

# Wellbeing and Sustainable Development (Scotland) Bill

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## 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 Wellbeing and Sustainable Development (Scotland) Bill, introduced in the Scottish Parliament on 27 March 2025.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 63–FM);
  - a Policy Memorandum (SP Bill 63–PM);
  - a Delegated Powers Memorandum (SP Bill 63–DPM);
  - statements on legislative competence made by the Presiding Officer and the Member in Charge of the Bill (SP Bill 63–LC).
3. These Explanatory Notes have been prepared by the Non-Government Bills Unit on behalf of Sarah Boyack 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 of the Bill

5. The Bill creates a new public duty, which requires all public bodies to have due regard for the need to promote wellbeing and sustainable development in the exercise of their functions. It also establishes statutory definitions of the terms “wellbeing” and “sustainable development” for the purposes of the Bill.

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6. The Bill also establishes a Future Generations Commissioner for Scotland (“the Commissioner”), whose general function will be to promote the wellbeing of future generations by promoting sustainable development by public bodies in all aspects of their decisions, policies and actions. The Commissioner will be appointed by and financially accountable to the Scottish Parliamentary Corporate Body (SPCB) and will be independent from government.

7. The Commissioner will oversee the implementation of the public duty created by the Bill. This will include publishing guidance for public bodies, promoting awareness and understanding of wellbeing and sustainable development, and encouraging best practice. The Commissioner will also review relevant law, policy and practice to assess their adequacy and effectiveness in giving effect to wellbeing and sustainable development. The Commissioner may also promote, commission, undertake and publish research on matters relating to wellbeing and sustainable development.

8. The Commissioner will have the power to undertake investigations into how public bodies are complying with their duty under the Bill. This will involve examining whether, by what means and to what extent they have regard to wellbeing and sustainable development in their decision-making, policy development and actions. These investigations may be conducted at a general level across all public bodies, or they may focus on the specific decisions, policies or actions of one or more public bodies.

9. The establishment of the Commissioner is inspired by the Future Generations Commissioner for Wales, which was established by the Well-being of Future Generations (Wales) Act 2015.<sup>1</sup> The model for the Commissioner, including their investigatory powers, is similar to that of the Children and Young People’s Commissioner Scotland.

10. The Bill consists of 19 sections and three schedules.

## Commentary on sections

### **Part 1: Wellbeing and Sustainable Development**

#### Section 1 - Duty

11. Subsection (1) requires public bodies, in the exercise of their functions, to have due regard for the need to promote wellbeing and sustainable development. “Public body” is defined in section 17 and includes Scottish public authorities and cross-border public authorities (but only in relation to functions exercisable in or as regards Scotland which do not relate to reserved matters).

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<sup>1</sup> [Well-being of Future Generations \(Wales\) Act 2015](#)

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12. Subsection (2) requires public bodies, when exercising their duty under subsection (1), to have regard to any guidance published by the Future Generations Commissioner for Scotland under section 5(2)(a), or revisions of any such guidance (as provided for by section 5(2)(b)).

## Section 2 – Sustainable development

13. Section 2 defines “sustainable development” in this Bill as “development that improves wellbeing in the present without compromising the wellbeing of future generations”.

14. This definition is inspired by the United Nations Brundtland Commission’s definition of sustainable development: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>2</sup> The Bill uses a modified version of the Brundtland definition, which frames wellbeing as the outcome of sustainable development.

## Section 3 – Wellbeing

15. Subsection (1) defines “wellbeing” as the ability of individuals, families and other groups within society to enjoy a range of factors. These factors are: (a) personal dignity, including respect for their choices and beliefs; (b) freedom from fear, oppression, abuse and neglect; (c) good physical, mental and emotional health; (d) participation in meaningful activity including work, education, training and recreation; (e) an adequate standard of living including suitable and affordable accommodation, food, clothes and energy; and (f) access to the natural environment for health, leisure and relaxation.

16. Subsection (2) confers a power on the Scottish Ministers to make regulations that amend subsection (1) to add, remove or vary the factors included within the definition of wellbeing.

17. Subsection (3) provides that regulations made under subsection (2) will be subject to the affirmative procedure. This means that regulations must be laid before the Scottish Parliament in draft form and approved by the Parliament before the regulations can be made and come into force.

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<sup>2</sup> [Our Common Future: Report of the World Commission on Environment and Development](#)

## **Part 2: The Future Generations Commissioner for Scotland**

### **Establishment**

#### **Section 4 – The Future Generations Commissioner for Scotland**

18. Subsection (1) establishes the office of the Future Generations Commissioner for 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.

### **Function**

#### **Section 5 – General Function**

19. Section 5 sets out the functions of the Commissioner. The general function of the Commissioner, set out in subsection (1), is to promote the wellbeing of future generations by promoting sustainable development by public bodies in all aspects of their decisions, policies and actions.

20. Subsection (2) details the specific functions that the Commissioner will undertake in exercising the general function. These include: (a) preparing and publishing guidance for public bodies about the exercise of their duty under section 1(1); (b) periodically reviewing and updating this guidance as appropriate; (c) promoting awareness and understanding of wellbeing and sustainable development among public bodies; (d) reviewing relevant law, policy and practice to assess their adequacy and effectiveness in promoting wellbeing and sustainable development; (e) promoting best practice by public bodies; and (f) promoting, commissioning, undertaking and publishing research on matters relating to wellbeing and sustainable development.

#### **Section 6 – Carrying out investigations**

21. Sections 6 and 7 give the Commissioner the power to carry out investigations into whether, by what means and to what extent public bodies have regard to wellbeing and sustainable development in making decisions, developing policy or taking actions.

22. Section 6(1) gives the Commissioner the power to carry out both general and individual investigations. The meaning of “general” and “individual” investigations is set out in section 7.

23. Subsection (2) 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 the Scotland Act 1998) and when the investigation would relate to legal proceedings that are before a court or tribunal.

## Section 7 – General and individual investigations

24. Subsections (1) and (2) cover general investigations, which are broad inquiries into how public bodies have regard to wellbeing and sustainable development in decisions, policy or actions in a particular policy area. For example, the Commissioner could undertake a general investigation into “housing” and the role of public bodies in ensuring the provision of adequate housing for future generations. The Commissioner may only carry out a general investigation if they are satisfied that the issue to be investigated is of particular significance to the wellbeing of future generations. 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 public bodies and stakeholder organisations. Ultimately, it is for the Commissioner to decide whether an issue is significant enough to warrant a general investigation, provided they have reasonable grounds to do so.

25. Subsection (3) covers individual investigations, which are narrower inquiries into specific decisions, policies or actions by one or more public bodies. For example, the Commissioner may decide to investigate a particular decision made by a public body in order to identify lessons for future decision-making or policy development. Under subsections (4) and (5), the Commissioner may seek other means of resolving the matter that could be the subject of an individual investigation. The Commissioner may initiate an alternative course of action, should they consider this to be appropriate.

## Section 8 – Initiation and conduct of investigation

26. Section 8 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. 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. Subsection (1)(b) requires that the Commissioner take 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 public body or bodies that will be subject of the investigation.

27. Subsection (2) makes it clear that investigations by the Commissioner will be conducted in public unless the Commissioner considers that it is necessary or appropriate to take evidence in private.

## Section 9 – Investigations: witnesses and documents

28. This section sets out the powers available to the Commissioner in gathering information and undertaking an investigation under sections 6 and 7.

29. Subsection (1) authorises the Commissioner, in relation to any matter within the terms of reference of the investigation, to require any person to give evidence or produce any relevant documents that they hold.

30. Subsection (2) is based on section 23 of the Scotland Act 1998,<sup>3</sup> and limits the Commissioner's powers to require the giving of evidence or the production of documents from certain persons. Section 23 of the Scotland Act imposes various restrictions on the Parliament's powers to require a person to give evidence or produce documents, for example, in relation to Ministers of the Crown, judges and members of tribunals. The Commissioner's powers under this section are subject to the same restrictions.

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

## Section 10 – Reports on investigations

32. 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 in light of those findings.

33. Subsections (3) and (4) set out that the Commissioner's investigation reports must be laid before Parliament and then published as soon as practicable.

## Section 11 – Requirement to respond

34. Section 11 sets out the circumstances in which a public body 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 any public body required to respond has a copy of the report (subsection (3)).

35. Subsection (2) requires a public body to respond in writing and within the timescale set out by the Commissioner. The response should set out what actions or intended actions the public body proposes to take in response to the recommendation, or, if it intends to take no action, the reasons for that.

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<sup>3</sup> [Scotland Act 1998](#)

36. Under subsection (4), if an investigation report includes a requirement to respond, the Commissioner must make publicly available (in whatever way the Commissioner considers appropriate) any written responses to a recommendation, as well as any comments on the response that the Commissioner considers appropriate. If a public body fails to comply with a requirement to respond, the Commissioner must publicise this failure in whatever manner they consider appropriate.

## Strategic plan, annual reports and other reports

### Section 12 – Strategic plans

37. Section 12 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 4 year period to which it relates begins. A “4 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 4 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.

38. 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 committee of the Scottish Parliament. Other examples may be public bodies subject to the duty created by the Bill, or other individuals and organisations with an interest in promoting wellbeing and sustainable development.

39. 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.

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

### Section 13 – Annual report

41. Section 13 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 October following the end of the reporting year.

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42. 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 the promotion of wellbeing and sustainable development, 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. Subsection (3) requires the Commissioner to comply with any direction given by the SPCB relating to the form and content of the report.

## Section 14 – Other reports

43. Section 14 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 15 – Protection from actions of defamation

44. Section 15 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) provides that such 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.

45. 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. "Statements" refers to "words, pictures, visual images, gestures or any other method of signifying meaning", as defined in section 36(b) of the Defamation and Malicious Publication (Scotland) Act 2021.



## Final provisions

### Section 16 – Application of public authorities legislation

46. Section 16 introduces schedule 3, which amends enactments relating to public authorities in order to bring the Commissioner within their ambit.

## Part 3: Ancillary Provisions

### Section 17 – Interpretation

47. Section 17 provides definitions of key terms in the Bill. Public bodies include Scottish public authorities and cross-border public authorities (but only in relation to functions exercisable in or as regards Scotland which do not relate to reserved matters). The definition makes clear that it only relates to the exercise of functions by public bodies in or as regards Scotland which do not relate to reserved matters.

### Section 18 – Commencement

48. Subsection (1) provides that provisions relating to the establishment of the Commissioner (section 4), interpretation (section 17), commencement (section 18) and short title (section 19), and further provision about the office of the Commissioner (schedule 1) come into force on the day after Royal Assent. Subsection (2) provides that the rest of the Bill, including most of its substantive provisions, comes into force after six months beginning with the day of Royal Assent.

### Section 19 – Short title

49. Section 19 provides for the short title of the Bill, by which it may be cited.

## Schedule 1: The office of the Future Generations Commissioner for Scotland

50. 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

51. 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

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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.

52. 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 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.

53. 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 sub-paragraph (2), and relate to the role of the SPCB in the approval and/or direction of certain functions undertaken by the Commissioner, including in relation to: the strategic plan; the annual report; remuneration, allowances and pensions; and appointment of staff, among other things. These Notes set out where the SPCB's approval or direction role is engaged at each relevant section or paragraph.

## **Part 2: Appointment, termination and terms and conditions**

54. 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.

55. 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.<sup>4</sup>

56. 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. 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

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<sup>4</sup> [Scottish Parliamentary Commissions and Commissioners etc. Act 2010](#)

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seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

57. 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.

58. 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.

59. 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 and who has not 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 for a permanent Commissioner 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**

60. Paragraph 11 permits the Commissioner to do anything which appears to them to be necessary or expedient to the carrying out of their functions, or to be otherwise conducive to the exercise of those functions.

61. 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.

62. 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**

63. 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.

64. Paragraph 15 allows the Commissioner to obtain advice, assistance or any other service from any person who they consider is qualified to give it. Subject to the approval of the SPCB, the Commissioner can pay that person fees and allowances for their advice, assistance or service.

65. 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.

66. 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.

67. 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 made publicly available by the SPCB.

## **Part 5: Accounts and accountability**

68. 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 compliance with this duty in any budget or revised budget proposal.

69. 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

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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).

70. 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 matters under section 19 of the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”). In accordance with paragraph 21(1)(c), a copy of the statement of accounts must be sent to the Auditor General for Scotland. 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.

71. 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

72. Paragraph 1 provides for the Commissioner to give further detail relating to section 9 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.

73. 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 concerning 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.

74. In cases where the person concerned is asked to provide documents, the date by which they are to be produced must be given.

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

## Privileges

76. 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 own powers in section 23(9) of the Scotland Act 1998.<sup>5</sup> These cover various privileges, such as the privilege against self-incrimination and privileges in connection with litigation.

77. 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

78. Paragraph 3 provides that a person giving evidence can be required to do so under oath. The Commissioner has the power under sub-paragraph (1)(b) to require any person giving evidence to them to take an oath, and sub-paragraph (1)(a) authorises the Commissioner to administer such an oath.

79. 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 below, at paragraph 82 of these Notes.

## Admissibility of statements in subsequent criminal proceedings

80. 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

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<sup>5</sup> [Scotland Act 1998](#)

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.

## Offences

81. 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.<sup>6</sup> 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 (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.

82. Under sub-paragraph (6), a person found guilty by a criminal court (under summary procedure) of an offence under paragraph 5 is liable to a fine not exceeding level 5 on the standard scale (currently £5,000, under section 225 of the Criminal Procedure (Scotland) Act 1995)<sup>7</sup> or to imprisonment for a maximum period of three months.

## Offences by bodies corporate and partnerships

83. Paragraph 6 allows for individuals who exercise control within an organisation, as well as the organisation itself, to have proceedings brought against them and punished where the organisation commits an offence under paragraph 5 of schedule 2 of the Bill.

84. 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 certain positions in an organisation that the person must hold to be held criminally liable for such an offence, and sub-paragraph (4) sets out that the person 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 above, at paragraph 82 of these Notes.

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<sup>6</sup> [Scotland Act 1998](#)

<sup>7</sup> [Criminal Procedure \(Scotland\) Act 1995](#)

## Producing copies or extracts

85. Paragraph 7 clarifies that the production of a copy of a document, or an extract of the relevant part of a document, is sufficient to comply with a requirement under section 9 of the Bill to produce a document.

## Allowances and expenses

86. 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

87. 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.

## Freedom of Information (Scotland) Act 2002

88. 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.

89. 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 Future Generations Commissioner 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 Future Generations Commissioner for Scotland.

## Public Services Reform (Scotland) Act 2010

90. 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.

91. 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



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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.

92. Paragraph 2 of schedule 3 of this Bill adds the Future Generations Commissioner 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 Future Generations Commissioner for Scotland.

## Public Records (Scotland) Act 2011

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

94. Paragraph 3 of schedule 3 of this Bill adds the Future Generations Commissioner to the list of bodies. As a result, any relevant provisions of the Public Records (Scotland) Act 2011 will apply to the Future Generations Commissioner for Scotland.

## Procurement Reform (Scotland) Act 2014

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

96. Paragraph 4 of schedule 3 of this Bill adds the Future Generations Commissioner to the list of such authorities. As a result, any relevant provisions of the Procurement Reform (Scotland) Act 2014 will apply to the Future Generations Commissioner for Scotland.

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# Wellbeing and Sustainable Development (Scotland) Bill

## Explanatory Notes

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