

Scottish Public Services Ombudsman response to the Call for Evidence by the Education and Culture Committee on the Children and Young People (Scotland) Bill

Background

The Scottish Public Services Ombudsman (SPSO) is the independent organisation that handles complaints from members of the public about devolved public services in Scotland. This includes almost all of the organisations listed in the schedules of the Bill¹. Under the Public Services Reform (Scotland) Act 2010, the SPSO was also given a lead role in improving the handling of complaints by public sector organisations in Scotland.

In responding to this consultation, I have concentrated on the section of the Bill which provides Scotland's Commissioner for Children and Young People (SCCYP) with an increased role in complaints handling. I also highlight that there is a need to consider how best to deal with complaints about the new obligations on public organisations in the bill.

Children and complaints – the SPSO experience

I would like to say a little about our experience of children, young people and complaints. In the last 18 months, amongst other issues, we have considered complaints about failures to protect children from bullying; to provide a teenager with appropriate psychiatric care for an eating disorder; decisions to remove respite care; and failures to properly investigate child protection concerns. We have looked at school admission arrangements and we have also had complaints from those unhappy that their involvement in their child's life has been limited in some way. As the organisation who looks at complaints from prisoners and about prisons, we can also take complaints from young offenders and have received complaints about how children visiting prison have been treated.

While these examples show they can be significant in content, the numbers we receive from children and young people are low. Child and early adulthood are similar to old age in that these are times of our lives when we are more reliant on public services. Care of the elderly and services provided to older people, particularly in the health service, remain a regular source of complaints to the SPSO. It is notable that we hear much less often about the services provided to and which impact on children. Almost without exception, complaints are brought, not directly by children and young people, but by parents and carers.

The question of why these groups, despite being significant users of public service, have such different rates of complaint to us is not one to which there is a simple answer. There will be positive reasons, for example, children and young people who receive high quality and appropriate service provision will not need to complain. However, it is notable that in 2012/13 only 5% of people who completed our equality monitoring form identified themselves as being under 24.

Barriers to children and young people complaining

I consider there are specific barriers in place which make it difficult for children and young people to complain. Some of this relates to age. It can take both confidence and experience to make a complaint about someone who has power over some aspect of our lives and while this is difficult for adults, it is likely to be more difficult for the young. Access to complaints systems is often designed with adults in mind and can prove intimidating and difficult for the young. The Children's Commissioner for England recently published a very interesting report on complaints from the point of view of young people. It highlights the problems faced and improvements that could be made to make the process more accessible.² However, it is also the case that in terms of services most likely to be used by children and young people,

¹ The one significant exception are police organisations.

² http://www.childrenscommissioner.gov.uk/content/publications/content_585

health, education and social work, the complaints landscape is not straightforward. There are multiple complaints routes and agencies with an interest in those complaints. The level of complexity of the system itself is likely to provide an additional barrier.

Multi-agency working and complaints

Since the publication of the Crerar and Sinclair reviews, significant work has been undertaken both by the SPSO and others to standardise complaints and streamline processes. Complexity remains. One driver of complexity is a direct result of multi-agency working. Multi-agency cooperation is essential to provide joined-up services focusing on the user rather than the needs of the organisations. However, when someone wants to raise a concern they may need to go through a number of different complaints processes because, while care may have been provided jointly, each organisation may still retain their own complaints process for their own area of responsibility. In November 2010, I wrote an article for Children in Scotland magazine and concluded: "Joint working provides many opportunities. A complaint dealt with well by an integrated service can result in improvements for the child concerned and for other children in a more holistic way than if different parts of the complaint had been dealt with by different agencies. Put simply, the opportunities for learning are greater if the responsibility is shared. For this to happen, the approach to multi-agency complaints should be integrated into the service at the design stage so that procedures – and the right culture – are embedded long before any problems arise."

This benefit has not yet been achieved. Complaints are often thought about not at the design stage but far too late in the process, sometimes only at the point when a complaint is made. The benefits set out in the bill of working together to support children will not be fully realised if we do not also accept that there need to be easy and accessible routes to raise complaints.

The new role of the SCCYP to pursue individual complaints

Having set out our concerns about complexity, it may now seem odd that I responded positively to the Scottish Government when they consulted about extending the role of SCCYP to include the ability of individual complaint. In my response to that consultation, I set out the administrative justice principles that should inform any system. These includes accessibility. I will simply refer the Committee to the points I made in detail³. In summary, while I was unable to comment fully because it was unclear at that stage what the role would be, I highlighted my concern at the low numbers of children and young people using complaints procedures and suggested this new role -- because of the visibility of the SCCYP amongst children and the skills they have developed in communicating with and representing children -- may help with that particular problem. While there are issues around a potential overlap with other complaints-handling organisations and how we work together, giving the SCCYP this role will hopefully allow them to investigate some significant individual issues; to highlight that children and young people can and should complain; and to develop the role they already undertake in providing information and support to those who would like to know how best to complain.

Resourcing the role

It should be clear that taking on a complaints-handling role will have a wider impact on SCCYP than may appear from the number of full investigations set out in the policy document. SCCYP will decide themselves what complaints it is appropriate for them to take forward. However, this new role will increase expectations of what the SCCYP will be able to do for individuals. People will see them as a place to go to pursue complaints. SCCYP will

³<http://www.spsos.org.uk/files/webfm/Media%20Centre/Inquiries%20and%20Consultations/2012/12%2009%2025%20Response%20to%20consultation%20on%20Children%20and%20Young%20People%20Bill%20all%20docs.pdf>

need to be able to explain why they will not deal with certain complaints and our experience is that this is not always an easy task. The role will also provide them with a clearer mandate to support children and young people who wish to complain. It is this aspect of the role that I feel may be particularly beneficial. It is important to note that this role will not be completely new. SCCYP staff already regularly provide helpful and timely information and advice to callers. However, their new role in investigating individual complaints will highlight this and drive demand for this advice and support role. This is a critical part of the role of all complaints-handling organisations and it is important that it is resourced as well as resource provided to actually take forward individual complaints.

Dealing with the overlap

The legislation currently says that SCCYP should not look at any issues which are “properly the function” of another person. This may be difficult to identify in practice. Their particular role is around failures to appropriately consider the rights, interests and views of children. In the consultation response to the Scottish Government we explained in more detail how we consider rights and apply that to cases. I do not repeat that here but it is the case that such failings would likely amount to service failure or maladministration, the categories which are the categories we judge complaints by. Our remit is broad and does cover most, though not all of the public sector.

SCCYP’s role will not be limited to the organisations under our jurisdiction and they will have a particular focus. However, it has to be accepted that it is not immediately clear from the legislation where the boundaries between their and our role will be. To be fair, this is not something that is easy to draft for and drafting too narrowly would restrict the role to the point where it may become impossible to use. It is likely the best approach is a pragmatic one. We have already been in discussion with SCCYP and other complaints-handling organisations and we all agreed on a need to work together to prevent as far as possible any confusion and to make sure we are signposting children and young people to the best and most appropriate organisations. We have had early discussions about how to do this in practice and I look forward to this continuing. As I have said above, complexity can be a barrier. However, we feel there may be benefits for improving accessibility for young people. It will be incumbent on complaints-handling organisations to work together to prevent the problems this could cause. This does not mean there will not be difficult cases or this will not cause certain problems. The final decision on how to weigh the benefits and disadvantages will lie with the Parliament. We are committed to working with others to make whatever system emerges as easy as possible for users.

Technical legislative issues

I would like to provide a few comments on the wording of the legislation itself. I am aware that organisations may have pockets of discrete information which when put together may indicate significant systemic failings but that there may be no clear structured way of sharing this information. We have agreements with regulators and others around information sharing and put as much information as we can in the public domain. We have made this searchable to allow anyone to access this. We are though, for very good reasons, subject to specific limitations on what information we can share. It is important that the public feel their complaints are treated confidentially. We are privy to significant amounts of personal information and know there need to be limits. For example, we have taken the very unusual step in a very small number of cases involving children and young people of either not publishing any information or not identifying the public organisation in the published information. In some council areas for example, simply identifying some characteristics of a school in that area would identify a child.

The following thoughts are reflections based on our legislation about how to balance the need to share information with the need to protect the interests of individuals.

Flexibility on reporting

The legislation as worded provides the SCCYP with the ability to publish some reports of completed investigations. There may be some benefit in giving them the ability, at their discretion, to share information from cases they received and considered but did not take further, subject of course to the need to protect the anonymity of the complainant(s).

Sharing information between organisations

In terms of sharing information, there are two sections under which we operate that balance sharing information and restrictions in interesting ways. At present, section 21 of our legislation the Scottish Public Services Ombudsman Act 2002 puts us under an obligation to consult with other UK ombudsman if we consider we have received a complaint which includes matters which could be under their jurisdiction. This was designed to deal with cross-border issues. These have not occurred to the extent that was anticipated so this section has not been much used. It could though be a model for a similar obligation on SCCYP and/or others to consult with each other when complaints may overlap to make sure the appropriate organisation is taking this forward. We would suggest an obligation should not be mandatory as this may be disproportionate but a positive indication that they may do so would likely help with some of the overlap issues mentioned above.

Another section which has been little used but may be a helpful model in this context is section 20 of our Act. Section 19 significantly restricts what information we may release and says that we can only do so for specified purposes. Section 20 allows us to release information to certain organisations if we consider there may be evidence which suggests that we are aware of information of particular importance to them because they have specific enforcement powers. At present, this section is limited to a very small number of organisations and circumstances. Our powers of gathering information appear to be more significant than those currently suggested for the SCCYP and I know there are general information sharing provisions in the legislation but would suggest these models merit some consideration. This may, in future, provide models for broader sharing within Scotland between complaints-handling and scrutiny organisations which balance the need to protect confidentiality while allowing important information to be shared.

Dealing with complaints about the duties on public organisations brought in by the Children and Young People (Scotland) Bill

The Bill creates a new role, the named person and there are new obligations on public organisations notably around creating a child support plan and co-operation. Any new duties placed on organisations raises the question of what do people do if they are unhappy with the way they are carried out. Many of the organisations are already under our jurisdiction and this may lead to complaints being brought to us. As noted above, the current landscape of complaint-handling provision means multi-agency working can be complex. This is particularly the case around interactions between social work, social care and health.⁴

We have been discussing the implications for us and the organisations under our jurisdiction with the Scottish Government. It may also be worth noting that there is also currently a working group looking at social work complaints the outcome of which may be relevant.

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⁴ See our response to the consultation on integration of health and social care for more details. <http://www.spsso.org.uk/files/webfm/Media%20Centre/Inquiries%20and%20Consultations/2012/12.09.11%20SG%20integration%20of%20adult%20health%20and%20social%20care%20all%20docs.pdf>