COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (SCOTLAND) BILL COMMITTEE

Tuesday 4 February 2003
(*Afternoon*)

Session 1

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COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE (SCOTLAND) BILL COMMITTEE

2nd Meeting 2010, Session 1

CONVENER

*Kay Ullrich (West of Scotland) (SNP)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Jackie Baillie (Dumbarton) (Lab)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
Mr Jamie McGrigor (Highlands and Islands) (Con)
*Irene McGugan (North-East Scotland) (SNP)
*Karen Whitefield (Airdrie and Shotts) (Lab)

*attended

THE FOLLOWING ALSO ATTENDED:

Karen Gillon (Clydesdale) (Lab)
Cathy Jamieson (Minister for Education and Young People)
Cathy Peattie (Falkirk East) (Lab)

CLERK TO THE COMMITTEE

Martin Verity

SENIOR ASSISTANT CLERK

Susan Duffy

ASSISTANT CLERK

Ian Cowan

LOCATION

Committee Room 3

Scottish Parliament

Commissioner for Children and Young People (Scotland) Bill Committee

Tuesday 4 February 2003

(*Afternoon*)

[THE CONVENER *opened the meeting at 14:04*]

Commissioner for Children and Young People (Scotland) Bill: Stage 2

The Convener (Kay Ullrich): Good afternoon. We have received apologies from Jamie McGrigor. I remind everyone to turn off their mobile phones and pagers—given that I was the guilty party last time, I have already done that. I welcome Cathy Jamieson, the Minister for Education and Young People; Karen Gillon, the convener of the Education, Culture and Sport Committee; and Cathy Peattie, the deputy convener of that committee.

I shall begin by advising members of the procedure for dealing with stage 2 of the bill. Members should have copies of the bill, the marshalled list of amendments and the groupings list. I ask you all to check that you have those papers. The amendments have been grouped to help debate. The order in which they appear on the marshalled list is the order in which they will be called and moved. We cannot move backwards on the marshalled list. Once we have moved on, that, I am afraid, folks, is it.

There will be one debate on each group of amendments. I will call the proposer of the first amendment, who should speak to and move the amendment and may speak to any other amendments in the group. I will then call other speakers, including the minister and Karen Gillon. Following debate, I will clarify whether the member who moved the amendment still wishes to press it to a decision. If the member does not wish to do so, he or she can seek the agreement of the committee to withdraw it. If it is not withdrawn, I will put the question on the amendment. If any member disagrees, we will proceed to a division by a show of hands. It is important that members keep their hands raised until the clerk has fully recorded the vote. Only members of this committee can vote. Other members of the Parliament may speak to or move amendments, but they are not able to vote. If any member does not want to move their amendment, they should simply say, "Not moved," when the amendment is called.

No amendments have been lodged to section 1.

Section 1 agreed to.

Schedule 1

THE COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE IN SCOTLAND

The Convener: Amendment 8 is grouped with amendment 9.

The Minister for Education and Young People (Cathy Jamieson): I want to put on record the fact that, in considering potential Executive amendments to the bill, I have sought to work within the spirit of the bill, as drafted by the Education, Culture and Sport Committee. The Executive welcomes the proposed establishment of a commissioner for children and young people, and the amendments that I have lodged seek to ensure that a commissioner will be able to add value to existing systems and to avoid duplication.

I have lodged four amendments, the purpose of which is to encourage partnership working and consultation. I will go on to talk about widening the scope of the commissioner's investigatory functions, but I will focus initially on the two partnership amendments in this group. It is important that all the amendments be viewed together, so that members can understand the intention behind the Executive's amendments. The policy intention is to ensure that the commissioner can cover all children and young people, to widen the investigatory remit while avoiding duplication and to ensure that the commissioner adds value and makes a positive difference.

Amendment 8 would encourage the commissioner to work co-operatively with other organisations. Amendment 9 would impose a duty on the commissioner to consult and, where appropriate, to exchange information with other organisations that the commissioner considers have similar functions, with the aim of avoiding duplication. In its report, the Finance Committee expressed some concerns about the potential for duplication.

We all want to ensure the establishment of a commissioner who makes a positive difference to the lives of young people. I know that the Education, Culture and Sport Committee has argued clearly that it is not for the commissioner to take on the role of other agencies; rather, it is for the commissioner to ensure that those agencies give sufficient priority to the rights and needs of children and young people. I welcome that mainstreaming approach, and agree that the focus must be on the added value that a commissioner can bring.

To ensure that such an approach works successfully, the commissioner will need to make links with a range of organisations and, where possible, work in partnership with similar organisations if he or she is to raise the profile of children's rights. I appreciate that the bill already includes a section that directs the commissioner to take "reasonable steps" to consult organisations that work with and for children and young people, but there is a range of regulatory organisations that may not fall within the current definition but with which it is particularly important that the commissioner develops a working relationship.

I have not sought to include a list of organisations in the amendments, as I am aware of the committee's desire to avoid including lists within the bill. I therefore propose that it should be for the commissioner to determine which organisations he or she considers to have similar functions. I would imagine that, depending on the issue, the commissioner might want to build links with the Scottish Commission for the Regulation of Care, Her Majesty's Inspectorate of Education, the Disability Rights Commission, the Equal Opportunities Commission and the Commission for Racial Equality. The commissioner may, of course, wish to work with organisations on an investigation or on a joint awareness-raising campaign.

It is important to state on record that, as the bill is a committee bill, no guidance will be prepared for or issued to the commissioner, so a newly appointed commissioner will look to the bill and the explanatory notes for such guidance. Parliamentary speeches will also help in setting the agenda. In the absence of formal guidance, the amendments will send an important signal about working methods. We as members may be clear about the type of approach that we expect a children's commissioner to bring to his or her role, but we need to ensure that an incoming commissioner—whether that is in 2003 or 2023—also understands that.

It is important that we place on record that the commissioner should have a focus on working and communicating with other organisations and on sharing information. All that will help to increase the effectiveness and impact of the commissioner. The amendments are not simply about discussing future work programmes but about establishing collaborative working arrangements. However, the amendments will not limit the commissioner's independence. It will still be for the commissioner to decide when to work alone and when to work with other organisations. It will also be for the commissioner to decide whom he or she wants to work with and on what basis.

The amendments are closely linked to amendment 11, which deals with investigatory powers and which I will speak to later. To ensure that investigations can be carried out without the risk of duplication, we need to ensure that there are good communication links between the commissioner and other agencies. The intention of the amendments is to provide the commissioner with the flexibility to make a difference while seeking to prevent duplication and overlap.

I apologise for taking so long to speak to the amendments, but it is important that we have some of those issues on the record.

I move amendment 8.

Donald Gorrie (Central Scotland) (LD): The minister said that no guidance would be provided. I can see that it is quite correct that, once the Parliament has passed the bill, neither the Parliament nor the Executive will provide any guidance to the commissioner, who will be very independent and do his or her duty as he or she sees fit. However, is there any scope for considering whether guidance might be issued to public authorities on how they should deal with the commissioner? Some concerns that have been raised with me have caused me to lodge other amendments that relate to this issue. Executive bills can provide for guidance, but this bill cannot because it is a committee bill. Is it possible to provide for guidance that would affect not the commissioner but how other people dealt with the commissioner?

Cathy Jamieson: The Commissioner for Children and Young People (Scotland) Bill is a committee bill, not an Executive bill. It is for this committee to establish during the course of its proceedings what guidance it wants to put on record on how the future commissioner should operate. There are a number of policy issues in relation to how other organisations deal with children and young people's issues generally, but those would normally be taken up by the Executive as part of its work in child-proofing all policy developments and in ensuring that children and young people are consulted and involved at every stage in the process. However, I cannot say what the committee should decide on for this bill, which is a committee bill.

The Convener: I allowed the minister to respond to that because I thought that it might be helpful, but she will also have an opportunity to wind up the debate on this group.

14:15

Karen Gillon (Clydesdale) (Lab): It is obvious that amendments 8 and 9 are aimed at encouraging the commissioner to work with others to minimise duplication and overlap. Neither amendment is necessary, as neither brings anything new to the bill.

Beginning on a mischievous note, I suggest that we refer to amendment 8 as the Martini amendment—any time, any place, anywhere. Its ambiguity adds nothing to the existing provision in paragraph 6(1) of schedule 1, which says:

"The Commissioner has a general power to do anything necessary or expedient for the purposes of, or in connection with, the exercise of the Commissioner's functions."

That will vest the commissioner with a general power that is ancillary to the main functions as detailed from section 4 onwards. It will ensure that the commissioner can carry out his or her functions effectively. The minister talked about partnership and, although the bill is already drafted, perhaps co-operation is a better word than collaboration to describe how the bill will lead the commissioner to work with others.

I refer colleagues to sections 4(1), 4(2)(a) to 4(2)(d), 5(3)(a) and 5(3)(b), 6, 7(2)(b), 8(1)(b), and 11(3). The ethos of the commissioner's work is to promote children's rights and encourage change rather than enforce it. The commissioner will not require a statutory power to communicate with others to do his or her job.

Amendment 9 is similarly unnecessary. There is already a duty in section 6(2)(c) for the commissioner to

"consult organisations working with and for children and young people on the work to be undertaken by the Commissioner."

That duty reflects what is said in the Education, Culture and Sport Committee's report on the bill, which states:

"The Commissioner will seek to minimise overlap and duplication with others by co-ordinating the work of the office, and establishing good working relationships with other relevant parties. These might include inter alia other commissioners and ombudsman, statutory organisations including the Parliament and the Executive, and children's organisations."

Furthermore, the mainstreaming approach that is outlined in the report and which is implicit in the bill and explicit in the explanatory notes, suggests that the commissioner can establish relationships with existing organisations to use networks that are already in place.

It is obvious that the commissioner cannot and will not operate in a vacuum. There is a complex structure of various regulatory inspection and promotion agencies that are relevant to children's rights. It would be inappropriate for the commissioner to replicate those, and the bill does not seek to do so. The bill will create a commissioner who can take an overview of issues, adopt an independent approach and focus on children and young people. In other words, there should be a mainstreaming approach.

Such an approach may mean that the commissioner's work potentially overlaps with that of others. However, the breadth of his or her remit is offset by the fact that there is no existing body in Scotland that focuses solely on the rights of children and young people. In that respect, the commissioner will be unique. The commissioner will have no coercive powers under the non-investigative functions, and common sense will require him or her to adopt a co-operative approach with others in the field.

The commissioner will essentially ensure that existing bodies work better for children and young people. In so doing, it is envisaged that the commissioner will make efficient use of resources, information and existing networks by co-operating with other bodies where appropriate. That will avoid duplication, minimise overlap and enable the commissioner to perform effectively.

Co-operation is of course a two-way process, and although the commissioner may initially draw on existing expertise and experience, he or she will undoubtedly become a source of knowledge and advice for others.

Clearly, co-operative working arrangements with other bodies are desirable and necessary. The Education, Culture and Sport Committee takes the approach that such aspects of the commissioner's work should be non-statutory, non-list based, discretionary and informal. They should be developed by the commissioner and other relevant bodies and should be set out through mutually agreed working arrangements, protocols, concordats and the like rather than being placed in the bill.

It is curious that amendment 9 does not require consultation per se, but merely asks that it occur "from time to time". That will avoid duplication, but only "so far as practicable".

I also suggest that the requirement to exchange information, which would be provided for by subsection (1)(b) of the proposed new section, would be part of any consultation required by subsection (1)(a), and would probably therefore be superfluous.

Amendment 9 would require the commissioner to consult persons whom he or she reasonably believes to have similar functions or who exercise similar functions. The functions of the commissioner are set out throughout the bill and in section 4(1) in particular, which states:

"The general function of the Commissioner is to promote and safeguard the rights of children and young people."

It is because nobody else has that function that the commissioner for children and young people is being created. I accept that others have duties that include the promotion and safeguarding of such

rights. However, other than other children's commissioners, it is difficult to identify who might fall within subsection (2)(a) of the proposed new section.

I accept that the intention that underlies amendment 9 is to make the requirement to consult explicit. I hope that I have addressed the issues on which the minister wanted me to elaborate and that I have shown that the implicit references throughout the bill, coupled with the explicit material in the explanatory notes, make amendment 9 unnecessary. I therefore invite the minister to withdraw amendment 8 and not to move amendment 9.

Irene McGugan (North-East Scotland) (SNP): I will speak in favour of the view that Karen Gillon has expressed.

Amendment 8 is ambiguous and imprecise. I would accept amendment 8 if it were a genuine Martini amendment—

Jackie Baillie (Dumbarton) (Lab): With an olive.

Irene McGugan: That is right, but as it is not that kind of amendment, I cannot accept it.

On amendment 9, Karen Gillon has comprehensively outlined the view that was taken by those of us who were involved in drawing up the bill. We feel that there are sufficient elements within the bill to avoid the overlap and duplication of work about which the Executive is concerned.

I will not repeat the arguments that Karen Gillon outlined, but I will mention one thing that concerns me and to which she did not refer. Children and young people have been placed at the heart of the bill all the time. However, one offshoot from the Executive's proposal is that it might detract from the ethos of involving children and young people. The Executive proposes that equal and perhaps greater weight be given to the commissioner's working relationship with a small group of statutory bodies. We want to avoid that kind of notion.

Jackie Baillie: I do not detect much of a difference between what Karen Gillon said and what the minister said. Ultimately, we all want to end up in the same place. The argument is really about the best way of achieving that. I have quite a bit of sympathy for what the minister said, but I feel that the approach that we all want is already implicit in the bill. Indeed, the explanatory notes make a clear reference to it.

I seem to recollect that, when the Executive asked the Education, Culture and Sport Committee to consider whether we needed a children's commissioner, the Executive's whole approach was about the need for mainstreaming. Mainstreaming was seen as providing added value without the potential for duplicating what was already being done. However, it is implicit in a mainstreaming approach that one has to work in partnership with other organisations in order to influence them.

The minister mentioned a variety of specific organisations that the commissioner might consult. Quite helpfully, she said that listing tends to date legislation quickly. However, section 6(2)(c), which covers the need to consult other organisations, is drawn widely enough not to exclude any of the organisations that the minister mentioned. Even if that were not the case, paragraph 6 of schedule 1 gives the commissioner the general power to do "anything necessary or expedient" in the course of doing his or her work. Given both those provisions, I think that there is sufficient provision within the bill to allow us all to be comfortable with it.

The Convener: The minister may wind up.

Cathy Jamieson: The discussion has been helpful. I welcome the contributions of committee members for putting on record the policy intention, although I do not think that there has been a disagreement over that. The difference of opinion—slight though it was—concerned whether that intention, on which everyone seems to agree, should be on the face of the bill or implicit in it.

However, I do not think that the absence of the Executive amendments will make the bill unworkable. Given the reassurances that I have had, which I expect committee members will make explicit again at stage 3, I will not press amendments 8 and 9.

Amendment 8, by agreement, withdrawn.

The Convener: Amendment 2 is grouped with amendment 3.

Karen Gillon: Amendments 2 and 3 would bring the provisions for the accountable officer into line with certain other acts that have been passed by the Parliament. Paragraph 10 of schedule 1 to the bill provides for the appointment of an accountable officer, who will sign accounts of expenditure, ensure the propriety of the finances and ensure that resources are used economically, efficiently and effectively. The accountable officer will be designated by the Scottish Parliamentary Corporate Body and may be either the commissioner or a member of the commissioner's staff.

In response to a concern that the Executive raised, it was agreed to propose an extra safeguard for the accountable officer, if he or she is a member of the commissioner's staff, to cover situations in which the accountable officer is asked by the commissioner to do anything which the officer considers is inconsistent with his or her role. Amendment 3 would place a duty on the accountable officer in such circumstances to

obtain written authority from the commissioner before taking action. A copy of that authority would have to be sent to the Auditor General for Scotland.

The effect of amendment 2 will be that that duty will apply only where the accountable officer is a member of the commissioner's staff. The amendment will bring the bill into line with recent precedent—for example, it follows the Scottish Public Services Ombudsman Act 2002.

I am pleased that the minister supports the amendments and I hope that the committee will support them, too.

I move amendment 2.

Amendment 2 agreed to.

Amendment 3 moved—[Karen Gillon]—and agreed to.

Schedule 1, as amended, agreed to.

Section 2—Appointment

The Convener: Amendment 4 is in a group on its own.

Donald Gorrie: Amendment 4 would instruct the Parliament to

"consult and involve children and young people and organisations working with and for children and young people in the process of selecting a nominee."

I am sure that everyone would agree that that should happen and I think that the matter is sufficiently important to figure in the bill.

If assurances are given that such consultation and involvement will happen, that might be satisfactory; however, it would be helpful to consider how such consultation should take place, as the bill is not an Executive bill and the Parliament would have to carry out the consultation. Would the Parliament consult before setting up an appointing committee, or would it tell the appointing committee to consult before it made appointments? I hope that members agree that young people and youth organisations should be involved as much as possible in the appointment process, but the question is, how should that be done?

I move amendment 4.

Karen Gillon: The Education, Culture and Sport Committee has been keen to involve children in our processes. We have sought to do so in a meaningful rather than tokenistic way, which I hope we have achieved.

The aim of amendment 4 is to ensure that the Parliament further involves children and young people and organisations that work with and for children and young people in the process of appointing the commissioner. However, the amendment is unnecessary and might not achieve what it sets out to do.

I am more than happy to reiterate our commitment to involving children and young people in the recruitment of the commissioner, but the standing orders do not allow for a child or young person to sit on the selection panel for the appointment of the commissioner. Under rule 3.11.3 of the standing orders, the selection panel will be made up of the Presiding Officer, the convener of the Education, Culture and Sport Committee and at least four, but not more than seven, members of the Scottish Parliament.

The Education, Culture and Sport Committee intends that the selection panel will take account of the views of children and young people in a meaningful way. That could be done through informal questioning of potential candidates or consultation on the job description. The reality of the situation—and what my legal note says I must say—is that decisions on candidates will be for the selection panel. I am keen to ensure that I say the right thing by following my legal note.

14:30

Informal questioning might entail candidates answering questions from a diverse panel of children and young people who might be chosen from key children's agencies such as Save the Children, Barnardo's and Children 1st. The appointment panel might observe that interaction and use it as part of the overall assessment of candidates' performance. That would allow children and young people to have a significant input, although it is clear that their input will not be to the extent of choosing the successful candidate.

The Education, Culture and Sport Committee's commitment to involving children and young people in the recruitment process has been relayed to the Parliament's corporate policy unit, which is responsible for overseeing such appointments. I expect that the CPU will wish to consider recent experience in Wales, where children and young people had input into the process of appointing the children's commissioner for Wales.

Given what amendment 4 seeks to achieve, it is oddly worded in that it would require consultation only on the process. I presume that the intention is that children and young people should have a say in deciding what kind of person should be the commissioner. However, it is not clear that the amendment would allow input into the actual proceedings, by which I mean the decision making involved in recruitment and appointment. The amendment might allow for input into the process and procedures that lead to the decision on who

should get the job, but I wonder whether it would allow input into the decision itself.

Amendment 4 would mean that the Parliament would have to consult not only children and young people but organisations that work with and for children and young people. It is likely that whoever takes up the post of commissioner will, like Peter Clarke in Wales, have worked in the children's sector. If the amendment were agreed to and such a situation arose, children's organisations would be required to input into the decision on which of their colleagues should become the commissioner. That could raise any number of questions about objectivity, transparency and propriety.

Given the Education, Culture and Sport Committee's firm commitment to seek the involvement of children and young people in the recruitment of the commissioner and the other factors that I have outlined, I invite Donald Gorrie to withdraw amendment 4.

Jackie Baillie: I have sympathy for what Donald Gorrie is trying to do, but the issue is how we can legislate for good practice. I do not believe that the measure proposed by his amendment should be included in the bill, although the Education, Culture and Sport Committee, the Parliament and other institutions accept that Donald Gorrie's suggestion would be good practice. Even if we put aside the standing orders—although I am very conscious of them—it would be tokenistic and not very inclusive to have one child on the panel.

No matter how we were to engage with children and young people—whether that happened prior to the shortlisting or prior to the interview—we would take advice from voluntary organisations that have worked creatively with children and young people. Given the commitments that have already been made, rather than agree to Donald Gorrie's amendment, we should leave the system as informal but flexible.

Donald Gorrie: It is encouraging that so much thought has been given to the difficult process of giving young people a say in the appointment procedure, given that they will not have a vote on the panel. Members' comments were helpful and encouraging and, on the basis of what they have said, I am happy to withdraw amendment 4.

Amendment 4, by agreement, withdrawn.

The Convener: Amendment 5 is in a group on its own.

Donald Gorrie: Amendment 5 is a slightly nit-picking amendment that tries to take account of the fact that a future Parliament might be less enthusiastic about the business of helping young people than the present, highly enlightened Parliament is. The appointment, or non-appointment, of the commissioner for a second period might be sneaked through without a parliamentary decision. In the light of the position at Westminster, which is not entirely parallel but similar, where the continuation of the appointment of Elizabeth Filkin became a controversial issue, it would be helpful if the bill were to make it clear that the Parliament must approve a resolution to reappoint or not to reappoint the commissioner. I am interested in members' response to my suggestion.

I move amendment 5.

Karen Gillon: Amendment 5 is directed at clarifying that a resolution of the Parliament would be required in appointing a commissioner to a second term of office. I welcome the opportunity to clarify that that is what would happen. The amendment is unnecessary because reappointment is already subject to the same procedure as appointment. Reappointment is covered under section 2(4), which refers to appointment "for a second period". Section 2(1) is the only provision on appointment and says that appointment is

"by Her Majesty the Queen on the nomination of the Parliament."

The procedures for nomination are covered by rule 3.11 of the standing orders. Rule 3.11.7 requires that a motion be lodged before the Parliament.

In light of that information, I invite Mr Gorrie to withdraw his amendment.

Irene McGugan: I will underline that point. The bill is clear that an appointment—whether a first or a second appointment—is fully covered by section 2. Nomination by the Parliament is required and the appointments need not be consecutive—that is, a first appointment may have occurred five years before the second. Section 2 will come into effect for every appointment. Donald Gorrie need have no worries about that.

Donald Gorrie: On the basis of those assurances, I am content to withdraw the amendment.

Amendment 5, by agreement, withdrawn.

Section 2 agreed to.

Sections 3 to 6 agreed to.

After section 6

Amendment 9 not moved.

Section 7—Carrying out investigations

The Convener: Amendment 10 is grouped with amendment 11.

Cathy Jamieson: The amendments would make two changes to the bill. The first change is intended to clarify the extent of the commissioner's

powers to investigate matters that may be before the courts, so that there would be no risk that any investigation by the commissioner might be seen as interfering with the independence of the judicial decision-making process. I do not think that there is any policy difference between the Executive and the Education, Culture and Sport Committee on that point. However, we are concerned that the bill as drafted does not completely reflect that policy intention, as it could allow the commissioner to investigate a case that involved more than one child. It is clearly important that that point is clarified on the record. The amendments would protect the independence of the judicial process in individual cases, but would still allow the commissioner to examine generic issues that affect children in relation to the courts.

The second change would broaden the commissioner's ability to undertake investigations. As drafted, the bill could be interpreted as not allowing the commissioner to undertake an investigation that would duplicate the work of another person. With amendment 11, I am proposing that the commissioner should be able to undertake an investigation unless someone with an overlapping remit indicated to the commissioner within 28 days of the publication of the notice of investigation that they were intending to conduct their own inquiry.

The power to conduct investigations will be an important part of the commissioner's remit. It will allow the commissioner to focus on specific issues, to highlight areas of concern and to make recommendations for change. Investigations are likely to be fairly infrequent events but, given their potential impact, it is important that we do not inadvertently exclude certain areas or certain young people from the commissioner's remit.

It might be helpful if I were to highlight a couple of examples of areas where difficulties could arise. The commissioner may wish to investigate whether the rights, interests and views of children in residential care are taken into account and respected. That is an important issue and is an area where the commissioner would have a clear interest. However, the Scottish Commission for the Regulation of Care has responsibility for inspecting care homes and, in undertaking inspections, the commission uses the national care standards. The standards for care homes for children and young people refer explicitly to their rights.

An example of those standards is:

"You must be satisfied that it"—

meaning the care home—

"can accommodate you and any belongings and equipment you need in a way which supports your right to privacy and dignity".

The standards continue:

"You have the right to feel safe, secure and protected in all aspects of your life … You have the right to contribute to decisions made about your life and care, in ways that are suited to your age … You know about your rights and responsibilities … You have access to other agencies and services, such as advocacy, that can support you in making your needs and preferences known. They can, with your permission, represent you and give your views. Information on these services is provided in a way you can understand."

We need some clarification that the bill could not be interpreted as preventing the commissioner from undertaking an investigation into the rights and views of children in residential care, as such an investigation could be deemed to fall within the remit of the care commission. We do not want investigations to be seen as duplicating work that is properly the function of another person or organisation, yet there may be times when it would be sensible for the commissioner to look at an issue, possibly because of the different perspective that they would bring to the issue as part of a wider investigation.

The care commission also inspects school care accommodation services, such as those provided in boarding schools, hostel accommodation and residential schools. The standards are again couched in the language of rights, for example:

"You have the right to be treated politely and with dignity … You have the right to take part in decisions about your life in a way that is right for your age."

I welcome the desire to avoid duplication, but I wonder whether it would be possible to achieve that without removing specific areas from the commissioner's remit. Amendments 10 and 11 would ensure that no areas were excluded from the commissioner's remit and that safeguards to prevent duplication were included, especially when the commissioner's remit is viewed in conjunction with the policy intention of sharing information and co-operation.

I have already mentioned that one of the proposed safeguards is that of allowing 28 days within which an organisation that has a remit in the relevant area can flag up its intention to conduct an inquiry. It might be helpful if I were to say a little more about that provision. At the moment, the commissioner would be obliged to establish whether an investigation would duplicate the function of another organisation, but the proposal in amendment 10 would remove that duty from the commissioner and place the obligation on the other organisation.

There is a concern that the bill as drafted directs the commissioner, before undertaking an investigation, to draw up the terms of reference for that investigation. He or she must then publish the terms of reference in a way that brings them to the attention of those likely to be affected by the

investigation. It is important, of course, that the commissioner shares information with organisations with a possible remit to allow them to flag up their interest. My proposal would not change that arrangement, but it would give organisations 28 days following the publication of the terms of reference to inform the commissioner that the issue falls within their remit and that they intend to conduct an inquiry.

The intention behind amendment 11 is to broaden the commissioner's investigatory powers. It would ensure that no areas were closed to the commissioner and that issues identified by the commissioner as important could not be ignored. An organisation could stop an investigation going ahead only if it was intending to conduct its own inquiry. The amendment would remove from the commissioner the burden of ensuring that an investigation did not duplicate the function of another organisation.

I hope that I have explained why we lodged the amendments. We want to clarify and broaden the commissioner's powers to ensure that he or she can make a positive difference to the lives of all children and young people. I would appreciate hearing committee members' views.

I move amendment 10.

14:45

Jackie Baillie: I echo the minister's comment that a substantial policy difference is not involved, but perhaps there are a few nuances in the way that we reach where we want to be. I keep asking the question: what is the added value? We were clear from the beginning that mainstreaming provided that added value, so we avoided duplication of other organisations' work, rather than set up the commissioner as the last resort. I am slightly nervous that the amendments might have the unintended effect of making the commissioner the last resort.

The bill does not preclude all investigations, but I accept that its scope is limited. However, that is right, because the benefit of having a commissioner is that a more proactive, child-focused and young person-focused approach would be expected from other organisations that provide services to children and young people.

Perhaps I am confused, so I would welcome some clarity. We want to avoid overlap with other organisations' remits. The care commission's remit is not about setting rights-based standards but about monitoring those standards, so scope might already exist for a positive working relationship without duplication.

I would be slightly concerned if organisations said, "For goodness' sake, we've got enough on. If the commissioner wants to investigate, we won't object within 28 days. The burden can fall on the commissioner rather than on us, because we are hard pressed." I do not suggest that any organisations would take that view, but such a view would not underpin the mainstreaming approach that we want. The policy intent is the same, but we should address those nuances.

Karen Gillon: The minister expressed her concern that the criteria for investigations would prevent meaningful investigations, but I do not think that that is the case. I will explain the background to the provisions in the hope of assuaging some concerns, and I will place reassurances on the record, so that no one has any dubiety.

The criteria for investigations were drawn up partly to prevent duplication of effort. In developing the policy, the Education, Culture and Sport Committee was concerned that investigations should form a small, albeit important, part of the commissioner's work. We were concerned that too much focus on investigations would suggest a reactive, rather than proactive, approach and we were concerned that it would tie up resources that would be better spent on the general remit.

It is therefore important to apply a strong test to potential investigations. The questions that will need to be asked in justifying an investigation are: Will the investigation duplicate others' work? Will it have a general application? Will it deal with what children and young people consider to be key issues? Sam Galbraith's original memorandum to the Education, Culture and Sport Committee asked what added value a children's commissioner might bring. In relation to investigations, my opinion is that added value would not be achieved by allowing the duplication of the proper functions of other organisations. I see nothing that would prevent the commissioner from providing input to investigation by another organisation of a case such as the minister outlined, or from bringing the perspective of children and young people to that.

Amendment 10 deals with the concern that the commissioner might interfere in court cases. In effect, section 7(3)(b) will prevent interference with matters that are before courts or tribunals, because it will prevent the commissioner from dealing with individual cases. In addition, existing legal rules prevent interference with current court proceedings and the publication of material that might interfere with the course of justice. Those rules would apply to the commissioner, as they do to anyone else. It is also valid that the commissioner should be prevented from duplicating the proper function of bodies such as the care commission, the public services ombudsman, Her Majesty's Inspectorate of

Education and so on. Otherwise, what are those organisations for?

The commissioner has a cross-cutting general remit in section 4 to promote and safeguard the rights of children and young people. 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.

It is necessary to ensure that the commissioner focuses on filling the gaps that nobody else fills. That will be done in two ways. First, investigations will have a specific remit in that they will focus on the rights, interests and views of children and young people. Secondly, the commissioner will not usurp the complex existing systems of investigation and inspection. Therefore, although the commissioner has a cross-cutting remit over a broad range of service providers, investigations will have a specific remit. In other words, although the range of those who can be investigated is relatively wide, the scope of what can be investigated is relatively narrow.

For example, 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.

As drafted, the Executive amendments would allow another organisation to delegate to the commissioner its responsibility for investigation, as my colleague Jackie Baillie pointed out. That would contradict the underlying principle of having the commissioner, which is to encourage other organisations to take children's rights seriously and to take children's views on board. When it is the proper function of an organisation to investigate how children's rights, interests and views are taken into account, delegating that function to the commissioner would indicate that the organisation did not take those rights seriously. Perhaps even worse, it would allow delays and uncertainty. Even if I were in favour of the concept of overlap, the introduction of an apparently arbitrary adult waiting period of 28 days would only increase uncertainty about whether an investigation would take place and who would carry it out.

Amendment 11 does not require an organisation to carry out an investigation; rather, the organisation need only indicate that it will do so. The two are not the same, which serves only to illustrate the complications that might result from allowing duplication. The commissioner could expend precious resources in negotiating over which agency should carry out an investigation, as well as in doing work that should be done by others. I hope that the committee will agree that time spent on work that is the proper function of other organisations would be time lost on work that was unique to the commissioner.

The criterion that there must be no overlap in investigation is true to the original remit that was given to the committee by the Executive, and it underpins the added value that a commissioner could bring to services for children and young people. I am quite clear—from reading the bill as drafted, and from taking into account existing legal rules that prevent interference—that there is no possibility that the commissioner could have any investigatory remit in individual cases and court proceedings. In relation to overlap, I recognise the intention behind Executive amendments 10 and 11, but I hope that I have demonstrated that they are not well founded and that there are potential dangers in proposed section 7(3)(d) and in the removal of section 7(2)(b). I hope that, in view of my reassurances, the minister will be able to seek to withdraw amendment 10 and not move amendment 11.

Cathy Jamieson: The debate has been useful and a number of points have been put on the record. My concern has been to ensure that the commissioner will have the opportunity to be proactive rather than reactive, so that they can pick up on some of the generic and general applications that arise from the problem areas.

Karen Gillon said that the commissioner would not want to overlap with HMIE in the inspection of schools, although there might be matters that the commissioner would want to consider. I gave a similar example of the commissioner's interest in relation to young people in residential care. I have tried to ensure that the bill is not drafted so tightly as to exclude situations in which children and young people sometimes find themselves, but which do not fit neatly into definitions that are expressed in legal and policy terms. It has been helpful to have Karen Gillon's reassurances.

I am also reassured by the explicit statement concerning matters that are before the courts. There has been no difference of intent regarding the policy; we simply wanted to ensure that the bill was drafted in such a way as to prevent any dubiety about that in the future. On the basis of Karen Gillon's reassurances, and in the hope that they will be made explicit at stage 3 for the avoidance of doubt, I am happy to withdraw amendment 10.

Amendment 10, by agreement, withdrawn.

Amendment 11 not moved.

Section 7 agreed to.

Section 8 agreed to.

Section 9—Investigations: witnesses and documents

The Convener: Amendment 6 is in a group on its own.

Donald Gorrie: Section 9 states:

"The Commissioner may require any person … to give evidence … or … to produce documents".

I suggest that the bill should also give the commissioner the power to enter premises that are managed by a person. There are many issues that the commissioner might explore that would involve examination of premises. For example, if the case involved homeless young people, the commissioner might want to inspect hostels, houses in multiple occupation and so on, in order to establish their quality. The same principle would apply to pre-school education establishments or after-school clubs that were run by a particular organisation, and it would apply to public, voluntary and commercial organisations. The commissioner should have the right to visit such premises.

I am sure that there would seldom be conflict. However, if somebody had something to hide and did not want the commissioner to visit, it would be unfortunate if the commissioner's ability to do so was unduly limited. Therefore, the power to enter premises is a reasonable power to add.

I move amendment 6.

Irene McGugan: I do not think that the commissioner needs a power of access. In the majority of cases, the commissioner would want to negotiate amicably with whomever, or with whatever agency, was under investigation. When there is sufficient concern to justify using such a power, others in society have that power—notably policemen and, in some circumstances, social workers. It might be more appropriate for the commissioner to involve those people.

I appreciate the fact that commissioners in other parts of the world have the sort of power that Donald Gorrie has outlined. However, I remind him that our commissioner will have a different remit from, in fact a more powerful remit than, that of most other commissioners. The bill sets out clearly the areas where compliance is required and where non-compliance will be viewed as a criminal offence. There are ways in which the commissioner can exercise considerable power, but I do not think that he also needs a power of access.

Karen Gillon: I have difficulty in understanding how the cases that Donald Gorrie has outlined would fall under the remit of the commissioner. They would probably come under the remit of other agencies that inspect houses in multiple occupation and children's homes. Inspection of such premises would not be within the remit of the commissioner.

Amendment 6 is directed at providing the commissioner with a power of entry to the premises of a service provider that is the subject of an investigation. The amendment is based on the premise that such a power is essential to enable the commissioner to fulfil their general function of promoting and safeguarding the rights of children and young people. Amendment 6 as drafted would, it appears, allow the commissioner access to the premises of any person, provided that that access has a bearing on the matter that is being investigated.

One of the key principles that underlies the ethos of the role of the commissioner is that he will, ultimately, achieve more through recommendation, influence and determination than he will through confrontation. In December 2001, the Education, Culture and Sport Committee heard powerful evidence from Ian Smith, the local government ombudsman, who said that his experience and that of his predecessors during the past 25 years was that

"recommendation, influence and determination are better than confrontation".

He went further and said:

"The power to enforce is not appropriate for a position that is also about sharing best practice, raising awareness and working with the grain of people."—[*Official Report*, *Education, Culture and Sport Committee*, 4 December 2001; c 2850-51.]

That approach has been reflected in the bill in the accountability and reporting mechanisms.

15:00

The commissioner will provide a unique focus and, as I said, will raise the profile of the rights of children and young people through consultation, mediation and recommendation. It is perhaps understandable that much of the focus throughout our work has been on investigations, although investigations are intended to form only a very small part of the commissioner's work. The purpose of an investigation, as set out in section 7(1), has been deliberately framed to enable the commissioner to cover the full breadth of children's and young people's issues in relation to article 12 of the United Nations Convention on the Rights of the Child—on rights, interests and views—but nothing more than that.

Amendment 6 is misleading in two ways. First, it appears that it would give the commissioner an additional power to enter premises in relation to an investigation. However, because of the lack of sanctions attached to that provision, it would provide merely the illusion of additional power. Secondly, the amendment would give the commissioner further powers under the power of entry to examine conditions in, and the management of, premises and the treatment of any children and young people in them.

As has been mentioned, that would create overlap with the work of other bodies including Her Majesty's Inspectorate of Education, Her Majesty's Inspectorate of Prisons, the Health and Safety Executive, the care commission and the Social Work Services Inspectorate. Without a doubt, amendment 6 is contrary to the committee's policy that there be no duplication of work. Amendment 6 raises false hopes about what the commissioner can investigate and what he is expected to achieve.

The powers that are available to the commissioner in conducting an investigation are based closely on the powers that parliamentary committees have under section 23 of the Scotland Act 1998. Those powers are the power to compel the attendance of witnesses and the power to require documents. Those powers also have criminal sanctions, which apply in the case of failure to comply. Given the type of investigations that will be open to the commissioner, the power to demand entry is inappropriate and could lead to confrontation, which cannot be the way forward.

I ask Donald Gorrie to seek to withdraw amendment 6.

Donald Gorrie: I am not a confrontational person. Some strong arguments have been made about what the commissioner can do under the provisions of the bill. My examples of places that the commissioner might visit may have been badly chosen, but I think that there are situations in which entry to premises could be important. One would hope that that would be done by agreement.

If there is an issue about whether young people who have problems with the law are best dealt with in residential accommodation, jail or wherever, I think that it would be important for the commissioner to be able to visit those places. I accept the point that that should be done by agreement. I also accept that the commissioner can get the relevant people to give evidence when those people try to stop a visit.

As the assurances that I have received are satisfactory, I seek to withdraw amendment 6.

Amendment 6, by agreement, withdrawn.

Section 9 agreed to.

Schedule 2 agreed to.

Sections 10 to 14 agreed to.

Section 15—Protection from actions of defamation

The Convener: Amendment 1 is in a group on its own.

Karen Gillon: Amendment 1 would restrict the protection from actions of defamation that is afforded to the commissioner and staff. At present, section 15 gives the commissioner and staff absolute protection from actions of defamation in relation to any statement that is made by them for any of the purposes of the bill. That would prevent a person from pursuing an action of defamation in respect of any statement that was made by the commissioner or staff in carrying out any of their duties under the provisions of the bill.

The Executive expressed concerns that such a level of protection was too wide-ranging and did not conform to other Executive legislation, including the Scottish Public Services Ombudsman Act 2002. Following further consideration, I seek to limit absolute protection for the commissioner and his staff to the key areas in which the commissioner and staff might need that protection.

Amendment 1 would, therefore, restrict the commissioner and staff's absolute privilege

"in conducting an investigation under this Act",

to

"communicating with any person for the purposes of such an investigation",

and in respect of any report published under the bill.

For all other statements made in carrying out duties under the bill, the commissioner and staff would have qualified privilege. That would allow individuals to raise an action of defamation against the commissioner or staff in relation to any statement that had been made by them in their professional capacity. To be successful the individual would be required to show that the statements were made maliciously or with intent to injure.

The protection that is afforded to members of the public in section 15(1)(b) will not be affected by amendment 1 and remains as a qualified privilege. That protects any communication that is made to the commissioner and staff—for the purposes of the bill—unless it is made maliciously or with intent to injure. Amendment 1 would enhance the bill by balancing the interests of the commissioner and staff—by giving them the protection that will allow them to carry out their roles effectively—with the interests of service

providers, members of the public and so on and their right not to have their reputations damaged. I hope that members will be able to support the amendment.

I move amendment 1.

Amendment 1 agreed to.

Section 15, as amended, agreed to.

Section 16—Interpretation

The Convener: Amendment 7 is in a group on its own.

Donald Gorrie: I want to raise a matter related to section 16. It was pointed out to me that some of the exercises that will be conducted by the commissioner to do with services for young people could involve organisations that are not strictly significant to children and young people. For example, there might be shops that sell liquor to under-age children, or there might be planning departments that fail to provide adequate recreational facilities for young people.

Amendment 7 suggests that we should add the words "or affecting" so that the first line of the definition of service provider would read:

"means any person providing services for or affecting children and young people".

Therefore, whether it was a public department, an agency or a commercial organisation that was supplying services to children but whose main work is not related to children, the commissioner could still examine it.

Another point was raised with me, although I did not lodge an amendment about it. Section 16 mentions that parents or guardians are not service providers. There is an issue about the role of parents or guardians, so I would welcome the committee's saying how Karen Gillon and others who have been involved in producing the bill see parents or guardians fitting into the provisions of the bill. The definition focuses on children and that is right, but parents and guardians have a role and they should be clear about how the bill will affect them, if at all. I would like that to be clarified.

I move amendment 7.

Jackie Baillie: Reporters and the committee debated the section about service providers; it was even debated in our discussions with voluntary organisations and service providers. "Service provider" is defined so that it includes services that affect children and young people. That point has been covered and does not need to be reconsidered. However, the planning service works for the whole community, therefore it can clearly be interpreted to come within the scope of the bill and within the remit of the commissioner.

Although it is not connected to amendment 7, it has been mentioned that, after consultation, the committee and the reporters took the view that parents play a critical and primary role in children's lives. Nothing about the commissioner is intended to interfere with that; indeed, the commissioner will positively support that role by raising awareness of children's and young people's rights.

Karen Gillon: Amendment 7 aims to widen the definition of service provider to include any service that affects children and young people. I understand the reasoning behind it, but it would reduce the focus on services that most affect children and young people. Section 7 grants the commissioner the power to investigate service providers. That remit and the number of criteria that must also be met are set out in that section, and they have been discussed under amendments 10 and 11.

The definition of service provider is already deliberately very wide. To achieve that width, listing particular services has been avoided. However, it is not the policy intention that every person who provides a service of any nature might potentially be investigated. The current definition provides the focus on services that have the most effect on children and young people, which are the services that are provided specifically for them. The definition of service provider covers more services than are provided exclusively to children and young people. Paragraph 41 of the explanatory notes makes that clear. It states:

"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."

I understand from Donald Gorrie's comments that the intention is to cover retail and transport services. Many retail services are clearly provided for the entire population, including children and young people. Those that number children and young people among their customers are therefore covered by the current definition. Similarly, transport services are generally provided for the benefit of the entire population, not just adults.

The planning system has already been given as an example. However, it is not clear that amendment 7 would enable concerns about the planning system to be addressed. First, it is arguable whether the planning system is a service as such. Secondly, even if the planning system is a service, any investigation into planning decisions could quite properly be prevented by the overlap criteria in section 7(2)(b). Thirdly, it must be remembered that the commissioner does not have the power to overturn decisions. Surely the appropriate place to object to planning proposals is through the existing system, which was set up for that purpose.

It should, however, be noted that the commissioner has a wide remit under section 4 to consider issues that relate to the rights of children and young people. Concerns about the planning system in general could be addressed under that section in circumstances in which those rights are affected.

Amendment 7 could cover virtually all service providers, even when their service is not for children and young people. For example, the provision of bus passes for old-age pensioners could affect children and young people—the service for children and young people might be reduced if fewer seats were available. Does that mean that the commissioner should be able to investigate services that are provided for pensioners because they affect children and young people?

Amendment 7 would be contrary to the focus on the services that are most relevant to children and young people, which are those that are provided for them. It is important that the bill and the commissioner maintain that focus. If, after the office has been established, issues emerge that the commissioner feels should come within his or her remit, Parliament could consider a suitable amendment. However, during the initial stages, it is vital that the key focus remain on the most relevant services.

15:15

Mr Gorrie mentioned parents. I want to make it clear that the commissioner will recognise parents' special and valuable role in the welfare and development of their children. Parents and guardians have a special responsibility and we recognise that parenting can prove to be the most demanding job that any of us faces—as a parent of two children under two, I appreciate that sentiment very much. The commissioner will recognise that some parents feel unsupported and that they lack information, advice and services. I have no doubt that the commissioner will wish to address that matter if that lack is considered to be seriously detrimental to the rights of children and young people.

The commissioner will not seek to replicate or undermine the role of parents and guardians and he or she will not investigate such people. The commissioner will have the power to promote children's rights among parents and guardians, just as he or she will have the power to promote those rights throughout society as a whole, which includes children, young people and adults.

Article 5 of the United Nations Convention on the Rights of the Child, which will be the crucial document that underpins the commissioner's work, recognises the importance of the responsibilities, rights and duties of parents. I hope that my assurances will clarify for Mr Gorrie the role of the commissioner in relation to parents, and that they will enable him to seek to withdraw amendment 7.

Donald Gorrie: The replies on the issues that I raised were helpful. I am satisfied with the assurance that the term "service provider" does not mean a body that exclusively, or even mostly, provides services for children and young people.

I accept Karen Gillon's point that—especially to start with—the commissioner should focus on services for young people. However, there might be better examples than the ones that I gave of organisations that provide services across the board, but which involve children and young people.

Karen Gillon's points about parents were helpful. In some quarters, the question of rights for young people is seen wrongly as being about children versus parents. It is helpful to have the assurance that parents and guardians are part of a team and that they have an important role in helping young people to develop.

All the points were useful, so I will be happy to withdraw amendment 7.

Amendment 7, by agreement, withdrawn.

Section 16 agreed to.

Section 17 agreed to.

Long title agreed to.

The Convener: That, folks, ends stage 2 consideration of the bill. I thank the minister, the convener, members and clerks of the Education, Culture and Sport Committee, and the members of this committee, all of whom helped to get us through the stage 2 consideration.

Meeting closed at 15:19.

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