

Explanatory Notes to Commissioner for Children and Young People (Scotland) Act 2003

2003 Chapter 17

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These notes refer to the Commissioner for Children and Young People (Scotland) Act 2003 (asp17) which received Royal Assent on 1 May 2003

COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (SCOTLAND) ACT 2003

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Parliament Non-Executive Bills Unit on behalf of Karen Gillon, convener of the Education, Culture and Sport Committee and member in charge of the Commissioner for Children and Young People (Scotland) Bill. They have been prepared in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND TO THE ACT

3. This Act is a result of a Committee Bill (i.e. a Bill initiated by a Scottish Parliament committee under Rule 9.15 of the Parliament's standing orders). The Act resulted from an investigation and report published by the Education, Culture and Sport Committee on 14 February 2002, *Report on*

Inquiry into the Need for a Children's Commissioner in Scotland, (2nd Report 2002, SP Paper 508). This was followed by a further report published on 3 July 2002, *Report on Proposed Commissioner for Children And Young People Bill*, (11th Report 2002, SP Paper 617). The proposal for a Committee Bill was debated and approved by the Parliament on 25 September 2002.

4. The Act was developed from the Committee's conclusion that a new and independent office of "Commissioner for Children and Young People" (the Commissioner) should be established by statute.

5. The 2nd Report recommended that the functions of the Commissioner should include advocacy for all children and young people at a national level; conduct of publicity and information campaigns; and presentation of an annual report to the Scottish Parliament. That Report also emphasised the need for a Commissioner to involve children and young people throughout Scotland in his or her work and to ensure that the work of the Commissioner is informed by the views of children and young people. This and other aspects of the Report were underpinned by articles of the United Nations Convention on the Rights of the Child (UNCROC). In particular, Article 12 of UNCROC emphasises the importance of the views of children. Similarly, Article 3 of UNCROC emphasises the importance of "the best interests" of children.

6. The Act creates the post of Commissioner for Children and Young People with the general function of promoting and safeguarding the rights of children and young people. This includes everyone in Scotland up to the age of 18, and those up to 21 years who have been "looked after" by a local authority. "Looked after" is defined in section 16. In doing so, the Commissioner will have regard to the United Nations Convention on the Rights of the Child (UNCROC).

7. There are a number of principles which underpin the Act. These are that:

- the Commissioner is independent;
- the best interests of children and young people should be a primary consideration in all matters affecting them; and
- the views of children and young people should be taken into account in accordance with age and maturity.

8. In exercising the general function of promoting and safeguarding the rights of children and young people under the Act, the Commissioner is to:

- promote an awareness of those rights amongst children, young people and adults;

- keep under review current law, policy and practice relating to those rights;
- promote best practice by service providers in relation to children and young people;
- promote, commission, and publish research;
- undertake investigations; and
- report to the Parliament.

9. The Commissioner can conduct investigations into how service providers take rights, interests and views into account in decisions or actions affecting children and young people. The Commissioner cannot, however, undertake an investigation which only concerns an individual child or young person. In an investigation, the Commissioner has the power to call witnesses to attend and require the production of documents. It is anticipated that investigations will be rare.

COMMENTARY ON SECTIONS

Section 1: Establishment

10. Subsection (1) establishes the office of Commissioner for Children and Young People.

11. Subsection (2) introduces schedule 1 which makes detailed provision concerning the status, independence, remuneration, terms of appointment and general powers of the Commissioner. The schedule also makes detailed provision in relation to various matters of an administrative nature.

Section 2: Appointment

12. Subsection (1) provides that the Commissioner will be an individual, who will be appointed by Her Majesty on the nomination of the Parliament.

13. Subsection (2) provides that anyone who is an MSP, MP or MEP or has held such an office in the previous year is disqualified from appointment.

14. Subsection (3) provides that the Commissioner holds office for a maximum period of five years but this must be read with section 3 which provides for the early removal from office of the Commissioner. The Scottish Parliamentary Corporate Body (SPCB), will on appointment determine the period of appointment.

15. The SPCB was created by section 21 of the Scotland Act 1998 (c.46)

(the Scotland Act) to provide the Parliament with the property, staff and services which it requires and to represent the Parliament in legal proceedings. As well as the specific functions set out in the Scotland Act, the SPCB is bound to perform functions conferred upon it by other legislation.

16. Subsection (4) provides for the re-appointment of the Commissioner. There can only be one re-appointment which, although it need not be consecutive to the original appointment, cannot be for more than another five years. No further re-appointment is allowed. As a consequence, the maximum period of time which one person can serve as Commissioner is ten years.

Section 3: Removal

17. Subsection (1) sets out the grounds on which the Commissioner may be removed from office by Her Majesty. The Commissioner may resign or may be removed following a resolution of the Parliament. Subsection (1)(a) permits the Commissioner to resign from office. Subsection (1)(b) enables the Parliament to pass a resolution for the removal of the Commissioner. Such a resolution could be passed on the grounds that the Commissioner had breached the terms of appointment or that the Parliament had lost confidence in the Commissioner's willingness, ability or suitability to carry out the functions of Commissioner. A resolution for removal by the Parliament would require the support of two-thirds of the total votes cast by those voting where the number of MSPs voting includes any voting to abstain.

Section 4: Promoting and safeguarding rights

18. The general function of the Commissioner, set out in subsection (1), is to promote and safeguard the rights of children and young people.

19. Section 16 provides that "children and young people" are individuals under the age of 18. However, if someone in Scotland has been "looked after" by an authority in the United Kingdom they will come within the remit of the Commissioner until they reach 21 years of age.

20. The word "rights" is not defined in the Act. Therefore the Commissioner's general function is to promote and safeguard any rights which apply to children and young people in Scotland, either statutory or otherwise. This includes, for example, the right to a school education under section 1 of the Standards in Scotland's Schools Act 2000 (asp 6).

21. Subsection (2) sets out specific duties of the Commissioner in carrying out the general function of promoting and safeguarding the rights of children and young people.

22. In particular the Commissioner is to promote awareness and

understanding of the rights of children and young people (subsection (2)(a)). In relation to children and young people themselves this might include providing information to individuals about what their rights are and where and how to access further assistance. In relation to the promotion of those rights amongst adults as well as children and young people this might include, for example, fostering a high media profile or holding conferences.

23. Under subsection (2)(b) the Commissioner is to consider legislation relating to the rights of children and young people as well as the way in which it is applied. An example of this might include issuing statements or reports on the possible impact of legislation and proposed legislation. It also requires the Commissioner to consider policy and practice. This could include consideration of Scottish Executive policy, Scottish Parliament practice, local authority practice, practice in voluntary organisations or practice in private companies. A review of law, policy or practice could result, for example, in recommendations in a report to the Parliament under section 12 or be referred to in the annual report under section 10.

24. Under subsection (2)(c) the Commissioner is to promote best practice amongst "service providers". Section 16 of the Act defines "service providers" in such a way as to include any person providing services for children and young people. The exercise of parental responsibilities is not regarded as a "service" for these purposes unless such responsibilities are being exercised other than by a parent or guardian (for example, by a local authority). (See paragraph 41, below for further discussion of "service provider").

25. Subsection (2)(c) is closely linked to the function of reviewing practice in subsection (2)(b). For example, the Commissioner could recommend improvements and highlight examples of good practice as a result of considering current practice under subsection (2)(b). The Commissioner might promote best practice by, for example, making recommendations to service providers.

26. Under subsection (2)(d) the Commissioner has obligations in relation to research relating to the rights of children and young people. This might result, for example, in the Commissioner undertaking research into the effect of a particular piece of legislation or policy on the rights of children and young people.

Section 5: United Nations Convention and equal opportunities

27. Section 5 places a duty on the Commissioner to have regard to the relevant provisions of UNCROC and also to act in a manner which encourages equal opportunities.

28. UNCROC gives an international framework to the concept of children's rights. It covers a very broad range of issues many of which relate to devolved areas. The key principles include the importance of children's

views, non-discrimination and the need to consider children's best interests as a primary consideration. UNCROC was ratified by the UK on 16 December 1991 and places obligations on the UK government. These obligations are monitored through reports by the UK government to the UN Committee on the Rights of the Child. Section 16 makes it clear that the Commissioner will not have regard to articles on which the UK government has entered reservations. It also makes clear that the Commissioner must interpret UNCROC in accordance with the declared interpretation of the UK government. At present, in relation to devolved matters, the UK has reservations entered against article 37(c) concerning young offenders. The UK government has also declared that the Convention applies only following a live birth and that "parent" is to be interpreted according to national law. Any change in reservations or interpretation made by the UK government will also apply to the Commissioner's interpretation of UNCROC.

29. Although the Commissioner must have regard to the relevant provisions of UNCROC, subsection (3)(a) provides that the Commissioner must, in particular, regard and encourage others to regard the best interests of children and young people as a primary consideration. This specific requirement mirrors Article 3(1) of UNCROC which provides that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of children and young people shall be a primary consideration."

30. In a similar way, subsection (3)(b) imposes an obligation on the Commissioner to have regard to and encourage others to have regard to the views of children and young people. This reflects Article 12(1) of UNCROC which provides that:

"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

31. Subsection (4) reflects the key principle of non-discrimination which is set out in Article 2 of UNCROC by imposing an obligation upon the Commissioner to act in a manner which promotes equal opportunities. Section 16 defines "equal opportunities" by reference to Section L2 of Part II of Schedule 5 to the Scotland Act. Equal opportunities generally is reserved and the definition used follows the exception to the reservation set out in the Scotland Act. The effect of the provision is to require the Commissioner to encourage non-discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions such as religious beliefs or

political opinions.

Section 6: Involving children and young people

32. Subsection (1) places a general duty on the Commissioner to encourage the involvement of children and young people in all of his or her work. This will ensure that the Commissioner's work is informed by the views of children and young people.

33. Subsection (2) details the manner in which the Commissioner is to encourage the involvement of children and young people in his or her work by listing a number of duties which the Commissioner must take reasonable steps to fulfil.

34. Subsection (2)(a) requires the Commissioner to take reasonable steps to ensure children and young people are made aware of the existence of the Commissioner through awareness of the Commissioner's functions, how to communicate with the Commissioner and what responses may be given by the Commissioner to issues raised.

35. Subsection (2)(b) requires the Commissioner to take reasonable steps to consult children and young people on the work to be undertaken by him or her. It would be for the Commissioner to determine how, who, what, why and when he or she consults. For example, "reasonable steps" in relation to some issues might mean consulting a particular group of children while, in relation to others, a wider general consultation may be appropriate.

36. Subsection (3) requires the Commissioner to give some priority to those children and young people who are not within the remit of other agencies or who do not have adequate means to make their views known for other reasons. This allows the Commissioner to focus on particularly vulnerable groups of children and young people who need extra support in making their views known.

37. Subsection (4) requires the Commissioner to prepare and maintain a strategy on the continued involvement of children and young people in his or her work under this section. The strategy will, as a consequence of section 10(2)(d) (see paragraph 58 below) require to be updated at least annually.

Section 7: Carrying out investigations

38. Subsection (1) gives the Commissioner a power to carry out investigations into how the rights, interests and views of children and young people are taken into account in decisions or actions affecting them.

39. Such investigations can be carried out in relation to the actions of service providers. Section 16 makes it clear that "service provider" means any person or organisation providing a service to children and young

people. This includes the private, public and voluntary sector. Thus any individual who, or organisation or company which, provides services to children or young people can be investigated by the Commissioner. For example, organisations which give advice, provide guidance or provide goods could be investigated. The service in question does not need to be provided exclusively to children or young people. Section 16 also makes it clear that parents carrying out their parental responsibilities are not service providers. However, the Act ensures that local authorities to whom parental responsibilities have been transferred are treated as service providers by referring to sections 1 and 2 of the Children (Scotland) Act 1995 (c.36) which apply only to natural persons.

40. Investigations can concern a single service provider or a group of service providers. For example, an investigation could consider the way rights, interests and views are considered by a single local authority, or by local authorities in general.

41. Before the Commissioner can carry out an investigation he or she must be satisfied on reasonable grounds that the conditions set out in subsections (2)(a) and (2)(b) have been met.

42. In coming to a view in that regard the Commissioner must consider information available about the issue. This might include research findings, consultation exercises and the experiences of individuals. The Commissioner must also consider any other information which is received by him or her.

43. Subsection (2)(a) requires that an issue for investigation must be of significance to children and young people. This is an area in which the views of children and young people will inform the work of the Commissioner. For example, the Commissioner may consult children and young people before launching an investigation. It could be an issue that affects a particular group of children - such as children with disabilities or "looked after" children, or children in a particular institution.

44. Ultimately, it is for the Commissioner to decide whether something is significant enough to be investigated provided that he or she has reasonable grounds upon which to do so.

45. Subsection (2)(b) prevents the Commissioner from duplicating the investigatory functions of other bodies. The Commissioner has a very broad remit which covers general areas, some of which are also covered by the remit of other bodies. This provision means that the Commissioner will not be able to investigate a service provider's standards towards children if these are already regulated and inspected by other bodies. However, the Commissioner could investigate the way in which children's rights, interests and views are taken into account by the service provider generally - but only if this was not an issue already addressed in existing regulatory arrangements. The Commissioner could investigate the way in which the

regulatory body itself takes children's rights, interests and views into account.

46. Subsection (3) places three further restrictions on the matters which may be subject to investigations. Firstly, the Commissioner can only investigate issues which relate to devolved matters. Secondly, an investigation must be concerned with children generally or a group of children. This prevents the Commissioner from investigating the case of an individual child or young person. This does not prevent, however, the Commissioner using examples of individual cases to inform an investigation. Thirdly, the Commissioner is prevented from undertaking an investigation into matters currently before courts or tribunals or into the decisions made by these bodies.

47. This third restriction prevents the Commissioner from impinging on current legal proceedings and investigating judicial decisions that have been made. It also prevents consideration of actions made under judicial directions by e.g. court staff. It does not prevent the Commissioner from investigating generic issues such as matters of structure or procedure, for example how child witnesses are treated generally by courts and tribunals.

Section 8: Initiation and conduct of investigation

48. Subsection (1) sets out procedural requirements which need to be fulfilled before the Commissioner can undertake an investigation.

49. Subsection (1)(a) requires the Commissioner to draw up terms of reference for the proposed investigation. The terms of reference will define the scope of the investigation which cannot be changed once an investigation has started.

50. In addition subsection (1)(b) requires that the Commissioner publishes notice of the investigation and its terms of reference in order to create awareness of it amongst those who may be affected by it. The precise means of publication employed by the Commissioner in order to satisfy this requirement will be a matter for the Commissioner's discretion.

51. Subsection (2) makes it clear that investigations by the Commissioner will be conducted in public unless the Commissioner considers that it is necessary or appropriate to take evidence in private. This could include, but is not limited to, circumstances in which a young child or a vulnerable person is giving evidence. In addition, given that the Commissioner will be required to consider the best interests and views of children and young people under sections 5(2)(a) and (b), this means that the Commissioner should ascertain their views as to privacy before they give evidence.

Section 9: Investigations: witnesses and documents

52. This section sets out the powers available to the Commissioner in

gathering information and undertaking an investigation under section 7.

53. Subsection (1) authorises the Commissioner to require any person to give evidence or produce documents they hold. These powers apply to companies and other bodies as they do to individuals. The Commissioner cannot request information or evidence which is outwith the scope of the investigation as set out in the terms of reference.

54. Subsection (2) is based on section 23 of the Scotland Act and limits the Commissioner's powers to require the giving of evidence or the production of documents from certain persons. Section 23 imposes various restrictions on the Parliament's powers, for example, in relation to Ministers of the Crown, judges and members of tribunals.

55. Subsection (3) introduces schedule 2 (see paragraphs 76-83 below), which contains further provision with respect to witnesses and documents. Schedule 2 also details the sanctions for non-compliance with a requirement under this section.

Section 10: Annual report

56. Subsection (1) requires the Commissioner to prepare an annual report which must be laid before the Parliament. The report must cover the functions exercised by the Commissioner during the preceding year.

57. Subsection (2) sets out the matters that must be included in the annual report. These will be included in every annual report. There is, however, no restriction on the inclusion of any other areas considered relevant to the Commissioner. The annual report will, for example enable the Commissioner to comment on the "big themes" of the previous year in relation to the rights of children and young people. It will also contain an indication of the themes to be tackled over the following year, including how the strategy to involve children and young people is expected to develop. The Commissioner can also make recommendations in the annual report. These could, for example be recommendations repeated from earlier reports (such as a report following an investigation) or they could be new recommendations. The annual report could, for example, be an opportunity for the Commissioner to comment on his or her powers under this Act and whether amendment to this legislation is desirable.

Section 11: Reports on investigations

58. Subsection (1) requires the Commissioner to report in writing to the Parliament following the conclusion of any investigation he or she has undertaken.

59. Subsection (2) requires the Commissioner to include in such reports any recommendations he or she may have arising out of the investigation. Other than this, the Act does not prescribe the content of such a report. This

is left to the Commissioner's discretion.

60. Subsection (3) requires that anyone whose activities have been the subject of an investigation be given a draft of the proposed report and an opportunity to make representations on it to the Commissioner.

Section 12: Other reports to the Parliament

61. This section enables the Commissioner to lay before the Parliament any other reports relating to his or her functions as he or she considers necessary or appropriate. This could include, for example, research findings, conference reports or reviews of policy, or practice. A review could include, for example, a "child impact statement" providing an overview of the extent to which the work of the Executive and the Parliament has reflected the rights of children and young people. Reports under this section could also include those relating to investigations that are, for any reason, terminated before conclusion.