategic overview of the issues which are being raised, and resolved, in relation to both complaints to relevant authorities and legal assistance if the general issue duplication clauses in Articles 11 and 15 of the 2003 Order reduce its role to that of a ‘signposting’ agency.

NICCY could alleviate some of these difficulties by entering into Information Sharing Protocols with bodies to which cases are referred, such as the one it already has with the Health and Social Care Board. But, in our view, such Memoranda of Understanding and Protocols should be part of a broader cooperation model, whereby NICCY is a ‘first stop shop’ for the protection of the rights and best interests of children and young people in Northern Ireland. As the statutory body established for that purpose, in the same fashion as the ECNI and the NIHRC in their respective spheres, NICCY should be able to take strategic decisions on assistance under Articles 11 and 15 and to maintain an interest in those matters which it chooses to refer to other bodies.

In the second type of scenario (involving cooperation between bodies), we do not envisage situations in which investigatory or regulatory bodies will have functions of ‘assistance’ either in relation to complaints to relevant authorities (under Article 11) or legal proceedings (under Article 15). Rather, we are considering situations in which bodies (or persons) other than NICCY are ‘likely’ to grant assistance in relation to both complaints against relevant authorities and legal assistance. But it is again difficult to rationalise the exclusion of NICCY from contributing to such assistance. There may be problems arising with joint assistance in relation to complaints to relevant authorities, for example concerning the management of such assistance. There may also be issues around the joint financing of legal assistance. But none of these problems is insurmountable.

NICCY should have free rein to add its unique expertise and experience in the pursuit of such assistance. It is certainly difficult to rationalise why NICCY should not become involved in such assistance merely because another NHRI, such as the ECNI or the NIHRC, is also involved. It seems to make even less sense that the statutory body, whose primary aim is ‘to safeguard and promote the rights and best interests of children and young persons’, should be excluded from such assistance because a voluntary or even private sector body or individual is ‘likely’ to provide such assistance.

Our recommendations in this area will focus on the need for cooperation between NICCY and other bodies, so that it can ‘add value’ to the work of others without actually duplicating that work. In our view, the statutory regime on assistance should facilitate such cooperation rather than place significant obstacles in its path. Although the Memorandum of Understanding with the NIHRC involves significant cooperative working on issues such as policy work, we recommend that such cooperative working should also apply to casework involving assistance. However such a model is significantly inhibited by the presence of issue duplication clauses in the 2003 Order. The third type of scenario involves ‘ex post facto’ involvement on the part of NICCY. It envisages a situation in which NICCY might become involved in assistance relating to complaints against relevant authorities, in legal assistance following investigations by investigatory and regulatory bodies, or in other investigations, complaints or legal actions taken by voluntary and private bodies and individuals.

It is not clear how general issue duplication clauses would operate in these circumstances. However, it is essential that NICCY is able to monitor both complaints to relevant authorities and legal proceedings involving the rights and interests of children and young people. As indicated above, this would be difficult to achieve once it has lost ‘carriage’ of a case. If NICCY were able to engage in such follow-up work it would be able to assess trends in complaints and litigation and to determine the strategic importance of those trends. It ought therefore to be in a position to assist with complaints and further litigation, even if it was not initially directly involved in the matter. It is again very difficult to understand why NICCY should not be permitted to make use of its assistance powers under Articles 11 or 15 by utilising its expertise and experience in these ‘aftermath’ situations.

In conclusion, general issue duplication clauses place severe restraints on NICCY’s ability to exercise its powers of assistance in relation to complaints to relevant authorities and to legal assistance. It is particularly inappropriate that it has to assess whether ‘any other person or body [is] likely to provide such assistance’. It is difficult to see how NICCY could possibly be expected to assess the likelihood of voluntary groups, lawyers, advice groups, private bodies and individuals providing such assistance.

Even in relation to statutory bodies, such as the ECNI and the NIHRC, the impediment to assistance presented by issue duplication clauses is difficult to justify. Such bodies have extensive agendas in the fields of human rights and equality and their own strategic objectives. None of them is particularly dedicated to the protection of the rights and interests of children and young people, in relation to which NICCY



has extensive experience and expertise. While it is unlikely, but not impossible, that other bodies would become involved in assistance on complaints to relevant authorities, they are very likely to be actively involved in assistance with legal proceedings. As with NICCY, the ECNI and the NIHRC have Legal Committees which take a period of time before deciding whether to fund a complainant's case. There is no justification for leaving NICCY in a position where it must assess these 'likelihoods', particularly, but not exclusively, when the issues at stake are matters of urgency.

The purpose of duplication clauses is to avoid a waste of public resources and possible conflict between various parties seeking to provide such assistance. But the 'added value' which NICCY can bring by providing such assistance far outweighs any potential duplication costs. NICCY must be free to allocate its resources as it sees fit, subject to budgetary constraints, audit and departmental oversight. NICCY ought to be, and be seen to be, a 'first stop shop' for children and young people. Alternatively, they may be referred to NICCY by other agencies and bodies. Paradoxically, general issue duplication clauses turn NICCY itself into a referral agency. If children and young people (or their parents and guardians) come to NICCY seeking assistance, there is no question of a conflict over that assistance. Indeed, it is general issue duplication clauses which create a potential conflict between NICCY's work and that of other bodies when none should exist in the first place.

We are certainly of the view that there should be the closest cooperation between NICCY and both public and private bodies, but this should be on the basis of the statutory body established to protect the rights and interests of children and young people being a 'one stop shop' for those cases, particularly those which are of strategic importance, where it decides that it is the most appropriate body to provide such assistance. In other cases, it may decide to refer the case to another body, without losing its interest in the case, or to cooperate with another body in the provision of that assistance. NICCY should also have the freedom to decide to provide assistance in 'follow up' cases, even if other bodies have already provided assistance, whether on referral from NICCY or not.

After thorough analysis of the implications of general issue duplication clauses in Articles 11 and 15, both in relation to public and non-public bodies and persons, we recommend that they be removed.

#### Personal issue duplication clauses

We have identified a range of personal issue duplication clauses. The most significant are in Article 13 ('Actions which may be investigated: restrictions and exclusions'). Paragraph (1) provides:-

*"The Commissioner shall not conduct an investigation in respect of any action in respect of which the complainant has or had -*  
*(a) a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise; or*  
*(b) a remedy by way of proceedings in any court,*

*unless the Commissioner is satisfied that, in the particular circumstances, it is not reasonable to expect the complainant to resort to or have resorted to the right or remedy.”*

In practice, this personal issue duplication clause is a significant impediment upon the use of NICCY’s powers of investigation. For example, if a parent contacts NICCY regarding their child being suspended, NICCY advises them that they have no appeal against same but that if they have an issue as to how the procedure was followed then they have recourse to a judicial review and they are directed them to seek legal advice. (NICCY can provide some legal advice to them short of issuing proceeding given the restriction in 15(3).) Therefore they have a remedy by way of proceedings in a Court; so NICCY has no remit.

Similarly, where a child is expelled and parents wish to complain about the decision or the procedure leading thereto, NICCY is restricted under 13(1)(a) as they have a right of appeal to the Expulsions Appeals Tribunal.

We will see below that the Local Ombudsman is subject to similar restrictions.<sup>19</sup> However, NICCY and the Local Ombudsman perform different functions. NICCY’s remit covers the ‘rights and best interests of children and young people’. The Local Ombudsman’s remit covers, ‘maladministration’, namely matters which specifically exclude issues legal rights, which lie at the heart of NICCY’s remit.

Therefore there is no justification for having these personal issue duplication clauses in Article 13.

In our first scenario, strategically important issues may arise, such as those referred to in the education sector, but NICCY is inhibited, or prevented, from investigating them.

In our second scenario, NICCY may wish to cooperate with other relevant bodies in carrying out such an investigation.

In our third scenario, since Article 13(1) covers situations where there had been recourse to these forms of redress, NICCY is prevented from conducting any follow-up investigation after that redress has been exhausted.

Therefore we recommend that the personal issue duplication clauses in Article 13 are removed.

#### Remit duplication clauses

We have found remit duplication clauses in Article 9(4), ‘General review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities’, and in Article 10(4), ‘Review of advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities in individual cases’, but only in relation to inspection arrangements. There is also a remit duplication clause in Article

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<sup>19</sup> Article 9 of the Commissioner for Complaints (NI) Order 1996.



12(2)(b), ‘Investigation of complaints against relevant authorities’. While issue duplication clauses create uncertainty around the exercise of NICCY’s powers of assistance, remit duplication clauses appear to create an absolute bar on the exercise of NICCY’s powers of investigation.

In terms of the review powers in Articles 9 and 10, the remit duplication clause was introduced in the draft Order in Council and had not been originally included in the OFMDFM Bill. As Deena Haydon states:

*All relevant authorities have a named body or person empowered to review [the] operation of their inspection arrangements. However, children and young people will not necessarily be aware which institutions have these statutory responsibilities and should not be expected to approach the ‘appropriate’ institution – if their rights are being breached, immediate action is required by adults to protect them and safeguard their rights. Children and young people should feel confident that they can go to one place – the Commissioner – to be heard and seek redress, rather than rely on ‘watchdog’ mechanisms within relevant authorities.<sup>20</sup>*

In the health and social care sector, the Regulation and Quality Improvement Authority (RQIA), sets out its remit as follows:

*RQIA is responsible for registering, inspecting and encouraging improvement in a range of health and social care services delivered by statutory and independent providers, in accordance with the Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003 and its supporting regulations.*

*The services we regulate include residential care homes; nursing homes; children's homes; independent health care providers; nursing agencies; adult placement agencies; domiciliary care agencies; residential family centres; day care settings; and boarding schools.<sup>21</sup>*

In the education and training sector, the Education and Training Inspectorate sets out its remit thus:

*The Education and Training Inspectorate provides inspection services for a number of organisations. These include the Department of Education, the Department of Agriculture and Rural Development, the Department of*

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<sup>20</sup> Independent Review of the Legislation of the Northern Ireland Commissioner for Children and Young People, ‘Putting Children First’ Alliance, October 2006, p 17.

<sup>21</sup> RQIA website, [http://www.rqia.org.uk/what\\_we\\_do/registration\\_inspection\\_and\\_reviews.cfm](http://www.rqia.org.uk/what_we_do/registration_inspection_and_reviews.cfm) (accessed on 30 January 2013).

*Employment and Learning, the Department of Culture, Arts and Leisure and Criminal Justice Inspection Northern Ireland.*

The bodies which the Education and Training inspectorate can inspect include:

*Pre-school centres including Nursery Schools and classes; Primary, Post-primary and Special Schools; Alternative Education Provision Centres; Independent Schools for the purpose of registration; Institutes of Further and Higher Education; Work Based Learning and Employment programmes; the Youth and Community sector; Initial Teacher Education organisations; and those aspects of the services of the Education and Skills Authority which pertain to learning and teaching and standards, including the quality of post-inspection support.<sup>22</sup>*

In the criminal justice sector, the Criminal Justice Inspectorate sets out its remit in this way:

*Criminal Justice Inspection Northern Ireland (CJI) is an independent, statutory inspectorate established in 2003 under s.45 of the Justice (Northern Ireland) Act 2002. It is a Non-Departmental Public Body (NDPB) in the person of the Chief Inspector.*

*CJI is one-of a-kind as it is the only unified inspectorate in the United Kingdom or Ireland that can look at all the agencies that make up the criminal justice system apart from the judiciary. Agencies which CJI can inspect include the police service, prison service, prosecution service, youth justice services and the courts.*

*This means CJI is in a unique position to identify issues that are common to some or all agencies and is in a strong position to promote inter-organisational learning and best practice across and between the various agencies.*

None of these agencies operates an individual complaints procedure. Indeed the CJI is prohibited from investigating individual cases.<sup>23</sup> They all therefore come within the remit duplication clauses in Articles 9 and 10 of the 2003 Order, at least as far as review of inspection arrangements is concerned.

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<sup>22</sup> ETI website, <http://www.etini.gov.uk/index/support-material/support-material-general-documents-non-phase-related/support-material-general-documents-about-inspection/which-organisations-are-inspected.htm>, accessed 30 January 2013.

<sup>23</sup> “By law, CJI is not allowed to investigate individual cases but it can, when asked by the Minister for Justice, undertake specific pieces of work including investigations and reviews.” CJI website, <http://www.cjini.org/AboutUs/Our-Remit.aspx>, accessed on 31 January 2013.

To what extent could NICCY conduct reviews, under Articles 9 and 10, into advocacy, complaint, inspection and whistle-blowing arrangements in any of these three sectors in each of the three scenarios outlined above (see page 23)? To remind ourselves, Article 9(4) provides:

*The Commissioner shall not review the operation of the inspection arrangements made by a relevant authority unless he is satisfied that no other body or person has power under any statutory provision to review those arrangements.*

NICCY could, either through a review of its casework, or a wider policy review, determine to examine the arrangements to protect children and young people from physical abuse in any of these sectors. There is no impediment to a review of advocacy, complaint and whistle-blowing arrangements. However, this remit duplication clause effectively nullifies NICCY's power to review inspection arrangements. Although the Welsh legislation does not specifically refer to advocacy, complaint, inspection and whistle-blowing arrangements, a key element in the Waterhouse Report in 2000 into child abuse in North Wales was the inadequacy of these types of arrangements. It is also difficult to see how a review could be conducted into advocacy, complaint and whistle-blowing arrangements, without impinging on inspection arrangements.

By placing these review powers at the head of the range of specific powers enjoyed by NICCY, the legislator appears to have intended that they should be a focus of NICCY's activities. In fact, we are only aware of one NICCY review conducted on such arrangements under these provisions. Therefore, the remit duplication clauses in Articles 9 and 10 are not only an absolute bar to reviewing any inspection arrangements, they also appear to be an impediment to conducting any reviews under Articles 9 and 10.

The original OFMDFM Bill did not include such an absolute bar to the review of inspection arrangements. The NIHRC has conducted an investigation into treatment of older people in care homes<sup>24</sup> and is presently conducting an investigation into racially motivated crimes, including the response of criminal justice agencies.<sup>25</sup> The ECNI, if so minded, could conduct an investigation into harassment in any of the sectors. As

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<sup>24</sup> 'In Defence of Dignity The Human Rights of Older People in Nursing Homes', NIHRC, 2012. See also 'Still in our care Protecting children's rights in custody in Northern Ireland', NIHRC, 2006.

<sup>25</sup> The NIHRC is 'undertaking an investigation that will examine the state's response to racially motivated hate crimes. In particular, the aim of the investigation is to examine:

- Preventative measures undertaken and / or driven by the Northern Ireland Executive; and
- The response of key criminal justice agencies to racially motivated hate incidents and crimes.' (<http://www.nihrc.org/index.php/publications/browse/item/674>, accessed on 31 January 2013).

mentioned above, the 'CJI is in a unique position to identify issues that are common to some or all [criminal justice] agencies'. But one could similarly say that NICCY is in a 'unique position' to review these arrangements from the perspective of the protection of the rights and best interests of children and young people.

There may be issues of the 'primacy' of these inspectorates in their given sectors. In relation to the first type of scenario mentioned on page 23 above, it should be open to NICCY to determine, no doubt in consultation with relevant bodies, to include inspection arrangements in any strategic review of arrangements on a matter such as physical abuse of children and young people, without being inhibited from doing so or from reviewing other arrangements because of inextricable links with inspection arrangements.

However the second type of scenario may be more relevant there. If NICCY determines that it wishes to conduct a review under Articles 9 or 10 in a sector where an inspection system already operates, it should be possible for it to do so in cooperation with that system or, at least, to be under a power to seek to cooperate with that inspectorate before launching its own review. NICCY already has a close working relationship with many of these inspectorates through the Children's Rights Implementation Group, including the Criminal Justice Inspectorate, the Regulation and Quality Improvement Authority, the Education and Training Inspectorate and the Equality Commission.

In practice, such a review may be about advocacy, complaint and whistle-blowing arrangements but impinging on inspection arrangements. Nevertheless, the cooperation of the relevant inspectorate should be sought in order to maximise the effectiveness of the review.

The Office of the English Commissioner has participated in an investigation into prison conditions for children and young people with Her Majesty's Inspectorate of Prisons, although this did not involve formal use of the Commissioner's powers. It should be open for NICCY to do the same but it would be preferable if NICCY enjoyed this power itself so that it can use its own powers of investigation in tandem with those of the inspectorate, in this case the Criminal Justice Inspectorate, or use its own powers if the inspectorate declines to be involved.

So also it should be open to NICCY to conduct its own review in the aftermath of another investigation. It already has the power to do so in relation to advocacy, complaint and whistle-blowing arrangements and we do not see why a remit duplication clause is necessary in these circumstances.

We therefore recommend that the remit duplication clauses in Articles 9 and 10 should be removed.

The third remit duplication clause is in Article 12(2) of the 2003 Order. It states:

*The Commissioner shall not exercise his power under paragraph (1) in relation to a complaint unless he is satisfied that –*  
*(b) the complaint does not fall within an existing statutory complaints system.*

This remit duplication clause is explained and expanded by the provisions of Article 12(3):

- (3) For the purposes of paragraph (2), a complaint falls within an existing statutory complaints system if a statutory provision confers power on a person to make the complaint to a body or person and –*
- (a) that body or person has power under a statutory provision to investigate the complaint; or*
  - (b) that body or person would have power under a statutory provision to investigate the complaint but for some exclusion or restriction in that statutory provision. (emphasis added)*

These clauses give primacy to the statutory complaints procedure, even if, on grounds of public policy, some matters are excluded from that procedure.

The primary complaints systems are those of the Police Ombudsman, the Northern Ireland Prisoner Ombudsman, and the Northern Ireland Ombudsman. The Police Ombudsman for Northern Ireland was established through section 51 of the Police (NI) Act 1998. The remit of the Police Ombudsman is simply to investigate ‘a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public’ (section 55(4)). The Northern Ireland Prisoner Ombudsman operates a complaint system concerning prisoners in Northern Ireland’s prisons. However, at present, the Office is not on a statutory footing<sup>26</sup> and therefore is not covered by the remit duplication clause in Article 12 of the 2003 Order.

#### The Northern Ireland Ombudsman

The Northern Ireland Ombudsman’s remit covers a wide range of relevant authorities within the remit of NICCY.<sup>27</sup> The Northern Ireland Ombudsman is made up of two offices, the Northern Ireland Commissioner for Complaints (sometimes described as ‘the Local Ombudsman’) and the Northern Ireland Assembly Ombudsman. Complaints are made directly to the Local Ombudsman. The key element of the complaint is that it concerns ‘maladministration’. For example, Article 7 of the Commissioner for Complaints (NI) Order 1996 provides:

*The Commissioner may investigate any action taken as mentioned in paragraph (5) only if a complaint is made to the Commissioner in accordance*

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<sup>26</sup> ‘The Government is currently considering options to put the office on a statutory footing in the near future.’ NIO Press Statement on appointment of present Prisoners’ Ombudsman, Pauline McCabe, 1 September 2008 (<http://www.nio.gov.uk/Media-Centre/News/Article/Appointment-of-Prisoner-Ombudsman-for-Northern-Ire>).

<sup>27</sup> ‘My Office investigates complaints made by people who believe that public bodies in Northern Ireland have not acted properly or fairly towards them. I can investigate the actions of most public organisations in Northern Ireland including Government Departments, their Agencies and Health Service providers.’ Northern Ireland Ombudsman website, <http://www.ni-ombudsman.org.uk/About-the-Ombudsman.aspx>.

*with this Order by person who claims to have sustained injustice in consequence of maladministration.*

Article 7 also provides:-

*Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a body to which this Article applies in the exercise of a discretion vested in that body.*

It is not clear where this ‘exclusion’ merely restates the scope of the Ombudsman’s remit or could be considered to ‘an exclusion or restriction’ covered by Article 12(3)(b) of the 2003 Order.

Schedule 3, paragraph 1 of the 1996 Order excludes:

*The commencement or conduct of any civil or criminal proceedings before a court of law in the United Kingdom, or of proceedings before any international court or tribunal.*

Article 9 of the 1996 Order governs ‘Matters not subject to investigation’. It provides:

*(3) Subject to paragraph (4) and to section 78 of the Northern Ireland Act 1998, the Commissioner shall not conduct an investigation under this Order in respect of –*

*(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;*

*(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.*

*(4) The Commissioner may conduct an investigation –*

*(a) notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3), if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it; or*

*(b) notwithstanding that the person aggrieved had exercised such a right as is mentioned in paragraph (3)(a), if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint.*

The cumulative effect of Articles 12(2)(b) and 12(3)(b) appears to give a very wide ambit to the remit duplication clause.

There is a similar complaints procedure to the Assembly Ombudsman, with the important qualification that complaints can be made only through a Member of the Legislative Assembly. The powers of the Assembly Ombudsman are set out in Article 9(2) of the Ombudsman (NI) Order 1996:

*The Ombudsman may investigate any action taken as mentioned in paragraph (1) only if –*



- (a) a written complaint is duly made to a member of the Assembly by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with the action so taken; and
- (b) the complaint is referred to the Ombudsman, with the consent of the person who made it, by a member of the Assembly with a request to conduct an investigation into it.

There is also a residual role for the Parliamentary and Health Service Ombudsman, i.e. the UK Ombudsman.<sup>28</sup>

In each of the three scenarios considered in this report (see page 23 above), the apparent all-embracing nature of the remit duplication clause in Article 12 places a formidable barrier to any investigations by NICCY under Article 12. Nonetheless, three arguments can be put.

First, Article 12 covers two types of investigations, the first being ‘that [the complainant’s] rights have been infringed by any action taken by a relevant authority’ (Article 12(1)(a)). It is therefore arguable that such complaints do not involve ‘maladministration’ so much as a breach of rights. The second type of investigation involves a complaint ‘that [the complainant’s] interests have been adversely affected by any such action’ (Article 12(1)(b)). Here, there may be more of an overlap with ‘maladministration’. But it must be remembered, as Citizens Advice Adviceguide states:

*The ombudsman cannot investigate a decision made by an organisation. It can only investigate the way in which a decision was reached.*

Therefore a complaint of ‘maladministration’ may not include an investigation into whether decisions of relevant authorities have adversely affected the complainant’s interests.

The third, more fundamental, argument is that complaints about ‘rights being infringed’ or ‘interests being adversely affected’ are not ‘complaints’ about maladministration at all. On its narrowest interpretation, the remit duplication in Article 12 could arguably be considered as not impinging on the Northern Ireland Ombudsman’s complaints procedures. But this approach would effectively nullify the effect of the duplication clause. On the other hand, the widest interpretation of the

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<sup>28</sup> ‘People in Northern Ireland can complain to the Parliamentary and Health Service Ombudsman about issues outside of the Northern Ireland Ombudsman jurisdiction. This includes complaints about HM Revenue and Customs, the Ministry of Defence and the Northern Ireland Office. Complaints about the health service in Northern Ireland are dealt with by the Northern Ireland Ombudsman, not the Parliamentary and Health Service Ombudsman. The Parliamentary and Health Service Ombudsman can only help if asked to do so by an MP.’ ‘How to use an ombudsman in Northern Ireland’, Citizens Advice Adviceguide ([http://www.adviceguide.org.uk/nireland/your\\_rights/civil\\_rights/how\\_to\\_use\\_an\\_ombudsman\\_in\\_northern\\_ireland.htm#the\\_parliamentary\\_and\\_health\\_service\\_ombudsman](http://www.adviceguide.org.uk/nireland/your_rights/civil_rights/how_to_use_an_ombudsman_in_northern_ireland.htm#the_parliamentary_and_health_service_ombudsman)).



duplication clause virtually nullifies NICCY's power to investigate under Article 12 at all.

In our first type of scenario, where NICCY considers that an investigation into a complaint against a relevant authority comes within its strategic objectives, it would appear to be able to conduct such an investigation if it involves the potential infringement of the rights of a child or young person. It may also be the case that it can conduct an investigation into a decision which involves a potential adverse effect on the interests of the child or young person. It is also arguable that an investigation could be conducted where issues of 'maladministration' are incidental to the investigation (or may come to light during the course of the investigation).

In our second type of scenario, there may be opportunities for cooperative working, for example, with the NI Ombudsman, where an investigation involves a mixture of issues involving the decision-making process and other issues on the rights and interests of children and young people.

In our third type of scenario, it may be open to NICCY, at least on a narrower interpretation of the remit duplication clause, to conduct a follow-up investigation into matters which arise from an Ombudsman report but which do not involve 'maladministration' in the decision-making process.

It is clear that the remit duplication clause in Article 12 is a significant obstacle to any investigations under Article 12. It gives primacy to the statutory Ombudsman systems over the role of NICCY. The 'restrictions or exclusions' provision appears to be particularly severe, depending on how it is interpreted in light of the statutory provisions on the various complaints systems.

More fundamentally, it is difficult to justify such a potentially wide-ranging remit duplication clause. There is a distinction between a body such the Police Ombudsman which has a specific remit over complaints against police officers and a body such as the NI Ombudsman which has a general remit over 'maladministration' across the public sector, including sectors where issues of the rights and interests of children and young people may arise.

NICCY has a 'primary aim' to 'to safeguard and promote the rights and best interests of children and young persons'. The NI Ombudsman has a responsibility to ensure fair administrative decision-making in the NI public sector. It does not have a role in promoting fair administration or, at present, conducting its own investigations of its own motion. It is not justifiable to have a remit duplication clause of potentially wide ambit which effectively neutralises NICCY's powers of investigation under Article 12 in favour of a body which has no remit for human rights, let alone the rights and interests of children and young people.

While it is possible that Article 12 could be interpreted in a way which does not allow the Northern Ireland Ombudsman to overlap significantly with NICCY's remit, we recognise that it may be rather artificial to adopt such an interpretation and we

therefore recommend that the remit duplication clause in Article 12 should be removed altogether.

NICCY appears to be uncertain as to who and what can be investigated by the Northern Ireland Ombudsman (whether acting as the Assembly Ombudsman or as the Commissioner for Complaints).<sup>29</sup> As regards who can be investigated, this can be established by checking the bodies listed in Schedule 2 to the two 1996 Orders governing the Ombudsman's work (as discussed in the previous section of this report). As regards what can be investigated, the difficulty arises because of the vagueness of the concept of 'maladministration', which is nowhere defined in the two 1996 Orders or elsewhere. It is, however, a broad-ranging concept and could readily embrace situations where an authority has acted in breach of a person's human rights. In the section which follows we set out our conclusions concerning the duplication clauses in the 2003 Orders below. More particularly, and without prejudice to what we there recommend, to the extent that the powers of NICCY and the Northern Ireland Ombudsman overlap in relation to relevant authorities we consider that possible difficulties could be avoided if the two bodies were to draw up a Memorandum of Understanding making it clear how each of them will deal with such situations if and when they arise. As in other contexts, the two bodies will no doubt wish to bear in mind the principles of value for money, effectiveness, and sensible cooperation. If, for example, the Ombudsman has already investigated a complaint of maladministration raised by a child or young person it will be very unlikely that NICCY will want to re-investigate the exact same matter. Only if there were some aspect of the matter which the Ombudsman had not investigated and which falls within the jurisdiction of NICCY should NICCY feel it necessary to consider launching another investigation. When the Ombudsman issues decisions which concern the rights of a child or young person, it would be sensible for the Ombudsman, provided the complainant agrees, to share the decision with NICCY, thereby enabling NICCY to consider what if any further action it would like to take on the matter.

### **Consideration of duplication clauses in the legislation of the GB Commissioners**

We have seen a consistent pattern in the remit duplication clauses in the legislation of the GB Commissioners. Taking as an example, the remit duplication clause under which the Scottish Commissioner operates, in section 7(2) of the Commissioner for Children and Young People (Scotland) Act 2003:-

*The Commissioner may carry out such an investigation only if the Commissioner, having considered the available evidence on, and any information received about, the matter, is satisfied on reasonable grounds that-*

*(a) the matter to be investigated raises an issue of particular significance to children and young people generally or to particular groups of children and young people ; and*

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<sup>29</sup> When considering this matter we have taken into account relevant legal advice provided to NICCY by a barrister in February 2012.

*(b) the investigation would not duplicate work that is properly the function of another person.”*

We understand that the Scottish Commissioner wishes to extend this power to individual cases.

However, our analysis indicates that this is a wide remit duplication clause. As set out above, any duplication which includes “another person” is far too wide. No Children’s Commissioner should be required to take into account the remit, or likelihood of action, by community and voluntary groups, let alone, private bodies or even individuals.

Also, given the potential breadth of the term ‘functions’, we are of the view that the none of the GB Commissioners should be subject to remit duplication clauses at all. Nor would we wish to see issue duplication clauses replace remit duplication clauses in the statutory provisions applying to the GB Commissioners.

In our view, the GB Commissioners should not be subject to duplication clauses in the exercise of their functions.

### **Conclusions on duplication clauses**

We can see that the rationale for issue duplication clauses is that NICCY should not use its resources where there are other bodies which are likely to do so. However, such restraints are not placed on other human rights institutions, such as the NIHRC or the ECNI. They are free to make strategic decisions on legal assistance on the basis of their own assessment of the significance of the issues involved. They are not under any duty to consult with other public bodies, let alone community and voluntary groups or even private bodies and individuals.

Similarly, the rationale for remit duplication clauses is that NICCY should not become involved at all on issues governed by statutory inspectorate and complaints systems. Indeed it cannot do so even if restrictions and exceptions apply within the statutory complaints system.

At first glance, it appears that NICCY enjoys a more extensive range of powers than its GB counterparts. The reality of the application of duplication clauses, however, is that NICCY operates under a 'residual' model, being able to use its powers only where there is no one else to do so. The outcome is that NICCY is understandably frustrated in its efforts to use these powers and to fulfil its 'primary aim', which is 'to safeguard and promote the rights and best interests of children and young persons'. This in turn leads to frustrations within groups in the children's sector and also amongst members of NICCY's Youth Panel and the staff of NICCY. Ultimately the reputation of NICCY in the public domain is damaged.

On a practical level, despite an impressive casework performance, NICCY's effectiveness in safeguarding the rights and best interests of children and young people is diminished by not being able to even threaten the use of its powers of review, assistance and investigation, even if this is to some extent a self-denying ordinance on NICCY's part. Although NICCY is highly proactive on many issues involving research into and the more general promotion of the rights and interests of children and young people, it is more difficult for it to be proactive in the use of its powers whenever they are so heavily limited.

We therefore come to the conclusion that duplication clauses, far from 'saving' public resources, actually waste NICCY's resources, in terms of experience and expertise, and unnecessarily curtail its role in safeguarding and promoting the rights and interests of children and young people.

This waste of resources is exacerbated by the application of issue duplication clauses to private and community and voluntary groups and by the 'restrictions and exceptions' provision in remit duplication clauses. But removing these extra restrictions on the use of NICCY's powers would not alleviate to any great extent the fundamental problem that these duplication clauses are counter-productive.

It may be that there was an understandable caution in the legislature in 2002 and within the direct rule administration in 2003. With only the Welsh precedent to work with, the legislators may have felt inclined to give NICCY extensive powers but to curtail them initially. Experience shows that apparently 'temporary' limitations in

legislation become ‘set in stone’. We did recommend the removal of duplication clauses in our 2006 Review but it may have been felt at that time that it was ‘too early’ to do so. In the more than six years which have since elapsed, NICCY’s staff have been more proactive in exploring the possibilities of using its powers but have been consistently frustrated by duplication clauses. We therefore consider that this review is an appropriate occasion for the Northern Ireland Assembly to review and remove these duplication clauses.

### **A cooperation model**

In addition to the removal of duplication clauses, we recommend that a more effective ‘duplication model’ should be built on cooperation between NICCY and other public bodies.

We have already seen that NICCY and some other public bodies have Memoranda of Understanding amongst themselves. We have also seen that duties of cooperation exist within the legislation governing the GB Commissioners. For instance, Schedule 2 of the Care Standards Act 2000 provides in paragraph 5:

- (1) Subject to any directions given by the Assembly, the [Welsh] Commissioner may do anything which appears to him to be necessary or expedient for the purpose of, or in connection with, the exercise of his functions.*
- (2) That includes, in particular –*
  - (a) co-operating with other public authorities in the United Kingdom...*

The Commissioner for Older People (Wales) Act 2006 is even more explicit. Section 16, ‘Working jointly with the Public Services Ombudsman for Wales’, provides:

- (1) This section applies where it appears to the Commissioner that –*
  - (a) he is entitled to examine a particular case under regulations made under section 10; and*
  - (b) the case is one which could also be the subject of an investigation by the Public Services Ombudsman for Wales.*
- (2) Where the Commissioner considers it appropriate, he must –*
  - (a) inform the Ombudsman about the case; and*
  - (b) consult him in relation to it.*
- (3) Where the Commissioner consults the Ombudsman under this section he and the Ombudsman may –*
  - (a) co-operate with each other in relation to the case;*
  - (b) conduct a joint examination of the case;*
  - (c) prepare and publish a joint report in relation to the examination.<sup>30</sup>*

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<sup>30</sup> Section 10, ‘Examination of cases’, provides: ‘(1) Regulations may make provision for the examination by the Commissioner of the cases of particular persons who are or have been older people in Wales, in connection with the Commissioner’s functions under this Act.

(2) The reference in subsection (1) to the Commissioner’s functions under this Act does not include his powers under sections 2(3) and 9, to the extent that they are exercised in relation

This is in stark contrast with the position concerning the relationship between NICCY and the Northern Ireland Ombudsman.

Likewise, section 17 of the Commissioner for Older People (Wales) Act 2006, 'Working collaboratively with other ombudsmen', provides:

- (1) This section applies where it appears to the Commissioner that a case which he is*
- (a) examining in accordance with regulations made under section 10, or*
  - (b) considering whether to examine in accordance with such regulations, relates to or raises a matter which could be the subject of an investigation by another ombudsman (the 'connected matter').*
- (2) Where the Commissioner considers it appropriate, he must inform the other ombudsman about the connected matter.*
- (3) Where the Commissioner considers that the case also relates to or raises a matter which he is entitled to examine himself (the 'older people matter'), he must also if he considers it appropriate –*
- (a) inform the other ombudsman about the Commissioner's proposals for the investigation of the case; and*
  - (b) consult the other ombudsman about those proposals.*
- (4) Where the Commissioner and the other ombudsman consider that they are entitled to investigate, respectively, the older people matter and the connected matter they may –*
- (a) co-operate with each other in the separate investigation of each of those matters;*
  - (b) act together in the investigation of those matters; and*
  - (c) prepare and publish a joint report containing their respective conclusions in relation to the matters they have each investigated.*

In practice, it is clear from discussions with his Office that the Welsh Children's Commissioner cooperates closely with the Public Services Ombudsman for Wales but the model in the Welsh Older People's Commissioner may be a more extensive basis for a cooperation model in the NICCY Order.

In 2011 the Research and Library Service of the Northern Ireland Assembly produced a valuable Research Report entitled 'The office of the Northern Ireland Ombudsman'.<sup>31</sup> The paper 'makes comparisons with the Scottish Public Services Ombudsman (SPSO), Public Service Ombudsman for Wales (PSOW) and Ombudsmen in other jurisdictions'. It also makes reference to Older People's Commissioners and NICCY.

The report highlights the duty of cooperation on the SPSO and the PSOW and specifically picks out the duty on the Welsh Older People's Commissioner to

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to a field in which the Assembly does not have functions.' Section 2(3) covers representations to the Welsh Assembly and section 9 covers research and educational activities.

<sup>31</sup> NIAR 145-11, March 2011.



cooperate with the PSOW and other ombudsman offices. It posed a number of questions, including the following:

*Is it possible to update legislation so that it includes a provision for Ombudsman to consult other relevant organisations where an overlap may exist*

*Would existing legislation relating to, for example, the Children's Commissioner or Older People's Commissioner, need to be amended to place a duty on other Commissioners/Ombudsmen to consult with each other?*

*To what extent could the use of MoUs address the issue of potential overlap with existing bodies?*

*Could these be used instead of a legislative duty to consult?*

A more recent example of cooperation in relation to children's rights and interests concerns the establishment, in September 2012, of the Safeguarding Board for Northern Ireland.<sup>32</sup> Clearly there is a desire to maximise cooperation in the safeguarding of children's rights and interests. In our view, NICCY must be at the heart of any cooperation model if it is to achieve what is NICCY's primary aim. To

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<sup>32</sup> DHSPSS press release, 'Safeguarding children is everyone's business and co-operation is vital to protect the most vulnerable young people in Northern Ireland', 18 September 2012 ([http://www.northernireland.gov.uk/index/media-centre/news-departments/news-dhssps/news-releases-dhssps-september-2012/news-dhssps-180912-co\\_operation\\_key.htm](http://www.northernireland.gov.uk/index/media-centre/news-departments/news-dhssps/news-releases-dhssps-september-2012/news-dhssps-180912-co_operation_key.htm)).

This body includes membership as follows:

Health and Social Care Board (HSCB)

Public Health Agency (PHA)

Health and Social Care Trusts (HSCTs)

Police Service of Northern Ireland (PSNI)

Probation Board of Northern Ireland (PBNI)

Youth Justice Agency (YJA)

Education and Library Boards (ELBs)

District Councils

National Society for the Prevention of Cruelty to Children (NSPCC)

A Designated Nurse for Safeguarding

Five representatives from the voluntary and community sectors

A GP who is a member of the British Medical Association

3 Lay Members appointed by Minister Edwin Poots

this end, a Memorandum of Understanding has recently been agreed between NICCY and the Board.

Below, we consider four versions of a cooperation model that could be applied to NICCY. Firstly, we consider whether an infrastructure of Memoranda of Understanding would be sufficient to ensure adequate cooperation between NICCY and other relevant bodies. Secondly, we consider a model involving a duty to consult other relevant bodies. Thirdly, we consider whether NICCY's duties should be extended to include a power to cooperate with other relevant bodies. Finally, we consider whether there should be a duty to cooperate imposed on NICCY.

### **Memoranda of Understanding**

We have already examined NICCY's Memorandum of Understanding with the NIHRC. There is also a similar memorandum with the Police Ombudsman for Northern Ireland and the Commission for Victims and Survivors and an Information Sharing Protocol with the Health and Social Care Board. A similar Memorandum has recently been agreed with the Safeguarding Board for NI.<sup>33</sup>

The present Memoranda of Understanding negotiated between NICCY and other bodies appear to be based on a principle of 'who does what' in terms of use of powers or even 'carriage of a case'. The elements of cooperation largely concern issues such as information exchange and policy formation. In the model which we envisage, the duplication clauses in the 2003 Order would be removed and so we need to consider how a prime objective – the most effective use of public resources – could then be achieved.

The Research and Library Service Report sets out a pre-existing infrastructure of Memoranda of Understanding involving bodies with powers unfettered by duplication clauses. For example, the RQIA has Memoranda with bodies including the Criminal Justice Inspection NI and the Education and Training Inspectorate, two other inspectorates with which NICCY may wish to cooperate in the future.

Similarly, the ECNI has Memoranda with the Community Relations Council and the NIHRC.<sup>34</sup> Finally, it notes that the NIHRC has Memoranda with the ECNI, the Police Ombudsman for NI, NICCY, the Prisoner Ombudsman and the Northern Ireland Court Service.

The primary issue considered by the Research and Library Service Report was whether the NI Ombudsman should enter into Memoranda with other investigative bodies. We are not aware of this occurring at this point in time.

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<sup>33</sup> We understand that NICCY is already in the process of developing Memoranda of Understanding with the Equality Commission for Northern Ireland and the Regulation and Quality Improvement Authority.

<sup>34</sup> It states that there is a MoU with the ECNI but we understand that discussions around that have not been completed.

Given that there are already Memoranda between various inspectorates in NI, we consider it an important element in a cooperation model for NICCY, in relation to its review powers under Articles 9 and 10, to seek to enter into Memoranda with the RQIA,<sup>35</sup> the ETI and the CJI. It already has a close working relationship with these bodies through the Children's Inspectorate and Oversight Bodies meetings which include these bodies, the ECNI and the NIHRC.

In terms of its assistance powers under Articles 11 and 15, we consider that Memoranda with the ECNI and the Legal Services Commission would also be beneficial. However, we are less certain of the benefits of Memoranda with community and voluntary groups or private organisations and individuals. There are other fora in which NICCY can communicate with bodies in the children's sector and those lines of communication should be sufficient to limit any duplication of resources.

Finally, in terms of NICCY's powers of investigation under Article 12, we consider that the existing Memoranda with the NIHRC and the Police Ombudsman should be renegotiated in line with a cooperation model between them and that similar Memoranda should be negotiated with the ECNI and the NI Ombudsman.

This is the simplest solution to the issue of duplication of powers, once the duplication clauses are removed from the 2003 Order. However, there are two potential complications. First, the negotiation of a Memorandum requires reciprocity. Given the history of Memoranda amongst inspectorates, and NICCY's close working relationships with them, we do not envisage such complications in that regard. It may be easier to negotiate Memoranda with the ECNI and the NI Ombudsman once there is the clarification of use of investigation powers after the duplication clauses have been removed.

In any event, all that NICCY can hope to achieve is to endeavour to negotiate such Memoranda. Under this first version of the cooperation model, she would not be obliged to do so.

A second complication involves joint working between public bodies. For example, it remains uncertain whether two statutory bodies could 'share' their powers or whether one body would have to take the lead. So also there may be issues around disclosure of information between the bodies.

It may be that an infrastructure of Memoranda of Understanding would be sufficient to allow NICCY to use its powers to the maximum effect while also ensuring the most effective use of public resources. However, given that the 2003 Order requires amendment to remove the duplication clauses, and also given that the legislator, at least in 2003, had concerns over duplication of resources, we will also consider two further versions of the cooperation model after the next sub-section.

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<sup>35</sup> Which is presently being negotiated.

### **A duty to consult**

We have already seen that the English Commissioner has a duty to consult other relevant bodies, albeit in the context of a duplication clause. A duty to consult is also central to the powers granted to the Welsh Older People's Commissioner. Again, we do not consider it appropriate for a duty to consult to include any duties towards community and voluntary groups or private organisations or individuals. It is unacceptable that a statutory body established to safeguard and promote the rights and best interests of children and young people should be under any duty towards such organisations and individuals.

Technically speaking, it might be preferable that these duties would be reciprocal in relation to other public bodies. But this would involve amendment to the relevant statutory provisions, at least in relation to use of statutory powers. However, it would still be possible, in the interests of non-duplication of public resources, to impose a duty to consult on NICCY without having reciprocal duties on other public bodies.

It would be possible to have a general duty to consult bodies 'as the Commissioner sees fit'. However, as in the Welsh Older People's Commissioner legislation, we consider that if a duty to consult is to be imposed it should be imposed with respect to named public bodies. Unilateral duties to consult the various relevant inspectorates could therefore be imposed in relation to NICCY's review powers under Articles 9 and 10, unless it was the inspection arrangements themselves which were being reviewed.

To the extent that such duties would require reciprocal amendments to the statutory framework under which other public bodies operate, there would be a difficulty in having a duty of consultation with either the NIHRC or the ECNI as this might require amendment to Westminster legislation. In any event, it might take some time for either body to reach a decision on an issue such as legal assistance. Since such decisions may be urgent from NICCY's perspective, we consider that it would be better for its relationship to be governed by Memoranda of Understanding with the ECNI and the NIHRC.

Nor do we consider it appropriate to have a duty of consultation with the Legal Services Commission. In our view, NICCY's powers of legal assistance should be subject only to the usual principles, already in the 2003 Order and in the powers of the NIHRC and the ECNI.<sup>36</sup> We are not convinced of the advisability of a duty of consultation in relation to assistance with complaints to relevant authorities under Article 11. Again, NICCY should not be constrained in its use of these powers.

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<sup>36</sup> As in Article 15(2): 'Where the child or young person applies to the Commissioner for assistance in relation to proceedings to which this Article applies, the Commissioner may, subject to paragraph (3), grant the application if he is satisfied that (a) the case raises a question of principle; (b) it would be unreasonable to expect the child or young person to deal with the case without assistance because of its complexity, or because of his position in relation to another person involved, or for some other reason; or (c) there are other special circumstances which make it appropriate for the Commissioner to provide assistance.'

In relation to NICCY’s power of investigation against relevant authorities under Article 12, a duty of consultation could be formulated with the Older People’s Commissioner, the Northern Ireland Ombudsman and, possibly, the Police Ombudsman and the Prisoner Ombudsman.

In the alternative, it might be considered sufficient for NICCY to have a power to consult other bodies. Indeed, a general duty to consult bodies ‘as the Commissioner sees fit’ would amount to little more than a stronger form of power to consult. It is arguable that NICCY must be given maximum flexibility to react quickly to what may be urgent situations involving vulnerable children and young people. In any event, either a duty to consult or a power to consult should not be constructed so as to place bureaucratic obstacles in NICCY’s path.

### **A power to cooperate**

It is important to appreciate that the Welsh Older People’s Commissioner model does not involve a duty to cooperate but rather a power to cooperate.<sup>37</sup> We consider that a duty (or power) to consult could be complemented by a power to cooperate but there would need to be further investigation as to whether such a power would have to be reciprocal, both in terms of the use of powers and issues such as the disclosure and sharing of information and reporting mechanisms.

We consider that a power to cooperate would be more appropriate in relation to review powers under Articles 9 and 10 and investigation powers under Article 12. As we have seen, there may be considerable overlap between a NICCY review and the power of the inspectorates. This might be difficult in relation to the ECNI, which is established under the Northern Ireland Act 1998 but derives most of its powers from a range of devolved legislation, and certainly in relation to the NIHRC, which is also established under the Northern Ireland Act 1998 but also derives its powers from that Act. This difficulty also applies to the Police Ombudsman, whose powers are derived from Westminster legislation.

The Welsh model specifically includes a power to cooperate with the Welsh equivalent of the Northern Ireland Ombudsman. Here, we consider a power to cooperate to be an appropriate basis for closer cooperation between NICCY and the Northern Ireland Ombudsman. Such a power to cooperate can be based specifically on

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<sup>37</sup> Section 17(4): ‘Where the Commissioner and the other ombudsman consider that they are entitled to investigate, respectively, the older people matter and the connected matter they may –

(a) co-operate with each other in the separate investigation of each of those matters;

(b) act together in the investigation of those matters; and

(c) prepare and publish a joint report containing their respective conclusions in relation to the matters they have each investigated.’ (emphasis added)

the Welsh model. Given that the powers of the NI Ombudsman have recently been considered in the Assembly, it might be possible to incorporate a power to cooperate into the Northern Ireland Ombudsman legislation also. However, if this is considered to be a separate issue, we do not consider that the removal of the remit duplication clause on investigations in Article 12 should be dependent upon amendment of the Northern Ireland Ombudsman legislation also.

### **A duty to cooperate**

We have also considered whether a duty to cooperate should be imposed and have come to the view that it would not be appropriate to do so. Firstly, the Welsh model does not go beyond a power to cooperate. Secondly, a duty to cooperate would have to be reciprocal, with all the difficulties of statutory amendment which that may involve. Thirdly, such a duty, unless carefully drafted, could amount to another form of duplication clause. If another public body refused to cooperate, such a duty could be as much an obstacle to the use of NICCY's powers as are duplication clauses at this time.

### **Recommendations on duplication clauses**

Unfettered by duplication clauses, NICCY could utilise its powers in each of the three scenarios which we have been considering (see page 23). In terms of strategic use of its powers, it would be free to conduct reviews under Articles 9 and 10. Under the proposed duties of consultation and power of cooperation in these Articles, it would have to consider cooperation with existing inspectorates but its strategic objectives could be achieved and would be enhanced by any such cooperation.

It would have unfettered powers of assistance under Articles 11 and 15, subject to the usual restrictions.

Its power to conduct strategic investigations under Article 12 would be constrained by duties of consultation and powers of cooperation with designated bodies but these would be limited restrictions which would open the opportunity for investigations which are not presently taking place.

In the second type of scenario, instead of being constrained by duplication clauses, NICCY would in some circumstances be under a duty of consultation and power of cooperation but this would involve the best use of resources on the part of both bodies and allow NICCY to maximise the input of its experience and expertise while having the opportunity to work with statutory bodies which already conduct investigations in these areas.<sup>38</sup>

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<sup>38</sup> For example, the NI Ombudsman conducted an investigation into the treatment of a sexually abused child by the Southern Health and Social Care Trust in 2011 ('Health Trust 'failed in its duty of care' toward sexually abused child, BBC News, 28 November 2011, <http://www.bbc.co.uk/news/uk-northern-ireland-15917986>). It is arguable that this investigation would have benefited from the participation of NICCY.



Where these duties and powers do not apply, NICCY would be free to enter into Memoranda of Understanding with bodies such as the NIHRC and the ECNI, and other public bodies, on a footing of equality of status.

In the third type of scenario, NICCY would have considerably greater freedom to follow up investigations already conducted by other bodies. Whether duties of consultation and power of cooperation are necessary in these circumstances is a moot point. In any event, there may be a need for provisions on disclosure of information between the cooperating bodies.<sup>39</sup> Certainly Memoranda of Understanding could facilitate such follow-up reviews, assistance and investigations.

We foresee the outcome whereby NICCY could take on its strategic role in safeguarding and promoting the rights and best interests of children and young people. The frustrations felt both within and outside NICCY would be alleviated. Concerns that might have been felt over duplication of resources when NICCY was established would be met by a limited duty of consultation and a power of cooperation in relation to some of NICCY's powers of investigation. Far from 'wasting' resources, the involvement of NICCY's experience and expertise in investigations would enhance those investigations and be cost effective.

We therefore recommend that there should be a duty of consultation and a power of cooperation in Articles 9, 10 and 12 of the NICCY Order. These should be modelled on the duties of consultation and power of cooperation already contained in the Commissioner for Older People (Wales) Act 2006.

### **Powers of investigation**

The 2006 Report took on the daunting task of examining in great detail NICCY's powers of investigation. It is a system of Byzantine complexity. We undertook a comparative review of NICCY's powers of investigation, looking at the powers of the ECNI, the NIHRC, the Northern Ireland Ombudsman and what is now the Equality and Human Rights Commission in GB. In this report, we will briefly examine some of the powers of investigation and inquiry enjoyed by the GB Commissioners and their use.

As far as NICCY's powers are concerned, Article 7 ('Duties of the Commissioner') allows some form of investigation in the following circumstances:

*(2) The Commissioner shall keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons.*

*(3) The Commissioner shall keep under review the adequacy and effectiveness of services provided for children and young persons by relevant authorities.*

The latter power is known within NICCY as a 'service review' and a number were undertaken in the period prior to the 2006 Report.

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<sup>39</sup> There is a brief discussion on disclosure of information in the Assembly Research and Library Service Report at p 11.

Under Article 8 ('General powers of the Commissioner'), there is what initially appears to be a wide 'general' power of investigation:

*(3) The Commissioner may, for the purposes of any of his functions, conduct such investigations as he considers necessary or expedient.*

Articles 7 (2) and (3) and Article 8(3) are subject to Article 8(4) which states:

*If the Commissioner so determines, Schedule 3 shall apply in relation to an investigation conducted by the Commissioner for the purposes of his functions under Article 7(2) or (3).*

Schedule 3, which is also applicable to some reviews under Article 9(7) (see below), sets out a relatively formal investigatory process, including terms of reference, the possibility of a hearing, and a right to make oral or other submissions by an authority or person who might be adversely affected by a report or recommendation, subject to cross-examination. Paragraph 2(6) provides:

*The Commissioner may for the purposes of an investigation obtain information from such persons and in such manner, and make such enquiries, as he thinks fit.*

However, unlike in formal investigations under Articles 16-23, the Commissioner has no power to enforce any requests for information or require anyone to give evidence to her.

Under Schedule 3, the Commissioner can issue a report or make recommendations and ultimately can publish a finding of inadequacy on the part of the authority or person in carrying out the recommendations.

These are nonetheless relatively wide general powers of investigation and, in relation to Article 7(2), include investigations of issues involving bodies and persons other than relevant authorities.

However, when we come to consider specific powers of investigation under Articles, 9, 10 and 12, three distinctions must be made. Firstly, all of these Articles have duplication clauses, as outlined above. Secondly, NICCY's powers of formal investigation, in Articles 16-23, are only available in relation to these specific powers of investigation. Thirdly, in Article 9 reviews, neither Schedule 3 nor the powers of formal investigation can be invoked in relation to a range of authorities, originally concerning reserved matters, set out in Schedule 1 Part II of the Order. It should however be noted that this restriction does not apply to reviews under Article 10 or investigations under Article 12.

Rather than examine in further detail this complex range of investigative powers, it is sufficient to again set out our recommendations from the 2006 Report:

*It is recommended that the Commissioner's powers of formal investigation should apply across the full range of the Commissioner's investigatory and complaint assistance powers.*

*It is recommended that Schedule 1 Part II authorities should be subject to same powers of formal investigation as apply to other relevant authorities.*

*There is no justification for limiting the Commissioner's powers to issues which exclude questions of illegality, even if legal proceedings upon the issues in question have been initiated. Indeed, given the Commissioner's powers of legal assistance and initiation and intervention in legal proceedings, such a restriction would be illogical subject to an appropriate restriction on conflict of interest scenarios.*

*The Commissioner's powers should be directed towards the role of reporting upon issues within his remit rather than taking on an adjudicatory role on matters of illegality with corresponding enforcement powers. It is perfectly proper that the Commissioner should have extensive powers of evidence gathering, as he enjoys at present, but it would fundamentally alter his functions to give him an adjudicatory role on unlawful breaches of the rights of children and young people, including enforcement powers such as non-discrimination notices.*

*It may be useful to consider whether the option should be open to the Commissioner to enter into action plans with relevant authorities in lieu of making recommendations in a report or even in lieu of making a formal report. As well as maintaining a public register of recommendations as set out in Article 19(5), it would be valuable if copies of reports with recommendations should be submitted to the Assembly.*

On the specific issue of Schedule 1 Part II authorities, a range of them under the heading, 'Justice and policing' now operate under devolved, as opposed to reserved, powers and therefore there is no justification to exclude them from investigations under Schedule 3 or formal investigations under Articles 16-23.

### **Article 3 – 'child or young person'**

In general, Article 3 provides that the term 'child or young person' means a person under the age of 18. But in two respects it can extend to persons aged 18 or over. Firstly, it includes people up to the age of 21 if they are disabled within the meaning of the Disability Discrimination Act 1995. Secondly, it embraces people for whom services are provided directly or indirectly by a Health and Social Services Board or Trust under Articles 34D, 35, 35A or 35B of the Children (NI) Order 1995. Those Articles relate to services which are provided to children who were 'looked after, accommodated or fostered' after reaching the age of 16 and before reaching the age of 18. The services can include continuing the appointment of a personal advisor for the young person (Article 34D(3)(a)), continuing to keep the young person's pathway plan under review (Article 34D(3)(b)), and contributing to the expenses incurred by the young person in living near the place where he or she is employed or seeking employment (Article 35B(1)) or receiving education or training (Article 35B(2)). The provision of such services can continue until the young person becomes 21 or, if the young person's pathway plan sets out a programme of training or education extending beyond that date, it can even carry on until the young person becomes 24 (Article

35B(3)(a)). From the wording of Article 3 of the 2003 Order it appears that NICCY can apply *all* of its powers in relation to these two categories of 18-20-year-olds.

In our study of the workings of the 2003 Order, and in our conversations with the many people who have experience of NICCY's work, we did not come across any dissatisfaction with the definition of 'child or young person' in the Order. But it does appear strange to us that the Order extends the remit of NICCY to 18-20-year-olds in only two types of situation, however deserving they may be. We consider that it would be more sensible for the Order to empower NICCY to assist any 18-20-year-old whom it considers to be vulnerable, for whatever reason. We have in mind, for example, the 18-20-year-olds who are 'NEETS' – not in education, employment or training. At present, only those NEETS who are under 18, or who, although now aged between 18 and 20, were looked after, accommodated or fostered between the ages of 16 and 18, can qualify for NICCY's protection. In our discussions with NICCY's Youth Panel we did not find support for extending NICCY's remit regarding NEETS, mainly because it might detract from NICCY's existing work. We also accept that the UN Convention on the Rights of the Child does not specifically extend to NEETS who are over the age of 18. Nevertheless, because NICCY's role already extends to two categories of vulnerable young people aged between 18 and 20 we recommend that the remit of NICCY be extended so that it can at least give advice to any vulnerable 18-20-year-old. If such a power were conferred we believe this would be in line with public expectations of the role of a Commissioner for Children and Young People. No doubt the Commissioner would in time devise criteria for deciding when she might exercise such a new power.

Articles 3(6)–(8) allow NICCY in certain situations to use its powers in relation to adults. There must be special circumstances which in the Commissioner's opinion make it appropriate to direct that such a situation exists. When it does so direct, then anything which the Commissioner can do in relation to a child or young person can be done in relation to an adult if it relates to an action taken by the adult concerning something done in relation to him or her when he or she was a child or young person. The kind of situation envisaged here is one where an adult makes a complaint about the way he or she was treated by a relevant authority when he or she was a child. On 29 September 2011 the Northern Ireland Executive announced that it was setting up an investigation and inquiry into abuse by institutions or the state in their duties towards children in their care between 1945 and 1995. On 18 October 2011 the First Minister and deputy First Minister said the inquiry would be backdated even further, to the birth of Northern Ireland in 1922.<sup>40</sup> We understand that the Commissioner has not yet directed that this inquiry warrants a direction which would trigger the Commissioner's power to assist adults in relation to this inquiry. On account of the importance of the inquiry in question, and the vulnerability of some of the adults in question, we would respectfully suggest that NICCY should consider, if it has not already done so, whether it should invoke Articles 3(6)–(8) in this context and whether it could then collaborate with other public or private bodies in assisting the adults in question to interact with the inquiry. We accept, of course, that the Commissioner may conclude that adequate assistance to such adults is already available through other sources, but such is the importance of the Historical Abuse

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<sup>40</sup> See now the Inquiry into Historical Institutional Abuse Act (NI) 2013.

Inquiry that we recommend that clear evidence would need to be produced to support such a conclusion.

**Article 4: ‘relevant authority’**

This Article defines ‘relevant authority’ because many of the Commissioner’s powers can be exercised only in relation to such a body. This is so as regards the Commissioner’s powers to review in general a body’s advocacy, complaint, inspection and whistle-blowing arrangements (Article 9), to review such arrangements in individual cases (Article 10), to give assistance to a child or young person who is making a complaint to a body (Article 11), to investigate complaints made by a child or young person against a body (Articles 12–13), and to conduct formal investigations of a body (Articles 16–23).

In general, the definition of ‘relevant authority’ is tied to that used for defining the jurisdiction of the Commissioner for Complaints and the Assembly Ombudsman in Northern Ireland. One person traditionally holds both those offices and his or her remit is to consider complaints of maladministration made by members of the public in relation to the actions or inactions of the bodies listed in, respectively, Schedule 2 to the Commissioner for Complaints (NI) Order 1996 and Schedule 2 to the Ombudsman (NI) Order 1996. Those lists are frequently amended and the effect of Article 4(1)(a) and (b) of the 2003 Order is that NICCY can exercise any of the powers mentioned in the paragraph preceding this one in relation to any of the bodies so listed at the relevant time.

In addition, NICCY’s powers can be exercised in relation to other bodies which are listed in Schedule 1 to the 2003 Order (as provided for by Article 4(1)(c)). But the power to conduct a formal investigation is restricted to those bodies listed in Part I of Schedule 1 (i.e. bodies dealing with health and personal social services or with education, and a few others). The power does not extend to the bodies dealing with justice or policing, and a few others, listed in Part II of Schedule 1. The rationale for this restriction appears to be, in part, that the bodies listed in Part II of Schedule 1 are bodies which, in 2003, were dealing with matters which had not been devolved to the Northern Ireland Assembly. As a result of the devolution of justice and policing to the Assembly in 2010, the bodies dealing with those matters have since been added to those that fall within the jurisdiction of the Commissioner for Complaints<sup>41</sup> (and the Assembly Ombudsman has been given power to consider complaints of maladministration made against the new Department of Justice). NICCY’s formal investigation powers do therefore now extend to all of those policing and justice bodies, although this does not appear so from the text of the 2003 Order itself, which has not been amended to reflect the changes brought about by the changes made in 2010. Moreover five other bodies listed in Part II of Schedule 1 remain excluded from NICCY’s formal investigation powers: the Police Ombudsman for Northern Ireland, the Parliamentary Commissioner for Administration (i.e. the Ombudsman dealing with complaints against UK government departments), the Information Commissioner, the Qualifications and Curriculum Authority, and the Northern Ireland

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<sup>41</sup> Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 19.



Office. While the rationale for the exclusion from NICCY's remit of the first three of these bodies may be that they are themselves investigative bodies with extensive powers, it is not clear why precisely this should exempt them from investigation by NICCY when they are suspected of violating children's rights. It is even less clear why the Qualifications and Curriculum Authority and the Northern Ireland Office are exempt as well: we imagine that the average member of the public would expect NICCY to be able to investigate alleged abuses of children's rights by either organisation. Some other public bodies remain completely outside the definition of 'relevant authority' in the 2003 Order, so in relation to them NICCY can exercise *none* of its powers or duties. Amongst these bodies are the UK Border Agency, the BBC, the Public Prosecution Service of Northern Ireland and the Northern Ireland Human Rights Commission.

We recommend that the text of the 2003 Order be clarified and extended so that it sets out more transparently and comprehensively the bodies in relation to which it can exercise its functions. In addition, there does not appear to be any satisfactory rationale for excluding some 'relevant authorities' from the formal investigation powers of NICCY. Nor does there seem any justification for excluding altogether from NICCY's oversight some authorities which have important functions in Northern Ireland. To the extent that those authorities deal with non-transferred matters, we hope they can be brought within NICCY's remit through acceptance of the recommendations we make on page 54-56 below concerning 'reserved' and 'excepted' matters, and to the extent that the authorities deal with matters which have already been transferred to Northern Ireland (such as the power to prosecute) we recommend that they be removed from Part II of Schedule 1 to the 2003 Order, thereby emptying Part II of all its content. To deny NICCY any formal investigative involvement with these authorities is to enhance the risk that failures by those authorities to properly consider the rights and best interests of children will not be brought to light. We say more about NICCY's formal investigation powers at pages 46-48 above.

We note, moreover, that the OFMDFM does not appear to have yet exercised its power under Article 4(2) of the 2003 Order to amend the list of 'relevant authorities' set out in Schedule 1 to the Order. We recommend that the OFMDFM should again review the list of 'relevant authorities' in Schedule 1 with a view to ensuring that no child or young person can slip through the protective net of NICCY's powers and duties.

### **The position concerning non-devolved matters**

The Northern Ireland Act 1998, when providing the legal framework for devolution in Northern Ireland in the wake of the Belfast (Good Friday) Agreement, divided matters into 'excepted matters' (Schedule 2 to the Act), 'reserved matters' (Schedule 3) and 'transferred matters' (defined in section 4(1) as 'any matter which is not an excepted or reserved matter'). Excepted matters are those which are not intended to be transferred to the Northern Ireland Assembly since they deal with national issues such as the Crown, elections to the UK Parliament, international relations, the defence of the realm, immigration, general taxation, national security and nuclear energy. Reserved matters are those which may, when the time is right, be devolved to the



Northern Ireland Assembly. They include postal services, import and export controls, minimum wages, financial services, intellectual property, telecommunications, surrogacy and embryology issues, consumer safety, and data protection. Matters may be deleted from or added to the list of reserved matters if, firstly, the Assembly has passed a resolution to that effect with cross-community support and, secondly, the Secretary of State for Northern Ireland lays a draft Order in Council to that effect before the UK Parliament. Following an agreement reached between local political parties at Hillsborough Castle on 5 February 2010, arrangements were made to transfer to the Northern Ireland Assembly a range of matters concerning policing and criminal justice which were originally listed as reserved matters in Schedule 3 to the Northern Ireland Act 1998. The transfer took effect on 12 April 2010.

Under section 8 of the Northern Ireland Act 1998, the Northern Ireland Assembly can include in a Bill provisions dealing with excepted or reserved matters, but it must first obtain the consent of the Secretary of State for Northern Ireland and, in the case of excepted matters, the provision in question must be ancillary to other provisions (whether in the same Bill or previously enacted) dealing with reserved or transferred matters.

At the time when the 2003 Order was made, no express limitation was placed on NICCY as regards the ‘matters’ it could look at, with the exception that, as already noted, its powers relating to formal investigations were restricted as regards a number of bodies dealing with justice, policing and a few other non-transferred matters. We understand, for example, that NICCY has involved itself in immigration matters affecting children or young people and has engaged directly with the UK Border Agency in such instances.

When the Children Act 2004 was enacted, providing for the appointment of a Children’s Commissioner for England, it explicitly permitted that Commissioner to promote awareness of the views and interests of children in Northern Ireland in relation to *excepted* matters, but required the Commissioner, when doing so, to take account of the views, and any work undertaken by, NICCY (section 7(1)–(3)). In addition, the Act permitted (and, on the direction of the Secretary of State, required) the Children’s Commissioner for England to hold an inquiry, for the purpose of investigating and making recommendations, into any case of an individual child in Northern Ireland which in the Commissioner’s opinion raised issues of public policy of relevance to other children (section 7(4)–(9)). As far as we can ascertain, this inquiry power has not yet been exercised.

The Children’s Commissioner for England was not empowered to promote awareness of the views and interests of children in Northern Ireland in relation to *reserved* matters, but now that justice and policing have been devolved to the Northern Ireland Assembly there is less concern than there might previously have been over the prohibition on NICCY exercising its powers and duties in relation to reserved matters. It is hard to think of situations that could arise which, being connected to matters that are still reserved, may conceivably fall outside NICCY’s remit, but it may be that the issue of ‘domicile’ (a technical term used mostly in legal rules concerning the application of foreign laws to disputes involving parties from more than one

country), or the operation of the Vaccine Damage Compensation Scheme, both of which remain reserved matters, could give rise to questions in the future about NICCY's powers.

Recent UK government statements during debates about the role of the Children's Commissioner for England suggest that it is in favour of each of the four Commissioners in the UK being able to deal with all issues relating to children living in their own particular jurisdiction in the UK. But current arrangements may not always make it entirely legal for the Commissioners to do so. For example, even if the OFMDFM and the Northern Ireland Office were to jointly agree that NICCY could carry out work relating to reserved or excepted matters, the activities in question could still be challenged by some interested party as being beyond NICCY's legal powers (i.e. as *ultra vires*).

In his review of the Office of the Children's Commissioner for England, published in December 2010, Dr John Dunford recommended that children's commissioners in devolved jurisdictions should in principle be responsible for all relevant matters in respect of children and young people who normally reside in their countries. He added: 'All UK governments (*sic*) should consider the legal and practical implications of putting this recommendation into practice and implement the option that best captures it in spirit'. In her response to the Dunford Report, the then Minister for Children, Sarah Teather MP (replaced in September 2012 by David Laws MP), stated:

*I do understand the difficulties that the current position presents for the Children's Commissioners in the devolved Administrations. I will want to work with them to achieve a situation, within the devolution settlements, where the interests of children in Scotland, Wales or Northern Ireland can be fully represented by the commissioner for that jurisdiction. (House of Commons Debs 6 December 2010, col 6WS)*

In its response to the consultation conducted by the Department for Education between July and September 2011 on the role of the Children's Commissioner in England, the UK government again stated that 'it is important that children living in Scotland, Wales and Northern Ireland are able to raise a concern with their local Children's Commissioner, regardless of whether it relates to a devolved or a non-devolved matter, especially as they are unlikely to appreciate the difference in practice and because some cases involve both'.

In May 2012 the UK government announced that it would include provisions to strengthen the powers of the Children's Commissioner for England in the forthcoming Children and Families Bill. The proposed clauses were subsequently published for pre-legislative scrutiny in July 2012. Those dealing with the issue of non-devolved matters were set out in the proposed Schedule 1, paras 3 to 5. They would have permitted the Commissioner for England to authorise the Commissioners for Wales, Scotland and Northern Ireland to promote and protect the rights of children in their jurisdictions in relation to a particular excepted matter, but would have excluded those Commissioners from publishing a report, advising the Secretary of State or otherwise making recommendations on the matter. The Commissioner for England would have

retained the power to conduct an investigation on a non-devolved matter in Northern Ireland but would have been obliged to consult with NICCY before doing so.

We are aware that in October 2012 the Northern Ireland Commissioner was a signatory to two letters sent on behalf of herself and other Commissioners in the United Kingdom to the Parliamentary Joint Committee on Human Rights, which was conducting an inquiry into the office of the Children's Commissioner in England. These letters indicated that the UK government's current proposals for dealing with non-devolved matters (whereby the Commissioner for England would be empowered to delegate responsibilities in relation to these matters to the other Commissioners) were not only 'piecemeal' but also created 'new layers of difficulty which are likely to result in each of us dealing with different aspects of the same matter'. All four Commissioners concluded that for the time being it would be better to make do with the current wording of the Children Act 2004 and to continue with the (unpublished) Memorandum of Understanding which they have collectively developed to address problems of overlapping jurisdiction.

Having taken interest from a number of key players, the Parliamentary Joint Committee on Human Rights issued its report on the reform of the office of the Children's Commissioner in England in December 2012 (6th Report of 2012-13; HL 83 /HC 811). On the issue of non-devolved matters it endorsed the view of the four Commissioners, being unpersuaded that there was any evidence of a need to change the current arrangements concerning the relationship between the English Commissioner and the devolved Commissioners. The Committee recommended that the four Commissioners should consider whether their current Memorandum of Understanding could be improved and that they should make it publicly available (para 143). The government agreed with the Joint Committee's views on this issue and therefore removed the clauses in question from the draft Bill.<sup>42</sup> The Bill was introduced to the House of Commons on 4 February 2013 and received its second reading on 25 February. It is currently being considered by a Public Bill Committee, which is expected to report by 23 April 2013. It does contain some provisions (in Schedule 5, paras 3 to 5) relating to the role of the English Commissioner in relation to non-devolved matters affecting children in Wales, Scotland and Northern Ireland, but these are not significant for the purposes of this report.

In the light of the consensus that has been temporarily reached, we are content to recommend that for the time being the issue of when and how NICCY can use its powers and duties in relation to non-devolved matters in Northern Ireland should be left to a Memorandum of Understanding between the four UK Commissioners. We have been supplied with a copy of the Memorandum of Understanding between the British and Irish Network of Ombudsman and Children's Commissioners and have reviewed it for the purposes of this report. One of the 'shared principles' which the Commissioners and Ombudsman in Ireland have agreed is that they will 'work in

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<sup>42</sup> *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540, p 79. See too House of Commons Library Research Paper 13/11 (14 February 2013), *Children and Families Bill, Bill No 131 of 2012-13*, pp 99 and 101.

partnership and collaboration’. More particularly, in relation to non-devolved issues, the Memorandum states that:

*The UK Commissioners will undertake to communicate openly where there is a matter in a jurisdiction which includes non-devolved issues. This will be approached through a principle of liaison and negotiation between the Commissioners and their respective offices. (pages 2-3)*

We recommend that, pending an amendment to the 2003 Order which we propose below, the current Memorandum of Understanding should be re-visited with a view to more detail being included as to how each of the Commissioners in the devolved regions – in particular NICCY – will conduct itself when working on a non-devolved issue. We would hope that the various Commissioners (and the Ombudsman for Ireland) could agree to assist NICCY as much as possible in whatever work NICCY decides to do in relation to the issue in question. We also recommend that, where necessary and appropriate, the Commissioner for England should exercise her powers under section 7(4)–(9) of the Children Act 2004, referred to at page 52 above, which allow her to hold an inquiry into any case of an individual child in Northern Ireland where in the Commissioner’s opinion there are issues of public policy raised which are of relevance to other children. Although it would obviously be more appropriate for NICCY to hold such an inquiry, if it is legally incompetent to do so it would be better that the Commissioner for England to conduct an inquiry than for no inquiry to be conducted at all.

Even an enhanced Memorandum of Understanding and the use of powers already conferred upon the Commissioner for England will not, however, provide a long-term solution to the problem concerning non-devolved matters. In our view the Commissioner should not have to concern herself with whether a matter in question is one which is ultimately the responsibility of the Northern Ireland Executive or of the UK government. We therefore recommend that in due course the 2003 Order should be amended to make it clear that NICCY’s remit extends to all children and young people residing in Northern Ireland. This could be done if, under section 8 of the Northern Ireland Act 1998 (see page 52 above), the consent of the Secretary of State for Northern Ireland is obtained for the inclusion of the relevant provision in the amending legislation enacted by the Northern Ireland Assembly. Given that extending the remit of NICCY in this way would not amount to conferring law-making or policy-making power on a devolved institution, there can be no constitutional objection to its enactment. Such a delegation of authority is not equivalent to extending the meaning of ‘transferred matters’ as far as the Northern Ireland Assembly and Executive are concerned.

However, if the proposal just outlined is too radical for the Northern Ireland Assembly, we recommend, as very much a second best alternative, that when, for example, NICCY wishes to review the complaint arrangements of a UK-wide body such as the UK Border Agency or the Home Office (which are not ‘relevant authorities’ for the purposes of the 2003 Order), or assist with complaints made to such authorities, or investigate complaints against such authorities, NICCY should be authorised by the 2003 Order to seek the consent of the Children’s Commissioner for

England to undertake such tasks using the powers otherwise conferred by the 2003 Order and the latter should be obliged not to unreasonably withhold such consent. We consider that this would provide effective legal authority for any such actions taken by NICCY on behalf of children or young people residing in Northern Ireland and immunise NICCY against legal challenges raised through judicial review proceedings brought by interested persons. We stress that our preferred recommendation is for an amending provision along the lines suggested in the previous paragraph.

### **Rights versus best interests**

It has been suggested to us that the 2003 Order may not be clear enough in specifying whether NICCY should prioritise the rights of children and young people or their best interests. Article 6(1) states that the principal aim of the Commissioner should be ‘to safeguard and promote the rights and best interests of children and young persons’. Article 6(2)(a) then says that in determining how to exercise her functions in relation to any particular child or young person the Commissioner’s paramount consideration must be the rights of that child or young person. Article 6(2) goes on to say that the Commissioner must have particular regard to the ascertainable wishes and feelings of the child or young person (‘considered in the light of his [or her] understanding’) and also regard to any statutory provision or rule of law which requires a body or person to act in a particular manner or to have regard to considerations other than the rights of the child or young person. Article 6(3) adds that the Commissioner must have regard to the importance of the role of parents in bringing up their children and to any relevant provisions of the UN Convention on the Rights of the Child.

It seems to us that to suggest that the legislation posits a conflict between the rights and best interests of a child or young person is to raise a false dichotomy. The bottom line is that children have rights and are entitled to exercise those rights. In the vast majority of situations the exercise of those rights will be in the best interests of the child or young person. However very few rights are absolute, so on occasions children, like adults, may legitimately be prevented from exercising a right which they would like to exercise. Similarly, children, like adults, can opt not to exercise their rights if they do not wish to do so. The only significant difference between children and most adults in this context is that some children may not yet be of a sufficient age or understanding to be able to make properly informed choices about their rights. It may therefore be necessary on some occasions for other persons to take decisions relating to children which go against their ascertainable wishes or feelings. But that does not mean that those decisions are not in the best interests of the children.

In our work for this review we have not been presented by a real or hypothetical scenario which suggests that the best interests of a child or young person can somehow ‘trump’ his or her rights. The case of *In the Matter of an Application by JR49* [2011] NIQB 41 was one where NICCY supported a challenge against a decision of the Department of Health, Social Services and Public Safety to transfer a 17-year-old boy detained in a mental hospital in Northern Ireland to a mental hospital in England. The doctors in Northern Ireland seemed to think that it was in the boy’s best interests to be transferred, but he and his family were very much against the transfer. Treacy J quashed the decision to transfer the boy because the authorities in Northern Ireland had not given proper consideration to the disadvantages of the



proposed move, including the fact that the Article 8 rights of the boy and his relations (to a private and family life) were not taken into account. On this occasion the boy's rights did take priority, but Treacy J did imply in his judgment that if the facts had been different (and the boy's family, for example, had been willing and able to continue regular visits to the boy even though he had been moved to England), the transfer might have been declared lawful. That would not have meant, however, that the boy's best interests took priority over his rights, only that there would have been no breach of his rights on the facts. Article 8 rights, like many others in the European Convention, can be limited for perfectly lawful reasons (here it would probably have been 'for the protection of health').

NICCY did bring to our attention the fact that a child may have the right not to be held in secure accommodation but yet be suffering from complex post-traumatic stress disorder. Apparently in Northern Ireland complex post-traumatic stress disorder is not considered to be a serious enough condition to justify a person's compulsory detention for mental health reasons, whereas in England and Wales it can be. What should NICCY do, therefore, if it is assisting a child who wishes to avoid being held in secure accommodation but who, as far as NICCY can judge, is very likely to harm him- or herself if not held under supervision? Should it support the child's right to liberty or the child's best interests to be kept safe? While we appreciate the practical dilemma such a case appears to present, we think it reflects a defect in the existing provisions on mental health law in Northern Ireland rather than a justification for preferring 'best interests' over 'rights'. If that is the case attention needs to be focused on reforming the mental health law. It must also be borne in mind that, given recent developments concerning the state's duty to protect the right to life (see, e.g., *Keenan v UK*,<sup>43</sup> *Savage v South Essex Partnership NHS Foundation Trust*,<sup>44</sup> and *Rabone v Pennine Care NHS Trust*<sup>45</sup>), it is arguable that, even in relation to children and young people, the right to liberty must on occasions take second place to the right to life.

In its General Comment No 2 (2002) on the role of independent national human rights institutions (NHRIs) in the promotion and protection of human rights the UN Committee on the Rights of the Child emphasises time and time again that such institutions must focus on the *rights* of children. It mentions the child's best interests only when saying (in para 19(i)) that NHRIs should 'ensure that the impact of laws and policies on children is carefully considered from development to implementation and beyond'.

As mentioned above, by Article 6(3) of the 2003 Order the Commissioner is obliged, when determining whether and, if so, how to exercise her functions, to have regard to (a) the importance of the role of parents in the upbringing and development of their children, and (b) to any relevant provisions of the UN Convention on the Rights of the Child. In addition, of course, NICCY is itself obliged, as a public authority, to comply

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<sup>43</sup> (2001) 33 EHRR 913.

<sup>44</sup> [2008] UKHL 74, [2009] 1 AC 681.

<sup>45</sup> [2012] UKSC 2, [2012] 2 AC 72.



with the Human Rights Act 1998, which means that in everything it does it must act compatibly with the rights in the European Convention on Human Rights (ECHR). While it is commendable that the Order gives weight to the Convention on the Rights of the Child in this manner even though it has not yet been formally incorporated into domestic law in the way that the ECHR has been, it would be even more commendable if the Order were to be amended to require NICCY to have regard to the full range of international human rights treaties which have been ratified by the UK. We recommend that such an amendment should be made. Many children in Northern Ireland would benefit, for example, if NICCY was required to have regard to the UN Convention on the Rights of Persons with Disabilities 2006, which the UK ratified in 2009. We acknowledge that this may place a more onerous responsibility on NICCY to keep itself aware of the range of international standards in question, but these are standards which, because the UK government has ratified the treaties in question, are binding upon the UK in international law and about which considerable information is readily accessible. If NICCY aspires to be a world-leading human rights body for children and young people it is appropriate that it commits itself to the implementation of the full range of children's rights to which the UK government has promised to adhere.

#### **NICCY's power to bring cases to court**

NICCY can bring applications for judicial review if it can satisfy the High Court that it has the requisite standing to do so. This means that it must be able to demonstrate that it has 'a sufficient interest in the matter to which the application relates' (see the Judicature (NI) Act 1978, s 18(4) and the Rules of Senior Courts (NI), Order 53, rule 3(5)). On this test, given its statutory remit, NICCY should have little difficulty in persuading the High Court that it has standing to apply for judicial review in cases where the issue is one which affects a significant group of children or young people in Northern Ireland. We do not know of any application for judicial review lodged by NICCY which has been rejected on the basis of its lack of standing in this sense. NICCY is not frequently required to consider whether to apply for judicial review in relation to decisions concerning particular children, because the Northern Ireland Legal Services Commission is usually willing to grant legal aid to the children themselves.

The difficulty arises in relation to arguments which NICCY might want to make based on the Human Rights Act 1998. Section 7(1) of that Act allows a person who claims that a public authority has acted or proposes to act in a way which is incompatible with European Convention rights to bring court proceedings against the authority but, by section 7(3), if the proceedings take the form of an application for judicial review the applicant is to be taken to have a sufficient interest in relation to the alleged unlawful act only if he or she is, or would be, a victim of that act. Likewise, while section 7(1) allows a person who claims that a public authority has acted or proposes to act in a way which is incompatible with European Convention rights to rely on the Convention rights in any legal proceedings, this is conditional upon the person being a victim of the unlawful act. And section 7(7) makes it clear that for the purposes of section 7 the term 'victim' means the same as in the European Convention, i.e. someone who has suffered from a violation of the rights in question. All of this means that NICCY finds it very difficult to make human rights arguments in court cases,

other than through its powers to intervene (in relation to which the constraints just mentioned do not apply). When it challenged the Secretary of State's right to introduce a law providing for anti-social behaviour orders, it was told by Girvan J that it did not have the required status of victimhood to make such a claim: [2004] NIQB 40 (para 14).

A similar difficulty faced the Northern Ireland Human Rights Commission when it was first established in 1999. Eventually, after much lobbying, that Commission succeeded in getting its statutory powers amended so that it acquired the right to take court proceedings in order to make arguments based on the Human Rights Act. This was achieved by removing the 'victim' limitation (see the Northern Ireland Act 1998, s 71(2A)–(2C), inserted by the Justice and Security (NI) Act 2007, s 14(2)). We strongly recommend that the same type of amendment be made to the 2003 Order, thereby allowing NICCY to play a similar role in relation to children's rights that the NIHRC can play in relation to human rights more generally. We would imagine that elected representatives, and the general public in Northern Ireland, would expect a body specifically created to safeguard the rights and interests of a particular group of vulnerable people to have the power to bring court cases relating to issues that affect that group even though the body itself is not (and could not be) directly affected. It should be noted that the Equality and Human Rights Commission in Great Britain has also been excused from having to satisfy the victim requirement when relying upon human rights arguments (see the Equality Act 2006, s 39(3)). In case it is argued that NICCY has no need to be given this power to take human rights cases in its own name precisely because the NIHRC already has that power, it must be noted that the NIHRC's annual government grant has consistently been less than that awarded to NICCY. Moreover, given its very wide remit in relation to everyone's human rights in Northern Ireland, the NIHRC is not in a position to focus on court cases involving children's rights and it does not have as much expertise in that specific area as the Commissioner and staff at NICCY would have.

### **NICCY's power to intervene in court proceedings**

NICCY's power to intervene in court proceedings is conferred in uncontroversial terms by Article 14(1)(b), (2) and (3). The Commissioner has made significant use of the power, sometimes more successfully than others. Like any other person or body wishing to intervene in someone else's litigation, the consent of the court is required before it can occur. We consider that to be a reasonable constraint and we have not seen evidence of such consent being unreasonably withheld. We therefore do not consider that any change needs to be made to the 2003 Order to enhance this intervention power.

### **Access to material made available in court proceedings involving children**

NICCY has experienced some difficulty in getting access to material which has been considered in private court proceedings involving children. The current legislation (the Administration of Justice Act 1960, s 12, and the Children (NI) Order 1995, art 170) restricts access to that material to the parties involved in the proceedings and makes it contempt of court – a criminal offence – to disclose the material to anyone else. This is for good reasons, since much of the material will be of a highly personal nature the disclosure of which would seriously violate rights to a private and family

life. But as a statutory body with a duty to safeguard the rights of children NICCY has a special role to play in our society and in some situations ought to be granted access to information which could well be of more general interest to children and young people in Northern Ireland or which, in the particular case, may reveal an actual or potential infringement of a child's rights which NICCY would have an interest in protecting.

We suggest that the way to plug this gap is for the Rules Committees, which devise the rules that govern the way proceedings are conducted in the various courts of Northern Ireland, should exercise the power given to them by section 95 of the Justice Act (NI) 2011 to issue rules which, in effect, exempt from the contempt of court laws the disclosure of specified information relating to family proceedings held in private. NICCY should write to the various Rules Committees making a case for the issuing of such rules in its favour.

### **Imposing a duty on government to respond to NICCY's reports**

Like many other non-departmental public bodies, NICCY at times feels frustrated that the reports it issues do not elicit any response at all – let alone acceptance – from the relevant government departments which together constitute the Northern Ireland Executive. If it were to conduct a formal investigation under Article 16 of the 2003 Order then the authority investigated would be under a statutory duty to consider and determine what action to take, if any, in response to NICCY's recommendations (see Article 18(6) of the Order), but otherwise there is no obligation on any relevant authority, including the OFMDFM, to respond to NICCY's views. This was a gap in the legislation which the legal advice obtained by NICCY from a barrister in February 2012 suggested should be filled.

The other Children's Commissioners in the United Kingdom have experienced the same frustration. In his final report on the Commissioner for Children in England, in 2010, Dr Dunford recommended that a duty should be imposed on the government or other relevant bodies 'to issue a written response, within a reasonable timeframe, explaining what action they plan to take in respect of the Commissioner's recommendations' (Recommendation 2.13), but such a change has not been reflected in the proposed new statutory provisions published by the UK government. In Wales there is now a tradition (although still not a legal requirement) whereby the Welsh Assembly holds an annual plenary debate on the Commissioner's annual report and the Welsh government issues a formal response to the recommendations contained in that report.

In our opinion there are three ways in which this problem might be addressed as far as NICCY is concerned.

The first is by designating the Northern Ireland Commissioner for Children and Young People as an officer of the Assembly (see too page 64 below, at recommendation 8). In that way the Commissioner's annual reports would be issued directly to the Assembly rather than first to the OFMDFM, which then lays the report before the Assembly (2003 Order, Schedule 2, para 12). If the report went directly to the Assembly it could as a matter of practice be assigned for consideration to a

particular Committee of the Assembly (probably the Committee on the OFMDFM). If the Committee chose to raise issues mentioned in the reports with the Minister responsible, the Minister would in effect be obliged to respond to the Committee. This is more or less the way in which, in Great Britain, the annual reports of the Parliamentary Commissioner for Administration (the Ombudsman) are dealt with. At Westminster there is a Select Committee on Public Administration, which each year conducts an evidence gathering session with the Parliamentary Commissioner (the last occurred on 18 December 2012) and it can, if it wishes, pursue further any of the issues raised by the Commissioner. Reports issued by the Select Committee are consistently responded to by the UK government. Likewise, in Scotland the chair of the Scottish Human Rights Commission is appointed by the Scottish Parliament, not by the Scottish government, and the Commission must report annually directly to the Scottish Parliament (Scottish Commission for Human Rights Act 2006, s 15).

However, while this change to the appointment and reporting procedures might make it more likely that an official government response to issues raised by NICCY will be forthcoming, it does not guarantee it. We do not think that, on balance, this legislative change alone would ensure an official response to NICCY's recommendations.

The second way in which the problem might be addressed is more promising. This would require amending the 2003 Order so that it imposes a duty on the Northern Ireland Executive, when developing a strategy on children and young people, or even when taking other actions which particularly affect children and young people, to take account of the advice of NICCY on the matter. A model to follow here might be that contained in the Child Poverty Act 2010, which, in section 10(3), requires the UK government, when it is preparing a UK strategy on how to meet child poverty targets, to 'have regard to any advice given by the [Child Poverty] Commission under this section'. In *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2012] EWHC 2579 (Admin), a High Court judge J held that the UK government had acted unlawfully in producing a strategy without first consulting the (as yet non-existent!) Child Poverty Commission. This decision appears to show the utility of the statutory provision in question, but of course no further sanction was imposed on the government. The decision was, however, partly responsible for expediting the appointment of members to the new Social Mobility and Child Poverty Commission (the names were announced on 17 December 2012).

Requiring the Northern Ireland Executive to 'have regard' to 'advice' from NICCY would of course be an improvement on the current situation, where the Northern Ireland Executive can completely ignore the views of NICCY if it so wishes. But it does not go very far in ensuring that NICCY's views are taken seriously.

The third method for addressing the current problem is in our view the best. This would entail amending the 2003 Order so as to require NICCY to produce an annual report on the progress being made by the Northern Ireland Executive as regards protecting the rights and best interests of children. The Order should then also be amended to require the Northern Ireland Executive to lay before the Assembly a response to the points raised by NICCY's report. General Comment No 2 by the UN Committee on the Rights of the Child (in para 18) says that States must ensure an

annual debate in Parliament on the NHRI's work relating to children's rights and on the State's compliance with the UN Convention on the Rights of the Child.

A good model in this context is provided by the Climate Change Act 2008, section 36 of which requires the Committee on Climate Change to report to Parliament on the UK government's progress towards meeting its targets on climate change and section 37 of which obliges the Secretary of State to lay before Parliament 'a response to the points raised by each report of the Committee under section 36'. We have not been able to find any comparable example in the legislation of other countries, although imposing a duty on rights bodies to produce annual reports on the current state of human rights in the country in question is not unknown. The Constitution of South Africa 1996 (in section 184(3)), for example, requires the South African Human Rights Commission to 'require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment'. There is not, however, any legal duty on the South African government to respond to such reports.

We recommend that the 2003 Order should be amended so as to require NICCY to produce an Annual Report on the progress being made by the Northern Ireland Executive as regards protecting the rights and best interests of children in Northern Ireland. The 2003 Order should also be amended so as to require the Northern Ireland Executive to lay before the Northern Ireland Assembly a response to each of the points raised in NICCY's Annual Report.

### **Independence, the Paris Principles and the ENOC standards**

For the purposes of this review we have looked again at whether the 2003 Order ensures that NICCY has the appropriate degree of independence to be able to satisfy the demands of the UN's Paris Principles and the standards developed by the European Network of Ombudspersons for Children (ENOC).

Like other non-departmental public bodies in Northern Ireland, NICCY is funded by public money and, rightly, must publicly account for how it spends that money. The government department which 'sponsors' NICCY is the Office of the First Minister and Deputy First Minister (the OFMDFM). While of course, in law, NICCY is a separate legal entity from the OFMDFM, in practice, given the provisions of Schedule 2 to the 2003 Order, NICCY is dependent on the OFMDFM as regards the processes for appointing and removing the Commissioner, the decision as to how much public money NICCY should receive, the size of the salary and allowances paid to the Commissioner, the number of staff the Commissioner can appoint and the remuneration and conditions of service of such staff, and the form in which NICCY's statement of accounts must be presented. While naturally we agree that any public body must be very careful in the way that it spends public money, we believe that the extent of the OFMDFM's involvement in NICCY's operational matters does compromise NICCY's actual as well as its perceived independence.



As regards the compatibility of the 2003 Order with the UN's Paris Principles, we refer back to the report we provided as part of our joint review of the Order in 2006.<sup>46</sup> Nothing has occurred since 2006 to make us want to alter any of the recommendations set out in that report concerning the respects in which the 2003 Order ought to be amended in order to make NICCY a body which (as far as children's rights are concerned) is fully compliant with the Paris Principles. For ease of reference we summarise those 14 recommendations below. In recommendation 8 we have substituted the Northern Ireland Assembly for the UK Parliament because in the interim devolution has been restored to Northern Ireland. We again conclude that the adoption of these recommendations is required to ensure that the 2003 Order is fully compatible with relevant international standards concerning children's rights institutions. We consider the recommendations to be compatible with those being made in the current report.

1. At the very least the Commissioner's remit should be extended to embrace all 'public authorities', but preferably it should be extended to private bodies in the way suggested by ENOC's standards (see pages 65-66 below). (para 21 of the 2006 Report)
2. Article 6(1) of the 2003 Order should be amended so that the Commissioner's principal aim – to safeguard and promote the rights and best interests of children and young persons – applies when he or she is exercising 'any of his or her duties or powers'. (para 22 of the 2006 Report)
3. To avoid doubt, consideration should be given to amending the 2003 Order in order to impose an express duty on the Commissioner to recommend, if necessary, the adoption of new legislation, the amendment of legislation in force, and the adoption or amendment of administrative measures. (para 25 of the 2006 Report)
4. Consideration should be given to amending the 2003 Order so as to impose on the Commissioner a duty to submit advice to the government on situations in parts of Northern Ireland where children's human rights have been violated, and to make proposals for initiatives to put an end to such situations. (para 28 of the 2006 Report)
5. Consideration should be given to whether the power of the Commissioner to promote the harmonization of legislation, regulations and practices in Northern Ireland with the international human rights instruments to which the United Kingdom is a party should be expressly listed as a duty. (para 32 of the 2006 Report)
6. Consideration should be given to whether the Commissioner's implied powers to encourage ratification of, or accession to, international human rights instruments

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<sup>46</sup> Brice Dickson, *An analysis of the extent to which the Commissioner for Children and Young People (NI) Order 2003 complies with the Paris Principles 1993* (May 2006), 28 pp. This is available from NICCY or direct from the author (b.dickson@qub.ac.uk).



- to which the United Kingdom is a party, and to ensure their implementation, should be expressly listed as a duty. (para 33 of the 2006 Report)
7. Consideration should be given to how sectors of society in Northern Ireland other than children and young people can have their views taken into account more generally by the Commissioner. (para 39 of the 2006 Report)
  8. The Commissioner for Children and Young People in Northern Ireland should be made an institution of the Northern Ireland Assembly, with funding voted to it by the Assembly. (para 42 of the 2006 Report)
  9. The limitations on the Commissioner's powers should be repealed. Any overlap with existing powers of other bodies should be dealt with through memoranda of understanding reached between the Commissioner and each of those bodies. (para 47 of the 2006 Report)
  10. The distinction between the three sets of investigative powers currently vested in the Commissioner should be abolished and those conferred by Articles 16 to 23 should be extended across the board. (para 55 of the 2006 Report)
  11. The 2003 Order should be amended so as to require the Commissioner to consult with the public. (para 57 of the 2006 Report)
  12. The 2003 Order should be amended so as to require the Commissioner to consult with the other bodies responsible for the protection and promotion of human rights in Northern Ireland. (para 59 of the 2006 Report)
  13. The 2003 Order should be amended so as to require the Commissioner to develop relations with the non-governmental organizations devoted to protecting and promoting the rights of children and young persons. (para 60 of the 2006 Report)
  14. The restriction in Article 3(4) of the 2003 Order, which limits NICCY's powers to investigate complaints to situations where either the child or young person or any person acting on his or her behalf makes the complaint, should be removed. This would allow NICCY to investigate complaints made by other individuals who are not acting on a child's or young person's behalf. (para 63 of the 2006 Report)

Our 2006 report measured the 2003 Order against the Paris Principles as interpreted and 'upgraded' by four other documents, namely, the UN's *Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights* (1995), the Commonwealth Secretariat's guide entitled *National Human Rights Institutions: Best Practice* (2001), ENOC's *Standards for Independent Human Rights Institutions for Children* (2001), and the UN Committee on the Rights of the Child's General Comment No.2 on *The role of independent national human rights institutions in the promotion and protection of the rights of the child* (2002). The recommendations above are therefore intended to ensure that the highest possible standards are applied in Northern Ireland.

Article 4 of the Statutes of ENOC provides that an institution qualifies for membership of the network only if it is established through parliamentary legislation which provides for its independence. In addition:

- the institution must have the function, established through legislation, of protecting and promoting children's rights;
- there must be no provisions in the legislation which limit the institution's ability to set its own agenda in relation to this function, or which prevent it from carrying out significant core functions suggested in the Paris Principles and ENOC's Standards;
- the institution must include or consist of an identifiable person or persons concerned exclusively with the protection and promotion of children's rights; and
- arrangements for the appointment of ombudspersons, commissioners and members of a commission must be established by legislation, setting out the term of the mandate and arrangements for renewal, if any.

ENOC's standards, drawing in part from the UN Convention on the Rights of the Child, make it clear that a Children's Commissioner should have the power to have regard to the situation of children in the family, in schools and in all other institutions. In addition, the standards require a Children's Commissioner to have power to consider the promotion and protection of children's rights in relation not only to government but also to private bodies.

NICCY is currently a member of ENOC but, given the provisions in the 2003 Order which limit its ability to set its own agenda in relation to its function of safeguarding and promoting children's rights, and prevent it from carrying out other significant core functions such as reviewing inspection arrangements and investigating complaints, it must be doubtful whether, on a strict interpretation of ENOC's membership criteria, NICCY is clearly eligible for such membership. This tends to undermine NICCY's credibility throughout Europe. If Northern Ireland is to have a children's rights institution which is fully respected throughout Europe as a model of good practice in the area, we recommend that the Northern Ireland Assembly should ensure that its duties and powers are amended in the ways suggested in this report.

## **Summary of recommendations**

### Duplication clauses

We recommend that issue duplication clauses in Articles 9, 10, 11, 13 and 15 of the 2003 Order be removed. While it is possible to interpret Article 12 in a way which does not allow the Northern Ireland Ombudsman to obstruct NICCY's work, we recommend that the remit duplication clause in Article 12 should also be removed.

In addition to the removal of duplication clauses, we recommend that NICCY should be empowered to work on a more cooperative basis with other public bodies concerned with the rights of children and young people.

In terms of its assistance powers under Articles 11 and 15, we consider that Memoranda of Understanding with the ECNI and the Legal Services Commission would be beneficial. The existing Memorandum with the NIHRC could be extended to casework involving assistance. In terms of NICCY's powers of investigation under Article 12, we consider that the existing Memoranda with the NIHRC and the Police

Ombudsman should be renegotiated in line with a cooperation model between them and that similar Memoranda should be negotiated with the ECNI, the NI Ombudsman and other public bodies.

Duties to consult (or, in the alternative, powers to consult) relevant inspectorates should be imposed in relation to NICCY's review powers under Articles 9 and 10, unless it is the inspectorate's own arrangements which are being reviewed. But NICCY's powers of legal assistance should be subject only to the usual principles, already set out in the 2003 Order. In relation to NICCY's power of investigation against relevant authorities under Article 12, a duty of consultation could be formulated with the Commissioner for Older People, the Northern Ireland Ombudsman and, possibly, the Police Ombudsman and the Prisoner Ombudsman. We reaffirm the recommendations we made in our 2006 report concerning the nature of NICCY's investigation powers: we think that the Commissioner's powers of formal investigation should apply across the full range of the Commissioner's investigatory and complaint assistance powers. The authorities listed in Part II of Schedule 1 to the 2003 Order should be subject to the same powers of formal investigation as apply to other relevant authorities.

A power to cooperate would be most appropriate in relation to NICCY's review powers under Articles 9 and 10 and its investigation powers under Article 12. We do not believe that a duty to cooperate should be imposed.

#### NICCY's remit more generally

There is a case to be made for extending the remit of NICCY so that it can at least give advice to all young people up to the age of 21 who are in a vulnerable position, including those who are not in education, employment or training. We would also suggest that NICCY should consider invoking Articles 3(6)–(8) of the 2003 Order so that it can assist adults who wish to submit information to the Inquiry into Historical Institutional Abuse about the experiences they endured as children in institutions. We recommend that NICCY refuse to provide such assistance only where it can point to clear evidence that such assistance is already available through other sources.

There is scope for clarifying and extending the text of the 2003 Order so that it sets out more transparently and comprehensively the bodies in relation to which it can exercise its functions. The OFMDFM should review the list of 'relevant authorities' in Schedule 1 with a view to ensuring that no child or young person can slip through the protective net of NICCY's powers and duties.

We recommend that for the time being the issue of when and how NICCY can use its powers and duties in relation to non-devolved matters in Northern Ireland should be left to a Memorandum of Understanding between the four UK Commissioners. But we also recommend that, pending an amendment to the 2003 Order which we propose below, the current Memorandum of Understanding should be re-visited with a view to more detail being included as to how each of the Commissioners in the devolved regions – in particular NICCY – will conduct itself when working on a non-devolved issue. We recommend too that, where necessary and appropriate, the Commissioner for England should exercise her powers under section 7(4)–(9) of the Children Act

2004 to hold an inquiry into any case of an individual child in Northern Ireland where in the Commissioner's opinion there are issues of public policy raised which are of relevance to other children. For the longer term we recommend that, further to a consent order issued by the Secretary of State for Northern Ireland under section 8 of the Northern Ireland Act 1998, the 2003 Order should be amended to make it clear that NICCY's remit extends to all children and young people residing in Northern Ireland. We can see no constitutional objection to such an enactment, but if this is too radical for the Northern Ireland Assembly, we recommend, as very much a second best alternative, that when, for example, NICCY wishes to review the complaint arrangements of a UK-wide body such as the UK Border Agency or the Home Office (which are not 'relevant authorities' for the purposes of the 2003 Order), or assist with complaints made to such authorities, or investigate complaints against such authorities, NICCY should be authorised by the 2003 Order to seek the consent of the Children's Commissioner for England to undertake such tasks using the powers otherwise conferred by the 2003 Order and the latter should be obliged not to unreasonably withhold such consent.

The 2003 Order should be amended to require NICCY to have regard to the full range of international human rights treaties which have been ratified by the UK government. This will help NICCY to promote itself as one of the world's leading children's rights institutions.

We strongly recommend that the 2003 Order be amended so as to permit NICCY to take cases to court based on the Human Rights Act 1998 even though NICCY is not itself a 'victim' as defined by that Act.

We do not consider that any change needs to be made to the 2003 Order to enhance its power to intervene in court proceedings.

NICCY should write to the various court Rules Committees in Northern Ireland making a case for those committees to issue rules under section 95 of the Justice Act (NI) 2011 which would exempt NICCY from the contempt of court laws if it were to receive specified information relating to family proceedings held in private.

We recommend that the 2003 Order should be amended so as to require NICCY to produce an annual report on the progress being made by the Northern Ireland Executive regarding the protection of the rights and best interests of children in Northern Ireland. The 2003 Order should also be amended so as to require the Northern Ireland Executive to lay before the Northern Ireland Assembly a response to each of the points raised in these annual reports.

We reiterate the 14 recommendations we made in 2006 concerning the changes which need to be made to the 2003 Order in order to render it fully compatible with relevant international standards. These include that the Commissioner's remit should be extended to embrace all 'public authorities' and as well as some private bodies; that consideration should be given to imposing a duty on the Commissioner to submit advice to the government on situations in parts of Northern Ireland where children's human rights have been violated and to make proposals for initiatives to put an end to

such situations; that consideration should be given to how sectors of society in Northern Ireland other than children and young people can have their views taken into account more generally by the Commissioner; that the Commissioner in Northern Ireland should be made an institution of the Northern Ireland Assembly, with funding voted to the office by the Assembly; and that the restriction in Article 3(4) of the 2003 Order, which limits NICCY's powers to investigate complaints to situations where either the child or young person or any person acting on his or her behalf makes the complaint, should be removed.