



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

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

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

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

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## Foreword

When I offered to undertake this mapping exercise for the Education and Culture Committee, I assumed that it would be a relatively straightforward task. But over the last few months it has become clear that making sense of the complaints and regulatory landscape in Scotland is no mean feat. How much more confusing must it be for children and young people who wish to complain about an alleged infringement of their rights.

There is of course a reason for this: safeguards need to be in place to ensure that the most vulnerable are protected and have a right to redress if systems fail them. This has led to a complex and at times crowded landscape and one that continues to evolve. Even as I write this foreword, changes are afoot to alter this further. The Education (Scotland) Bill proposes changes to procedures in relation to complaints to Scottish Ministers ('Section 70 complaints') and the Scottish Government will also be consulting on a complaints route for the Named Person and the Child's Plan, both of which are contained within the Children and Young People (Scotland) Act 2014.

There is no doubt that there have been real improvements since Crerar and Sinclair reported. Complaints-handlers are doing a tremendous job of engaging service users, resolving complaints at the lowest level, providing a more streamlined approach to complaints-handling, making it easier for people to complain and using complaints as opportunities for learning. However, there is also recognition that while systems have improved for most, this is not the case for children and young people. Children and young people simply do not complain – complaints-handling bodies recognise this as an issue and are keen to both understand and address it. There remains a gap in remedies for most alleged infringements in children's rights.

So how and where does my office fit into this complicated landscape? What can my office bring that is distinct from all those other bodies, within the constraints of the legislation that gives me the power to conduct both individual and general investigations, to resolve competent individual complaints without recourse to an investigation?

In the course of this exercise, I spoke to complaints-handling bodies, regulators, improvement agencies and national human rights institutions. While there are clear differences between complaints-handling bodies and regulators, the extended investigatory powers will have a bearing on both. I wanted to have a clearer picture of how these bodies interact with each other and where my office can fit in and have its own distinct role.

Given the nature of this exercise, I also thought it important to ask children and young people their views. Members of the Children's Parliament told me the issues they wish to complain about and, more importantly, to whom they wish to

complain. They spoke about the importance of a trusted adult who could help them with their complaints, of when complaining works and why, and of the barriers that stop them complaining. What struck me was the importance they place on complaints – ‘complaining is good for both children and adults’, I was told. It gives children a voice, addresses power imbalances and promotes well-being. They told me of the problems that arise when they feel unable to complain and how important it is to involve them in the process, ensuring they are active participants in both addressing problems and finding solutions.

Traditionally children have been without a voice in complaints mechanisms. This was recently underlined in the United Nations Human Rights Council,<sup>1</sup> where speakers noted that empowering and enabling children to access justice is fundamental for child protection. An essential element of this is the right to lodge complaints. Involving children in matters affecting them is a key article of the UN Convention on the Rights of the Child (article 12). Those drafting the Convention recognised the particular vulnerabilities of children and young people and the fact that they are often invisible in decision-making processes. This is why children need their own Convention.

In a similar way, the Scottish Parliament and Government recognised that children and young people needed their own Children’s Commissioner whose main function would be to promote and safeguard their rights. The 2003 Act establishing my office also places restrictions on matters that I can investigate. These are still contained in the Children and Young People (Scotland) 2014 Act. Part 2 of this Act extends my powers, allowing me to conduct individual investigations as well as general ones, but also to resolve competent individual complaints without recourse to investigation. This report considers the scope and function of the legislation in detail.

The Education and Culture Committee specifically asked how I would avoid duplicating the work of other complaints-handling bodies and regulators. An exploration of this is a key focus of this report. Many existing complaints-handling bodies and regulators view the Commissioner’s power to take complaints and conduct investigations on the basis of the ‘rights, interests and views’ of the child, as falling within, or intersecting with, their own remit. To some extent this is true, but this report aims to illustrate why my office is uniquely placed to consider the ‘rights, interests and views’ of children and young people in ways that others cannot – and should not be expected to.

This exercise poses some challenging questions, not least whether the legislation giving me these new powers facilitates my involvement or restricts it. Children told me that they find complaints systems complicated, yet want choice

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<sup>1</sup> Human Rights Council, 13 March 2013.

in how and where to take their complaints. Balancing the need for choice while aiming to simplify will be difficult.

Children wish to be involved, but do not always have the skills or confidence to work through problems on their own. They recognise the value of taking more serious complaints to adults, but feel that talking to strangers is a barrier. They understand formality is important, but feel at the mercy of systems which take too long and do not work for them. The model I propose seeks to address these concerns, offering an approach which places children and young people at the heart of the system.

Without exception, the people I interviewed helped me to make sense of the current landscape, suggesting ways we could work together to help make the intention behind this legislation a reality. I thank them for this.

I look forward to a positive and constructive relationship with others that will ultimately lead to an improved culture of taking children's and young people's rights seriously.

**Tam Baillie**

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

## Chapter 1. Introduction

This report presents the findings of a mapping exercise undertaken by the office of the Children’s Commissioner and responds to requests for clarification from the Education, Culture and Sport Committee around the scope of the investigatory power provided for by the Commissioner for Children and Young People (Scotland) Act 2003.<sup>2</sup> The Commissioner has had the power to investigate matters relating to the rights, interests and views of children and young people (generally) since the office’s inception in 2004. This power was extended to permit investigations into individual children’s circumstances by Part 2 of the Children and Young People (Scotland) Act 2014.

This is the **full report** on the findings of the Commissioner’s mapping exercise. It sets out the Commissioner’s current functions and discusses the scope of the extension of the investigatory powers in the Children and Young People (Scotland) Act (2014) within the broader complaints-handling and investigatory landscape. It provides a narrative on the legal framework and governing statutes of complaints-handling and regulatory bodies and draws on the views of relevant bodies and other stakeholders including children and young people and proposes a model of operation to work within this framework.

A **summary report** presenting an overview of the key points has also been published.

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<sup>2</sup> Hereafter ‘the 2003 Act’.

## Chapter 2. Background

This chapter of the report provides background information to the mapping exercise.

- **Section 2.1** discusses the rationale for the establishment of the Children's Commissioner and what distinguishes this role from that of others with an interest in, and a remit relating to, children and young people and their rights.
- **Section 2.2** highlights the need to create a culture in which children's rights are respected, and the role of Children's Commissioners in doing so.

### 2.1 A Children's Commissioner for Scotland

The office of Children's Commissioner was established by the Commissioner for Children and Young People (Scotland) Act 2003. It is an independent public body whose functions focus on promoting and safeguarding the rights of children and young people in Scotland and whose powers enable the Commissioner to fulfil that task. The Commissioner can and must do so without fear or favour and without regard to funding considerations or adverse publicity. These are some of the strengths of the Commissioner model and why it has been continually supported in Scotland.

A stand-alone Children's Commissioner's office would be more accessible, more visible and more relevant to children than other bodies ever could be.

In passing the Commissioner for Children and Young People (Scotland) Act 2003, the Scottish Parliament recognised that promoting and monitoring children's rights was essential to creating a culture where these rights are taken seriously. The Commissioner was seen as helping to give 'a powerful voice to the most vulnerable and disadvantaged children in Scotland'.<sup>3</sup>

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<sup>3</sup> Nicol Stephen MSP, Deputy Minister for Education and Young People (2001-2003), during the passage of the Commissioner for Children and Young People (Scotland) Bill 2003.



## 2.2 UNCRC Rights and Children's Commissioners

It is the most vulnerable and disadvantaged children in Scotland who perhaps need a Commissioner most. Recent reports of child sexual exploitation on a large scale and of adults reporting abuses they suffered as children remind us of what can happen when children's rights, interests and views are not respected and cultures of disbelief are left to persist. One way towards ensuring that such children's rights violations do not happen again is to fully implement the United Nations Convention on the Rights of the Child (UNCRC) and in particular articles 3 and 12: the principle that the child's best interests shall be the primary consideration in all matters affecting the child, and the right of the child to express a view, be heard and be taken seriously. These are arguably the two key UNCRC rights and feature prominently in the 2003 Act.<sup>4</sup>

Article 12 (2) explicitly links the child's right to be heard in any judicial and administrative proceedings affecting the child, in a manner consistent with the procedural rules of national law. It thus has value as both a substantive right and a procedural right which emphasises the active role of the child in exercising and securing their UNCRC rights. Recent high-profile cases illustrate that this is key to protecting children: it unlocks their access to justice and helps secure the full set of rights to which every child is entitled by virtue of the UK being a state party to the UNCRC.

In its 2008 'Concluding Observations', the UN Committee on the Rights of the Child<sup>5</sup> welcomed the establishment of independent Children's Commissioners across the UK, but considered their powers to be limited and not fully compliant with the Paris Principles.<sup>6</sup> It recommended that UK 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>7</sup>

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<sup>4</sup> 2003 Act, s. 5 (3).

<sup>5</sup> The UNCRC was adopted by the General Assembly on 20 November 1989. It recognises that children had additional rights by virtue of their age and vulnerability. The UK ratified the Convention in 1991, requiring all UK jurisdictions to ensure that policies and practice comply with the UNCRC.

<sup>6</sup> The Paris Principles: a set of international standards which frame and guide the work of National Human Rights Institutions (NHRIs).

<sup>7</sup> UN Committee on the Rights of the Child Concluding Observations: United Kingdom of Great Britain & Northern Ireland, 2008.

<http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf> (paras 16 and 17).

## Chapter 3. Legal Framework

This chapter sets out the legal framework in which the Commissioner operates as well as the background to and the terms of the extension of the Commissioner's investigatory power. It then discusses the key restriction on the Commissioner's power.

- **Section 3.1** summarises the Commissioner's current functions, duties and powers under the Commissioner for Children and Young People (Scotland) Act 2003.
- **Section 3.2** sets out the background to the recent extension of the Commissioner's investigatory powers and sketches the key features of the extended power. It identifies the non-duplication requirement as a central issue for further exploration.
- **Section 3.3** charts the legislative history of the non-duplication requirement, from the Inquiry into the Need for a Children's Commissioner in Scotland to recent debates in the Scottish Parliament's Education and Culture Committee.
- **Section 3.4** discusses key aspects of legal advice obtained by the Commissioner in relation to the extent of his investigatory power and its limitations, including the non-duplication requirement.

### 3.1 The Commissioner's current functions

The Commissioner's functions are set out in the Commissioner for Children and Young People (Scotland) Act 2003. The general function is to 'promote and safeguard the rights of children and young people'.<sup>8</sup> This includes the review of law, policy and practice as it relates to children and the sharing of good practice and research.<sup>9</sup> The Commissioner has a duty to encourage the involvement of children and young people in his work and consult them on the work he intends to undertake.<sup>10</sup> The Commissioner also has a duty to have regard to the UNCRC in exercising his functions under the Act, to regard and to encourage others to regard the best interests of children and young people as a primary consideration, and to do the same in respect of the views of children and young people on all matters that affect them.<sup>11</sup>

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<sup>8</sup> 2003 Act, s. 4 (1).

<sup>9</sup> 2003 Act, s. 4 (2). Note that the Act's wording is that '[i]n exercising that general function the Commissioner is, in particular, to' undertake the activities mentioned in the particularisation, which implies that this list is non-exhaustive.

<sup>10</sup> 2003 Act, s. 6.

<sup>11</sup> 2003 Act, s. 5.

Section 7 (1) of the 2003 Act provides for an investigatory power:

*The Commissioner may carry out an investigation into 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 and young people.*

'Rights' are not defined, and the Commissioner is not limited to considering the UNCRC. 'Service provider' is given a wide definition in the Act<sup>12</sup> and includes services provided to children and young people by public, private and voluntary organisations.

The power to carry out an investigation is limited in two ways.

Firstly, section 7 (3) excludes investigations relating to reserved matters, to an individual child or to a case currently before a court or tribunal or the decision-making of a court or tribunal in particular legal proceedings. There is no room for discretion.

Secondly, having considered the available evidence, the Commissioner must be satisfied on reasonable grounds that

1. the matter to be investigated raises an issue of particular significance to children and young people generally or to particular groups of children and young people; and
2. the investigation would not duplicate work that is properly the function of another person.

Sections 8, 9, 11 and 13 and Schedule 2 make further provisions about the processes to be followed in an investigation, children's anonymity, reporting and the power to compel witnesses and obtain evidence in the course of an investigation.

### **3.2 Extension of the Commissioner's investigatory power**

In its consultation document *A Scotland for Children: A Consultation on the Children and Young People Bill*, the Scottish Government proposed extending the Commissioner's investigatory power.<sup>13</sup> This followed the withdrawal of proposals for a Rights of Children and Young People (Scotland) Bill in 2012 which had elicited calls to give children and young people access to a remedy for alleged infringements of their UNCRC rights. Ministers recognised a gap in the current complaints and investigatory landscape, and the proposals that became Part 2 of the 2014 Act were introduced in Parliament as part of the Children and Young People (Scotland) Bill in March 2013. The Policy Memorandum states that:

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<sup>12</sup> 2003 Act, s. 16 (1)

<sup>13</sup> Scottish Government, July 2012.

*The change will have the effect on introducing an additional mechanism to support children in seeking redress where they feel their rights, interests and views have not been properly taken into account.*<sup>14</sup>

The Commissioner has long supported extending the investigatory power to allow for individual investigations, while maintaining that this should be in addition to, not instead of, extended judicial remedies for children to enforce their rights. He also specified the need for sufficient resourcing to ensure the Commissioner would be able to continue to effectively exercise his other statutory functions, as the Parliament intended and as the Parliament, children and young people, the children's sector and the public would expect. The relevant part of the Children and Young People (Scotland) Bill was scrutinised and was passed by the Scottish Parliament without amendment on 19 February 2014.

### **Key features of the extended power**

Part 2 of the 2014 Act extends the powers of investigation to individual children by amending the 2003 Act, allowing the Commissioner to undertake both general and individual investigations into the subject matter specified in s. 7 (1).

With the exception of the restriction relating to individual cases, which will be repealed in order to effect the extension of the power,<sup>15</sup> the exclusions and restrictions to the investigatory power set out in the 2003 Act will continue to apply in respect of investigations relating to individual children and young people. In particular, the 2003 Act's exclusion from the scope of the Commissioner's power of investigations relating to reserved matters or proceedings before a court or tribunal remains and will apply to all investigations.<sup>16</sup> Further, the 2014 Act restates the non-duplication requirement noted above,<sup>17</sup> so that an investigation by the Commissioner into an individual child or young person's case that would 'duplicate work that is properly the function of another person' would not be competent.<sup>18</sup>

The 2014 Act will also introduce a new provision that allows the Commissioner to take appropriate steps with a view to resolving a (competent) case without the need for an investigation.<sup>19</sup>

Building on the experience of other Children's Commissioners and bodies with similar functions, the Commissioner anticipates that most 'competent' complaints will be resolved under s. 7 (5) without recourse to a full investigation.

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<sup>14</sup> Children and Young People (Scotland) Bill Policy Memorandum paragraphs 45 and 49

<sup>15</sup> 2014 Act, s. 5 (2)(b).

<sup>16</sup> 2003 Act, s. 7 (3).

<sup>17</sup> At 2.2.

<sup>18</sup> 2003 Act, new s. 7 (2A), inserted on commencement of s. 5 (2)(a) of the 2014 Act.

<sup>19</sup> New s. 7 (5), to be introduced by commencement of s. 5 (2)(c) of the 2014 Act.

## Restrictions on the Commissioner's power: the non-duplication requirement

It is expected that in practice the non-duplication requirement will be the most significant restriction on the Commissioner's investigatory power, as its effect is to define the scope of the Commissioner's power in distinction to the 'proper functions' of other bodies with relevant investigatory remits. The statutory provision that applies to individual investigations reads as follows:

*(2A) The Commissioner may carry out an investigation only if the Commissioner, having considered the available evidence on, and any information received about, the matter, is satisfied on reasonable grounds that the investigation would not duplicate work that is properly the function of another person.<sup>20</sup>*

The application of this restriction in the Commissioner's future practice has been among the principal issues in the office's preparatory work ahead of the commencement of the extended investigatory power in 2016. It has also caused considerable debate in the Scottish Parliament's Education and Culture Committee.

For these reasons, the sections that follow in this chapter explore the meaning and legal implications of that provision in some detail.

### 3.3 Legislative history on the meaning of 'non-duplication'

The development of the 'non-duplication' requirement in the Commissioner's establishing legislation is traced through reference to statements made in Parliament pre- and post-2003. Parliamentary debates around the remit of similar bodies which help to establish the meaning and scope of the requirement are also discussed.

In 2002 the Education, Culture and Sport Committee reported on its Inquiry into the Need for a Children's Commissioner in Scotland.<sup>21</sup> In its conclusions, it stated that the weight of evidence appeared to be 'against giving the Commissioner the power to investigate individual cases, other than in exceptional circumstances'. The view was that the Commissioner should act as a clearing house and 'be able to identify the appropriate agency or body to which to refer the child's or young person's case'. The Committee did, however, recognise that there would be cases of significance in terms of children's rights which the Commissioner should investigate and was an early supporter of individual investigations, albeit only in 'unusual and exceptional circumstances'.

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<sup>20</sup> 2003 Act, new s. 7 (2A), inserted on commencement of s. 5 (2)(a) of the 2014 Act.

<sup>21</sup> Education, Culture and Sport Committee, *Second Report 2002, Report on the Inquiry into the Need for a Children's Commissioner in Scotland*, paragraph 65.

By the time the final Bill proposals were published,<sup>22</sup> individual investigations were excluded and general investigations were only to be undertaken in 'exceptional circumstances' and so far as reasonably possible involve no duplication of work carried out by existing organisations. This refers to investigatory work being carried out by another organisation, rather than investigations which an organisation has a 'proper function' to undertake. The non-duplication requirement is also qualified by 'so far as is reasonably possible'. This was omitted from the 2003 Act and not added by the 2014 Act. It is interesting to note, however, that the Scottish Commission for Human Rights Act 2006 does include similar wording.<sup>23</sup>

The duplication of investigatory functions arose again at stage 2 of the Commissioner for Children and Young People (Scotland) Bill.<sup>24</sup> The Convener of the Education, Culture and Sport Committee commented on the Commissioner's investigatory power in the wider landscape of investigatory and inspection bodies, stating that:

*The broad general remit of children's rights potentially brings a large number of service providers within the scope of the Commissioner's investigations. That is why the Commissioner should be prevented from duplicating the investigative functions of other organisations.*

The Convener also underlined the need for the Commissioner to focus 'on filling the gaps that nobody else fills' and stated that this would be done in two ways:

- Investigations will have a specific remit in that they will focus on the rights, interests and views of children and young people.
- The Commissioner will not usurp the complex existing systems of 'investigation and inspection'.

She noted that 'the range of those who can be investigated is wide, but the scope of what can be investigated is relatively narrow'. By way of example, she stated:

*If the Commissioner wanted to investigate how children's rights, interests and views were taken into account at school, the existence of HMIE, which inspects schools, would not prevent that. However, if it were shown that one of the proper functions of HMIE was to investigate how children's rights, interests and views were taken into account at school, it would be sensible to prevent the Commissioner from duplicating that work.*

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<sup>22</sup> Education, Culture and Sport Committee, 11<sup>th</sup> Report 2002, Report on Proposed Commissioner for Children and Young People Bill.

<sup>23</sup> Discussed below, section 4.4.

<sup>24</sup> Commissioner for Children and Young People (Scotland) Bill Committee, Official Report, 4 February 2003, Stage 2 Consideration of the Commissioner for Children and Young People (Scotland) Bill, Columns 14-21.

The Convener's comments offer a valuable insight into the thinking behind the office's establishing legislation. The idea that the investigatory power would fill the gaps that nobody else fills refers to the specific remit relating to children's rights. The HMIE example illustrates that specificity about the proper functions of organisations when determining whether a proposed investigation by the Commissioner would duplicate it.

The context in which the comments were made is also of interest. The Convener was responding to an Executive amendment which would have replaced the non-duplication requirement, allowing the Commissioner to give 28 days' notice of an intention to investigate to bodies whose remit may be engaged in the case. The Commissioner would be free to investigate if there was no indication that another body would be doing so (rather than stating that they had the power to do so with no requirement to act).<sup>25</sup> The amendment fell as the Committee considered the provisions in what became the 2003 Act adequate. This does, however, show that alternatives to the non-duplication requirement had been discussed.

Wider views of the meaning and scope of duplication emerged during the passage of the legislation to set up the Scottish Human Rights Commission. The Justice 1 Committee's report highlights a range of views. For example, in relation to the SPSO, the then Ombudsperson, Professor Alice Brown, stated that although the legislation which governed the SPSO's remit made no direct reference to human rights, some of the complaints dealt with were in fact issues of breaches of human rights. She also pointed out that maladministration may involve more general inconsistencies with human rights concepts – for example, when a public authority fails to give adequate information regarding rights of objection or appeal.<sup>26</sup>

Her view was that it would be duplication to even set up another body to consider individual complaints. This was in marked contrast to the evidence given by Scotland's then Children's Commissioner, Professor Kathleen Marshall, who strongly supported the creation of the Scottish Commissioner for Human Rights, stating that the post would complement her own and acknowledging that there would be some overlap between the two roles.

The Committee also considered the proposed function for the new Human Rights Commissioner to 'review law' in the context of the Scottish Law Commission's function to recommend reforms to improve, simplify and update Scottish law and to offer the Government independent advice on law reform.<sup>27</sup> It

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<sup>25</sup> See the discussion of the Commissioner's legal advice on this point at 3.4.

<sup>26</sup> Justice 1 Committee, *1<sup>st</sup> Report 2006 Scottish Commissioner for Human Rights Bill*, para 53.

<sup>27</sup> *Ibid*, para 62.

concluded that ‘there is also a potential for the Scottish Commissioner for Human Rights to, in part, duplicate the work of the Scottish Law Commission in reviewing the law’.<sup>28</sup>

Three different perspectives on ‘overlap’ and ‘duplication’ can be observed:

- The SPSO considered that duplication arose from the establishment of the Scottish Commissioner for Human Rights. This was based on the view that although the SPSO had no specific human rights remit, some complaints disclose human rights issues and some acts considered to be ‘maladministration’ would also be inconsistent with human rights concepts.
- The Children’s Commissioner recognised potential overlaps which ought to be managed so as to achieve complementarity of functions.
- The Committee concluded that the SCHR’s function to review the law of Scotland would partially duplicate the functions of the Scottish Law Commission. However, it may be observed that many others, including Committees of the Scottish Parliament and the Commissioner,<sup>29</sup> have such a function, and each of those bodies will exercise that function within the scope of its own general purpose and functions.

Duplication of investigatory functions arose again during the passage of the Children and Young People (Scotland) Act 2014. In evidence to the Education and Culture Committee, the Ombudsperson stated that the matters the Commissioner may wish to pursue under his extended investigatory power would be likely to ‘amount to service failure or maladministration, the categories which are the categories we judge complaints by’.<sup>30</sup> He welcomed the extension of the Commissioner’s power, but was concerned about potential overlap with its functions. There was no opportunity to explore this in detail in committee.

We shall return to the issue of non-duplication in Chapter 5, when key stakeholders discuss the implications of this provision both with regard to their own statutory functions and in regard to the Commissioner being able to function effectively.

### **3.4 Review of legal advice**

In March 2013 the Commissioner obtained the Opinion of Senior Counsel W. James Wolffe QC to assist in the consideration of proposals to extend the

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<sup>28</sup> Ibid, para 65.

<sup>29</sup> 2003 Act, s. 4 (2)(b). Notably, in the 2003 Act this is framed as a particularisation of the Commissioner’s general duty to promote and safeguard the rights of children and young people.

<sup>30</sup> Ibid, para 49. The relevant passage in the report contained a significant drafting error and the meaning given to this phrase by the context above is thought to be what was intended, consistent with similar statements elsewhere.



investigatory powers of the office. This related to issues of interpretation of the 2003 Act, and specifically the scope and meaning of the provisions that regulate the investigatory power. (NB this was taken prior to the introduction of the Children and Young People (Scotland) Bill.) Some of the key points made are utilised in the discussion of the interpretation of the terms of the non-duplication requirement below.

### **The terms of the 'non-duplication' requirement**

The non-duplication requirement in s. 7 (2)(b) of the 2003 Act is as follows:

*(2) The Commissioner may carry out such an investigation only if the Commissioner, having considered the available evidence on, and any information received about, the matter is satisfied on reasonable grounds that –*

*(b) the investigation would not duplicate work that is properly the function of another person.*

On commencement of Part 2 of the 2014 Act this provision will be replaced by s. 7 (2A), which is in identical terms. Most of the provision is clear and uncontroversial. For example, it is accepted that 'satisfied on reasonable grounds' requires the Commissioner to assess the question of potential duplication objectively and rationally, based on the evidence and information available. To be 'satisfied' of the matter requires a higher degree of certainty than other statutory language such as 'suspect', 'believe' or 'consider'. The terms that require exploration are 'properly the function of another person' and 'non-duplication'. These are now considered below.

### **What is 'properly the function of another person'?**

In Senior Counsel's opinion, the Commissioner would firstly have to establish whether or not there is any other person who has a 'proper function' which the exercise of the investigatory power may duplicate.<sup>31</sup> Counsel was clear that in doing so, the Commissioner would have to 'bear in mind that the proposed investigation would be into the matters mentioned in section 7(1)',<sup>32</sup> that is

*whether, by what means and to what extent, a service provider has [/had] regard to the rights, interests and views of children and young people [/a child or young person] in making decisions or taking actions that affect [/affected] those children and young people [/that child or young person].<sup>33</sup>*

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<sup>31</sup> Opinion of W. James Wolffe QC, 28 March 2013, p. 5.

<sup>32</sup> Ibid, p. 6.

<sup>33</sup> 2003 Act, s. 7 (1). The alternatives in the square brackets reflect the substantially identical terms of the power in respect of individual children and young people in new s. 7 (1)(b), once brought into force.

In other words, a relevant other person must have a 'proper function' to do what the Commissioner would propose to do in an individual investigation under his s. 7 (1) power. A 'function' of another person may be a power and/or a duty to do a thing.<sup>34</sup> Counsel repeatedly stated that the fact that there was another person with regulatory, inspection or investigatory functions relating to children and young people would not suffice to exclude an investigation by the Commissioner, unless that other person's functions properly include the matters mentioned in s. 7 (1), as above.

It follows that any other person's proper function would have to be sufficiently similar to that given by Parliament to the Commissioner before an investigation by the Commissioner would be incompetent. Notably, Counsel's analysis is wholly consistent with the stated intentions of the member in charge of the Commissioner for Children and Young People (Scotland) Bill cited above.

Counsel further clarified that the reference to another person's 'function', rather than exercising of that function, indicates that this is what must be considered when determining whether or not there is duplication:

*The phrase 'properly the function of' makes clear, it seems to me, that the question is not whether the other person is in fact exercising or going to exercise that power, but is simply whether or not the other person has, as a function, the power in question.*<sup>35</sup>

This is consistent with the Commissioner for Children and Young People (Scotland) Bill Committee's decision to reject an amendment which would have required an assertion of action rather than an assertion of competence to exclude an investigation by the Commissioner.<sup>36</sup>

What exactly is 'properly the function of another person' will depend on how the functions of any relevant other person are defined. Presumably the Commissioner would need to refer to the other person's establishing statute (and relevant case law) or other documents that establish the proper remit of a relevant other person in order to satisfy himself as to the competence of the complaint.

### **What constitutes 'duplication'?**

It may seem trite to ask what 'duplication' means, given the frequent use of the term in the parliamentary debates about the remits of public bodies, and its use in legislation including the 2003 and 2014 Acts, but there is no definition of the term in either Act or in the section considering other investigatory bodies' establishing statutes. Yet understanding this term is critical to determining the

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<sup>34</sup> Interpretation and Legislative Reform (Scotland) Act 2010, Schedule 1.

<sup>35</sup> Opinion of W. James Wolffe QC, cited above, p. 7.

<sup>36</sup> See page 16 above, at 3.3.

scope of the non-duplication requirement and to assessing whether the proposed investigation of a given case will duplicate the 'proper functions of another person'.

The logical starting point is the dictionary meaning of 'duplicate' which is 'to make or be an exact copy or copies of something'.<sup>37</sup> This suggests that to exclude a matter from investigation by the Commissioner, the proper function of another person would have to be sufficiently similar to the Commissioner's power under s. 7 (1). This is consistent with the Opinion of Senior Counsel and the views expressed by the Committee Convener responsible for the Bill that became the 2003 Act.<sup>38</sup>

Furthermore, it may not only be the subject matter which is relevant but also the person or body to be investigated. The Commissioner's investigatory power concerns the actions<sup>39</sup> of 'service providers', as defined in s. 16 (1) of the 2003 Act.<sup>40</sup> This includes public, private and voluntary providers of services to children and young people and those service providers need not provide services exclusively to children and young people.<sup>41</sup> As such, the scope of the Commissioner's power under s. 7 (1) is wide in terms of service providers covered. The Commissioner must also assess whether it is 'properly the function of another person' to investigate the matters mentioned in s. 7 (1) in respect of the particular service provider or class of service providers in that case.

As noted above, key to understanding what is properly the function of any other person is an understanding and familiarity with the governing statutes of relevant bodies. An overview and analysis of these bodies can be found in Chapter 4.

Having discussed the Commissioner's current and forthcoming powers, the nature and scope of the restrictions placed upon these as well as the legal implications, it is now appropriate to turn to the review of relevant other bodies' governing statutes.

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<sup>37</sup> Chambers English Dictionary, 'duplicate', verb, sense 1.

<sup>38</sup> Opinion of W. James Wolffe QC, p. 6, and section 3.3 above.

<sup>39</sup> Including failures to act: 2003 Act, s. 16 (1).

<sup>40</sup> Section 16 (1) reads on this point: 'any person providing services for children and young people but does not include a parent or guardian exercising the responsibilities imposed or the rights conferred by sections 1 and 2 of the Children (Scotland) Act 1995 (c. 36)'.

<sup>41</sup> See, for example, Explanatory Notes to the 2003 Act, para 39 (Westlaw).

## Chapter 4. Governing Statutes of Complaints-Handling Bodies and Regulators

This chapter reviews and discusses the governing statutes of bodies with whose remit the Commissioner's extended investigatory power is most likely to overlap. The purpose of this chapter is to identify relevant points of overlap or other features of these bodies' establishing statutes that are of interest to the Commissioner's power.

While other bodies and their functions are of interest and must be explored in the practical exercise of the power in the future, this exercise had to take a proportionate approach and focus on the bodies that appear most relevant for present purposes. This chapter is by no means a complete or authoritative statement of the law, but an exploratory piece of work which helped inform the main report. It will be beneficial to read it alongside Chapter 5 on stakeholders' perspectives.

These bodies are:

- Scottish Public Services Ombudsman (4.1)
- Care Inspectorate (4.2)
- Equality and Human Rights Commission (4.3)
- Scottish Human Rights Commission (4.4)
- Healthcare Improvement Scotland (4.5)
- Information Commissioner's Office (4.6)
- Scottish Information Commissioner (4.7)
- Mental Welfare Commission (4.8)

## 4.1 Scottish Public Services Ombudsman (SPSO)

### Relevant Legislation

The Scottish Public Services Ombudsman Act 2002 provides the legal framework for SPSO's work. The Scottish Parliamentary Commissions and Commissioners etc. Act 2010 extended and qualified the functions of the SPSO.

SPSO's power to investigate arises where a complaint is made and conditions as to the identity of the body complained of, the subject matter and the effect on the complainant are met. The 2002 Act, s. 2 provides:

*(1) The Ombudsman may investigate any matter, whenever arising, if —*

*(a) the matter consists of action taken by or on behalf of a person liable to investigation under this Act,*

*(b) the matter is one which the Ombudsman is entitled to investigate, and*

*(c) a complaint in respect of the matter has been duly made to the Ombudsman.*

A complaint is only competent where the complainant claims to have suffered 'injustice or hardship' in consequence of the act/omission complained of.<sup>42</sup>

The Ombudsman has discretion as to whether to initiate, continue or discontinue an investigation and he may take such action in connection with a complaint or request as he thinks may be of assistance in reaching any such decision; this may 'include action with a view to resolving the complaint or request'.<sup>43</sup>

### Persons liable to investigation

These are specified in Schedule 2. This covers public authorities and classes of public authorities and ranges from the Scottish Executive (in some circumstances), local authorities and health-service bodies to Registered Social Landlords (RSLs) and Creative Scotland. Although extensive, the approach differs from that taken in s. 7 (1) of the 2003 Act which covers the broader category 'service provider'.<sup>44</sup>

The reference to actions taken 'by or on behalf of' public authorities in terms of matters that may be investigated<sup>45</sup> means that services contracted out to

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<sup>42</sup> 2002 Act, s. 5 (3).

<sup>43</sup> 2002 Act, s. 2 (4) and (5). These subsections were added through an amendment during the Bill's passage through Parliament, as Parliament had not wanted SPSO to run the risk of acting *ultra vires* when acting quickly or informally to fix problems (SPSO Interview, 13 January 2015).

<sup>44</sup> '[S]ervice provider' is defined in s. 16 (1) as 'any person providing services for children and young people, but does not include a parent or guardian exercising the [parental responsibilities and rights].

<sup>45</sup> 2002 Act, s. 5 (1)(a), (b), (d) and (e).

voluntary or private-sector providers by listed public authorities are covered. Section 7 (6) excludes the investigation of actions taken by/on behalf of an independent service provider unless it is their function to provide it on behalf of a health-service body or family health-service provider. It could be argued that the Commissioner's power under s. 7 (1) reaches further into service provision by the private and voluntary sectors than SPSO's powers, but its subject matter for investigation is narrower, namely the focus on children and young people's rights, interests and views.<sup>46</sup>

### **Matters for investigation**

The section that specifies the matters which may be investigated by SPSO is complicated, a result of there being different categories for different types of services providers. SPSO may investigate only if a complainant claims to have sustained injustice or hardship as a result of two types of deficient practice:

- Maladministration
  - by or on behalf of a listed authority other than a health-service body<sup>47</sup> or independent provider, a family health-service provider or a Registered Social Landlord, in connection with the exercise of its administrative functions;
  - by a health-service body or independent provider, in connection with any action it has taken or a Registered Social Landlord, in connection with any action it has taken;
- Service failure<sup>48</sup>
  - any listed authority other than a family health-service provider or a Registered Social Landlord;
  - other actions taken by or on behalf of family health-service providers.

### **Restrictions to SPSO's jurisdiction**

Restrictions to SPSO's jurisdiction are set out in Section 7 and Schedule 4. The Ombudsman must not investigate a complaint unless he is satisfied that other routes of complaint, review and appeal have been exhausted or where it is unreasonable for the complainant to have to invoke these.<sup>49</sup> Further restrictions and exclusions apply – for example, in relation to national security or matters before the courts.

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<sup>46</sup> 2003 Act, s. 7 (1).

<sup>47</sup> It has different powers in different areas; in health complaints it can look at clinical judgement (professional judgement is normally exempt).

<sup>48</sup> Defined in subs. (2) as 'any failure in a service provided by an authority, or any failure of the authority to provide a service which it was the function of that authority to provide'.

<sup>49</sup> 2002 Act, s. 7 (8). The proportion of total complaints to SPSO that are premature has decreased over recent years and was 34% in 2013-14 (SPSO (2014), *Transforming Scotland's Complaints Culture: SPSO Annual Report 2013-14*, p.12).

SPSO must not investigate complaints that relate to 'conduct, curriculum or discipline' in schools or colleges.<sup>50</sup> Further, SPSO may not question the merits of a decision taken without maladministration by or on behalf of a listed authority in the exercise of a discretion vested in that authority,<sup>51</sup> except decisions taken by a health-service body, a family health-service provider or an independent provider resulting from that person's exercise of clinical judgement. This may be significant in terms of potential overlap with the Commissioner's power under the 2003 Act, as it would (subject to the exceptions noted above) restrict SPSO's role in considering defects in a service provider's discretionary decisions to formal rather than substantive matters, i.e. the decision-making process rather than the decision itself. The Commissioner would be permitted to investigate such matters so long as they were within the scope of s. 7 (1) of the 2003 Act.

It is also worth noting in this context that the definition of 'service provider' in the 2003 Act includes private and voluntary-sector organisations. As such, the scope of the Commissioner's power is broader in terms of the range of service providers covered than SPSO's, which extends to services provided by such organisations on behalf of a listed authority only.

However, beyond those clear delineations of remits there are significant grey areas, within which clear lines are more difficult to draw.

Some complaints to SPSO will include failures in respect of children and young people's rights, interests and views, and may disclose maladministration. An example may be a complaint about a decision made about a young person in which the young person was entitled to participate, but was not enabled to do so. Another may be a case of a service provider, such as a school, failing to follow its own procedures, such as its anti-bullying policy. These are cases that would also fall within the Commissioner's s. 7 (1) power, but an investigation by the Commissioner would be duplication under s. 7 (2A).

However, it must also be acknowledged that in a case that would fall within both the Commissioner's and SPSO's remit, each body could justifiably (in terms of its respective powers and purpose) take a quite different approach. Differences in approach would be linked to each body's respective purpose and functions and both would be justified by their respective legal frameworks. Where the approach taken to the subject matter of the investigation would differ significantly in a given case, there would be no duplication, and it is likely that the outcome sought by the complainant would determine the appropriate complaints route. Cases falling into those areas will have to be assessed on a case-by-case basis, and good communication links and clear signposting arrangements between the two bodies will be essential.

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<sup>50</sup> 2002 Act, Schedule 4, para 10.

<sup>51</sup> 2002 Act, s. 7 (1).

## **Complaints: Time limits and procedure**

The SPSO has the power only to investigate complaints made within 12 months of when the complainant first had knowledge of the matter. This may be disregarded where the Ombudsman is satisfied that there are 'special circumstances' that make it appropriate for a time-barred complaint to be considered.<sup>52</sup> This highlights another dimension in the consideration of the Commissioner's competence in respect of a complaint. Suppose a case involving a children's rights issue falls within SPSO's jurisdiction, thus preventing the Commissioner from investigating it. Would the investigation of this case by the Commissioner continue to be 'properly the function of another person' once it is time-barred for SPSO under s. 10 (1)? If the Ombudsman has not deemed there to be 'special circumstances', SPSO would no longer have power to investigate, but the Commissioner now would.

## **Informal resolution**

As noted, the Ombudsman may take any action connected with the complaint or request which may assist in reaching a decision. This may 'include action with a view to resolving the complaint or request'.<sup>53</sup>

## **Implications for the Commissioner's exercise of the investigatory power**

SPSO has a broad remit to investigate complaints in which members of the public claim injustice or hardship resulting from maladministration or service failure. This will in some cases include failures in respect of children and young people's rights, interests and views. In contrast, the Commissioner's investigatory power is narrowly focused on the rights, interests and views of children and young people, in the context of the Commissioner's general function to promote and safeguard the rights of children and young people. As noted above, there are some clear boundaries between the Commissioner's and SPSO's remits in some areas. However, there are also substantial areas of overlap, some of which will be satisfactorily resolved with reference to differences in approach linked to each body's purpose and functions.

As a result the interaction between the two bodies must be managed effectively so as to avoid duplication, in the interest of complainants – children and young people, and those acting on their behalf. This will be achieved by fostering a positive working relationship, and the Commissioner and SPSO have already committed to drawing up an MoU, and to work together to ensure effective communication and signposting about complaints.

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<sup>52</sup> 2002 Act, s. 10 (1).

<sup>53</sup> 2002 Act, s. 2 (5).



## 4.2 Care Inspectorate

### Relevant legislation

The Public Services Reform (Scotland) Act 2010 consolidated the regulatory and inspection work previously undertaken by the Care Commission, HMIE (child protection) and the Social Work Inspection Agency under the auspices of Social Care and Social Work Improvement Scotland (known as the Care Inspectorate).

Section 79 of the 2010 Act sets out the Care Inspectorate's duty to establish a complaints procedure:

*(1) SCSWIS must establish a procedure by which a person, or someone acting on a person's behalf, may make complaints (or other representations) in relation to the provision to the person of a care service or about the provision of a care service generally.*

*(2) The procedure must provide for it to be available whether or not procedures established by the provider of the service for making complaints (or other representations) about that service have been or are being pursued.*

This broad provision does not specify the types of complaints to be covered, making it difficult to establish whether there is likely to be overlap with the Commissioner's power in terms of s. 7 (1) of the 2003 Act.

'Care services' are subject to the power. These are defined in s. 47 and Schedule 12 of the 2010 Act, and it encompasses an extensive range of services, including 'a support service', 'a child-care agency', 'a secure accommodation service', 'an adoption service', 'child-minding' and 'day-care of children'. It does not include social work services.

### Overlap and Risk of Duplication

The scope of the Care Inspectorate's duty under s. 79 (1) is difficult to ascertain, but it appears to be very wide and has been left for the Care Inspectorate to determine. This makes it difficult to say much about the likelihood of duplication of the Care Inspectorate's function under this provision by the exercise of the Commissioner of his investigatory power. However, the place of the s. 79 duty within the statute may set the parameters within which the scope of the procedure is to be interpreted. Section 59 of the 2010 Act concerns the registration of 'care services'. The question may then be whether or not any such complaints-handling process in the context of registration, monitoring and enforcement or even deregistration of a care service will investigate 'whether, by what means and to what extent the rights, interests and views' of the child or young person were taken into account by the registered care service. The Care Inspectorate's leaflet on the complaints mechanism suggests that such

complaints will concern ‘standards of care being provided’,<sup>54</sup> and the procedure itself does not mention children’s rights or human rights generally.<sup>55</sup>

It is worth noting in light of the extensive discussion of the non-duplication requirement on the Commissioner that s. 79 (2) does not reflect any concern about duplication of service-level complaints-handling by work being undertaken by the Care Inspectorate under its complaints procedure. Indeed, the Procedure suggests that it may handle complaints in parallel with or subsequently to other relevant organisations with a remit to investigate complaints.<sup>56</sup>

## **Inquiries**

Section 98 provides that the Care Inspectorate may set up an Inquiry into any matter concerned with ‘the exercise of its functions and any matter connected with the provision of a social service’.<sup>57</sup> The law governing Inquiries ordered by the Scottish Ministers<sup>58</sup> applies. There is limited information as to the rationale behind this provision from the documentation accompanying the Act, nor from its predecessor legislation, which contained a near-identical power. The Explanatory Memorandum simply states that:

*The Commission and the [Scottish Social Services] Council need to have legal authority to investigate issues of serious concern that may arise in respect of their functions or any particular care service.*<sup>59</sup>

Neither s. 98 of the 2010 Act<sup>60</sup> nor s. 65 in the 2001 Act<sup>61</sup> provide much by way of context for that power beyond that in both Acts it appears along with provisions relating to complaints procedures relating to the conduct and performance of the Commission itself.

## **Implications for the Commissioner’s exercise of the investigatory power**

There is likely to be substantial overlap between the Commissioner’s investigatory function and the Care Inspectorate’s complaints procedure. It has been agreed that a robust MoU will assist in promoting clarity as to the delineation of powers, as well as the sharing of information and signposting of complainants where appropriate.

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<sup>54</sup> Care Inspectorate, *Unhappy about a care service? Find out what you can do* (May 2014), p. 3.

<sup>55</sup> Care Inspectorate, *Procedure for Handling Complaints* (July 2014).

<sup>56</sup> At para 3.2. But note the comments by the Care Inspectorate on this in the chapter on stakeholders’ perspectives above.

<sup>57</sup> 2010 Act, s. 98 (2)(b). Note that ‘social service’ includes ‘care services’, as discussed above, and social work services.

<sup>58</sup> Local Government (Scotland) Act 1973, s. 210.

<sup>59</sup> At para 129.

<sup>60</sup> Chapter 5: Miscellaneous.

<sup>61</sup> Part 5: Provisions common to Commission and Council – Complaints, inquiries and maladministration.

### 4.3 Equality and Human Rights Commission (EHRC)

#### Relevant Legislation

The Equality Act 2006 created the Commission for Equality and Human Rights by way of a merger of the three previous Commissions concerned with gender, race and disability equality, and extended the grounds on which discrimination is unlawful.

The Equality Act 2010 consolidated the existing anti-discrimination laws into a single Act and brought in a wider-ranging public-sector duty to reduce inequalities.

The EHRC's principal duties are set out in ss. 8 and 9 of the 2006 Act. Under s. 8 the EHRC must

- promote understanding of the importance of equality and diversity, and encourage good practice in relation to equality and diversity;
- promote awareness and understanding of rights under the equality enactments, and enforce the equality enactments; and
- promote equality of opportunity and work towards the elimination of unlawful discrimination and unlawful harassment.

Under s. 9, the EHRC has duties to

- promote understanding of the importance of human rights;
- encourage good practice in relation to human rights;
- promote awareness, understanding and protection of human rights; and
- encourage public authorities to comply with s. 6 of the Human Rights Act 1998.<sup>62</sup>

Subs. (2) defines human rights as the Convention rights<sup>63</sup> and 'other human rights' although subs (3) places a duty on the EHRC to 'have particular regard' to the Convention rights.

#### Restriction on certain activities in Scotland

The EHRC may not take 'human rights action' in relation to a matter if the Scottish Parliament has legislative competence to enable a person 'to take action of that kind in relation to that matter',<sup>64</sup> except with the consent of a person that is established by the Scottish Parliament and whose principal duties relate to

<sup>62</sup> That is, the duty on public authorities to comply with the Convention rights.

<sup>63</sup> Meaning most of the rights contained in the European Convention on Human Rights: Human Rights Act 1998, s. 1 (1).

<sup>64</sup> 2006 Act, s. 7 (1).

human rights and are similar to the EHRC's duties under s. 9.<sup>65</sup> This means that EHRC (Scotland) requires the agreement of the SHRC to carry out human rights activity relating to devolved matters. The EHRC does not require consent from the Children's Commissioner's office before taking human rights action, although in practice the Commissioner is always informed if the EHRC is undertaking work related to the rights of children and young people.

### **Supporting Cases, Judicial Reviews and Interdicts**

The Commission has the power to support cases although it is restricted by statute to providing assistance to cases with a claim under equality legislation (which includes cases that have both a discrimination and human rights element), and statutory time limits apply. It can also take own-name Judicial Reviews, apply for interdicts and intervene in cases taken by others (or join proceedings as a third party), both in relation to discrimination and human rights.

### **Inquiries**

The EHRC has a power under s. 16 of the 2006 Act to conduct Inquiries on 'any matter relating to any of the Commission's duties under sections 8 or 9'. Such inquiries can have a very wide scope, though their use in relation to human rights matters in Scotland is subject to s. 7. This may impact on the scope of general investigations by the Commissioner into matters in which discrimination or human rights issues of some kind are a significant feature of the alleged failure to take into account the child or young person's rights.

### **Investigations**

Investigation under s. 20 may be commenced where the EHRC suspects unlawful conduct<sup>66</sup> on the part of a (natural or legal) person. They may (but need not) arise out of the findings of an Inquiry under s. 16. 'Unlawful' means in breach of the provisions of the Equality Act 2010 (only) – i.e. unlawful discrimination and harassment, etc. There are exclusions in the definition section.<sup>67</sup> Investigation is an enforcement power for equality law set out in the 2010 Act and therefore different from the broader inquiries power.

While there may be overlaps with the Commissioner's extended investigatory power, cases falling into this category would be likely to be referred to the EHRC in any event, not least in light of the EHRC's enforcement powers.

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<sup>65</sup> 2006 Act, s. 7 (4).

<sup>66</sup> This includes actions and *deliberate* omissions: 2006 Act, s. 35.

<sup>67</sup> 2006 Act, s. 34: e.g. contravention of the duties in s. 149, the Public Sector Equality Duty.

## Assessments

Assessments under s. 31 are used to examine compliance with listed public authorities' Public Sector Equality Duty (PSED). As the PSED does not confer enforceable rights on individuals, the Commissioner's investigatory remit is less likely to overlap with it. However, individuals can petition for Judicial Review, founded on a listed authority's failure to meet the PSED.<sup>68</sup> Further, it seems possible that incidental findings of likely non-compliance with the PSED may emerge from an investigation by the Commissioner, and findings as to children's rights principles – for example, the best interest principle from a s. 31 assessment conducted by the EHRC.

## Implications for the Commissioner's exercise of the investigatory power

There will be significant overlap between the Commissioner and the EHRC in terms of complaints alleging discrimination on the grounds covered by article 2 of the UNCRC and the Equality Act 2010 which may be actionable. Such complaints may be taken forward by the EHRC in various ways, but broadly would entail either support of an individual case through the legal system – which is quite different from an investigation by the Commissioner – or by using the individual complaint to found an investigation. Both these processes could be directed at providing resolution of individual complaints and there is therefore a risk of duplication.

A MoU between the Commissioner and the EHRC will establish robust processes to ensure choice for the complainant in terms of the processes for resolution, and timely communication about cases, which is of particular importance in light of time bars that apply to discrimination cases of the kind that the EHRC may take or support.

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<sup>68</sup> For example, the successful challenge to the closure of the Independent Living Fund: *R (o.t.a. Aspinall) v Secretary of State for Work and Pensions* [2014] EWHC 4134 (Admin).

## 4.4 Scottish Human Rights Commission (SHRC)

### Relevant legislation

#### Scottish Commission for Human Rights Act 2006 (the 2006 Act)

Section 2 sets out the Commission's general duty: to promote human rights and, in particular, to encourage best practice in relation to human rights. '[H]uman rights' are defined as:

*(a) the Convention rights within the meaning of section 1 of the Human Rights Act 1998 (c.42), and (b) other human rights contained in any international convention, treaty or other international instrument ratified by the United Kingdom.*<sup>69</sup>

'Any international convention' would cover children's human rights under the UNCRC. However, this must be read against Section 5 (2) of the Act, which notes that:

*The Commission must seek to ensure, so far as practicable, that any activity undertaken by it under this Act does not duplicate unnecessarily any activity undertaken by any other person under any other enactment.*<sup>70</sup>

The restriction placed on SHRC's activities provides a useful comparator to that placed on the Commissioner. Firstly, it applies to 'any activity' and is therefore broader than that imposed on the Commissioner, which only applies to investigations. However, in two other ways it is narrower, leaving the SHRC greater scope for action.

- i. The duty only requires SHRC to 'seek to ensure, so far as practicable' that no duplication occurs, which gives the Commission more scope. In the Explanatory Notes to the 2006 Act the Scottish Executive acknowledged that other statutory agencies have 'interests or remits that overlap' with the SHRC's.<sup>71</sup>
- ii. The requirement to avoid 'unnecessary' duplication recognises that there may be times when 'duplication' may be necessary and appropriate. This is a more realistic and helpful way of looking at 'duplication'.

### Inquiries

Under its power to conduct inquiries the SHRC may investigate the policies and practices relating to the human rights of Scottish public authorities<sup>72</sup> generally, or those of a particular Scottish public authority as they relate to human rights specified in s. 9 (6), namely the Torture Conventions and the United Nations

<sup>69</sup> Emphasis added.

<sup>70</sup> Emphasis added.

<sup>71</sup> *Explanatory Notes*, Scottish Commission for Human Rights Act 2006, para 20.

<sup>72</sup> 2006 Act, s. 8.

Convention on Rights of Persons with Disabilities (UNCRPD). The SHRC's inquiries power is subject to restrictions set out in s. 9. The Commission may not conduct an inquiry into the policies and practices of any Scottish public authority in relation to a particular case, although it may take such cases into account in the course of an inquiry.<sup>73</sup>

### **Implications for the Commissioner's exercise of the investigatory power**

While there is a potential for overlap with the Commissioner's power relating to certain types of general investigation, such overlap and risk of duplication in terms of individual investigations is very small. The existing working relationship between the Commissioner and the SHRC will be built on to develop effective communication and signposting processes in respect of matters of mutual interest.

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<sup>73</sup> 2006 Act, s. 9 (3) and (4) respectively.

## 4.5 Healthcare Improvement Scotland (HIS)

### Relevant Legislation

Public Services Reform (Scotland) Act 2010: Part 6 of the Act establishes HIS as the national body for the improvement and scrutiny of all registered independent healthcare services and the NHS in Scotland.

Section 108 of the 2010 Act inserts new sections into the National Health Service (Scotland) Act 1978. New section 10Z8<sup>74</sup> introduces a complaints-handling function covering independent healthcare services as defined in new s. 10F. This is in very similar terms to that in respect of 'care services' introduced by s. 79 of the Act and discussed above.<sup>75</sup>

Similarly, new s. 10Z12 introduces a power to cause inquiries to be held into 'any matter connected with the provision of an independent healthcare service or a service provided under the health service'.<sup>76</sup> The same issues as discussed in the context of the Care Inspectorate arise from the equally broad terms of these provisions, which make it difficult to determine the 'proper function of another person' against which the Commissioner's investigatory remit is to be delineated.

### Implications for the Commissioner's exercise of the investigatory power

There may be overlap between the Commissioner's investigatory function and HIS's complaints procedure. It has been agreed that a robust MoU will assist in promoting clarity as to the delineation of powers, as well as the sharing of information and signposting of complainants where appropriate.

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<sup>74</sup> Titled 'Complaints about independent healthcare services'.

<sup>75</sup> Section 3.4.3.

<sup>76</sup> 2010 Act, s. 10Z12 (1).



## 4.6 Information Commissioner's Office (ICO)

### Relevant legislation

The Data Protection Act 1998 gives the ICO power to regulate, promote good practice by and investigate complaints against data controllers (any organisation which handles personal data), and to enforce the protections afforded by the Act.

Under the Freedom of Information Act 2000 ICO investigates complaints against public authorities failing to comply with the Act (reserved bodies only in Scotland).

Other relevant legislation includes the Privacy and Electronic Communications Regulations and various regulations relating to environmental information.

Section 51 of the Data Protection Act sets out the general duties of the Information Commissioner in terms of promoting good practice by data controllers and assisting them in the observance of the Act. Section 51 (2) states that the Commissioner:

*shall arrange for the dissemination in such form and manner as he considers appropriate of such information as it may appear to him expedient to give to the public about the operation of this Act, about good practice, and about other matters within the scope of his functions under this Act, and may give advice to any person as to any of those matters.*

### Exercise of rights in Scotland by children

In Scotland, many children are able to exercise their rights under the 1998 Act in their own right. The Act provides that persons under the age of 16 can exercise any rights conferred by any provision of the Act 'where he has a general understanding of what it means to exercise that right'. A person of 12 years of age or more is deemed to be of sufficient age and maturity to have such understanding/capacity.<sup>77</sup>

### Implications for the Children's Commissioner's exercise of the investigatory power

There will be overlap between the Children's Commissioner's investigatory power in respect of one key aspect of children and young people's right to privacy (art. 16 UNCRC) and the ICO's regulatory functions. Complaints relating to data protection will be dealt with by the ICO, whose enforcement powers are wide-ranging and robust. Agreeing an MoU with the ICO will be greatly beneficial, not only to establish clear communication and referral routes, but also because matters that are the proper function of ICO to investigate may well

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<sup>77</sup> DPA 1998, s. 66.

form part of a larger and complex complaint suitable for investigation by the Children's Commissioner in terms of children's rights, interests and views.

## 4.7 Scottish Information Commissioner (SIC)

### Relevant legislation

The Commissioner advises on, enforces and adjudicates on complaints under the Freedom of Information (Scotland) Act 2002 ('FOISA') and the Environmental Information (Scotland) Regulations 2004 ('the EIRs').

The Scottish Information Commissioner is responsible for conducting investigations and making decisions in relation to requesters' dissatisfaction with a public authority's handling of information requests. The Commissioner's powers relate to information requests made under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004. Requesters must make a written application to the Scottish Information Commissioner before an investigation can be undertaken and a decision made.

The SIC has enforcement powers including decision notices on complaints which are enforceable through the courts, and enforcement notices which detail the steps an authority that is subject to FOISA must take to comply with the Act or the EIRs.<sup>78</sup> Further, the SIC has a power to 'assess whether a Scottish public authority is following good practice'.<sup>79</sup> The SIC may further issue a recommendation of good practice where it appears to the Commissioner that an authority is not complying with good practice.<sup>80</sup>

### Implications for the Children's Commissioner's exercise of the investigatory power

It is not expected that there will be significant overlap of the Children's Commissioner's investigatory power with the SIC's functions. However, promoting children and young people's rights under FOISA may well aid the resolution of their complaint in some cases, so there are some synergies between the two Commissioners' functions whose realisation a closer working relationship may support.

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<sup>78</sup> FOISA, ss. 49 and 51 respectively.

<sup>79</sup> FOISA, s. 43.

<sup>80</sup> FOISA, s. 44.

## 4.8 Mental Welfare Commission

### Relevant legislation

Adults with Incapacity (Scotland) Act 2000

Mental Health (Care and Treatment) (Scotland) Act 2003

Public Sector Reform (Scotland) Act 2010

Criminal Procedure (Scotland) Act 1995

The Commission is responsible for monitoring the operation of the Mental Health (Care and Treatment) (Scotland) Act 2003 and reporting to Scottish Ministers concerning on its operation. It is also required to report to Ministers and other bodies on matters of general interest or concern regarding the welfare of any persons with a mental disorder. Other bodies include local authorities, Health Boards, Special Health Boards, NHS Trusts, the Care Inspectorate or 'any such other person, or group of persons, as it considers appropriate'.<sup>81</sup> Section 8 of the Act places a duty to bring specific matters to the attention of Scottish Ministers and others. These circumstances are defined in s. 8 (2) of the Act.

As part of its monitoring work, it receives notifications of most interventions under the 2003 Act and uses these to report on how the Act is used and to highlight trends or geographical variations in the use of the Act

The Commission is also responsible for the welfare parts of the Adults with Incapacity (Scotland) Act 2000. While the statutory basis for most of the Commission's work with children and young people is Part 2 of the Mental Health (Care and Treatment) (Scotland) Act 2003, the Adults with Incapacity Act 2000 is also relevant. This provides methods of intervening on behalf of adults (aged 16 or over) who lack capacity to take some or all decisions for themselves.

### Investigations

The Commission does not have a specific complaints function, but has powers of investigation, provided in s. 11 of the 2003 Act. It can investigate if someone with a mental illness or learning disability is not receiving the appropriate care and treatment. The circumstances when this can arise are set out in s. 11 (2). The Act provides for the Commission to undertake Inquiries following on from investigations.

### Visits

The Commission is authorised to conduct visits to patients who fall within certain categories detailed under s. 13 (1) (2). Section 13 also covers patients subject to intervention orders under s. 53 (10)(b) of the Adults with Incapacity

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<sup>81</sup> 2003 Act, s. 7 (g).

(Scotland) Act 2000 and guardianship orders under s. 58 (7)(d) of that Act. If it appears to the Commission that patients may be resident, or may be receiving medical treatment, in certain premises (or use the facilities provided there), the Commission may visit these premises. These include hospitals, premises where independent healthcare is provided, care home services or secure accommodation services, prisons and young offender institutions. The Commission can inspect these facilities and interview patients who have concerns. It is worth noting that this can be done jointly. For example, in 2014 the Mental Welfare Commission and the Care Inspectorate visited young people in secure care settings, who had identified mental health difficulties and who may be supported by or referred for assessment to CAMHS. Such an approach supports the duty of co-operation set out in s. 114 of the Public Services Reform (Scotland) Act 2010. Such visits may be made with or without prior notification. 'Care home service' has the meaning given to that expression by s. 2 (3) of the Regulation of Care (Scotland) Act 2001 and 'secure accommodation service' has the meaning given to that expression by s. 2 (9) of that Act. Visits and monitoring can help to provide a general picture of care and treatment across Scotland. Investigations allow the Commission to focus on a single case and make recommendations which can improve wider practice across Scotland.

It is worth noting that the Commission is a member of the National Preventative Mechanism (NPM), along with the Care Inspectorate, the SHRC, HM Inspectorate of Constabulary for Scotland and HM Inspectorate of Prisons.

### **Implications for the Commissioner's exercise of the investigatory power**

There is likely to be some limited overlap in terms of the MWC's power to conduct investigations into the care and treatment of patients under s. 11 of the 2003 Act. The Commissioner may have a locus in terms of children and young people's rights, interests and views in respect of some aspects of some cases. However, there may be scope for some co-ordination of work of mutual interest. It has already been agreed that a MoU between the Commissioner and the MWC will clarify the delineation of responsibilities and establish communication and procedures for signposting and information-sharing.

## Chapter 5. Stakeholders' Perspectives

This chapter of the report focuses on key points arising from a series of structured interviews undertaken with complaints bodies, regulators, ombudspersons and National Human Rights Institutions (NHRIs) from January to March 2015. These were mostly face-to-face interviews, although where this was not possible, telephone interviews were undertaken. Most of the interviews were with Scottish or UK bodies, but other organisations were approached, where it was felt that they could add to the discussions.<sup>82</sup>

A separate consultation was also carried out with children and young people and this can be found in Chapter 6.

**Section 5.1** highlights the complex nature of the complaints-handling and regulatory landscape and summarises key developments over the last decade that are relevant to this exercise;

**Section 5.2** focuses on the five areas of education, social work, health, police and prisons, to highlight the complexity referred to above;

**Section 5.3** explores the perspectives of key stakeholders on thematic areas related to the Commissioner's new powers of investigation, as introduced by the 2014 Act;

**Section 5.4** highlights key findings and learning points.

### 5.1 Complex nature of complaints-handling and regulatory landscape

The Scottish complaints-handling and regulatory landscape has been subject to considerable change and review over the last decade.

A key finding from the Crerar Review (2007)<sup>83</sup> was that complaints processes in public services were neither accessible nor easy to use and were often complex and variable in their content. It made numerous recommendations aimed at developing a standardised, simplified system for the handling of public-service complaints, to be introduced and overseen by the Scottish Public Services Ombudsman (SPSO). The Fit for Purpose Complaints System Action Group, led by Douglas Sinclair, took these into account when considering how to improve the Scottish complaints-handling system and called for simplification of complaints processes and of the overall landscape of complaints-handling bodies. Its report to Ministers (2008) led to new roles and responsibilities for SPSO and also impacted on how public bodies responded to complaints.

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<sup>82</sup> The Discussion Guide used in these interviews is provided at Appendix 2.

<sup>83</sup> Report of the Independent Review of Regulation, Audit, Inspection and Complaints-Handling of Public Services in Scotland.

Other recommendations of relevance led to public-service organisations reviewing their schemes of delegation to ensure that the authority to resolve at the front line is maximised and the chain of decision-making is as short as possible. The training needs of front-line employees and complaints-handlers have also been reviewed and a standardised complaints-handling process for each public-service sector to ensure consistency in approach across all sectors is now in place. As a result of Sinclair and subsequent changes to legislation, the number of stand-alone complaints-handling bodies has been reduced and functions have been transferred to simplify the process and landscape.

Sinclair also urged that the complaints-handling function should not be embedded within bodies with an inspection and regulation role, except in exceptional circumstances. Some bodies interviewed have both these functions (such as Care Inspectorate, Equality and Human Rights Commission) and some do not (such as Mental Welfare Commission). All are relevant to this exercise.

It is worth making a distinction about the role of complaints-handlers and regulators. Complaints-handlers respond to individual claims of injustice or hardship and provide redress, whereas regulators will enforce standards, which might include taking complaints as evidence. As noted above, some, such as the EHRC, will have both roles, as they can respond to individual claims and can provide legal support that achieves redress. For the purposes of this exercise, we interviewed a range of bodies, including both complaints-handlers and regulatory bodies. The reason for this is that the new powers in the 2014 Act require us not to duplicate what are the 'properly the functions of another person' – whether this be in the area of complaints-handling or vis à vis investigations in the context of a regulatory function, i.e. the enforcement of standards or through investigations in individual cases. This is an important point.

Understanding the governing statutes of relevant other bodies is also essential to ascertaining where the Commissioner's new powers sit within the overall complaints-handling and regulatory landscape. An analysis of these statutes is contained in Chapter 4. The overall view was that the legislation is complex – some of it narrowly defined, some less so, and this applies to complaints bodies and regulators alike.

The complaints and regulatory landscape can be particularly complicated for those who are most vulnerable, including children and young people. This is due in part to the number of organisations involved, but is also linked to children's ability to navigate systems designed by and created for adults. Children and young people themselves have highlighted this as a barrier to bringing a complaint.<sup>84</sup>

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<sup>84</sup> See Chapter 6 of this report and p. 17 of Children's Parliament (2015), *Together We Can Fix It*.

It is important to note that some children may require day-to-day support from a range of services, including the local authority (for example, education and social work), specialist health services and many other services such as children's hearings, adoption and fostering panels, youth justice services and the court system. Understanding where and how to complain if something goes wrong is not always easy, and clear information about these procedures is crucial. In some instances, while a child or young person (or someone supporting them) might feel they are bringing a single complaint, they might in reality require a number of separate complaints to be submitted to a range of agencies.

It is also worth noting that there may be an additional complexity for children and young people where their complaint covers both reserved and devolved matters. Similarly, there may be difficulties establishing who best to approach with a complaint where more than one body may have a remit to cover a particular issue (for example, around human rights or freedom of information).

## **5.2 Areas of particular complexity**

In order to explore some of the particular difficulties children and young people in Scotland could experience while attempting to bring a complaint, five key areas were identified for in-depth analysis. These were selected on the basis of them being the main areas of concern (other than family disputes) that children and young people and those supporting them have raised with the Commissioner for Children and Young People over the last five years:

- Education
- Social work
- Health
- Police
- Prisons

Key bodies with responsibility for handling complaints in relation to these areas were identified and approached for interview. All of those approached to assist with this mapping exercise agreed to do so. They provided helpful insight into some of the barriers that currently exist in relation to children and young people bringing complaints, and also suggested ways in which the Commissioner for Children and Young People may be able to assist.

In the following section, each thematic area will be explored in detail, demonstrating the various routes open to children and young people (and their supporters) in bringing a complaint.

It is worth noting that the majority of public bodies mentioned in this section will fall under the jurisdiction of the SPSO (in relation to matters they are entitled to investigate, i.e. where local complaints routes have been exhausted, a complaint can be brought to the SPSO). However, there are some exceptions to this, both



in relation to particular bodies (such as Police Scotland) and specific issues that will fall outside SPSO's remit (such as certain education-related complaints and social work complaints). Where these exceptions exist, alternative routes have been identified. It is also worth noting that all of the public bodies referred to will also be in some way regulated by the EHRC in relation to equality issues.

For each subject area, a table has also been created in order to provide a broad overview of where each type of complaint is likely to be routed. This is intended as a general guide only. Where the complaints route is not straightforward, this is outlined in the main text.

## Education

These myriad complaints systems are particularly noticeable in the area of education, where there is a complex landscape of complaints-handling bodies, regulators and tribunals. This can be confusing both for complainants and those in complaints-handling roles. This has (on occasion) resulted in complaints being referred on to bodies that do not have the remit to deal with them – for example, local authority officers incorrectly referring additional-support-needs issues to the SPSO rather than directly to the Additional Support Needs Tribunal (ASNTS) – and discrimination cases being missed:

*Most staff are trained in our complaints process, so most local authority staff will say, 'Oh, you've got a complaint. This is what we do', which is great. It's just that when you get into some of those more complex areas, people are just thinking, 'Oh, this is what you do when you've got a complaint' and are forgetting as they don't get additional-support ones that often. (SPSO)*

There may also be multiple complaints routes, with a range of potential outcomes open to those bringing education-related complaints. In order to make an informed choice about the best complaints route for them, complainants need to be made fully aware of the options available to them from the outset. Bringing a complaint to the EHRC, for example, could result in legal action, either taken or supported by EHRC, which could lead to redress for the individual as well as achieving wider impact (for example, through an authority formally agreeing to an enforceable improvement action). Alternatively, the EHRC could use the information to inform an inquiry, or found a formal investigation.<sup>85</sup> Bringing the complaint to the SPSO could result in the investigation of potential service failure and/or maladministration and, where a complaint is upheld, recommendations being made for improvement.

In relation to education complaints, stakeholders felt that the correct identification of any underlying issues was also vital. In particular, staff needed

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<sup>85</sup> Discrimination applies to all of the five areas mentioned in the report.

to be familiar with the dispute resolution mechanisms for complaints relating to additional-support needs. They pointed out that where an issue is routed often depends on the nature of the problem, rather than simply on the area of education it sits within. For example, discrimination can thread through various education issues, although it may not be presented as such by the person bringing the complaint. For example, what might initially be presented as a failure to tackle bullying by a local education authority, might actually relate to discrimination on grounds of religion or belief, sexual orientation or gender identity,<sup>86</sup> which would fall within the remit of the EHRC rather than the local education authority.

*It is important for people coming to you [i.e. the Children's Commissioner's office] for you to have training in recognising or identifying discrimination. This requires particular skills and expertise.*  
(EHRC)

In terms of bodies involved in an education complaint, and depending on the issue, a complaint about a child's education would be heard in the first instance by the school or the local authority (in line with the national model Complaints-Handling Procedure (CHP)). A local authority's complaints policy might cover, for example, failure to provide a service (such as school transport) or a failure to meet national guidelines. There are two stages: front-line resolution, then investigation. If the complainant is still dissatisfied, the complaint can then be raised with the SPSO.

Education Scotland, the improvement and scrutiny body, does not investigate complaints about the establishments it inspects and works with – for example, pre-school centres, schools, colleges, specialist schools (including residential special care and secure provision), prison education, educational psychology services or education authorities.

Education Appeals Committees hear exclusion appeals and, in some cases, the refusal of placing requests. If their appeal is unsuccessful, complainants then have a further right of appeal to the Sheriff (the ASNTS can hear some exclusion appeals if they involve disability discrimination).<sup>87</sup> Indeed, the complaints

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<sup>86</sup> Other than harassment relating to admission to or treatment by the school of a pupil, as sexual orientation, religion or belief, and gender reassignment are excluded in this context: Equality Act 2010, s. 85 (10). The exclusion applies to schools, not FE/HE institutions. Age is also excluded as a protected characteristic in the school context: s. 84 (a). In terms of subject matter, the relevant provisions of the 2010 Act do not apply to the content of the curriculum in both schools and FE/HE: s. 89 (1).

<sup>87</sup> Under the Equality Act 2010 parents can either appeal an exclusion decision to the EAC or to the ASNTS (on disability discrimination grounds).

landscape for children with additional-support needs or disabilities is particularly complex.<sup>88</sup>

The ASNTS considers references (appeals) made by parents and young people against decisions of education authorities regarding the provision of additional support. It also hears references involving children and young people who either have, or are potentially entitled to have, a co-ordinated support plan. In some cases, it can also hear placing request references.

Independent adjudication can also be used where there is a disagreement with the education authority's decision – for example, about whether additional-support needs exist or the type of support required by a child or young person with additional-support needs. While there is currently scope for young people to bring complaints independently, stakeholders were clear that in practice this rarely happens:

*This is open to young people from the age of 16, but it is rarely used due to a lack of awareness about it and what it deals with, and at times a concern that the adjudicators report will not be acted upon by the authority.*

(Enquire)

The ASNTS hears all school disability discrimination claims. The EHRC can take cases that involve a claim of discrimination or both discrimination and human rights. As noted, this can ribbon through all areas of education.<sup>89</sup> It can also consider an inquiry or investigation, or initiate proceedings for interdict or Judicial Review in education.

The default provision in s. 70 of the Education (Scotland) Act 1980 can also be used in respect of an alleged failure by a relevant body to perform a statutory duty relating to education. 'Complainants' effectively call on Scottish Ministers to exercise their discretionary power to make an order to enforce that statutory duty. It does not apply to common law duties (for example, a duty of care), nor is it concerned with the merits of a decision of any education provider.

The Education (Scotland) Bill, currently at Stage 1, would introduce a power to make regulations about the procedure to be followed in relation to s. 70 complaints to Ministers. The intention of this will be that Ministers should not consider an issue or reconsider a decision which should be dealt with by the ASNTS.

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<sup>88</sup> If a child with additional-support needs and a complaint relating to this has been unable to be resolved by the Education Service, the Education (Additional Support for Learning) (Scotland) Act 2004 provides the right to request independent mediation.

<sup>89</sup> An example of their involvement links to the recent Sheriff Court ruling that a local authority acted unlawfully when it removed a disabled student's support package on the day he turned 18. The EHRC intervened in the Council's appeal against the Sheriff's judgment: *M v Fife Council* 2014 SLT (Sh Ct) 147.

A decision made by the ASNTS may be appealed on a point of law to the Court of Session.

In cases where no other right of appeal is available, a decision made by an education authority or any other public body may be challenged through Judicial Review.

Other bodies consider different types of education complaints – for example, appeals against an attendance order are heard by the Sheriff, the SQA hears exam appeals procedures, and the General Teaching Council for Scotland (GTCS) deals with complaints against registered teachers (or applicants for registration), in terms of their ‘fitness to teach’.

Stakeholders highlighted the difficulties for both complainants and professionals in navigating their way through such a diverse range of complaints routes for education matters.

This complex layering was particularly apparent throughout the stakeholder interviews. The SPSO noted that while it can take complaints about schools, colleges and universities, it must not investigate action concerning the ‘giving of instruction’ and ‘conduct, curriculum or discipline’<sup>90</sup> in relation to schools. Discrimination in schools, colleges and universities rests with the EHRC, although a discrimination case might also involve maladministration. It is indeed a multifaceted picture.

*We take complaints about education matters, both at school and university or college level. Schedule 4, paragraph 10 and 10 (a) are the specific exemptions around the giving of instruction, whether secular or religious, and conduct, curriculum or discipline which are schools, so that’s a specific exclusion. At universities and colleges, it’s more narrow. We can’t look at academic judgement... so, for example, with the SQA, we could look at some of the complaints that come to them – we could look, but actually they are who can get your result changed. (SPSO)*

Stakeholders also pointed out that because of the number of bodies involved, it is not always clear where the complaint should be routed. This is particularly so for cases involving multiple issues:

*I was thinking about a family I spoke to a couple of years ago which had a very complex situation where they had children who had additional-support needs, but one of the issues was around behaviour in schools... and one of the concerns that they had was about their children – and it didn’t go as far as exclusion, but they were being asked not to attend, or being taken out of the classroom into other space... So if, for example, you’ve been disciplined in a way that’s not exclusion, we can’t go there.*

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<sup>90</sup> Scottish Public Services Ombudsman Act 2002, Schedule 4 (10).

*There's a gap there... there's so many different processes that actually means a point is being missed.<sup>91</sup> Now those are likely to be very complex cases. (SPSO)*

## Social Work

Local authorities must operate a social work complaints procedure which is separate to the local authority's usual complaints procedure.<sup>92</sup>

In 2011-2012, the Scottish Government consulted on proposals to change the social work complaints system in order to streamline the process and provide a more user-focused complaints procedure.

Proposals are currently under consideration to align social work complaints within a standard complaints-handling procedure approved by the SPSO, to ensure that there is a robust and accessible complaints procedure for social work in Scotland. These changes also propose the transfer of functions currently performed by local authority complaints review committees to the SPSO. In line with changes to the role of the SPSO in complaints arising from children's services, these proposals relating to social work complaints would not see the Ombudsman taking on any new role until at least 2016. This will further alter the complaints-handling landscape.

Local authorities currently have a duty to ensure that looked-after/care-experienced young people have knowledge, access to and support to engage with these appeals and complaints processes. This necessitates clear information and supports such as advocacy, which is often provided by Children's Rights Officers or advocacy workers provided by Who Cares? Scotland.

At present, there are numerous regulations covering throughcare and aftercare. These promote informal resolution of complaints within a specified period before formal proceedings are instigated.<sup>93</sup> As previously stated, while informal resolution can often provide the best result for children and young people, by its very nature it is often not formally recorded. This can mean that the true extent and nature of issues raised by children and young people are missed.

Looked-after disabled young people may also require additional support from the local authority in order to help them complain.

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<sup>91</sup> The child could go to the ASNTS, e.g. if the child was disabled and the discipline/exclusion related to behaviour linked to the child's disability. If not, s. 70 might be invoked, as the school is not entitled to suspend the provision of education unless the child has been excluded.

<sup>92</sup> Section 5B of the Social Work (Scotland) Act 1968, s. 52 of the NHS Community Care Act 1990 and the Social Work (Representations Procedure) (Scotland) Directions 1996 requires every local authority social work service to develop and implement a complaints procedure. It is worth noting that anyone with an interest in the general welfare of the child (including foster carers) can make a complaint, in contrast to adult social work.

<sup>93</sup> For example, s. 73 of the Regulation of Care (Scotland) Act 2000 Act strengthens the provisions of s. 29 of the Children (Scotland) Act 1995 and makes provisions for complaints and appeals.

As with education issues, stakeholders highlighted that where a social work issue is routed depends on the problem and whether it is accurately identified by staff whose role it is to signpost the complainant.

Complaints about the conduct and practice of workers applying for registration or those already registered is investigated by the Scottish Social Services Council (SSSC), and discrimination issues will go to the EHRC.

The regulation of care services is the responsibility of the Care Inspectorate, which also has a statutory responsibility to investigate complaints about registered care services.<sup>94</sup> However, there are some notable gaps. For example, some special schools in Scotland are not registered care providers and therefore would not fall under the remit of the Care Inspectorate.

Child Protection is covered by local authority child protection committees and may also require the involvement of the police.

*We will always notify the appropriate bodies about complaints that concern conduct which may be a criminal offence or issues that indicate a risk to children. (Care Inspectorate)*

## **SCRA/Children's Hearings Scotland**

The Scottish Children's Reporter Administration (SCRA) and Children's Hearings Scotland (CHS) both have complaints procedures.

SCRA's complaints procedure deals with complaints about SCRA staff (for example, their actions or behaviour, timescales and SCRA facilities).

The CHS complaints procedure deals with complaints about children's panel members or those who support panel members. This could relate to a failure to provide a service, providing an inadequate standard of service, treatment by or attitude of a member of the CHS Board, CHS staff member, panel member or AST member, CHS's failure to follow the appropriate administrative process or dissatisfaction with certain policies.

If, having pursued these complaints routes, the person remained dissatisfied, both the SCRA and CHS processes would culminate in a referral to the SPSO.

It should be noted that complaints relating to decisions made by a children's hearing do not fall under either the CHS or SCRA complaints routes. Instead, these can be appealed to the Sheriff within 21 days of the hearing.

It is also worth highlighting that the Children and Young People (Scotland) Act 2014 gives Ministers powers to introduce new complaints procedures by regulations relating to the Named Person (Part 4, s. 30) and the Child's Plan (Part 5, s. 43). This will be consulted upon in summer 2015.

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<sup>94</sup> Public Services Reform (Scotland) Act 2010, s. 79.

## Health

The NHS has its own complaints procedures, aligned to the Patients Rights (Scotland) Act 2011. This provides a Charter of Patient Rights and Responsibilities,<sup>95</sup> which details what people can expect from NHS services. Given that many children access and are in receipt of a wide spectrum of health services (e.g. specialist children's services, hospitals, community-based services), it is essential that they know what to do and where to go if things go wrong.

Stakeholders outlined that complaints about health are dealt with locally in the first instance and NHS Scotland can make arrangements for those requiring impartial advice to make a complaint from a local independent advice and support service, through Citizens Advice Bureaux. If the NHS has fully investigated a complaint, the final port of call will be the SPSO. If the issue is one of discrimination, complaints can also be taken to the EHRC.

Health Improvement Scotland (HIS) has no remit for Health Boards, but regulates independent hospitals (including children's hospices) and private psychiatric hospitals. Complaints about such facilities are received directly by them, once the local complaints procedure has been exhausted. If someone wishes to complain about the way that HIS has handled the complaint, this will be via the SPSO.

The General Medical Council deals with the most serious complaints about doctors, and other medical professions have their own complaints-handling processes (such as Royal College of Nursing and Royal College of Midwives).<sup>96</sup>

The SPSO took over the Mental Welfare Commission's functions relating to complaints about mental-health services in 2002. There are restrictions on this in areas relating to someone currently detained or under compulsory treatment under the Mental Health (Care and Treatment) (Scotland) Act 2003, or the Criminal Procedure (Scotland) Act 1995. The SPSO has the power to investigate complaints about a failure to access information about local availability of advocacy services and signposting to the services. The SPSO can also investigate any service failure of, and actions taken by, the Commission, including decisions requiring clinical judgement.

In terms of its regulatory functions, the Mental Welfare Commission conducts investigations if it believes that a person has been unlawfully detained, or subject to ill-treatment or neglect, or there is a deficiency in care and treatment. Where there are concerns about a person's care or well-being, it has a power to visit them. This goes beyond patients who are detained (in an NHS mental-

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<sup>95</sup> <http://www.gov.scot/resource/0039/00390989.pdf>.

<sup>96</sup> A complaint can be made to a professional body even if one has been made under the NHS complaints procedure. If an investigation has already started under the NHS complaints procedure, the professional body may decide to wait for the outcome of this before taking any action.

health unit or hospital, for example). This means that it can visit people in a range of settings, including secure units, prisons and YOIs and private healthcare facilities (such as a CAMHS facility). It does not go into residential special schools as a matter of course, but would do so if a specific issue was brought to its attention and concerned a child with a mental-health issue:

*A child with a learning disability in a special school is just as much (our) concern as a child with an eating disorder in an NHS hospital.*

(Mental Welfare Commission)

The Mental Health Tribunal considers and determines applications for compulsory treatment orders under the Mental Health (Care and Treatment) (Scotland) Act 2003, and any appeals against compulsory measures. The Mental Welfare Commission technically has a power to discharge a person from a short-term detention order or a compulsory treatment order (CTO), but this has to date never been exercised. The Commission does from time to time exercise its statutory power to remit a CTO to the Tribunal for review.

For completeness, it should be noted that the ICO regulates patients' data protection rights and OSIC regulates the right of access to information through FOISA. The application of information rights – whether through the DPA or FOISA – is often key to enabling a complainant to raise an issue with a regulator, as the case may be identified from and built around the information provided to them.

The Mental Welfare Commission also noted that in relation to mental health, one person's complaint can involve a host of agencies, working to their particular statute, and this can have an impact on the complainant:

*Part of the complexity is that we are all working under different statutes and powers – it does take a lot of thought and care about how you do it well, leaving aside how people get represented and supported. People can find the whole experience of complaining so damaging. They end up either exhausted and go away dissatisfied or they can turn into professional complainers.* (Mental Welfare Commission)

## **Police**

The two key pieces of legislation applying to complaints-handling and investigations in relation to Police Scotland are the Police, Public Order and Criminal Justice (Scotland) Act 2006 and the Police and Fire Reform (Scotland) Act 2012. Section 34 (2) of the 2006 Act defines a complaint as 'a statement (whether oral, written or electronic) expressing dissatisfaction about an act or omission by the Authority, by the Police Service or by a person who at the time of the act or omission was a person serving with the Police'.



Police Scotland can deal with complaints about police officers or staff, up to and including chief superintendent rank, both on and off duty, while the Scottish Police Authority (SPA) deals with complaints relating to senior staff (i.e. the rank of assistant chief constable or above).

Where appropriate, minor complaints are resolved as informally and as locally as possible, but complex cases or those in which there is an inference of criminality are dealt with by specialist investigators.

On-duty matters of a criminal nature will be referred to the Criminal Allegations Against the Police Division of the Crown Office and Procurator Fiscal Service (COPFS), while allegations of criminal activity off-duty are reported to the local COPFS. Members of the public can contact COPFS directly if they are not confident about reporting the matter to the police.

Complaints can relate to police officers or staff but can also be 'quality of service' complaints (e.g. relating to the implementation of policies or procedures). The complaint can be made by the person to whom the act or omission took place (including children or young people), someone adversely affected by the act or omission, or a person acting on behalf of someone affected. Children and young people can choose to be represented by someone (e.g. a solicitor or an advocacy organisation). Once the police have investigated the complaint, the final port of call if the complainant is still unhappy (regarding a non-criminal complaint) is to the Police Investigations and Review Commissioner (PIRC), who may review the way the complaint was handled by Police Scotland. After its review, the PIRC may issue a Complaint-Handling Review (CHR). This may contain recommendations or organisational learning points.

The Police and Fire Reform (Scotland) Act 2012 was set up the Scottish Police Authority (SPA) 'to maintain policing, promote policing principles and continuous improvement of policing, and to hold the Chief Constable to account'. It expanded the role and responsibilities of the Police Complaints Commissioner for Scotland (PCCS) to create a Police Investigations and Review Commissioner (PIRC).<sup>97</sup> Its role is to conduct independent investigations into the most serious incidents involving the police. The Chief Constable must refer some incidents to the PIRC, including:

- the death or serious injury of a person who had direct or indirect contact with the police at or before his/her death or serious injury where the contact may have caused, or contributed to, the death or serious injury;
- police use of firearms, Tasers or CS spray (referral at the request of the Chief Constable or the Scottish Police Authority);

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<sup>97</sup> The Commissioner is appointed by Scottish Ministers and is independent of the police.

- allegations of a criminal nature (as directed by COPFS);
- death in police custody (under direction of COPFS);
- serious injury in police custody or following police contact (referral at the request of the Chief Constable or the SPA);
- complaints made against senior officers (referral at the request of the SPA).

The SPA must also refer certain incidents to the Commissioner, including circumstances in which there has been a serious incident involving police officers and staff at any rank and potential misconduct by a senior officer of Police Scotland if the Authority considers that the matter needs to be investigated. The Commissioner may also decide to investigate 'relevant police matters' where he considers it would be in the public interest.<sup>98</sup>

Again, if complaints across any of these areas are related to discrimination, these can be taken to the EHRC and if they relate to human rights to the SHRC or the EHRC.

## Prisons

The Scottish Prisons Service complaints system is set out in Part 12 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011. There are three different points of access: a general complaint, a confidential access complaint and a separate NHS complaints system, relating solely to health (the NHS rather than the SPS, has provided the care in prisons since 2011). The final step (once the prisoner has exhausted all complaints procedures) is the SPSO.

These complaints systems are open to young people in Young Offender Institutions, as well as those in the general prison population.<sup>99</sup>

It is worth highlighting the new prison monitoring and inspection roles which respond to OPCAT<sup>100</sup> requirements and support complaints. These establish a system of regular visits to be undertaken by independent, international and national bodies where people are deprived of their liberty, in order to prevent torture and other cruel, inhumane or degrading treatment or punishment.

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<sup>98</sup> There are other policing bodies that operate in Scotland, such as the British Transport Police, so this specific point does not purely relate to Police Scotland or the SPA.

<sup>99</sup> Section 16 of the Commissioner for Children and Young People (Scotland) Act 2003 states that the Commissioner's remit extends to young people up to the age of 21, if they have ever been in the care of a local authority.

<sup>100</sup> Optional Protocol to the Convention Against Torture.

### 5.3 Stakeholders' views on the extension of powers for Scotland's Commissioner for Children and Young People

Having outlined the remit of their own organisations, stakeholders were then asked for their perspective on the Commissioner's extended powers. 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.

#### *Ensuring Non-Duplication*

As outlined earlier in this report, Section 5 (2) of the Children and Young People (Scotland) Act 2014 states that the Commissioner may only carry out an individual investigation (that is, into the circumstances of an individual child or young person) where the Commissioner '...is satisfied on reasonable grounds that the investigation would not duplicate work that is properly the function of another person'.

The non-duplication requirement in the Commissioner's legislation generated considerable discussion, with some stakeholders feeling that this was restrictive and could limit the Commissioner in undertaking his role effectively (SHRC, EHRC). Others felt that a narrow reading of this would run counter to the spirit of the 2014 Act which was 'surely to advantage young people' (Care Inspectorate).

The EHRC argued:

*Your legal opinion is quite clear. You cannot duplicate the work that is properly the function of another body – even if we decide not to undertake an investigation. I think your remit is narrow.*

The SHRC also raised concerns and felt that the powers were unclear:

*I don't think that the scope of the new powers is clear. This makes it difficult to see how they fit in with what currently exists.*

SHRC further reflected on the way in which duplication was addressed in its own legislation:

*The SHRC legislation is quite different in that there is not a restriction in relation to the inquiry function, rather there is a power to co-operate with others and a requirement that the Commission 'seeks to ensure as far as is practicable' that any activity isn't duplicating activity undertaken by another statutory body. The Commission has to go through a process of considering what other bodies have done, but it can still take action in furtherance of its general duty to promote human rights if appropriate. The difference between function and activity is important. Where there are overlapping functions such as SHRC's function to promote all human rights and SCCYP's function to promote and safeguard the rights of children and young people, the Act is clear that the Commission can still undertake activity despite the*

*function overlap. Under the new powers, SCCYP could not undertake an individual investigation where it is within another body's function, even if that body was not undertaking any activity.*

The Care Inspectorate viewed the non-duplication requirement as follows:

*It seems to me that the matters the Care Inspectorate might be required to investigate may well engage issues that could be regarded as falling within s. 7 (1) of the Commissioner for Children and Young People (Scotland) Act 2003.*

Others felt that the unique nature of the Commissioner's role by definition meant that this should be seen as joint working, and some questioned what duplication actually meant in practice:

*'Unhelpful' or 'unnecessary' duplication is perhaps a better way of describing duplication. We could be working on the same thing, but be looking at different aspects of this. (Care Inspectorate)*

*If you were conducting an investigation, you'd have to be realistic. Investigations do cover aspects that are technically the remit of another agency. What you need to have is very clear Memoranda of Understanding and very clear lines of communication with these agencies, so you can collectively decide who is best placed to do this and what is best for the child. (Local Authority 1)*

*There's always going to be overlap. It's about not undermining the other agencies and the agencies' remit. (Local Authority 1)*

### ***Rights, interests and views***

All stakeholders were asked whether they could investigate 'whether, by what means and to what extent a service provider has had regard to the rights, interests and views of children, in making a decision or taking an action that affected those children and young people' and were also asked about the application to individual children. The question was designed to mirror the provision in s. 7 (1) of the Act (as amended).

*Not only are we able to investigate the rights, interests and views of children and young people, we have a requirement to do so... the regulatory regime under which we operate is very much concerned with the rights, interests and views of people who use services. In relation to regulated services, this is reflected, for example, in the Social Care and Social Work Improvement (Scotland) Regulations 2011 in addition to the National Care Standards.*

(Care Inspectorate)

The positive message from the interviews was the importance bodies are placing on embedding children's rights into their work and the eagerness to get this right. However, while this may be the policy intention, this needs to be seen in the context of the governing statutes of the respective bodies.

The SPSO investigates maladministration and service failure. It is worth noting that in many cases 'maladministration can include a failure to take into account rights, interests and views and that would be worked out on a case-by-case basis'.

*There's no clear definition of maladministration, but it would certainly cover failure to respect rights. (SPSO)*

*Rights, views and interests are now becoming embedded in local government practice and public services are now moving into more participative practices. This is therefore being dealt with in a way that wasn't the case before and is certainly on the radar of public bodies. (SPSO)*

Education Scotland noted that this was a core part of its work and a central part of inspection, although it does not investigate individual cases. A standard question will be to ask how young people's views are being taken into account generally. Other bodies, such as the Care Inspectorate and the Mental Welfare Commission, are working hard to establish good practice in this area with regard to their inspections and visits:

*With regard to investigating rights, interests and views, this is where we have most overlap in terms of the new powers. It will be important that we have protocols and understandings in place to ensure this runs smoothly. (Care Inspectorate)*

### ***Frequency of complaints***

All stakeholders acknowledged that children and young people do not currently engage with existing complaints-handling or regulatory processes. This was seen 'an issue of concern'. (SIC)

*I am not naïve enough to think that we are getting it right, as we clearly aren't. The fact is that children and young people do not use our complaints system. We see this as a significant gap, but it is not for the lack of will. We need to both empower and encourage them. (Scottish Prisons Service)*

*Children and young people seldom contact the office and there is certainly an issue about how young people engage with complaints procedures. (SPSO)*

Data<sup>101</sup> from the Scottish Information Commissioner suggested that it received few 'applications for a decision' from children and young people, with no applications from those under 16 since reporting started in April 2013. Four applicants since April 2013 fell into the 16 to 21 age group. The situation was similar for its enquiry service:

*We rarely, if ever, receive enquiries from those aged under 16, and receive a small number of enquiries from those within the 16 to 21 age group. The latter... will most commonly come from students who are either studying FOI, or using their information rights as part of their coursework. (SIC)*

Concern was expressed regarding evidence of lower awareness and lower use of FOI rights by children and young people. This was felt to be key to children and young people successfully pursuing a range of other complaints.

The UK Information Commissioner (ICO) also noted that although few applications or enquiries are received by children or young people, a proportion are received from those either acting on behalf of children or pursuing an issue of relevance, concern or interest to them. This was echoed by others:

*It's extremely rare that we'd hear from children and young people. We do receive complaints on their behalf – and almost always from parents. I've certainly met with at least one advocate for a young person, but they were also being supported by their parents. (SPSO)*

*The actual complaint numbers we get about children are tiny. That says it all... we don't get complaints from children and young people, but we get thousands of complaints about pot-holes. (Local Authority 1)*

In evidence to the Education and Culture Committee, and in his Annual Report, the Scottish Public Services Ombudsman welcomed the 'possible expansion of the Children's Commissioner's role in relation to complaints', stating that the likelihood would be 'that more children and young people may complain to the Commissioner as a result of his expanded role'.<sup>102</sup>

Education Scotland reported that very few children contacted it directly with complaints and, when they did, it was often on matters falling outside its remit. In those circumstances, Education Scotland would signpost the child or young person on to the most appropriate complaints route.

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<sup>101</sup> From April 2013 SIC began to collect demographic information. Those making valid applications for a decision were invited to participate in equal-opportunity monitoring: 24% of the 578 applicants in 2013-14 and 30% of the 252 applicants in the first six months of 2014-15 agreed to participate.

<sup>102</sup> *Transforming Scotland's Complaints Culture*, SPSO Annual Report 2013-2014, p.47.

The Care Inspectorate remarked that:

*Children and young people almost never contact the office. We have a lot of contact with children and young people, but not through the complaints procedure.*

The Mental Welfare Commission does not have a complaints-handling function but does have a helpline. The Commission reported that, to date, no child or young person has accessed this, although it is open for them to do so.

The Equality and Human Rights Commission receives complaints from a helpline that is run by the government-funded Equality Advisory and Support Service (EASS) which determines if an issue is 'strategic' (i.e. likely to affect a broader group of children and young people). If it is, it refers the case to the EHRC. Cases can also be brought to it by lawyers and NGOs. The Commission also noted that issues raised by children and young people are likely to be automatically classed as 'strategic' as there are so few of them.

### ***Reasons why children and young people do not complain***

Stakeholder perceptions of why children and young people do not complain were numerous and ranged from children and young people not knowing about their rights (OSIC, ICO, MWC); children and young people not having enough information about complaints systems (ICO), and children and young people not believing that making a complaint would change anything:

*They don't believe it will make a difference, they feel vulnerable and I think they don't understand the systems. (SPSO)*

Other reasons cited were not being confident enough to raise issues (SPSO) and inaccessible systems which appeared to have been designed with adults in mind (ICO), or which simply did not resonate with the way in which children prefer to engage (Local Authority 1):

*There's always someone they can offload to. I don't think they ever think of formalising a complaint through a proper process. Everything is an instant response. Going through a very formalised process where there is an investigation and you've got to wait for a report... For a lot of these kids, they want an instant result... and that's all anecdotal. I've got no evidence... We are trying hard to reach out, but children and young people are naturally reticent about complaining. (Local Authority 1)*

The point was also made that it can take confidence and experience to make a complaint and that this is likely to be much more difficult for young people:

*Complaining about your teacher must be quite frightening and you probably want your mum or dad to do it on your behalf. (SPSO)*

These comments echo many of those made by children and young people themselves.<sup>103</sup>

### ***Enforcement powers***

Other stakeholders raised the issue of enforcement powers. The EHRC has a range of enforcement powers and uses these strategically where policies or practices may lead to widespread or serious breaches of equality laws or the Human Rights Act. The EHRC can support individuals to take legal actions that involve discrimination claims (or claims of discrimination with human rights). It can also carry out Inquiries and Investigations or can raise Judicial Reviews in its own name. It can also use legally binding Section 23 agreements under which a body commits to certain actions set out in an agreed plan, which will be monitored by the Commission.

Enforceable outcomes were raised by SIC in relation to the Commissioner's new powers. SIC spoke of the specialist nature of complaints about access to information and noted that this is covered comprehensively by specific powers held by the SIC:

*Even if there were scope, it is a highly specialised area and there is likely to be little benefit to the complainer because it would introduce unnecessary complexity. For example, even if SCCYP were to investigate, it does not have the powers to make an enforceable decision that there was a breach of FOI law: only the SIC has those powers, so only the SIC could achieve an enforceable outcome for the complainer. Nor would it remove the right of the complainer to submit an appeal to the SIC in addition to any action being taken by SCCYP.*

The Commissioner's extended powers will not be directly enforceable in this way. Rather, the Commissioner will, following an investigation, be able to make a series of recommendations. These recommendations will be accompanied by a requirement for the service provider to respond. He can also choose to lay a report before the Scottish Parliament.

Other stakeholders with non-enforceable powers, most notably the SPSO, reported that these powers were still highly effective. They reported that where recommendations for change were made as a result of an investigation, it would be exceptionally rare for these recommendations not to be met. If this did occur, the SPSO would also have the ability to lay a report on the matter before the Scottish Parliament.

Timescales were also highlighted by stakeholders as an important consideration. The Equality Act 2010 states that a case must be raised in court within six months of the discrimination taking place. This is an important point, as any

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<sup>103</sup> Children's Parliament (2015), *Together We Can Fix It*.



delay could result in the complainant not being able to pursue a case, although the EHRC would still be able to consider the use of its other powers.

### ***Choice and the provision of information***

The EHRC, however, also considered that it is important to give children and young people a choice in how and where they take their complaint forward, and referred to the Office of the Charity Regulator (OSCR) by way of example. When it received a complaint of possible discrimination by a charity, it told the complainant that they had an option to consider a discrimination claim rather than (or as well as) a complaint to OSCR.

*If an issue that involved discrimination or human rights is brought to SCCYP, there would be a need to advise that child or young person of the different options that are available to tackle an issue. That would include advising them that they may have a right to take legal action in relation to discrimination. The decision about what route to take should be one for the child or young person.* (EHRC)

*You have to agree how you make that work, without bouncing people back and forth.* (EHRC)

Providing information will allow the complainant to consider carefully which route to take:

*What if this individual actually wants to go to you – they might just want to go to you and not go to anyone else. You should be signposting, but they have to make that choice.* (Local Authority)

There will inevitably be some tension in ensuring choice through the provision of different options while calling for simplification and the total prevention of overlap, both of which are important issues for children and young people. Realistically, this is not always possible and not always desirable.

### ***Signposting***

Stakeholders highlighted the importance of clear signposting arrangements and close working relationships with other bodies in order to ensure complaints are correctly routed.

The Care Inspectorate has signposting arrangements with other organisations, including Childline, and stressed that it was important that children are not confused about who to turn to if there is a problem:

*We could do a lot of harm that way. I'm worried about unintended consequences. How do we involve children more without muddying the water around existing procedures... it could confuse children about who to phone and at what point... I'd hate children in a crisis not to know who to*

*contact.*

(Care Inspectorate)

*We do have memoranda in terms of making sure that we are signposting people in the right direction, so we often have memoranda of understanding that sets out 'this is what we do' and 'this is what you do' and then we can all signpost the right way. What we do know is that in terms of joint working, our legislation is highly restrictive and I think that the combination of our legislation may be tricky just in terms of the actual practicalities. (SPSO)*

It was clear that those interviewed were acutely aware of the need to inform other bodies if they felt that a case was relevant and would equally expect to be alerted to matters of relevance to them. Co-operating, consulting and informing between regulators is explicitly laid out in various MOUs (for example, with the Care Inspectorate and the Mental Welfare Commission. These statutory requirements are laid out under s. 96 of the Public Services Reform (Scotland) Act 2010 and s. 8a of the Mental Health Care and Treatment (Scotland) Act 2003.

*We would go in if there was a specific issue brought to our attention. We wouldn't go in as a matter of course. The Care Inspectorate might notify us, especially where there was particularly a human rights issue.*

(Mental Welfare Commission)

Many of those interviewed felt that the Children's Commissioner's office provided a unique approach which could complement their work by helping to support children and young people taking forward a complaint through existing complaints-handling and/or investigatory processes, including local processes.

*What is different about the Children's Commissioner's office is that you cover all these issues and can see the bigger picture. These organisations are actually quite narrow in terms of scope and function. You can track and do trend analysis and help to pinpoint the problem. (Local Authority 1)*

*If a case came to you about a child with a mental disorder and fell within the sorts of things we could investigate, we would welcome if you asked if it was something the Commissioner would investigate. Even below the investigatory level – you may well come across an issue from a young person or carer/parent issues – difficulties and issues are bringing up around mental health. A person struggling with service access – or what is around much lower key – doesn't get to an investigation stage. We've got this one case – does this seem unusual to you? (Mental Welfare Commission)*

*You'd be having a holistic view of this whole entire experience for the child. That's actually quite different from the role of other bodies. It's quite unique.* (Local Authority 1)

### **5.3 How stakeholders envisaged working with the Commissioner's office**

Stakeholders were generally supportive of the Commissioner's new role and keen to find ways to work collaboratively. Stakeholders expressed a desire to develop detailed Memoranda of Understanding with the Commissioner's office, in order to ensure clarity of roles and avoid duplication of effort.

The Care Inspectorate wanted to explore how an MOU with the Commissioner's office would work. The suggestion was that:

*It would be good to develop a draft MOU for the first six months and see how it works. The spirit of the Act is to advantage young people so the MOU cannot be restrictive and stop agencies from working to the advantage of young people.*

The Mental Welfare Commission agreed, stating that it had various MOUs with various bodies to ensure they were 'not tripping over each other'. Others spoke of the need to clarify functions within an MOU:

*I see you as one of our closest partners in all of our work because the mandates are so complementary. I think it would be useful to have an MOU so that we can have very clear processes for how things are decided – to avoid duplication and to reflect the functions and restrictions that both of us have.* (SHRC)

Stakeholders also felt that these MOUs would need to be accompanied by regular contact with the Commissioner's office and the development of good working relationships with other key bodies (such as local authorities). This would help the Commissioner when attempting to facilitate a child/young person's access to a particular complaints route.

### **5.4 Key findings from stakeholder interviews**

A number of learning points emerged from speaking with stakeholders:

- 1) Children and young people generally do not currently approach existing complaints bodies and regulators to raise a complaint. While parents may bring complaints on their child's behalf, it is very rare that a child or young person will bring a complaint directly. Stakeholders would welcome more complaints from children and young people.

- 2) Stakeholders felt that one of the reasons children and young people didn't complain to them was that they did not always know about their right to do so.
- 3) Stakeholders felt that current complaints systems were complex and difficult for children and young people to navigate, particularly where multiple issues needed to be resolved. Clear signposting support, and an unbiased presentation of options, was vital in helping children and young people (and those supporting them) to know who could best help them.
- 4) Complaints that are made by children and young people are often done so informally to people they trust. While this can help them resolve their difficulties quickly, it can mean that complaints are not formally logged and learning from these complaints is lost.
- 5) There was a recognition that the Children's Commissioner had a distinct role to play and that giving children control in how their complaints are handled is important. It provides them with a degree of ownership over their story. The general view was that this is what makes a Children's Commissioner's office unique and why its place in the complaints and regulatory landscape is essential. The findings from the Children Parliament also underline this point.
- 6) All stakeholders expressed a willingness to work closely with the Commissioner to ensure that children and young people are better able to pursue complaints in future.
- 7) While the restriction on the Commissioner duplicating the work of other bodies had the potential to be restrictive, stakeholders felt this could be mitigated through building strong working relationships with existing complaints bodies and regulators and effective Memoranda of Understanding. In the main they emphasised the need to find practical ways of ensuring that functions will be exercised in a complementary manner that delivers the best outcomes for children and young people. The question is whether the Commissioner's tightly restricted legislation allows for such an approach to be taken.
- 8) In addition to carrying out investigations, stakeholders could see a role for the Commissioner in supporting children and young people in bringing their complaints to existing complaints bodies and regulators.

## Chapter 6. Views of Children and Young People and Those Working With Them

### 6.1 Introduction

While the primary purpose of this mapping exercise was to examine the existing complaints and regulatory landscape in Scotland and to explore where the Commissioner's extended powers fit within this broad framework, the Commissioner felt that it was important to ensure that the views of children and young people and those working with them were not lost in this process.

This was achieved by:

#### Consultation with Children and Young People

Commissioning the Children's Parliament to undertake a consultation with a group of 15 children and young people aged from nine to 14. The aim of the event was to explore children and young people's views/experiences of making complaints and to identify any barriers they might experience in doing so. The full Children's Parliament report has been provided separately.<sup>104</sup>

#### Consultation with practitioners via a round-table event

Hosting a round-table event with 20 practitioners from a range of organisations working with children and young people. The aim of this was to seek the views of practitioners in relation to the barriers children and young people might experience in bringing a complaint. Practitioners were also asked to outline what they thought a child-friendly complaints process might look like and how the Commissioner could help children and young people access this. The event was followed by an online feedback survey to participants, which gathered additional views from a range of practitioners. A briefing report brought together the main learning points from both the round-table event and the online survey, and these are reflected below.<sup>105</sup>

This section of the report highlights the key findings from both these activities.

### 6.2 The value of complaining

The children and young people who participated in the Children's Parliament consultation were clear that the right to complain was something they valued highly. They recognised that pursuing a complaint could help build their confidence, 'sort out people's problems' and 'make (our) voices heard'. They felt that it was important to be able to complain as this 'links in with some of our rights'. They went on to say that 'it is also important because it teaches children

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<sup>104</sup> Children's Parliament (2015), *Together We Can Fix It*.

<sup>105</sup> 'Supporting Children and Young People in Raising Complaints', Findings from the Round-Table Event, 25 February 2015; available on request.

to respect others and adults too'. However, they also identified barriers to bringing complaints.

### **6.3 Barriers to complaining**

#### ***Not being taken seriously or being listened to***

The children and young people felt that adults do not listen properly to children and do not take children's concerns seriously. This was seen as a major barrier. In some cases this could lead to a child or a young person feeling that adults were in some way trivialising an issue of importance to them or that their complaint was somehow seen as being of lesser value than that of an adult. This could be off-putting to the child or young person and had the potential to prevent them from bringing a complaint in future.

#### ***Adults not fully understanding the problem or making incorrect assumptions***

Practitioners working with children and young people identified that adults' mistaken assumptions could sometimes prevent a problem being successfully resolved for a child or young person. The example of a BME child experiencing bullying at school was given. A practitioner had worked with the child's school to try to resolve the child's difficulties, but the fact that the bullying was racially motivated wasn't factored into the school's response. As a result, the core issue wasn't dealt with. Practitioners felt that this could point to a lack of training, both in handling complaints and in children's rights. The children and young people suggested that this was because adults struggle to see the world through the eyes of children and that systems are designed by adults, for adults.

#### ***Lack of control***

The children and young people said that it was important for them to retain power and autonomy as much as possible when making a complaint, i.e. they should not feel that in making a complaint, a matter would be completely taken out of their hands. Neither should assumptions be made by adults about whether or not a child of a particular age had the ability to contribute a view. They felt that currently adults do not work with children to find solutions that work and felt that they should be active participants in addressing problems and finding these solutions: 'Children have opinions too and should not be overlooked just because of their age.' They pointed out that 'children's ideas are often as good as – or better than – adults' ideas'.

Practitioners were also clear that children and young people are often best placed to identify a workable solution to a problem affecting them (with some exceptions – for example, where it may be harmful or unfair to the child or young person to expect them to do so). The children and young people also expressed concern about nothing being done when children and young people

complain. Even where their complaint was taken seriously, there was frustration at being kept out of the decision-making process, saying that 'They [the adults] usually make decisions without asking us – we get told later.'

### ***Power imbalances***

Along with the need to retain as much control of the issue as possible, the power imbalance between children or young people and adults was something that the children and young people were acutely aware of, and this could influence whether or not to bring a complaint. Before considering whether or not to bring a complaint, they tended to assess the potential for negative repercussions. For example, where a child or young person has an ongoing relationship with a person they wish to complain about (such as a teacher, social worker or care worker), they must also factor in whether, by complaining, they are likely to jeopardise that relationship or whether they are likely to be penalised in some other way for doing so (for example, will they be treated differently as a result of their complaint?). Where there is a fear that it will result in such changes, children and young people may choose not to pursue a complaint further. They talked about 'being scared' and 'getting frightened things will go wrong'.

Practitioners echoed this point, suggesting that children and young people may be worried about the consequences of raising a complaint and that within a culture of 'not grassing' they may fear retribution from the person being complained about.

Practitioners also highlighted that there could be further difficulties – for example, where a parent might assist a child in bringing a complaint. The child was satisfied with a solution offered, but the parent may still want to pursue the complaint.

### ***Not knowing about their rights***

Practitioners suggested that children and young people 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 how to do so. This is particularly the case for those with learning disabilities, asylum-seeking children and younger children.

### ***Not knowing who to complain to***

The children and young people identified a further barrier in that they do not always know who to complain to or how to do so. They were particularly concerned about the prospect of taking a complaint outside of their local area. Practitioners also highlighted that where numerous agencies were involved in a child or young person's care, it was often not clear which professional should take the lead in finding out the child or young person's views. This could mean that the child or young person's views may not be sought.

Practitioners identified that knowing where to complain was particularly difficult for children and young people with complaints involving multiple services (for example, education or health). They also highlighted the difficulties for a child or young person when a formal complaint is upheld and nothing subsequently happens. This meant that the child or young person was likely to become disillusioned and therefore unlikely to want to complain again.

### *A poor experience can deter young people from complaining*

Practitioners also highlighted that for some BME communities, the (poor) experience of one child or family in complaining can actually act as a deterrent for the whole community, so it is important for complaints be dealt with properly in the first instance.

### *The language of complaints*

Practitioners also recognised that the word 'complaint' could be off-putting to children and young people, whose focus might be on problem-solving or finding a solution to their difficulty. There was a perception by practitioners that bodies handling complaints could often focus more on following the complaints process/bureaucratic structures, rather than ensuring a child was actually listened to. Practitioners suggested that, in some cases, following a complaints process could actually delay resolution for a child or young person.

## **6.4 Issues for adults to consider**

### *The right to privacy*

The children and young people were concerned that information was often shared without their knowledge or consent. Practitioners also felt that for the children and young people they worked with to complain confidently, they had the right to expect the child or young person might want to keep some of their information private (for example, if they had a hidden disability).

### *The impact of a decision*

Practitioners also highlighted that decision-makers may not always think through the broader impact of a decision on a vulnerable child or young person. One practitioner gave the example of a young person who had experienced domestic abuse being moved to live in unsuitable temporary accommodation. The practitioner said that this resulted in the young person having not just a housing problem, but also having to attend a new school while covered in bed-bug bites. This caused further stress and anxiety for the young person as their appearance put them at risk of bullying at school. Furthermore, there needs to be an awareness of how quickly harm is done to children and for effective and timely remedies to be found to resolve the issues raised.



### *The importance of a trusted adult*

Children and young people said they wanted to have someone they trusted to bring their problems to. They felt this would give them greater confidence to complain. This could either be another young person (for example, resolving a problem through peer mediation) or an adult. Regardless, children and young people thought it was important that they should have a good relationship with whomever they chose to bring their complaint to. The limited availability of advocacy services was also identified by young people as a factor in a young person deciding whether or not to pursue a complaint.

### *What this tells us*

These issues might explain, 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).

## **6.5 What would a child-friendly complaints system look like?**

### *What children and young people said*

Children and young people suggested that what would help them would be to:

- Develop their own skills to resolve issues for themselves, whenever possible.
- Have more opportunities for peer mediation.
- Know where to go to complain and have a range of choices about where to take complaints.
- Take their complaints to people they know and trust.
- Have confidence that adults will respect their complaints and see the world through their eyes.
- Know something will be done about their complaint.

They also reported that they wanted adults to help create a culture where children and young people were encouraged to complain. They saw 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.

### *What practitioners said*

- All complaints processes need to be accessible and clear.
- Children and young people should easily be able to establish who to bring their complaint to.

- Children and young people often want to avoid complaints being escalated and they would prefer for them to be resolved at the lowest level possible.
- Practitioners pointed out that in their experience, sometimes what a young person really wanted was to be heard and for someone to say sorry.
- Supporting children and young people in bringing a complaint was seen as key and this support could help ensure that a child or a young person is heard and help children and young people express what they want to happen, as well as managing the expectations of a child or young person. It was also seen as being important in helping children and young people better understand complex procedures and the range of options open to them. It was emphasised, though, that this support needed to be provided in a way that was neutral and did not seek to influence the child or young person's decision in any way.

## 6.6 The Commissioner's role in supporting children and young people to access existing complaints processes

### *What practitioners said*

- Ensuring that children and young people and their carers were aware of children's rights and what might constitute a rights violation. In order to complain, children and young people need to know that there is a problem.
- Providing accessible information about existing complaints processes (for example, when and how to access these) to children and young people (and those supporting them).
- Directing children and young people to the most appropriate complaints route or support organisation. This involvement could range from the straightforward provision of contact details to providing a 'warm transfer'<sup>106</sup> to another organisation.

In terms of added value, it was felt that the Commissioner's involvement was likely to ensure that children and young people would be taken more seriously by the bodies they were complaining about. They also suggested that the Commissioner might be able to act as a catalyst in resolving an issue for a child

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<sup>106</sup> A 'warm transfer' is a child-friendly process whereby one body (e.g. the Commissioner's office) could provide an introduction (with the child/young person's consent) to another body. This might be when it is clear that the child/young person's complaint sits firmly with another body, yet they have chosen to bring it to a particular agency. A 'warm transfer' could take the form of a meeting or three-way telephone conversation, including the child/young person and both agencies. This is designed to ensure a smoother transition for the child/young person and lessen the risk that they will drop their complaint.

or young person (for example, where a situation had reached stalemate). Some practitioners felt that the Commissioner should work with services to improve the accessibility of their complaints services to children and young people.

## **6.7 Moving forward**

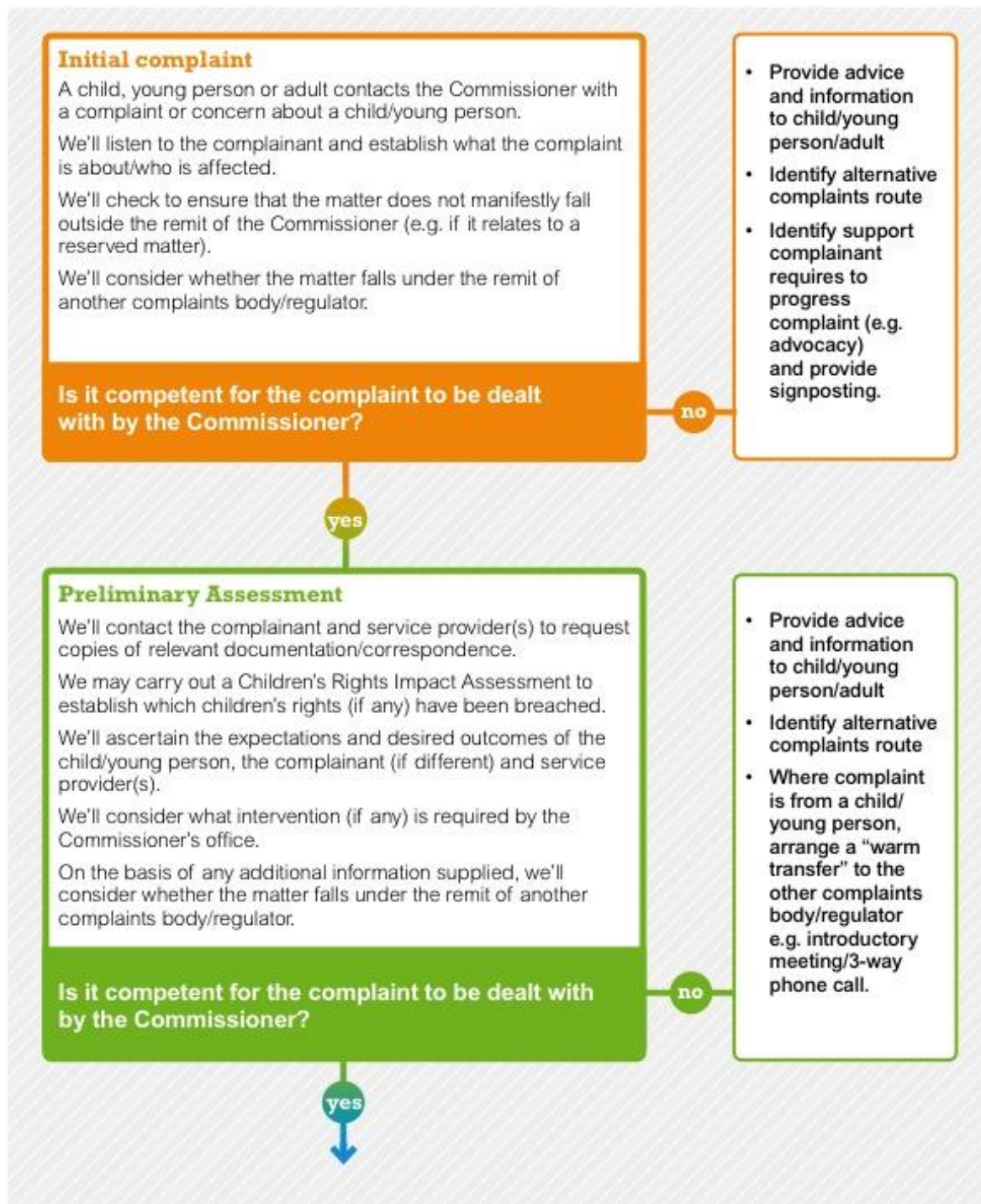
Many of the practitioners consulted expressed a desire to engage with the Commissioner's office on an ongoing basis, to help ensure that any new processes and procedures adequately reflect the needs of the children and young people they work with. The Commissioner has also committed to involving children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

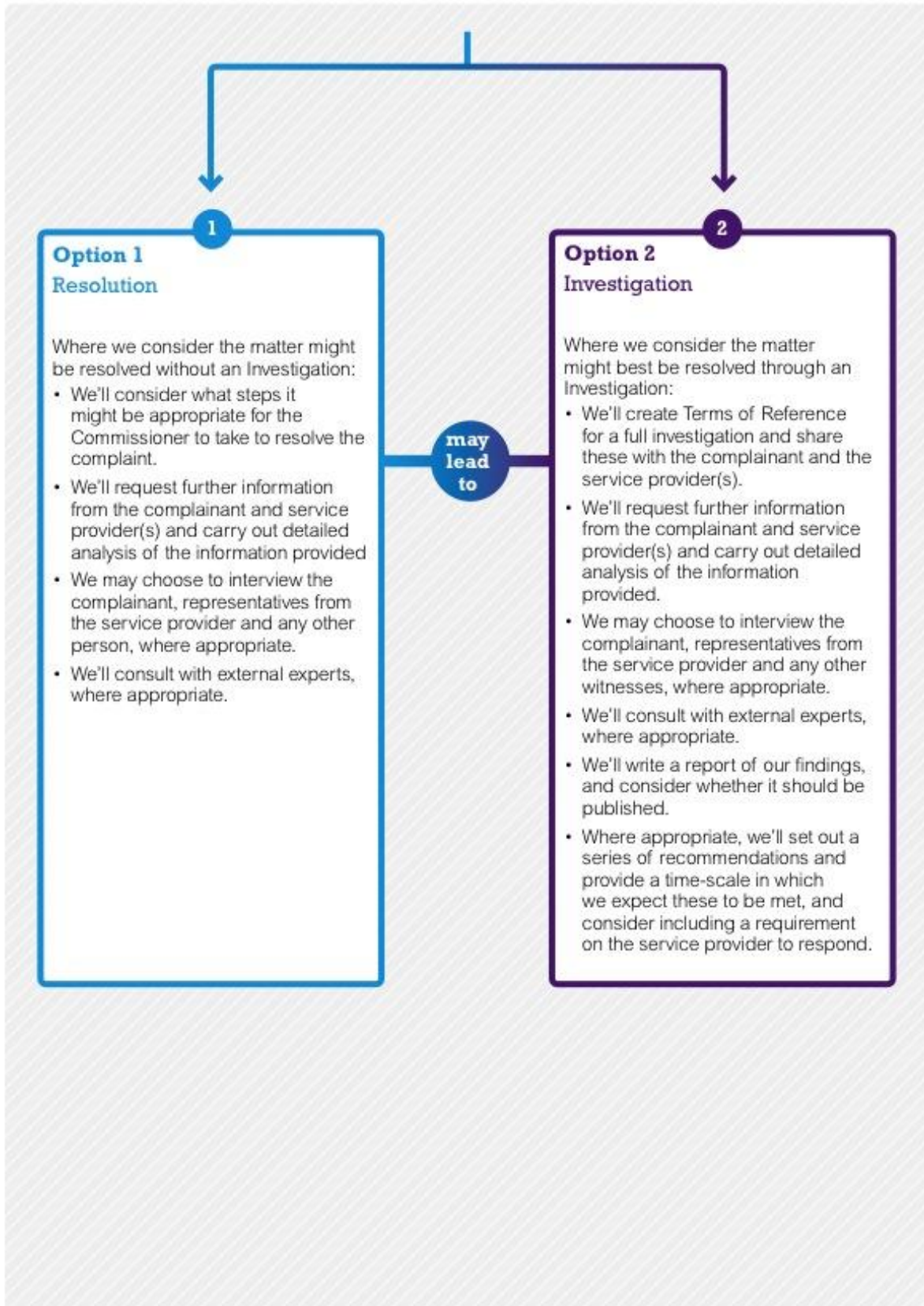
The learning from both the consultation with children and young people has helped to inform the development of the Commissioner's Model of Operation, which is outlined in the following chapter.

# Complaints handling process



Scotland's Commissioner for Children & Young People





**Option 1**  
**Resolution**

Where we consider the matter might be resolved without an Investigation:

- We'll consider what steps it might be appropriate for the Commissioner to take to resolve the complaint.
- We'll request further information from the complainant and service provider(s) and carry out detailed analysis of the information provided
- We may choose to interview the complainant, representatives from the service provider and any other person, where appropriate.
- We'll consult with external experts, where appropriate.

**may lead to**

**Option 2**  
**Investigation**

Where we consider the matter might best be resolved through an Investigation:

- We'll create Terms of Reference for a full investigation and share these with the complainant and the service provider(s).
- We'll request further information from the complainant and service provider(s) and carry out detailed analysis of the information provided.
- We may choose to interview the complainant, representatives from the service provider and any other witnesses, where appropriate.
- We'll consult with external experts, where appropriate.
- We'll write a report of our findings, and consider whether it should be published.
- Where appropriate, we'll set out a series of recommendations and provide a time-scale in which we expect these to be met, and consider including a requirement on the service provider to respond.

This model of operation 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, including being considered for full investigation. The model has been developed to provide clarity for the Commissioner and his staff, but also to ensure that any complaints brought to the Commissioner are dealt with in a fair and consistent manner. 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.

Before looking at each stage of the model in more detail, it is worth considering how complaints are likely to first arrive at the Commissioner's office.

As a general rule, complaints are not presented as neat, comprehensive and clearly defined packages of information. Those bringing complaints to the Commissioner may be under a great deal of stress, be angry and/or upset. As such, incomplete information is likely to be presented to the Commissioner, at least in the initial stages. For children and young people, contacting a formal body to raise a complaint can in itself be a stressful experience. It is perhaps understandable, then, that information that is crucial to the resolution of a case may be omitted at this early stage as the child or young person (or person supporting them) may find it difficult to articulate clearly the nature of their problem. Equally, they may not recognise the significance of certain information.

Children and young people may have no understanding at this stage of how their rights have been breached, but will know instead that something is 'wrong' or that they have been treated unfairly.

In this context, the Commissioner has created a model of operation that allows time and space for this initial exploration of a child or young person's complaint, but that also ensures that urgent issues are dealt with swiftly.

### **Key stages of the model of operation**

There are three main stages in the Commissioner's model of operation. These are designed to enable the Commissioner's proper exercise of the extended investigatory function in a way that is both transparent and fair.

The Commissioner's office has learned from the experiences of Children's Commissioners' offices and complaints-handling bodies in other jurisdictions – particularly Northern Ireland and Wales, where they have been handling individual complaints for many years – that the reality of complaints-handling is not always as linear as any staged model of operation suggests. For example, it may be that a matter is considered at the initial complaint stage and proceeds to

the next stage, but that in light of further information that emerges, the case is effectively restarted. As previously stated, this is linked to the indeterminate nature of complaints and the fact that the 'presenting issue' is not necessarily the central issue in the complaint, or possibly not the only issue requiring attention. This may be revealed only in the course of further information-gathering and discussion with complainants and service providers. For this reason, it is assumed that there will need to be some flexibility in the Model of Operation, with the ability for a case to move forward or back a stage as and when required.

## 7.1 Initial complaint

When a child or young person (or a person acting on their behalf) first contacts the Commissioner's office, staff from the Complaints and Investigations team will try to establish what the complaint is about and who is affected. They will note down basic information, including the name and contact details of the complainant, details of any child affected (if these are different), details of any service providers and information about any complaints processes that may have already been explored.

It is important to note that this stage may be quite time- or resource-intensive, for the reasons previously stated – for example, complaints being presented in an incomplete or non-linear fashion. Equally, a child or young person may want to build trust with a complaints-handler before revealing the true nature of their complaint. With this in mind, a number of phonecalls or e-mails may be required before even the most basic information about a complaint is assembled.

At this stage, the Commissioner's staff will also try to establish whether the matter being complained about falls manifestly outside the remit of the Commissioner. The 2003 Act<sup>107</sup> provides for a range of circumstances where the Commissioner may not carry out an investigation. That is:

- where the complaint relates to a matter reserved to the Westminster Parliament;
- where the matter relates to a decision of the courts or a tribunal;
- where the matter is subject to live court proceedings or a tribunal.

The Commissioner's powers are also limited to assisting children and young people in Scotland up to the age of 18 (or 21, if they have ever been looked after by a local authority).<sup>108</sup>

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<sup>107</sup> 2003 Act, s. 7 (3).

<sup>108</sup> 2003 Act, s. 16 (1).

Part of the initial complaint process will include consideration of whether the matter is likely to fall within the 'proper functions of another person'.<sup>109</sup> In some cases, this will be clear from the outset – for example, where a complainant is in need of legal advice. In other circumstances, however, in order to establish this, and having regard to any Memoranda of Understanding that might be in place, the Commissioner's Complaints and Investigations team may discuss the case on an anonymised basis with that other person or body (unless this would be inappropriate for whatever reason). It is anticipated that in many cases reaching the Commissioner, this will involve him referring the complainant on to a local complaints process.

Where it is established that the other body has a remit to deal with a complaint, or if the matter is excluded under s. 7 (3) of the 2003 Act, this will be explained to the child or young person, or to the person acting on their behalf.

Where another complaints route is identified, the child or young person (or person bringing a complaint on their behalf) will be signposted to that body. In so doing, staff from the Commissioner's office may provide additional support (for example, finding local advocacy provision for the child or young person or identifying any other source of support). The Commissioner's office may also provide information relevant to the complaint (for example, providing a balanced assessment of the key children's rights pertaining to the child or young person's complaint).

Where there are any urgent child protection issues, these will be dealt with in accordance with the Commissioner's Child Protection Policy and Procedures.

Where it appears that a matter falls within the remit of the Commissioner, and it raises a relevant matter relating to the rights, interests and views of the child or young person, it will progress to the Preliminary Assessment stage.

### ***Case Study 1***

*A care worker contacts the office about a vulnerable young person (C), who has left care but has been unable to access appropriate support and accommodation. C had been placed in residential care outside her home local authority as there was no appropriate provision in her home authority, and lived there for several years until she left shortly after her 16th birthday. In the six months since C left care, she has been in and out of rented accommodation. There is a concern that she is being put at risk of sexually harmful behaviour. C wishes to stay in*

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<sup>109</sup> 2003 Act, s. 7 (2A).



*the area where she was in residential care as she no longer has any family ties in her home local authority and worries that she will fall into bad associations if she returns there. C's home local authority has offered to fund supported accommodation for C, but only in the home local authority area. The local authority area in which C is living refuses to provide or fund the services C needs in its area. The care worker says that C has not made an official complaint to her home and/or host authority and she is not keen to do so. She just wants to stay in the area she is in and can't understand why this isn't possible.*

***Does this fall within the remit of the Commissioner?***

While the matter is not excluded under s. 7 (3) of the 2003 Act, the young person has not yet explored local complaints routes and therefore the Commissioner would at this stage be unable to consider the matter under his extended investigatory powers.

From the young person's perspective, C has been clear that she does not want to pursue the matter through local complaints routes. The matter is further complicated by the prospect of having to pursue the complaint through two separate local authority complaints processes (the home and host authorities).

At this stage the Commissioner may decide to speak directly to C to find out more about her complaint and to explore why she has not chosen to pursue an official complaint.

While it is clear that the matter falls outside the investigatory remit of the Commissioner, there is still scope for the Commissioner to ensure a child-rights-focused approach is taken.

***A child-rights-focused approach***

A child-rights-focused approach is key to every piece of work that the Commissioner undertakes. This approach allows the Commissioner to effectively put himself in the shoes of the child or young person experiencing a difficulty. It allows him to look at an issue from a children's rights perspective, taking a holistic rather than a narrow approach, something that can be particularly valuable where a complaint has reached a stalemate of some kind. The Commissioner's work, and the legislation creating his role, is framed around the UN Convention on the Rights of the Child. The Convention sets out the minimum rights a child or young person should be able to expect to enjoy.

When considering a matter from a children's rights perspective, the Commissioner initially looks at whether two key Articles (sections) have been respected. The first is Article 3, which states that in all decisions being made

about a child or a young person, that decision should be based primarily on what is in that child or young person's best interests. The second is Article 12, which states that where a decision is being taken that directly affects a child or young person, the views of that child or young person should be sought and these should be taken into account in the decision-making process. The assessment of what is in a child or young person's best interests needs to be considered alongside other rights, in order to form a true picture. In the case of C, this would involve looking at:

- Article 20, which states that a child or young person who is deprived of his/her family environment has the right to special protection from the state.
- Article 27, which states that a child or a young person has the right to an adequate standard of living (this would include matters such as housing).
- Article 19 of the Convention provides a child or a young person with protection from violence or abuse.

The Commissioner may at this stage consider carrying out a Children's Rights Impact Assessment.

### ***Next steps***

Having assessed the issue from a child rights perspective, and having acknowledged that another body has a remit to investigate C's complaint, the Commissioner then has a number of options open to him. The first would be to provide straightforward signposting and information provision, providing details of the complaints routes open to C and letting her decide whether or not to pursue the matter further.

Given C's vulnerability, however, the Commissioner may decide to provide further support. This might involve researching local advocacy providers and/or identifying support organisations with expertise in other areas highlighted by C's complaint (for example, housing). This could be complemented by providing a 'warm transfer' to that body. Essentially, this would involve introducing C to the other body and ensuring she was happy before withdrawing from the process.

## **7.2 Preliminary assessment**

At this stage, the focus of the Commissioner's team will be on forming a clearer picture of the matter being raised, as well as engaging with all parties concerned, including the complainant and any service provider about which a complaint has been made.

The Commissioner's staff may ask for written documentation from both parties. They may also telephone or request a meeting with parties.

It is important to note that the Commissioner will do so in a non-partisan fashion, i.e. gathering information to allow him to form a balanced view, rather than taking a particular stance at this stage.

Part of this process will involve establishing the desired outcomes of all parties. When a complaint has been brought on behalf of a child or young person, it is particularly important to establish exactly what they want to happen (as this may differ from the viewpoint of the adult supporting them). The Commissioner's staff will usually speak directly to the child or young person to take account of their views, in accordance with Article 12 of the UN Convention on the Rights of the Child, unless an assessment is made that it is inappropriate to do so. This might happen, for example, where a matter is so distressing that consulting with the child or young person is likely to lead to further trauma for them.

When all information has been received by the Commissioner's office, in addition to carrying out detailed analysis, he may also decide to carry out a Children's Rights Impact Assessment (CRIA).<sup>110</sup> The CRIA is a tool developed by the Commissioner's office to help assess an issue or proposal from a children's rights perspective. It can provide a holistic view of a situation, in the context of the rights contained in the United Nations Convention on the Rights of the Child.

This can also help all parties identify and agree the key points of complaint, as well as moving towards identifying possible outcomes/solutions.

In order to ensure fairness and accuracy, it is crucial that this stage of the process is carried out thoroughly and in a child-friendly manner. This is both time- and resource-intensive, particularly where there is a large volume of information to be processed, such as where a complaint has been ongoing for a considerable length of time or where a matter involves multiple agencies.

It is important to state that, at this stage, the very act of clarifying the main points of complaint and presenting an issue from a children's rights perspective may be sufficient to move a complaint towards a successful resolution. It may also become apparent at this stage, on the basis of the additional information provided, that the matter is excluded under s. 7 (3) of the 2003 Act. If this is the case, this will be explained to the child or young person, or the person acting on their behalf, and further information and support will be provided, if appropriate.

If, on the basis of all the information available to him, the Commissioner concludes that the matter is highly likely to fall within the 'proper functions of another person', the Commissioner's Complaints and Investigations team will try

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<sup>110</sup> See <http://www.sccyp.org.uk/policy/cria> for more information about the Commissioner's Children's Rights Impact Assessment model.

to discuss the case on an anonymised basis with that other person or body (unless this would be inappropriate for whatever reason) and have regard to any Memorandum of Understanding which may be in place with that organisation. If appropriate, the child or young person, or the person acting on their behalf, will then be signposted to that body. Given that they are likely to have built up a relationship of trust with the Commissioner's office, and in order to smooth any transition to another complaints body, the Commissioner's staff may provide a range of support to enable them to do so. This could include providing information about the other complaints body and its processes, producing a Children's Rights Impact Assessment, organising and/or attending a joint meeting, or formally transferring the case over to the other body.

If the Commissioner is happy that the case falls under his competency, the complaint will move to the investigatory stage. Within this stage, there are two options open to the Commissioner.

### ***Case Study 2***

*D is 15 years old. She visits the office asking if her father can make her go and live with his family in Poland. Further discussion reveals that her boyfriend took a photograph of her in a revealing top. The photograph is not sexually explicit, but D normally wears very modest clothing, in keeping with her father's conservative religious principles (although according to D, neither she nor her mother shares those views).*

*While in class, D had read a text message from her mother reminding her of a dentist appointment. Her teacher noticed and confiscated her phone. While the teacher had the phone she looked through D's messages and found emails from her boyfriend and the photograph he took. The teacher showed these messages to the head teacher, who called D to her office for a discussion. The head teacher said that she was concerned about the content of some of the messages from D's boyfriend and considered that she should have a meeting with D's parents, despite D's pleas not to do so.*

*D's father is now threatening to send her to live with his parents in rural Poland. There had already been arguments between D's mother and father about the moral standards of young people in the UK and the freedoms D should have. D says that if she is made to move to her father's family she will not be able to have the education that she would have in the UK and go on to university, and in any case she does not want to leave her mother, brother and sisters behind and go*

*live with family members she has never met. She is also very unhappy about the head teacher's actions, but does not know what to do and is frightened to complain because of possible repercussions if she does stay in the country.*

### ***Does this fall within the remit of the Commissioner?***

As D has not yet explored local complaints processes, the Commissioner would be unable to carry out an investigation into D's complaints under his investigatory powers.

However, aside from a range of possible complaints requiring different remedies, there is a pressing issue – that is, the concern that D will be forcibly sent to live in Poland. There is a need therefore to urgently identify someone to help the family resolve their differences. This person needs to be sensitive to the cultural issues associated with this issue and skilled in mediation. D may also need to be provided with information about steps she could take to prevent her being removed to Poland against her will and/or what to do in an emergency situation.

D's complaint also highlights a range of issues, with a number of potential bodies to which she could bring her complaint. A number of issues may also require to be explored further. For example, how old is D's boyfriend? If he is significantly older, this may in some way explain the teacher's concern. In any case, D will need information about the remit of each complaints body and an indication of possible outcomes in order to decide where best to bring her complaint. For example, while she would have the option of raising the complaint with her local education authority, she may also want to pursue a complaint against her individual teacher with the GTCS. She may also need reassurance that, in complaining, she will not be jeopardising any future educational plans.

As the matter may relate to a potential breach of data protection, D may also want to consider raising a complaint with the Information Commissioner's office, where it is appropriate to do so.

So, while the complaint falls outside the Commissioner's investigatory remit, there is still scope for the Commissioner's involvement and the adoption of a child-rights-focused approach to D's issue.

### ***A child-rights-focused approach***

In the context of the UN Convention on the Rights of the Child, again, the two main considerations would be Article 3 and Article 12. That is, are decisions being taken about a child or young person being done so that child or young

person's best interests, and are the views of the child being sought and taken into account in any decision-making process? Alongside this, however, are a number of other key rights. These include:

- Article 13, which states that a child or young person has the right to freedom of expression.
- Article 14, which provides for the right to freedom of thought, conscience and religion.
- Article 15, which provides for a right to freedom of association.
- Article 16, which states that a child or young person has a right to privacy.

There are further children's rights that may be of relevance to D's situation:

- Article 5 of the Convention states that a child or young person has the right to appropriate direction and guidance from their parents, consistent with their evolving capacities.
- Article 7 states that a child or young person has the right to know and be cared for by their parents (with some limited exceptions).
- Article 9 states that a child or young person has the right not to be separated from their parents unless it is in their best interests to do so.

All these rights will need to be balanced against each other in order to form a clearer view of D's situation. Again, a Children's Rights Impact Assessment may be a helpful tool in doing so.

### ***Next steps***

While the Commissioner will have a role in identifying the complaints routes open to D, the first priority must be in ensuring the safety of D. This might involve raising a child protection concern through the local social work office. The Commissioner might also have a role in safety planning for D and seek advice from a specialist body about steps a young person can take when concerned about being forcibly removed from a country.

There is also a need to consider how D's family can best be brought together to discuss the matter constructively. This might involve the Commissioner identifying a local organisation offering family mediation. The Commissioner might also want to identify some local support for D. This might include, for example, an advocacy or support organisation. The Commissioner could also help D access these.

In exploring complaints routes, the Commissioner will be able to help D make an informed choice about the various complaints routes available. Where appropriate, he may also support D in accessing these routes.

## 7.3 Resolution/Investigation

### Option 1: Resolution

Where the Commissioner is convinced that the matter has the potential to be resolved without recourse to an investigation, and it is in a child or young person's best interests to do so, then Section 7 (5) of the Act (as inserted by the Children and Young People (Scotland) Act 2014) offers an opportunity to attempt that, without a formal investigation. However, attempting resolution in this manner does not preclude the Commissioner from subsequently carrying out a formal investigation.

Activities at this stage are likely to include requesting further information from all parties and further in-depth analysis. The Commissioner and his team may choose to interview the complainant, representatives from the service provider and any other person, as appropriate. Where it is thought helpful, the Commissioner may bring together key people in order to find a child-focused solution. The Commissioner may also consult with external experts, where appropriate.

The aim at the end of this process is to find a solution to the complaint that ensures the child or young person's rights are protected. Where possible, any solution agreed should also reflect the views of the child or young person. For example, the child or young person might seek an apology or to be placed back in the position they would have been in had their complaint not arisen. They may want a decision to be overturned or for a matter that has previously been considered to be looked at again.

It is anticipated that the vast majority of complaints reaching the Commissioner's office and not being resolved at the Preliminary Assessment stage will be resolved now.

However, at any stage in this process, it may become apparent that the early resolution of the child or young person's complaint is neither likely nor possible. The Commissioner may then decide that the only option available is to carry out an investigation.

### Case Study 3

*You are contacted by a worker on behalf of E, who is 15 years old. E has been in trouble at school recently. She has been told by some of her teachers that she is disruptive and she is convinced that they no longer want her in their class. On a number of occasions she has been sent home from school early. This is something that appears to be*

*happening more frequently. Yesterday, she was told by the head teacher that she should not come in today in order to 'cool off'. She has not been formally excluded. The worker is concerned that E is missing so much education, particularly when she has exams coming up. E has told the worker that she's considering leaving school as soon as she's able to.*

### ***Does this fall within the remit of the Commissioner?***

Yes, there is the potential for the Commissioner to investigate this matter under his extended powers. E has previously submitted a complaint about the same issue to the local education authority; this was not upheld, however. The local education authority is adamant that it has no case to answer and accuses E of making up the complaint. E says that the situation hasn't improved and that she is still missing classes.

Having established that E has no additional-support needs (in which case the ASNTS might be considered), the matter would be something the Commissioner could formally investigate. 'Informal exclusion' is an education matter that would fall outside the remit of the SPSO. Other appeals routes pertaining to school exclusion are not open to E as she has not formally been excluded from school.

### ***A child-rights-focused approach***

In accordance with the UN Convention on the Rights of the Child, there are a number of key rights issues raised by E's case. As with the previous case studies, the two key rights to be considered are Article 3 and Article 12 of the Convention. Article 3 states that where a decision is being made that affects a child or young person, that child or young person's best interests shall be a primary consideration in making that decision. Article 3 is of particular importance here because the actions of the school appear to be solely in its interests. It is clearly not in E's best interests to miss a significant proportion of her schooling.

Other rights relevant to E's case include:

- Articles 28 and 29,<sup>111</sup> which provide a right to education and for that education to be directed towards the development of a child's personality, talents and mental and physical abilities to their fullest potential.

Again, in order to ensure that full consideration is made of E's complaint, these rights will have to be considered and a decision made that is based around what is in E's best interests.

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<sup>111</sup> Key aspects of that right are reflected in the Standards in Scotland's Schools etc. Act 2000, ss. 1 and 2 (1).



### *Next steps*

There is a range of options that may be considered by the Commissioner. Having gathered all the available information, including speaking to E to ascertain her views, as well as to all agencies involved (where E consents to this), the Commissioner may decide in the first instance to seek a resolution (Option 1), rather than carry out an investigation (Option 2).

Given that E is in a situation that appears to be detrimental to both her education and well-being, the priority for the Commissioner would be in ensuring that all parties are brought together to try to establish a workable solution as soon as possible. The Commissioner would also have a role in identifying support for E and ensuring that the support was provided. The focus of this stage would very much be on finding practical solutions and ensuring E was able to attend school full-time. Again, a Children's Rights Impact Assessment may be a useful tool in setting out the various children's rights issues raised by E's situation.

Where a workable solution could not be achieved (for example, where the school or local education authority was reluctant to engage with the Commissioner, or where the Commissioner believed bodies were not working in the best interests of E), the Commissioner would have the option of moving to a full investigation. He would then be required to draft formal Terms of Reference.<sup>112</sup> He would have the power to compel the production of witnesses and/or documents,<sup>113</sup> and would produce a report, with recommendations.<sup>114</sup> The Commissioner may decide to lay this report before the Scottish Parliament.

### **Option 2: Investigation**

Where it is clear that the matter may only be resolved by means of an investigation, the matter will progress to that stage. The Commissioner and his team will develop clear investigatory processes and procedures to sit alongside this model of operation.

Once the decision to carry out an investigation has been taken, the Complaints and Investigations team will draft Terms of Reference and will share these with all parties (child or young person, other complainant and service provider). Where appropriate, a child- or young-person-friendly summary will be provided.

As with Option 1, the Commissioner's staff are likely to request more information from all parties and carry out a detailed analysis of the information provided.

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<sup>112</sup> 2003 Act, s. 8 (1)

<sup>113</sup> 2003 Act, s. 9

<sup>114</sup> 2003 Act, s. 11

The Commissioner's staff may also choose to interview the complainant, the service provider and any other witnesses. The Commissioner may look at wider policies and look at how an issue may be handled by different service providers. He may identify policy or legislative issues requiring change.

The Commissioner and his staff may also choose to engage an external expert, with particular expertise in the area, to provide comment.

As previously stated, under Section 9 of the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner has powers to compel witnesses and the production of documents from service providers.

The Commissioner has a duty to prepare a report of any investigation, which must include any recommendations made by the Commissioner as a result of that investigation. He may include a requirement to respond from the service provider with which the investigation was concerned, and may publish such responses received from service providers. The 2003 Act (as amended) makes detailed provision for such reports in s. 11, 13 and 14AA. This is the principal mechanism by which the Commissioner may exert influence in respect of the policies and practices of service providers as a result of investigations.

It is important to note for the purposes of this model of operation that the Commissioner has discretion as to whether to lay before Parliament and/or publish any report into an individual investigation.<sup>115</sup> Additionally, there is a specific duty on the Commissioner to ensure, so far as reasonable and practicable, that a report does not name or identify any child or young person referred to in the report.<sup>116</sup> As the Commissioner has a general power to lay before Parliament and publish any report on the exercise of his functions,<sup>117</sup> this may be used to bring to the attention of Parliament, service providers and the public any matters arising from the issues dealt with at any stage other than an investigation, so long as he complies with the provisions on anonymity of children and young people.

A further critical way in which the extended investigatory function will add value to the work of the Commissioner and to children and young people is the interaction of complaints and investigatory work with the other functions of the office, including policy development and influencing, research and participation. Through internal reporting and review, the findings in children and young people's cases will inform and enrich these other aspects of the Commissioner's work and further enhance the Commissioner's ability to effectively address

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<sup>115</sup> 2003 Act, s. 11 (5).

<sup>116</sup> 2003 Act, s.13

<sup>117</sup> 2003 Act, s. 12.

children and young people's rights concerns through casework, policy development and influencing, and promotional work.

## **Conclusion**

The Commissioner's model of operations for individual complaints is grounded in a children's rights approach and informed by a clear understanding of the needs of children and young people. The model is pragmatic and solutions-focused. The Commissioner is committed to supporting children and young people by facilitating access to existing complaints routes and providing the information and support they need in order to continue to fully enjoy their rights.

## Chapter 8. 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 this 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 rather complicated complaints-handing 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. In addition, despite overlapping mandates, we have identified gaps that can be filled by the Commissioner's extended powers.

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.

## Appendix 1. Methodology

The research was undertaken from December 2014 to May 2015, with a report submitted to Parliament at the beginning of May 2015.

This covered:

- An analysis of Scottish Parliamentary official reports, Committee proceedings and correspondence between the office and the Scottish Parliament and the Scottish Government, with an emphasis on the issue of non-duplication.
- Identification and mapping of complaints bodies, regulators and rights-based bodies in Scotland which can receive complaints from children and young people and whose remits may include the investigation of matters relating to children and young people's rights, interests and views.
- A review of legal advice provided to the office and an analysis of the governing statutes of bodies whose remits might overlap or duplicate the new powers of the Commissioner (in terms of the investigatory power and resolving cases without formal investigation).
- Gathering the views of identified stakeholders, including complaints-handling bodies and regulators, other Commissioners' offices, the wider children's sector and other key players.

A four-phased approach was adopted:

### **1) Desktop research (December 2014 to January 2015)**

- A review of relevant discussions during the Parliamentary process (including Official Reports, Committee evidence, correspondence with SCCYP and the Scottish Parliament and Scottish Government).
- A review of legislation/statutes setting up the relevant complaints-handling bodies and regulators and an exploration of the extent to which they take into account the rights, interests and views of children and young people.

### **2) Interviews with stakeholders (January 2015)**

- A letter was sent to all relevant regulators (in the week commencing 15 December 2014), detailing the purpose of the exercise and asking them to participate. Questions were developed during the week commencing 15 December and a discussion guide was based on these questions.
- Appointments for telephone interviews were set up for January 2015.

### 3) Stakeholder engagement (February 2015)

- A teleconference was held with the Children's Commissioner's office, the Scottish Government and representatives from the UK Children's Commissioners' offices.
- Wider stakeholder group engagement with representatives from the children's sector took place after the analysis of the interviews with complaints bodies and regulators. Identified stakeholders were invited to take part in a round-table discussion in February 2015. In advance of these events, questions were circulated to participants around children's engagement in complaints processes.
- The Children's Parliament was commissioned to undertake a consultation with a group of 15 children and young people aged from nine to 14. The aim was to explore their views and experiences of making complaints and to highlight any barriers to doing so.
- Analysis of the above.

### 4) Report write-up

Prior to completing the report, we liaised with those who had been interviewed to ensure that their views and opinions had been accurately represented and not taken out of context. We received considerable support at this stage.

### Scotland's Commissioner for Children and Young People – Mapping Exercise

#### Discussion Guide: Interviews with Key Stakeholders

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##### Introduction

In its last state examination of the UK Government, the United Nations Committee on the Rights of the Child recommended that the Scottish Government give the Children's Commissioner the power to investigate individual complaints on behalf of children and young people. Part 2 of the Children and Young People (Scotland) Act 2014 aims to fulfil that recommendation.

During the passage of the Bill and subsequent to it becoming an Act, it has become increasingly apparent to the Commissioner that there is a lack of clarity around the extent of the new powers introduced by that Act relating to individual investigations. Furthermore, there appear to be a variety of understandings around the meaning of a further provision introduced by the Act, which allows the Commissioner to resolve matters (that are competent for an individual investigation) to be resolved without resorting to an investigation.

The Commissioner has offered to undertake a mapping exercise for the Education and Culture Committee of the Scottish Parliament to help to clarify scope and interpretation of these new powers.

This interview will form part of that exercise and will be part of a wider project which seeks to investigate the current complaints and regulatory landscape as it relates to children and young people and their rights, views and interests.

##### The interview

- We anticipate the interview will last around **40-50 minutes**.
- Notes will be taken of the discussion and may be referred to in the final report.
- Part 2 of the Children and Young People (Scotland) Act is attached as an appendix.
- We will be presenting a report to Parliament in May and your organisation will be referred to in the report, but we will not be naming individuals. We will, of course, let you see the relevant sections of the report before it is submitted to Parliament.

## **Guide to the interview questions**

### **Your Role (10 minutes)**

1. What is your statutory basis for complaints-handling and/or investigations?
2. Do you have responsibility for the public-sector bodies only?
3. Do children and young people contact your office? If so, how many?
4. What sort of complaint is raised by or on behalf of children and young people?
5. Can you delegate any of your responsibilities?

### **Duplication - Investigations (15 minutes)**

6. Is your body able to investigate whether, by what means and to what extent a service provider has had regard to the rights, interests and views of children and young people, in making a decision or taking an action that affected that child or young person?
7. Do you perceive there are gaps in your service provision for children and young people?
8. What are you exempt from investigating?
9. How do you see the work you undertake fitting in with the new powers of the Children's Commissioner?
10. Do you see any scope for joint working with the Commissioner?

### **Resolving cases without formal investigation (15 minutes)**

11. Is there a role for the Commissioner to become involved on behalf of children and young people before a formal investigation is undertaken by your office? (Is this ruled out under the Act? 'matters that are competent for an individual investigation')
12. Do you have any other final comments?

Thank you very much for taking part.



### **Appendix 3. Glossary**

ADR Alternative dispute resolution

ASNTS Additional Support Needs Tribunals for Scotland

BME Black and minority ethnic

CAMHS Child and Adolescent Mental Health Services

CCfW Children’s Commissioner for Wales

CHP Complaints-Handling Procedure

CHS Children’s Hearings Scotland

CSA Children (Scotland) Act 1995

DPA Data Protection Act 1998

EAC Education Appeals Committee

EASS Equality Advisory and Support Service

EHRC Equality Human Rights Commission

EIRs Environmental Information (Scotland) Regulations 2004

EIS Environmental Information Regulations

FE Further education

FOISA Freedom of Information (Scotland) Act 2002

GTCS General Teaching Council Scotland

HE Higher education

HIS Health Improvement Scotland

ICO Information Commissioner’s Office

LGBT Lesbian, gay, bisexual and transgender

MoU Memorandum of Understanding

MWC Mental Welfare Commission

NGO Non-governmental organisation

NHRIs National Human Rights Institutions

NHS National Health Service

NICCY Northern Ireland Commissioner for Children and Young People

NPM National Preventative Mechanism

ODR Online dispute resolution

OPCAT Optional Protocol to the UN Convention Against Torture

OSCR Office of the Charity Regulator  
PECR Privacy and Electronic Communications Regulations  
PSED Public Sector Equality Duty  
RSL Registered social landlords  
SCRA Scottish Children's Reporter Administration  
SHRC Scottish Human Rights Commission  
SIC Scottish Information Commissioner  
SPSO Scottish Public Service Ombudsman  
SQA Scottish Qualifications Authority  
SSSC Scottish Social Services Council  
UNCRC United Nations Convention on the Rights of the Child  
UNCRPD United Nations Convention on the Rights of Persons with Disabilities