

Scotland's Commissioner Landscape: A Strategic Approach

Purpose

1. The Committee is invited to take evidence from Ivan McKee MSP, Minister for Public Finance, in relation to its inquiry into [Scotland's Commissioner Landscape: A Strategic Approach](#). The Minister will be accompanied by the following Scottish Government officials—
 - Catriona Maclean, Deputy Director, Public Bodies Support Unit, and
 - Steven MacGregor, Head of Parliament and Legislation Unit, Scottish Government.

Overview

2. Seven¹ independent officeholders are directly responsible to the Scottish Parliament, with their terms and conditions of appointment and annual budgets set by the Scottish Parliamentary Corporate Body (SPCB). They are a mix of commissions, commissioners, or ombudsman, and range from having regulatory, complaints handling, rights-based, investigatory or advocacy functions. For the purposes of the Committee's inquiry, this mix of bodies is referred to as 'Commissioners'.
3. Legislation creating a patient safety commissioner has also recently been passed by the Scottish Parliament. A further six² are being proposed or considered. The Commissioners' budgets form part of the SPCB's own budget which is "top-sliced" from the Scottish Consolidated Fund.
4. In its [Report on the Scottish Budget 2023-24](#), the Committee expressed concerns regarding this potential significant increase in the number of SPCB-supported bodies and their associated costs. More recently, the Committee raised these broad concerns during scrutiny of Financial Memorandums (FMs) for Bills proposing the creation of a patient safety commissioner (now passed) and a victims and witnesses commissioner (stage 2).

¹ These are the Scottish Information Commissioner, Scottish Biometrics Commissioner, Children and Young People's Commissioner Scotland, Standards Commission for Scotland, Ethical Standards Commissioner, Scottish Public Services Ombudsman and Scottish Human Rights Commission.

² The Parliament is currently scrutinising Bills that would also see a Victims and Witnesses Commissioner and Disability Commissioner being established. Draft proposals for Members Bills creating an Older People's Commissioner and Wellbeing and Sustainable Development Commissioner are under consideration by Parliament, while the Scottish Government is also looking at the possibility of creating a Future Generations Commissioner and a Learning Disabilities, Autism and Neurodiversity Commissioner or Commission.

5. Following informal discussions with the Scottish Government's Public Bodies Support Unit, the Scottish Parliament's Non-Government Bills Unit, and SPCB supporting officials, the Committee launched an inquiry in December 2023 into [Scotland's Commissioner Landscape: A Strategic Approach](#), with the following remit—
 - to foster greater understanding of how the Commissioner landscape in Scotland has evolved since devolution,
 - to enhance clarity around the role, and different types, of Commissioners and their relationships with government and parliament,
 - to establish the extent to which a more coherent and strategic approach to the creation and development of Commissioners in Scotland is needed and how this might be achieved,
 - to provide greater transparency to how the governance, accountability, budget-setting, and scrutiny arrangements work in practice, and whether any improvements are required, and
 - to identify where any lessons might be learned from international Commissioner models.
6. The focus of the inquiry is on SPCB-supported Commissions, Commissioners, and Ombudsman only. Other than as wider context, the inquiry will **not** therefore:
 - consider the overall public body landscape,
 - examine the role of those commissioners who report directly to the Scottish Government, or
 - make recommendations on the merits or otherwise of individual commissioners.
7. The inquiry's call for views ran from 11 January until 11 March 2024 and received [23 responses](#). Questions were grouped around three broad themes: (a) the Commissioner landscape, (b) governance, accountability, and scrutiny, and (c) value for money and the effectiveness of the current approach.
8. SPICe has produced a [summary of the written submissions](#) received, as well as a [briefing](#) to support the inquiry which maps the current Commissioner landscape and identifies other UK and international Commissioner models. [SPICe has since produced a further briefing](#) containing additional information in relation to the New Zealand and Wales models, as requested by the Committee.
9. The Committee has to date held six evidence sessions in relation to this inquiry—
 - On [16 April 2024](#), the Committee heard from Research Scotland on its May 2023 [Report on Commissions and Commissioners](#), which was commissioned by the Scottish Government to inform proposals to create a Learning Disabilities, Autism, and Neurodiversity Commissioner.

- On [30 April 2024](#), the Committee heard from all current officeholders³ supported by the SPCB (Commissions, Commissioners and Ombudsman), on their insights in relation to the Commissioner landscape.
 - On [7 May 2024](#), the Committee took evidence in round-table format from Age Scotland, the ALLIANCE⁴, Alzheimer Scotland, Carnegie UK Trust, Common Weal, and the National Autistic Society, regarding their views on the need for creating new commissioners and other options.
 - On [14 May 2024](#), the Committee heard from Scottish Parliament Committee Conveners⁵ in relation to scrutiny of proposals to create Commissioners and of their performance.
 - On [21 May 2024](#), the Committee took evidence from the Law Society of Scotland, Professor Alan Page, Emeritus Professor of Public Law, University of Dundee, and Dr Ian Elliott, Senior Lecturer in Public Policy, Centre for Public Policy, University of Glasgow.
 - On 28 June 2024, the Committee heard from SPCB Members, Maggie Chapman MSP and Jackson Carlaw MSP, as well as the Scottish Parliament’s Clerk/Chief Executive, David McGill.
10. The Committee also held two informal sessions as part of this inquiry. The first, held on 16 April 2024, explored the experiences and insights of former Commissioners, while the second, which took place on 14 May 2024, explored the background to individual MSPs submitting proposals to create new Commissioners—
- [A summary of the issues discussed on 16 April 2024](#) with former Commissioners/Ombudsman, and
 - [A summary of the issues discussed on 14 May 2024](#) with an MSP and former MSPs who submitted proposals to create new Commissioners.
11. Both summary notes are attached at Annexe A.

Correspondence from the Scottish Government relating to the Committee’s inquiry

12. The Committee received [a letter from the then Deputy First Minister on 7 March 2024](#) offering her “reflections on the points raised by the inquiry regarding whether a more ‘coherent and strategic approach’ is needed for the creation of any further Commissioners” (attached in full at Annexe B). The then Deputy First Minister stated that “while established Commissioners are independent of central government, there is some limited influence government can have in the creation of new public bodies”.
13. She highlighted the Scottish Government’s Ministerial Control Framework (MCF), which includes three principles: (1) any new public body should only be

³ These officeholders are listed at footnote 1.

⁴ Health and Social Care Alliance Scotland.

⁵ Conveners from the Health, Social Care and Sport Committee, Criminal Justice Committee, Standards, Procedures and Public Appointments Committee, and Education, Children and Young People Committee gave evidence to the Committee on 14 May 2024.

set up as a last resort, (2) only after consideration of all other delivery mechanisms has been exhausted, should approval under the MCF be followed, and (3) Cabinet approval is required for setting up any new public body. The then Deputy First Minister went on to note that this process only applies to Government proposals, however, “it could be a viable option for the SPCB” to introduce a best value assurance process for non-government proposals. She offers any support her officials can provide, adding “it will ultimately be for Parliamentary colleagues to decide how to proceed”.

14. SPCB Members, however, told the Committee on 28 May 2024 that the SPCB, as a non-political body, is not the appropriate vehicle to take a view on the merits or otherwise of creating Commissioners or to provide a leadership role on what the Commissioner landscape or “architecture” should look like. They explained that the SPCB’s role is to give effect to the will of Parliament in relation to Commissioner establishment. Annex C sets out more information on the role of the SPCB, along with details of previous related reviews.
15. The Scottish Government recently introduced Bills to establish a Patient Safety Commissioner and Victims and Witnesses Commissioner and is also considering proposing creation of a Learning Disability, Autism and Neurodiversity Commissioner and a Futures Generations Commissioner. Committee Members may be interested in hearing from the Scottish Government about how the MCF has and is being used by the Scottish Government in practice.

Summary of issues raised at previous evidence sessions

Growing Commissioner Landscape

- Current Commissioners noted that the Commissioner landscape has evolved organically over time, with each officeholder being distinct and having different governance arrangements “for good reasons”.
- The Committee heard from a large number of witnesses that proposals to create new Commissioners are often driven by systematic failures and frustrations in the system, with limited public finances a significant factor. For example, relevant committees highlighted that creation of both a Victims and Witnesses Commissioner and a Patient Safety Commissioner had been proposed due to a perceived failure of public bodies to respond to serious concerns in the justice and health sectors respectively.
- It was suggested that creating a Commissioner can be a way for Government to appear to respond to perceived failures, “without actually doing something”. Some witnesses argued that such perceived failures could be better addressed through existing delivery mechanisms such as local authorities.
- It was noted that some individual Members can feel that creating a Commissioner is “an easy way to give prominence to an issue”,
- Some campaign groups suggested that creating a Commissioner could however just be a “sticking plaster” until wider improvements in services are achieved. Some Conveners also noted that it might be impossible for some of the proposed Commissioners to resolve the issues that they are being created to address, including failures in public service delivery.

- The growth in Commissioners may also be due to groups feeling the need for a ‘champion’, particularly after seeing the benefits of similar Commissioners across the UK, and of those in Scotland representing other groups of society.
- One witness suggested that “we now have an awareness of the importance of people’s rights that was not there 25 years ago when the Scottish Parliament came into being” and expectations regarding the delivery of services have changed as a result. The suggested that, if it is accepted that the landscape and context has changed, then a full review should be carried out to establish what model is needed to focus on the rights that individuals and groups now have.
- Some witnesses suggested that new Commissioners could prevent people being “pushed from pillar to post”, while others felt that additional Commissioners could create further complexity in the system and add to the confusion around which Commissioner people should approach.
- Other witnesses were not convinced that new commissioners are the best option, expressing concerns that their funding may not reach those ‘on the ground’. They noted a lack of evaluation of the difference commissioners have made, lack of understanding around how commissioners meet individuals’ needs, and challenges in being able to identify and assess other options.
- Commissioners have distinct roles and functions, which should be recognised. Most of the new Commissioners are being proposed to represent a particular group in society through the advocacy/champion model, while many of the existing bodies have regulatory, complaints-handling, or technical functions.
- Some campaign groups felt that they could potentially save costs, through prevention “rather than getting to a crisis point”. It was also suggested that Commissioners can use money differently and more efficiently, though having a commissioner does not necessarily mean more resourcing for a particular group.
- Some witnesses suggested that there should be a presumption against creating any new Commissioner.
- Some witnesses argued that a complete review of the nature and role of Commissioners is required rather than Parliament agreeing or rejecting individual proposals to create Commissioners. Consideration should be given to whether the existing Commissioner landscape should be rationalised and whether consolidated legislation could provide a consistent framework for all Commissioners.
- Post-implementation reviews should be carried out, along with periodic reviews to assess whether the officeholder is still relevant and required.
- Witnesses had mixed views, however, on whether the inclusion of sunset clauses in enabling legislation would be a positive move. Some consider that an officeholder must be in post for some time before they are able to address systemic issues. Setting up new a body, even for a short time, can also require a substantial amount of time and money.
- SPCB witnesses discussed the need for Parliament as a whole to evaluate how the Commissioner landscape is functioning and whether changes to the “architecture” are needed. The possibility of mergers or amalgamations of some existing Commissioners could then be considered where this would align with this agreed architecture and as part of a phased approach to delivering a new Commissioner landscape in Scotland.

Alternative models

- The Commissioner model can often be seen as the starting point rather than the outcome of detailed deliberations on need, added value and a full range of options.
- Some witnesses felt that other options, such as strengthening the Scottish Human Rights Commission (SHRC), through a ‘rapporteur’ model, should be considered. Those calling for this intersectional ‘champion’ approach suggested that it could prevent people “falling through the gaps”, while others were sceptical that “bolting functions onto the SHRC would improve things”. SPCB witnesses said they had some sympathy with the approach of including advocacy/rights based ‘rapporteurs’ within the SHRC. However, they highlighted that powers, functions and resources would need to be increased on a phased basis, as the SHRC is not currently in a position to take on this level of additional duties.
- A number of witnesses argued that proposals for new Commissioners should be viewed through the lens of intersectionality, rather than the current approach of “putting people in boxes” which could then create uncertainty for individuals (whose needs straddle a number of Commissioner remits) as to which Commissioner they should approach.
- In this context, it was argued that the Children and Young People’s Commissioner Scotland is required to be a separate entity as children are less able to advocate for themselves and their voices could be lost if their rights were instead subsumed into an adult-focused body. This position was supported by the Education, Children and Young People’s Commissioner, who argued that a separate Children’s Commissioner is also needed to close the implementation gap between policy ambition and action.
- One witness noted that consideration of alternatives to Commissioners should be broader to include reforming Parliament, such as having more committees, or a different approach to undertaking scrutiny.
- A model of fewer Commissioners with more powers and larger budgets “might bring a more strategic approach” to the landscape.
- The creation of a “free-standing Commissioner” should be a “last resort”, after considering whether a Commissioner is needed and, if so, whether its functions could be added to an existing body. There must also be transparency around potential costs and the functions that they need.

Scrutiny of proposals to create new Commissioners

- The Criminal Justice Committee (CJC) heard during evidence that a Victims and Witnesses Commissioner could create duplication with both victim support bodies and the Children and Young People’s Commissioner. It also considered that the costs associated with a new Commissioner could be put to better use by improving services and support for individuals. Any review of whether the Victims and Witnesses Commissioner should continue beyond a defined time period would need to focus on their effectiveness in delivering outcomes.
- In contrast, the Health Social Care and Sport Committee (HSCSC) considered that a Patient Safety Commissioner for Scotland is required as a mechanism to identify systematic failures across the health sector and needs to be entirely independent of government to restore public confidence and trust,

following a series of significant historic medical safety issues as highlighted in the Cumberledge Review⁶. This Commissioner was described as a ‘golden thread’ which would run through the complex landscape of patient safety, amplifying the voices of patients. Potential overlaps with other bodies were recognised by the HSCSC, which argued therefore that collaboration is needed, as well as effective measuring of outcomes. Evidence received by the HSCSC suggested that this Commissioner would effect real change in this area.

Independence and democratic accountability

- There is often a perception that an SPCB-supported body is more independent than ‘champions’ or those Commissioners who are responsible to government. This assumption was challenged by witnesses, who argued that ‘independence of thought’ was seen to be more important and is being achieved through other models such as government ‘champions’.
- It was highlighted, for example, that inspection bodies within the criminal justice sector, such as His Majesty’s Inspector of Constabulary and the Police Investigations and Review Commissioner, are effective in demonstrating their independence, producing challenging and robust reports, without the need to be accountable to, and funded by, the SPCB. When new Commissioners are being proposed, consideration should be given to whether they really need to be SPCB-supported bodies, or if they can operate as independently if they were government arms-length bodies.
- Some campaign groups noted that a layer of commissioners could “shift democratic accountability”, particularly if they were created instead of dedicated Ministers.
- Academic witnesses considered that Commissioners are performing a role that the Government should be doing, being held to account by Parliament.
- Existing Commissioners argued that they are responsible to the people of Scotland through the Scottish Parliament and that their work is complementary and adds value to that of the Parliament and its MSPs.
- While parliamentarians can take on elements of the advocacy role proposed in relation to some additional Commissioners, it was noted that others, such as the Biometrics Commissioner, require to have technical expertise, or have distinct ‘quasi-judicial’ roles with oversight of MSPs or public bodies.
- The public perception of Commissioners and their effectiveness is unknown, though it was recognised that some perhaps have a higher profile than others.
- It was argued by some witnesses that the Information Commissioner, the SHRC and Children’s Commissioner had all influenced policymaking and legislation, which they may not have been able to do had they been associated with the government.

Accountability to the SPCB

- Budget-setting arrangements can be challenging for Commissioners, who are asked to submit their budget bids in July/August, then do not receive confirmation of their budget until January/February the following year and before the SPCB pay award (which they follow) is agreed. As staff costs make

⁶ [First Do No Harm \(immdsreview.org.uk\)](https://immdsreview.org.uk)

up a large proportion of their overall budgets, pay awards can impact significantly on their budgets. SPCB witnesses told the Committee that they take a rigorous approach to examining Commissioner budgets and requests for additional funding. The SPCB is now holding additional meetings with each Commissioner, as well as official-led discussions and support, and annual independent assessments.

- Some officeholders are demand-led, which provides an additional layer of uncertainty in relation to budget bids.
- The SPCB provides guidance on the parameters for officeholders' budget bids, including where the context is one of fiscal constraint.
- As with all public sector organisations, Commissioners find it challenging to undertake medium and long-term financial planning in the absence of multi-year budgets.
- A number of campaign groups suggested that those with lived experience should have a role in the accountability model
- Some witnesses had concerns that the SPCB has limited resources to be able to support and hold officeholders to account. SPCB witnesses shared these concerns that their governance role has increased with the growth in the number of Commissioners, with an impact on its budget, resources and staffing.
- In considering what questions to ask of the SPCB, some witnesses suggested that the SPCB should be asked how they see their accountability role in relation to Commissioners. It was argued that they may wish to consider whether this is a role that they wish to perform at all, as "there are other things that the SPCB should be doing ... that is a better use of their time". A potential "danger that Commissioners occupy a kind of 'no-man's land' where they are not accountable to anyone" was noted.

Committee scrutiny of Commissioners' performance

- Existing Commissioners felt that, where it takes place, parliamentary scrutiny of performance is robust, however, they said they would welcome more regular committee scrutiny.
- It was suggested that, in examining performance, progress against Commissioners' functions and four-year strategic plans should be assessed.
- Campaign groups argued that committees should have a greater role in scrutiny of performance, with a focus on delivery of outcomes. Difficulties in assessing their performance was also noted.
- It was suggested that Commissioner reports should be examined by committees and the whole Parliament, through for example, committee-led debates.
- Some witnesses argued that the vehicles for accountability and scrutiny are inadequate and there are tensions within the current model, where resourcing is provided by the SPCB and scrutiny rests with committees. The SPPAC Convener suggested that this model leads to challenges in identifying cultural issues early on, an issue which has arisen previously.
- It can be challenging for committees to make a judgement on whether a Commissioner has made a difference or if they are value for money. The SPPAC Convener suggested that a strong 'oversight committee' responsible for scrutiny of all Commissioners and "looking at the whole picture", is needed.

- One Commissioner suggested that it would be helpful if committee scrutiny of performance linked into scrutiny by the Finance and Public Administration Committee of their budgets, efficiency, and effectiveness.
- The capacity of committees to undertake effective scrutiny was noted, with significant legislative commitments highlighted. One Convener suggested that legislative programmes could be lightened to allow more proactive work, including scrutiny of Commissioners' effectiveness. Challenges in relation to Commissioners falling in the remit of more than one Committee were also highlighted.
- An academic witness argued that it can be challenging to demonstrate whether Commissioners are effective or value for money as they are essentially "a scrutiny body". He went on to suggest that reporting mechanisms should be reviewed, highlighting the example of New Zealand where there is a separate 'Officer of the Parliament Committee' which scrutinises all three Commissioners.
- Another witness suggested that scrutiny of Commissioner performance in committees appears to be "perfunctory", arguing that more time may be required for them to develop their relationships with committees and promote better understanding around their respective strategies.
- While recognising the challenges for Committees in scrutinising the effectiveness of Commissioners, SPCB witnesses argued that this scrutiny should be enhanced to focus on delivery of outcomes. There was also some discussion on whether committees have the technical expertise to scrutinise those Commissioners with specialist functions such as the Biometrics Commissioner.

Overlap, duplication, and gaps in functions

- Commissioners explained that, where there is commonality or overlapping functions, current officeholders work together to co-ordinate their activities.
- However, they have concerns regarding the potential for duplication arising from the creation of additional Commissioners, which they suggested could lead to a 'hierarchy' of rights and the possibility of conflicting views on the same or similar issues. It was further noted that the proposed commissioners do not have their basis in human rights.
- Conveners expressed concerns regarding the potential for duplication in establishing additional Commissioners and creating barriers for some people unclear who they should approach.
- Some Commissioners further highlighted certain gaps in the functions of the SPSO and SHRC.

Sharing office space and services

- It was suggested that a strategic approach to back-office functions should be taken. Commissioners who are responsible to government can access its services and accommodation and the Standards Commission for Scotland (SCS) is located within the Scottish Parliament and shares many of its services. Both were highlighted as more cost-effective models.
- Enabling legislation should mandate any new Commissioners to enter into 'back-office' support arrangements with other organisations.

- Significant progress has been made by the SPCB and current Commissioners in sharing office premises and services. Discussions amongst them continue regarding how to progress this issue further. It was suggested however that the unravelling of back-office and support functions can often be challenging and time-consuming for established organisations.
- Statute requires separate audit functions, and therefore primary legislation would be required to allow auditing to be shared across Commissioners.
- Hybrid working provides greater opportunities to share offices. The Scottish Information Commissioner provided the example of recently freeing up space within his office to potentially accommodate new officeholders.
- SPCB witnesses explained that they have actively pursued the sharing of premises and services of a number of Commissioners and are seeking opportunities to expand this cost-saving approach.

Support for individual Commissioners

- Some campaign groups suggested that an Older People’s Commissioner (OPC) is necessary as this group makes up 40% of the population, experience ageism and poverty, and a commissioner can bring legal powers and greater resourcing compared to charities. An ideal OPC model would be akin to the Children and Young People’s Commissioner Scotland, which has “made inroads, improved outcomes, and is a positive advocate or champion”.
- Those supporting the establishment of a Future Generations Commissioner said it could drive long-termism, by prioritising prevention, being outcomes-based and better using the National Performance Framework. This approach, they suggested, could lead to cost savings, though it was recognised these are difficult to quantify.
- Calls for a Learning Disabilities, Autism and Neurodiversity Commissioner are a result of limited progress being made and “voices unheard”.

Next steps

16. The Committee will hold its last evidence session on this inquiry with the Minister for Public Finance at its next meeting on 4 June 2024.

Clerks to the Committee
May 2024

Finance and Public Administration Committee
Scotland's Commissioner Landscape: A Strategic Approach
Note of issues discussed at session with former Commissioners, 23 April 2024

Background

1. To inform its inquiry into Scotland's Commissioner Landscape: A Strategic Approach, the Finance and Public Administration Committee held an informal discussion with the following former Commissioners/Ombudsman on 23 April 2024—
 - Professor Bruce Adamson, former Children and Young People's Commissioner Scotland,
 - Professor Alice Brown, former Scottish Public Services Ombudsman, and
 - Bill Thomson, former Ethical Standards Commissioner.

Note of issues discussed

2. The following issues were discussed at this session⁷—

Commissioner landscape and types

- The terminology of 'commissioner' can be unhelpful, as each are distinct bodies and not directly comparable. They include a range of investigatory, rights-based, complaint-handling and advocacy bodies, with some being recognised by international bodies such as the UN.
- For example, the Children's Commissioner has its origins in a Parliamentary Committee Bill and is recognised as an Independent Children's Rights Institution, in line with international principles. It was considered that this particular role needs to be distinct and separate as children have no voice in elections and limited economic power. It is also important that children have a named person to hold to account, i.e. a commissioner rather than a commission.
- In contrast to the pre-devolution UK system which had four Ombudsman, the Scottish Public Services Ombudsman (SPSO) was created as a 'one-stop-shop' to simplify the complaints landscape and make it more accessible to the public. One of its early initiatives was to work with others such as the Auditor General for Scotland, the Scottish Information Commissioner and the Children and Young People's Commissioner, to develop and publish a 'Route Map' to make it easier for the public to find the services they need.
- A growing Commissioner landscape provides potential for duplication and overlap of remits and services. The newly created Patient Safety Commissioner (PSC) may have the potential to duplicate some SPSO functions, albeit the PSC has powers to initiate its own inquiries. It was suggested that the SPCB has the opportunity to identify overlaps

⁷ Comments have not been attributed to individuals and some comments do not necessarily represent all participants' views.

through its consideration of officeholders' strategic plans. Nevertheless, clarity and distinction of functions should be built into the founding legislation.

- It was recognised that the role of some commissioners "is to be in a difficult space" in challenging Government, and "if it's easy, public bodies will do it, if it's a popular choice, politicians will do it".
- Media attention in the early days related solely to the growing costs of 'tsars', rather than explaining the roles that they played, and it would be "unfortunate if we were to return to those days".

Accountability, scrutiny, and performance

- There are benefits of commissioners being properly independent of both Parliament and Government, including the ability to hold Government to account on its performance. However, it was noted by one former Commissioner that this independence can also create a culture and mindset of them "always being right".
- It was noted that commissioners' budgets are examined by the SPCB, which presents its own budget to the Finance and Public Administration Committee for scrutiny.
- Committee scrutiny tends to involve annual evidence sessions on annual reports and/or strategic plans. Where this happened, it provided effective and, at times, robust scrutiny of performance, which was welcomed. However, some other commissioners were looking for more accountability and scrutiny and struggled, at times, to secure Committee time due to other Committee workload commitments. The Welsh model, which sets out a requirement for annual evidence sessions in statute, was highlighted as an example of good practice.
- The need to clearly frame the role and functions of commissioners in founding legislation at the outset is crucial to them being able to demonstrate effectiveness.
- Independent assessments of commissioners' performance are routinely carried out and provided to the SPCB as a way of assessing performance against their individual terms and conditions. These assessments are not circulated more widely or made public. This was felt to be a missed opportunity as they are a 'good tool' in demonstrating the effectiveness of their performance.
- With the volume and nature of the SPCB's responsibilities, subject committee scrutiny on commissioner performance should instead be strengthened.
- It was suggested that commissioners' effectiveness should be evaluated against common and consistent standards. It was also noted that individual commissioners could play a greater role in explaining and promoting how they have performed against their functions.

Prioritisation and collaboration

- With the Children's Commissioner's broad remit, prioritisation is a clear part of the role. It is always possible to argue for more funding, but given the demands, there could never be enough funding to address them all.

- In contrast, the SPSO is demand-led and so it is not possible to prioritise complaints. Instead, the SPSO proactively supports and provides training to public bodies on handling complaints to ensure “they get it right first time”, thereby reducing complaints to the SPSO over time. This includes working with local authorities and other bodies under their jurisdiction in the early days to develop and improve their complaints procedures.
- It was noted that commissioners do already carry out a lot of collaborative work, and four bodies share a physical space and back-office functions.
- However, sharing offices is sometimes not as simple as it sounds, with penalties for early release of leases and challenges around data-sharing in light of GDPR requirements.
- Nevertheless, attendees agreed that more can be done to share services, and carry out joint projects and joint working, as well as changing the culture to work together more to resolve issues.

Growth in Commissioner landscape

- Failures in the delivery of services was considered to be one of the drivers of the perceived need for creating new commissioners. Questions could be asked about why some groups are feeling as though they have been let down and how these issues can be resolved.
- Questions should also be asked about what problem a new commissioner would be addressing, what is the difference they would make in real terms, what are the costs including opportunity costs, and are there other options.
- Before creating a new commissioner, the proposals should be tested against the Session 2 Finance Committee criteria (suggested by the then SPSO) “with rigour” and consideration given to “the public good and public purse”.
- Some proposed commissioners could “fit within existing models”. For example, the jurisdiction of the SPSO’s office has extended over time to include complaints in other sectors, such as further and higher education, Scottish Water, and the Scottish Prison Service, and new functions including an independent review service for the Scottish Welfare Fund and the independent National Whistleblowing Officer for the NHS in Scotland.
- Asked whether an alternative to creating new distinct commissioners would be to create ‘leads’ or ‘rapporteurs’ within the Scottish Human Rights Commission (SHRC) with a focus on different issues or groups, attendees noted that the SHRC has been set up “to be able to represent everyone”. Many human rights commissions internationally have very broad remits (e.g. Poland). This ‘super-commissioner’ model can lead to less accountability for specific groups. The New Zealand model includes designated Commissioners for race relations, equal opportunities, and disabilities, which provides direct accountability but, it can be challenging for these ‘leads’ to be visible and to have their own autonomy over budgets and decision-making. The tension between Commissioners can lead to a lack of an holistic/intersectional approach to rights.

- Another alternative to creating a new commissioner is for an individual to be appointed within Government that has responsibility for being a focal point for and representing specific voices when policy is being developed or challenged. Disadvantages of this approach include less dynamism, independence and visibility.
- All former commissioners/ombudsman cautioned against 'proliferation' of commissioners and asked, "where does this stop?"
- While arguments can be made for the creation of individual commissioners, attention should be paid to the cluttering of the landscape.
- Efficiencies should be baked into the enabling legislation when creating any new commissioners, as well as integrating rights within service delivery at the outset.
- It was important to be realistic about the costs of creating a new post and to consider what could be achieved with the money saved by not creating a new post, i.e. if it was spent elsewhere.
- The existing model could be strengthened, including having a clear distinction of the functions that bodies should be delivering.
- Sunset clauses could also be considered. One former Commissioner suggested that this approach could be looked at for bodies addressing time-limited issues, but should be avoided for foundational institutions, particularly those that are required by international obligations.

**Committee Clerking Team
May 2024**

Finance and Public Administration Committee
Scotland's Commissioner Landscape: A Strategic Approach
Note of issues discussed at session with MSPs and former MSPs, 14 May 2024

Background

3. To inform the Committee's inquiry into [Scotland's Commissioner Landscape: A Strategic Approach](#), the Finance and Public Administration Committee held an informal session with the following MSP and former MSPs on 14 May 2024 to discuss their experiences of proposing Members Bills' that include the creation of new Commissioners—
- Sarah Boyack MSP, who submitted a [final Members' Bill proposal](#) this parliamentary session which seeks to create a Wellbeing and Sustainable Development Commissioner,
 - Alex Neil, who introduced the [Commissioner for Older People \(Scotland\) Bill](#) in Session 2, and
 - David Stewart, who introduced the [Commissioner for Victims and Witnesses \(Scotland\) Bill](#) in Session 3.⁸

Note of issues discussed

4. Former MSPs discussed the following issues—
- Their position regarding the proposal of new, distinct Commissioners had changed over time.
 - One proposal was, at the time, based on discussions with support groups who felt that an advocate/champion was needed and having seen similar models created in other areas of the UK. One former MSP added that he was very much influenced by the SPCB Commissioner model of independence from government.
 - The model of rapporteurs within the Scottish Human Rights Commission (SHRC) was highlighted as an alternative approach which would minimise overlap and duplication. It was suggested that post-legislative scrutiny should be carried out in relation to the enabling legislation creating Commissioners to assess whether they are performing against their legislative functions. Sunset clauses could be added to any new legislation that establish Commissioners.
 - The Committee heard that there is merit in having regulatory bodies such as information commissioners, Ombudsman who can look at any type of injustice and individual cases, and Commissioners such as the SHRC, where technical expertise is required. However, while recognising decisions around Commissioners were for the Parliament, it was suggested that there should be no 'champion/advocate' type Commissioners, as that model had limited power to act and is "largely unaccountable". This role, it was argued, is "the job of Parliament" and the electorate can vote for other candidates at elections if

⁸ Members' Bills proposing an Older People's Commissioner and a Victims and Witnesses Commissioner both fell at the end of the relevant parliamentary session, after the lead committees had no capacity within their respective workloads to consider them.

parliamentarians have not undertaken that role effectively. There is a danger in expanding the Commissioner model as that can “almost displace the democratic element”. It was suggested that the existing Commissioners should also be reviewed for impact and cost-effectiveness.

- The evidence received by the Committee suggesting that people are attracted to creating a new Commissioner in response to failures in the delivery of services was discussed and it was noted that “the Commissioners have been and will be scapegoats for other problems”. Government can see value in creating something new rather than resolving difficult issues. While a strong, vocal Commissioner can make a difference in relation to their role and impact, this can have the opposite effect with Ministers, who have a better platform to “make things happen”.
- The Session 2 Finance Committee criteria should be enhanced beyond being guiding principles and used to assess all proposals that would create new Commissioners. It was suggested that the criteria might be consolidated into legislation.
- It was noted that the role of the SPCB is limited; it does not have the remit or capacity to properly hold Commissioners to account. Historically, it was also challenging to move towards shared premises and services for Commissioners, and while progress has been made in this area in recent years, more action is required. Scrutiny also requires to be enhanced and should be based on how effectively Commissioners perform against the functions in their enabling legislation and whether they deliver value for money.
- The Children’s Commissioner’s advocacy role was discussed. Their ability to make a difference to endemic issues such as child poverty was also questioned. It was suggested that the enabling Bill should have included a sunset clause to enable their effectiveness to be measured before deciding whether the role in its current form is still needed, as “if the job is done, then why have one?”.
- It was noted that it is for Parliament to decide what brings most added value: spending resources on Commissioners or on the delivery of services.

5. Sarah Boyack MSP discussed her proposed Members’ Bill—

- She suggested that the proposed Wellbeing and Sustainable Development Commissioner is distinct as it would embed futures thinking, joined-up thinking across government, preventative approaches and best practice and do the “heavy-lifting” in achieving progress towards net zero and against sustainable development goals.
- The proposal is based on a successful model in Wales and is seen by the Member as essential against current pressures on public finances as it “can save money in future”.
- Accountability to Parliament, she argued, is crucial in raising standards and ensuring transparency.

Correspondence from the then Deputy First Minister to the Committee dated 7 March 2024 in relation to the Committee's inquiry

Dear Kenneth,

I note that the Committee has commenced an inquiry examining Scotland's Commissioner landscape. I am writing to offer my reflections on the points raised by the inquiry regarding whether a more "coherent and strategic approach" is needed for the creation of any further Commissioners.

As Parliamentary Commissioners and Ombudsmen typically cover Scottish Government activity it is important to ensure independence from the Scottish Ministers. While established Commissioners are independent of central government, there is some limited influence government can have in the creation of new public bodies.

As agreed by Cabinet on 9 May 2023, the Scottish Government's Ministerial Control Framework (MCF) aims to ensure that decisions around the creation of new public bodies are made based on evidence and value for money against the backdrop of significant pressure on public spending. The MCF includes the following three principles:

1. The Scottish Government's policy is that any new public body should only be set up as a last resort;
2. Only after consideration of all other delivery mechanisms has been exhausted, should the approval process for setting up a new public body through the Ministerial Control Framework be followed; and
3. Approval for setting up a new public body must be sought formally from Cabinet before any decision or announcement is made.

The MCF ensures there is a rigorous, consistent and transparent decision-making process for the creation of new public bodies should a proposal or consideration come from within government. Where this concerns the potential creation of a new Commissioner, MCF guidance stresses that the merits of that decision must be discussed with the Chief Executive's Office of the Scottish Parliamentary Corporate Body (SPCB) at the earliest opportunity.

While the Scottish Government has the MCF, I am aware there is not a similar control mechanism available for public bodies being proposed from outside government. Were a Bill proposing the creation of a new public body, be it a Commissioner or otherwise, to come forward from an MSP outside of government there would be no place for the MCF to act as a control mechanism ensuring best value. Instead, government can take a position on Bills that arise from out with government during the consultation stage and throughout the passage of a Bill. At these points we can outline any concerns with proposals, particularly in relation to the costs involved. However, if MSPs decide to have a Commissioner, it will be for

the Scottish Parliament to determine if it is being done in a way that is most effective. Introducing a best value assurance process for proposals coming from outside of government would be a decision for Parliament and would need to go through a Parliamentary process. It could be a viable option for the SPCB to take on that role as sponsor.

Given the current financial constraints the public sector is facing I understand the desire to consider best value when taking decisions on the establishment of new Parliamentary Commissioners. While I appreciate there has been little research in Scotland, or the UK, on Commissioners which evaluates their powers or ways of working I am aware this is not the first time these matters have been considered. Following consideration by the Finance Committee of the 2006-07 public spending budget process and its concerns about rising costs, the Parliamentary corporation requested that Audit Scotland undertake a review of the opportunities for Commissioners and the Scottish Public Services Ombudsman to share services, including the associated issue of office location. Audit Scotland also reviewed the processes for scrutinising the budgets of the Scottish Public Services Ombudsman and Commissioners, including an examination of the then existing lines of accountability and how this worked in practice. The 2009 'Review of SPCB Supported Bodies' also looked at the possibility of shared services across Parliamentary Commissioners, as well as the option of merging the Commissioner for Children and Young People in Scotland with the Scottish Human Rights Commission. These points are reflected in the findings of both the Scottish Human Rights Commission report 'At A Crossroads - Which Way Now for the Human Rights System in Scotland', and Research Scotland's report 'The Role of Commissions and Commissioners in Scotland and the UK'.

On the back of these reports and in the context of the wider Public Service Reform programme, there are a number of options available to ensure evidencing best value is embedded as best practice within the Scottish Parliament. While the Scottish Government does not have the responsibility to put in place control mechanisms on the creation of new public bodies coming from outside government, I can see a lot of similarities between the issues raised and those that lead to the creation of the MCF. As such, I would like to restate that my officials are happy to, and have, offered support to Parliamentary colleagues by sharing their learning and understanding. However, it will ultimately be for Parliamentary colleagues to decide how to proceed.

SHONA ROBISON

Role of the Scottish Parliamentary Corporate Body and parliamentary committees: background note

The primary purpose of the SPCB is to provide the Parliament and Members with the property, staff and services needed to carry out all parliamentary and representative functions. The role of the SPCB in supporting officeholders is set out in the legislation that establishes each of the offices. The statutory duties of the SPCB include the following—

- providing the funding for the officeholder to undertake their functions. In respect of this, the officeholder must provide the SPCB with proposals for the use of resources and expenditure which is required by a set date for the SPCB to approve. The officeholder can also submit a revised budget for approval during the financial year. In preparing a budget an officeholder must declare that the resources will be used economically, efficiently, and effectively,
- indemnifying officeholders for liabilities in undertaking their functions,
- appointing the officeholder or a member of the staff as the Accountable Officer,
- determining the terms and conditions of appointment of the officeholders including term of office, remuneration, pensions, and allowances,
- powers of direction as to the location of an officeholder's office,
- approving the officeholders' determination about the number of employees and their terms and conditions of employment,
- powers of direction for the sharing of premises, staff, services or other resources with any other officeholder or any public body and the form and content of an annual report,
- commenting on the officeholder's draft strategic plan as a statutory consultee,
- approving determinations for adviser's fees, and
- appointing Acting Officeholders.

The SPCB has previously indicated to the Committee that the oversight of independent officeholders is now becoming a more significant time commitment for it, as well as accounting for a substantial part of the SPCB's overall budget.

The budget process for officeholders begins with the SPCB inviting officeholders to submit a budget for the following year. The SPCB provides an indication of the staff costs uplift figure it is using in its budget, as officeholder staff costs follow those of the SPCB. Budget bids are scrutinised and interrogated at official level, before the SPCB is invited to consider and approve each bid. The SPCB may seek additional information or clarification before it approves officeholder budget bids, which then form part of the SPCB submission to the FPA Committee for scrutiny before the overall budget is agreed by the Parliament.

Officeholders are subject to annual evaluation which is undertaken by an independent assessor for the SPCB. This process is designed to provide independent information to the SPCB on whether an officeholder is fulfilling the

functions of their post; and ensures any development needs are identified quickly and support provided.

While the SPCB has responsibility for funding the various offices and oversight of the governance arrangements, officeholders are accountable to the Parliament for their functions through the laying of annual and other reports. This accountability to the Parliament is through Committee monitoring and scrutiny. Standing Orders (Rule 3.6) provides that where an officeholder's annual report or strategic plan is laid before the Parliament, the Clerk/Chief Executive refers that document to the relevant committee for consideration.

In January 2023, the SPCB and Conveners Group signed a Written Agreement⁶ aimed at clarifying the respective roles and responsibilities of the SPCB and relevant committees in the oversight of officeholders. It aims to set out a robust governance role for the SPCB and promotes effective scrutiny by committees of how officeholders carry out their functions.

Review of SPCB Supported Bodies 2009

The Review of SPCB Supported Bodies Committee was set up in November 2008 and, in line with its remit, made [recommendations](#) to alter the terms and conditions of the officeholders and the structure of the bodies supported by the SPCB. It also drew heavily on a [2006 report by the Finance Committee on its Inquiry into Accountability and Governance](#) and the [Crerar Report of 2007 on the regulation, audit and inspection and complaints handling of public services in Scotland](#), as “both reports had been debated by and received the general support of the Parliament”.

The Finance Committee's 2006 inquiry was “prompted by concerns about increasing costs, the perceived shortcomings of budgetary accountability, the lack of consistency in governance arrangements and other matters”.

The inquiry examined the growth in the number of independent, regulatory, and investigatory bodies and associated growth in funds allocated since devolution. It also considered the financial implications of any overlaps in the remits and responsibilities of independent, regulatory, and investigatory bodies. The Committee noted the potential for any number of interest groups to argue the necessity of a commissioner to protect their rights and highlighted the costs associated with providing resources to such additional officeholders. It suggested appropriate tests for the creation of future bodies/officeholders, firstly that any future bodies should not duplicate a role already being carried out, and secondly, for bodies to be designated as Parliamentary commissioners, the following criteria (guiding principles) should be met—

- **Clarity of Remit:** a clear understanding of the officeholder's specific remit,
- **Distinction between functions:** a clear distinction between different functions, roles and responsibilities including audit, inspection, regulation, complaint handling, advocacy,
- **Complementarity:** a dovetailing of jurisdictions creating a coherent system with appropriate linkages with no gaps, overlaps or duplication,
- **Simplicity and Accessibility:** simplicity and access for the public to maximise the “single gateway/one-stop shop” approach,

- **Shared Services:** shared services and organisational efficiencies built in from the outset; and
- **Accountability:** the establishment of clear, simple, robust and transparent lines of accountability appropriate to the nature of the office.

The Finance Committee recommended that the above principles should be followed by members of Parliament when considering whether to approve proposals for new officeholders and that—

“Policy papers accompanying new proposals for officeholders should provide strong evidence that the proposer has explored all possible opportunities to have an existing body carry out the additional function or make use of existing resources wherever possible to support any new office-holder and have very good reasons for not adopting an approach which would avoid the creation of a new body”.

The Committee further highlighted that the Scottish Commissioner for Children and Young People (SCCYP) was the only Commissioner (of a total of six at the time) which is representative of one specific group in society as opposed to representing all. It concluded that SCCYP is in an anomalous position when compared with other Commissioners and that the role would not (if created in 2007) satisfy the criteria the Committee had set out (see above).

The then Finance Committee’s report was debated and unanimously approved by Parliament on 20 December 2006.