

## **CYPE(6)-09-22 - Paper to note 18**

### **Y Pwyllgor Plant, Pobl Ifanc ac Addysg**

### **Children, Young People and Education Committee**

Jane Hutt MS  
Minister for Social Justice

22 April 2022

### **Powers of the Children's Commissioner for Wales**

Dear Jane,

Following our annual scrutiny of the Children's Commissioner in December 2021, the Commissioner shared with us a paper outlining views on the legal powers and remit of the Commissioner's office. We understand that this paper, which is attached, has already been shared with you.

The paper outlines how, despite being world leading when the office of the Children's Commissioner for Wales was established, there are now some significant gaps which hinder the Commissioner's ability to advocate and support children in Wales. During the annual scrutiny session, the Commissioner cited a recent example, where she was only able to intervene in relation to significant issues in a private school in north Wales because it had a residential element to the school. She told us that, had it been a day school, she could have not intervened. If so, this is clearly an anomaly. She also cited her inability to intervene in private children's homes or mental health institutions.

The Commissioner argues that some of the gaps are the result of omissions and inconsistencies in the original legislation, which have become apparent over time. Others have arisen because of changes to the devolution settlement since her office was established. However, the paper also outlines other concerns, including the on-going debate about who should be responsible for appointing the Commissioner. Both the previous CYPE Committee and ourselves believe that this appointment should be made by the Senedd. Our views were informed by our involvement in the pre-appointment scrutiny process for the new Commissioner. We also note that an independent review commissioned by the Welsh Government in 2014 also recommended transfer of the appointment to the Senedd.

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The paper also calls for a review into the incorporation of the UNCRC in Wales, and how full incorporation could potentially be taken forward alongside the necessary legislative changes to the Commissioner's remit and powers.

We note that the House of Lords is currently [undertaking post legislative scrutiny of the Children and Families Act 2014](#), including a question as to whether the Commissioner in England has the correct remit and powers.

We would welcome your views on the issues raised by the Commissioner in the paper, and what plans the Welsh Government has to address these. Once we have received this, we will consider what further work we may wish to do in this area.

I am copying this letter to the Children's Commissioner, and the Equality and Social Justice Committee.

I would be grateful for your response no later than Friday 27 May 2022.

Yours sincerely



Jayne Bryant MS,

Chair

Croesewir gohebiaeth yn Gymraeg neu Saesneg.

We welcome correspondence in Welsh or English.

## **Paper on the Children's Commissioner for Wales' legal powers and remit**

November 2021

In 2021, the Children's Commissioner for Wales (CCfW) undertook a formal review of the Welsh Government Ministers' exercise of their functions in respect of two education policy matters, using the power in section 72B of the Care Standards Act 2000. The [report](#) of that Review sets out a number of areas in which we identified difficulties or deficiencies in the exercise of our formal powers. This paper develops those points further, and should be read in conjunction with the published report of the Review.

In response to that Review, the Welsh Government rejected the Commissioner's calls in respect of her legal powers, but, following further discussion with the Children and Families Branch of Welsh Government, the CCfW was asked to submit reflections on areas for potential change or enhancement to the Commissioner's legal powers.

By way of background, there is a published summary of our existing powers on our website [here](#)

### Relevant legislation

[Care Standards Act 2000, Part V](#) and associated Schedules to the Act

[The Children's Commissioner for Wales Act 2001](#)

[The Children's Commissioner for Wales Regulations 2001](#)

[The Social Services and Well-being \(Wales\) Act 2014](#) and the [Part 6 Code of Practice](#)

### Background / Context

The CCfW was the first Commissioner post created in Wales, and the first Children's Commissioner role in the UK. It was also the first 'Wales only' piece of primary legislation passed since devolution for Wales. As such, the role is underpinned with what was then pioneering legislation.

In the two subsequent decades, there is much that can be learnt from other legislation that has since been developed in relation to the other UK Children's Commissioners, and Wales' other statutory Commissioners. The CCfW legislation has at times been used as a blueprint or starting point for other Commissioners' offices. So why the need to take another look at the extent and reach of the Commissioner's legal remit and powers now?

It is vital that Wales keeps pace with developments in other UK nations. It is right to be proud of being the first UK nation to create such a post but other nations have since stepped beyond the role and powers that were created in Wales.

The legislation in other UK nations and in Jersey for the appointment of a Children's Commissioner drew on, but has enhanced and strengthened, aspects of the CCfW legislation in order to create a more effective basis for Commissioners to fulfil their remit. The omissions identified in the legal basis for CCfW highlight that a review of legislation should be undertaken, with a view to

strengthening the safeguards that the Commissioner provides to the rights and welfare of children and young people in Wales.

Recent cases have also highlighted clear deficiencies in the powers or barriers as to how the Commissioner may intervene to safeguard and protect the rights of all children in Wales, in any setting. The Covid-19 pandemic has also brought into stark view the inequalities and disadvantages children in a wide range of settings have experienced and the importance of an independent champion to help them access their rights where these have been curtailed or overlooked.

This paper is not intended to be exhaustive, but it considers how the process of change might be advanced, suggesting also that the legislation should be developed by the Senedd, rather than the Welsh Government.

#### Strengths of the current CCfW legislation

- Historic legislation that has led the way for other nations to follow;
- Responded directly to the Waterhouse Inquiry and as such the powers have a particular focus on children in receipt of services from local authority social services;
- Strong legal powers in some scenarios to undertake formal case examinations such as the Clywch Inquiry;
- Jurisdiction covering a broad range of devolved public services;
- The ability to support individuals to progress their cases or complaints at the lowest level possible, without always having to resort to legal routes of resolution, thus improving and speeding up the outcomes for the benefit of children and their families;
- Grounded in international human rights, with a requirement for regard to the United Nations Convention on the Rights of the Child in exercising all functions.

#### Apparent gaps or anomalies – *these are explored further within this paper*

- Appointment is by the Executive and not the Legislature; this is not the recommended practice for independent human rights institutions;
- A mixed picture on how the different powers can be exercised, with some lacking the operational or practical details needed to make them viable;
- Changes to organisations' roles and remits and new organisations created since the post was enacted, that do not fall within the Commissioner's existing remit;
- Lack of information on how the Commissioner can require access to documentation and settings in discharging their functions;
- Inability to intervene in certain settings due to the current devolution settlement.

These gaps inhibit the Commissioner's ability to discharge their statutory remit in full, as the protection of children's rights requires access to institutions and documentation in order to understand how due regard has been paid to children's rights in Wales. This, therefore, means that for some children, the Commissioner is unable to support them or investigate their concerns, because of the type of setting in which they have occurred or because the legislation doesn't give the power to receive papers or enter premises.

### Commentary during the passage of the original legislation

It is notable that discussion of the Children's Commissioner for Wales Bill 2001, in the House of Lords, as recorded in Hansard<sup>1</sup>, highlighted how there was a determination to pass the Bill without delay and prior to the next election. Baroness Gale summarised that the Bill "may not contain everything that everyone wants, but I am sure that all the organisations and those concerned about the well-being and rights of children would prefer it rather than the alternative." Lord Hoosan also observed that "The worst thing that we could have is an ineffective commissioner, because that would bring the whole system into disrepute."

The decision to curtail the Commissioner's remit to devolved services only was noted on behalf of the Government by Baroness Farrington of Ribbleton to be "one of policy rather than constitution". It was also a Government decision in relation to rights of access, which a number of Lords raised in their contributions to the Bill's passage. The Government response was that "they want to ensure that the commissioner has all the powers necessary to be effective but do not believe that right of access is necessary." The original legislation pre-dated the extension of the devolution settlement in Wales, but the parallel post for England, enacted subsequently, does confer a power of entry, in Section 2E of the Children Act 2004 (as inserted by the Children and Families Act 2014). It is notable that the powers of the post holder in England were reviewed and revised 10 years following the creation of the office; it has been over 20 years since the post was created in Wales, with no substantive amendments made to the legislation beyond consequential amendments.

In the House of Commons, the then Secretary of State for Wales, in response to questions from members, affirmed that "the commissioner will have oversight of all public bodies in Wales, especially those that are dealt with by the National Assembly".<sup>2</sup> (At this point there was no separate Welsh Government). Whilst this may have been the original intention, it is unfortunately not the case that the Commissioner's powers extend to all public bodies in Wales.

An amendment tabled in the National Assembly for Wales at this time also stated: "the Assembly affirms its beliefs that the Children's Commissioner for Wales should have statutory powers across all areas affecting all children in Wales, and that his or her powers should include:

- Power to require inquiries
- Powers to order disclosure of information
- Powers to require action to be taken by public authorities and bodies, in accordance with their own duties."

The amendment was passed unanimously by all four parties in the Assembly. It is timely to reflect on that intent and to ensure that the legislation supports the Commissioner to undertake their duties to the fullest of their ability.

Set out below is more detail on these individual anomalies or gaps, as well as the case for change.

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<sup>1</sup> [https://api.parliament.uk/historic-hansard/lords/2001/feb/19/childrens-commissioner-for-wales-bill#S5LV0622P0\\_20010219\\_HOL\\_229](https://api.parliament.uk/historic-hansard/lords/2001/feb/19/childrens-commissioner-for-wales-bill#S5LV0622P0_20010219_HOL_229)

<sup>2</sup> [https://api.parliament.uk/historic-hansard/commons/2000/dec/13/childrens-commissioner#S6CV0359P0\\_20001213\\_HOC\\_15](https://api.parliament.uk/historic-hansard/commons/2000/dec/13/childrens-commissioner#S6CV0359P0_20001213_HOC_15)

## Proposed changes to the CCfW legislation

### Operational matters:

- Each of the different powers in the Commissioner's legislation comes with a differing level of detail in relation to how that power is exercised.
  - In relation to case examinations (s.74 Care Standards Act 2000), there is extensive detail in the Regulations as to the relevant procedure, and the process for gathering evidence, including the assumption of quasi High Court powers in respect of witnesses.
  - In relation to reviewing the arrangements for whistleblowing, advocacy and complaints (section 73 Care Standards Act 2000), there is procedural detail, which includes the setting of Terms of Reference and requiring organisations to submit evidence within set timescales.
  - The power under section 72B Care Standards Act 2000 (review of exercise of functions of designated bodies) is not expanded upon; the legislation is silent as to how this power is exercised.

It could be considered that this was intended to be a strength at the time of drafting, so as not to curtail the Commissioner in how the s.72B power would be exercised. However, through our use of this particular power in the recent Review, it became apparent that this presented a barrier to the safe sharing of relevant papers in order to complete the review of how Welsh Government's functions had been exercised. Children and young people's rights cannot be fully protected by the Commissioner's office without access to all relevant documentation to understand the processes undertaken and the decision making history. The Government will not be able to hold up the Commissioner's office as an example of detailed scrutiny of them, if the legislation remains as drafted, thus allowing requested documentation to be withheld.

The s. 72B power enables the Commissioner to review the functions of the Welsh Government, amongst other bodies. However, the Government also appoints the Commissioner and provides annual funding for their office. The s.72B power does not include the power to review the functions of the Senedd.

**This is why there should also be a central role for the Senedd in the appointment and funding of the Commissioner's office.** There is an inherent conflict of interest in the body that is being scrutinised and held to account (WG) being the holder of the purse strings and in control of how the Commissioner may exercise their full powers. Moving the appointment process to the legislature and not the executive would provide a clear separation between operational and financial matters, and the scrutiny role.

In the case of the s.72B Review, officials had suggested use of the Freedom of Information framework as a potential compromise in this regard. Whilst the suggestion of alternative arrangements was welcome in terms of pragmatism, this in practice would not have allowed for any additional papers/content of papers to be disclosed to the office. In addition, as documented in the Review report, this does not give the Commissioner any greater access to papers than that which a

member of the public could obtain. We do not think that that is the aim or spirit of this power in the Commissioner's legislation.

The Paris Principles<sup>3</sup> require that National Human Rights Institutions have 'adequate powers', so that they can initiate inquiries and investigations, gather the evidence and documents they need, consult with NGOs and State institutions and publicise their reports, findings and recommendations. It cannot be said at present that the Commissioner's office and remit fulfils that important principle, while access to institutions and documentation is in effect curtailed through the absence of clarity in the legislation.

**The Commissioner should be appointed by the Legislature (Senedd) and not the Executive (Government) in order to maintain separation from those who fall within the Commissioner's scrutiny and powers.**

**We also recommend, as a minimum, that the CCfW Regulations aligned to the exercise of the S.72B power are reviewed and revisited, to create a process for sharing documentation in a transparent and legal way.**

**In addition we recommend consideration of the issues below to enable the Children's Commissioner to exercise their powers fully, for the benefit of children in Wales.**

#### Policy areas:

- **Private provision for children:** The Commissioner does not have legal powers to enquire or investigate in relation to all schools in Wales despite education being devolved. As the 2019 case in north Wales illustrated, we were limited in our powers in relation to independent schools. We identified through legal advice that we would have some powers in relation to regulated services provided in Wales, namely boarding accommodation being provided as part of a school. By virtue of this being a boarding school, the school in question *did* fall within our remit, and the intervention of CCfW was a key factor in safeguarding children in this setting, but an independent day school currently would not fall within our remit.

Similarly, private children's homes (which make up the majority of children's homes provision in Wales) and private children's mental health settings do not fall within our remit. We have concerns currently about specific provision in each of those categories.

**We recommend widening the categories of services and organisations in Wales over which the Commissioner has remit under Schedules 2A and 2B of the Care Standards Act 2000, in recognition of the needs and rights of children in all settings in Wales to be kept safe and supported.**

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<sup>3</sup> <https://ganhri.org/paris-principles/>

- Related to this, the Older Person's Commissioner has a power of entry<sup>4</sup> into any premises other than a private dwelling at any reasonable time, for the purposes of interviewing an older person in relation to their powers to review organisations' discharge of their functions. The Children's Commissioner for England has powers of entry to settings<sup>5</sup> also, and in fact would have more powers of entry to visit children in secure settings in Wales than the CCfW. A similar power for CCfW could be an alternative way to alter the Children's Commissioner's powers in respect of independent schools, but also this would bring in other closed settings such as youth justice/custody provision which currently sits outside of the Commissioner's remit. Whilst we enjoy productive working relationships with the two custody settings in Wales (HMP Parc YO1 and Hillside Secure Children's Homes), they are not required to co-operate with the office and could not be compelled to do so should a serious incident be suspected or alleged. With work taking place currently on new safe therapeutic accommodation and new accommodation settings under the Youth Justice Blueprint for Wales, it is timely to consider how children's rights in such settings will be protected and underpinned.

Powers of entry and access to records would be the key elements to consider, in our view.

**We recommend consideration of how the CCfW remit may be extended to include power of entry into any premises other than a private dwelling at any reasonable time, for the purposes of speaking with a child or young person in relation to their powers to review organisations' discharge of their functions.**

- The CCfW office was set up in response to findings of the Waterhouse inquiry, and due to the context of that particular inquiry we have enhanced powers in respect of children that are owed continuing duties by social services beyond the age of 18. This highlights two relevant issues when considering the Commissioner's powers at the present time:
  - The wording of this power in our legislation is linked back to the Social Services and Well-being (Wales) Act 2014 and the associated duties to support care leavers post 18. For some young people this goes up to the age of 25 but for others the official position in the legislation is that that support ends at age 21. Whilst we've welcomed and supported Welsh Government's direction to social services that they should now be funding Personal Advisers for all care leavers up to the age of 25<sup>6</sup>, until the relevant legislation is amended to reflect this, it affects the interpretation of this power in the Commissioner's legislation. We have taken a purposive interpretation to this; continuing to support care leavers up to the age of 25 and challenging local authorities who are not complying with the WG direction, but in the event of a complaint the formal position of the legislation does not currently back this up. We are aware of plans to bring forward legislation to correct this, but we simply make this point here to highlight our existing calls from successive annual reports in this regard.

<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2006/30/section/13>

<sup>5</sup> [https://www.legislation.gov.uk/ukpga/2004/31/pdfs/ukpga\\_20040031\\_en.pdf](https://www.legislation.gov.uk/ukpga/2004/31/pdfs/ukpga_20040031_en.pdf) section 2(8) Children Act 2004

<sup>6</sup> In response to our [Hidden Ambitions](#) report

- In addition, there may be the need for consequential amendments to be made to our legislation, in light of the new Additional Learning Needs legislation which extends duties up to the age of 25. Currently we are unable to support children and families once their child attains the age of 18; whereas formal education continues for many with additional learning needs up to at least the age of 19. It should be noted that support for children with SEN/ALN has been a consistently high area of our office's casework year on year.
- Developing and implementing a Youth Work Strategy for Wales which extends to age 25 may also be of interest when considering the limits of the Commissioner's remit, in order to ensure that the office can support young people receiving youth work services where there are problems or difficulties arising, and hold relevant organisations to account in doing so.

**We would be open to discussions in relation to the age related restrictions of our remit, in the context of specific pieces of legislation or strategies. It is noted that this may require amendments beyond the Commissioner's Regulations themselves, and also would inevitably increase the resource requirements of the office.**

#### Wider issues:

The Public Services Ombudsman for Wales (PSOW) legislation was amended in 2019, to create new powers for the Ombudsman to:

- accept oral complaints;
- undertake own initiative investigations;
- investigate private medical treatment including nursing care in a public/private health pathway;
- undertake a role in relation to complaints handling standards and procedures.

The Ombudsman's previous legislation that was amended dated from 2005. By contrast, the CCfW legislation has not been revisited since it was enacted in 2000 and 2001.

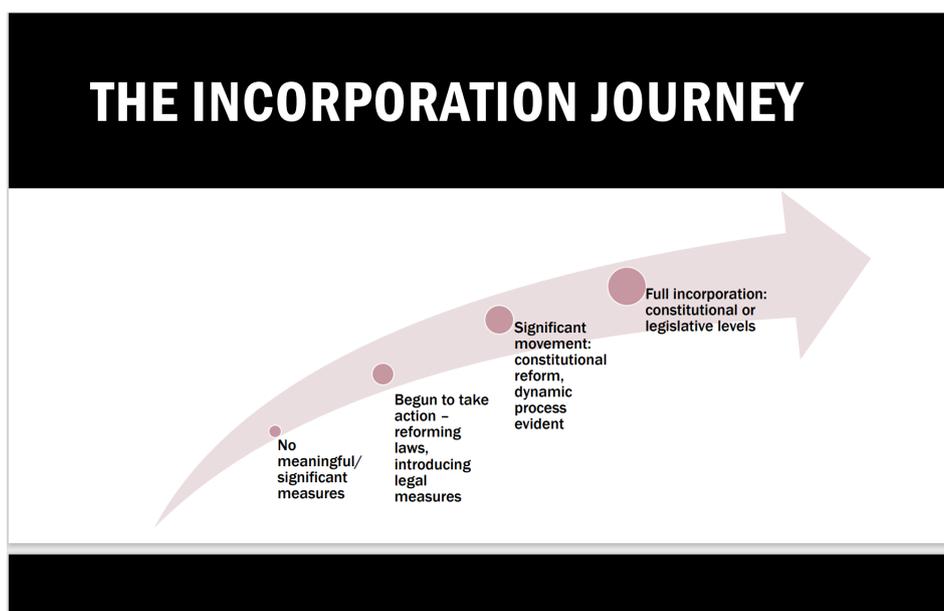
It took several years for the PSOW's amendment legislation to be passed; we therefore believe that there is a need for swift action in this regard. We believe that this paper and our Statutory Review report provide a compelling case for change, to ensure that all children in Wales are protected and in receipt of their rights, wherever they may live or receive services. That was the originating intention of the legislation when introduced and it is right that, twenty years on, the provisions are reviewed to ensure they give the greatest possible effect to the operation of the legal powers designed to protect those children's rights.

In 2021, the Scottish Parliament unanimously passed a Bill to fully incorporate the UNCRC into their domestic law. The Bill was challenged by the UK Government in the Supreme Court on constitutional grounds; the judgment in September remitted the Bill back to the Scottish Parliament but on the grounds that certain sections sought to restrict the UK Government's legislative powers. Such a provision was not compatible with the devolution settlement, in which the UK Government's did **not** take issue with the Scottish Parliament's decision to incorporate the UNCRC and this was

“recognised to be a matter for the Scottish Parliament”<sup>7</sup>. Any changes required to the Bill do not relate to full incorporation of the UNCRC and the implementation of the UNCRC within Scotland and by devolved public bodies.

The Scottish Bill would further advance the protections for children’s human rights in Scotland, going beyond the arrangements here in Wales under the Rights of Children and Young Persons (Wales) Measure 2011, which amounts to partial incorporation only. There remains a compelling argument for further incorporation of the UNCRC here in Wales.

At a webinar event in October 2021<sup>8</sup>, Professor Kilkelly presented the findings of her recently published book 'Incorporating the UN Convention on the Rights of the Child', the first comprehensive analysis of progress across the world towards giving legal effect to the CRC. Professor Kilkelly shared insights about the challenges and successes different countries have faced when incorporating the Convention in their own unique contexts. In this international event, she highlighted how Wales is only at the second stage of the incorporation journey, as illustrated on the following diagram:



The powers of the Commissioner in relation to public bodies in Wales are only as strong as the other legislative provisions underpinning how they work. Although the Commissioner can review public bodies’ exercise of their functions, there is not currently a duty on bodies such as health boards and local authorities to act compatibly with children’s rights or to demonstrate how they have done so. Examples during the pandemic such as the continued closure of parks and leisure centres in some

<sup>7</sup> REFERENCES (Bills) by the Attorney General and the Advocate General for Scotland - United Nations Convention on the Rights of the Child and European Charter of Local Self-Government (Incorporation) (Scotland) [2021] UKSC 42 (06 October 2021) (bailii.org) paragraph 4 of the judgment

<sup>8</sup> <http://www.crae.org.uk/news/rock-event-on-incorporating-the-un-convention-on-the-rights-of-the-child-into-national-law-with-ursula-kilkelly/>

local authority areas demonstrate how, provided LAs have *considered* children's rights in reaching their decisions, there is little that the Commissioner can challenge even if the ultimate decision does not uphold children's rights. The same can be said of the 'due regard' model that applies to Welsh Ministers under the 2011 Measure; regard to rights is not the same as acting compatibly with them.

It is only full and direct incorporation of the UNCRC into Welsh domestic law that will ensure a shift in public bodies' practices, including those of the Welsh Government. This will also allow the Commissioner, but also members of the public, to hold those bodies to account more effectively where they have not acted compatibly with children's rights. But more importantly, it will shift how public bodies think about and apply rights in their decision making, thus ensuring a better experiences for children and their families.

**We recommend a review of incorporation of the UNCRC in Wales to date, and for further incorporation of the UNCRC to be taken forward in conjunction with changes to the Commissioners' remit and legislation. This would fundamentally improve children and families' direct experiences when in receipt of services from public bodies in Wales, and/or their ability to effectively challenge where this experience is not compatible with their rights.**