



OFFICIAL REPORT
AITHISG OIFIGEIL

DRAFT

Finance and Public Administration Committee

Tuesday 30 April 2024

Session 6



The Scottish Parliament
Pàrlamaid na h-Alba

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website - www.parliament.scot or by contacting Public Information on 0131 348 5000

Tuesday 30 April 2024

CONTENTS

SCOTLAND'S COMMISSIONER LANDSCAPE.....	Col. 1
---	---------------

**FINANCE AND PUBLIC ADMINISTRATION COMMITTEE
15th Meeting 2024, Session 6**

CONVENER

*Kenneth Gibson (Cunninghame North) (SNP)

DEPUTY CONVENER

*Michael Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

- *Ross Greer (West Scotland) (Green)
- *Jamie Halcro Johnston (Highlands and Islands) (Con)
- *John Mason (Glasgow Shettleston) (SNP)
- *Liz Smith (Mid Scotland and Fife) (Con)
- *Michelle Thomson (Falkirk East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

- Rosemary Agnew (Scottish Public Services Ombudsman)
- Ian Bruce (Ethical Standards Commissioner)
- David Hamilton (Scottish Information Commissioner)
- Lorna Johnston (Standards Commission for Scotland)
- Nicola Killean (Children and Young People's Commissioner Scotland)
- Dr Claire Methven O'Brien (Scottish Human Rights Commission)
- Dr Brian Plastow (Scottish Biometrics Commissioner)
- Jan Savage (Scottish Human Rights Commission)

CLERK TO THE COMMITTEE

Joanne McNaughton

LOCATION

The Robert Burns Room (CR1)

Scottish Parliament

Finance and Public Administration Committee

Tuesday 30 April 2024

[The Convener opened the meeting at 09:30]

Scotland's Commissioner Landscape

The Convener (Kenneth Gibson): Good morning and welcome to the 15th meeting in 2024 of the Finance and Public Administration Committee. The first item on our agenda is to continue to hear evidence in relation to our inquiry into Scotland's commissioner landscape. We are joined by Ian Bruce, Ethical Standards Commissioner; Dr Brian Plastow, Scottish Biometrics Commissioner; David Hamilton, Scottish Information Commissioner; and Lorna Johnston, executive director, Standards Commission for Scotland. I welcome you all to the meeting. I am sure that you will be very helpful to our deliberations. I may direct questions at one individual or ask you collectively; it is up to yourselves whether you want to come in on the back of someone else's response.

What stimulated the inquiry was, firstly, the rising cost of commissioners, as well as their proliferation. For example, in January we took evidence from the Scottish Parliamentary Corporate Body on the annual budget round for the current financial year. At that time, we were faced with a 2.6 per cent increase in cash terms in the Scottish budget, which as you know, if you know the gross domestic product deflator, is significantly below the rate of inflation. When we looked at the office-holders, however, we found that the actual funding bids were all significantly in excess of that. For example, the four organisations represented here today made bids as follows: the Scottish Information Commissioner asked for an 8.1 per cent uplift; the Ethical Standards Commissioner for a 13.2 per cent uplift; the Standards Commission for Scotland for a 7.4 per cent uplift; and the Scottish Biometrics Commissioner for 12.4 per cent.

The national health service, the police and so on did not get those kinds of uplifts. Obviously, I have your submissions here but, for the public record, could you say how you feel that those increases are justified at a time of tremendous financial pressure? Who would like to go first? Yes, Brian; you have a fairly small budget, I suppose, although I am interested in hearing from everyone.

Dr Brian Plastow (Scottish Biometrics Commissioner): Yes. I am very happy to go first on that one.

I suppose that the first thing to say, as you have rightly highlighted, is that the Scottish Biometrics Commissioner's function is tiny. I have only three members of staff. Our first year of operation, 2021-22, was a kind of set-up year and then 2022-23 was the first proper year of operations.

The reason why our financial requirement would appear higher than last year is because we actually had a £32,000 underallocation in salaries in our budget for the year just passed, because of the way that the Parliament sets the annual budget. What typically happens is that, around August or September of each year, you are asked to make your budget submission for the following year to the parliamentary corporation. You then hear nothing till around January or February, after the Scottish budget has been determined. Then what happens is that around February or March you learn of your budget award for the subsequent year, but that happens before the pay award is determined by the Parliament. For example, last year my budget was set at £444K but actually had a £32,000 underallocation in salaries.

The Convener: That is quite common across the public sector, though. I am asking what it is about the commissioners or the office-holders that has meant that there has been such a significant increase in the current financial year compared to other organisations that are basically told, "This is your budget, make do and mend with that."

Of course, some commissioners and commissions have been around for many years. I do not want to go into some of those questions at the minute because I am quite keen to get answers to the questions that I have. Why should the Scottish Parliament say, "We are going to have to restrict the amount that we give to front-line services because we do not have the money, but when it comes to the commissioners, we feel that it is okay to be much more generous." That must make other organisations think, "How come they are getting between a 7 and 13.2 per cent increase in their budget and we are not?"

Dr Plastow: Could I come back on that?

The Convener: Yes.

Dr Plastow: The point that you make is why the inquiry is necessary, because the commissioner landscape in Scotland has evolved organically over time. If you were to design the current landscape today, you would not necessarily do it this way. You would not have the seven existing office-holders, supported by the parliamentary corporation, operating from four different buildings. You would probably design in common back-office support functions such as financial processing,

human relations, and information and communications technology, but because it has evolved organically over time, we are where we are. I think that the next step is how we achieve some of those efficiency savings for the public purse.

The Convener: Yes. One of the things that you have talked about, for example, is the need to limit the amount of public money being paid by every commissioner for external and internal audit. Those are all cogent points, but I come back to my original point. It just stood out to the committee that there seemed to be quite a significant increase in terms of the allocation of funding to commissioners at a time when more commissioners are in the pipeline. Obviously, that is why we were alerted to this and that is what almost triggered this inquiry, to be perfectly honest with you. Do any other colleagues want to come in?

David Hamilton (Scottish Information Commissioner): I would like to point out that 90 per cent of my budget goes on staff and that I am looking at some things that I can deal with and fix, and some things that I cannot. The reality is that the staff are employed on Scottish parliamentary terms and conditions, so that 90 per cent of my budget is entirely outwith my control. The rest of the expenditure, given the nature of my work, can be legal expenses for cases that people are competing against and some of those can be quite expensive. We currently have a case at the United Kingdom Supreme Court. That is a bit of an unknown in all these things.

What I can assure the committee—and I say this with the benefit of not having been involved in setting the budget because I took post only in October—is that there is no capacity. This was not an agreed increase from my organisation and my predecessor; it was a necessity to fund the organisation and to keep the freedom of information regime going. I suppose that, ultimately, the question is whether you want that to happen or not. That would be my question to the Parliament. If you want to support the services and the demand, there is a cost to it and historically it has been underfunded.

The Convener: But who is not going to say that? The NHS would say that, the police would say that, and local government would say exactly that.

David Hamilton: I absolutely agree, yes.

The Convener: The issue for us—you might not feel it from where you are sitting—is that it almost seems as though you have been insulated, relatively speaking, from the really hard decisions that are being made by the public sector across the board, given that, as I said, the Government's

cash uplift was 2.6 per cent and the minimum uplift of the organisations before us is 7.4 per cent. I think that the NHS and local government and the police would also say, "Salaries are a huge chunk of what we do." I think that we are all in that position.

Some commissions and commissioners have been around for many years. I think, and I think some of my colleagues will agree with me, that when an organisation is set up there is a head of steam, a mission to accomplish, and a lot of things that it wants to do initially. One thinks of a big burst and then settling almost into a steady state, perhaps. Maybe I have this wrong, but that is why, when there are big jumps in terms of budget you think, "Well, why is that happening?"

I understand from the Information Commissioner's point of view that the number of FOI requests is going up all the time and there is a real issue about that. We do appreciate that, but in other areas one wonders. Have other colleagues anything that they want to say?

Lorna Johnston (Standards Commission for Scotland): Our budget is the same. I think that 85 per cent goes on salary costs, for members and staff. We are also a bit demand driven. The large chunk of the remaining costs depend on case referrals that come to us, which we have no control over. Then, if we hold hearings, it depends on where those are held. It could be in Orkney or Shetland or the Highlands and there are costs associated with that. Outwith the hearings and the salary costs, we do not have a huge amount of expenditure; there is a demand driven aspect to our work. I think that that is the same with Ian Bruce. It depends on the number of complaints that he receives.

The Convener: Again, I could say the same about local government, the police or the NHS. That is the kind of issue that is facing them.

Ian Bruce (Ethical Standards Commissioner): It will be no secret to the committee that my office was subject to an audit by the Auditor General for Scotland. It had an extensive range of recommendations for my immediate predecessor at the time, but it fell to me to implement those. One of the key findings was that, in the view of the auditors, we did not have sufficient resources to fulfil our statutory functions.

We were required to conduct an extensive workforce planning exercise and that is what we did, and it was extensive. We submitted a bid to the SPCB on the back of that. It was clearly an evidence-based bid and we said, "This is what we feel we need in order to acquit those statutory functions." That bid was accepted. As with the other office-holders, far and away the majority of

my office's expenditure is on staff. That is the position that we found ourselves in.

I have also had the workforce planning exercise internally audited in order to provide—not just to myself but to this and other committees—the assurance that that workforce planning exercise was conducted robustly and based on evidence of what we need to fulfil those functions.

As with other office-holders, there has been a rise in demand for our services. There have been additional complaints and there are any number of things that drive those. You spoke about officers being in place for a long time, but I think traditionally people felt that we should have been getting through investigations much more quickly because people do not want complaints hanging over them. All the work that we have done, further to that planning exercise and recruitment, has been about improving the service that we provide.

The Convener: Okay. So, are we gonnae be in a position whereby, as we go forward to the next financial year, we see similar bids or do people feel that things are much more settled in terms of the areas that we are talking about? Ian, do you feel that?

Ian Bruce: I can speak only for myself but, as I say, it was an extensive workforce planning exercise. It was very much an evidence-based exercise and we have already had it validated by our internal auditors. I am content that we now have the resources that we need in order to fulfil those statutory functions and to do so well, which I think is what the public has a right to expect.

The Convener: Yes, indeed.

One thing that has been talked about a lot is the issue of overlaps and gaps. I will come to all of you, but I will first go back to you, Ian. Do you feel that we need a Standards Commission for Scotland and an Ethical Standards Commissioner? Is there not an overlap in the remits? Could the two be merged, for example?

Ian Bruce: As I think I pointed out in my letter, I have any number of lines of accountability. In terms of MSP conduct and complaints about lobbying, my role is to investigate those complaints and then report to the Scottish Parliament. The ultimate decision on whether a breach of the relevant provisions has occurred lies with the Standards, Procedures and Public Appointments Committee. Effectively, I am not judge and jury; my role is to investigate, reach a view and report to the Parliament. The relationship with the Standards Commission is very similar.

To put it in relatively straightforward terms, you might think of me as something akin to the Crown Office. My role is to investigate and come up with my findings about whether a breach has

occurred—that would be in relation to complaints about councillors and members of devolved public bodies—but I am not the final decision maker. The Standards Commission—

09:45

The Convener: Yes, indeed. One thing that all the written submissions have been very clear about is the roles that you all have. They are all really well written submissions, so I compliment you on that.

We had a private session with a colleague who talked about New Zealand and where all the overlaps are. We also looked at the UK and where the potential overlaps are there. There is a lot of concern about overlaps, and indeed gaps in Scotland. Is there any overlap between the two of you?

Ian Bruce: I think that we have distinct functions, to be honest with you.

The Convener: You think that they are completely distinct.

Ian Bruce: Yes.

The Convener: Where would gaps exist?

Ian Bruce: I am not sure that there are any gaps, because the legislation that determines my role and the role of the Standards Commission is quite explicit. It was very early legislation in the Scottish Parliament. I am sure that Lorna Johnston could probably speak more eloquently about this than I can, but the Standards Commission's role is adjudicatory—that is its function—and my role is investigatory. I think that that is pretty clear.

The Convener: You do not think that that could be more efficiently and effectively done under one umbrella.

Ian Bruce: Certainly, for my part, I work as effectively and efficiently as I possibly can and I am committed to continuous improvement, but I think that my role is quite discrete and distinct from that of the Standards Commission.

Lorna Johnston: We put in our written submissions the reasons why we think that the two organisations should be separate. Those include the need to ensure that any inconsistencies in terms of interpretation of the codes of conduct are clarified. The separation also gives, essentially, a route of appeal against any findings that Ian Bruce has made. Because we can hold public hearings, that means that we can take evidence under oath and hear testimony from witnesses.

You asked about gaps. We also have a role not just in adjudication but in promoting the codes of conduct and trying to ensure that councillors and members of devolved public bodies understand

what is expected of them to try to prevent any inadvertent or technical breaches. We do training events and produce guidance and advice notes and other learning material.

The Convener: David and Brian, do you feel that there are any gaps in provision or that there is an overlap? I certainly cannot imagine an overlap between your two bodies, but are there any gaps in provision? One thing that the committee and the Scottish Parliamentary Corporate Body and the Parliament more widely is looking at is the likelihood of more commissioners coming in and whether any gap needs to be filled by a commissioner or could be filled in another way. Do you have any views on that?

David Hamilton: Speaking for myself, I sit almost apart from the other commissioners in many ways, just because of the nature of my responsibilities, so I do not see any gaps or overlaps. My office is quite a separate and distinct entity, as it is more regulatory as opposed to being involved in rights advocacy.

The Convener: What about you, Brian?

Dr Plastow: There are two useful ways to think about this: through the lenses of front-office and back-office functions. My function really is quite niche and distinct, but I think that a number of the existing office-holders and a number of the proposed office-holders fall under common themes, which is most commonly a human rights theme. There is probably a legitimate question to be asked around the Scottish Human Rights Commission and the children's commissioner, as both those organisations fundamentally deal with people's human rights. That is the front-office bit. I would say that there are clusters of commonalities.

However, for me, the key to unlocking all this is about the journey towards a more strategic approach to back-office support functions. I will give an example from a different context. There are lots of independent office-holders in Scotland who are supported not by Parliament but by Government. For example, in the criminal justice sphere, which is where I operate, you have a chief inspector of constabulary, a chief inspector of prisons and a chief inspector of prosecutions. All of those are independent office-holders who in their case are accountable to ministers rather than the Parliament, and they all benefit from the centralised back-office support of the Government machine. In other words, they do not have to procure their own information technology systems, find their own office space or have their own HR services, corporate services managers and so on and so forth.

The added advantage—I highlight this in my written submission—is that, although those organisations all have more staff and bigger

budgets than I do, because their financial processing is handled centrally through the Government machine, they are not exposed to the requirements of both external audit and internal audit. The existing independent office-holders are required to be externally audited every year and there is not just a financial cost associated with that—for a small organisation, it all but paralyses you for two or three months. We also have to have an internal audit, so a big chunk of our individual budgets goes in money to—

The Convener: I have to say that you have already commented about that and you all talked about back-office functions and so on, and that covers everything from property to IT to everything else. There is already a high proportion for salaries, but I think that you would prefer if the money, such as you have, went on staff rather than functions that could perhaps be covered elsewhere. Do you feel that, if additional commissioners are created, they should effectively be locked into a collective auditing system and the back-office functions that you talked about there?

Dr Plastow: Yes, that is my personal view. My function was born in the pandemic, so we were deliberately designed to be, as I refer to it, lean by design. We have a shared services agreement with the Scottish Public Services Ombudsman, so my financial processing, my HR support and some ICT support, facilities management services and so on are provided to me.

The financial memorandum that accompanied the passing of the Scottish Biometrics Commissioner Bill was based on a commissioner plus four staff, but because of that shared services arrangement, I have only ever recruited three staff. In essence, I have gapped a post—if you want to use that terminology—for three years. That is why I have been able to operate within my allocated budget in each and every one of those years. I think that that is the way forward and that it should be mandated that new commissioners or ombudsmen coming in will participate in shared services with existing bodies.

The Convener: Lorna, David and Ian, do you agree with that?

David Hamilton: Absolutely. The longer you go on as independent organisations, the more divergence you get in corporate services and the harder the journey backwards is. My aspiration is to have more shared corporate services with the other commissioners, but the practical reality of that is challenging, because we are a much more established organisation of nearly 20 years with different systems and different divergences.

It takes me back to my policing days, where you had all these different police forces that all had the same genesis but all went their different ways, and

trying to pull them back together into some kind of corporacy was very challenging, because there were dependencies on different corporate structures that needed to be unravelled. To be frank, I do not have the capacity to do that, because we do not have the staff to do it. That is a whole world of pain that we would need to go through, and we will chip away at that, but it has a long way to go. To start at the beginning and to embed that approach and bake it into legislation would certainly be my advice for the way forward.

My understanding is that, to change what we have in relation to the audit functions, for example, would need a change in legislation.

The Convener: Should as many organisations as possible be based in the Parliament building, Ian?

Ian Bruce: I am not sure that the estate could manage, but—

The Convener: I know—exactly.

Ian Bruce: There is clearly plenty of scope in relation to where a physical office is located. We will all be aware that there are any number of buildings in the public sector estate at the moment that are largely running empty, because things have changed a lot since the pandemic. Clearly, there are options to potentially share buildings and back-office services. All those things are possible, and I would be more than happy to work towards a position where we are sharing more services.

Another thing to point out is that new regulations continually come out. There would be some legislative change required. Each of the office-holders has statutory functions and statutory obligations that they need to fulfil—audit is one of them. However, new regulations come out fairly regularly and are applied to office-holders when they are not necessarily applicable to our work. All those things cause additional work as well. More thought needs to be given to the impact of regulation on organisations such as ours.

We are required to report on things such as our environmental impact. We investigate complaints and our staff work from home so, by and large, we do not have much of an environmental impact, but we need to expend staff time and resources to report on those things. Therefore, more thought needs to be given to that area, and that applies across the public sector.

Lorna Johnston: We benefit from a lot of shared services, because we are based in the Parliament building. We get our IT provision and we have access to SP learning and the postal provision and all that kind of stuff. We are in a slightly different position from the other office-holders, but we certainly find it very helpful to be based in this building.

The Convener: Okay. I will open up the session to colleagues round the table. The first will be Michelle Thomson.

Michelle Thomson (Falkirk East) (SNP): Good morning. Thank you very much for attending today. I will start by following up on the theme of front-office and back-office functions, which the convener was probing.

You have described the budget process as being quite inefficient—I think that Brian Plastow, in particular, did. Are you able to quantify how many days you spend—we could say “waste”—going through the budget process? I understand that you start in September but you do not get the final consideration until much later. If you were to say, “We spend N days on it,” what would the number be—roughly—just as a matter of interest?

Dr Plastow: Thanks, Michelle. It is a good question, but it is quite difficult to answer. I would not say that we need to spend an inordinate amount of time on it, because we are given quite clear guidelines by the corporate body as to what our submission should contain. For example, around August or September, when we are asked to submit our budget submission for the following year, the tight financial context is explained and we are asked to submit our bid on the basis of a certain parameter—let us say it is inflation at 3 per cent.

That is fine, but then what typically happens is that, maybe a month or so later, we have another communication, which says, “Can you now model it on 3 per cent and 4 per cent?” So we do that. That does not take much time. Then, maybe a couple of months later, we are told, “There are changes to national insurance rules. Can you now model it on 3 per cent and 4 per cent and change the national insurance, and can you change the pension figures?” None of that takes a lot of time, but, for an office-holder, the frustrating part is that you put your budget submission in in the summer but you hear nothing until midwinter.

That is then compounded if, when you are given your budget award, it is—as in my case—less than you asked for and, after your budget award has been made, the pay award kicks in and there is no recalibration—or, as is the case this year, the pay award has still not been decided. Here we are, in the new financial year, and I know what my budget for this year is but I have no idea what the pay award is going to be.

Michelle Thomson: We have had commentary that that limits long-range forecasting in your budgeting. David Hamilton, if you want to come in next, you can reflect on that additional dimension.

David Hamilton: Yes. That is not unique to us. I think that most public sector bodies have that challenge. When you get an audit report that says,

“You need to do some more medium-term financial planning,” where can you start with that? You just cannot. That is the reality, because you do not know what you are getting next year.

10:00

In its communications to us, the corporate body is very clear that there is no money. So, we are very circumspect in what we ask for, and, if we need to go for funding, we are aware that there is a limited pool of money and there is a duty on us to be mature and sensible in our ask and expectations. Also, we understand that it is a shared pool of money, and we want to support each other as commissioners. So, if one takes, others do not.

Michelle Thomson: I will follow that up with you before I bring the others in. Have you ever been approached by a representative of the Scottish Government to actively consider ways in which you can increase the sharing of back-office functions or to explore the further idea, which the convener was floating, of a shared service centre for the range of functions?

David Hamilton: I am certainly not aware of having been approached by the Government.

I have had conversations with the corporate body, and I have already offered space and accommodation in my office, saying that, if there are going to be future commissioners, we would compress to allow them to have a base there. There has not been any direct activity in relation to that, which I can understand, because the corporate body is very clear about the independence of commissioners and the legislation is worded in such a way that there has to be some kind of operational independence that allows commissioners to consult and discuss. There are very few things that can compel us.

Michelle Thomson: If that were to be progressed, who do you anticipate would drive that narrative about being more efficient with shared services? I think there is a general sense that all of you—and, indeed, the other commissioner bodies—could do that.

David Hamilton: The ball is in our court at the moment. From my observations, it seems to have been batted back and forth a little bit between the corporate body and the commissioners as a collective. We have already had conversations between the commissioners to see what we can do, and there are some short-term strategies. For example, when staff leave organisations, do we necessarily replace them straight away or can we look at what is available? Even that is very challenging, because we need some kind of coterminous aspect to when we can take people on.

It is a challenging project, and I do not think we have a huge amount of capacity to do it. We would probably need some funding to get it going.

Michelle Thomson: As you pointed out, change is time consuming and expensive in resource terms.

I am not forgetting you, Lorna, but can I bring in Ian Bruce? Do you have any further reflections on this area?

Ian Bruce: Not a great many. I mentioned the workforce planning exercise, and it takes a lot of time and effort to do that properly. At that particular point in time, we had a snapshot of how many hours we expend on absolutely everything, so we do have a very clear picture of that. In due course, that will allow us to identify those aspects of our work that potentially could be pooled. We could certainly assist in a discussion of that nature, and we are happy to share our materials with any other office-holder who has an interest in that type of activity.

We do try to forward plan. We have just published our strategic plan for the next four years, which contains financial projections for the next four years. Far and away the majority of the activities that we are planning to engage in will be delivered in-house, and that work is all costed in the plan. We are not looking at significant rises; it is costed in line with inflationary rises. As has been pointed out, our staff's terms and conditions are tied to those of the SPCB, so we have very little wiggle room.

Michelle Thomson: Let me bring in Lorna Johnston. As you pointed out, you are in a slightly different circumstance, which I appreciate. In response to David Hamilton's comment that it would be up to individual commissioners to look at making savings, a bit of me thinks, “Do turkeys generally vote for Christmas?” I am being a wee bit provocative, and I am sorry for picking on you, but could I have your reflections on that?

Lorna Johnston: I think that we have all started looking at the shared services agenda. Two years ago, we entered a payroll contract with, I think, a couple of the other office-holders and a couple of other organisations. We also all have data protection officer services that are provided through that kind of shared service. I do not think that anyone is necessarily being protective and not looking to share services.

We had a meeting with Rosemary Agnew, the Scottish Public Services Ombudsman—I think you are hearing from her next. She invited office-holders to a meeting a couple of months ago to talk about this very issue. Everybody is very willing to see what further can be done, so I do not think that office-holders are leaving it to the SPCB to

look at this. I think that it is on everybody's agenda as something that we need to work harder on.

Michelle Thomson: I want to move on to an area that is of interest to the committee, which is scrutiny by MSPs as compared to scrutiny by and accountability to the SPCB. I know that the children's commissioner recently appeared in front of the Education, Children and Young People Committee and some of you have referenced appearing in front of committees, but, in general terms, apart from this committee, have you had any strong sense from MSPs, as opposed to the SPCB, that they are particularly interested in the efficiency and effectiveness of what you do? How frequently do you appear in front of committees? How much are you given a grilling, which of course is entirely healthy? I do not know who wants to go first, but I would like to hear some honest reflections on that.

David Hamilton: I appeared in front of the Standards, Procedures and Public Appointments Committee a couple of months ago and found it an engaging and helpful experience and quite challenging, which is helpful, because it keeps me true to what I need to be doing. It was a very honest discussion as to where the organisation was with the backlog. There was a lot of interest shown in that, and we had a discussion about legislative changes and so on that might be required. I certainly got a lot of engagement from the committee, particularly from the convener, who has a real interest in the freedom of information regime.

Independently of that, I have had engagement just from bumping into MSPs who are interested in engaging and talking. I have had a number of discussions with MSPs looking to see how the system can improve and asking about the office, so I have found the level of engagement very good. There is a lot of interest in it and there is good scrutiny both on the operational and, from the corporate body, on the financial side of things.

I am also cautious and conscious of the nature of my role. It may be that I am considering a FOI request against an organisation such as the Scottish Parliament or the corporate body or against Government officials. Therefore, there has to be some delineation, but I think that it is very comfortable and everyone understands what the lines are. I genuinely do not think that it requires further accountability to protect the independence of the post.

Michelle Thomson: Does everyone else have a clear line of sight with the committee that they would be asked to appear in front of?

Lorna Johnston: I have appeared before the Local Government, Housing and Planning Committee in the past couple of years. I have

found it a very helpful exercise; it has been very engaged in our work. Quite a few members of the committee have local government backgrounds or are friends of people who are still councillors and they are able to give us a bit of intelligence back and ask questions that are relevant to the training and engagement work that we do. Therefore, yes, I find it a very useful exercise.

Dr Plastow: I am going to give you a slightly different answer. My work is aligned directly to the portfolio of the Criminal Justice Committee. I have been in post for three years. I have been called before the committee once in three years and that was to discuss the passing of the statutory code of practice back in 2022. In those three years, I have submitted seven reports to Parliament: two annual reports and accounts, one operational report, a code of practice and three separate assurance reviews. My expectation would have been to have been called before the Criminal Justice Committee more often than I have been—I believe that I am scheduled to go before the committee in November this year. Part of the reason for that might also be because of what is going on in that space. There are a lot of issues around policing, prisons and the courts.

That is just to give you an honest picture. I have been before the committee once in three years. Was I grilled when I was there? Yes, I was grilled. Did I enjoy the experience? Yes, I did, and I have to say that the committee was very supportive.

Michelle Thomson: Ian, do you have anything to add?

Ian Bruce: I have a number of masters, but I report alongside Lorna Johnston to the Local Government, Housing and Planning Committee in respect of the investigation of complaints against councillors, which is my work in that area. I also report to the Standards, Procedures and Public Appointments Committee. That is not just in respect of MSP complaints. An awful lot of that committee's focus is, quite rightly, on public appointments. I regulate the system whereby people are appointed to public bodies. There are currently 100 of those, and that is vitally important work. Sorry to be taking a side step in front of the committee, but those public bodies spend well in excess of a third of all the public money that is expended in Scotland, and I am not sure that they are necessarily above the radar in the sense that they should be because, if we do not get those appointments right, their governance is not right and that is an issue for all of us.

When it comes to scrutiny from those committees, I see the Local Government, Housing and Planning Committee at least annually and the Standards, Procedures and Public Appointments Committee at least annually, but usually a bit more frequently than that and not necessarily always in

public. I do private briefings for members as well, particularly when there has been a change. There is significant interest in my work in that area.

The committees tend not to tread on each other's toes. They are respectful of the other subject committee in terms of the areas of questioning that they put to me. They are always challenging. They are always helpful, and I always change my practices if, as is often the case, I get a good suggestion in committee about the way in which I fulfil my functions.

Going back to the very start of your question, I am not sure that those subject committees necessarily see themselves as having a role in terms of budget setting, efficiency and that side of things. They are more interested in the statutory function than they are in operational matters. I think that they would view the SPCB as having the primary role there, because the SPCB approves our staffing levels and our budget, so I have those three different masters.

Michelle Thomson: Obviously, each of the commissioners and commissions is set up slightly differently and, therefore, each has its associated legislation. I am interested in the extent to which the success or outcome of a commission is directly correlated to the commissioner personality profile, rather than the legislative framework. I will direct that to you, David Hamilton. I think that most people would concede that we have seen a different approach from you. You have seized the initiative in some areas despite coming on board only relatively recently. Is that about you, or is it simply because it allows for that? What do you put it down to? I am thinking about outcomes here.

David Hamilton: It is probably mainly circumstances, in truth. A lot of my—shall we say?—battles and fights have been ones that have been long cooking; I just happen to be the one to take them out of the oven. Different commissioners have different styles, and I think that the diversity of that is one of the strengths of the commissioners system in that it is time limited. As turkeys, Christmas is coming for all of us a lot earlier than anyone else. That is a helpful position to have, because many of us will finish before the changes take place, so we can be honest about this.

In terms of personalities, different people bring different things to organisations, but I certainly have nothing but admiration for what my predecessors achieved in their different ways. They all picked up the baton at different parts of the relay. At the moment, I am on the home straight, but I will be doing another lap soon and I will be passing on to somebody else who, no doubt, will have a different character with different priorities.

10:15

Liz Smith (Mid Scotland and Fife) (Con): Good morning. This is a difficult question but, nonetheless, it is an important one. Mr Hamilton, it picks up on your comment that the development of the commissioner landscape has been organic over time. Obviously, some have regulatory functions, some have advocacy functions and some have complaints at their heart, so they are all quite different. Do you have any advice to us about the criteria that should be used to decide whether a commissioner's office is being efficient in delivering what it has been asked to do?

David Hamilton: Coming as the new boy to this forum, I was rather surprised, to be honest, because I could not quite understand what a commissioner was at first and what it meant. Every single one of us has a different governance structure and a different way of being put together. That is for good reasons—I do not think that any of them are wrong; it is just that they are all different. I guess the question for me would be, what is it that you are trying to achieve by having another commissioner? What is the gap that you are filling, not just within the commissioner landscape but in terms of public services?

I suspect that a lot of the desire for future commissioners is a bellwether to the lack of trust and confidence in a lot of public services. It is unfortunate, but that does not just go to the Government; it goes to Parliament and it goes to the civil service. I think that that is why people see a need for a commissioner, because a commissioner is there to provide independent oversight. I am not sure that that is the right approach to take, though. There has to be a reason to have a commissioner, to protect the office because it is a significant office; it is a royal appointment and it is something that has to be serious. Therefore, there has to be a very careful consideration of who is made a commissioner and who is made a champion or an advocate in future.

Liz Smith: How would we go about making that comparison? How do we decide whether the right person to do something is a commissioner, rather than a champion or some other public sector body, whoever it might be, maybe not living up to their reputation? What should the criteria be for us, as a Parliament, to use in deciding on that outcome?

David Hamilton: Perhaps the first question is, what value is it going to add? I think that it was Rosemary Agnew in her submission who made a very good point regarding confusion. You could get into a situation where you have a number of different commissioners who are interested in a particular case. As commissioners, we see regular frequent flyers, who come to us across our different organisations and people looking for an angle in on their particular issue, and sometimes

the more angles you have, the more risk there is and the more inefficiency there is in a system. There needs to be clarity as to what is being added. There are existing provisions for a lot of the organisations and a lot of the functions that people are annoyed with, but people want to take it a stage further and a stage further, and I think that that is the danger.

Liz Smith: Dr Plastow, you gave an interesting response earlier when you said that you had been a bit surprised that you had not been asked for further scrutiny on the seven reports that you have done over your time. Do you think that the Parliament could benefit from greater scrutiny of such reports on a more regular basis, so that we are deciding what has been delivered effectively and what has not?

Dr Plastow: Yes is the short answer. There are a couple of things here. First, there should always be a presumption against creating any new commission unless it is absolutely necessary. The second point is that, if you do decide to create a new commission or a new commissioner, there needs to be a post-implementation review, but there does not appear to be one. The Parliament needs to satisfy itself that, whatever an independent office-holder has been charged to do by the Parliament, they are properly doing it.

The Parliament should also have periodic reviews to consider whether an individual office-holder, whether that be commissioner, ombudsman, or commission, is still required and is still relevant. It is very easy to invest in new things. This is not just about the Parliament, as it happens everywhere, including in the public sector. It is much more difficult to disinvest in things. Often, these posts arise because of a particular wicked issue—a controversy, a something—but, 20 years down the line, that might no longer be relevant, so I think that there needs to be a more systematic look at how this entire landscape fits together.

Liz Smith: Some of the proposals for new commissioners have been made in members' bills. Individual MSPs who, for one reason or another have been working with constituents or on a particular issue, have decided that there is a gap. Should the Parliament be looking at that, to give more scrutiny to the process of deciding where the need lies, or is it just up to the member to make a proposal?

Dr Plastow: There should definitely be more parliamentary scrutiny. Obviously, there is a process in terms of the various stages of a bill and, quite rightly, any new proposal will be exposed to quite substantial scrutiny, which needs to be really robust. There has to be challenge with an eye to the public purse in all these things. At the moment, seven independent office-holders are supported by the Parliament and I think that there

are potentially another six in the pipeline. Intuitively, that sounds wrong; it has taken us probably from 2002 to 2024 to arrive at the current landscape, so another six sounds a bit much, to be honest.

Liz Smith: Ms Johnston and Mr Bruce, do you have any reflections on exactly what the problem entails? We have a situation where we are technically almost doubling the number of commissioners. Does that reflect poor scrutiny or problems within the delivery of public services? Why have we got into this situation?

Lorna Johnston: I am not sure. It may be because there is no clear rationale and a limited remit in terms of what each one is supposed to be doing. Some office-holders have quite a broad, undefined remit. I think that our governing legislation works well because we have such a limited and fixed remit. We know exactly what we are doing, it is easy for us to report on success against that or otherwise, and it is easy for that to be scrutinised. If the remit is broader and more undefined, that is obviously a lot harder to do.

Ian Bruce: For my part, I will put my public appointments hat on for a wee while. First, it is important for the committee and the Parliament to consider the intersectionality of individuals who want to access services. I know that there are proposals for some new commissioners, but the issue is having people in wee boxes. So, you are an older person, or you are a neurodiverse person, or you are a disabled person—you can be all three of those things. It is important to view all the proposals through that lens of intersectionality. Is it anticipated that an individual who is in challenging circumstances would approach all three commissioners, or are all three a champion for that individual? People are not in wee boxes and it is wrong to think of them in that way.

Secondly, we are all accountable officers and it is incumbent on us to demonstrate what difference our work makes. That is already in the public finance manual. When I introduced the last strategic plan, I also introduced a whole range of new metrics—the things that we can evidence that demonstrate what difference we are making. Those things should be considered at the outset. If you are planning a bill to set up a new office-holder, what difference are they going to make?

Liz Smith: It is much more difficult with the advocacy remits to define what it is that you are trying to do than if you are regulatory or dealing with complaints, where that is easier to measure. Our difficulty—and the Parliament's difficulty—is that quite a few of the potential new commissioners are to do with advocacy. To try to measure and define what it is that they are going to be looking at is quite difficult. Thank you very much for your comments. They are very helpful.

Michael Marra (North East Scotland) (Lab):

The creation of commissioners is a process where the Parliament hands over some of its own responsibilities to independent individuals. I was struck by a quote in the submission from the Law Society of Scotland, which said:

“Whilst it can be argued that Commissioners in Scotland are therefore an offshoot of, and for, the Parliament their role may create questions about accountability and the extent to which the appointment and scrutiny of Commissioners is democratic.”

Do you think that your roles are democratic and sufficiently so? May we start with David Hamilton?

David Hamilton: I do not know how they can be democratic, in all honesty. I think it has to be an appointment. Certainly, my appointment was not political in any way. A cross-party group of MSPs appointed me on that basis.

My accountability is to the democratic body, and I do not know how you can do anything else. Again, I look with horror at the thought of police commissioners, such as we have down in England and Wales, which become party political by default as soon as you make them elected. That is not an appropriate thing for any of our functions. It has to be the best person for the job, and that is what your job is: to find that person.

Michael Marra: How do other colleagues feel about whether your role is democratic or supports democracy in Scotland?

Lorna Johnston: Our role supports democracy because we are helping to ensure that politicians, as in councillors, are making decisions in the best interests of the public, rather than in their own interests, so that in itself supports democracy.

Commission members are appointed by the Scottish Parliamentary Corporate Body, a cross-section of MSPs, with the approval of the full Parliament, so they are not any kind of political appointment at all.

Michael Marra: Do you have any comments, Ian Bruce?

Ian Bruce: I am accountable to the Parliament and, I would say, to the people, via that route. I am sorry to be simplistic about it, but that is how it feels to me. I know that I am accountable to the people of Scotland. In lieu of the people, this Parliament is the one that holds me to account and rightly scrutinises my activities. I think that it does that on behalf of the people of Scotland.

Michael Marra: Okay. The three people who have contributed so far are in roles that are about accountability, but also about distance from the Parliament. You hold roles that are, in essence, watching the watchers, if you want to put it like that. Scrutiny of politics and politicians is part of what you do, in terms of your function. Is it right

that you are accountable to the Parliament on that basis, or should there be a more direct line of accountability? Mr Hamilton has probably already answered the question, but he can have another go if he wants.

David Hamilton: As I say, I understand what the parameters are. For me, trust in my independence is absolutely fundamental to my role. If I lose that, it is burst. My role has to be independent.

The accountability piece so far has been very respectful. It has not been about operational decisions. It has been about strategy. It has been about my approach to things. No one has ever spoken to me about a decision that I have issued. Nobody has ever challenged me on that, privately even. It is what it is. The way of dealing with that is through the courts. Once I make a decision, that is it. There is no going back, even if I wanted to.

My world is quite straightforward. I update the Parliament as to how I am dealing with the workload, as a big picture, and give the assurance that I am doing that appropriately and properly. If there were suddenly a raft of appeals going to the Court of Session, that would show a problem with the decision making and I suspect that at that point the Parliament would be saying, “Well, what is going on here?”.

10:30

Michael Marra: Would the three people who have answered already say that there is a distinction between your roles and the roles of the commissioners we will see on the next panel and who are being proposed? Liz Smith describes them as advocacy commissioners. Would you draw a distinction between your technical work versus that of some of those other commissioners?

David Hamilton: I have legal powers, probably uniquely, given my role. Others have statutory powers of recommendation and referral, and some do not have statutory powers. They can make comment and so on, on different things. There is a wide spectrum of outcomes that can come from commissioners. This goes back to the question of what new commissioners would be able to do other than say, “That is not right”, which may not hold a lot of truck. The power is quite important.

Michael Marra: Ian Bruce, you are called a commissioner but what you do is distinct from whatever the children’s commissioner does. In a technical sense, do you see that difference?

Ian Bruce: Yes, I do, but my view, looking across the current cohort, is that they all have distinct functions and they all operate in slightly different areas.

The word “organically” was used earlier about the growth of commissioners. Originally, the post I now fulfil was fulfilled by three different office-holders and lobbying was tagged on to it at a later stage. Even within this single office I fulfil a diverse range of functions.

Michael Marra: You all pointed out earlier that the three of you were demand-led on the basis of issues being referred to you. That is not the case with other commissioners, or with some of those that have been proposed. They are more self-directed. Is that not the case?

Ian Bruce: I am probably not sufficiently well informed to answer that question.

Michael Marra: I can ask them that. I am inviting lots of comments on other colleagues.

Dr Plastow, you said in your submission:

“In my view there are also opportunities for Parliament to strengthen post-implementation review arrangements.”

You have talked about that already in terms of accountability. How do you judge your outcomes for the public, whether you have achieved your mandate and you are producing value for the public?

Dr Plastow: That is an interesting question. In my case my legal function is to

“support and promote”—

two important words—

“the adoption of lawful, effective and ethical practices in relation to ... biometric data”

and technologies used specifically by Police Scotland, the Scottish Police Authority and the Police Investigations and Review Commissioner, because all those organisations can either arrest people or collect their biometric data without their consent.

One of the challenges for any organisation that is not primarily, for example, a complaints-based body that can evidence its performance through metrics, is how to evidence its outcomes. How do you evidence that what you are doing is promoting public confidence and trust in, for example, the use of biometric data and technology by the police? In a sense you cannot. In our case, every year we pick a different theme, and we conduct an assurance review. Two years ago, we looked at how the police collect biometric data from children and from vulnerable adults who have been arrested, because those two things were mentioned or referenced in the legislation as areas to which the commissioner must give attention. We have recently looked at images and later this year we will be looking at DNA.

Invariably, those reports will result in recommendations to Police Scotland or the SPA

or the PIRC. However, it is only after they have actioned those recommendations and made the improvement that you can evidence a real outcome. A good example is that, more than a year ago now, we made four recommendations to Police Scotland from two reports. One was about Police Scotland not discharging people’s right to information when they were being arrested. In other words, Police Scotland was not giving people any reason for taking their fingerprints or DNA or photograph and it was not giving them any information on what that data would be used for, where it would be stored, who it would be shared with and so on. We made four recommendations and, a year later, Police Scotland is only now at the stage of implementing those recommendations.

It will be another year, which will be two years on from our work, before we will be able to say that because of the recommendations that we made to Police Scotland, in a typical year in Scotland, the information rights of around 88,000 people—the number of custody episodes each year—are now being discharged. That is a long and complicated way of saying that it depends on the functions of the commissioner or the commission or the ombudsman as to how easy or difficult it is to evidence their work.

On the point that Liz Smith made earlier about advocacy-type commissioner roles, it is very difficult to evidence what you are doing. We live in a social world and sometimes things that happen in the social world are far more difficult to evidence than the scientific world.

Michael Marra: You would be able to evidence, perhaps, that those four different recommendations have not been taken up by Police Scotland.

Dr Plastow: They have been taken up, but it has taken it 12 months to do the groundwork to make the necessary procedural and policy changes.

Michael Marra: Do you see a point at which the Parliament, or even you, might observe the field and say, “My work here is done”?

Dr Plastow: Yes. This particular role arose because of a number of controversies in relation to what, a few years ago, the Parliament described as a biometric wild west. Particularly in England and Wales, there is lots of what I would call unregulated experimentation with various biometric technologies. The most recent fad in policing is a polygraph test—a lie-detector test—which has no scientific basis whatsoever. There is no scientific evidence to say that those tests work.

It was in that context that there was a bit of a moral panic on a lot of this. We are still in the midst of that. Many of you will be aware that the

policing minister for England and Wales wants the police to have direct access to all of our driving licence images and all of our passport images so that they can bulk-wash those through police facial recognition every time there is a shoplifter. However, having said that, I could reasonably see that in maybe five or six years' time, this landscape may settle down and come right off the political radar. That goes back to my earlier point that all the office-holder posts should be kept under continual review by the Parliament to see whether they are still required.

Michael Marra: I will pose a final question to each of you. Logically, could your work be done by the Parliament? Could your work, Dr Plastow, be done by the Parliament?

Dr Plastow: There is a two-part answer to that. On the operational side of the business that would be very difficult because it requires a high degree of technical knowledge. You need to know the right questions to ask to know whether the answer that you are being given is correct or not.

On the other side of the business, of course it could. This is the point that I want to get across, which is that it depends on what you mean by independence. I think that this is all about independence of thought in terms of your ability to discharge your mandate, but in terms of back-office support there are lots of opportunities to do things better than they are currently done.

Michael Marra: Lorna Johnston, could your work be done by the Parliament?

Lorna Johnston: I do not think so, if you want to retain public confidence in the independence of decision-making about councillors and members of public bodies.

David Hamilton: No, for much the same reasons of independence.

Ian Bruce: It would be challenging, and it would certainly look very different, particularly for MSP complaints.

John Mason (Glasgow Shettleston) (SNP): We have covered a lot of ground already, but I would like to pursue the idea of merging organisations. This will probably apply more to the second panel than to you. To be simplistic, the two of you, Mr Hamilton and Dr Plastow, are both dealing with information, so why could you not be the one organisation? Yours is quite small, Dr Plastow, and you have said how difficult it is with a small number of staff and that one more or one fewer member of staff would make a huge difference to your budget. However, putting yourselves together would give a bit of flexibility, it would mean that you could save half a member of staff or that if somebody is off sick it is not such a big deal.

Similarly, Ms Johnston and Mr Bruce, merging your organisations has already been suggested. You are both looking at the same cases, so that is duplication. I accept that in your submissions you think that it is not duplication, but it is duplication because you are both looking at the same cases. Surely, at a time of pressure that is a way forward. Could you comment on that?

Dr Plastow: That is the wrong approach. For example, if you want to abolish the Scottish Biometrics Commissioner function, you do not give my duties and responsibilities to David Hamilton. You give them to His Majesty's Inspectorate of Constabulary, which already exists. That would require a legislative change because its functions do not currently extend to the PIRC.

Of course, the Parliament did consider, during the passage of the bill, the presumption of not creating a commissioner if the functions could be adequately discharged. One of the suggestions during the passage of the bill was that the function could go to HMIC. At the time, HMIC did not want it and the Parliament did not want that either, but that is not to say that at some point in the future, if the Parliament was so minded, that could not work. Theoretically, it could.

Ian Bruce: I go back to the answer that I gave earlier. Ms Johnston mentioned public trust and confidence. In response to your question that we are looking at the same cases, the same is true for the Crown Office and the judiciary but there is no suggestion that those should merge to make savings.

John Mason: Are you not on a slightly smaller scale than them? They are dealing with thousands of cases.

Ian Bruce: Of course, but our functions are very distinct from those of the Standards Commission. It is true that we look at the same cases, but I investigate those cases and report on them to the Standards Commission, which adjudicates on them. Those are clearly separate functions.

John Mason: Could you not have two commissions within the one organisation?

Ian Bruce: It is possible, but my question is whether the public would feel trust and confidence in a system like that if those organisations were not statutorily independent. I agree that economies of scale are always possible and that is something that I would be happy to look at and pursue.

David Hamilton: There is no crossover between the Information Commissioner and the Biometrics Commissioner.

John Mason: Therefore, if I merge you, I will merge you with someone else. That is fine.

Lorna Johnston: Some of our powers, such as the power to suspend or disqualify a councillor, can have quite big implications on the political makeup of a council. Therefore, in terms of public confidence, as Ian was saying, you would always expect to have a body to review any initial decision that was taken at the investigation stage. That is another reason why it should be independent. The public would expect some review of that initial decision.

John Mason: I was once suspended for nine months as a councillor. At the time I had not even realised that there were two separate organisations—if there were at that time. It just seemed like all one process. If it had been one organisation it would have made no difference to me.

Dr Plastow, I picked up in your submission—I think you have mentioned it already—that some of the other commissioners are not legally separate, such as the chief inspectors of constabulary, prisons, and prosecutions. Are they less independent than you and your colleagues are?

Dr Plastow: I do not see them as being any less independent at all. I have what I refer to as a peer support group. I meet on a semi-regular basis with the chief inspector of constabulary, the chief inspector of prisons, the chief inspector of prosecutions, and the Police Investigations and Review Commissioner, because we all operate in the criminal justice sphere.

Could you repeat your question?

10:45

John Mason: Are they less independent?

Dr Plastow: No.

John Mason: Mr Bruce made a point earlier about how things appear to the public. Those inspectors might appear to be less independent than you are.

Dr Plastow: No, I disagree. I worked at His Majesty's Inspectorate of Constabulary for about seven years. The office-holder there is completely independent in the same way that every one of us is. The only difference is that they are appointed by ministers, whereas we are appointed by the Parliament. But, and this is a big but, they benefit from shared central services support on finance, HR, and other processes. If you stand up a new commission—I am probably unique among the serving commissioners as having done this—there is an enormous amount of work that you have to do to stand up that new entity. You do not turn up on day 1 and somebody gives you an IT system.

John Mason: That has been covered. It is more the independence bit that I was interested in.

Dr Plastow: That is my point. It is independence of thought. That is the important point, all the back-office stuff—

John Mason: If it is independence of thought, is it more important who we appoint to the positions than whether they are answerable to the Parliament or Government or whatever?

Dr Plastow: Both. It is important who you appoint. They have to be credible within the area in which you will operate. However, it is also important that they are answerable to the Parliament. You can get hung up on the meaning of independence, but the primary thing is having independence of thought and the ability to say what you need to say, free from any political interference.

The Convener: Thank you very much, that has concluded the questions from the committee. Thank you very much for the evidence that you have given this morning. We will continue with our next panel of witnesses and beyond. I will call a break until 5 to 11.

10:47

Meeting suspended.

10:55

On resuming—

The Convener: Welcome back, folks. We will continue taking evidence for our inquiry into Scotland's commissioner landscape. I welcome Nicola Killean, Children and Young People's Commissioner Scotland; Dr Claire Methven O'Brien, commissioner, and Jan Savage, executive director, from the Scottish Human Rights Commission; and Rosemary Agnew, Scottish Public Services Ombudsman. I intend to allow about 90 minutes for this session.

I will begin by asking about duplication, because in your submissions—they are excellent and are of a very high standard—the issue of duplication runs throughout. It is important to start with an issue that you have all highlighted. I will go to Nicola Killean first; others can respond subsequently. Your submission said:

“We have a statutory duty to avoid duplicating the work of others as far as is practical. We already have overlapping remits with other Commissioners and Commissions and other statutory bodies such as regulators, inspectorates and ombudsmen. We strongly recommend that parliament makes it a key priority to ensure that any new offices do not further limit the remit of existing offices or create more complexity for children and young people.”

Will you talk us through that a wee bit? Where do you feel that there is duplication with other organisations? Which organisations are they?

Nicola Killean (Children and Young People's Commissioner Scotland): I was highlighting in my submission that, when there is some overlap with existing office-holders, we manage that well. We have good relationships, and we look at where it is possible to use that to our advantage—for example, we recently co-commissioned a piece of research with the SHRC.

The concern is about duplication, rather than overlap. When there is some overlap, we co-ordinate and can look at that. The concern is about how duplication can limit activity. I will give an example that concerns our ability to investigate. It is written into our legislation that we can take forward an investigation only when that would not duplicate work under another organisation's investigative functions. Our concern is very much about the detail of any proposals for and legislation on future office-holders. We are concerned about whether that would limit my ability to take forward priorities that children and young people have asked of me and whether it would hinder, rather than help, some work.

The Convener: Do you have concerns about particular bodies?

Nicola Killean: I have no concerns about existing office-holders.

The Convener: I am asking not just about office-holders but about the public sector landscape in general.

Nicola Killean: At the moment, I have no concerns. There is not extensive duplication at all, and there is minimal overlap, which we manage well.

Jan Savage (Scottish Human Rights Commission): Our submission focused mainly on the future shape of the commissioner landscape. We have concerns about the potential for duplication of mandate and for a hierarchy of rights to be created through having multiple public bodies with a variety of legislative mandates.

Similar to what the children's commissioner said, under the current system, we have legitimate circumstances where we work together—when an overlap exists—but our founding act specifies that we must not duplicate the work of any other public bodies, so we do not do that.

11:00

Rosemary Agnew (Scottish Public Services Ombudsman): Thank you—I think—for the opportunity to speak this morning.

The Convener: It is not going to be that bad—come on.

Rosemary Agnew: I am delighted to be here.

The question of gaps and duplication—they go hand in hand—is interesting. As my colleagues have said, in practice, we do not duplicate effort and work. As an ombudsman, the SPSO has a different model from that of a commission or a commissioner. In complaints work, there is very little overlap, because the SPSO investigates complaints about the bodies that are in its jurisdiction, which is listed.

The issue is more about a perception that there are overlaps. For example, we do work on whistleblowing and, in theory, Healthcare Improvement Scotland also does work on whistleblowing, but it does that differently. That is one of those things about us all having a slightly different perspective and remit. In practice, what is missing is the ability to work together more often, to work more collaboratively and to share information and intelligence more constructively.

Between us, we all have most of what is currently seen as being needed, but we cannot always practically make that work in the holistic way that we might want to. I might identify an issue—I would expect this to be more prevalent when we start looking at child-friendly complaints—that goes beyond my jurisdiction or where I do not have the powers to investigate more generally. If that happened, I would share my information—depending on what it was—with the Human Rights Commission or the children's commissioner, and I hope that we would be able to work together.

When we highlight themes and trends—particularly from our investigation work—I can take them to people. If I see that a particular issue is arising with a type of complaint, I will feed that back to the Government. I like doing that and it is an effective way of working. I would just like to see that through a bit more and look at providing a solution. The issue for me is not an overlap but a gap.

Dr Claire Methven O'Brien (Scottish Human Rights Commission): Like the children's commissioner, we do not see extensive or systematic duplication of our mandate by other bodies, but the concern is to avoid that situation arising, because it could lead to greater complexity for rights holders and people who are affected by decisions or policies of the Government, which could cause confusion and diminish the effective accessibility of all the mechanisms that are available to individuals or groups. In such a situation, different bodies could also arrive at conflicting positions on the same topic.

If we reflect backwards, addressing that was part of the motivation for establishing the Equality and Human Rights Commission at the United Kingdom level, besides capturing efficiencies by merging what were a number of distinct statutory

equality bodies. That is an on-going debate, even at the level of the United Nations system.

The limiting factor is the need to maintain a distinct focus for specific groups of rights holders who are affected by public policy and by legislation in different ways, and the need to have champions and visibility for those specific groups. That captures where we stand.

The Convener: From the previous panel and this panel, we are already getting the idea that people seem fairly content with the existing landscape but are concerned about how it might develop. For example, Rosemary Agnew's submission said:

"It seems that the need for a Commission/er is often the starting point, rather than being the conclusion of analysis of what the current gaps or shortcomings (or strengths) are."

Rosemary Agnew: That comes from my experience of being involved in the development of a number of pieces of legislation and in the creation of new functions, including mine as the independent national whistleblowing officer. The requirement that comes across strongly and is absolutely right is that, whatever the model of oversight is, it needs to be independent of the Government in its decision making. However, the assumption is made that the answer to independence is a commission, a commissioner or a parliamentary office-holder. Jumping to that conclusion can influence the way in which legislation is written and put into practice, and it can often lead to frustration at the end of the process because, by the time all the overlaps with all the other commissioners have been taken out, the remit can often be unclear.

The assumption that independence of the Government always means having a parliamentary commissioner is worth exploring, because there are independent decision-making bodies that are not part of a parliamentary office-holder environment—I am thinking of the Police Investigations and Review Commissioner, Audit Scotland, the inspectorates and Healthcare Improvement Scotland, and even of commissions such as the Scottish Commission on Social Security and the Poverty and Inequality Commission. What they all have in common is that they are independent of the Government in their decision making.

I question why the recommendation often jumps straight to thinking that being independent equals having a parliamentary office-holder, as opposed to analysing what the gap is, what the need is and whether the work is being delivered somewhere else but could be done better, before creating the right structure to meet the need. I have perceived that assumption, which I do not think is even conscious—it is probably often subconscious.

The Convener: Jan Savage, your executive summary says that a

"persistent lack of access to justice, at individual and systemic level, is the driving methodology behind the calls for the creation of new public bodies to address this."

Jan Savage: As you are aware, last summer the commission published the paper, "At a Crossroads—which way now for the human rights system in Scotland?" which sought to understand what is going on here, why we are in this position and why Scotland's public finances are being faced with such a variety of requests from different groups of individuals in different parts of the country to set up new commissions to uphold those rights. That comes from a place of frustration. The people of Scotland are telling us that there are frustrations in their lives with the system for accessing justice for their individual set of circumstances, and that there needs to be systemic learning on the basis of that to improve access to justice more generally.

It would appear that the commissioner model is often a result of that frustration. Those groups of individuals and rightsholders need a champion and they need to be visible. The frustration thereafter comes because of the gap between good policy and legislation and good intentions and what is happening on the ground in people's lives. It is therefore understandable that people are calling for these new commissions and commissioners.

Convener, you suggested that we are content with the existing landscape. The commission has to be clear that there are deficiencies with the current mandate of this commission, in particular, that are not the whole of the problem, and fixing them will not fix everything, but they have an impact on this commission's ability to service access to justice more broadly.

The Convener: Nicola Killean, do you think that some of the organisations that are looking for new commissioners are looking for a magic bullet?

Nicola Killean: To the responses that Rosemary Agnew and Jan Savage have already given, I would add that the question is what are the underlying causes and what are the options available to be able to progress the concerns that are being raised. There is no magic bullet for the progression of rights; it takes time. However, this inquiry has given an opportunity to ask questions about why this is happening, where more has to be done, and whether the powers of the existing office-holders, for example, of SHRC, match the remit of the organisations that we have at the moment.

The Convener: Claire Methven O'Brien, your submission says:

"We suggest that a review cycle of existing Commission/er mandates to assess fitness for purpose within a changing landscape is something which Parliament should consider."

Dr Methven O'Brien: It is true that the demand for new and additional commissions and other entities derives from frustration. The positive side of that is that people are able to articulate that demand for support and representation. Unfortunately, public administration cannot sustain independent bodies for each and every constituency or challenge as it emerges, especially in a relatively small unit of government as we are in here.

To the extent that the issues that are being ventilated are human rights issues, the mandate of the national human rights institution—which is what the Scottish Human Rights Commission is, according to the Paris principles—says that it is required to be sufficiently broad and flexible, it ought to be able to accommodate and reflect those issues, respond to those frustrations and help to advance the positive agenda behind the demand for new bodies as long as we have adequate statutory mandate at the level of legislation that we have in Scotland and the powers and resources.

That brings us to reflecting on the terms of our existing mandate and the extent to which that could be strengthened further. Such reflection has not been done in a systematic way since the adoption of the Scottish Commission for Human Rights Act 2006, but it would allow us to be more agile and better equipped to be able to respond more proactively to at least some of the demands or some elements of the demands that have motivated the proposals for new commissioners that we have seen.

The Convener: Would strengthening that mandate mean that some of the pressures for new commissioners would abate because their proposed functions could be delivered by a modified version of the existing commissioner structure, for example?

Dr Methven O'Brien: We are optimistic that we could at least address or mitigate some of the unmet need. That relates to, for instance, the need for the commission to have a broader membership. We are concerned that we are at the lower threshold of number of commissioners in terms of feasibility and organisational resilience. We are quite vulnerable to lack of and changes in commission personnel. That has been demonstrated in recent years.

The UN Paris principles also require a human rights commission to be pluralistic and represent the breadth of opinion on pressing social issues across Parliament and society. If commissioners were somewhat more numerous, we would be

more able to fulfil the representative function that is foreseen for a national human rights institution.

On statutory powers, the inquiry power that we have is quite narrowly constrained. That might or might not be why the commission has never used it, but if it was more broadly defined that would give us more possibilities to take on some of the issues that have motivated some of the calls for new commissions through commission-led inquiries or investigations.

Another important aspect could be the ability to raise proceedings in court in our own name to strengthen our scope to advance the legal accountability of public authorities and to advise individuals. That could be with cases that have a broader significance beyond the specific facts for some of the groups in society that are calling for commissions.

The Convener: Perhaps we need fewer bodies and the ones that are already there should have greater strength and flexibility in what they are able to deliver and achieve.

That takes me to another part of your submission, Jan Savage, about sunset clauses, which is an issue that I have talked about a lot. You said:

"Sunset clauses which consider whether an issue requires a permanent public body or a short life focus to address, perhaps through the Committee Inquiry system."

Can you expand on that a bit?

11:15

Jan Savage: That was presented as a potential suite of options for Parliament to consider for managing the pressure of the current asks. As Claire Methven O'Brien says, there has not been an opportunity for the commission to review its mandate since 2006, so the opportunity for regular engagement with Parliament about the deficiencies in the mandate and where the challenges are does not appear to be in the system. That is one thing.

A separate issue is in respect of the setting up of new public bodies, which is a consideration for Parliament. To date, it has not appeared in the legislation that creates the new public bodies that have evolved recently so it might well be something for Parliament to consider. Equally there are other routes to consider for achieving the policy objectives of new bodies. For example, a statutory instrument could be used to require the commission to set up an inquiry or a rapporteurship-type model for a specific period of time. That is a different approach that might achieve the same policy intent as a sunset clause, for example.

Nicola Killean: I want to add a slightly different perspective on sunset clauses and looking at that as an option. As a relatively new commissioner in post, I have benefited hugely from coming into an office that has a dedicated team who have been there for a number of years, have seen issues through and have built up a huge amount of expertise. Therefore, it is important to take a balanced view on the pros and cons.

Although I understand that a sunset clause can give some protections, I also think that it is important to consider the potential unintended consequences of that, particularly for a commissioner's final year in office, if that was when there was a review or a consideration of that, and the prospect of recruiting a quality team into any new role if sunset clause was already in place.

Many of the issues that we are trying to progress take many years and sometimes it can take multiple office-holders' terms to achieve that. I therefore caution you on the unintended consequence of a commissioner who you want to come in and you want to set the bar high, and understand that it might take several years. We have to tackle big, systemic issues. I just wanted to add something about taking a balanced view on that.

The Convener: I have to say that I do not think that anyone would be thinking about the children's commissioner for Scotland in terms of a sunset clause, human rights or the ombudsman. I am talking about the new commissioners who come in with a specific remit to try to deliver something that they feel is not being delivered.

Rosemary Agnew: I echo what Nicola Killean has said. There is something attractive about the option for a specific remit for a specific amount of time. However, care needs to be taken on whether the sunset clause relates to the function or the creation of the organisation. We have some experience of the significant costs of setting up new organisations. We were part of the support that set up the office of the Scottish Biometrics Commissioner.

A huge amount of work and setup costs are necessary just to get to the point of having a physically functioning office. By the time an office-holder starts getting well into their remit, they can see the sunset clause looming on the horizon. They can see the sun setting ahead of them and they start to wind down their organisation because, at that point, their staff will know that it is coming to an end. There is more risk of losing staff when things are not finished and effectively it would end up with maybe one or two years of a mature and effective organisation.

That could have unintended consequences because it could drive the office-holder to do things that they think they can achieve in the time rather than addressing some of the systemic, underlying issues that can take years to unpick. Therefore, I would add the same caution.

The Convener: The same argument could be made for a parliamentary term. In five years do we rush to achieve things within a short time? Every member around this table faces a sunset clause every five years and some of us face it more frequently than that, in a different form.

Rosemary Agnew: Nicola Killean described the idea of an organisation that runs beyond the person who is appointed in the commissioner role. The character of that organisation might change but fundamentally what it is there to do becomes established. We have to make sure that it does not stagnate, but bringing in a new, time-limited function means that the machinery needs to be there to support that function and the person with the responsibility can focus wholly on that, not on all the things that it takes to get the office up and running.

The Convener: That is interesting. I will open the questioning to colleagues around the table.

Liz Smith: I asked the previous panel this question and I know that it is a difficult one. Are there specific criteria that we can use to discover whether what you are delivering is effective and good value for money? I know that that is difficult, but this finance committee has to look at the outcomes. What do we have to do to measure how successful you are?

Nicola Killean: I am happy to take this first. We can look at the mandate that we have been given, alongside what the role is set up to do, what the office is set up to do and what progress has been made against that. We each have to produce a four-year strategic plan, which should match the functions and the remit of the organisation that we represent. In terms of assessing and scrutinising impact and progress, those are the existing mechanisms. You ask what a particular office-holder or commissioner was set up to do, look at how they have outlined progress and whether there is evidence that that progress is being achieved.

Liz Smith: The Scottish Biometrics Commissioner, on the previous panel, said that he was slightly surprised that, given that he had submitted seven reports, he was questioned only once. As children's commissioner, do you feel that you are being scrutinised well enough?

Nicola Killean: Yes. This is the fourth committee session that I have been invited to give evidence to since I came into post eight months

ago. [*Interruption.*] I jest, but overall, yes, there is a good scrutiny process in place.

I want to emphasise that, as well as being scrutinised by the Scottish Parliamentary Corporate Body, I was invited in recently by the Education, Children and Young People Committee to have a session on my strategic plan. I welcomed that and I have said in my submission that I would welcome that as an annual opportunity, both to report on and be scrutinised on progress, and because it is an opportunity for me to bring to the Parliament what children and young people have been telling me and to represent their views.

I also have a young advisers group and we have been developing over the years—and I will continue to do so—ways and means in which they can hold us to account against the strategic plan and our priorities.

Liz Smith: You have obviously got a very high-profile commissioner job. As the convener hinted at, it is not one of the ones that people would seek to undermine, given the good work that happens there. Do you feel, with that high-profile nature, that the scrutiny tends to increase? Is it your view that that is what happens and that for other commissioners, who are not quite so much in the public eye, that scrutiny process is not as strong?

Nicola Killean: I am not sure that I could comment on the other commissioners. My main contribution is to say that the scrutiny of my office is appropriate and proportionate to the role and the remit, with the addition of the opportunity to come here annually. As I said earlier, either I or members of my team are often in the Parliament to provide evidence or support with advice or information. Sometimes, that is reactive to what is currently live, whereas we want to bring more of what children and young people have asked of us and the priorities that they are asking for. That is why I welcome that annual opportunity. From my perspective, the scrutiny feels proportionate, fair and representative.

Liz Smith: Ms Agnew, you raised an interesting point earlier when you said that you felt that there was a bit of a gap sometimes. Does that gap come about because other bodies that could be looking after a problem are not doing their job sufficiently well? One of the questions that the committee is looking at is the almost doubling of the number of commissioners in future. Quite a lot of the new proposals are about commissioners who have an advocacy purpose. Has that resulted from the fact that there are other areas or other public bodies that are not doing as much as they could to address a problem?

Jan Savage: That type of commissioner, with advocacy functions, comes back to the champion

model. Civil society generally does an exceptional job at raising the profile of issues and bringing those issues to the attention of the Parliament.

Claire Methven O'Brien's earlier point on the deficiencies of the Scottish Human Rights Commission's mandate are relevant to this particular point. Currently, the commission's mandate explicitly prevents it from providing advice to individuals. Effectively, the door to the commission is closed to the people of Scotland in any meaningful way. That is not the commission that we would wish to be. That does not mean to say, given the size and scale of our organisation, that we would be able to offer an advice service—that is not what this is about. However, to be in a position where we can directly and more frequently engage with people would overcome some of the challenge and perception that, in the past, the commission has perhaps not been progressing issues.

Claire also mentioned the deficiencies in the commission's current governance arrangements. We are a unique office-holder in front of you today, in so far as we have a pluralist membership. We do not just have a human rights commissioner, we have a chair of the Scottish Human Rights Commission and the membership of that commission, all appointed by the Parliament to be those office-holders.

There are other international models—in New Zealand and Australia and other places—whereby Parliaments appoint more commissioners specifically to come in to represent and champion particular groups of individuals. That may be something that the Parliament wishes to consider and it is something that the commission could be open to.

There are further weaknesses in the current commission's mandate that may be leading to the justifiable perception from certain sections of society that the commission is not addressing problems. That might change if the commission had the ability not just to monitor how human rights are being enjoyed but to take proactive action to change things by raising own-name proceedings, for example, which other human rights commissions across the United Kingdom can do, but this Scottish Human Rights Commission cannot.

I can see that there is a justifiable perception from many sections of society that this particular commission may have been part of the issue. As we said in our submission, we do think that that is part of the problem. It is not the whole problem, but it is part of it, and it would be helpful if the committee were minded to consider whether it would be appropriate for parliamentary committee-led amendments to the commission's mandate,

rather than having to wait for Government-initiated legislation to make that happen.

Rosemary Agnew: I have a couple of remarks on accountability and the question whether new commissioners are being proposed because existing organisations are not doing their jobs well. I would slightly reword the question. We are not doing the job that we think we should be doing because we do not have the right legislative remit. It is a slightly different take on what Jan Savage said. If you look across the entirety of the regulatory oversight, scrutiny and commissioner landscape, parliamentary or otherwise, and talk to a group of complainers, we will probably all come up with the same answer of what we think needs putting right. It is often to do with the remit that we do not have.

11:30

To come back to your accountability point, however, it is important to separate out remit from performance. The questions of whether an office-holder is effective, value for money, and doing what they said they would do in their plans and budget submissions are questions about performance. Where there are governance gaps is in squaring the circle. I appear before the Local Government, Housing and Planning Committee where I get robust questioning of performance, particularly in relation to impact. However, I do not see that circle squared back to this committee asking me whether I have done what I said that I would do with the money that, through the SPCB process, you have given to me as an accountable officer. There is something about squaring that circle.

The other area that it is important to think about—which ties into holding the Government and policy to account—is that there is a risk that so much time will be spent scrutinising us that we miss the point of what we are trying to tell you about the organisations that we have oversight of. I wonder whether there is a discussion to be had about whether we can add greater value to the parliamentary process by enabling you to hold others to account through what we find. That is particularly true of an advocacy model of a commissioner.

Liz Smith: That is a very helpful answer. Thank you very much.

Michael Marra: I want to start on the advocacy issue and I will come to Nicola Killean first. You mentioned that tackling big systemic issues takes many years. We have had a children's commissioner for 21 years in Scotland. Where do you think that the children's commissioner's office has improved outcomes for children?

Nicola Killean: There has been huge progress in recognising, valuing and seeing children's rights implemented in Scotland. The Children and Young People's Commissioner's office has made a huge contribution towards that. Some very specific examples include, last week, the Parliament passing the Children (Care and Justice) (Scotland) Bill. My office has been working on that alongside the Parliament and civil society for many years. Of course, there is also the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024.

Our specific remit is about promoting, protecting and safeguarding children's rights in Scotland and looking at that through the lens of law, policy and practice. We see huge progression towards that and we see that reflected from a practice perspective, with additional information provided to children and young people and education about their rights being embedded into schools across Scotland. There is huge evidence of the impact of the contribution that we are making.

Michael Marra: There is a lot in there about a rights discourse, but child poverty has increased significantly over those 21 years, we have a decline in educational outcomes for young people and we have a mental health crisis among children and adolescents. Is there a risk here that we are more concerned with issues of rights rather than outcomes and what happens to young people as a result?

Nicola Killean: Embedding children's rights and taking a rights-based approach should be the driver of those outcomes being achieved. As you will be aware, the strategic plan that I have just launched is based on children and young people's views. Education, mental health and poverty are the three biggest areas that children and young people have asked me to work on.

To build on Rosemary Agnew's point about being clear about the remit of a commissioner, part of our role is to promote children's rights being considered whenever law, policy and practice is created and implemented. It is also to raise accountability and concern when children and young people's rights are not fulfilled. We believe that child poverty is one of the greatest breaches of the human rights of children and young people, but my office does not have enforcement powers. I can bring recommendations and we can undertake systemic investigations, but we are dependent on the Parliament to take that information and say that more has to be done.

Michael Marra: The issue is about both the presentation of rights and the realisation of rights. I could not agree more strongly with you. The strategic plan that you have set out certainly chimes with my views—I have also listened to

children—on the needs of children and young people over the coming years.

I wonder, however, whether the demand for advocacy roles that we have discussed suggests that there is a disconnect between a discourse of rights and the realisation of rights. Young people's rights are not being realised and the outcomes are going in the wrong direction for many young people, while we promise them UNCRC implementation and other legal provisions. It comes down to some of the concerns that the committee has about the outcomes for people rather than process issues.

Jan Savage: Nicola Killean's point about the founding mandates of the commissions represented here is important. If we go back to the Scottish Commission for Human Rights Act 2006, it provides for a

"general duty ... to promote human rights".

The commission's mandate has no teeth that would allow it to step into more of an accountability space. You can see quite easily, through the advocacy for new commissioners, that there is an accountability gap.

As we have explored in the evidence this morning and in our submissions, there are things that could be done by amending the existing mandates of the commissions to plug that accountability gap a little. For example, we do a lot of monitoring work. We monitor how the implementation of the international human rights treaties is being experienced on the ground. We promote rights and we monitor how they are experienced. We can report that to the Parliament, but we have limited enforcement powers or routes through the courts to do much about those findings. That is why, as a commission, we want to be clear with the committee about the deficiencies in the mandate that prevent us from providing that usefulness into the system.

There are two core things to reflect on: the ability to raise own-name litigation and to have that looser power of inquiry. Those mandates would give the commission the opportunity to do what the Parliament cannot, which is to test the application of good legislation through the court system. Also, what the Government will not, or cannot do, is to direct how public services are delivered and inquire into the decisions that are being made on the ground on the application of those policies. That is the unique value that commissioners and office-holders of the Parliament can offer into the system. That is something that we cannot do at the moment.

Michael Marra: That is really useful. As I noted to the previous panel, the Law Society of Scotland said:

"Whilst it can be argued that Commissioners in Scotland are ... an offshoot of, and for, the Parliament their role may create questions about accountability and the extent to which the appointment and scrutiny of Commissioners is democratic."

What Jan Savage has described—a commissioner who is appointed by the Parliament taking enforcement action and deciding what should happen with public services—does not sound very democratic. If we were to give you those powers, at what point would the public ask a question about accountability in that regard?

Jan Savage: It would be as democratic as the parliamentary process allowed it to be. The Parliament creates the opportunity, the Scottish Parliamentary Corporate Body progresses the interview process and the nomination then goes to the Scottish Parliament for all MSPs to vote to approve the appointment of the commissioner. In that respect, the process is clear—

Michael Marra: I am sorry to interrupt. I absolutely agree with what you have said about appointments, but you are making a case for having stronger enforcement functions that would allow you to instruct public bodies or public services on what to do. How would that relate to the democratic function of an elected Parliament? Who should be accountable for the direction of public services?

I sound as though I am being quite harsh on you all, but I think that these are political questions and that you would be well within your rights to say, "This is your job." My concern is that we are ceding part of our job to you and that you are perhaps requesting to have more of those functions.

There is a question about what kind of country we want to live in. We have elections, parties put forward manifestos and politicians are then elected to make such decisions. Is it not the case that we would be adding an extra layer beyond that? For instance, we would be asking you to make some of those decisions if we gave you the extra powers that Jan Savage described.

Dr Methven O'Brien: We have already conceded, to some extent, that we agree with that position. With the rights discourse, it is inevitable that there will be an unfolding of new identities. Equality and discrimination law and diversity and intersectionality policies generate new demands on the Government and the private sector to accommodate and reflect the specific needs, interests and rights of different groups in society. In turn, that creates demand for representation and a better set of mechanisms for securing accountability for those rights.

As I have said, in any unit of government—particularly in the relatively small unit that we are

talking about—it is, unfortunately, not feasible to establish new bodies to meet the demands of, and fulfil a representative function for, each and every one of the possible social identities or constituencies. The question is how we best accommodate that within a more feasible set of structures. A limiting factor is that those structures should not encroach on the function of the Parliament in scrutinising claims and deliberating on the proper policy solutions to meet, within existing resources, all kinds of needs in a complex society, given the competition for resources. I think that we are on the same page in that regard.

The Scottish Human Rights Commission is all for strengthening our relationship and connection with the Parliament. We are accountable through the appointment process that Jan Savage mentioned, our annual engagement with the Equalities, Human Rights and Civil Justice Committee and the presentation of our annual report. We would be interested in putting on a statutory footing the delivery to the Parliament of an annual state of the nation report, which could provide a pretext for a proper debate involving the commission and the Parliament to evaluate—this relates precisely to Liz Smith’s question—the performance of the commission and of all state institutions in delivering a rights agenda, not just talking about it. That is worth considering, and we are open to a discussion about other additional mechanisms.

Michael Marra: That is really useful.

Jan Savage talked about how powerful civil society is in making representations to the Parliament. Why are parts of the third sector and civil society asking for more commissioners?

Jan Savage: As we explored in the commission’s paper last summer, based on our conversations with people who work in and speak to civil society organisations, we understand that there is a variety of reasons for that. Fundamentally, there is an accountability gap and people are frustrated about the difference between good human rights-infused policy and the reality. The fact that more people know about their human rights and what to expect is really good, and the commission has published research that demonstrates that positive progression.

There is also the need for a champion. When people feel pretty disenfranchised, they look at the success of the commission model, which is seen to be effective, and they want one. However, people often do not fully understand the difference between a model involving a parliamentary office-holder or commission and one involving a national advocate or champion, who would be established through a different mechanism. Fundamentally, the accountability gap is why we are in this position.

There is also the impact of comparative policies elsewhere in the United Kingdom. Commissioners have been set up in England, Wales and Northern Ireland for different groups of people.

We are in this position for a variety of reasons. Fundamentally, it comes down to access to justice and frustration with the system.

Michael Marra: That is really clear.

I will ask quite a stark question. Why should we have a children’s commissioner and not an older people’s commissioner?

Nicola Killean: I can answer from the point of view of children and young people. The evidence is absolutely clear that children under the age of 18 are subject to a greater number of rights breaches. The majority of them, individually, do not hold political or economic power, so if they are based in an adult-focused organisation, we know that their voices are lost.

That is why the Scottish Parliament deserves huge credit for recognising those in civil society who campaigned for 10 years for the creation of the Children and Young People’s Commissioner. The model with an independent children’s rights institution, under the Scottish Parliamentary Corporate Body, is held up internationally as the platinum standard.

11:45

Michael Marra: Does having one commissioner and not another risk a hierarchy of rights?

Dr Methven O’Brien: It ought not to. As we touched on earlier, we are interested in exploring with the Parliament, under the Scottish Human Rights Commission model, opportunities to extend the extent to which we are able to provide greater representation and championing for other constituencies, including older people, by increasing the number of commissioners or using a model whereby the Parliament could, through a statutory instrument, nominate specific groups or thematic focus areas for us to concentrate on for a delimited period. That might be one way of emulating what could otherwise be a parliamentary inquiry, with the focus, for a specific amount of time, being on the rights of a specific group.

Rather than baking in a specific focus for the Scottish Human Rights Commission for all time, there could be something functionally equivalent to a parliamentary body with a sunset clause. That is one way in which we could achieve visibility, champion, deepen the focus and understanding, make recommendations and scrutinise public bodies in relation to specific groups without establishing a permanent hierarchy among those groups.

Ross Greer (West Scotland) (Green): I want to go back to Michael Marra's question about groups in the third sector but expand that to individual MSPs, because a lot of the momentum to create new commissioners at the moment is from members' bills as well as Government bills. Is the SHRC able to engage? Whether it is a third sector group making a proposal or an MSP beginning to float it, can you have a conversation with them? Have you been having conversations about alternatives such as an expansion to or change in your mandate?

As you are currently constituted, can you have such conversations and, if so, what has the response been? Obviously, we are clearly now in a place where there is a lot of momentum behind creating a whole new range of commissioners, which is why we are here.

Jan Savage: We have been having those conversations, prompted by our research last summer, and our mandate permits us to do that. As Claire Methven O'Brien mentioned, we are governed by a set of principles, the Paris principles, which were set by the United Nations and which encourage us to work collaboratively with civil society. It is fair to say that the response from civil society and MSPs has been a mixed bag. There has been a lot of positivity about the SHRC engaging in that way and looking to propose an alternative system in the context of a strengthened mandate for the SHRC whereby we could deliver more visibility and work particularly across the international treaty system to address some of the issues.

You will have seen in the evidence that has come to the committee that some civil society organisations are minded to accept that. Others are less so. In particular, the Health and Social Care Alliance Scotland has suggested that a strengthened Scottish Human Rights Commission would probably deliver a lot of the policy intent behind the civil society calls.

So, yes, we have those conversations and we will continue to do so, and part of that is about educating civil society about the mandate of our national human rights institution.

Ross Greer: I agree that the ALLIANCE's written evidence was really useful in demonstrating that there are folk in the third sector who want a different model, but we are still faced with a range of proposals to create new individual discrete commissioners. When you have been having those conversations—obviously you have been persuasive to some but not yet sufficiently so for others—do they ultimately need to see a shift coming from Parliament or do they need it from Government? What do they need? I understand that, fundamentally, they need the issues of rights

breaches to be addressed, more effective scrutiny and so on, but what does that look like?

My fear is that, if the committee produces a report saying that what is actually needed is for Parliament to get much better at its job and that then sets out all the ways in which we can do that, our colleagues might or might not agree with that but, even if they did, that feels a step removed to me. If I have a meeting with a third sector group that is really concerned about a vulnerable group's rights being breached, and I say, "Don't worry—the solution is that we are going to reform the parliamentary committee system," that just feels like it is far too many steps removed and will not be persuasive.

Jan Savage: We cannot speak for civil society or for the MSPs or Government departments that are all pushing for commissioners for different reasons. We can speak to the contribution that an enhanced Scottish Human Rights Commission could make in that landscape. As we said at the start, it cannot be the solution to all the problems, but it certainly could be explored further to identify and address some of the accountability gap and the visibility gap and strengthen the relationship with Parliament in respect of raising those rights. It is not all of the solution, but it can be some of it.

Ross Greer: Rosemary, you looked keen to come in on that.

Rosemary Agnew: I want to offer a slightly different perspective to try to help us understand why we are where we are. It is a bit like that diagram that can be seen as a vase or as two faces facing each other. One thing that we have seen as our society has developed is a much greater understanding among people that they have rights. It is not universal and it is not necessarily consistent, but people are more conscious of it. If we look at how legislation has developed since 1999, we see that there are a whole range of commissioners and other officer-holders who were created through legislation that is in functional silos.

The SPSO started off as a complaints body. You have the Scottish Information Commissioner, who has a very specific remit against a very specific piece of legislation. What happens is that people start getting a better understanding of rights. In my view, rights are delivered at the point that the service is delivered. If you become aware that you are not getting the service that you should have, who do you go to? Collectively, we see a group of people for whom, either in fact or perception, their needs and rights are not being met, and often the needs go with the rights. We see that through complaints. For some types of complainer, their needs are perhaps not being met and, by definition, their rights are not being met.

What we have seen in legislative development in the past few years—the UNCRC act is a good example of this—is legislation that is not about silos; it is about embedding rights into everything. The rights need to be delivered at the point where the service is delivered. Children are more disempowered. We have seen that through our work on child-friendly complaints. The conclusion that we have come to with child-friendly complaints is that the best place to embed the rights is with those who make complaints on behalf of children, who might not even know that a complaint is being made.

We are facing a dilemma: how do we embed the rights and make duty bearers accountable at the service delivery level while not completely dismantling the structures that we already have? That is where the type of advocacy commissioner model probably comes back to a question for Parliament. Is it a rapporteur model, where the commissioner does all the scrutiny and research, comes back to Parliament and says, “We have done all this, and we think that there is a fundamental gap in the delivery of rights at the ground level”? That is a different model from saying, “You are empowered to go and enforce rights.”

Fundamentally, we are collectively trying to find our way through how we embed rights at every level of public service. I can give you an example of how, with complaints, using that different lens of rights gives the same outcome but a different way of expressing it. I have used this example before. An elderly person is in a dementia ward. Their room is being cleaned and they are put into a day room where they can be supervised and the staff can make sure that they are okay, but it is a room that people walk through, and the lady is wearing a nightie with one tie at the back. Policy-wise, the staff are probably following the policies—they have to make sure that the person is moved to a safe environment—but what have they done to respect her dignity? That is how you get a rights-based approach into things.

The opportunities of the human rights bill and, if we do it well, the UNCRC act will help us to deal with our dilemma. It is the siloed bits—those who do the scrutiny, look at complaints and enforce information rights—who are the ones who can support the advocacy role and say to Parliament, “We have evidence from here, here and here of where things could work better.”

I hope that that is of some use.

Ross Greer: Certainly—it is a useful example. Thank you.

I will pose my last question to Nicola Killean. You have already laid out what you and your office think would be useful changes to address the

issue, but I will pose the question slightly differently. You will have a lot of contact with the groups that are pushing for, and sincerely believe that there is a need for, new discrete commissioners because of the overlap with your remit, as has been discussed. What would they need to see from Parliament specifically? It is a different question from the one about Government and existing commissioners. What would they need to see in the committee’s report to be satisfied that there is an alternative to new discrete commissioners?

Nicola Killean: Similarly to Jan Savage, I would not like to assume what people would be looking for, especially if it was not the particular proposal that has been put forward. However, I can draw on the recent engagement that we had with stakeholders as part of our strategic plan. You will be aware that I did a lot of work with children and young people, but we also held a number of round tables with stakeholders who work across children’s services. The feedback from them on the added value that the commissioner roles bring was very much loud and clear for me and was about matching the remit with the legislative powers.

I can only assume that, if the proposals are not being taken forward, any response would have to point towards what the alternative is and how those concerns have been addressed. I would add that the concerns that are being raised are about systemic challenges that will take time, so there is not necessarily a short-term fix.

Ross Greer: Thank you.

John Mason: I will continue with you, Ms Killean. If a child is on the autism spectrum and is a victim of something, which commissioner would they go to if there were three?

Nicola Killean: We would always first of all promote that, where possible, children and young people have routes to remedy as locally as possible. As Rosemary Agnew said, we want the practitioners who are working with children and young people to be able to support them in the best way possible, to understand the children’s rights and, wherever possible, for there to be access to remedy or support. At the moment, with the current office-holders, if such an individual was going to approach one of us, it is likely that they would come to the Children and Young People’s Commissioner.

John Mason: You are certainly the highest profile at the moment. Would you then have to reach agreements with all the other commissioners—say, if we have 14—as to who does what?

Nicola Killean: That is one of the concerns that we have highlighted in our written submission.

That is particularly about confusion for rights holders on who to go to and potential concerns about what can be done if there is duplication more than overlap. To make that very specific, at the moment, I have committed in my strategic plan to take forward a big piece of thematic work on education that will look at children and young people who are currently furthest away from the education system and at children with disabilities and with additional support needs. Therefore, I will be very much looking to develop relationships and work with those children and young people.

Given the number of proposals that are in place, I would have concern if there was duplication that would pause some of that work while we were trying to figure out whether there was duplication and, if so, whether there were any issues about that.

12:00

John Mason: If the SHRC were to be given more powers and had different departments, would that make the whole system more joined up than it is with separate commissioners?

Dr Methven O'Brien: Potentially, yes it would.

John Mason: That is a nice simple answer, thank you.

Ms Killean, you said that you have quite a good relationship with the Education, Children and Young People Committee. Should we, as MSPs, be doing more of the work that you are doing?

Nicola Killean: I believe very much that the work that we are doing adds complementary value. We have specific functions and powers, which we have touched on, that enable us to look at systemic issues. For example, we are about to get strategic litigation powers, but we also have an investigative power. We are able to relay our reports to Parliament. When MSPs engage with those reports—our annual report or research or investigative work—that is where we see maximum impact.

John Mason: I think that it was Ms Savage who mentioned that the words “commission” and “commissioner” mean a lot of different things to different people. Is that a problem? We understand that things are the same internationally, in that many countries have a somewhat complex landscape. Is that a problem? Should we be trying to define “commission” and “commissioner”?

Jan Savage: There appears in this particular context to be an issue that is more about a lack of understanding of the difference between a Scottish parliamentary public body and a champion-type commissioner or non-departmental public body of the Scottish Government. That

seems to be where there is the biggest dividing line in terms of awareness and understanding of the purpose of commissioners.

There are various commissioner models. In Scotland, the two commissioner models that we have are parliamentary commissioners and the majority of requests from social care and MSPs seek to replicate those models. We probably have an issue in that we should explore the defined purpose and function of a parliamentary officer-holder as opposed to those of an advocacy-led champion.

John Mason: I will come to Ms Agnew in a moment, because she has touched on the independence question. I asked this question of the previous panel. Is it more important that the commissioner is independent in themselves rather than in terms of what they are called and whether they are answerable to the Government, Parliament or whatever?

Jan Savage: That comes down to the purpose of the body. If its purpose is to be an advocacy organisation that champions the experiences of a group of individuals, perhaps it does not need to be part of the parliamentary system. If part of its function is to be an independent body that upholds the human rights of a particular group of individuals at systemic level, and it uses the unique set of powers that office-holders of Parliament have at their disposal to do that, independence is absolutely critical.

It has to come back to mapping out the purpose of each proposal and the commissioner’s intended function. That should guide what model is adopted.

John Mason: Okay. Ms Agnew talked earlier about independence. I do not know whether you saw that we had the Scottish Biometrics Commissioner in. I asked him the question because he had made the point about other commissioners, some of whom are appointed by the Government, such as the Scottish Veterans Commissioner and the Police Investigations and Review Commissioner, which you mentioned. Does it make a difference if commissioners are appointed by the Government or Parliament?

Rosemary Agnew: I think that that might make a difference. There is a perception that it makes a difference, which leads me to the question of why people do not trust commissioners if they are not put in place by Parliament. It is a fundamental question: some of the commissioners act very independently and are clearly independent, so I think that there is an issue about perception. It is legitimate to ask why people do not trust a commissioner unless the commissioner is appointed through a parliamentary process.

There is also a subtle difference in terms of accountability. I think of myself as being accountable to the people of Scotland, through the Parliament. You are the elected members; you are there to speak for your committees, your Parliament and your constituents. I feel that that is a way of holding the ombudsman to account. It is not the Government holding me to account; the Government exists to deliver its legislative programme and the mandate for Government for the session. There is a difference, in that sense. I think that someone who is Government appointed can be independent, but we need to consider the way that they are held to account and how that is reported.

Your other question was about whether we should define a single commissioner model. When we were putting our submission together we were thinking not about trying to define a single commissioner model but about perhaps defining a number of commissioner models and deciding which would be most appropriate to deliver the outcome that is being looked for. An advocacy commissioner model is very different from, for example, the Scottish Information Commissioner, who is a parliamentary office-holder and has a much more specific role.

Instead of trying to always define a model, the various remits could be looked at and a general description could be given of what type of commissioner or organisation is needed. It might not be a commissioner; it might be an ombudsman, or it might be a champion or whatever. When you scrutinise legislation, one of the things that could be looked at—including by people like me, who comment when consultations are open—is whether there has been consideration of what model is appropriate to achieve the outcome that is required by what gave rise to the legislation. That might provide a bit more clarity in—as you have no doubt discovered over the past few weeks—the quite complex matter of trying to pin down where thinking and scrutiny should be directed.

I do not envy committees the job of scrutinising legislation, because there are often so many different outcomes that you could go for. It is difficult to go backwards to ask whether the proposal for a commissioner was scrutinised in the appropriate way. Perhaps the type of commissioner could be considered not based on a set of criteria for what a commissioner should be, but based on a way of assessing whether the model will deliver the outcome that is sought. If we are looking for a champion for a particular group of people, that might be not a commissioner but a very different type of role. I will leave that idea there.

John Mason: You have correctly said that it is quite a complex area. I think that we are struggling, in some ways, to get to grips with it. I suspect that many people would probably struggle to say how the children's commissioner and His Majesty's Inspectorate of Prisons for Scotland differ from each other.

I was interested in your point that although they are all independent to the public, how the public see the role might depend on whether the role is called "commissioner" or something else. I think that most people would think that His Majesty's Inspectorate of Prisons for Scotland is quite independent; from the public's point of view, I am not sure that there is a difference between their being answerable to the Government and their being answerable to Parliament. I get that, theoretically, they are less independent.

Rosemary Agnew: It is more that they could be perceived as being less independent. I know that the role and remit are not just about the person; for pretty much every commissioner or inspectorate that I have come across, their independence is one of the things that is closest to them, and they strive to ensure that they operate independently. It is about the perception of who made the appointment, how the appointment was made and whether it was done separately from any policy. The advantage in having a parliamentary appointment process is that it is separate from the machinery of Government.

John Mason: Okay. I will switch to the other witnesses.

One of the things that I have thought about, and is why I have been asking about this, is whether we can put everything into the SHRC and merge things. I asked the previous witnesses, as well, and they were resistant to that. One of the issues—if I am not mistaken—for the children's commissioner and the SHRC is that international obligations make it impossible to put folk together in one commission.

Nicola Killean: I will start, and I am sure that Claire Methven O'Brien will want to come in, too.

It is important for me to state that merging the children's commissioner into an adult-focused organisation would be a backwards step for Scotland. As I mentioned earlier, it was after 10 years of campaigning that Parliament recognised that children's and young people's voices get lost within adult-focused organisations. I believe that the SHRC agrees with us.

It is important that we maintain our independence. Our model is recognised internationally as being one of the best models. It is recognised that children and young people know, through having their own commissioner and a separate organisation, that Parliament has

committed to them. Their voices are being heard and they are being represented completely independently.

Dr Methven O'Brien: I will not disagree with the children's commissioner on anything that she has just said. I think, however—when it comes to proposals for new additional commissioners—that it is important to register that either some proposals do not have a basis in international human rights law, or the extent to which there is a human rights component to the agenda of concern is quite marginal.

Not by any means could all the existing proposals be meaningfully folded into the Scottish Human Rights Commission, given its existing mandate. Patient safety, for instance, and other issues go beyond it. They have a human rights component, but the standards and the issues of primary concern that those constituencies are advocating for would go beyond what has been established by the decision of human rights supervisory bodies or, in some cases, even by soft law standards. That is definitely a limiting factor in respect of whether the various proposals could all be folded into the mandate of the SHRC.

John Mason: Okay.

Finally, in your submission, you talk about the need for adequate resources to widen access to front-line advice and so on. Do you need more resources now and, if so, how much more? Is it 50 per cent more or twice as much?

Jan Savage: That is probably one for me to answer. The SHRC has for a long time been advocating for more resources. I will put this in the context of the current office holders who are in front of you. The SHRC's current head count is 14 staff and we have a budget for this year that has been signed off at £1.4 million. That is slightly less than the comparable children's commissioner budget. That is quite a tight budget for an organisation that has the duty and responsibility to monitor human rights among all the people and in all the places of Scotland, and to engage with Parliament in that space.

We would require additional resource in order to deliver future development of the commission's mandate. I will not put a figure on that today, because that would need to be modelled. Suffice it to say that it would not be anywhere near the cost of setting up 10 new public bodies. The amount would be very dependent on the functions; there could be enhanced monitoring, which would be done using the rapporteur model.

As Claire Methven O'Brien said, the commission needs to be focused on international human rights treaties and not necessarily on particular groups of people who have rights within those treaties. It is important for the commission to ensure that a

universal approach is taken that would capture the groups that we have not spoken about today—groups of people who do not necessarily have an active civil society voice or have not sufficiently made their way into Parliament with well-funded campaigns behind them to ask for new commissioners. The SHRC exists for those people, too, so structures that we would seek to enhance would reflect that.

12:15

We have spoken about enabling powers to provide advice and allow the ability to take cases through the courts to test the law. That would be done case by case and we would look to arrange that with Parliament, so it would not necessarily be built into the core budget of the commission to make it greater than it needs to be. Certainly, there are deficiencies in respect of the mandate and there are, arguably, deficiencies in respect of the SHRC's current size.

John Mason: Thanks very much, and thank you, convener.

The Convener: That has concluded questions from the committee.

I have one question for Nicola Killean. We obviously have a Minister for Children, Young People and Keeping the Promise and I am just wondering about the relationship that we have with that minister, because the role is quite specific. We do not, for example, have a commissioner for housing, even though we have a Minister for Housing. How do you engage and are there any gaps or overlaps?

Nicola Killean: There is certainly no overlap for my role. I see my role as being very much about supporting the Government, wherever possible, in promoting and protecting children's rights, but it is also about scrutinising how the Government has taken that forward, and about providing comment and challenge, where appropriate and when we have something to add. Over the years, members of my team and those of previous commissioners have been able to balance that; they have been able to meet and work together and publicly hold the Government to account.

My commitment to children and young people is that we will continue to do that and work with ministers or cabinet secretaries who are aligned to thematic pieces of work that children and young people have asked me to take forward. Since I have been in post, I have set up regular meetings so that I am able to have regular updates, raise issues that children and young people have brought to me and provide appropriate challenge, when necessary.

The Convener: That is very interesting. Thank you for that.

Okay, folks—that concludes this evidence session. I thank everyone for their evidence. We will continue our deliberations next week. I call a brief break until 12.20, so that our guests and the public can leave before we go into private session.

12:17

Meeting continued in private until 12:33.

This is a draft *Official Report* and is subject to correction between publication and archiving, which will take place no later than 35 working days after the date of the meeting. The most up-to-date version is available here:
<https://www.parliament.scot/chamber-and-committees/official-report>

Members and other meeting participants who wish to suggest corrections to their contributions should contact the Official Report.

Official Report
Room T2.20
Scottish Parliament
Edinburgh
EH99 1SP

Email: official.report@parliament.scot
Telephone: 0131 348 5447
Fax: 0131 348 5423

The deadline for corrections to this edition is:

Friday 31 May 2024

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000

Textphone: 0800 092 7100

Email: sp.info@parliament.scot



The Scottish Parliament
Pàrlamaid na h-Alba