Scotland's Commissioner for Children and Young People (SCCYP) welcomes the opportunity to comment on the general principles of the Public Services Reform (Scotland) Bill.

The proposal to bring SCCYP and the other ‘parliamentary’ commissioners and ombudspersons within the ambit of a wide-ranging Executive power is of great concern to us. In its current form, the Bill would enable Ministers to change the functions of, or abolish any listed public body by order, with a minimum level of parliamentary scrutiny.

It is SCCYP’s view that the wide-ranging power that the Government is pursuing through Part 2 of this Bill is not an appropriate way to proceed in respect of parliamentary commissioners and ombudspersons. SCCYP is rightly and properly accountable to Parliament, through the SPCB and through subject committees. It should be Parliament through its proper processes that decides about any changes to our structure and functions.

The proper constitution of independent human rights bodies

The Policy Memorandum to the Bill states that

‘[t]he overarching purpose of the Bill is to simplify and improve the landscape of Scottish public bodies, to deliver more effective, co-ordinated government that can better achieve its core functions for the benefit of the people of Scotland.’

PSR (S) Bill, Policy Memorandum, para 2; emphasis added

While SCCYP’s work will no doubt contribute to a number of the Scottish Government’s objectives, the Commissioner’s role cannot be construed in any way as forming part of the organisation or the functions of government. Our role is to promote and safeguard the rights of children and young people, having particular regard to their rights under the United Nations Convention on the Rights of the Child (UNCRC)\(^1\). The state (in relation to devolved matters, the Scottish Government) in contrast, is the primary duty-bearer in respect of the rights held by children and young people under the UNCRC, and under other domestic and international law.

The Policy Memorandum further reads:

‘Public bodies are normally established to carry out executive functions or other tasks which have a clear national remit. In simple terms, this means a public body carrying out its day to day work independently of Ministers but for which Ministers are ultimately accountable.’

PSR (S) Bill, Policy Memorandum, para 6, emphasis added

\(^1\) Sections 4 and 5 of the Commissioner for Children and Young People (Scotland) Act 2003 (‘the 2003 Act’).
While the latter part of the quote may be true for Non-Departmental Public Bodies and similar types of public bodies, this is not the case for SCCYP. The proper exercise of our functions is in fact conditional upon our independence from government, and upon public confidence in our independence. The nature of bodies concerned with the state’s adherence to human rights standards requires such bodies to be removed from the sphere of influence of government. This is a key element of the internationally accepted minimum standards for the proper constitution of national human rights institutions, known as the Paris Principles².

Furthermore, the assertion in the Policy Memorandum that ‘it is often a matter of historical accident whether changes to improve the delivery of public functions require legislation’³ is not precise in respect of SCCYP. The office was established by means of the Commissioner for Children and Young People (Scotland) Act 2003, a committee bill that was brought forward after an extensive parliamentary inquiry into the need for and feasibility of such an office. This rather illustrates the point we are making with regards to the legislative short-cut proposed by the Government in s.10 (1). Decisions about the structures and functions needed to promote and safeguard the rights of children and young people in Scotland are best made on the basis of detailed consideration of the often complex issues that are involved. In the 2003 Act, the balance of power was clearly and deliberately set in favour of Parliament. The recent report of the Review of SPCB-Supported Bodies (RSSB) Committee’s inquiry acknowledged that fact and reaffirmed the underlying principle⁴. In evidence to the Committee, the Cabinet Secretary for Finance and Sustainable Growth stated:

‘The clear distinction between the powers of the Executive and the Parliament must be properly recognised in meeting the essential requirement of ensuring that public concerns are properly and dispassionately considered, free of any relationship with the Government. That point of principle helps us to understand the distinction between those parts of the scrutiny process that are properly the preserve of the Government to change and those that are more appropriately the preserve of the Parliament. The distinction is clear.’

John Swinney MSP, RSSB Committee, OR 9 December 2008, Col 21f

The distinction is indeed clear. Its purpose is to enable bodies like SCCYP to exercise their statutory functions in the interest of the people whose rights they were set up to safeguard without fear or favour. It follows that it is inappropriate to include SCCYP and other bodies of a similar nature in the list of public bodies that are subject to the very wide Executive power in s.10. Any inquiry into those bodies to review whether they are fit for purpose and delivering value for the public purse should properly be undertaken by Parliament (and has been, on two occasions since 2004).

---

³ Public Services Reform (Scotland) Bill, Policy Memorandum, para 94.
The most recent inquiry of this nature reported only a week before the present Bill was introduced. The RSSB Committee considered the structures of the SPCB-supported bodies in great detail, and in the context of proposals from the SPCB and recommendations from the 2006 Finance Committee Inquiry. The report concluded that there should be some limited changes to the landscape. The RSSB Committee’s Convener subsequently won the Parliament’s approval to introduce a committee bill implementing the report’s recommendations concerning those bodies. This will include measures to streamline and harmonise the different bodies’ establishing statutes in respect of financial and budgetary matters, and consolidate current good practice in relation to budgets and staffing in law. It will further include new powers for the SPCB to secure cost-savings on the part of those bodies, for example through service-sharing.

This is the right and proper way to proceed in respect of the SPCB-sponsored bodies; Part 2 of the Bill, in contrast, maps out a process that would be inappropriate for Parliament’s independent bodies.

**Part 2 – Process and safeguards**

The focus of this submission has been on questions of principle and we have laid out SCCYP’s views on those above. We have further considered the Bill’s provisions regarding the exercise of the s.10 power and have explored some of the issues with Scottish Government officials, with a view to testing the strength of the procedural safeguards. This section summarises SCCYP’s views on these provisions in the Bill.

*Proportionality – s.12 (2)(a)*

Under this section, any proposed measure must be proportionate to the three objectives of efficiency, effectiveness and economy. It is unclear how the Government intends to weigh those largely financial objectives against more substantive objectives, in SCCYP’s case the need to retain an independent body to promote and safeguard the rights of children and young people with statutory powers. The Bill gives no indication as to how the public interest in financial savings will be weighted against children and young people’s interest in an independent statutory organisation with the sole objective of promoting and safeguarding their rights. In this respect, it is arguable that the provision is not a safeguard at all.

*Necessary protections – s.12 (2)(b)*

The Bill provides that no ‘necessary protections’ may be removed by a s.10 order. This links the points of principle above to the question of procedural safeguards. The Bill further provides that the removal of necessary protections is not to be treated as such if those protections are provided in an alternative manner (s.12 (3)). We are aware that there can be, and there have been, different ideas about

---

5 RSSB Report (see above, FN4); The inquiry report was debated and the motion seeking authorisation to introduce a committee bill implementing its key recommendations agreed without division on 18 June 2009.

6 See recommendation 10 (staffing and financial provision, etc) and 11 (budgets, service sharing, etc). This is already largely covered in Schedule 1 of the Commissioner for Children and Young People (Scotland) Act 2003.
how the parliamentary commissioners’ functions are best delivered, and no public body can expect that its structure and remit will not come under scrutiny from time to time.

It is SCCYP’s view, however, that government should not be given a power that is as wide-ranging as the provision in s.10 of this Bill. Such a power would enable the Government to make sweeping changes (including merger or abolition) to the structure and functions of SCCYP and other rights bodies by order, with minimal parliamentary scrutiny. There is a risk in the fact that the condensed parliamentary process allows very limited debating time for detailed interrogation of a proposal; the result may be weakened rights protection for Scotland’s children and young people. SCCYP therefore believes that the only real and proportionate safeguard is a process allowing for detailed parliamentary consideration of evidence from stakeholders and the complex arguments that are often involved in decisions about how rights are most effectively promoted and protected.

Parliamentary procedure – s.20 (1)
The Bill reduces the extent of parliamentary scrutiny of even the most sweeping proposals for change (including abolition) to 90 minutes’ debating time in the lead committee\(^7\). This is in stark contrast to the detailed and thoughtful parliamentary process that was evident throughout the inquiry and the consideration of the committee bill that established SCCYP in the first session of the Parliament. We are concerned that this may result in the adverse consequences we described above.

Consultation – s.21
The Bill requires consultation with the officeholder and ‘such organisations as appear \([to Scottish Ministers\) to be representative of interests substantially affected by the proposals’; further, Ministers may consult others ‘as they consider appropriate’.

We note that there is no requirement to conduct an open consultation with stakeholders and the general public on a proposed order. Consultation may even be dispensed with altogether in certain circumstances. We are concerned that the Government’s attempt to create a more expedient process in pursuance of its public bodies reduction target comes at a substantial cost to the principles of openness, and access and involvement, which have consistently been emphasised throughout the first decade of the new Scottish Parliament\(^8\).

Conclusion
For the reasons outlined above, we urge the Committee to take the view that SCCYP and other organisations whose nature and functions require independence from government should be removed from Schedule 3, and to make recommendations in its stage 1 report accordingly.

\(^7\) s.20 (2)(c) requires orders made under the power in s.10 (1) to be dealt with using affirmative procedure. According to Rule 10.6 (3.) the Parliament’s Standing Orders (3rd Edition, 4th Revision, June 2009), this involves a maximum of 90 minutes of debate in lead committee.