

# **MSP Briefing**

## **Scotland's Commissioner Landscape**

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

**October 2024**

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Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights.

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The Commissioner is fully independent of the Scottish Government.

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We welcome the report of the Finance and Public Administration Committee on Scotland's Commissioner Landscape.<sup>1</sup>

The Committee's inquiry was prompted by concerns over the potential for, and implications of, current proposals for additional Commissioners. Our written evidence to the Finance and Public Administration Committee outlined our concerns, in that regard, particularly the risk of creating duplication and overlap through a more complex and fragmented landscape.<sup>2</sup>

#### **Key messages**

- We welcome the Committee recommendation for a moratorium on the creation of new SPCB<sup>3</sup> supported bodies.
- We are committed to developing an improved approach to reporting how we have delivered our functions and how the quality of that work can be assessed.
- We welcome the recommendation to reinstate annual evidence and scrutiny sessions with the Education, Children and Young People Committee.
- We will continue to work with other SPCB supported bodies to identify shared services efficiencies.
- We recognise the extreme pressure on the public purse and services and Our budget bid is the minimum required to deliver our statutory functions; we have not requested additional funding for implementing our new UNCRC legal powers.
- We are listening to the calls for additional SPCB bodies to represent specific groups and seeking to understand across the system how unmet need can be addressed.
- Our priorities and the focus of the work of the office must remain the priorities of children and young people.

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<sup>1</sup> [Report on Scotland's Commissioner Landscape: A Strategic Approach](#)

<sup>2</sup> [Scotland's Commissioner Landscape - a strategic approach. Evidence of the Children and Young People's Commissioner Scotland](#)

<sup>3</sup> Scottish Parliament Corporate Body

## Our comments on specific report recommendations

### ***SPCB supported bodies are invited:***

- ***to set out more clearly in their annual reports how they have fulfilled the functions included in their enabling legislation and what specific outcomes they have delivered, to support more effective scrutiny of their performance by committees.***

We recognise the challenges for committees in their role scrutinising the performance of parliamentary bodies while balancing the need to respect their independence. We will commit to developing an improved approach to reporting how we have delivered our functions and how the quality of that work can be assessed. It is our intention to develop a child-friendly approach to this with children and young people over the course of our current Strategic Plan and to report on this through our Annual Reports.

As an SPCB supported body, we support the view that our performance should be effectively scrutinised by parliament against the Commissioner's statutory functions.

### **Our statutory functions**

The Commissioner for Children and Young People (Scotland) Act 2003 established the office of the commissioner. The Act was introduced as a Committee Bill, as opposed to a Government Bill, and was Parliament's response to a 10 year-long campaign by civil society, in particular children and young people themselves, for an independent champion.

Our Act has been modified by the Children and Young People (Scotland) Act 2014, the Scottish Parliamentary Commissions and Commissioners etc Act 2010 and the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

The Commissioner's general function is to promote and safeguard the rights of children and young people up to age 18, or 21 if they have ever been "in care" or "looked after" by a local authority. This includes the responsibility for monitoring enjoyment of all human rights of children and young people in Scotland, with special reference to the UNCRC.

More specifically, the Commissioner must:

- promote awareness and understanding of the rights of children and young people;
- keep under review the law, policy and practice relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice;
- promote best practice by service providers; and
- promote, commission, undertake and publish research on matters relating to the rights of children and young people.

We have a duty to consult children and young people on the work we do and to pay special attention to groups of children and young people who have difficulty in making their views and experiences known.

The Commissioner has specific powers to carry out investigations. When the UNCRC Incorporation Act came into force in July this year, this brought new powers to raise proceedings in court, or intervene in proceedings, in some circumstances.

The Commissioner works with other organisations in exercising its functions and must seek to ensure that it is not duplicating the work other public bodies are already doing.

### **Why did MSPs decide that a Children's Commissioner was needed?**

*"MSPs can raise such issues and advocate children's rights, but they cannot devote themselves solely to that task".<sup>4</sup> Elaine Smith (Labour)*

*"The commissioner's independence will avoid the baggage of political bias, and ministers will have to respond to comments and challenges from a powerful advocate of children's needs".<sup>5</sup> Ian Jenkins (Lib Dem)*

*"An independent and permanent office of the children's commissioner will ensure that the welfare of our young is never marginalised by political considerations and that children's voices are not lost in the clamour for the Parliament's attention".<sup>6</sup> Jackie Baille (Labour)*

*"Moreover, the commissioner's role is not an alternative to the duty of MSPs to represent their constituents. Instead, the commissioner can endeavour to ensure that existing bodies work better for children and young people".<sup>7</sup> Karen Gillon (Labour)*

*"The commissioner will also be powerful. That power will derive from being a statutory creation, from being independent of the Executive and the Parliament, from being credible—with children and young people driving work and prioritisation—and from the political input that exists in a direct route to Parliament through the commissioner's duty to report".<sup>8</sup> Irene McGugan (SNP)*

*"Let us have a commissioner who can consider how we can better protect children and how the public services that seek to protect them can be more attentive to their needs than to those of the producers. Let the commissioner report to the Parliament so that we can debate what further measures, if any, must be taken to right wrongs and to relieve injustices".<sup>9</sup> Murdo Fraser (Cons)*

Children don't have the same power (or voting rights) as adults, their rights and interests are often marginalised in favour of adults. Children and young people find it easier to engage with child-focussed institutions such as ours – their voices are often drowned out in adult-focussed or adult-dominated organisations.

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<sup>4</sup> [Official Report \(September 25, 2002\) Proposed Commissioner for Children and Young People Bill](#)

<sup>5</sup> [Official Report \(January 15, 2003\) Commissioner for Children and Young People \(Scotland Bill: Stage 1\)](#)

<sup>6</sup> [Official Report \(January 15, 2003\) Commissioner for Children and Young People \(Scotland Bill: Stage 1\)](#)

<sup>7</sup> [Official Report \(January 15, 2003\) Commissioner for Children and Young People \(Scotland Bill: Stage 1\)](#)

<sup>8</sup> [Official Report \(January 15, 2003\) Commissioner for Children and Young People \(Scotland Bill: Stage 1\)](#)

<sup>9</sup> [Official Report \(January 15, 2003\) Commissioner for Children and Young People \(Scotland Bill: Stage 1\)](#)

The UN Committee on the Rights of the Child specifically called for the creation of ‘*specialist independent human rights institutions for children, ombudspersons or commissioners for children’s rights*’. As such, the establishment of the Children’s Commissioner is not just a response to domestic need but also an international obligation.

Children’s Commissioners serve a very important function to stand ‘in the middle’ between local and global human rights perspectives – a two-way process which translates global rights into local systems and ensures the local to the global transfer of knowledge and experiences.

**We ask relevant committees:**

- ***in addition to annual evidence sessions, to undertake more detailed scrutiny of the performance of supported bodies once a session, wherever possible.***

The Commissioner welcomes annual evidence and scrutiny sessions with the Education, Children and Young People Committee. This provides us with an opportunity to highlight those parts of our work which would otherwise be less visible to the Parliament and also to support the Committee’s understanding of how we are delivering our functions. Annual evidence sessions will provide the opportunity to proactively share work we undertake with children and young people, supplementing the evidence we provide in response to Committee calls on specific issues.

We provided detail on our current governance and scrutiny arrangements in our evidence to the Committee Inquiry.<sup>10</sup> While we believe these arrangements are robust, we continue to work on improving ways of involving children and young people in our governance and scrutiny.

At times we have been asked to explain how the existence of our office contributes to improvements in areas which are not directly related to our statutory functions, for example improvements in educational attainment. This type of outcome cannot be attributed to effective delivery of our statutory functions.<sup>11</sup> Our office will continue to work to improve understanding of our functions and the outcomes we can and have delivered.

## **The difference we have made**

In November 2023, the Cabinet Secretary for Justice and Home Affairs, Angela Constance, told the Criminal Justice Committee: “*The Children and Young People’s Commissioner Scotland is a model of a commissioner working well*” and that we had “*contributed to many policy and legislative changes in the Parliament*” and have “*shifted and changed our dialogue on how we support children and young people.*”

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<sup>10</sup> [Scotland's Commissioner Landscape: a strategic approach. Evidence of the Children and Young People's Commissioner Scotland.](#)

<sup>11</sup> It is the state’s responsibility to deliver education, the Commissioner’s role is to monitor law, policy and practice and assess whether that is created and delivered in a rights compliant way. The limitations of our functions are clear. For example, in our investigation on restraint in education, we highlighted the ways in which current practice wasn’t compatible with children’s rights and the need for statutory guidance. However, we can’t introduce legislation or enforce our recommendations. That is the role of Parliament and Government.

During the history of our office, we have undertaken a wide range of initiatives to further children's rights. The most significant impact we can evidence is the increased prominence of a children's human rights narrative in Parliament, in Government and across all of Scotland's public services.

Our role varies, sometimes we lead initiatives, sometimes our work is the spark that starts a broader campaign. Sometimes we support the work of others. Our work sometimes yields immediate impact, but mostly we focus on influencing the conditions for system change.

The impact we deliver is in the big and the small. Just as children experience their rights in the big and the small.

For individual children, the impact is most likely to have come through their involvement directly with our office in project activity. Their knowledge of rights is increased, their views are valued and have been actively sought.

For groups of children, the longstanding work for incorporation of the UNCRC into domestic law has strengthened the protections afforded to children's rights and made domestic remedies available to challenge breaches by public authorities. Groups of children whose rights are most at risk have the most to gain.

Where our office adds value is through our relentless focus on the human rights context and human rights framework. We often use our influence to amplify the voice of those least likely to be heard.

## **Examples**

- Our research in 2013 into children's experience of domestic abuse and child contact led to our joint Power Up Power Down participation project in 2016 with Scottish Women's Aid; the creation of the "Super Listener" which has now been translated into 8 European languages; informed a campaign to improve the recognition of children in the Domestic Abuse (Scotland) (Act) 2016 and amendments to what is now the Children (Scotland) Act 2020 that will guarantee children's right to participate in the Courts.
- In 2019, we championed and supported two young people to give evidence on Scotland's rights record to the UN Committee Against Torture. As the youngest people ever to appear and give evidence to the Committee, they talked about issues such as restraint and seclusion and the minimum age of criminal responsibility.
- Our work on the administration of medication and health care procedures in school, in 2013, led to a review of Scottish Government guidance ensuring that children with medical conditions were not prevented from attending school because of their medical needs.
- Our 2008 work on the age of leaving care, "Sweet 16?" led to a campaign to improve the rights of care experienced children in Scotland, culminating in the changes to aftercare and throughcare in the Children and Young People (Scotland) Act 2014.

- Our 2018 investigation into the use of restraint and seclusion in schools highlighted rights breaches, influenced the approach of the ASN Tribunal, and has led to the introduction of Daniel Johnson MSP's members bill on the issue.
- In 2004, within months of taking up the post, the first Children's Commissioner challenged the UK Home Office detaining children in Scotland's Dungavel immigration centre. Working alongside young people in the communities where children and families were subject to dawn raids and subsequent detention, the office worked to achieve an end to this practice.
- Our 2021 investigation into compliance with secure care duties identified significant numbers of children unlawfully deprived of their liberty and prompted important practice changes from local authorities.
- Our 2008 review of the rights of children of prisoners, Not Seen Not Heard Not Guilty highlighted the damaging effects for children of having a parent in prison.<sup>12</sup> We made a range of recommendations to the Scottish Prison Service, Scottish Ministers and other duty bearers. We published an updated review in 2011 showing that the Scottish Government had promised action and the Scottish Prisons Commission urged a rethink about the way imprisonment is used in Scotland. Our work raised the profile of children of prisoners in debates in parliament and elsewhere.
- In 2020, during the early months of the Covid 19 pandemic we produced an independent Children's Rights Impact Assessment (CRIA) which analysed the impact of the pandemic across nine themes: physical health; mental health; education; poverty; rest, recreation and play; children protection, children's hearings and care; domestic abuse; disabled children and those with other additional support needs; and children in conflict with the law and in secure care. This CRIA was recognised internationally for its broad scope and informed our ongoing work on the pandemic, including parliamentary evidence. Our recommendations to Scottish Government in relation to the impact on teenagers of social distancing led to changes in the lockdown rules and guidance.
- In 2024, following extensive engagement with our office, the Lord Advocate amended her Instructions on Prosecution of Trafficking Victims to provide better protection for children who have been criminally exploited and enhance compliance with Scotland's international law obligations
- In 2022, we supported care experienced children and young people to raise concerns about their care records with MSPs and statutory bodies. This helped them prompt action from the Information Commissioner's Office on improving access to care records.

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<sup>12</sup> <https://www.cypcs.org.uk/resources/not-seen-not-heard-not-guilty-the-rights-and-status-of-children-of-prisoners-in-scotland/>

## What's next?

We are pleased that the UNCRC Incorporation Act creates new powers for our office to intervene and to bring proceedings to court and we have reshaped our team to ensure we are able to deliver as much as possible in-house. We have exercised our statutory power to intervene twice since July and there are a number of other cases which we are in the process of assessing for possible intervention against the criteria set out in our Strategic Litigation Toolkit.<sup>13</sup>

We do not want to litigate every issue. Use of these powers will be strategic and exceptional. There are often better ways to resolve things, but litigation is a really useful and powerful tool to influence change. We should not need large scale legal action by children to try to access their rights, but in the absence of system change, litigation can end up being the only option for children and families. That is another reason for Government and other duty bearers to press ahead with necessary reforms.

We are listening to the calls on Parliament and Government to establish more Commissioners to advance the issues facing different groups. It is clear many people feel underrepresented or unserved by organisations across the public sector. While we do not think more Commissioners (SPCB supported bodies) is the answer, we do think that the groups calling for independent bodies clearly signal areas where the implementation gaps are widest. This should help steer Parliament's prioritisation of issues for further scrutiny and for strengthening of enforcement mechanisms.

### ***The SPCB is invited to:***

- ***continue to work with SPCB supported bodies to identify opportunities for sharing services, premises and achieving efficiencies, and to include evidence of this work in its budget bids to this Committee.***
- ***explore ways in which it will seek to bring greater transparency to its governance and oversight arrangements and discussions with SPCB supported bodies. This should include considering whether any material from internal assessments could appropriately be published for use by committees and others.***

We are pleased to provide our support to SPCB on these recommendations.

We have a strong relationship with the SPCB, with the Commissioner and Senior Management Team in regular contact over issues such as finance and governance. As a small office, this helps both the Commissioner and Parliament manage risk, by seeking early support on potential issues.

The SPCB also support us with various governance arrangements, including for example, the Parliament's Data Protection Officer providing us with advice in meeting our obligations under the GDPR. We would welcome assurances of ongoing Officeholder support from the SPCB.

The SPCB supported bodies actively work together, through an Officeholders Shared Services Network and Accountable Officers meetings, to identify

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<sup>13</sup> [Children's Rights Strategic Litigation Toolkit - The Children and Young People's Commissioner Scotland](#)



opportunities to collaborate across their functions. Our office upholds the commitment to sharing corporate and functional resources where possible and to the extent that they do not impact on our independence or ability to deliver our different statutory functions.

Through our budget bids we have sought to deliver our functions in a cost-effective way.

The financial memorandum for the Commissioner for Children and Young People (Scotland) Act 2003 proposed annual costs of about £1.2 million (excluding set up and year one costs). Adjusted for inflation that figure would now be worth around £2.2 million.<sup>14</sup>

Our budget this year is: £1.66 million.

Real term savings have been achieved in a range of ways over the last 20 years, including a reduction in publication costs as more information is made available online. But there has also been a reduction in budget for specific activities, including commissioned research and travel and expenses, as a proportion of the overall spend.

The office neither requested nor received additional funding for implementing the new powers for the office introduced by the UNCRC Incorporation Act.

In any further review, we would seek to inform an understanding of the extent to which additional cuts to funding or merging of remits may preclude the Commissioner from delivering the statutory functions that the office was established by the Scottish Parliament to fulfil.

Scotland's understanding of taking a child rights-based approach has advanced since our office was established. For children to meaningfully participate fully in the work of the Commissioner, they must be involved in all functions, including governance. Adult-focussed organisations are rarely able to fully adapt their processes and prioritise children's views and involvement in all that they do. It would be a retrogressive step if the Children's Commissioner was constrained by being unable to independently decide how to execute their functions or by being merged into a broader organisational structure (whose stakeholders are predominantly adults).

The Children and Young People's Commissioner is just that - an office created by Parliament for the children and young people of Scotland. We work to maintain the highest standards nationally and internationally in putting children at the core of our work. We are consistently approached to get involved in work well beyond our capacity as a small organisation. Our priorities will always be directed by children and young people, with children's rights our guiding beacon.

For further information, please contact Gina Wilson [gina.wilson@cypcs.org.uk](mailto:gina.wilson@cypcs.org.uk)

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<sup>14</sup> Using Bank of England inflation calculator