

**Report To:**

**The Office of the First and Deputy First Ministers**

**Under Article 24**

**of**

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

## **Contents**

<b>Page</b>	<b>Contents</b>
<b>2</b>	<b>Introduction</b>
<b>4</b>	<b>The Duties of the Commissioner</b>
<b>4</b>	<b>The Powers of the Commissioner</b>
<b>7</b>	<b>Executive summary of recommendations</b>
<b>9</b>	<b>Recommendations as to amendments to the order which are necessary and desirable</b>
<b>9</b>	<b>Power to bring legal proceedings</b>
<b>11</b>	<b>Power to assist in relation to legal proceedings</b>
<b>12</b>	<b>Powers of investigation</b>
<b>13</b>	<b>Power to review advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities</b>
<b>14</b>	<b>Power to assist with complaints to relevant authorities</b>
<b>14</b>	<b>Investigations of complaints against relevant authorities</b>
<b>16</b>	<b>Review of the 2003 Order</b>
<b>16</b>	<b>Schedule 1 to the 2003 Order: relevant authorities</b>
<b>17</b>	<b>Further recommendations under Article 24 (4) (b)</b>
<b>17</b>	<b>Periodic reporting</b>
<b>18</b>	<b>Duty on Government Departments to consult</b>
<b>18</b>	<b>Paris Principles compliance</b>
<b>19</b>	<b>Terms of Office</b>
<b>20</b>	<b>Conclusion</b>
<b>21</b>	<b>ANNEX A</b>
	<b>A Review of the Duties and Powers of the Northern Ireland Commissioner for Children and Young People by Barry Fitzpatrick and Brice Dickson – March 2013</b>

## **INTRODUCTION**

The Office of the Commissioner for Children and Young People was set up in 2003 under The Commissioner for Children and Young People (NI) Order 2003, (hereafter the 2003 Order). Article 24 of that Order states as follows:

### **24. – (1) The Commissioner shall –**

**(a) keep under review the working of this Order;**

**Make reports on it to the First Minister and deputy First Minister in accordance with the following provisions of this Article.**

**(2) The first report under this Article shall be made as soon as practicable after the third anniversary of the making of this Order.**

**(3) A subsequent report under this Article shall be made at such time as the Commissioner thinks fit, not being earlier than three years after the making of the last previous report.**

**(4) A report under this Article –**

**(a) shall include the views of the Commissioner on the adequacy and effectiveness of this Order; and**

**(b) may contain recommendations as to amendments to this Order which in the opinion of the Commissioner are necessary or desirable.**

**(5) The First Minister and deputy First Minister acting jointly shall lay a copy of every report sent to them under this Article before the Assembly.**

The first Report under Article 24 was submitted in 2007 no response to the recommendations contained therein has ever been received by the Commissioner. As substantially more than three years have passed since then, this second Report under Article 24 is submitted, in line with the contents of that Article and in line with OFMDFM direction to conduct an updated review<sup>1</sup>. This Report contains the view of the Commissioner on the

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<sup>1</sup> OFMDFM Letter dated 26 July 2011. Reference: COR/1181/11

adequacy and effectiveness of the 2003 Order, together with recommendations as to amendments to the Order which in the opinion of the Commissioner are necessary to enable her to carry out her functions in the fullest manner. In the preparation of this report the Commissioner also sought independent advice on the current legislation from Professors Brice Dickson and Barry Fitzpatrick, their report is annexed hereto. This Report and the report by Professor Dickson and Professor Fitzpatrick should be read in conjunction with their previous report submitted in 2007.

The Commissioner considers it imperative and indeed timely, that this report is now acted on appropriately to review the founding legislation and amend it in line with the recommendations contained herein. The Commissioner considers the matter of 'victim status' to be an absolute priority in relation to her work alongside a duty being placed upon the Executive to reply to this report in a timely manner. This is particularly important given that the legislation is now 10 years old and none of the recommended amendments have been made.

The 2003 Order states that the Commissioner's principal aim in exercising her functions under the Order is to 'safeguard and promote the rights and best interests of children and young persons' (Art. 6 (1)).

The 2003 Order then sets out the powers and duties of the Commissioner to enable her to carry out this aim. These are set out in Art. 7 – 23.

**The Duties on the Commissioner include:**

- Promoting an understanding of the rights of children and young persons and matters relating to their best interests, together with an awareness of the importance of those rights and a respect among children and young persons for the rights of others;
- Keeping under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young people and services provided by relevant authorities for children and young persons;
- Advising the Secretary of State, The Executive Committee of the Assembly and a relevant authority on the rights or best interests of children and young persons, either if requested to, or if the Commissioner thinks it appropriate;
- Taking steps to ensure children, young people and their parents are made aware of the functions of the Commissioner, the location of her office and the ways in which they may communicate with her; and
- Encouraging children and young people to communicate with the Commissioner, seeking their views on her functions, ensuring the Commissioner's services are available, so far as practicable, to them where they live and that anything the Commissioner publishes which is aimed at them, takes account, so far as practicable of their age, understanding and usual language.

**The Powers of the Commissioner include:**

- Undertaking, commissioning or providing financial, or other assistance, for research, or educational activities, concerning the rights or best interests of children and young people, or the exercise of the Commissioners functions;

- Issuing guidance on best practice, regarding the rights or best interests of children and young persons;
- Conducting such investigations as she considers necessary or expedient;
- Compiling information, providing advice, making representations or recommendations and publishing any matter regarding the rights or best interests of children and young persons;
- Reviewing advocacy, complaint, inspection and whistle blowing arrangements for relevant authorities;
- Assisting with complaints to relevant authorities;
- Investigating complaints against relevant authorities; and
- Bringing, intervening in or assisting with legal proceedings.

This list of duties and powers appears to be wide ranging, however the ‘duplication clauses’ in the legislation then limit the ways in which these powers can be utilised to meet the duties of the Commissioner. In some instances the limitations placed upon the Commissioner by the legislation, in its present form, are such as to almost completely negate the power which has been given. It is the view of the Commissioner that the legislation requires amendment, to address such limitations on the exercise of her powers. The legislation in its present form is damaging to the reputation of the Commissioner among the public, stakeholders and within the children’s sector, as it appears there is general misunderstanding regarding the restrictions placed on her powers and her inability to exercise same due to those limitations.

To give an example the Commissioner has often been criticised for not using her powers of investigation fully (or some would believe at all!) however, the restrictions in the legislation are such that the Commissioner can only do so in very limited circumstances – i.e. where there is no one else / no other body who can investigate.

As the adequacy and effectiveness of the 2003 Order is severely limited by the restrictions placed upon the powers of the Commissioner, the Commissioner therefore believes it is vital for the Executive to finally take the necessary action in relation to the recommended amendments thereto.

## **EXECUTIVE SUMMARY OF RECOMMENDATIONS**

This report is prepared in compliance with Article 24 of Northern Ireland Commissioner for Children and Young People (NI) Order 2003.

This is the second such report submitted by the Commissioner, the first report having been submitted in 2007 to which no response has been received.

This executive summary sets out the recommendations made by the Commissioner for amendments to the present legislation to remove obstacles and difficulties it presents to her work in line with findings and recommendations ensuing from the review of the legislation conducted by independent legal experts.

The rationale for each of these recommendations is set out in detail in the body of the Report.

### **Recommendations: - In Summary**

- 1. The 2003 Order be amended to insert a clause stating that in relation to bringing legal proceedings, the Commissioner need not be a victim or potential victim of the act in question.**
- 2. The 2003 Order be amended to remove Article 15 (3).**
- 3. The 2003 Order be amended to remove Article 13 (1). In addition that the formal powers of investigation are extended to all investigations undertaken by the Commissioner.**
- 4. The 2003 Order be amended to remove Article 9 (4) and Article 10 (4). Any overlap in powers between NICCY and other bodies can be dealt with by Memorandum of Understanding regarding joint working.**
- 5. The 2003 Order be amended to remove Article 11 (4).**



- 6. The 2003 Order be amended to remove the restrictions placed upon the Commissioner's power by Article 12 (2) (b) and (3).**
- 7. The 2003 Order be amended to stipulate in Article 24 a timeframe of no more than 6 months, to include the report being laid before the Assembly, within which a comprehensive response to this report shall be received by the Commissioner.**
- 8. The 2003 Order be amended to move those bodies listed in Part II of Schedule 1 to Part I and in addition all the powers of the Commissioner be extended to all public bodies in Northern Ireland to save any confusion.**
- 9. The 2003 Order be amended to include a requirement upon NICCY to produce a periodic report on the progress by the Executive regarding the protection of rights and best interests of children in Northern Ireland together with a duty on the Executive to respond to each of the points raised in the report.**
- 10. The 2003 Order be amended to place a duty on government to consult with NICCY before issuing legislation. Such consultation to take place prior to any general consultation period.**
- 11. The 2003 Order be amended to make NICCY an institution of the NI Assembly, to confer upon it the independence required by the Paris Principles.**
- 12. The 2003 Order be amended to provide that the Commissioner should have a single term of 7 years, to enable greater focus on long term work and strategic aims of the organisation and to reflect greater independence in operational and strategic integrity [e.g. internal staffing arrangements].**

## RECOMMENDATIONS AS TO AMENDMENTS TO THE ORDER WHICH ARE NECESSARY AND DESIRABLE

### 1. Power to bring Legal Proceedings

Article 14 of the 2003 order gives the Commissioner the power to bring legal proceedings (other than criminal proceedings) involving law or practice concerning the rights or welfare of children or young persons (Art 14 (1) (a)). However, this power is severely restricted in a number of ways. **The first and most damaging limitation on this power is the Commissioner's lack of victim status.** This has led to the Commissioner being refused leave to bring legal proceedings on a number of occasions. E.g. when NICCY attempted to bring a legal challenge to the Secretary of State's right to introduce a law providing for anti-social behaviour orders submitting that it was incompatible with the European Convention on Human Rights, we were told by Girvan J. that we did not have the required status of victimhood to bring such a legal challenge (2004 NIQB 40 paragraph 14). Girvan J. stated:

*“In relation to the question of the incompatibility of the proposed legislation with the Convention, the Commissioner faces the legal problem created by the need to establish victimhood within the Act and Convention. In addition, under the Northern Ireland Act 1998 itself a challenge to Ministerial action or legislation on the grounds of a breach of Convention obligations must be brought by a “victim”. The Commissioner herself is not a victim and the fact that she is empowered to bring proceedings under the 2003 Act does not of itself confer upon her a power to bring proceedings to challenge legislation or draft legislation. Miss Higgins sought to argue that in some way the 2003 Act impliedly abrogated the victimhood requirement in relation to proceedings brought by the Commissioner. I cannot read the legislation in this way however”.*

It is a severe restriction on a body set up to safeguard and promote children's rights if it cannot use its legal powers to bring cases where we seek to rely on incompatibility with either a European Convention such as the ECHR, UNCRC or the Human Rights Act itself to address an infringement of children's rights. This is particularly ironic when you consider that the 2003 Order stipulates that we are to have 'due regard' to any relevant provisions of the UNCRC in determining whether and how to exercise our functions.

**The onus should not be placed on a vulnerable child victim to have to bring such proceedings, but rather on the statutory body set up to protect such children and assist them with cases such as this.**

NICCY is not the only statutory body to have faced such a difficulty. The Northern Ireland Human Rights Commission faced a similar difficulty when it was first set up. However, they have succeeded in having their originating legislation amended by virtue of S14 of the Justice & Security (NI) Act 2007. *S14 (2B) states –*

*In relation to the Commissioner's instituting, or intervening in, human rights proceedings – (a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate.*

The NIHRC has a wide remit in respect of human rights, however, the expertise on the rights and best interests of Children and Young People resides in the office of NICCY as the statutory body set up to safeguard and promote children and young people's rights.

It is vital therefore that NICCY should have the power to bring such cases in the same way that NIHRC can bring cases in respect of adults.

**Recommendation 1: I recommend that an amendment is made to the 2003 Order to insert a clause stating that in relation to bringing or intervening in legal proceedings the Commissioner need not be a victim or potential victim of act in question.**

## **2. Power to assist in relation to legal proceedings**

Article 15 of the 2003 Order gives the Commissioner the power to provide assistance in relation to legal proceedings. The Commissioner may arrange for the provision of legal advice or representation and any other assistance which she thinks appropriate. However, a restriction is put upon this power by Article 15 (3) which states:

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

This restriction has a major impact on where we can provide assistance, particularly in relation to the power to arrange for the provision of legal representation or advice. If a child were to be legally aided by the Legal Services Commission then they would provide funds to secure legal representation and advice. As the provision of such legal aid is normally advanced to children in civil cases the role of the Commissioner is therefore nullified, as another body can provide such assistance.

We do not believe that this is a consideration which NICCY should have to take into account. As the statutory body set up to safeguard and promote children's rights, we have the expertise to do so and should be in a position to directly assist vulnerable children and young people. We should not have to 'withdraw' to allow a solicitor in private practice to advance the case instead of us. Equally we should not have to pass a case to an NGO who can draw down legal aid or only be able to go forward with it if they decline to do so.

As a statutory body we should be able to focus on our key strengths and principal aim without having to encounter these restrictions. At the widest interpretation of this restrictive clause, if any person, e.g. any solicitor, or a private individual of means, was prepared to take the case on and provide or pay for advice and representation then we could not. We do not believe it was the intention of the legislative draftsman to give us a power which there was almost no circumstance in which we could use.

**Recommendation 2: I recommend that the 2003 Order be amended to remove Article 15 (3).**

### **3. Powers of Investigation**

Article 8 (3) of the 2003 Order gives the Commissioner the power to conduct such investigations as she considers necessary or expedient. However, this power is also restricted by further clauses contained within the 2003 Order. In particular Article 13 places a restriction on this power. Article 13 states –

*(1) 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 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.*

A strict interpretation of this clause would mean that the Commissioner could not investigate anything as there can be few occasions when a complainant does not have a right to appeal or review of a decision and indeed if that were absent that could be grounds for judicial review of the decision by way of court proceedings. It would be a very rare circumstance where the Commissioner could be satisfied that the circumstances were such that it was not reasonable to expect the complainant to have resorted to such a remedy.

This restriction is therefore extremely limiting and has a major impact on the power of the Commissioner to investigate a complaint. It has been our experience that the general public do not understand that such a restriction exists and become frustrated at the idea of a Commissioner who is meant to be able to investigate their complaints but cannot do so.

**Recommendation 3:** I recommend that the 2003 Order be amended to remove Article 13. In addition I recommend that the formal powers of investigation are extended to all investigations undertaken by the Commissioner.

**4. Power to review advocacy, complaint, inspection and whistleblowing arrangements of relevant authorities**

Articles 9 and 10 of the 2003 Order confer this power upon the Commissioner. However, yet again this power is restricted to an unworkable degree. Article 9 (4) states

- *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.*

Article 10 (4) repeats this restriction in respect of individual cases.

This restriction is very wide ranging given the number of inspectorate bodies in Northern Ireland. The majority of the complaints received by NICCY relate to health, education or justice. In relation to Education the ETI is in place, the RQIA is the inspectorate body regarding health and the CJI in respect of justice. The existence of these bodies effectively negates or certainly significantly reduces the power given to NICCY to review inspection arrangements of relevant authorities.

**Recommendation 4:** I recommend that the 2003 Order be amended to remove Article 9 (4) and Article 10 (4). Any overlap in powers between NICCY and other bodies can be dealt with by Memoranda of Understanding regarding joint working.

## **5. Power to assist with complaints to relevant authorities**

Article 11 of the 2003 Order confers the above power upon the Commissioner. Specifically Article 11 (2) states –

*Subject to paragraph (4), the Commissioner may act on behalf of a child or young person in –*

- (a) Making such a complaint to a relevant authority; and*
- (b) Any investigation or other proceedings conducted by that authority pursuant to the complaint.*

However, yet again this power is then restricted. Article 11 (4) states -

*The Commissioner shall not take any action on behalf of a child or young person under paragraph (2) unless it appears to the Commissioner that there is no other person or body likely to take such action.*

This again impacts upon the work of the Commissioner and leads to dissatisfaction from the public who would support the belief that it is her role to assist. The Commissioner would have to defer to voluntary bodies, support groups or even concerned individuals on a strict interpretation of this clause.

**Recommendation 5: I recommend that the 2003 Order is amended to remove Article 11(4).**

## **6. Investigations of Complaints against relevant authorities**

This power is conferred upon the Commissioner by Article 12 of the 2003 Order. Article 12 (1) states –

*Subject to paragraph (2) and Article 13, the Commissioner may conduct an investigation into a complaint made by a child or young person –*

- (a) That his rights have been infringed by any action taken by a relevant authority; or*
- (b) That his interests have been adversely affected by any such action.*

However, this power is then restricted by Article 12 (2) which states –

*The Commissioner shall not exercise her power under paragraph (1) in relation to a complaint unless she is satisfied that –*

- (a) The complaint raises a question of principle; and*
- (b) The complaint does not fall within an existing statutory complaints system.*

This is a wide ranging restriction on the work of the Commissioner as there are many other statutory complaints systems. However, the situation is made even more restrictive by the addition of a clause at Article 12 (3) as this clause states that a complaint falls within an existing statutory complaints system not only if the body or person has power under a statutory provision to investigate the complaints but also if:

*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. (12 (3)(b)).*

The effect of this clause is to prevent the Commissioner investigating a complaint even if the statutory complaints body itself does not actually have the power to investigate due to an exclusion or restriction placed upon them. This leaves a serious gap for a young person in this situation where the result is that neither body can actually investigate their complaint.

**Recommendation 6: I recommend that the 2003 Order be amended to remove the restrictions placed upon the Commissioner’s power by Article 12 (2) (b) and (3).**



## **7. Review of the 2003 Order**

As stated above Article 24 of the 2003 Order states that the Commissioner shall keep under review the working of this Order and make reports on it to the First Minister and Deputy First Minister in accordance with the contents of that Article. However, there is no stipulation as to when the Commissioner will receive a response to such a report. As stated above the report submitted in 2007 (some six years ago) was not responded to, and therefore none of the necessary recommendations have been implemented.

**Recommendation 7: The 2003 Order be amended to stipulate in Article 24 a timeframe of no more than 6 months, to include the report being laid before the Assembly, within which a comprehensive response to this report shall be received by the Commissioner.**

## **8. Schedule 1 to the 2003 Order: Relevant Authorities**

Schedule 1 Part 1 identifies the bodies which are considered to be 'relevant authorities' for the purposes of the Order. Policing and Justice Bodies are listed under Part II of Schedule 1. At the date of the 2003 Order being drafted Policing and Justice was a reserved matter, however; it has now been devolved and we therefore believe these Bodies should be moved from Part II to Part I of Schedule 1.

**Recommendation 8: I recommend that those bodies listed in Part II of Schedule 1 should be moved to Part I and in addition all the powers of the Commissioner be extended to all public bodies in Northern Ireland to save any confusion**

## **9 - 12. Further Recommendations under Article 24 (4) (b)**

In addition to the identified restrictions placed upon my powers above and the recommendations in relation thereto, I submit, in line with Article 24 that the following amendments to the 2003 Order are also necessary and desirable to allow me to fulfil my duties and exercise my powers to their optimum potential.

### **9. Periodic Reporting**

In line with NICCY's monitoring role, it is vital that we ensure that NICCY provide a clear and focused review of the progress of the Executive regarding protection of the rights and best interests of children in Northern Ireland including our most vulnerable and/or marginalised Children and Young People. This would obviously have to be in parallel to the opportunity for the NI Executive to respond to each of the points raised in the report.

**Recommendation 9: I recommend that the 2003 Order be amended to include a requirement upon NICCY to produce a periodic report on the progress of the Executive regarding the protection of rights and best interests of children in Northern Ireland together with a duty on the Executive to respond to each of the points raised in the report, in a timely manner.**

## **10. Duty on Government Departments to Consult**

As the statutory body set up to promote the rights and best interests of Children and Young People and in line with our duty to offer high level advice prior to policy / strategy / legislation development, it is crucial that NICCY be involved at the outset to assist in ensuring these are ‘child rights and best interests compliant’.

**Recommendation 10.** I recommend that the 2003 Order be amended to place a duty on government to consult with NICCY before developing relevant policies/strategies/legislation; this to take place prior to any general stakeholder consultation period.

## **11. Paris Principles Compliance**

As previously highlighted in the review conducted prior to this one, it is vital that NICCY maintains its independent status in line with ‘Paris Principles’ compliance and recognised international ‘rights’ standards. The Paris Principles are a set of international standards for human rights organisations.

**Recommendation 11:** I recommend that NICCY be made an institution of the NI Assembly, to confer upon it the independence required by the Paris Principles.

## **12. Term of Office**

To enable greater focus on longer term strategic aims, outputs and outcomes for Children and Young People, it is the 'preferred option' that the term of office of Commissioners be for a single term but which covers a 7 year time period. The Commissioner should also have greater autonomy over the organisational structure and staffing necessary to meet corporate and strategic aims.

**Recommendation 12: I recommend that the Commissioner should have a single term of 7 years and greater autonomy over internal structures to meet corporate and strategic aims.**

**IN CONCLUSION:**

As Commissioner for Children and Young People I have been striving throughout my period in office to improve the lives of Children and Young People in Northern Ireland. I believe that if my recommendations in respect of amendments to the 2003 Order are implemented I will be able to hand over to my successor an enhanced ability to continue with this work.



**Patricia Lewsley-Mooney**

**Commissioner**

**May 2013**