

Comisiynydd Plant Cymru Children's Commissioner for Wales

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Paper on the Children's Commissioner for Wales' position on the recommendations from the Independent Review into the Role and Functions of the Children's Commissioner for Wales

Introduction

I began in post on 20 April 2015 and since my arrival I have spent time listening and working with my staff team looking at the current working practices of the organisation. We have also been working on the recommendations contained within Dr Shooter's review of this office. Having a series of independent recommendations to consider in my first year in post has been useful and I have included some of them in my current extensive 'Beth Nesa' // What Next' consultation with children, young people and adults. I have provided my current position in relation to each recommendation made by Dr Shooter below.

Between April and August I conducted face –to-face meetings with over 1000 children and young people of all ages and living in a wide range of circumstances. I also met and listened to over 200 professionals and parents. The findings from these consultation meetings have been thematically analysed and a large-scale and accessible survey developed which will close on November 2nd. Some of the questions in the survey relate directly to the review recommendations, including how to involve children and young people in the governance structure of my office and the title of my post. I will be reporting on the consultation and setting out my strategic goals in January 2016. I will report on the organisational structure and working methods that will enable me to fulfil my goals.

One of the priorities for me and my organisation following the review is the improvement of our legislative basis to ensure that the Children's Commissioner for Wales is enabled to promote and safeguard the rights and well-being of *all* children and young people in Wales, on *all* matters. The creation of my role was an attestation to the critical role an independent human rights institution has in protecting and promoting the rights and well-being of children and young people, which is why we need a truly independent champion.

Recommendation 1.1: Opportunities should be explored for joint enterprise between Commissioners and Ombudsmen in Wales around common human rights issues.

Recommendation 1.2: Greater clarity should be sought around the respective responsibilities where issues overlap their boundaries.

I am open to exploring the possibility of greater collaboration and my office is already engaged with the Public Services Ombudsman (PSO), the Older People's Commissioner and Welsh Language Commissioner about this. Independence is a defining feature of any rights based organisation and is viewed by the UN as a source of legitimacy and authority. With this in mind, I am supportive of joint enterprises which may potentially produce improved outcomes for children and young people, and therefore improves access for all citizens to their human rights.

Recommendation 2: Negotiations should begin to amalgamate some of the back office functions of the soon to be 4 statutory commissioners and Public Service Ombudsmen in Wales or to explore cost effective options.

I am conscious of the recently-published report of the National Assembly for Wales (NAfW) Public Accounts Committee (PAC), which acknowledges that there is little to be saved financially from sharing 'back office' functions¹. That said, I am actively working with the PSO and other Commissioners across Wales to respond to all of the PAC's recommendations and work towards informal arrangements for sharing knowledge, skills and experience. We have already identified areas of focus for 2015/16, including reviewing and updating existing Memoranda of Understanding, consolidation of staff learning and development programmes, potential for procurement of a common internal audit service and working together on the required review of our existing Strategic Equality Plans.

Recommendation 3: The possibility of one Single Act covering all Commissioners and the Ombudsmen in Wales should be explored.

Recommendation 4.1: There should be exploration of a more consistent approach to Commissioners in Wales, their purpose, funding, accountability and governance.

Recommendation 4.2: This could be underpinned by a single Act, the possibility of which should be explored.

Whilst I would be supportive of an exploration for a single piece of legislation pertaining to all Commissioners and the Ombudsmen in Wales, the priority for me and my organisation would be consolidating and updating our existing legislation to ensure that the Children's Commissioner for Wales' legislative remit is strengthened. This intended outcome was the basis of the call made by my predecessor for the current arrangements to be formally reviewed. We would want to ensure that new legislation would enable the Commissioner to act on all matters which relate to or affect children in Wales, in order to promote and protect the rights of children and young people as enshrined by the UN Convention on the Rights of the Child (UNCRC).

¹ <http://www.assembly.wales/laid%20documents/cr-ld10127%20-%20report%20of%20the%20public%20accounts%20committee%20-%20%20scrutiny%20of%20accounts%202013%20-14/cr-ld10127-e.pdf>

Recommendation 5.1: The office of the Children’s Commissioner for Wales should be independently reviewed once in the course of every full tenure. Recommendation 5.2: This should be a statutory requirement.

I agree that the internal and external scrutiny which takes place throughout a Commissioner’s term should be well understood and information should be appropriately shared. My office would agree that independent assessments of the work that it undertakes are both desirable and necessary, and a number of independent examinations are already systematically carried out, including internal and external audit. I agree that a more systemic review of public bodies is necessary from time to time and am happy to open my office to review as part of a rolling programme applied to other public bodies. I am not convinced that this needs to be a statutory requirement.

Recommendation 6: There are clear principles around independence of public bodies involved in human rights. The Welsh Government should acknowledge and adhere to them by transferring the appointment and funding of the Children’s Commissioner to NAFW.

Recommendation 7: The appointment of the Children’s Commissioner should continue to be by open public recruitment and by an appointments committee of cross party membership with stakeholder representatives, including children and young people.

My office has called for the accountability and governance of the Children’s Commissioner for Wales be transferred to the NAFW. Currently, the appointment of the Children’s Commissioner is within the remit of Welsh Government; the terms and conditions of appointment are determined by the Welsh Government; and the removal from office, subject to the Care Standards Act, rests with the First Minister of Wales.

The Commissioner’s funding is received from the Welsh Government, a body which I am expected to hold to account and could potentially review. I have to report annually to Welsh Government in respect of delivery of my work plan. As the independent human rights institution for children’s rights, independence from the executive arm of government would greatly clarify my role. Whilst it should be acknowledged that in practice, there has not been inappropriate interference compromising the role of the Commissioner, the fundamental conflict of interest is not something that can be ignored. Neither is it possible to foresee what the actions and approaches of future Governments may be. Such a separation would comply with the Paris Principles, which outline best practice for independence within Ombudsmen and Commissioners. I maintain the call for the human rights institution for children’s rights in Wales to be appointed by and to report to the NAFW.

It would be necessary to ensure that the Commissioner could only be removed from office in exceptional circumstances and that the Commissioner had complete discretion as to the manner in which the functions of the office were exercised and not subject to direction or control of the National Assembly or the Welsh Government. The legislation in the case of the Auditor General for Wales and the Public Services Ombudsman provides for dismissal on grounds of misconduct and it requires a motion of the Assembly which is passed by at least two-thirds of the number of Assembly Members voting in favour.

The legislation for the Auditor General also states explicitly that the “Auditor General has complete discretion as to the manner in which the functions of that office are exercised and is not subject to the direction or control of the National Assembly or the Welsh Government” (Section 8 (1) of the Public Audit (Wales) Act 2013). Similar wording is also used in the legislation for the Ombudsman and would be appropriate for the Children’s Commissioner.

In reviewing this recommendation, Welsh Government could consider the recommendations contained within the Dunford Review of the Office of the Children’s Commissioner for England², to ensure the Children’s Commissioner for Wales is (and is also perceived to be) independent from Welsh Ministers.

I agree that the appointment of the Commissioner should be made by open public recruitment and by an appointments committee of cross party membership, most importantly including meaningful input from children and young people. Although my own experience of recruitment was of a fair and balanced process, it would also be preferable that this was handled by the legislature instead of the executive, to safeguard against any perceptions of a political appointment and to ensure independence from the Welsh Government.

Recommendation 8: There should be a more formal structure for the scrutiny of the Children’s Commissioner shared between the appropriate finance and subject committees of NAfW. The members of those Committees may require training in the functions of the Commissioner in order to carry out their scrutiny.

I support the view that there should be rigorous scrutiny of the work of the office by the appropriate National Assembly for Wales Committees. This should be set formally through legislation and as part of the Assembly’s Standing Orders, as is the case with the Auditor General and the Public Services Ombudsman, rather than our current arrangements which are based on convention. In the long term, the Commissioner’s legislation should include such provisions but short term, a solution should be examined via NAfW standing orders.

Recommendation 9.1: The Children’s Commissioner should be required to have an Advisory Board.

Recommendation 9.2: Appointments to the Board should be led by the NAfW and governed by the Public Appointments Process, of which the Commissioner should be part. Recommendation 9.3: Ideally each of the Commissioners in Wales should also sit on an Advisory Panel/Board of one of the other Commissioners.

I support the establishment of an advisory body and would wish to have this in place by April 1st 2016 or as soon after as is possible. This development will need to take into account the existing Audit and Risk Committee arrangements that are already in place. An advisory body, whilst being independent and objective, must not fetter the exercise of the Commissioner’s functions and its remit must be purely advisory. Any recruitment to the group must be open and in adherence with

² <https://www.gov.uk/government/publications/review-of-the-office-of-the-childrens-commissioner-england>

the Nolan principles. I would like to discuss with Welsh Government the best process for facilitating this.

I tend not to agree that each of the Commissioners in Wales should also sit as an Advisory Panel / Board member on one of the other Commissioner's Boards, with the exception of the Future Generations Commissioner Board, which is set in statute. The principal aim of the Children's Commissioner for Wales is to promote and safeguard the rights and welfare of children in Wales, and my time and energies must be dedicated to fulfilling this aim rather than advising others on how best to fulfil their aims and objectives. There are already existing Memoranda of Understanding (MoU) between all Commissioners and Ombudsmen in Wales outlining our operational working arrangements and we communicate regularly, working together as appropriate.

Recommendation 10: The Commissioner's budget estimates should be far more detailed than they currently are.

The current governance arrangements enable me to discharge my functions as Accounting Officer and meet the requirements as determined by HM Treasury and the National Assembly for Wales.

Whilst the governance arrangements are adequate and comply with best practice, the level of open and transparent scrutiny and accountability could be improved. At present, I am required to submit an estimate of my income and expenses to the Welsh Government, five months before the start of the financial year to which it relates (£1.715 million in 2013-14). The estimate is amalgamated into Welsh Government's own annual estimate (£16,170 million in Total Managed Expenditure in 2013-14), which is discussed by the Assembly's Finance Committee. The Ambit of the budget motion, only includes reference to the Commissioner's office within the Communities and Tackling Poverty Major Expenditure Group; and it excludes any actual disclosure of the request for resources submitted by the Commissioner's office.

There is therefore no open or transparent disclosure of the Commissioner's request for resources, which leads to an inability for the Finance Committee and the National Assembly to scrutinise the Commissioner's estimate. This is in contrast to the position of bodies such as the PSO or the Assembly Commission. These bodies are required to submit individual budget estimates directly to the Finance Committee, who scrutinise the organisations request for resources. These estimates are then used to form part of the drawdown from the Welsh Consolidated Fund, after the Assembly has passed a budget motion authorising drawdown of funds. In order to improve the level of scrutiny of the Commissioner's budget, adoption of a similar process to that applicable to the PSO would increase the level of open and transparent accountability.

There has been an agreement between Welsh Government and my Audit and Risk Assurance Committee to revise the budgeting arrangements and submission for October 2015 and I will be submitting a fuller estimate.

Recommendation 11: The WG should develop a new comprehensive national awareness raising strategy for children's rights. The terms of the UNCRC and the work of the Children's Commissioner for Wales should form part of the training of teachers, social workers, health

personnel and all other professionals working with children and young people and should be a mandatory part of the school curriculum.

I fully support this recommendation, which recognises the critical role that Welsh Government has to play in implementing its duty under Article 42 of the UNCRC, to raise awareness about children's rights, the UNCRC, and the work of the Children's Commissioner for Wales.

Recommendation 12: The legal background governing the Children's Commissioner for Wales should be consolidated and simplified in one piece of Welsh legislation. This legislation should make clearer the distinction between principal aims, functions, powers, duties and remits.

The legal basis governing the CCfW should be consolidated and simplified into a new piece of legislation, which specifies the distinct duties and powers under the remit. At the outset of the Programme for Government, there was a commitment to strengthen the role of the Children's Commissioner for Wales³ yet my legislative framework remains unchanged.

Currently the powers and functions of the Commissioner are set out in three different enactments. The need to reform the statutory basis of the Children's Commissioner for Wales has been accepted for many years and there has been cross party consensus on the issue. The shortcomings of the current legislative remit for the Commissioner are laid out at length in an advice paper prepared for the Commissioner's office in support of a proposed Child and Young Person's Bill (See Appendix1). Whilst the proposed Bill has not come into being and the paper was written prior to any discussions regarding the Wales Bill resulting from the St David's Day agreement, the findings of the paper are still highly relevant and support many of the aspirations to clarify and broaden the role and remit of the Commissioner.

I would particularly welcome the proposal for new legislation to set out the Commissioner's functions in broad terms, with the principal aim of safeguarding and promoting the rights and well-being of children and young people in Wales. Use of the Commissioner's statutory powers to review functions have yielded progress and traction in the areas of complaints and advocacy provision and I hope to continue to build upon the foundations laid by the first two Commissioners.

My office has previously identified the need to examine further whether or not the Children's Commissioner's legislation offers the required provision to effectively challenge Ministers in relation to the duty of due regard contained in the Rights of Children and Young Person's (Wales) Measure 2011 (referred to as 'the Measure'). This is especially relevant as the Children's Rights Scheme (referred to as 'the Scheme') sets out that those wanting to challenge Welsh Ministers may seek to do so via the Children's Commissioner for Wales.

The Children's Commissioner for Wales is currently and appropriately included in Section 10 of the Scheme, "What can children and young people (or their representatives) do if they think Ministers have not had due regard to the UNCRC?" Information within the scheme should clearly set out the parameters of action that we are able to take in representing individual children and young people

³ <http://www.assemblywales.org/en/bus-home/pages/plenaryitem.aspx?category=Record%20of%20Proceedings&itemid=752>

in line with the current legislative remit. Although I could review the exercise of functions by a Welsh Minister in considering the extent to which the rights and welfare of children are taken into account; should I wish to look at reviewing and monitoring arrangements of Ministers (and compel Ministers to provide specific and relevant information for the purposes of the review), I could only do so in relation to in relation to complaints, whistleblowing and advocacy under the current legislative remit. Therefore the suggestion within the scheme that the Commissioner may utilise legal powers and potentially undertake a review if children and young people feel Ministers have not considered children's rights when making decisions that affect their life, requires further attention. **A simple solution to this would be to bring the Commissioner's powers of review together so that I may hold duty bearers to account on all matters relating to children within remit.**

Enabling me with the power to request any information that I may reasonably require from any person for the purposes of undertaking my functions would bring my remit in line with the Children Commissioner for England, the Paris Principles and that stated in General Comment No. 2: "NHRIs should be accorded such powers as are necessary to enable them to discharge their mandate effectively, including the power to hear any person and obtain any information and document necessary for assessing the situations falling within their competence."⁴

Recommendation 13: There is no cogent reason for expanding the powers of the Children's Commissioner to include sanctions and several reasons why it would be counterproductive to do so.

I agree with this recommendation.

Recommendation 14: The remit of the Children's Commissioner for Wales should be extended to cover all matters whether devolved or not, that involve the welfare of children and young people who normally reside in Wales.

Recommendation 15: The WG should work with its UK counterparts to find a way of expressing this principle in new legislation.

As argued throughout this paper, I support the recommendation to widen the powers to facilitate the Commissioner to act on all matters which relate to or affect children in Wales. This would not necessarily involve devolving further legislative or executive powers to Wales. In fact it is difficult to understand why the Commissioner's functions need to be linked only to relevant devolved matters (or whatever the relevant constitutional settlement may be post implementation of the Wales Bill). The role of the Commissioner is to serve the interests of children in Wales. This is separate from the issue of what legislative and executive powers are devolved to the National Assembly for Wales and Welsh Ministers.

⁴ Committee on the Rights of the Child, General Comment No. 2, The role of independent national human rights institutions in the promotion and protection of the rights of the child, U.N. Doc. CRC/GC/2002/2 (2002). Para. 9.

The UK Commissioners made the following recommendation to the UN Committee on the Rights of the Child in 2015:

“In line with the Paris Principles, the Children’s Commissioners should be mandated by their legislatures rather than governments and be equipped with the necessary human and financial resources in order to carry out their mandate in an effective and coordinated manner so that the rights of all children in all parts of the State party are safeguarded.”⁵

Similarly, Professor Dunford recommended in his independent review of the Office of the Children’s Commissioner for England, that:

*“children’s commissioners should be responsible for the interests of children and young people who normally reside in their countries. If possible, this principle should be enshrined in law.”*⁶

However, the issue has remained unresolved despite the changes to the role of the Children’s Commissioner for England, brought about by the Children and Families Act 2014. I believe there is a real opportunity that this recommendation from the independent review can inspire a new legislative basis for the Children’s Commissioner for Wales.

Giving the Commissioner authority to deal with all matters relating to Wales would provide a single point of contact for children in Wales and a single Commissioner to deal with regard to safeguarding and promoting their rights and well-being. Further consideration would need to be given to any additional reporting arrangements that may be required if I had authority to act in non-devolved matters, though I already have some duties to report to the Houses of Parliament.⁷ This would allow the Commissioner to be more effective in promoting children’s rights and raising awareness of my office, thus helping the UK Government achieve its aim ‘to make the UK the most child-friendly country in Europe’.⁸

Recommendation 16.2: The WG should develop further its commitment to participation in its own work.

Recommendation 16.3: The Commissioner should continue to hold it to account on the commitment.

I fully support the recommendation for Welsh Government to further develop its commitment to participation in its own work, which recognises the important role that Welsh Government has to play in raising awareness about children’s rights, the UNCRC, and the work of the Children’s Commissioner for Wales.

The participation agenda is facing significant challenges and the support infrastructure has been reduced in Wales in recent years. In 2014 the Welsh Government discontinued financial support for Funky Dragon, the Children and Young People’s Assembly for Wales. In late 2014 my office

⁵ <http://www.childcom.org.uk/uploads/publications/564.pdf>

⁶ <https://www.education.gov.uk/publications/standard/publicationdetail/page1/CM%207981>

⁷ See Regulations 13 and 15 of the Regulations

⁸ Foreword to the Draft Legislation

welcomed the funding allocated to develop the Young Wales project, which aims to widen the way in which children and young people are able to engage with the Welsh Government and assist and inform policy development across Wales. We look forward to seeing how the Young Wales work develops, how it sets and achieves its goals and we hope to be able to support the work in any way possible.

It is important to understand what Young Wales is and what it is not. It is our understanding that the project is not intended to deliver a peer-led, democratic mechanism for children and young people at a national level. There is, therefore scope to further develop mechanisms which holds Welsh Government to account and not designed to directly support Government in their work.

There are national level developments with potentially far reaching consequences, for instance setting clear expectations on local authorities for the participation of children and young people in Wales. However, we are concerned that the local infrastructure for facilitating and supporting the national commitments is faced with significant challenges. These challenges come mainly in the form of financial constraints as well as the age-inclusive approach to policy as we see a move away from the partnership arrangements for children and young people into the new Public Service Board structures.

The National Assembly for Wales (NAfW) has progressed its own efforts to engage children and young people in its work. The innovative way in which children and young people have assisted the legislature in looking at issues and scrutinising the Welsh Government is to be welcomed. There is an opportunity for the NAfW to continue to develop their work, for instance enabling children and young people to help set the agenda and consider how to further formalise their participatory structures. This is an important issue that should be discussed in the lead up to the NAfW elections and carried over into the new Assembly by the AMs so that further progress can be achieved.

Recommendation 17: Any new legislation should be clear about the formal role of children and young people in the appointment of the Children’s Commissioner.

The “Children’s Commissioner for Wales (Appointment) Regulations 2000” already state “The appointment of the Commissioner shall be made only after taking account of ...

b) the views of relevant children as to any candidates interviewed for the appointment”.

Any new legislation should also reflect this.

Recommendation 18: The Commissioner’s remit should be extended to all children and young people up to the age of 25.

My office has previously argued against the general extension of the UNCRC and Rights Measure for young people up to the age of 25. We believe there are more effective means of applying and upholding human rights to 19-25 year olds and believe that are no means through which the UNCRC can be applied to this age group.

The UNCRC, as well as all associated materials which emanate from the UN Committee on the Rights of the Child, is not sufficient for the purpose of protecting the rights of those over the age of 18. The

UNCRC exists due to the particular vulnerabilities of those under the age of 18 which require special safeguards and protection and any Children's Commissioner should be focusing on this group.

Placing Ministerial obligations on the basis of such a fundamental anomaly may well lead to significant confusion at a time when there is still much work to be done in improving awareness of the UNCRC in Wales. We would also be concerned that extending obligations may have a negative impact through diverting focus on those who should currently be benefitting from the Rights Measure.

Recommendation 19: The title should change to The Children and Young People's Commissioner for Wales.

My office presented to the review team that the title of the Children's Commissioner for Wales could be changed, to properly reflect the age range the Commissioner's remit already covers, as we work with looked after young people up to the age of 21 and up to 25 if they are engaged in education. Nonetheless, a longer title could be seen as unwieldy. I would like to learn more of what young people think about the potential title change, and this forms part of my current 'Beth Nesa'/What Next' consultation.

Recommendation 20: The successful applicant should be required to give up all existing posts with a perceived conflict of interest.

With regards to Recommendation 20, my terms and conditions already reflect this recommendation and I have fully adhered to the requirements.

Recommendation 21: The Children's Commissioner for Wales should be appointed for a single, fixed term of 6 years, that period to cover two 3 yr work plans.

Recommendation 22: Consideration should be given to a contract for the Children's Commissioner, to a "duty of care" to be contained in that contract, to the bearer of that duty and to the inclusion of a provision for what should and shouldn't happen after leaving office.

Recommendation 23.1: The appointment of the Deputy Commissioner should be made through the Public Appointments Process led by NAfW and with the involvement of the Commissioner.

Recommendation 23.2: The status of the Deputy Commissioner, tenure, circumstances in which the powers of the Commissioner might be delegated to him and the process for removal from office should be laid down in legislation.

Recommendation 25: The Children's Commissioner should continue to enjoy the independence afforded by "corporation sole". But this should not be at the expense of proper external accountability and internal governance.

Recommendation 26: The Children's Commissioner should be required to produce two 3 year work plans during the course of his tenure. His Annual Report should be used by the NAfW to assess progress against those work plans. Those documents should be written in a way that is amenable to scrutiny.

In a very fast moving environment for children and young people, the office agrees with the suggestion of working to three year strategic plans. Following an internal review of the organisation's corporate planning process in May 2014, practice has already changed; from 2016 we will have two three-year work plans.

The current 7 year tenure allows appropriate space and time for each new Commissioner to consult and personally influence the development and direction of their first 3 year plan.

The Commissioner's behaviour in post and after leaving the post is in effect a matter of conscience however we would suggest that by developing a protocol or contract between Welsh Government and the office holder, which outlines reasonable expectations on the post holder in relation to the role and broad parameters around removal from the role, we can strengthen and safeguard both the role of the Commissioner and the incumbent's well-being.

I have been apprised of how my office undertakes rigorous recruitment processes for all its staff, including the Deputy Commissioner. Children and young people and external stakeholders have been and will continue to be involved in the recruitment and selection of the Deputy Commissioner and all other Posts.

All of the functions of the Commissioner are vested in the office holder as a corporation sole and this includes the appointment of staff. If the Assembly or Government were responsible for appointing the deputy, he or she could not be an employee of the Commissioner.

The Commissioner is a corporation sole because it was decided that the functions conferred by the enabling legislation were best exercised by a single individual rather than by an organisation led by a corporate board (a body corporate). The status of corporation sole does not, on its own, guarantee that the office holder is independent. Neither does it imply that the office holder is or should be exempt from internal or external scrutiny. I am currently reviewing my internal governance structures, including my accountability to children and young people, and expect to put in place a strengthened structure during 2016.

Recommendation 24: The Commissioner and Ombudsmen for Children in the UK and Ireland are tackling common problems in different ways. The opportunity should be used to learn from each other and demonstrate how this has been put into practice.

I am an active member of the British and Irish Network of Children's Commissioners and Ombudsmen (BINOCC) and the European Network of Commissioners and Ombudsmen (ENOC). The four UK Children's Commissioners work collaboratively on monitoring and reporting of the UNCRC, holding the UK State Party to account on the realisation on the rights of children and young people across all jurisdictions, and on influencing the UK Government on non-devolved matters such as child poverty, youth justice, asylum and immigration. Since commencing my tenure as Commissioner I have reviewed the current arrangements and considered opportunities for greater collaboration.

Recommendation 27: The Investigation and Advice service of the Children's Commissioner for Wales should have clearer criteria for taking on cases and closing them and more rigorous follow-up of those signposted elsewhere.

Whilst my statutory remit provides the basis by which cases are eligible for my office to take forward, the review recommendation provides an opportunity for us to clarify the criteria we work towards. I have directed the Investigations and Advice team to implement recommendations that were made to the team by another review into the service, which was commissioned by my predecessor and undertaken by external experts. These recommendations will assist in streamlining the flow of cases through the organisation and manage the expectations of those accessing the service.

Recommendation 28: Greater and more intelligent use should be made of data collected, of research and of the views of children and young people to inform the Commissioners policy. The IT system should be replaced to be more useful for this purpose.

From my academic and professional experiences I am acutely aware of the importance of continuously reviewing the use of data, research, and the views of children and young people to inform policy. A significant programme of work has been instigated by my office to address its data management and I am positive that my 3 year strategic plan will include a robust research and analysis plan. We will ensure that our data collection and assimilation helps drive improved outcomes for children and young people.

Recommendations 29: The Commissioner should be required to justify the balance of his work in scrutiny of his work plans and Annual Reports before NAFW and its committees.

Effective scrutiny of the Commissioner's work plans and annual reports by the NAFW and its committees would enable this to take place. Whilst I agree with the recommendation, it would be down to Welsh Government or the AMs within the NAFW to move this forward through securing new legislative requirements, although an interim measure would be to incorporate this requirement within the Assembly's standing orders.

Recommendation 30: The Commissioner should consider shifting the balance of her work towards a closer involvement in influencing Government policy formulation and legislation in ways which do not compromise independence.

As I work with key stakeholders in developing my three year corporate plan I will be concurrently considering how best to influence government policy and balance the work of the office to meet the strategic and organisational goals that we frame. In doing so I will assess the current balance of work with my team and evaluate how we have previously sought to influence policy formulation and legislation.

I have been immediately impressed with the level of work my Policy, Public Affairs and Senior Officers are currently involved with, and I am enthused by the prospect of shaping such a strong team with potential for more growth and development.

Recommendation 31: Before any investigatory action, the Commissioner should be required to consult statutory investigative bodies to draw upon previous work and clarify roles. This should be a statutory duty to avoid duplication.

Whilst my statutory remit provides the basis by which cases are eligible for my office to take forward, the review recommendation provides an opportunity for us to clarify the criteria we work towards and improve communications with other bodies. I have directed the Investigation and Advice team to implement recommendations that were made to the team by another review into the service commissioned by my predecessor and undertaken by external experts, which will go some way to streamlining the flow of case through the organisation and manage the expectations of those accessing the service.

In leading my first thematic review, I have ensured that other bodies, such as the CSSIW, Care Council for Wales, Heads of Children's Services, Estyn and Welsh Government have been consulted in the early stages of the review.

Recommendation 32: The Commissioner should have a formal policy for the reserves he holds. Consideration should be given to how some of the current reserves could be better used for the children and young people he represents.

I agree that the office should have a formal policy on reserves. The Commissioner is subject to HM Treasury rules and guidance; and my annual accounts are clarified by the Auditor General for Wales. The office has developed a reserves policy following the recommendations of the NAFW PAC Committee. I will carefully consider how these reserves are best to be utilised.

Recommendation 33: The voice of children and young people should be central to the mandate and the scrutiny of the work of the CCfW and its impact. Their voices should be incorporated in the Commissioner's Annual Reports or go to NAFW in parallel reports of their own.

I wholeheartedly agree that the voice of children and young people should be central to the mandate and scrutiny of my office and I can attest that this currently takes place in a variety of ways although it is not articulated as clearly as it could be. I will review current practice. Through my 'Beth Nesa' / What Next' consultation and with my office I will think through how best to reflect this in all of our work streams and Annual Reporting process. I remain committed that children and young people's involvement is central to my work, is clearly reported and will form part of my first three year corporate plan.

Recommendation 34: Recommendations made by the Commissioner in any of his reports should be more rigorously and systematically followed through to assess compliance and their possible impact.

It is essential that the office follow up recommendations in reports, especially those that have been made following use of legislative powers.

Recommendation 35: The Children's Commissioner should re-establish a formal regular Advisory Group of children and young people to inform his work, with a wider consultation process for that Advisory Group to check its own mandate.

I am in the process of reviewing how my office engages with children and young people, to determine how they can best inform the work of the Commissioner, and how this can be clearly

demonstrated to children and young people. This is likely to involve a formal advisory group, as well as clarify how a broader base of children and young people can be regularly involved in informing my work.

Recommendation 36: Children and young people should be given greater opportunity to contribute pro-actively to the policies of the Children's Commissioner through the 3 yr work plan process. They should be part of the scrutiny of the Commissioners progress, either by contributing to the Annual Reports or by laying parallel reports of their own before the NAFW.

On my first day in post I committed to running a large consultation with children and young people in Wales. 'Beth nesa' / What next' is enabling children, young people and adults to help me identify priorities for the first of my three year corporate plans for 2016 – 2019. Prior to the launch of the consultation survey in September, my team and I met with children, young people and adults from a wide range of backgrounds to establish and agreed the subject areas to be covered within the survey. One of these areas will be to establish how children and young people themselves feel they should hold me to account as their champion, in the absence of a National Assembly for children and young people in Wales.

Recommendation 37: There is a perception that CCfW is less accessible to minority groups than the rest of children and young people. The Commissioner should take more active steps to address this.

Managing perceptions and expectations for a role as broadly defined by the remit of the Commissioner is a challenge in itself, and there is a fine balance to be struck in promoting the rights of all children and young people whilst seeking to protect those whose entitlements are not always afforded. I have laid a challenge down to my team to reflect on how we engage with all children and young people in Wales and I look forward to creatively engaging with all networks via my 'Beth Nesa' / What next' consultation process. I am pleased with work the office has already undertaken in relation to many minority vulnerable groups such as looked after children and young people, children and young people with disabilities, asylum seekers, and young carers. However, I am not complacent and I think we can be more strategic, impactful, child-focused and purposeful as we move forward.

Recommendation 38: The Commissioner should continue to take account of equality legislation in the composition of its staff. Consideration should be given to funding a senior post to engage more fully with minority communities.

Although CCfW's workforce is not hugely diverse in its composition currently, the office is confident that it is compliant with equalities legislation and is fully committed to continually improving our ability to represent the communities that we serve.

As stated in my response to recommendation 37, I am pleased with work the office has undertaken in relation to many minority vulnerable groups and prefer to further embed engagement with minority groups into the work of the whole office rather than employ a specific post for this purpose.

In accordance with good practice, I will actively review how under-represented groups are encouraged and enabled to apply for posts in my office.

Recommendation 39: The Commissioner should adopt a life span approach in setting policy priorities. This should be reflected in work plans and Annual Reports.

My 'Beth Nesa' / What Next' consultation is taking a life span approach as a basis for its methodology and the data gleaned from this process will inform the corporate strategy and subsequent annual work plans.

Recommendation 40: The Commissioner should consider whether the office in Llansamlet is too remote for effective communication with policy formulators. The viability and benefit of the Colwyn Bay office need to be reassessed. This should not necessarily mean losing the skills and experience of staff based there.

I am currently considering an options paper that has been produced by my office's management team and I have agreed to inform the staff team of any decisions by November at the very latest.

Recommendation 41: The Children's Commissioner should re-examine whether current staff structures are working satisfactorily.

I note that a similar recommendation was made by the Public Accounts Committee following its Inquiry into the accounts of Commissioners.⁹ As the priorities start to emerge for my corporate strategy, I will be seeking to align the structure of the organisation in order to fulfil the objectives we collectively set.

Children's Commissioner for Wales

October 2015

⁹ <http://www.assembly.wales/laid%20documents/cr-ld10127%20-%20report%20of%20the%20public%20accounts%20committee%20-%20-%20scrutiny%20of%20accounts%202013%20-14/cr-ld10127-e.pdf>

Updated advice in support of the proposed Child and Young Person's Bill

Note: This advice was provided to the Commissioner initially by Morgan Cole LLP (now Blake Morgan LLP) in July 2012 and was further reviewed in June 2014. It was prepared in response to a request for advice at a particular time for a particular purpose. This note therefore was prepared on the basis of the law as it stood at such time. In particular it was prepared before the decisions of the Supreme Court in the *Agriculture Sector (Wales) Bill* case and the *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* case.

BACKGROUND

This advice relates to the Welsh Government's ("WG") second session bill, which had a working title of The Child and Young Person's Bill (the "**Bill**").

Three key points were discussed:

1. How the current legislation for the Children's Commissioner for Wales ("**CCfW**") could be simplified;
2. The CCfW's independence, accountability and appointment process; and
3. To what extent the National Assembly for Wales can use its legislative powers under the Government of Wales Act 2006 to extend the remit of the CCfW to all matters affecting all children and young people in Wales.

Following that meeting we were asked to prepare this initial advice. This advice note considers each issue above in turn.

Since our initial instructions, our understanding is that the WG has withdrawn The Child and Young Person's Bill as part of the WG's current legislative programme. We have nonetheless been asked to prepare this advice note. The Children's Commissioner for Wales' Office will need to engage in further discussions with WG regarding the need for legislative reform on the legislative remit for the Children's Commissioner for Wales. This advice also helped inform the discussions regarding the legislative proposal for the Children's Commissioner for England.

1. CURRENT LEGISLATION

1. Care Standards Act 2000

- 1.1 The CCfW's powers are derived from Part V of the Care Standards Act 2000 ("**2000 Act**") as amended by the Children's Commissioner for Wales Act 2001 and regulations made pursuant to the 2000 Act.

- 1.2 Part V of the 2000 Act sets out:
 - 1.2.1 The establishment of the office of the Children’s Commissioner for Wales (section 72);
 - 1.2.2 The principal aim of the CCfW (section 72A);
 - 1.2.3 The key functions of the CCfW; namely the CCfW’s power to:
 - 1.2.3.1 Review the exercise of functions of Welsh Ministers (section 72B);
 - 1.2.3.2 Review and monitor the arrangements certain bodies have in place in relation to complaints, advocacy and whistle blowing (section 73); and
 - 1.2.3.3 Examine an individual child’s case (section 74); and
 - 1.2.3.4 Assist a child in relation to certain proceedings (section 76).
- 1.3 To fully understand the extent of the CCfW’s powers, the 2000 Act needs to be read in tandem with the Children’s Commissioners for Wales Regulations 2001 (the “**2001 Regulations**”) as amended by The Children’s Commissioner for Wales (Amendment) Regulations 2007.
- 1.4 The 2001 Regulations also set out further provisions including the CCfW’s reporting requirements.
- 1.5 Further regulations deriving from the 2000 Act are:
 - 1.5.1 The Children’s Commissioner for Wales (Appointment) Regulations 2000; and
 - 1.5.2 The Children’s Commissioner for Wales (Appointment) (Amendment) Regulations 2007.

2. Shortcomings of the current legislation

- 2.1 In our view, the legislation is cumbersome, repetitive and in many respects unclear for the reasons set out below.
- 2.2 Simplifying the legislation from which the Children’s Commissioner for Wales derives his powers will mean:
 - 2.2.1 there will be less confusion for CCfW, his office, other public sector bodies and, most importantly, the public as to the extent of CCfW’s powers;
 - 2.2.2 the CCfW will have confidence as to when and in what circumstances he has the power to act; and

- 2.2.3 the CCfW is less likely to risk acting *ultra vires* and thus attract legal or audit censure.
- 2.3 We have set out below a non-exhaustive list of some of the key shortcomings of the current legislation:
- 2.3.1 **A complex patchwork of powers, deriving from multiple sources which cross-refer and require careful analysis.** Since the CCfW's powers are set out in both the 2000 Act and the 2001 Regulations there is an additional layer of complexity. For example,
- 2.3.1.1 the CCfW's powers in relation to the review of exercise of functions of Welsh Ministers (section 72B) and reviewing and monitoring arrangements (section 73) derive from the 2000 Act.
- 2.3.1.2 However, the CCfW's powers to examine cases (section 74) and provide assistance in relation to certain proceedings (section 76) are derived from the 2001 Regulations.
- 2.3.1.3 Consequently before the CCfW is able to:
- 2.3.1.3.1 review and monitor certain bodies' complaints, advocacy or whistle blowing procedures, the CCfW must consider extent of his powers as set out in Regulations 2 and 3;
- 2.3.1.3.2 examine an individual child's case, the CCfW must consider the extent of his powers as set out in Regulations 4 to 9; and
- 2.3.1.3.3 assist a child in relation to certain proceedings, the CCfW must consider the extent of his powers as set out in Regulations 10 and 11.
- 2.3.2 **The drafting of the legislation is not particularly clear.** For example:
- 2.3.2.1 Schedule 2A organisations and Schedule 2B organisations are similar. This causes confusion when asked to consider when the CCfW can use his powers to undertake a functions review or an arrangements review.
- 2.3.2.2 There is conflict between the CCfW's powers to provide assistance in relation to 'proceedings' pursuant to Section 76 (and Part IV of the 2001 Regulations) and section 77. Section 77 states that the CCfW cannot 'enquire into or report on' any matter so far as it relates to 'legal proceedings'.
- 2.3.2.2.1 In the 2000 Act 'proceedings' is defined as including "a procedure of any kind and any prospective proceedings". "Legal proceedings" is not defined. Whilst section 77 states that the CCfW cannot enquire into or report on any matter so far as it relates to "legal

proceedings”, the 2001 Regulations states that before he may exercise his powers to provide assistance to a child, he can consider what assistance that child may have under the Access to Justice Act 1999 (which allows individuals to seek legal aid for certain legal proceedings). Consequently there is ambiguity as to the CCfW’s ability to provide assistance in relation to matters which may be heard by a Court or Tribunal.

2.3.2.2.2 The 2000 Act defines proceedings as including ‘prospective proceedings’. However, the 2001 Regulations do not define ‘proceedings’ nor refer to ‘prospective proceedings’. Since the CCfW’s powers to provide assistance derive from the 2001 Regulations there is ambiguity as to whether the CCfW is able only to use his powers in relation to proceedings already underway and not in relation to matters where proceedings have not commenced. This ambiguity also only emphasises the conflict between Section 76 and Section 77 in respect to CCfW’s powers to assist with “legal proceedings”.

2.3.3 **The legislation is repetitious.** We have identified the following provisions as examples of repetition:

2.3.3.1 Section 73 of the 2000 Act. In particular subsections (2) – (2C) are lengthy, repetitive and unclear.

2.3.3.2 Section 72B(2) – (7) and Section 73 (5A)-(5E) are broadly similar. These provisions could be re-drafted to avoid repetition.

2.3.4 **The definitions and terminology used are not all clearly identified, and can be confusingly inconsistent.** Although section 78 of the 2000 Act is headed “definitions”, other terms are used in the 2000 Act which are defined in other sections or not defined at all. Furthermore there is confusion caused between the same terms being used in the Act and the Regulations, but with different meanings. For example:

2.3.4.1 The 2000 Act and the 2001 Regulations both define the meaning of “child” and “regulated children’s services in Wales”. Both definitions are wider under the 2001 Regulations than under the 2000 Act;

2.3.4.2 “subordinate legislation” is defined in section 72B(7);

2.3.4.3 “proceedings” is defined in section 76 (1). (Note further paragraph 2.3.2.2 in relation to the use of term ‘proceedings’);

2.3.4.4 “prescribed person” is not defined in the 2000 Act (it is however defined in Regulation 3(2) of the 2001 Regulations).

- 2.3.5 The 2001 Regulations add additional definitions which, if they had been used in the 2000 Act, could have simplified the 2000 Act. For example:
- 2.3.5.1 “arrangements in relation to complaints, whistle-blowing or advocacy”;
 - 2.3.5.2 “functions review”;
 - 2.3.5.3 “arrangements review”.

3. The Children and Young Persons Bill (the “Bill”)

- 3.1.1 Most of the issues identified above would be addressed if one enactment captured the CCfW’s remit and powers. On that basis, we suggest that the current legislation be repealed and replaced with a bespoke Bill which comprehensively sets out the CCfW’s powers and functions. Further discussion will be required to identify the appropriate legislative opportunity with WG.
- 3.1.2 In order to avoid confusion as to the extent of the CCfW’s functions and powers we propose that such a Bill sets out the CCfW’s functions in broad terms i.e. to safeguard and promote the rights and welfare of children and young people¹ resident in Wales. This would be the CCfW’s principal function. Also, the CCfW should be able to exercise his powers in respect of *any* matter which affects the welfare or safety of a child or young person resident in Wales.
- 3.1.3 Consequently, the CCfW’s functions and powers should not be limited to functions review, arrangements review and examining individual cases or providing assistance to individual children and young people. Instead, the CCfW should be able to do *anything* in pursuance of his primary function.
- 3.1.4 A Bill may however wish to set out a non-exhaustive list of the CCfW’s powers (see the proposed Draft Bill prepared by the Secretary of State for Education, Section 2(1) and 2(3) in respect of the Children’s Commissioner [for England]).
- 3.1.5 The CCfW’s powers would however be restricted where the CCfW is seeking to use his powers to areas outside of the National Assembly for Wales’ legislative competence under the Government of Wales Act 2006 (please see section 3 of this advice for further details).
- 3.1.6 However, since the CCfW’s powers will not be limited to a defined list of organisations the CCfW would have the power to act where a child or young person resident in Wales receives services from a national organisation (e.g. UK Border Agency) or a private organisation (e.g. private prisons).

¹ Further consideration may be required to determine who is a ‘young person’. Currently, and save for as provided pursuant to regulation 21 of the 2001 Regulations, and section 78(1B) of the 2000 Act, the CCfW’s remit applies only to children under the age of 18.

- 3.1.7 A Bill will need to dovetail with the legislation dealing with the Reform of the Office of Children’s Commissioner in England. We note from the proposed Draft Bill prepared by the Secretary of State for Education, the proposed amendments to Section 5 of the Children Act 2004. There is a clear need for the CCfW and WG to engage in the scrutiny process to ensure that the reform of the Office of the Children’s Commissioner in England does not restrict the legislative reforms required by CCfW and WG.

- 3.1.8 We have set out below a high level skeleton of the structure of the Bill:
 - 3.1.8.1 The establishment of the office
 - 3.1.8.2 The functions of the CCfW
 - 3.1.8.3 Any restrictions on the CCfW’s powers
 - 3.1.8.4 Interpretation of key definitions
 - 3.1.8.5 Schedules dealing with:
 - 3.1.8.5.1 status, appointment and term of office
 - 3.1.8.5.2 reporting requirements.

2. INDEPENDENCE FROM GOVERNMENT AND APPOINTMENT ARRANGEMENTS

1. Independence

- 1.1 In accordance with The Children’s Commissioner for Wales (Appointment) Regulations 2000 (as amended) the First Minister appoints the CCfW for a term of 7 years.
- 1.2 The CCfW is also required, pursuant to the 2001 Regulations, to submit annual reports and reports arising from either a functions review or an arrangements review to the First Minister.
- 1.3 The Dunford report which reviewed the role of the Office of Children’s Commissioner in England (OCCE) identified that there was a perception that the OCCE had been hampered in its role as a result of not being sufficiently independent from Government. Dunford identified a number of factors that reduced OCCE’s independence including:
 - 1.3.1 the OCCE’s budget is determined by the Secretary of State for Education and the CCfW is personally accountable to the public accounting officer.
 - 1.3.2 The Commissioner is appointed by the Secretary of State for a term of 5 years and can be re-appointed for a further term of 5 years.
 - 1.3.3 It is feared that the Secretary of State may have power to remove a Commissioner who is too challenging of Government policy².
- 1.4 Similar issues apply to the CCfW.
- 1.5 In his report, John Dunford stated:

“There should be a requirement for parliamentary involvement in the process of appointing the Children’s Commissioner. This should entail a pre-appointment hearing and an opportunity for the Select Committee to raise concerns directly with the Secretary of State if he chooses not to accept its recommendations. The committee should also have an opportunity to consider and comment on the job description prior to the Children’s Commissioner’s post being advertised. I believe that these arrangements would have avoided the criticisms that were levelled at the appointment process for the present Commissioner.

I see little risk of the Commissioner’s position being compromised as a result of the Secretary of State holding a legal power to dismiss the post-holder. This power can only be used in the event of the Commissioner becoming unfit or unable properly to discharge his/her functions; or having behaved in a way that

² Page 33, Review of the Office of the Children’s Commissioner (England) November 2010

is not compatible with him/her continuing in office. These are very high hurdles and would be open to legal challenge in the event of their misuse.

- 1.6 He nonetheless made recommendations in relation to:
- 1.6.1 the appointment process; recommending that the relevant select committee should be consulted on the job description and to make recommendations at the pre-appointment stage; and that the term of office should be 7 years.
 - 1.6.2 The Children's Commissioner for England should submit an annual report to Parliament and other reports to both Parliament and the Secretary of State simultaneously.
 - 1.6.3 The Children's Commissioner for England should receive a three year budget and the freedom to determine how best to use it. John Dunford did not believe that it was possible for OCCE to have complete financial independence. He had considered the option of funding the OCCE through Parliament. There are precedents for this (referring to the Information Commissioner who is paid out of the Consolidated Fund) but said that these bodies tend to perform a parliamentary or regulatory function. However, this is in our view an area which may be worth considering further, since it could be fairly argued that the way in which the CCfW has developed, and the place that children's rights hold within the policy and legislative agenda in Wales mean that a different approach could be legitimately taken here.
- 1.7 When preparing any legislative options, consideration should be given to the recommendations identified above to ensure that the CCfW is (and is also perceived to be) independent from the Welsh Ministers.

2. **Appointment arrangements**

- 2.1 John Dunford's review also considered whether the re-appointment of the Children's Commissioner in England affected independence.

- 2.2 He said:

I support the NGO Co-ordinating Group's proposal for a single seven-year term for the Commissioner. In its 2007 report 'Ethics and Standards', the Public Administration Select Committee recommended a single non-renewable term of office, commenting: '*... The most effective safeguard against concerns that regulators' independence may be influenced by a desire for reappointment is to provide for a reasonably lengthy single non-renewable term. In our view this term should not be more than seven years (nor less than five years)*'. The Commissioner for Wales is appointed for a seven-year term and I understand that Scotland is also considering moving to a seven-year term of office".

- 2.3 We note that the CCfW is considering whether the CCfW should have the opportunity to be re-appointed. We were asked to undertake a review of the

appointment arrangements of (i) the Children’s Commissioners in the UK and (ii) other Commissioners in the UK.

2.4 Our review reveals that the terms of appointment differ from between the various Commissioners. Of course, different Commissioners exercise very different functions within very different statutory frameworks, but they share the feature of being required to be independent of Government.

2.5 Notwithstanding that the Children and Families Act 2014 will, once in force, provide that the Children’s Commissioner for England be appointed for a single term of 6 years, it seems that the current ‘trend’ for Commissioners’ appointments is for a single term of 7 years. This reflects the appointment of the term for the Welsh Language Commissioner. It also reflects the proposed amendments to the appointment term for the Information Commissioner.

Current appointment arrangements for Children’s Commissioners in the UK.

	Wales ³	England ⁴	Scotland ⁵	Northern Ireland ⁶
Appointment	First Minister, after taking account of (i) views of children; and (ii) advice of any selection panel	Secretary of State, who must (as he thinks fit) involve children	By Her Majesty on the nomination of Parliament	By the First Minister and deputy First Minister acting jointly,
Term	7 years	Not more than 5 years ⁷	Not more than 8 years	4 years
Reappointment	No	Once – subject to the same terms of Appointment, above	No	Once – subject to the same terms of Appointment, above
Early removal	First Minister may relieve the Commissioner of office: (i) on ground of misbehaviour; or (ii) on being satisfied the Commissioner is incapable of performing functions	Secretary of State may remove if satisfied that the Commissioner has: (i) become unfit or unable to discharge functions; or (ii) behaved in a way not compatible with the office	May be removed by Her Majesty if: (i) the Commissioner requests; (ii) Parliament is satisfied the Commissioner has breached the terms of appointment and 2/3 of Parliament vote in favour of removal; or (iii) 2/3 of Parliament vote that they have lost confidence in the Commissioner’s willingness,	First Minister and deputy First Minister acting jointly may remove the Commissioner if satisfied that the Commissioner has: (i) been convicted of a criminal offence; (ii) become bankrupt or made arrangements with creditors; (iii) without reasonable excuse failed to discharge functions for three consecutive

³ Children's Commissioner for Wales (Appointment) Regulations 2000

⁴ Children Act 2004

⁵ Commissioner for Children and Young People (Scotland) Act 2003

⁶ Commissioner for Children and Young People (Northern Ireland) Order 2003

⁷ Note that under the Children and Families Act 2014, which is not yet in force, the Commissioner’s term of appointment is a single term of 6 years

			suitability or ability to perform functions	months; or (iv) become unfit or unable to exercise functions
Other			Restriction on employment after ceasing to be Commissioner, for example, cannot be an employee of the new Commissioner until the end of the next financial year	

2. Current appointment arrangements for other Commissioners in the UK.

	Welsh Language Commissioner⁸	Older People's Commissioner for Wales⁹	Commissioner for Older People Northern Ireland¹⁰
Appointed by	First Minister after taking account of: (i) the recommendations of the selection panel (which interviews candidates and makes recommendations to the First Minister); (ii) consultees (e.g. the Assembly); and (iii) ministerial responsibility, merit, independent scrutiny, equal opportunities, probity, openness and transparency and proportionality, including the Code ¹¹	First Minister, after taking account of: (i) views of older people; and (ii) advice of any selection panel.	First Minister and deputy First Minister acting jointly, after taking account of views of over 60s
Term	7 years	4 years	4 years
Reappointment	No	Once – subject to the same terms of Appointment, above	Once – subject to the same terms of Appointment, above
Early removal	First Minister may dismiss if satisfied that Commissioner is: (i) unfit to continue in office; or (ii) is unable or unwilling to exercise functions	First Minister may dismiss: (i) on ground of misbehaviour; or (ii) if satisfied that Commissioner is incapable of performing functions	First Minister and deputy First Minister acting jointly may remove the Commissioner if satisfied that the Commissioner has: (i) been convicted of a criminal offence; (ii) become bankrupt or made arrangements with creditors; (iii) without reasonable excuse failed to

⁸ Welsh Language (Wales) Measure 2011 and Welsh Language Commissioner (Appointment) Regulations 2011

⁹ Commissioner for Older People in Wales (Appointment) Regulations 2007

¹⁰ Commissioner for Older People Act (Northern Ireland) 2011

¹¹ Commissioner for Public Appointments' Code of Practice for Ministerial Appointments to Public Bodies of August 2009

			discharge functions for three consecutive months; or (iv) become unfit or unable to exercise functions
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3. EXTENDING CCfW'S REMIT UNDER THE GOVERNMENT OF WALES ACT 2006

1. Issue

- 1.1 The CCfW wishes to extend his powers to enable him to act on all matters which relate to or affect children in Wales.
- 1.2 We have been asked to consider to what extent can the Assembly use its legislative powers (under the Government of Wales Act 2006) to extend the remit of the CCfW.
- 1.3 This advice is a summary of our advice dated 15th March 2011, with some amendments and additions to address developments in caselaw.

2. Executive Summary

- 2.1 The Assembly's legislative competence is:
 - 2.1.1 sufficiently broad to extend the CCfW's functions to enable him to assist children in relation to all matters which relate to or affect children in Wales, except in certain fields that are expressly excluded from the Assembly's competence (e.g. broadcasting, pre-existing functions of Ministers of the Crown), except to the extent that this can be said to be "incidental to, or consequential on" the issue of protection of children; and
 - 2.1.2 probably broad enough to extend in a similar way the CCfW's functions of investigating and reporting on cases involving children in Wales.

3. Competence to make Acts

- 3.1 The Assembly has specific power to pass Acts that relate to the 'protection and well-being of children' in Wales. Changing the CCfW's functions clearly relates to the protection and well-being of children, therefore changing the CCfW's functions appears to be within the Assembly's power.
- 3.2 However, this power is subject to many exceptions, for example, the Assembly's powers are **expressly** excluded from the field of broadcasting. This means that the Assembly **cannot** on the face of it legislate to protect children if it deals with protecting children in the field of broadcasting. Another important restriction is that the Assembly cannot legislate so as to remove or alter a function of a Minister of the Crown (i.e. a Minister of the UK Government) which existed before the commencement of the provisions which gave the Assembly the power to make Acts (i.e. before May 2011).
- 3.3 However, many matters are not expressly excluded in this way, for example, prisons and immigration are **not** expressly excluded. But at the same time, prisons and immigration are not expressly **included** either – the powers are silent in relation to prisons and immigration. As a matter of simple logic, it is difficult to understand the Assembly's powers in any other way than permitting the Assembly to make Acts

which relate to the protection and well-being of children in “limbo” fields such as prisons and immigration. Nevertheless, this is not a foregone conclusion. The Attorney General has referred to the Supreme Court the Agricultural Sector (Wales) Bill. The Bill’s purpose is to re-introduce in Wales legislation in respect of agricultural wages. Such legislation had previously been contained in the Agricultural Wages Act 1948 but was repealed by the Enterprise and Regulatory Reform Act 2013, enacted by the UK Parliament. The Bill was considered to be in competence by the Government and the Assembly, because it relates to Agriculture, which is a devolved area. The Attorney-General has argued that the Bill is outside competence, because it is about employment. Employment is neither expressly devolved nor reserved. His argument boils down to saying that the Bill does not really relate to Agriculture at all, taking account of its effect in all the circumstances. The decision in this case will have a profound impact on how far the Assembly can legislate in “ those “ limbo” fields, and accordingly how far the Commissioner’s remit might be extended.

- 3.4 As noted, broadcasting is one field that has been expressly excluded. Another field expressly excluded is the Children’s Commissioner established under the Children Act 2004 (**the CA2004 Commissioner**). In other words, the Assembly cannot pass legislation which alters or removes the powers that the CA2004 Commissioner has in Wales. Nevertheless, this prohibition does not **of itself**, in our view, prevent the Assembly from legislating to extend the powers of the CCfW into areas which are also within the remit of the CA2004 Commissioner.

We should also point out that the Assembly can legislate on excluded areas if that is, incidental to, or consequential on” the conferred legislative powers, in this case the protection or well-being of children. As to where the boundaries lie between what is “incidental” or “consequential” and what is not, this was considered in the Supreme Court decision in the Local Government Byelaws (Wales) Bill case, handed down in November 2012. In that case, Lord Neuberger emphasised that it would be a matter of fact and degree in each case, requiring an examination of the individual piece of legislation concerned. His remarks focused on the particular Assembly Bill in question, and offer comparatively little guidance in the present case. Lord Hope gave some further guidance which is more general in nature. He said: *The words “incidental to, or consequential on, any other provision contained in the Act of the Assembly” make it clear that the interpretative exercise to which it points is one of comparison. How significant is the removal of the pre-commencement function, when it is seen in the context of the Act as a whole? If the removal has an end and purpose of its own, that will be one thing. It will be outside competence. If its purpose or effect is merely subsidiary to something else in the Act, and its consequence when it is put into effect can be seen to be minor or unimportant in the context of the Act as a whole, that will be another. It can then be regarded as merely incidental to, or consequential on, the purpose that the Bill seeks to achieve. The provision in question meets this test. So it is within competence.*

4. What CCfW wants to do

- 4.1 Our understanding at this stage is that CCfW is looking to obtain the power to enable him to act on all matters which relate or affect children in Wales.

- 4.2 Our original view, based on a straightforward interpretation of the Government of Wales Act 2006, was that this could be done within the Assembly's legislative competence, provided that an express exception does not apply (e.g. broadcasting). Nevertheless, that opinion must be subject to the decision of the Supreme Court in the Agriculture Sector (Wales) Bill case.
- 4.3 Even if that case is decided against the Welsh Government, the Byelaws case gives helpful guidance about the extent to which the Assembly can legislate on matters otherwise outside its competence on the basis that they are incidental or consequential to the main purpose of the legislation. There are powerful arguments, in our view, for saying that the protection and welfare of children in Wales would be the principal (indeed probably the only) purpose of any legislation extending the Commissioner's remit, and that any impact this has on other areas outside competence incidental or consequential.
- 4.4 The previous point would, in our opinion, be strong enough to enable the Commissioner's existing remit to be extended to the welfare of children in excluded and limbo areas of competence.

MORGAN COLE LLP

31 JULY 2012 as amended 18 June 2014