



House of Commons
Welsh Affairs Committee

**The Powers of the
Children's
Commissioner for
Wales: The
Government Response
to the Committee's
Fifth Report of Session
2003–04**

**Fourth Special Report of Session
2003–04**

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales.)

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Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at www.parliament.uk/parliamentary_committees/welsh_affairs_committee.cfm.

Committee staff

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Fourth Special Report

The Committee published its Fifth Report of Session 2003–2004 on 29 July 2004. The response from the Department for Education and Skills was received on 4 October 2004 and is published as the Appendix to this Report.

Appendix

1. Our experience of the Children’s Commissioner for Wales confirms to us that the power to launch investigations enhances rather than limits the effectiveness of a Commissioner. For that reason we welcome the amendments to the Bill to empower the Children’s Commissioner for England to instigate inquiries. However, we remain concerned that the Secretary of State would retain an unwanted influence over the Commissioner in respect of inquiries that could undermine the Commissioner’s independence. (Paragraph 21)

The Government’s intention is that the Children’s Commissioner should have a strategic role in championing children’s views and interests. We share the Committee’s view that the power to initiate inquiries enhances the effectiveness of a commissioner, and believe that it will strengthen the Children’s Commissioner’s strategic role. Having listened very carefully to the views of people both inside and outside Parliament, we tabled an amendment to the Children Bill which inserted a new clause that empowers the Children’s Commissioner to initiate an inquiry into the case of an individual child where that case raises issues of public policy that are of relevance to other children.

The Children’s Commissioner may only carry out such an inquiry if he or she is satisfied that it will not duplicate work that is the function of another person, and he or she must consult such other persons and the Secretary of State before holding an inquiry in order to ensure that there is no duplication. The Secretary of State will have no veto over the Children’s Commissioner’s inquiries. The final decision on whether to proceed with an inquiry lies with the Children’s Commissioner, and each inquiry held under this new clause will be for the Children’s Commissioner only to conduct as he or she sees fit, using the inquiry powers to summon witnesses and evidence and take evidence under oath. Following an inquiry, the Children’s Commissioner must publish a report containing his or her recommendations, and send a copy to the Secretary of State.

In addition, the Children Bill also provides for the Secretary of State to direct the Children’s Commissioner to carry out an inquiry into the case of an individual child, where that case raises issues of relevance to other children. This will not undermine the Children’s Commissioner’s independence or autonomy to carry out his or her own inquiries, and we envisage that the Secretary of State’s power will be very rarely used. However, a case may arise that is so serious that it would only be appropriate for an inquiry into it to be carried out by the Children’s Commissioner, and we feel it is sensible to ensure that the Secretary of State is able to identify and initiate any action necessary. We expect the Secretary of State to discuss the matter with the Children’s Commissioner before directing any such inquiry and to take fully into account the Children’s Commissioner’s views and any pressures on

his or her time and resources that may affect his or her ability to carry out an inquiry effectively.

2. We recommend strongly that the Government use the period before it introduces the Bill to the House of Commons as time for reflection. Both our inquiry and the debate in the House of Lords have highlighted the need for a better division of powers on non-devolved matters between the Children's Commissioners for Wales and England. We recommend that the Children Bill be amended to confer on the Children's Commissioner for Wales powers that cover all aspects of a child's life in Wales. (Paragraph 26)

The Government's intention from the outset has been to ensure that all children, wherever they are in the UK, have a voice. In developing proposals for the final Children's Commissioner to be established in the UK, we have sought to address the interests of children in all parts of the UK in the fairest way, and in a way that ensures the best fit with existing commissioners and the division of powers and responsibilities set out in the devolution settlements.

Non-devolved matters are determined by central Government in Westminster. It is essential that we receive consistent messages about how these matters affect children's lives, wherever they may be in the UK, so that we know how we can make improvements that achieve the fairest possible outcomes. It is therefore entirely logical that one commissioner should report on non-devolved issues to the UK Parliament in Westminster, where these issues are debated and decisions made. This ensures the appropriate lines of accountability since the powers of the Commissioners relate to the bodies that have responsibility for the matters the Commissioners are investigating.

The Children's Commissioner for Wales is currently able to make representations to the National Assembly for Wales on any matter affecting the rights or welfare of children in Wales. That includes non-devolved matters. The Assembly may then take the matter to the UK Government, and the Children's Commissioner for Wales himself is not prevented from approaching the UK Government to discuss non-devolved issues in Wales. It is important to bear in mind that the establishment of the Children's Commissioner will not undermine the role, powers or independence of the Children's Commissioner for Wales in any way. He will still be able to carry out all his functions as he does now. The establishment of the Children's Commissioner will only serve to enhance the provision for children in Wales, ensuring they have a clear voice in Westminster on matters that affect their lives and are decided in Westminster.

3. We conclude that the Government's approach to devolution on this issue has fallen short of what we would expect. Its failure to specifically consult either children in Wales or the Children's Commissioner for Wales in advance, undermines the devolution settlement. More seriously it reinforces the notion that Wales remains on the margins of the UK Government's consciousness. Had the Minister consulted the Children's Commissioner for Wales at an early stage, this could have been avoided. The Minister should reflect upon her error of judgement not to consult Welsh children on an issue that directly affects their lives. (Paragraph 35)

The Government's approach to devolution on this issue has been to ensure that we are as fair and as consistent as we possibly can be, within the terms set by the different settlements. The Government has fulfilled its obligations under the Memorandum of Understanding in the development of policy in this area. We would therefore strongly dispute the notion that Wales, or any other part of the UK, has been on the margins of the Government's consciousness. Indeed, a considerable amount of time and effort has been devoted to this issue, with Wales often at the forefront.

The Children's Commissioners for Wales and Northern Ireland both met separately with the Minister for Children, Young People and Families some time before the Bill was ready for publication in March 2004. Although the Minister was clear that the Bill would not be used as a vehicle for extending the Welsh Commissioner's powers over non-devolved matters, she asked many questions about their work and their views on the legislation that established them. The answers they provided informed the continuing development of the then draft Bill, for example leading to the inclusion of a duty to take into account the work and views of the other UK Commissioners.

It is true that we did not carry out specific consultation with children in Wales on 'Every Child Matters'. We should however record that most of that Green Paper referred to matters that are devolved to Wales and it would not have been appropriate for the UK Government to consult Welsh children on such matters. We could potentially have consulted Welsh children on the Commissioner alone, but we did not conduct such issue-specific consultation with children in England. However, as pointed out in the supplementary written evidence provided to the Committee by the Minister for Children, Young People and Families on 18 May 2004, we are extremely mindful of the impact of all our proposals on children - in Wales as in other parts of the UK. That is why we have aimed for fairness, consistency and clarity within the terms of the devolution settlements.

We have also ensured that Welsh children will be represented on the new national Children and Youth Board. Comprised of twenty-five 11 to 19 year olds, the Board has been established by the Department for Education and Skills to advise the Minister on children and young people's views on a range of issues. Some self-selected members of the Board will also be actively involved in the recruitment of the Children's Commissioner.

4. Should the proposed division of powers be accepted by Parliament, we would expect a statutory duty to be placed on the Commissioner to consult, and work jointly, with the Commissioners for the other parts of the United Kingdom upon an equal footing. Furthermore, we recommend that any such arrangements must not impinge upon the independence of the Children's Commissioner for Wales. (Paragraph 48)

The Government firmly believes that an effective working relationship between all the UK's Commissioners, established through good communication links and close cooperation, must be an essential part of the work of the Children's Commissioner and the Commissioners in Wales, Scotland and Northern Ireland. We do not want to dictate how they should go about establishing this relationship. We envisage that they will wish to draw up protocols, or Memoranda of Understanding, that set out the details of how they will work together within the framework of their respective legal instruments, for the benefit of all the UK's children. Although we will be happy to offer advice or guidance, should the Commissioners need it, we have been very clear that we do not intend to intervene in this

process – it is for the independent Commissioners themselves to develop these arrangements together, as they see fit and as their relationship evolves. This process would therefore begin after the Children’s Commissioner has taken up his or her post.

We have also been clear that it is not our intention to set up a Children’s Commissioner who is first among equals. For the reasons outlined above, the Children’s Commissioner’s remit will cover non-devolved matters across the UK, but that does not mean that he or she will be at the top of a ‘hierarchy of Commissioners’. We fully expect the Children’s Commissioner to work in cooperation with his or her UK counterparts, and included in the original draft of the Children Bill a duty on the Children’s Commissioner to take into account the work and views of the other Commissioners when carrying out his or her general function on a non-devolved matter in their respective nations. The duty was lost as a consequence of a non-Government amendment to Clause 2 which was carried at Report Stage of the House of Lords and which restricted the Children’s Commissioner’s function to children in England. We will therefore seek to restore it when the Bill reaches the House of Commons.

5. It is for the UK Government to decide upon the appropriate levels of support for children in England. However, it is our role to scrutinise such policies that have an impact on Wales. We remain unconvinced that the Government has assessed correctly the resources for the Children’s Commissioner for England in respect of his or her obligations to Wales. Therefore we recommend that the Government revisits its costing assumptions at the earliest opportunity. (Paragraph 52)

The Government’s estimated funding for the Children’s Commissioner is appropriate to his or her role and functions. As the Minister for Children, Young People and Families pointed out when she gave her evidence to the Committee, the Children’s Commissioner will have a somewhat different role to that of the Children’s Commissioner for Wales, in that he or she will not be taking on any casework. This is not to play down the value that the casework aspect of the Welsh Commissioner’s role has in a Welsh context, but with 11.7 million children in England, compared with around 700,000 in Wales, it is likely that the Children’s Commissioner would become overwhelmed with individual cases.

The Children’s Commissioner will be able to allocate resources as he or she deems appropriate. We do not intend to ring-fence any part of the Children’s Commissioner’s budget, although we would expect him or her to take into account the role that he or she will have in Wales, Scotland and Northern Ireland when allocating resources.

We are currently reviewing the estimated funding for the Children’s Commissioner, in light of the new power to carry out their own inquiries.

6. If the Government persists with its proposals, part of the resources allocated to the English Commissioner will need to be used to publicise his role in Wales and, where necessary, to act on behalf of children in Wales. Without a physical presence in Wales, the role of promoting the English Commissioner may have to fall to the Welsh Commissioner. This would be an inappropriate call on his resources. Therefore we recommend that the Government rethink its resource strategy to include a detailed assessment of the resources necessary for a physical presence in Wales. (Paragraph 56)

The role of promoting the Children's Commissioner will not fall to the Welsh Commissioner. The Government has never made any suggestion that this could be the case. Indeed, we have given the Children's Commissioner a duty to involve children in his or her work, in particular to ensure they are made aware of his or her function and how they may communicate with him or her, and to consult them on matters he or she proposes to look at under his or her general function. It is for the Children's Commissioner to carry out this duty, and to allocate resources for that purpose as appropriate.

We think it unlikely that the Children's Commissioner will wish to set up offices in Wales, Scotland or Northern Ireland. However, in carrying out this duty, the Children's Commissioner will need to find ways of letting children in Wales, Scotland and Northern Ireland know about his or her role, and how they can communicate with him or her about non-devolved matters in their countries. The UK Commissioners may wish to work together to ensure that children across the UK know about them, what they do and how they fit together – for example by setting up links to one another's websites. But it will be the responsibility of the Children's Commissioner—not his or her counterparts—to publicise his or her own role, as we cannot deny children the right of access to the Children's Commissioner should they have views on or concerns about non-devolved issues.

In any case, we hope and anticipate that each Commissioner will be able to act as a 'first port of call' for the children in their country. Through developing their own independent protocols and ways of working, the Commissioners will be able to set out effective channels of communication for passing information through. For example, the Children's Commissioner may need to refer to the other Commissioners any communications he or she receives from children in their nations on devolved matters. Similarly, the Commissioner will want to find ways of making them aware of communications he or she receives on non-devolved matters. In this way, they can ensure that whichever Commissioner a child contacts, the message will find its way smoothly to the appropriate office.

7. Access to services in the Welsh language is vital to the needs of Welsh-speaking children. Those children require access to documentation and services in Welsh from the office of the English Commissioner from the outset, not after a period of time. By passing responsibility for the implementation of a Welsh language scheme to the Children's Commissioner for England, the Minister has washed her hands of her responsibilities towards Welsh children. If the Government refuses to rethink its proposals, we recommend that the Government open discussions with the Welsh Language Board immediately to ensure that Welsh language services will be provided by the office of the Children's Commissioner for England on the first day of its operations. (Paragraph 63)

The Government shares the view of the Committee that it is important that Welsh-speaking children have access to services in the Welsh language. The Minister for Children, Young People and Families has given a great deal of thought towards her responsibilities to children in Wales, as well as Scotland, Northern Ireland and England, and will ensure that all relevant legal obligations are met for the benefit of children in all four nations. This

commitment applies to the provision of Welsh language information or services by the Children's Commissioner.

The Government does not intend to develop a language scheme for the Children's Commissioner before he or she is even in post, or to ring-fence any of the Children's Commissioner's funding for this purpose – it must be for the independent Children's Commissioner to draw up a scheme, and allocate resources towards this task as he or she sees fit. In any case, it would be highly premature to do so before the Children Bill has been through the proper Parliamentary process, throughout which it is subject to change.

In terms of timing, once the Children's Commissioner is in post we expect that he or she will work as quickly as is practicable to fulfil his or her duties under the Welsh Language Act. The evidence submitted by the Welsh Language Board to the Committee on 21 May 2004, states that at the time of writing, the Welsh Commissioner “is currently preparing a Welsh Language Scheme”. Given that Mr Clarke took up his post in 2001, we infer that this process can take a considerable amount of time and that it would be extremely unlikely that the Children's Commissioner would be able to provide Welsh language services from day one of his or her operations.

The Government will endeavour to do any groundwork towards the Children's Commissioner's Welsh language obligations that we feasibly can without compromising the Children's Commissioner's independence or pre-empting the will of Parliament. Officials at the Department of Education and Skills have written to the Welsh Language Board to open a constructive dialogue to that end.

8. We continue to believe that the appropriate solution to the concerns raised about the division of powers between the Children's Commissioners in the United Kingdom is to give the Commissioners for the four parts of the United Kingdom remits that cover fully the countries that they represent. Our inquiry has made clear that we are not alone in this view. (Paragraph 64)

The Government has taken this view into account as we have developed the Children's Commissioner proposals. However, as outlined above we have made every effort to ensure that what we are establishing makes the best possible fit with the powers and responsibilities set out in the devolution settlements.

9. The post-devolution landscape has been one of general accord between the National Assembly for Wales, the Welsh Assembly Government and the UK Government. The Children Bill has undermined that accord. The views of the National Assembly for Wales, the Welsh Assembly Government, the NGOs that work directly with children in Wales and the Commissioners for Wales, Scotland and Northern Ireland all concur that powers over non-devolved matters should be given to the Commissioners in Wales, Scotland and Northern Ireland. The Government has dug in its heels against that consensus. The Minister has hidden behind the false premise that the extension of the Commissioner's powers is a direct part of the devolution settlement. While it may appear to be a convenient defence it is misguided and puts into question the Minister's commitment to placing the needs of children over that of spurious bureaucratic expediency. (Paragraph 77)

We do not agree with this assessment of the Children Bill. The UK and Assembly Government have worked closely together throughout the preparation and progress of the Bill and it contains a number of significant provisions relating to Wales. These include a major addition to the devolution settlement through the transfer of the functions of the Children and Families Court Advisory and Support Service (CAFCASS) in Wales to the Assembly. In addition, Part 3 of the Bill is a package of measures for the reform of children's services in Wales which respond to the distinctive Welsh context and the policy aspirations of the Assembly Government. The introduction of the Bill was welcomed by Jane Hutt, Assembly Minister for Health and Social Services, who stated, "I believe that the Children Bill represents an important opportunity to move forward in the policy direction we have already set in Wales." (Cabinet Written Statement to NAW, 10 March 2004)

It is also important to take into account the close working that has taken place between the UK and Assembly Government in developing the provisions for the Children's Commissioner. The UK Government has not at any time hidden behind the 'false premise' that the powers of the Commissioners are a direct part of the devolution settlements. Rather, we have consistently shown that devolution has been a key influencing factor in the development of the new Commissioner's remit, and that we have acted within the landscape created by the settlements. This is not a convenient defence, it is a fact.

The needs of children, wherever they are in the UK, have been of paramount importance to Ministers and officials throughout the development of the Children's Commissioner clauses of the Bill. It is for that reason that we have pursued the fairest, rather than the easiest way forward, within the boundaries set by the devolution settlements and the legislation that established the existing Commissioners in Wales, Scotland and Northern Ireland. Our proposals will ensure that children have a champion and a clear voice in Westminster on non-devolved issues, regardless of their geographic location.