

Commissioner for Older People (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Commissioner for Older People (Scotland) Bill, introduced in the Scottish Parliament on 2 April 2025.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 64–FM);
 - a Policy Memorandum (SP Bill 64–PM);
 - statements on legislative competence made by the Presiding Officer and the Member in Charge of the Bill (SP Bill 64–LC).
3. These Explanatory Notes have been prepared by the Non-Government Bills Unit on behalf of Colin Smyth MSP, the Member who introduced the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

Overview

5. The Bill will establish a Commissioner for Older People in Scotland (“the Commissioner”), whose primary purpose will be to promote and safeguard the rights and interests of older people. The Commissioner will be appointed by and accountable to the Scottish Parliamentary Corporate Body (SPCB) but will be independent from Government.
6. The Commissioner will advocate for older people at a national level, using the functions set out in this Bill to promote awareness and understanding of the rights and interests of older people. The Commissioner will also review law, policy and practice relating to the rights and interests of older people with a view to assessing their

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adequacy and effectiveness, promote the use of skills and experience of older people, and promote best practice by service providers. The Commissioner may also promote, commission, undertake and publish research on matters relating to older people.

7. The Commissioner will have the power to undertake investigations into those who provide services to older people where the investigation is related to matters within the remit of the devolved institutions. Investigations will ask how the service provider has given effect to the rights, views and interests of older people. These investigations may be into a service provider at a general level or they may deal with services provided to an individual older person.

8. The model for the Commissioner, including their investigatory powers, is similar to that of the Children and Young People's Commissioner Scotland.

9. The Bill consists of 18 sections and three schedules.

Commentary on sections

Establishment

Section 1 – Commissioner for Older People in Scotland

10. Subsection (1) establishes the office of the Commissioner for Older People in Scotland. Subsection (2) introduces schedule 1 which makes detailed provision for the status, remuneration, terms of appointment and various matters of an administrative nature in relation to the Commissioner.

Functions

Section 2 – Function

11. Section 2 sets out the functions of the Commissioner. The general function of the Commissioner, set out in subsection (1), is to promote and safeguard the rights and interests of older people. The definition of "older people" for the purposes of the Bill is provided for in section 16 as follows: "people who are 60 years of age or over". Related expressions have corresponding meanings (for example, "older person").

12. Subsection (2) sets out the functions that the Commissioner should undertake in exercising the general function. These are to (a) promote awareness and understanding of the rights and interests of older people; (b) keep under review the law, policy and practice relating to the rights and interests of older people with a view to assessing the adequacy and effectiveness of such law, policy and practice; (c) promote best practice by service providers; (d) promote the use of skills and experience of older people; and (e) promote, commission, undertake and publish research on matters relating to the rights and interests of older people.

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13. The definition of “service providers” for the purpose of the function set out in subsection (2)(c) (and in section 6 in relation to the Commissioner’s power to carry out investigations) is provided for in section 16 as follows: “any person providing services for an older person other than a person providing services for them because of their existing family relationship, community or neighbourhood links, or friendship with them and who does not principally provide those services for remuneration or as part of their employment”.

Section 3 – United Nations Principles

14. Section 3 provides that the Commissioner, in exercising their functions as set out in the Bill must have regard to the provisions of the United Nations Principles for Older Persons adopted by the General Assembly Resolution 46/91 of 16 December 1991¹. There are 18 principles, grouped under five themes: independence, participation, care, self-fulfilment and dignity.

Involving older people

Section 4 – Involving older people in the work of the Commissioner

15. Section 4 is intended to ensure that the Commissioner’s work is informed by the views of older people. Subsection (1) requires the Commissioner to encourage the involvement of older people in the Commissioner’s work.

16. Subsection (2) details the manner in which the Commissioner is to encourage the involvement of older people in the Commissioner’s work by listing a number of duties which the Commissioner must take reasonable steps to fulfil.

17. Subsection (2)(a) requires the Commissioner to take reasonable steps to ensure that older people are made aware of the existence of the Commissioner, the Commissioner’s functions, how to communicate with the Commissioner and what responses may be given by the Commissioner to issues raised.

18. Subsection (2)(b) and 2(c) require the Commissioner to take reasonable steps to consult older people, and organisations working with and for older people, on the work to be undertaken by the Commissioner.

19. While it is for the Commissioner to determine what constitutes “reasonable steps”, an example of what this could be is sharing relevant information with organisations working with and for older people, including those which are governed by older people, who could then provide details to their membership.

¹ [United Nations Principles for Older Persons | OHCHR](#).

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20. Subsection (3) requires the Commissioner to prepare and maintain a strategy on the continued involvement of older people in the Commissioner's work under this section.

Investigations

Section 5 – Carrying out investigations

21. Sections 5 and 6 give the Commissioner the power to carry out investigations into whether, by what means and to what extent a service provider has regard to the rights, interests and views of older people in making decisions or taking actions that affect older people or an older person.

22. Section 5(1) gives the Commissioner the power to carry out general and individual investigations as provided for in this section and section 6. The meaning of "general" and "individual" investigations for the purposes of this Bill are set out in section 6. Sections 6(1) and 6(2) cover general investigations which is about the making of decisions of or the taking of actions that raise an issue of particular significance to older people generally, or particular groups of older people (for example, people distinguished by matters other than their age, such as their geographical location). In coming to a view in that regard the Commissioner must consider the available evidence and information, which could include research findings and consultation exercises with older people and organisations about their experiences. Ultimately, it is for the Commissioner to decide whether something is significant enough to be investigated provided that they have reasonable grounds upon which to do so. Section 6(3) sets out that an individual investigation is about the effect of decision-making or actions on an individual older person. Under section 6(5) the Commissioner may seek other means of resolving the issue which is potentially to be investigated. The Commissioner may initiate an alternative course of action, should they consider this to be appropriate.

23. Sections 5(2) and 5(3) deal with circumstances in which the Commissioner wishes to investigate a matter which another public body also has the power to investigate. Other relevant bodies may include the Equalities and Human Rights Commissioner (EHRC), the Scottish Human Rights Commission, or the Care Inspectorate. These subsections set out that in such circumstances the Commissioner should not investigate the matter unless the Commissioner has consulted with the other body or bodies which have the power to investigate and, having done so, has determined that it would be more effective and expedient for the Commissioner to investigate. Although not set out in the Bill, examples of when the Commissioner may determine that they are best placed to investigate a matter could include when the Commissioner has more time and resources available than the other body, or where an older person or an organisation working with or for older people has contacted the Commissioner to express concern about a particular issue given the Commissioner's expertise.

24. Subsection (4) sets out circumstances in which the Commissioner may not carry out an investigation - namely when the matter is reserved (as set out in schedule 5 of

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the Scotland Act 1998) and when the investigation would relate to legal proceedings that are before a court or tribunal.

Section 6 – General and individual investigations

25. Section 6 sets out what is meant by general and individual investigations. Some of the detail contained in section 6 has been covered above in paragraph 22 above. The definition of service provider to be used in relation to investigations, and throughout the Bill is set out in section 16. The Commissioner may investigate any person or organisation which provides a service to an older person or older people. This can include the private, public and voluntary sector and thus any individual who, or organisation or company which, provides services to older people could be investigated (noting, however, that excluded from the definition of “service provider” are individuals who provide services (not principally for payment or as part of their employment) for an older person primarily due to an existing relationship – for example a family member, neighbour or friend. Such persons could not be subject to an investigation by the Commissioner). Investigations can concern a single service provider or a group of service providers. For example, an investigation could consider the way rights, interests and views of older people are considered by a single local authority or by local authorities in general.

Section 7 – Initiation and conduct of investigation

26. Section 7 sets out details of how an investigation should work in practice. Subsection (1) sets out the procedural requirements which need to be fulfilled before the Commissioner can undertake an investigation.

27. Subsection (1)(a) requires the Commissioner to draw up terms of reference for the proposed investigation. The terms of reference will define the scope of the investigation.

28. Subsection (1)(b) requires that the Commissioner takes steps to ensure that those who may be affected by the investigation are made aware of the Commissioner’s plans to carry out an investigation and of the terms of reference. This may involve, for example, the Commissioner publicising the forthcoming investigation on their website, or writing directly to the service provider who will be subject of the investigation.

29. Subsection (2) makes it clear that general investigations by the Commissioner will be conducted in public unless the Commissioner considers that it is necessary or appropriate to take evidence in private. This could include, but is not limited to, circumstances in which a vulnerable person is giving evidence. Subsection (3) provides that individual investigations will be held in private. This provision has been included to ensure the privacy of the older person involved is protected.

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Section 8 – Investigations: witnesses and documents

30. This section sets out the powers available to the Commissioner in gathering information and undertaking an investigation under sections 5 and 6.

31. Subsection (1) authorises the Commissioner to require any person to give evidence or produce documents they hold, which are within the terms of reference of the investigation.

32. Subsection (2) is based on section 23 of the Scotland Act² and limits the Commissioner's powers to require the giving of evidence or the production of documents from certain persons. Section 23 imposes various restrictions on the Parliament's powers, for example, in relation to Ministers of the Crown, judges and members of tribunals.

33. Subsection (3) introduces schedule 2 (see paragraphs 77 to 90), which contains further provision with respect to witnesses and documents. Schedule 2 also details the sanctions for non-compliance with a requirement under this section.

Section 9 – Reports on investigations

34. This section provides for the Commissioner to prepare reports following an investigation. Subsections (1) and (2) provide that, following the conclusion of an investigation, the Commissioner must prepare a report which includes the investigation's findings and any recommendations made as a result of the findings. Under subsection (3) a report cannot be finalised until, as far as it is reasonable and practicable, a draft report has been issued to any person who has been named or is otherwise identifiable in the report. This is included in order to let that person comment upon the draft report prior to its publication. An example of when it may be considered reasonable and practicable not to share a draft report with a person prior to the report's publication could be when several attempts to contact the person in question have been made over a period of time, with no response.

35. Subsections (4) to (6) set out that reports on general investigations must be laid before Parliament and then published as soon as practicable. Reports on individual investigations may be laid before Parliament. If a report on an individual investigation is laid before Parliament, it also must be published as soon as practicable after it has been laid.

Section 10 – Requirement to respond

36. Section 10 sets out the circumstances in which someone is required to respond to a report on an investigation and how the Commissioner should deal with such responses. Subsection (1) provides that the Commissioner may require a response to any recommendation made in a report on an investigation. The Commissioner must ensure that anyone required to respond has a copy of the report (subsection (3)).

² [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk).

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Subsection (2) sets out that a response should be in writing and provided within the timescale set out by the Commissioner. The response should set out what actions or intended actions the person proposes to take to give effect to the recommendation and if the person intends to take no action, the reasons for that.

37. Under subsection (4) the Commissioner must make publicly available (in whatever way the Commissioner considers appropriate) part or all of a written response to a general investigation unless the Commissioner considers publication to be inappropriate.

38. The Commissioner must publicise a failure to respond to a recommendation made in a report of a general investigation in whatever manner that they consider appropriate.

39. With regard to individual investigations, subsection (6) provides that the Commissioner may take either of the actions set out in subsection (4).

Strategic plan, annual reports and other reports

Section 11 – Strategic plans

40. Section 11 provides for the preparation and publication of strategic plans. Subsection (1) requires the Commissioner to prepare and publish a strategic plan every four years and that the plan should be laid before Parliament before the four-year period to which it relates begins. A “four-year period” begins on 1 April following this section coming into force 6 months after Royal Assent and subsequently every four years after that (subsection (7)). However, the Commissioner may vary the four-year period. Subsection (8) sets out to what extent the reporting period can be varied and requires the Commissioner to obtain approval from the SPCB before such a change can be made.

41. Subsection (2) requires the Commissioner to consult the SCPB and any other persons the Commissioner considers appropriate before the plan is published. While it will be for the Commissioner to determine which persons, if any, to consult with, subsection (3) provides that this could be a Parliamentary committee. Other examples may be older people, or organisations working with, or for, older people.

42. Subsection (4) sets out what a strategic plan is and what must be included in the plan, including the Commissioner’s objectives and priorities for the forthcoming four years, how those objectives and priorities will be achieved and how much they are estimated to cost.

43. Subsection (5) allows for the strategic plan to be reviewed and revised at any time. Should the Commissioner choose to do so subsection (6) provides that the same requirements as set out in subsections (1) to (4) (see paragraphs 40-42 above) apply.

Section 12 – Annual report

44. Section 12 provides for the preparation and publication of annual reports. Subsection (1) requires the Commissioner to prepare and publish an annual report that covers the functions exercised by the Commissioner during the preceding reporting year. The “reporting year” covers the period beginning 1 April each year until 31 March the following year (subsection (4)). The report must be laid before Parliament within 7 months of the reporting year ending and therefore no later than the end of October following the end of the reporting year.

45. Subsection (2) sets out the matters that must be included in the annual report. These will be included in every annual report. Each report must include a review of the issues the Commissioner has identified as being relevant to older people and of the activities undertaken by the Commissioner in order to fulfil their functions. The report must also contain any recommendations the Commissioner wishes to make as a result of the work they have undertaken in the preceding year and an overview of the Commissioner’s plans for the forthcoming year. The latter must include the strategy for involving older people in the work of the Commissioner in the year ahead. This ties in with the requirement set out in section 4(3) (see paragraph 20).

Section 13 – Other reports

46. Section 13 provides for the preparation and publication of other reports. Subsection (1) enables the Commissioner to lay before the Parliament any reports other than those provided for elsewhere in the Bill, relating to their functions as they consider appropriate. The subject matter of reports could include, for example, research findings or reviews of policy or practice. Subsection (2) requires any report laid before Parliament to be published as soon as practicable after it is laid.

Protection from actions of defamation

Section 14 – Protection from actions of defamation

47. Section 14 sets out how the Bill provides for protection from actions of defamation for statements made to or by the Commissioner (or a member of the Commissioner’s staff). Subsection (1) sets out which statements are to have absolute privilege (meaning they cannot form the basis of an action of defamation for any person referred to in those statements). The statements which will benefit from absolute privilege are any statement made to the Commissioner and any statement made by the Commissioner or their staff in conducting an investigation, including where communicating with a person in relation to an investigation. In addition, any reports published under this Bill are subject to absolute privilege.

48. Any other statement made by the Commissioner (or a member of the Commissioner’s staff) will have qualified privilege. Under qualified privilege individuals can make statements and can assist in investigations without fear of an action for defamation provided statements are not motivated by malice or intent to injure. What is meant by a statement is “words, pictures, visual images, gestures or any other method

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of signifying meaning”. This definition is set out in section 36(b) of the Defamation and Malicious Publication (Scotland) Act 2021.

Final provisions

Section 15 – Application of public authorities’ legislation

49. Section 15 introduces schedule 3 which amends enactments relating to public authorities in order to bring the Commissioner within their provisions.

Section 16 – Interpretation

50. Section 16 provides definitions of key terms in the Bill. Such terms have been explained in these Notes in relevant places.

Section 17 – Commencement

51. Subsection (1) provides that this section and sections 1 (establishment of the Commissioner), 16 (interpretation) and 18 (short title) and schedule 1 (the office of the commissioner for older people) come into force on the day after Royal Assent.

52. Subsection (2) provides that the rest of the Act (section 2 to 15, schedule 2, and schedule 3) will come into force after six months beginning with the day of Royal Assent.

Schedule 1: The office of the Commissioner for Older People in Scotland

53. Schedule 1 makes detailed provision concerning the status; appointment, disqualification, terms of office, remuneration, and pension of the Commissioner. It also provides for the ability to fill the role on a temporary basis, as well as for the appointment of other staff and accounts and accountability.

Part 1: Status and Independence

54. Paragraph 1 provides that the Commissioner is a juristic person distinct from the natural person holding the office of Commissioner. This means that the Commissioner has their own legal personality that is separate from the legal personality of the individual who holds the office. This allows the officeholder to enter into legal relations and exercise their statutory functions as the Commissioner, rather than as the individual who holds the office. It also means that the legal personality of the Commissioner continues to exist when the individual who holds the office changes

55. Paragraph 2 provides that the Commissioner is not to be regarded as being a servant or agent of the Crown and does not enjoy any status, immunity or privilege of

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the Crown. The Commissioner's property belongs to the Commissioner (as Commissioner) and not to the Crown. The Commissioner's staff are not to be treated as civil servants.

56. Paragraph 3 provides that the Commissioner is not subject to the direction or control of any member of the Scottish Parliament, the Scottish Ministers or the SPCB except as explicitly provided for in the Bill. The relevant provisions are set out in subparagraph (2).

Part 2: Appointment, termination and terms and conditions

57. Paragraphs 4 and 5 provide for the following: that the Commissioner will be appointed by the King on the nomination of the Scottish Parliament; that a Commissioner may serve only one term of office; and that a person is disqualified from being appointed Commissioner if at the time of the appointment or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, of the House of Commons, or of the House of Lords.

58. Paragraph 6 provides that the Commissioner may hold office for a single term of up to eight years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.³

59. Paragraph 7 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or may become disqualified from holding office under paragraph 5.

60. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the support of at least two thirds of (normally) the total number of members of the Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

61. Paragraph 8 provides that the validity of any acts of the Commissioner is unaffected by any procedural defects in the Parliament's nomination or by the Commissioner subsequently becoming disqualified from acting as the Commissioner.

³ [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk).

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62. Paragraph 9 enables the SPCB to set and pay such remuneration, allowances, pension and gratuities to the Commissioner as it determines. It will be for the SPCB to decide whether payments are made and the amounts of any payments. The SPCB must indemnify the Commissioner for liabilities incurred by the Commissioner in the exercise of their functions.

63. Paragraph 10 makes provision for the appointment of a temporary or acting Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint as acting Commissioner a person who is not disqualified from holding the post under paragraph 5 of this schedule, or as they have previously held the post of Commissioner (as provided for under paragraph 4(3)). The SPCB will determine the terms, conditions and duration of the appointment. The acting Commissioner should have the same role, functions and responsibilities as the permanent Commissioner and be subject to the same terms as set out in this Bill, with the exception of those set out in paragraphs 6 (tenure), 7 (early termination) and 9(3) (payment of pensions, allowances and gratuities, including compensation for loss of office).

Part 3: General powers

64. Paragraph 11 permits the Commissioner to do anything which appears to it to be necessary or expedient to the carrying out of their functions.

65. Paragraph 12(1) permits the Commissioner to charge a reasonable fee for providing anything in connection with the carrying out of the Commissioner's functions. Paragraph 12(2) sets out that, any fee charged should be retained by the Commissioner and used to cover the costs incurred by providing the service for which the fee has been charged.

66. Paragraph 13 outlines the restrictions on the Commissioner's general powers in relation to the acquisition and disposal of land, namely that the Commissioner may not acquire or dispose of land without the consent of the SPCB.

Part 4: Staff and offices

67. Paragraph 14 allows the Commissioner to appoint staff, subject to the consent of the SPCB as to the number of staff appointed, and to determine staff terms and conditions subject to the approval of the SPCB.

68. Paragraph 15 allows the Commissioner to obtain advice, assistance or any other service from any person the Commissioner believes is qualified to provide it. The Commissioner may pay any such person fees and allowances as the Commissioner sees fit, subject to approval by the SPCB.

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69. Paragraph 16 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

70. Under paragraph 17, while the Commissioner can delegate any responsibility to any person, ultimately the Commissioner remains responsible for carrying out those delegated responsibilities. Having delegated functions, the Commissioner is still able to decide to carry out those responsibilities personally.

71. Paragraph 18 requires the Commissioner to comply with any direction given by the SPCB in respect of the location of the Commissioner's office and the sharing of any resources with any other public office or body. The SPCB may revoke or change a direction on this matter that has previously been given. Any such direction is to be published by the SPCB.

Part 5: Accounts and accountability

72. Paragraph 19 requires the Commissioner to prepare a budget before the start of each financial year and seek the approval of the SPCB by such a date as the SPCB determines. Under sub-paragraph (2), the Commissioner may seek to revise the budget during the year by submitting revised proposals to the SPCB for approval. When preparing a budget or a revised budget, the Commissioner is required to ensure that resources will be used economically, efficiently and effectively (sub-paragraph 3) and must, under sub-paragraph (4), certify this in any budget or revised budget proposal.

73. Paragraph 20 requires the SPCB to designate either the Commissioner or a member of the Commissioner's staff as the accountable officer (in accordance with section 17 of the Public Finance and Accountability (Scotland) Act 2000). The functions of the accountable officer are set out in sub-paragraph (2) and include: the signing of the accounts; ensuring that the finances are kept in good order; and ensuring that resources are used economically, efficiently and effectively. Sub-paragraph (3) provides a degree of protection for an accountable officer who is not also the Commissioner should they be required to act in any way which is inconsistent with their responsibilities. Before any such action can be taken, the accountable officer must obtain written authority from the Commissioner and send a copy of the authority to the Auditor General for Scotland as soon as possible. Under sub-paragraph (4), the accountable officer is directly answerable to the Parliament for the exercise of those functions specified in sub-paragraph (2).

74. Paragraph 21 sets out the accounting and auditing requirements that apply to the Commissioner. The Commissioner must keep proper accounts and accounting records and prepare a statement of annual accounts for each financial year. A financial year is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and is a year ending with 31 March. In fulfilling these duties, the Commissioner must comply with any directions given by the Scottish Ministers, who are responsible for such

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matters under section 19 of the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”).

75. In accordance with paragraph 21(1)(c) a copy of the statement of accounts must be sent to the Auditor General for Scotland. The provisions of sections 21 and 22 of the 2000 Act then require the Auditor General to audit the accounts or appoint someone suitably qualified to do so. They also require the accounts to be sent to the Auditor General not later than 6 months after the end of the financial year in question. Once the accounts have been audited, the 2000 Act makes provision for them to be sent to the Scottish Ministers, whereupon Ministers are required to lay them before the Parliament within 9 months of the end of the financial year in question.

76. Under paragraph 21(3), the Commissioner must make a copy of their audited accounts available for inspection, free of charge, to anyone on request.

Schedule 2: Investigations: supplementary provisions on witnesses and documents

Requirement to give evidence or produce documents

77. Paragraph 1 provides for the Commissioner to give further detail relating to section 8 of the Bill which gives the Commissioner the power to require persons to give evidence or produce documents relating to an investigation being undertaken by the Commissioner.

78. Sub-paragraph (1) makes provision for the Commissioner to give notice in writing to a person who is required to give information or produce documents in line with the equivalent notice provision for the Scottish Parliament that is contained in section 24 of the Scotland Act 1998. The notice must set out the subjects to which the required evidence will relate. In addition, when a person is asked to appear before the Commissioner in person, details of the time and location of such an occasion should be provided to the attendee. In cases where the person concerned is asked to provide documents, the date by which they are to be produced must be given.

79. Under sub-paragraph (2) notice must be sent by registered or recorded delivery post. In the case of an individual, it has to be sent to their last known address and in any other case to the person’s registered or principal office.

Privileges

80. Paragraph 2 sets out restrictions to the Commissioner’s powers to require evidence and documents. The power extends to the limits applicable to court proceedings in Scotland. This is in line with the provision that applies to the Parliament’s

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own powers in section 23(9) of the Scotland Act 1998⁴. These cover various privileges such as the privilege against self-incrimination and privileges in connection with litigation.

81. Sub-paragraph (2) provides a similar restriction to that of section 23(10) of the Scotland Act 1998 in relation to a Scottish Law Officer or a procurator fiscal declining to answer a question or produce a document in relation to the operation of the system of criminal prosecution in any particular case. Under the Scotland Act 1998 this applies to the fiscal if the Lord Advocate considers that answering or producing it might prejudice criminal proceedings in the case in question or would otherwise be contrary to the public interest and the Lord Advocate has authorised the fiscal to decline to answer the question or produce the document on that ground. Similarly, this applies to the Lord Advocate and the Solicitor General under section 27(3) of the Scotland Act 1998 if they consider that answering the question or producing the document might prejudice criminal proceedings in the case in question or would otherwise be contrary to the public interest.

Evidence on oath or affirmation

82. Paragraph 3(1)(b) provides that a person giving evidence can be required to do so under oath. Sub-paragraph (1)(a) authorises the Commissioner to administer such an oath.

83. Under sub-paragraph (3) a person will be able make an affirmation, as an alternative to taking an oath as provided for in the Oaths Act 1978. Sub-paragraph (2) makes it an offence for a person who has been required to take an oath by the Commissioner to fail to do so. The penalties for failing to take an oath when required to do so are set out in sub-paragraph (2) and are the same as those set out in paragraph 87 below.

Admissibility of statements in subsequent criminal proceedings

84. Paragraph 4 sets out that, when a person makes a statement in answer to any question by the Commissioner which the person was obliged to answer, any such statement would be inadmissible in any proceedings in a criminal court. The effect of this is that a person cannot incriminate themselves during the investigation process. The one exception to this provision is in the event that perjury proceedings (perjury being the offence of lying on oath or on an affirmation) are initiated in respect of the statement made to the Commissioner.

⁴ [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk).

Offences

85. Paragraph 5 creates offences in relation to failures to comply with requirements imposed by the Commissioner as to the giving of evidence or the production of documents. These are the equivalent to those set out in section 25 of the Scotland Act 1998 in relation to failure to comply with requirements imposed by the Scottish Parliament. For example, it will be an offence for a person who is required by the Commissioner to give information or produce documents to fail to do so unless they have a reasonable excuse (see sub-paragraph (5)). If the person deliberately alters, suppresses, conceals or destroys any document that they have been required to produce, the defence of having a reasonable excuse for having done so does not apply.

86. Under sub-paragraph (6), a person found guilty by a summary criminal court of an offence under this section is liable to a fine not exceeding level 5 on the standard scale (currently £5,000) (section 225 of the Criminal Procedure (Scotland) Act 1995) or to imprisonment for a maximum period of three months.

Offences by bodies corporate and partnerships

87. Paragraph 6 allows for individuals who exercise control within an organisation, as well as the organisation itself, to be proceeded against and punished where the organisation commits an offence under the Bill.

88. Sub-paragraphs (3) and (4) set out the conditions that must be met in order for the person or organisation to have committed an offence under the Bill. Sub-paragraph (3) lists that the person or organisation must hold a certain position in an organisation and sub-paragraph (4) sets out that the person or organisation must have played a part in the offence or that the offence was a result of the person's neglect. The penalties are the same as those set out in paragraph 86 above.

Producing copies or extracts

89. Paragraph 7 clarifies that production of a copy or an extract can fulfil a requirement under section 8 to produce a document.

Allowances and expenses

90. Paragraph 8 makes provision for the payment of allowances and expenses to persons giving evidence or producing documents. The level of those allowances and expenses will be a matter to be determined by the Commissioner who must first seek agreement from the SPCB. The SPCB will be asked to agree a scheme for paying allowances and expenses (rather than agreeing each individual payment to those giving evidence or producing documents).

Schedule 3: Public authorities' legislation

91. Schedule 3 adds the Commissioner to the list of bodies contained in various pieces of existing legislation. These are: the Freedom of Information (Scotland) Act 2002, the Public Services Reform (Scotland) Act 2010, the Public Records (Scotland) Act 2011 and the Procurement Reform (Scotland) Act 2014. Note that under section 17 this schedule comes into force six months after the date of Royal Assent.

Freedom of Information (Scotland) Act 2002

92. The Freedom of Information (Scotland) Act 2002 makes provision for the disclosure of information held by Scottish public authorities or by persons providing services for them.

93. Part 7 of schedule 1 of the Freedom of Information (Scotland) Act 2002, sets out a list of public authorities to which that Act applies. Paragraph 1 of schedule 3 of this Bill adds the Commissioner for Older People in Scotland to the list of public bodies (categorised as "other"). As a result, any relevant provisions of the Freedom of Information (Scotland) Act 2002, will apply to the Commissioner for Older People in Scotland.

Public Services Reform (Scotland) Act 2010

94. The Public Services Reform (Scotland) Act 2010 makes provision for the purpose of simplifying public bodies, including the transfer and delegation of certain functions, the dissolution of certain bodies and provision in relation to the regulation of officers of court.

95. Schedule 5 of the Public Services Reform (Scotland) Act 2010 lists the persons, bodies and officeholders to which the order-making powers in section 14 of that Act (public functions: efficiency, effectiveness and economy) apply. Section 14 of the Act enables the Scottish Ministers, by order, to make any provision which they consider would improve the exercise of public functions by the bodies listed in schedule 5 (including the Scottish Ministers) having regard to efficiency, effectiveness and economy.

96. Paragraph 2 of schedule 3 of this Bill adds the Commissioner for Older People in Scotland to the list of bodies to be included in scheduled 5 of the Public Services Reform (Scotland) Act 2010. As a result, any relevant provisions of that Act will apply to the Commissioner for Older People in Scotland.

This document relates to the Commissioner for Older People (Scotland) Bill (SP Bill 64) as introduced in the Scottish Parliament on 2 April 2025

Public Records (Scotland) Act 2011

97. The Public Records (Scotland) Act 2011 makes provision about the management of records by certain authorities.

98. The schedule of the Public Records (Scotland) Act 2011 sets out a list of the authorities which must comply with the records management duties that are set out in Part 1 of that Act. Paragraph 3 of schedule 3 of this Bill adds the Commissioner for Older People in Scotland to the list of bodies. As a result, any relevant provisions of the Public Records (Scotland) Act 2011, will apply to the Commissioner for Older People in Scotland.

Procurement Reform (Scotland) Act 2014

99. The Procurement Reform (Scotland) Act 2014 makes provision about the procedures relating to the award of certain public contracts.

100. Part 3 of the schedule of the Procurement Reform (Scotland) Act 2014 sets out a list of “contracting authorities” to which the provisions in the Act apply. Paragraph 4 of schedule 3 of this Bill adds the Commissioner for Older People in Scotland to the list of such authorities. As a result, any relevant provisions of the Procurement Reform (Scotland) Act 2014, will apply to the Commissioner for Older People in Scotland.

This document relates to the Commissioner for Older People (Scotland) Bill (SP Bill 64) as introduced in the Scottish Parliament on 2 April 2025

Commissioner for Older People (Scotland) Bill

Explanatory Notes

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