

Consultation on a proposal for a Children and Young People Bill



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

Please key F11 to move between fields

1. Name/Organisation

Organisation Name

Scottish Public Services Ombudsman

Title Mr Ms Mrs Miss Dr *Please tick box as appropriate*

Surname

Martin

Forename

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2. Postal Address

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

4. Background

In analysing your response, it would be helpful to know your background. Please indicate the area which best describes your involvement with children from the options below.

Please tick box as appropriate:

- | | |
|------------------------|-------------------------------------|
| Early Years | <input type="checkbox"/> |
| Education | <input type="checkbox"/> |
| Health | <input type="checkbox"/> |
| Justice | <input checked="" type="checkbox"/> |
| Parent/Carer | <input type="checkbox"/> |
| Police | <input type="checkbox"/> |
| Social Work | <input type="checkbox"/> |
| Sport and Leisure | <input type="checkbox"/> |
| Voluntary Organisation | <input type="checkbox"/> |
| Other | <input type="checkbox"/> |

Comments

CONSULTATION QUESTIONS

1. A SCOTLAND FOR EVERY CHILD

More effective rights for children and young people

1. Do you feel that the legislative proposals will provide for improved transparency and scrutiny of the steps being taken by Scottish Ministers and relevant public bodies to ensure the progressive realisation of children's rights?

We have set our response to this consultation in a separate paper.

2. On which public bodies should a duty to report on implementing children's rights be applied?

Comments

3. Do you agree that the extension of the Children’s Commissioner’s role will result in more effective support for those children and young people who wish to address violations of their rights?

Comments

A new focus on wellbeing

4. Do you agree with the definition of the wellbeing of a child - or young person - based on the SHANARRI Wellbeing Indicators, as set out in the consultation document?

Comments

5. Do you agree that a wider understanding of a child or young person’s wellbeing should underpin our proposals?

Comments

Better service planning and delivery

6. Do you agree that a duty be placed on public bodies to work together to jointly design, plan and deliver their policies and services to ensure that they are focussed on improving children's wellbeing?

Comments

7. Which bodies should be covered by the duties on joint design, planning and delivery of services for children and young people?

Comments

8. How might such a duty relate to the broader Community Planning framework within which key service providers are expected to work together?

Comments

Improved reporting on outcomes

9. Do you agree that we should put in place reporting arrangements making a direct link for the public between local services and outcomes for children and young people?

Comments

10. Do you think that these reporting arrangements should be based on the SHANARRI Wellbeing Indicators as set out in this consultation paper?

Comments

11. On what public bodies should the duty for reporting on outcomes be placed?

Comments

2. A SCOTLAND FOR EACH CHILD

Improving access to high quality, flexible and integrated early learning childcare

12. Do you agree that the Scottish Government should increase the number of hours of funded early learning and childcare?

Comments

13. Do you agree that the Scottish Government should increase the flexibility of delivery of early learning and childcare?

Comments

14. Do you think local authorities should all be required to offer the same range of options? What do you think those options should be?

Comments

15. How do you think the issue of cross-boundary placements should be managed, including whether this might be through primary or secondary legislation or guidance?

Comments

16. Do you agree with the additional priority for 2 - year olds who are 'looked after'? What might need to be delivered differently to meet the needs of those children?

Comments

The Named Person

17. Do you agree with the proposal to provide a point of contact for children, young people and families through a universal approach to the Named Person role?

Comments

18. Are the responsibilities of the Named Person the right ones? Are there any additional responsibilities that should be placed on the Named Person?

Comments

19. Do you agree with the proposed allocation of responsibilities for ensuring that there is a Named Person for a child at different stages in their lives set out in the consultation paper?

Comments

20. Do you think that the arrangements for certain groups of school-aged children as set out in the consultation paper are the right ones? What, if any, other arrangements should be made? Have any groups been missed out?

Comments

The Child's Plan

21. Do you think a single planning approach as described in the consultation paper will help improve outcomes for children?

Comments

22. How do you think that children, young people and their families could be effectively involved in the development of the Child's Plan?

Comments

Right to support for looked-after children

23. Do you agree that care-leavers should be able to request assistance from their local authority up to and including the age of 25 (instead of 21 as now)?

Comments

Corporate Parenting

24. Do you agree that it would be helpful to define Corporate Parenting, and to clarify the public bodies to which this definition applies? If not, why not?

Comments

25. We believe that a definition of Corporate Parenting should refer to the collective responsibility of all public bodies to provide the best possible care and protection for looked-after children and to act in the same way as a birth parent would. Do you agree with this definition?

Comments

Kinship care

26. Do you agree that a new order for kinship carers is a helpful additional option to provide children with a long-term, stable care environment without having to become looked after?

Comments

27. Can you think of ways to enhance the order, or anything that might prevent it from working effectively?

Comments

Adoption and permanence

28. Do you agree that local authorities should be required to match adoptive children and families through Scotland's Adoption Register?

Comments

Better foster care

29. Do you agree that fixing maximum limits for fostering placements would result in better care for children in foster care? Why?

Comments

30. Do you agree foster carers should be required to attain minimum qualifications in care?

Comments

31. Would a foster care register, as described, help improve the matching by a local authority (or foster agency)? Could it be used for other purposes to enhance foster care?

Comments

32. Do you think minimum fostering allowances should be determined and set by the Scottish Government? What is the best way to determine what rate to pay foster carers for their role – for example, qualifications of the carer, the type of 'service' they provide, the age of child?

Comments

Assessing Impact

33. In relation to the Equality Impact Assessment, please tell us about any potential impacts, either positive or negative; you feel the legislative proposals in this consultation document may have on any particular groups of people?

Comments

34. In relation to the Equality Impact Assessment, please tell us what potential there may be within these legislative proposals to advance equality of opportunity between different groups and to foster good relations between different groups?

Comments

35. In relation to the Business and Regulatory Impact Assessment, please tell us about any potential economic or regulatory impacts, either positive or negative; you feel the legislative proposals in this consultation document may have, particularly on businesses?

Comments

Thank you for responding to this consultation.

Please ensure you return the respondent information form along with your response.

The closing date for this consultation is 25 September 2012. Please return to childrenslegislation@scotland.gsi.gov.uk

or

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SPSO response to the Scottish Government consultation on the Children and Young People Bill

Background and context

The Scottish Public Services Ombudsman (SPSO) is the independent body that investigates complaints from members of the public about devolved public services in Scotland. This includes, amongst others, local government, the National Health Service and a range of public bodies whose actions impact daily on the lives of children and young people. Since 2010, we are also the body tasked with improving the handling of complaints by those public bodies.

The aims for the Bill set out by the Scottish Government in the consultation to help support children and their families and to encourage a child-centred approach to the provision of services are positive and we would fully support any initiative that improve the lives of children in Scotland. In responding to this consultation, we have sought to comment where we may have genuine and useful insight as a result of our roles in investigating complaints and improving complaint handling. We have also commented when the bill would have a direct impact on this office in terms of the reporting requirement. We have not commented where we felt there would be others who could do so more effectively.

Extending the powers of Scotland's Commissioner for Children and Young people to investigate infringements of the rights of individual children and young people

It is important that an individual can hold public bodies to account for actions which those public bodies have taken and which impact on that individual. This is one of the founding concepts behind administrative justice. It is also important that any system set up to allow for this can deal with the disparity in power and ability to both access and use information that occurs in any disagreement between a public body and a private individual.

These basic principles apply to all citizens and, for children and young people, the second point is of particular relevance when considering what barriers may exist to them holding bodies to account and how those barriers should be dealt with.

The Bill suggests that the current power of the Scottish Commissioner for Children and Young People (SCCYP) to investigate infringements on behalf of a group should be extended to individuals. We set out below the points which, in our experience of complaint handling, it would be appropriate to consider when assessing how this will meet the objectives in the two principles set out above; the ability to hold to account; and to allow for real and meaningful access.

Holding to account

There are a number of ways in which public bodies are held to account and individuals allowed to question decisions made about them by those bodies. Most people are very familiar with the court process through which definitive rulings about public obligations can be made. In some areas, tribunals have been set up to deal with particular rights and duties; an example relevant to this area would be the Additional Support Needs Tribunals¹. The Ombudsman has a role both as the final stage of investigating complaints about public bodies and also in ensuring that the public body who receives those complaints handles complaints well.

Difficulties can arise when the landscape for holding a body to account becomes cluttered and the individual is required to pursue what for them is one issue through a series of different routes which can all only look at different parts, or may be looking at the same

¹ More detailed information about these tribunals is available on their own websites: http://www.asntscotland.gov.uk/asnts/CCC_FirstPage.jsp

complaint from different angles. The Sinclair² review supported the need for simplicity and clarity.

This means that care should always be taken to fully review and understand both the current system and how any new powers should fit with that. There is no scoping within the consultation documentation of the ways children and young people currently can question the decisions of public bodies. Even although they may not deal directly with the infringement of rights in terms of the UN Convention, it is still relevant as an allegation of a rights infringement may be part of a broader picture and the ideal should be that the child or young person should only have to go through one process to have all their concerns dealt with.

The absence of this review of the broader landscape makes it difficult to fully assess the proposed new role for the SCCYP. For example: it is the case that if a body is required to take a child or young person's views into account; to have a child-centred approach; to take into account their rights; and there is an allegation that this has not occurred, then the SPSO could consider whether the body had acted in accordance with those requirements. This may limit the proposed extension of power to the SCCYP who will not be able to investigate if a matter is already within the function of another body.

This may become clearer if I set out the way we deal with questions of discrimination or human rights breaches. In both the equalities and human rights legislation³, specific provisions were created to allow the courts to make decisions about allegations of breaches -- the courts can be approached for a specific ruling on this point. This does not mean the does not accept complaints where there may be a human rights or equalities dimension. We do so regularly, however, our role is to ensure that the public body can demonstrate that those aspects of the complaint have been properly dealt with. If there is an underlying dispute about the precise meaning of the legislation and a requirement for a ruling on what the specific obligation in terms of the legislation is in a specific case, those are issues which can only be resolved by the courts. A recent High Court case in England between the PHSO and Mencap led to an interesting exploration of the differing role of the PHSO and the courts in connection with discrimination legislation.⁴

Therefore, although there is overlap between our role and that of the courts, we find that this has not caused specific problems and we can still take the duties in human rights and discrimination legislation into account while respecting the role of the courts. In this context it is important to bear in mind the role of the Equality and Human Rights Commission who can provide some initial advice and also support certain cases, to the extent in some circumstances of being able to take test cases. This is important given that the court process can not only be intimidating but without support it is very difficult for individuals to compete with the resources a public body has in defending a court case.⁵

The Bill as currently proposed does not allow for a similar enforcement role for the courts which are set out in the equalities and human rights regimes, not does it provide for the

² The Sinclair report refers to the report of the Fit-for-Purpose Complaints System Action Group which reported in 2008 and which was chaired by Douglas Sinclair. Details are here: <http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/IndependentReviewofReg/ActionGroups/FCSAG>

³ Useful information about this can be found on the Equality and Human Rights Commission website <http://www.equalityhumanrights.com/>

⁴ ***R (Mencap) v The Health Service Commissioner*** CO/6118/2009 (17 November 2011)

⁵ Again see their website for details of what support they can and cannot provide in individual cases. In particular, they can only take as test cases issues related to discrimination and equalities legislation.

SCCYP to support test cases. Instead it provides for them to have a role around investigating specific violations. As currently worded, it is not clear to us what the extent and limits of this role are and, as suggested above, we envisage there may be some difficulty with certain complaints who may overlap both our and the SCCYP jurisdictions. Similar issues may arise with the Care Inspectorate. In these circumstances, we would suggest that in taking this forward, the Scottish Government should ensure that the SCCYP, Ombudsman and any other relevant bodies are included in discussions around the detailed wording of these sections so that we can fully explore these issues prior to the legislation being put in place. This may reveal some very simple ways to clarify the position and ensure that there is no confusion once any legislation is in force.

Access

There are two aspects to this. The first is that it should be easy for children and young people to access the system. The second is the ability of the organisation receiving complaints to deal with them efficiently and effectively on receipt.

Access for young people and children

One way of ensuring access to complaints and other systems for holding bodies to account is to keep the system simple and straightforward. As has been noted, simplicity was one of the key lessons of the Sinclair review.

This applies not only in how a body is complained about but in how they receive and deal with complaints and concerns themselves. It needs to be seen as a normal part of providing a service that the person not only can input into how that service is provided but can raise concerns. They should also have access to an independent body who can consider their concerns. As part of the landscape of bodies who can consider complaints, we do provide this function in many areas. It is worth noting that in health complaints, this extends to the ability to fully consider the decision made.

It has been a concern for this office for some time that we do not hear from children and young people. Parents do bring us complaints about health, social work and education matters on behalf of their children but, although we can do so, we tend not to hear directly from children. The SCCYP do have a specific remit and skill in dealing with children and young people and extending their powers may provide an access point which is not currently in existence. Although we have set out in detail the route which has been set up around human rights and equality issues, it is the case that a route which does not involve courts may also be more appropriate for children, particularly if the aim is not to set out legally certain determinations of rights but to deal with specific, individual concerns. In taking on the role of investigating complaints, a body such as the SCCYP can also set out to balance the difference in resource between the public body and the individual by using their own resources to uncover and gather evidence. Routes which involve an independent body taking on an investigative role rather than merely adjudicating in the strict manner of the court process can also be less adversarial which may be appropriate when there may be an important ongoing relationship between the body who it is alleged has failed and the child or young person. It is also important to note that when looking at an individual case there is always the opportunity to prevent this happening to others and to improve the system generally. This is often the key reason why people choose to engage with a complaints process.

Ensuring SCCYP have appropriate resources

In taking on any new role, the SCCYP will need to be appropriately resourced. The SCCYP will ultimately be best placed to set out what they may need. We have said above that we consider work still needs to be undertaken to clarify what that role is and this will help to identify what resource will be needed. However, we thought it may be helpful to set out some observations based on our own experience both as an investigator of complaints and

of a body who has been tasked with taking on new functions and needed to balance current and new roles. We not only have experience ourselves of the resources required to undertake complaints but also of taking on new areas of responsibility.

Complaint handling and investigating complaints can be very resource intensive. It is also demand-led and it can be difficult to estimate what that demand may be. The SCCYP will also need to have sufficient resources for complaint handling to ensure that this does not limit their ability to carry out their current functions. Individual complaints can and may well be more urgent than longer term policy work. In the long term though, that policy work may have potentially larger impact and to protect the current functioning of the SCCYP it would be important to ensure that they have appropriate resources to deal with the complaints they may receive. The SCCYP would also need to have in place governance structures to ensure that they can maintain impartiality when making decisions about complaints brought to them. This means they should not be acting as an advocate when investigating complaints. Public bodies do need to be sure that the SCCYP is not making decisions on complaints because they have a broader policy agenda. This is because if recommendations as the result of an investigation are seen to come not from a failing and injustice experienced by an individual but as a result of a broader policy view by the SCCYP, that may lead to those recommendations being undermined and seen to be partial. None of these issues are insurmountable but they do need thought through to make sure the resources put in place are sufficient.

Conclusions

In conclusion, we support the aim of ensuring that children and young people have mechanisms in place to challenge public bodies when they consider their rights have been infringed. It is extremely positive that the Scottish Government have recognised there may be such a need when considering how to protect the rights of children in this Bill. We think there are a number of factors that need to be considered before deciding what is the right mechanism and how to take this forward. First, greater clarity is needed around the proposed role and how this interacts with existing rights. Once this has been achieved work will then need to be undertaken to ensure that the SCCYP is properly resourced to take on this new function.

Reporting on implementing the rights of children and young people

We consider the reporting requirement to be a positive development and would welcome the opportunity to assess our work against the rights set out in the UNCRC. There is always a need when setting up a reporting regime to ensure sufficient flexibility to allow for the different relationships bodies have with the public to be recognised. However, we consider this can be reflected in supporting guidance and does not mean that bodies should be exempt from this requirement.