



**Scotland's Commissioner  
for Children & Young People**

## **Summary Report**

**'We May Be Children, But We All Have Rights'**

**Scotland's Commissioner for Children and Young People**

**May 2015**

## Introduction

*'I know we are only children, but we have complaints too and children have the right to a voice, so why shouldn't we complain? I think adults should listen to us more because we may be children, but we all have rights.'*

—participant in the Children's Parliament consultation event

This report provides a summary of a mapping exercise and analysis undertaken for the Education and Culture Committee of the Scottish Parliament by Scotland's Commissioner for Children and Young People. The main report aims to both inform the Commissioner in his approach to carrying out his new investigatory power and to assist the Committee in understanding where this sits within the broad complaints handling and investigatory framework. This summary report provides a brief overview of the key findings from that exercise.

### **Why did we undertake a mapping exercise?**

The Commissioner has the power to investigate matters relating to the rights, interests and views of children and young people (generally) under the Commissioner for Children and Young People (Scotland) Act 2003. A restriction to this power is that these investigations must not duplicate work that is properly the function of another person. This power was extended to permit investigations into individual children's circumstances by Part 2 of the Children and Young People (Scotland) Act 2014. The non duplication restriction remains.

Following a request for clarification from the Education and Culture Committee around the scope and interpretation of these new powers and to establish how Part 2 would work in practice within the current complaints handling and regulatory landscape, the Commissioner offered to undertake this exercise. This was carried out from December 2014 – April 2015.

## **Chapter 1: Our methodology**

### **Context for a Children's Commissioner**

The report explores the rationale underpinning the establishment of the office of the Children's Commissioner, why children differ from other rights holders and why they require their own dedicated support and complaints mechanisms.

### **Legislative framework**

The report sets out the Commissioner's statutory framework, including the investigatory power and its limitations. It then traces the development of the non duplication requirement through statements made in the Scottish Parliament from the *Inquiry into the Need for a Children's Commissioner in Scotland* in 2002, to recent debates in the Parliament's Education and Culture Committee. It also looks at other parliamentary debates around the remit of similar bodies which gives an insight into the meaning and scope of the non-duplication requirement. We review legal advice commissioned by Commissioner in 2013 in relation to the extent of his investigatory power and analyse the governing statutes of bodies whose remits are most likely to overlap with the Commissioner's extended investigatory powers.

### **Interviews with stakeholders**

We wrote to relevant complaints bodies, regulators, ombudspersons and national human rights institutions (NHRIs) detailing the purpose of the exercise and asking them to participate. We circulated a discussion guide to allow them time to prepare their responses in advance. The interviews were mostly face to face, but where this was not possible, telephone interviews were arranged. We were able to meet around 15 different representatives from a range of organisations.

### **Wider stakeholder engagement**

The interviews were supplemented by a roundtable event with stakeholders working with children and young people. We also commissioned a small piece of research with children and young people to get an insight into how they view current complaints systems, what barriers to complaining they feel exist and how systems could be improved to better meet their needs.

## **Chapter 2: Why do we need a Children's Commissioner?**

In chapter 2, we explain the rationale for the establishment of Scotland's Commissioner for Children and Young People and what distinguishes this role from those of others with a remit relating to children and young people and their rights. We note that traditionally children are often denied a meaningful voice and are invisible in decision making processes, in part due to their age, vulnerability and powerlessness in an adult world. We underline the consequences of not listening to children or taking their views seriously – the recent glut of historical abuse cases bears witness to this – and we stress the importance of understanding children as the subject of rights, who are entitled to be treated with respect and to exert influence over their own lives.

We reinforce why the Parliament decided to establish a dedicated office which has as its main function the promotion and safeguarding of children's rights, and that such an office should be accessible, visible and relevant to children and young people in a way that other offices with a complaints handling and/or investigatory role cannot be. We then go on to highlight why this new investigatory power is required.

We demonstrate how important it is for children and young people to have access to justice and redress if their rights are infringed. We also note that when the Scottish Parliament passed the Commissioner for Children and Young People (Scotland) Act 2003, it recognised that promoting and monitoring children's rights is essential to creating a culture where children's rights are taken seriously.

## **Chapter 3: The legislative framework**

Chapter 3 introduces the legal framework in which the Commissioner operates, along with the background to and the terms of the extension of his powers. It highlights the key restriction on this power (i.e. the non-duplication requirement) through tracing its legislative history and by reference to legal advice obtained for the Commissioner.

The chapter begins by looking at the Commissioner's current functions and then proceeds to the changes introduced by Part 2 of the Children and Young People (Scotland) Act 2014.

## The Commissioner's current functions

The Commissioner's functions are set out in the Commissioner for Children and Young People Act (2003). His general function is to promote and safeguard the rights of children and young people.<sup>1</sup> The Act details the provisions which enable this function to be undertaken. This Act also provides for an investigatory power. The Commissioner may investigate:

“...whether by what means and to what extent, a service provider has regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children young people”.<sup>2</sup>

The power extends to public, private and voluntary sector service providers, but not to persons with parental responsibilities and rights, except where these are held by a local authority<sup>3</sup>. The power is limited in two ways:

- Investigations relating to reserved matters, to individual children or to cases currently before a Tribunal or court are excluded<sup>4</sup>.
- The investigation must not duplicate work that is properly the function of another body<sup>5</sup>.

Part 2 of the Children and Young People (Scotland) Act 2014 extends the Commissioner's investigatory power to allow for individual investigations.

We highlight the background to this extension in the full report, noting that the United Nations Committee on the Rights of the Child recommends that UK's Children's Commissioners:

*'...should be mandated to receive and investigate complaints from or on behalf of children concerning violations of their rights and be equipped with the necessary human and financial resources in order to carry out their mandate.'*<sup>6</sup>

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<sup>1</sup> 2003 Act, s. 4 (1).

<sup>2</sup> 2003 Act, s. 7 (1).

<sup>3</sup> 2003 Act, s. 16 (1).

<sup>4</sup> 2003 Act, s. 7 (3).

<sup>5</sup> 2003 Act, s. 7 (2A).

<sup>6</sup> UN Committee on the Rights of the Child (2008), *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, paras 16-17.

The Scottish Government also recognised that there was a problem with accessible remedies for children’s rights infringements and a gap in the current complaints and investigatory landscape, and introduced Part 2 of the Children and Young People (Scotland) Bill.

The Scottish Parliament passed the Bill, including the provisions extending the Commissioner’s investigatory powers.

### **What are these new changes?**

Part 2 of the Act extends the power of investigation to cover individual investigations as well as general ones, by amending the 2003 Act. It also introduces a new provision which will give the Commissioner the power to resolve (competent) matters without resorting to an investigation. We note that the Commissioner anticipates that most competent cases will be resolved without recourse to a full investigation - an assessment based on the experience of other Children’s Commissioners and bodies with similar functions. The exclusions and restrictions to the investigatory power set out in the 2003 Act (apart from that relating to individual cases) remain; the most significant of these is the non-duplication requirement.

### **The non-duplication requirement**

By studying the legislative history of the non duplication requirement from the *'Inquiry into the Need for a Children’s Commissioner in Scotland'* in 2002, to recent debates in the Scottish Parliament’s Education and Culture Committee around the Children and Young People (Scotland) Act 2014, we are able to ascertain how this requirement is understood by key players.

The requirement came from Parliament’s deliberations around where to place the Commissioner’s specific, rights-based investigatory power in the landscape of regulatory and investigatory bodies. It started as a less restrictive condition than that which was eventually included in the 2003 Act (and latterly replicated in the 2014 Act). The member in charge of the Committee Bill that became the 2003 Act emphasised the narrow, rights-focused nature of the Commissioner’s investigatory power and suggested that another person’s ‘proper function’ needed to be at least sufficiently similar to the Commissioner’s investigatory power before the non-duplication requirement was triggered. This view is consistent with the Opinion of Senior Counsel obtained by the Commissioner.

The concept of non-duplication has been broadened since the early discussions around a Children's Commissioner. In subsequent debates, far less specific overlap has been required between functions that might be similar. In one example (the SHRC), the risk of duplication was considered to exclude any rights-based advocacy for law reform. A similarly restrictive meaning of the non-duplication requirement continues to be used in debates about the extension of the Commissioner's investigatory power.

### **Review of legal advice**

We reviewed legal advice commissioned by the Commissioner in 2013. This mainly focused on issues of interpretation around the scope and meaning of the provisions regulating the investigatory power and was commissioned to assist in the consideration of proposals to extend the investigatory powers of the office.

Two terms which feature in the 2003 and 2014 Acts are 'properly the function' and 'non-duplication'. We consider that a clear steer on these terms helps clarify Parliament's intention as well as the scope of the legislative provisions. These are considered in some depth in the full report, with reference to our legal advice.

### **'Properly the function'**

Counsel was clear that the Commissioner would first have to establish if there is another person who has a 'proper function' which the exercise of his investigatory power may duplicate and the matters to be investigated would be those in section 7 (1), namely, *'whether, by what means and to what extent a service provider has regard to the rights, interests and views in making decisions or taking actions that affect those young people'*.

Counsel was of the view that, just because another person has regulatory or investigatory functions relating to children and young people, this is not enough to exclude an investigation by the Commissioner unless that person's function properly includes the matters mentioned in s. 7. This means that any other person's proper function would have to be sufficiently similar to the Commissioner's before an investigation by him would be deemed incompetent. Counsel also stated that the other person does not have to exercise that power: the fact that that other person has that function is sufficient to render an investigation by the Commissioner incompetent.

## **'Non duplication'**

The legal interpretation of 'non duplication' is also considered. We note that, whilst the term is not defined in either the 2003 or the 2014 Act, it is critical to understanding the limits of the Commissioner's powers and the scope of the non-duplication requirement. Taking into account the views expressed by the Member in charge of the Bill, Counsel's opinion and internal discussions, our understanding of the term is broadly:

- To exclude a matter from investigation, the proper function of another person would have to be sufficiently similar to that of the Commissioner.
- It is not only the subject matter which is relevant, but also the person or body to be investigated (which is wide in scope in terms of service providers in the Commissioner's case).

An investigation by the Commissioner would therefore be excluded where there is another person with a relevant statutory function, which properly includes within its scope:

- The matters for investigation mentioned in respect of the Commissioner's power in s. 7 (1) of the 2003 Act.
- The breadth of bodies that fall into the 2003 Act's definition of 'service provider' as applied in a given case.

## **Chapter 4: Governing statutes**

Key to understanding what is 'properly the function of any other person' in practice is having a sound grasp of the governing statutes of relevant bodies; these are considered in Chapter 4. We look at the legislation of a number of bodies and attempt to identify relevant points of overlap or other features which have a bearing on the Commissioner's investigatory power. We make the point that this is an exploratory piece of work and should be seen as such. Its main purpose is to assist the Commissioner in understanding better the scope of his investigatory power.

Clearly other bodies and their functions will be of interest and relevance, but because of time constraints we focused on the bodies which appeared to be most relevant for the purposes of the mapping exercise. Eight were



selected, covering a combination of complaints handling bodies, regulators and National Human Rights Institutions (NHRIs).

These were:

- Scottish Public Services Ombudsman (SPSO)
- Care Inspectorate
- Equality and Human Rights Commission (EHRC)
- Scottish Human Rights Commission (SHRC)
- Healthcare Improvement Scotland (HIS)
- Information Commissioner's Office (ICO)
- Scottish Information Commissioner (SIC)
- Mental Welfare Commission for Scotland (MWC)

The detail is provided in the full report, but the general point is that Scotland's complaints handling and investigatory landscape is complex and the statutes of bodies with whose functions the Commissioner's extended investigatory power potentially overlaps vary in approach and complexity. Defining what is 'properly the function' of another body so as to avoid duplication appears to be straightforward with regard to some of the bodies reviewed, but it is extremely difficult to deduce the 'proper functions' of some regulators or complaints bodies, as their remits may cover areas of significance from a children's rights perspective. This is likely to cause substantial practical issues and the Commissioner will have to work with those organisations before and after his extended power has entered into force.

Some specific points are worth highlighting from the full report:

- Only the Commissioner's office has an express power to investigate matters relating to children's rights, interests and views. However, the remit of some bodies do include aspects of children's rights. Some bodies have wide discretion with regard to their investigatory powers, whilst others' investigatory roles are more clearly and sharply defined. Some bodies also have specific powers to informally resolve complaints.
- Some bodies' remits are not clearly defined, yet due to the non duplication requirement the Commissioner is required to effectively define his investigatory remit in distinction to those of others, and that is difficult to do in practice.

- The persons liable to investigation vary across statutes. Most cover only public bodies; others also cover the contractors they work with. Others have a wider reach - this can be specified in schedules to legislation and can be added to by order, or are broadly defined in statute.
- Restrictions on investigations and their statutory framing vary greatly across bodies. Some bodies are subject to a strict prohibition of 'duplication' whilst others have discretion. In one case, 'duplication' is expressly permitted.
- The approach towards exhausting local complaints procedures before proceeding is not a requirement for all bodies, and some bodies have discretion to dispense with such a requirement.
- Some bodies have a duty to cooperate in the area of investigation and can conduct joint investigations, whilst others have certain restrictions placed on them. Some bodies' investigatory powers are subject to time limits, although there is discretion to dispense with these in exceptional circumstances.

The complaints handling landscape continues to shift, resulting in frequent changes to bodies' remits. Others appear to enjoy wide discretion in the definition of their own investigatory remits, which might impact on the Commissioner's investigatory remit.

## **Chapter 5: Stakeholders' perspectives**

Chapter 5 highlights the key findings arising from a series of interviews undertaken with complaints bodies, regulators, ombudspersons and National Human Rights Institutions (NHRIs). We discuss the complex nature of the complaints handling and regulatory landscape, and refer to changes made to this landscape over the last decade. The five areas of education, social work, health, police and prisons, are discussed to highlight the levels of complexity, the numbers of bodies involved and the range of routes available for the complainant. We note that the picture becomes more complicated when a challenge is multifaceted, particularly those having a discrimination element.

The main body of this chapter explores the perspectives of stakeholders on thematic issues related to the Commissioner's new power of investigation.

As part of this, stakeholders were asked to explore how the Commissioner's extended powers might complement the work of existing complaints handling bodies and regulatory processes, and to identify where any gaps in provision might exist. Areas covered are non duplication and how this is perceived - both in relation to how work is currently conducted and in relation to the extension of the Commissioner's new power. On this issue, some view the new provision as restrictive, whilst others feel that a narrow reading of this runs against the spirit of the Act. In general, there is agreement that some overlap will occur and that a pragmatic and workable approach is the best way forward. Useful comments were made around the way in which duplication is addressed within the legislation of particular bodies and how this provides flexibility that is not contained in the Commissioner's legislation.

It is felt that the Commissioner must be able to work with agencies, understand their remits and develop clear MOUs accordingly.

A strong message from stakeholders is about the importance placed by bodies on embedding children's rights into their work and the eagerness to get this right. Children's rights are perceived as a core part of the work of those interviewed, regardless of whether they have a complaints function or not. They see the Commissioner's office as an essential part of this landscape. The resource intensive nature of handling complaints is also emphasised. Stakeholders feel that the new power to conduct individual investigations is likely to increase demand and that this requires proper resourcing to allow it to function effectively.

A striking finding from the interviews is just how few children and young people make use of complaints systems and processes, or indeed know how to complain. Stakeholders suggest various reasons for this, which are wide ranging. All feel that efforts need to be made to improve on this, commenting on how necessary their involvement is in terms of understanding and enforcing their rights and entitlements.

Other issues raised include the importance of choice in who children and young people complain to, as well as having the options available to them explained. Providing information and effective signposting are seen as key, as is providing the right support for children and young people, as appropriate.

We also look at the redress mechanisms available and the different outcomes for the complainant, depending on the route the individual chooses to take, as well as comparing and contrasting other bodies' powers with the Commissioner's extended powers.

We also explore how stakeholders envisage working with the Commissioner's office and the need for clear Memoranda of Understanding to ensure clarity of roles and avoid duplication.

## **Chapter 6: The Views of Children and Young People and those working with them**

Whilst the primary purpose of the mapping exercise is to examine the existing complaints and regulatory landscape in Scotland and explore where the Commissioner's extended powers fit within this framework, we are concerned that the voice of children and young people is getting lost. We feel that it is essential to hear their views, so commissioned the Children's Parliament to undertake a consultation exercise for us. The group comprised 15 children and young people aged from 9 to 14-years-old. We were keen to hear their thoughts and experiences of making complaints and how the systems worked for them. We also asked them to identify any barriers they might experience in doing so.

We also held a roundtable event with a number of practitioners from a range of organisations working with children and young people. We wanted to hear from them what they felt was preventing children and young people from making a complaint and what they thought a child-friendly complaints process might look like. This group also offered suggestions as to how the Commissioner could help children and young people access this. The event was accompanied by an online survey, targeted at those working directly with children and young people.

Much of what children and young people told us chimed with the views of the practitioners. The children were very clear that the right to complain was something they value highly and that pursuing a complaint can help build their confidence, and give them a say in matters affecting them. The barriers identified to bringing complaints however are numerous, the chief one being that adults often do not take them seriously and do not listen to them; that they often trivialise issues important to them or treat their complaint as being of lesser value than that of an adult.

Practitioners noted that not all complaints handlers are trained in working with children and young people and do not have a sound understanding of

children's rights. As a result, they struggle to see the world through the eyes of children and can try to make them fit into a system designed by adults, for adults. This is also a key point for children and young people. They are keen to retain power and autonomy as much as possible when making a complaint, and do not want assumptions made by adults about whether or not a child of a particular age has the ability to contribute a view. They feel that adults do not currently work with children to find solutions that work. Children want to be active participants in addressing problems and finding these solutions. Both groups are clear that children and young people are often best-placed to identify a workable solution to a problem affecting them (with some exceptions - where it may be harmful/unfair to the child/young person to expect them to do so).

The children and young people also expressed concern about nothing being done when they complain, even when their complaint is taken seriously. They are also nervous about possible negative repercussions and are acutely aware of the power imbalances that currently exist between children and young people and adults. Practitioners support this view.

Two further issues are that children and young people are not always aware of their right to complain and from a practitioners' point of view that they may not have sufficient knowledge of their rights to recognise that a situation warrants a complaint, or even understand that they have a right to complain or know whom to complain to.

The latter point is of particular significance if the issue is complex and there is involvement from a host of services (for example, education or health). This is particularly the case for vulnerable groups of children

The report highlights issues for adults to consider, an important one being the right to privacy. The children and young people were concerned that information is often shared without their knowledge or consent, and practitioners feel the children and young people they work with have the right, and might want to, keep some of their information private (for example, if they have a hidden disability). Other issues include thinking about the impact a decision might have on a child and the importance of a child or young person being supported through the process. Children and young people said they want to have someone they trust to bring their problems to and that this would give them greater confidence to complain.

All of the above explains, in part, why children and young people can be perceived as non-complainers (when, in reality, they are often weighing up a complex range of factors before deciding whether or not to do so).

Clearly there is a need for a child-friendly complaints system, and we heard views on what this might look like from both groups. Children's Parliament, who facilitated the consultation with children and young people, suggest that children should be able to develop their own skills to resolve issues for themselves whenever possible, that they should have more opportunities for peer mediation, that they should be able to know where to go to complain and have a range of choices about where to take complaints. They emphasise the need for trusted adults to help them with their complaint and the importance of knowing that something will be done about their complaints. They also reported that children and young people want adults to help create a culture where children and young people are encouraged to complain. They see complaints as offering an opportunity to make changes for the better and to improve the well-being both of themselves and of other children and young people.

The practitioners provided practical suggestions: the need for complaints processes to be accessible and clear and the importance of de-escalating a complaint and resolving it at the lowest level possible. Supporting children and young people in bringing a complaint is seen as extremely important. Practitioners feel that this support could help ensure that a child or a young person is heard and able to express what they want to happen, as well as managing the expectations of a child or young person. It is also seen as being important in helping children and young people better understand complex procedures and the various options open to them. They emphasise that this support needs to be provided in a way that is neutral and does not seek to influence the child or young person's decision in any way.

These consultations provide invaluable insight for us in terms of developing our complaints procedures and investigatory function, not least in ensuring that children and young people and their carers are aware of children's rights and what might constitute a rights violation. Other key points include the need to provide accessible information about existing complaints processes (when and how to access these) to children and young people (and those supporting them) and directing children and young people to the most appropriate complaints route or support organisation. This involvement can range from the straightforward provision of contact details to providing a 'warm transfer' to another organisation.

It is felt that the Commissioner's involvement is likely to ensure that children and young people will be taken more seriously by the bodies they are complaining about. They also suggest that the Commissioner may be

able to act as a catalyst in resolving an issue for a child/young person (for example, where a situation has reached stalemate). Some practitioners feel that the Commissioner should work with services to improve the accessibility of their complaints services to children and young people.

The learning from both the consultation with children and young people and with practitioners has helped to inform our model of operation, which is outlined in Chapter 7.

The practitioners have expressed a desire to engage with the Commissioner's office on an ongoing basis, to help ensure that any new processes and procedures adequately reflect the needs of the children and young people they work with. The Commissioner has also committed to involving children and young people in this development process.

## **Chapter 7: The Model of Operation**

We present the Commissioner's model of operation in Chapter 7. This outlines how complaints from individual children and young people (and those representing them) will be handled by the Commissioner's office from April 2016. It identifies the stages at which a complaint may be dealt with within the Commissioner's office and also provides case studies at each stage to illustrate how this might work in practice. The model of operation is also illustrated by an infographic.

The model of operation is grounded in a children's rights approach and informed by a clear understanding of the needs of children and young people. It is also pragmatic and solutions focused.

Because of the need for brevity, the model of operation used for handling complaints on behalf of groups of children and young people has not been included within the scope of this chapter.

## Concluding remarks

Our case is built on the simple fact that children are conspicuously absent from complaints and investigatory processes, yet these processes are essential to ensuring that their rights are both respected and upheld.

The concept of 'children's rights' is something that many fail to fully understand. It can be easily trivialised, as evidenced by the children and young people and practitioners referred to in the report. It is however fundamental to the safety, well-being and development of our children and young people and indeed of society as a whole.

This was recognised by the Scottish Parliament when it set up the Commissioner's role in 2003 and when it extended the investigatory powers of the Commissioner in 2014.

We have a complicated complaints handling and regulatory landscape in Scotland which requires specialist knowledge and understanding to navigate, and children and young people need assistance to make use of these systems.

We welcome the fact that there is an increasing need for existing complaints and regulatory bodies to focus on human rights and take this into account where relevant. This is consistent with the emerging thinking at international level, as is the extension of the Commissioner's power to handle and investigate individual complaints. The Commissioner's specific function is to investigate individual complaints on the basis of 'rights, interests and views of children and young people'. It is our *raison d'être* and is what distinguishes us from other bodies.





**Scotland's Commissioner  
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