



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Finance and Public Administration Committee

**Tuesday 14 May 2024**

**Session 6**



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**FINANCE AND PUBLIC ADMINISTRATION COMMITTEE**  
**17<sup>th</sup> 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:**

- Clare Haughey (Rutherglen) (SNP)
- Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)
- Sue Webber (Lothian) (Con)
- Martin Whitfield (South Scotland) (Lab)

**CLERK TO THE COMMITTEE**

Joanne McNaughton

**LOCATION**

The Robert Burns Room (CR1)



# Scottish Parliament

## Finance and Public Administration Committee

Tuesday 14 May 2024

*[The Convener opened the meeting at 09:30]*

### Scotland's Commissioner Landscape

**The Convener (Kenneth Gibson):** Good morning, and welcome to the 17th meeting in 2024 of the Finance and Public Administration Committee.

Agenda item 1 is an evidence-taking session for our inquiry into Scotland's commissioner landscape. We are joined in the room by Audrey Nicoll, convener of the Criminal Justice Committee, and remotely by Clare Haughey, convener of the Health, Social Care and Sport Committee. Good morning, and welcome to the meeting. I intend to allow around an hour for this session, and we are going to move straight to questions.

Audrey, I want to begin by asking you about your committee's report on the Victims, Witnesses and Justice Reform (Scotland) Bill, in which you said:

"We remain to be convinced that a strong case has been made for the establishment of a Victims and Witnesses Commissioner. Instead, we consider that better outcomes may be achieved by focusing spending in areas which have more direct and immediate benefit for victims and witnesses."

How did the committee arrive at that conclusion?

**Audrey Nicoll (Aberdeen South and North Kincardine) (SNP):** Thank you very much, convener, and thank you for the invitation to attend your meeting this morning.

As you have said, the Criminal Justice Committee engaged in fairly extensive scrutiny of the Victims, Witnesses and Justice Reform (Scotland) Bill. It is a significant bill of six parts, part 1 being the proposal to create a victims and witnesses commissioner, and we took evidence from a range of witnesses, including organisations already involved in supporting victims and witnesses, bodies in the justice system and a number of lived-experience witnesses. A few issues that came out of the evidence led us to conclude that we, as you have said, remain to be convinced about the case for creating the victims and witnesses commissioner post.

Perhaps I can run through two or three of those issues. The first was duplication. As I have said, a number of bodies already do significant support work, particularly with regard to victims of sexual crime, and it was suggested that there was the potential for a commissioner to overlap with—or perhaps intrude on—the extensive work of those existing bodies. In fact, Scottish Women's Aid commented that it felt that its relationships with the likes of Scottish Government policy makers were already very good and productive. In fact, Scotland is held to be a bit of a standout in that regard.

The next issue was cost. The financial memorandum sets out start-up costs of around £640,000, I think, with recurring costs after that, and there was certainly a feeling that that money could be put to better use. Sandy Brindley from Rape Crisis Scotland said that she would prefer to see resource going to supporting legal representation for victims than perhaps to supporting a victim and witnesses commissioner.

The third of the key issues that came up in our evidence was the potential overlap of a victims and witnesses commissioner with the role of existing commissioners, specifically that of the Children and Young People's Commissioner Scotland. In fact, in her submission to the committee, that commissioner highlighted some concern about her role in supporting children's rights and interests overlapping with that, potentially, of a victims and witnesses commissioner.

Obviously other issues were raised, convener, but I would say that those were the key ones.

**The Convener:** Thank you for that very comprehensive answer, Audrey.

Of course, the Scottish Government has said that it

"is committed to the establishment of a Victims and Witnesses Commissioner"

and that it would fill an identified accountability gap. Did the committee recognise any accountability gap that needed to be filled?

**Audrey Nicoll:** As you have said, the Scottish Government's position is that there is a gap, particularly with regard to the scrutiny of criminal justice bodies. A number of bodies already engage in scrutiny—for example, His Majesty's Inspectorate of Constabulary of Scotland, HM Inspectorate of Prosecution in Scotland and the Police Investigations and Review Commissioner. To a certain extent, there is already a degree of scrutiny in and around criminal justice and its impact on victims and witnesses.

As I said in my first answer, a range of well-established organisations such as Victim Support

Scotland, Scottish Women's Aid and Rape Crisis Scotland and potentially even cross-party groups engage in scrutiny to an extent, and their work circles back to the question of where we are going in Scotland with regard to improving the experiences of victims and witnesses. It all starts from the baseline of everybody recognising that the experience of victims and witnesses in the justice system is very often poor and traumatising and that things need to change.

**The Convener:** Do you think that there is enough parliamentary oversight of that landscape, which, to put it mildly, does seem to be rather complex?

**Audrey Nicoll:** I can speak only for the Criminal Justice Committee. A significant aspect of the scrutiny work that we do—that is, the work that does not involve the scrutiny of a bill—ultimately circles back to the experiences of victims and witnesses. An obvious example is the work that we do on violence against women and girls. However, we are currently considering the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill, and you could argue that that bill is seeking to put in place arrangements to improve the experience of individuals who encounter Police Scotland officers and find themselves in a position where either they have made a complaint about a policing matter or a misconduct investigation is being carried out. You could argue that, ultimately, that circles back to the experience of victims and witnesses, too.

I would say that a broad range of work is already taking place, but, in the context of my committee, much of our work lands in the space of improving the experience of victims and witnesses.

**The Convener:** Thank you.

Turning to Clare Haughey, I note that your committee took a somewhat different view on a patient safety commissioner for Scotland. You said:

"It is important to ensure public confidence and trust in the healthcare system in Scotland."

What was it that you felt was lacking that a commissioner could deliver?

**Clare Haughey (Rutherglen) (SNP):** Thank you very much, convener, for inviting me along this morning. I apologise for not being able to be there in person.

It is important to note where the idea of a patient safety commissioner came from: it came from the United Kingdom-wide independent medicines and medical devices safety review, more commonly known as the Cumberlege review, which looked at the issues around mesh, sodium valproate and Primodos. It highlighted that patients did not feel that they had been listened to as well as the length

of time that it took for their problems to be acknowledged.

One of the review's nine recommendations was that a patient safety commissioner be appointed as an independent public leader with a statutory responsibility, to champion listening to patients, promoting service users' perspectives and seeking improvements to patient safety with regard to the use of medicines and medical devices. As a direct consequence, the Patient Safety Commissioner for England and Wales was appointed in September 2022.

I was not a member of the committee when it took evidence on the Patient Safety Commissioner for Scotland Bill, but I know that it had the advantage of being able to seek guidance and information from the commissioner for England and Wales. The Scottish Government also gave a commitment to implementing all the recommendations from the review, including the creation of a patient safety commissioner for Scotland, which was done via primary legislation.

It is fair to acknowledge that, in Scotland, the regulatory landscape around patient safety was already complex prior to the bill. Some of the issues that Audrey Nicoll has highlighted were also considered by my committee, but members felt that the role had the potential to improve patient safety across health services in Scotland and ultimately supported the bill's general principles at stage 1.

**The Convener:** You have almost touched on the next question that I was going to ask, which is about a concern. The Health, Social Care and Sport Committee's "Stage 1 Report on the Patient Safety Commissioner for Scotland Bill" said:

"Stakeholders noted concerns over ... the potential for overlap and duplication of roles and responsibilities within the system, and the future role of the proposed Commissioner within an already complex landscape."

It is clear that there are issues relating to where the commissioner will operate relative to the existing landscape. How can the commissioner really work within that landscape effectively without there being duplication and overlap?

**Clare Haughey:** One of the key things is the independence of the role. The commissioner has the freedom to define and establish the principles underpinning their work, and the scope and remit of their work. One of the committee's recommendations was that patients should be given the opportunity to provide input into the scope and remit of that work. Perhaps that is not as evident in other commissioner roles that involve looking at patient safety or in other bodies that look at assessing medical devices and medicines. It was generally accepted by stakeholders that there was a need for the role, and that was

certainly reflected in the written evidence that the committee received and in its evidence sessions.

**The Convener:** How is the success—or not, as the case may be—of such a commissioner measured? One thing that this committee is concerned about in a whole host of areas is outcomes.

**Clare Haughey:** You are absolutely right. We have to ensure that positive outcomes come from the creation of any commissioner. I welcome this inquiry, given the number of commissioners and proposed commissioners. There has to be evaluation.

The patient safety commissioner will lay before Parliament a report annually. That does not preclude them from doing that in relation to other investigations that they carry out or other areas that they investigate.

It is really important that we ensure that, with all commissioners, there is value for money and that the roles that they carry out are not duplicated, there is not unnecessary overlap, and there is collaboration between them so that resources are used effectively. If commissioners have good working relationships, the duplication of work should be reduced.

**The Convener:** Okay. Thanks.

Audrey, you have said that a victims and witnesses commissioner

“should be for a time-limited period”

and that

“Parliament would want to see clear evidence that the post of Commissioner has noticeably improved the experience of victims and witnesses.”

How do you envisage the Parliament being able to scrutinise that effectively?

09:45

**Audrey Nicoll:** The committee came to that conclusion as an option in the event that the Scottish Government is clear that it wishes a commissioner post to be established.

**The Convener:** The committee is not keen, but if that goes ahead, you want a sunset clause. Is that right?

**Audrey Nicoll:** Yes. I think that we set out in our report that one option would be undertaking a piece of work to evaluate the effectiveness of the commissioner over the period of the existence of the post. Obviously, that would need to be set against criteria that the Parliament considers are appropriate to measure what we are looking for the commissioner to undertake and to achieve. The success of that work could then be measured.

**The Convener:** I note that the Scottish Biometrics Commissioner falls within your remit. On scrutinising that individual's work and the work of his team, he gave really interesting evidence when he came to this committee, and I was very impressed by the work that is being done. Would your committee consider not just taking round-table evidence, as we do, but going out to visit the Scottish Biometrics Commissioner to look at the work that is being done on the ground, for example? Do you think that that approach might be beneficial in assessing the work of a specific commissioner, such as the Scottish Biometrics Commissioner?

**Audrey Nicoll:** Absolutely. I watched with interest the Scottish Biometrics Commissioner, Dr Plastow, giving evidence to this committee two or three weeks ago. As he described it, the work that he does is “quite niche”. It is certainly of great interest to everybody.

I would whole-heartedly support the option of going out to visit the commissioner. As you know, it can sometimes be difficult to bring commissioners or other witnesses to a committee because of tight work programmes. You will know that the Criminal Justice Committee has a significant workload relating to bills. I whole-heartedly support that suggestion.

**The Convener:** I have a question for Clare Haughey before I open up the session to colleagues around the table. We had a round-table session last week. One of the issues that came up in that session was that commissioners could potentially take away some of the democratic accountability of ministers. Where do you think that the patient safety commissioner fits in with ministerial responsibility?

**Clare Haughey:** I was not on the Health, Social Care and Sport Committee at the time, so I find that a really difficult question to answer from the evidence that it took. As I said, the commissioner will have to lay before Parliament an annual report. Parliament will therefore have the opportunity to scrutinise that, and committees will have the opportunity to invite in the patient safety commissioner for evidence sessions, as they do with all other commissioners.

**The Convener:** Okay. Thank you.

**Liz Smith (Mid Scotland and Fife) (Con):** Good morning. An issue that has been put to us by people who have given evidence so far is that one of the reasons for the proposals to increase the number of commissioners is that there have been failures in public services, which have resulted in new demand. I am sure that Ms Haughey will be aware of the Eljamel case. I can cite on-going examples of where public health services have failed former patients of Eljamel. I

am sure that the forthcoming public inquiry will uncover some of that.

Ms Nicoll, some would argue that the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill was introduced because of pressures on the existing police forces, which are not able to do some of the things that we would like them to be able to do. To what extent do you feel that the people who have given evidence to our committee so far have a fair point about failures in public services?

**Audrey Nicoll:** You mentioned the police bill. We can start with that. We have already taken evidence that suggests significant failures not just in the conduct of police officers and others, but in the way in which those alleged acts of misconduct have been dealt with internally. A lot of reasons seem to be emerging about why that may be happening with specific regard to Police Scotland.

In answer to your question, I again cite the victims and witnesses commissioner proposal. Part of that has been based on what feels like a failure to date to grasp the nettle and respond to concerns and perceived failings in the conduct of organisations. That bodies should be held to account is a very understandable public interest. If that requires a legislative change or the creation or establishment of a commissioner who can represent the public, I understand that sentiment.

**Clare Haughey:** Liz Smith has raised a pertinent and interesting point specifically about Dr Eljamel and the concerns that were raised about that case.

If you look back at the origins of the patient safety commissioner and the Cumberlege review, you will see that three main issues were looked at: mesh, sodium valproate and Primodos. Those issues were raised by patients—almost exclusively women. They raised issues relating to the effects that those medical devices and medications were having on them and their children.

We need to ensure that there is a mechanism for such issues to be raised and investigated. It was felt that a patient safety commissioner would be able to be the vehicle for doing that, and that a patient safety commissioner would be able to look at broader systems issues and issues with medication and medication devices, and to raise those issues. Perhaps individual patient voices were not being listened to. That was what the committee heard, and certainly that is what the Cumberlege review heard.

**Liz Smith:** That is a very interesting reflection. In some cases, there might have been human error, with the people who were responsible for overseeing a case not having done their job effectively, but there could be system failure, too. In some ways, that is the more interesting point, because that might need legislative changes.

What are your reflections on whether we should spend more time trying to address failures in existing public services or whether we should create more commissioners?

**Audrey Nicoll:** I can come in on that. My committee's scrutiny of the Police (Ethics, Conduct and Scrutiny) (Scotland) Bill has just got under way. Last week, we took evidence on issues relating to training in Police Scotland. If we cast our minds back, I think, 10 years ago to when eight police forces became a single force, we can see that we looked at the potential for that process of amalgamation to involve, to a certain extent, some cost cutting and some fine tuning of service delivery. Areas of operational delivery that were seen as non-essential were changed, and we looked at police training and leadership.

Having worked in that world—I declare that I am a former police officer—I note that there is perhaps a perception that things such as equality and diversity training are desirable but not necessarily essential. However, several years on from that change, issues relating to misconduct by police officers seem to be catching the public eye, and we are now looking at the bill that I mentioned on the back of Lady Elish Angiolini's extensive review of the handling of police misconduct and complaints.

**Liz Smith:** Ms Haughey, you gave a very sensible response to the convener's question about democratic accountability. As well as examining costs, which is obviously our meat and drink on this committee, we believe that the accountability line is very important. I now have far more experience of the health side of things because of my interest in the Eljamel case, and it seems to me that there was so much buck passing—it was always somebody else's problem—which left so many distressed patients at their wits' end, given all the trauma that they had faced. If we are to ensure that there are better public services, we have to decide how best to ensure that there is accountability in the system. I am interested in your views on how that could happen in the health brief.

**Clare Haughey:** There is certainly the opportunity for the patient safety commissioner to ensure that there is accountability. One of the things that struck me when reading through the evidence was that stakeholders, professional organisations, professional regulators and individuals described the commissioner as potentially being the golden thread that could unify and unite patient safety and clinical governance structures, as there are numerous clinical governance structures, oversight organisations, professional regulators and so on. It struck me that, if patient groups and patient representatives felt that a patient safety commissioner would help



to amplify their voice, it would be worth their while to have such a commissioner.

There absolutely must be reviews and accountability, because we are talking about public money. We want the commissioner to succeed in allowing people's voices to be heard—particularly voices that are heard less often—in ensuring that all healthcare providers are accountable for their practice and for the care that they deliver, and in ensuring that issues, particularly those relating to medicine and medication devices, are highlighted at the earliest opportunity, because, as was reflected in the Cumberlege review, that is not happening at the moment.

**Liz Smith:** Thank you, both.

**Michael Marra (North East Scotland) (Lab):** You will be aware that the committee is concerned by the requests for a large number of new commissioners. Your committees have been particularly involved in the proposals for a victims and witnesses commissioner and a patient safety commissioner, and we have been reflecting on the broader demands for them.

We have had a variety of evidence on the matter. Are these questions of the moment, or are there more systemic issues? In other words, are problems happening now because of austerity, lack of resources and governance issues, or are commissioners part of an architecture that is addressing more permanent systemic issues?

10:00

**Audrey Nicoll:** Through our work, the Criminal Justice Committee has interacted with a range of issues relating to the experiences of victims and witnesses. When we were scrutinising the proposal for a victims and witnesses commissioner, what came out in the evidence was the historical challenge that victims experience when they enter the criminal justice system.

In answer to your question, I would say that we are probably looking at a more systemic challenge. However, it is possible that that challenge has been enhanced by where we are at the moment, as experiences of poverty, cases of poor mental health and pressures on families have arisen from the economic space that we are in. Perhaps it is a bit of a hybrid of both.

**Clare Haughey:** I will come at the question from a slightly different angle, given the origins of the proposals for a patient safety commissioner. The issues that were raised were from the 1960s, the 1970s, the 1980s and up to the 2000s. We are looking at a different landscape, and those were the foundations for the need for a patient safety commissioner. In written and oral evidence,

people consistently said that patients' voices were not being heard, with patients perhaps feeling that they were not being believed. People wanted the commissioner to be an advocate for those voices and to raise concerns about issues relating to medication side effects, medication devices and so on. In Scotland, the patient safety commissioner's remit will be wider than the remit of the commissioner in England and Wales.

Deprivation and austerity will play a part, but the issues that have resulted in the patient safety commissioner have a much deeper history.

**Michael Marra:** I will follow on from what the convener said about outcomes and whether the commissioners will be able to make change. From the Criminal Justice Committee's work, what effect do you see the victims and witnesses commissioner having on outcomes for citizens? Can you describe your theory of change that will make things better for people? I recognise that you have been sceptical about the proposal.

**Audrey Nicoll:** That is a difficult question to answer. I have my own views, but the committee did not necessarily discuss that issue collectively. One of the ideas that sits underneath the proposal is that the commissioner will give victims and witnesses a voice that they perhaps do not have at the moment. I cannot remember whether this point was made in one of the submissions on the Victims, Witnesses, and Justice Reform (Scotland) Bill, but it was thought that the commissioner would have a key role in engaging with victims and witnesses through their work in scrutinising policy, legislation and the work of stakeholders. That could certainly be an area of focus when scrutinising the effectiveness of such engagement, the form that it takes and the value of it.

**Michael Marra:** On 17 January, the new First Minister, who was a member of the Criminal Justice Committee at the time, said that the commissioner would not have any teeth. He said:

"the bill says that the role of the commissioner is to "monitor compliance" with standards, "promote best practice" in relation to trauma-informed practice and "undertake and commission research". The commissioner will not, under the existing proposal, have the power to put his or her foot down and say, "This is not acceptable." That power is somewhere else".—[*Official Report, Criminal Justice Committee*, 17 January 2024; c 69.]

That is an expression of concern that, as much as things might be said by a commissioner, they might not necessarily effect change. Is that not the First Minister's concern?

**Audrey Nicoll:** That view was articulated not just by the now First Minister but by other witnesses, who questioned the extent to which the commissioner could influence change and would be able to require change. We heard that view

fairly broadly during our evidence taking on the proposals for a commissioner.

**Michael Marra:** That commissioner would perhaps produce a report that would come to your committee for consideration by the Parliament. Would that be right?

**Audrey Nicoll:** I think that this is reflected in the Government's response, but the proposal is that any review of the effectiveness of the commissioner's role would come back to the Parliament.

**Michael Marra:** I suppose that I am talking more about their day-to-day work. This committee is concerned about the capacity of other committees to deal with the workload from the outputs of commissioners. On 30 April, Brian Plastow, who is accountable to your committee, said:

"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".—[*Official Report, Finance and Public Administration Committee*, 30 April 2024; c 14.]

I believe that he is to come to your committee in November, but does that not talk to a structural issue? I recognise that your committee is incredibly busy with legislation—not just the bill that we have been talking about but other legislation. Do you not have the capacity to work with commissioners to ensure that the good work that they do is processed effectively?

**Audrey Nicoll:** That is a really important point to raise. I am aware that Dr Plastow commented on his engagement with my committee. Without making excuses, I point out that the issue is the capacity of our committee. As you have acknowledged, we are a legislation-heavy committee.

We will be speaking to the Scottish Biometrics Commissioner later in the year, and I regularly follow his work, because it is of real public interest. I am aware of the compliance reports that he has submitted. Would I like the situation to be different? Absolutely, but the challenges of our workload make things difficult. That just reflects where we are with parliamentary work.

I will make one point in relation to the Criminal Justice Committee's potential follow-up scrutiny of the role of a victims and witnesses commissioner. Perhaps there is a case for other committees having a role in scrutinising the work of that commissioner, given the cross-cutting and overlapping issues that they might be engaged with.

**Michael Marra:** Clare Haughey, it is my understanding that the outputs of the Cumberlege review included a reasonably technical request about providing oversight on medical devices and medical interventions. Those are technical issues that Parliament more broadly does not have the specialist knowledge to understand and examine, so specialist capacity is required. You are talking more about advocacy and people not being heard or believed, so that is more about voice rather than technical capacity. To be devil's advocate, are things such as listening to citizens and advocating on their behalf not things that parliamentarians should be doing? Do we need somebody else to do that?

**Clare Haughey:** I would not disagree with you, Mr Marra, that that is absolutely our role as elected representatives. I am sure that you have been representing your constituents in issues relating to what they perceive as medical negligence, issues accessing healthcare or just concerns about the impact that medication or medical devices have had on them.

The landscape of patient safety is complex. We have clinical governance structures, we have royal colleges that look at issues, and we have United Kingdom-wide oversight of some medications and issues relating to those. It is important that we ensure that the public are confident and have trust in the healthcare system, so it is absolutely key for the commissioner to have a clear purpose and role of advocating for system-wide improvements in the safety of healthcare and promoting the importance of the views of patients and members of the public.

I referred earlier to what stakeholders described as the golden thread to bring together all those systems and structures. Obviously, we do not yet have a patient safety commissioner in that role, but that is what the committee anticipated would be the outcome from having a commissioner. Ultimately, Parliament passed the legislation that introduced the commissioner, so parliamentarians agreed that that was required.

**Michael Marra:** My final question relates to finance. Your committee acknowledged in its stage 1 report on the Patient Safety Commissioner for Scotland Bill our committee's concerns, in our letter of 31 January, about parliamentary resource and drawing on the funds of the Scottish Parliamentary Corporate Body, but you simply noted that

"sufficient resources to the SPCB to support the work of the Commissioner"

should be handed down by the Government. Have you had any assurances from the Government that it will actually do that?

**Clare Haughey:** I do not think that there has been any further correspondence with the committee, but I am certainly happy to check with clerks and update Mr Marra and other members on that.

**John Mason (Glasgow Shettleston) (SNP):** To start with, I will follow on from what Michael Marra asked you, Ms Haughey. You have said various things. You specifically talked about system-wide issues, and then you said that, because of the history of the problems through the 1960s and so on, that is specifically why there is a need for the patient safety commissioner. I am asking you to speculate a bit, but do you think your committee would take a different view if a commissioner was proposed for something specific such as multiple sclerosis or arthritis? Some of the arguments are that some people's voices are not being heard, and their voices would be heard more if there was a commissioner for different kinds of disability—that has been proposed—and so on and so forth.

Was the patient safety commissioner unique because of the circumstances?

**Clare Haughey:** Given the history and the UK-wide review, and the acceptance from the Scottish Government—obviously I cannot speak for it—of all the review's recommendations, creating the post of a patient safety commissioner certainly made sense. I understand that there is an argument for commissioners for various other issues and I am sure that many more proposals will come to Parliament. I say from a personal point of view, rather than from a committee point of view, that we need to ensure that there is a good and sound rationale for new commissioners and that they will add value to the public landscape, public conversation and advocacy for individual groups. That is why the committee is looking into the issue.

Certainly, with the patient safety commissioner, the evidence was there as to why we required to appoint one.

**John Mason:** That is helpful—thank you.

One of our predecessor committees—the Finance Committee in 2006, I think—suggested that there should be a limit on how many more commissioners we had. It suggested that we should look at alternate models. In this case did your committee look at alternate models? For example, did you consider whether an existing commissioner could have taken on the role? Some witnesses have said to us that we should expand the role of the Scottish Human Rights Commission, which could have a department or a rapporteur who would, for example, look after patient safety, children's affairs or older people. Did your committee consider that kind of model?

10:15

**Clare Haughey:** The committee considered the evidence that was put in front of it, and the overwhelming evidence from stakeholder and stakeholder groups was that they supported the commissioner. In terms of exploration of other models, I can again write to this committee if that was explored more widely. As I said, I was not the convener of the Health, Social Care and Sport Committee at the time that it took evidence, so I certainly was not privy to any of the private discussions. I have seen only the public papers and the report recommending that the general principles of that bill be approved.

**John Mason:** Okay, thanks—that was maybe an unfair question.

I will ask Audrey Nicoll about alternate models. Within your committee's remit, there are quite a lot of alternate models. You mentioned the inspector of constabulary and the prisons inspector, both of which are funded by the Government, not by Parliament, but yet they are, I think, quite independent. Is that another model that works?

**Audrey Nicoll:** You are right that a number of inspectors sit within the criminal justice space, as you have mentioned. Again speaking personally, my instinct is that they work independently. Having read quite a number of reports of HMICS, I think that the position that it takes on issues feels quite independent and probing. Some reports that I have seen published by HMICS have been quite challenging. It is expected, of course, that recommendations that are made by HMICS, for example, are actioned. That model appears to do what it says on the tin.

Another example is a recent report by His Majesty's Inspectorate of Prosecution in Scotland about how cases of domestic abuse are processed through our court system. There is certainly some good practice, but areas were highlighted as requiring attention. I am confident that the commentary around that will be scrutinised and that consideration will certainly be given to implementing the recommendations that are made.

As I highlighted in an earlier response, the criminal justice space has inspectorates and also has third-sector organisations that work tirelessly and do valuable work, ultimately, to make the experience of victims and witnesses better. Maybe it is right that we have a broad range of scrutiny processes, some of which are fulfilled by the third sector and some of which are accountable to Parliament. Perhaps we should welcome that model in Scotland.

**John Mason:** One argument is that, despite the good work that the third sector does in a lot of areas, it does not have the power to make binding

recommendations—that phrase has been used a number of times. It would be quite strong if bodies could dictate. You suggested that one body—I am sorry, I cannot remember which one it was—makes recommendations that almost always are accepted.

**Audrey Nicoll:** That is a valid point. However, I will cite a recent example of a third sector body. The committee has engaged with Rape Crisis Scotland on the issue of access to court transcripts when a victim of a sexual offence feels that accessing the transcript of a trial will perhaps support closure and coming to terms with what has happened. However, at the moment, it is extremely costly to purchase, if you like, or access court transcripts from the Scottish Courts and Tribunals Service.

We have done a piece of work with Rape Crisis Scotland, and I am pleased to say that the Scottish Government has now put in place a pilot where, in certain circumstances, a transcript will be made available at no cost. That is one example where there can be a little bit of power to the elbow of organisations such as—

**John Mason:** That involved the third sector and the committee working closely together. It is a good example. I do not know how much your committee is involved with the Scottish Human Rights Commission. It has suggested that, if it was given a bit more power to initiate inquiries, it could co-ordinate the whole field of human rights a bit more. A lot of what we are talking about is related to human rights. Is that model worth looking at?

**Audrey Nicoll:** I would be happy for that to be explored. We are perhaps at a point where we need to look at models that promote best practice. I suspect that one size does not fit all. I am not familiar with the position of the Scottish Human Rights Commission, but I would welcome that, and I expect that that will be part of your committee's scrutiny of the issue.

**John Mason:** Okay. I will leave it at that.

**Michelle Thomson (Falkirk East) (SNP):** Good morning. The example of the third sector body that Audrey Nicoll mentioned illustrates my question. I was looking at the new responsibilities of the ministers and cabinet secretaries and noticed that Ivan McKee's responsibilities include public service reform, efficient government and so on.

I have almost hypothetical questions for you both. Audrey, if a stringent new cap on public sector expenditure was brought into force that meant that the commissioner, whom you were required to consider as part of your recent scrutiny, were removed, what specifically would you do to address some of the issues around the treatment of victims and witnesses? Secondly, Clare, I am not saying that the patient safety

commissioner will be removed—I do not want to set any hares running—but, given that it is a slightly different situation, if that commissioner were removed, hypothetically, what could you do to address the perceived gap?

**Audrey Nicoll:** That is a big question in the criminal justice space. If I can go into committee mode for a moment, what came up in the evidence that we took across the bill—as you know, the bill is about improving the experience of victims and witnesses, which at the moment is not good enough—was that it is extremely difficult to effect positive change across that whole system. Take, for example, the proposals around trauma-informed practice. Lots of good work is going on now and we know that agencies are embedding that, but we are still not there yet.

The question that I would put back to you is, how, across separate agencies, do you effect a whole-system approach? You can do that in ways that do not cost money and do not involve passing new legislation or creating a victims and witnesses commissioner. An example might be post-legislative scrutiny, which might be an option if that process within the Parliament could be effected more frequently and more effectively.

We know that hard choices have to be made in relation to the public purse. Again, I suppose it comes back to taking provision from one area to enhance the provision in another area. In the criminal justice space, that is incredibly difficult.

I am not sure that I have given you a concrete answer, because it is such a huge question, but those are a couple of points that come to my mind that my committee would agree with.

**Michelle Thomson:** In some respects, you have answered my question because you did not say, “We have no idea how we could improve things without the installation of a commissioner.” Arguably, that would be an answer. However, you already have quite a lot of ideas. The original example that you gave about Ellie Wilson promoting the transcripts of rape victims was another earlier version.

Clare Haughey, I have my cutting knife in the name of Ivan McKee. Realistically, what are the remedies and how readily to they come to mind with regard to a situation in which the patient safety commissioner was to be no more?

**Clare Haughey:** To answer a difficult and complex question, we need to look at what has got us to this point. The historical issue is that those less-represented voices were not heard and the women who were raising issues about medications and medical devices such as mesh were not listened to or were dismissed.

I will turn the question around. If we do not have a patient safety commissioner, how will we ensure that those patient voices are heard and that those concerns are responded to promptly and are believed? What is the cost not only financially but emotionally and physically of not listening early to those people who say that there are issues and that we need to change how things are prescribed or how treatments are actioned?

**Michelle Thomson:** Does that not play to Liz Smith's earlier comment about systemic issues and organisational and cultural issues resulting in people's voices not being heard? Is working on those issues another remedy? It is difficult, as I know from previous experience, to change the culture of an organisation, but is that a potential remedy?

**Clare Haughey:** Certainly, it is absolutely key to ensure that the complex landscape that we have for patient safety is pulled together, that the public has trust and confidence in the healthcare that is provided, that they are listened to and that their concerns are responded to. However, from the written and oral evidence that we received, and from the previous report, we can see that that is not the case. That has to be remedied, and having a commissioner in place to pull all of that together is one remedy for that.

**Michelle Thomson:** I have a wee follow-on question for you, Ms Nicoll, about your committee's recommendation to consider a time-limited period should a victims and witnesses commissioner be established. Did you consider what that time period might be, given the considerable organisational establishment and set-up costs?

10:30

**Audrey Nicoll:** As you say, we suggested that, should the Government establish a commissioner, one option, given the current landscape, would be to make the post time-limited, with a view to a piece of work being done to evaluate and scrutinise its effectiveness. We did not particularly consider a time period, as we felt that that could perhaps be refined in the further stages of the bill, once there had been a consideration of an optimum time that would allow the commissioner enough time to embed, and for outcomes to be seen and the value of the role to be established. However, as you quite rightly say, there is a financial aspect as well.

**Michelle Thomson:** Were you simply being kind to the Government? Rather than saying, "No, we should not have one", were you being nice and suggesting an interim measure? I know I am being slightly controversial, but were you being kind by

coming up with another option or was it a sensible suggestion?

**Audrey Nicoll:** We were coming from the evidence that we heard. There was a lot of support for the proposals for a victims and witnesses commissioner, particularly from some organisations that already work with victims, less so from those that work with witnesses. We tried to reflect the reality of the situation that we are in financially and recognise the existing support for the post of commissioner.

Again, it comes back to the fact that there is an absolute acknowledgment across individual sectors, Parliament and the Government that things need to change.

**Michelle Thomson:** My last wee question is for you both. We have conducted a thorough investigation so far, and everybody who has appeared before us has had a good grasp of their particular area and has convincingly articulated why a commissioner is necessary and, indeed, effective. However, from our point of view, we look at the entire landscape rather than one individual silo, which is perhaps where the mismatch comes in.

Again, this is a slightly hypothetical question for you both, to finish off. If you were us and you were required to look at the entire landscape, bearing in mind the need for efficiency and effective government and the critical financial constraints, what would your reflections be? Audrey, you smiled, so you can go first.

**Audrey Nicoll:** That piece of work would be timeous and worth while. The preparation period before coming to the committee today has been quite enjoyable for me, as I have been able to examine the landscape around commissioners. It is not a pick-and-mix situation, but a number of models came out in some of the evidence that you took. The landscape of commissioners has emerged organically. Perhaps we are at the point at which, in the spirit of efficiency and transparency, a fairly robust, overarching review is entirely appropriate.

**Clare Haughey:** I agree with Audrey. I welcome the committee's inquiry into this. When I saw that you were looking at the issue, I thought that the exercise was certainly timely and worth while.

I would add only that you should scrutinise what organisations, stakeholders and the general public think that a commissioner will do that will improve or advocate more for their particular cause, issue or concern. That is my challenge to the committee. I will leave it at that.

**Jamie Halcro Johnston (Highlands and Islands) (Con):** I have a quick question on that point, Clare. We have talked about stakeholders a

lot. We can appreciate why stakeholders and organisations may support commissioners, but is there any evidence of the general public's perception of commissioners, what they do and how effective they are? Is public awareness of commissioners' roles and responsibilities important in terms of their success?

**Clare Haughey:** That is an interesting question. I hope that perhaps your committee will look at some of those issues around the public's perception of commissioners and recognition of their role. I imagine, from my casework, that the Scottish Public Services Ombudsman probably has the highest profile of those organisations, but I am sure that some commissioners have profiles that are not as high as stakeholder organisations hope that they would be.

The committee wanted to make sure that the commissioner would make the public more aware of their role and set out the fact that they would not take on individual complaints. Other commissioners could perhaps look at that.

**Jamie Halcro Johnston:** I suppose that there is a question about outcomes, because the better known a commissioner is, the more work they might have to do and the higher their budgets might need to be. They could almost be victims of their own success, to quote a phrase. Audrey, could you give us some thoughts?

**Audrey Nicoll:** I agree with everything that Clare Haughey set out. As you say, there will be greater public awareness of some commissioner roles, such as that of the members of the Scottish Human Rights Commission and the Children and Young People's Commissioner Scotland, and less awareness of others, such as the Scottish Biometrics Commissioner. Why would the public know about that last one? Having said that, his work is highly relevant to where we are going with biometrics.

I concur with Clare Haughey's comment that it would be good if your committee could consider the public's general awareness of commissioners and their roles, purposes and responsibilities. I am sure you will do that in your work around scrutinising the landscape.

**The Convener:** That has concluded questions from the committee. Do our witnesses have any final points that they wish to make? Do they think that we have omitted anything, or feel a burning desire to add something to our deliberations?

**Audrey Nicoll:** No. Thanks again for the opportunity to meet the committee today.

**Clare Haughey:** In case I strayed into any issues this morning that might raise this as a concern, I refer members to my entry in the register of members' interests, which states that I

hold an NHS Greater Glasgow and Clyde bank staff nurse contract. I have nothing else to add, and I thank you for the opportunity to contribute today.

**The Convener:** Thank you for your welcome contributions and, also, I hope you start feeling a lot better, Clare, and that we will soon see you back here at the ranch.

Without further ado, I call a five-minute break in order for our witnesses to leave and other witnesses to settle in.

10:38

*Meeting suspended.*

10:45

*On resuming—*

**The Convener:** Welcome back, everyone. We will continue taking evidence for our inquiry into Scotland's commissioner landscape.

I welcome to the meeting Sue Webber, convener of the Education, Children and Young People Committee, and Martin Whitfield, convener of the Standards, Procedures and Public Appointments Committee.

I will open up the session to questions from members, given that there are no opening statements. First, how do the committees scrutinise the performance of the commissioners within their remits?

**Sue Webber (Lothian) (Con):** You may be aware that the current Children and Young People's Commissioner Scotland has newly come into post. We had her in front of us recently.

We have been quite thoughtful about how best to carry out the scrutiny role, given that she is new in the position. We also have to recognise that each commissioner is quite different. As convener, I was never given the opportunity to scrutinise the previous commissioner. I have only ever had Nicola Killean in front of the committee.

We heard evidence from her and her team about their strategic plan and that set the tone of what we will look for from her in the next year or so. We looked at what her priorities will be and we were glad to know that they are around poverty, education, mental health, climate change and discrimination. Nothing is unfamiliar or a surprise. Those priorities are all in the work plan that the commissioner is keen to focus on.

We were interested when she spoke at length about her accountability tracker, which, in the landscape that she works in, is designed to hold the Government and other bodies to account for how they are progressing their plans in relation to

the promises that they have made to children and young people. We are keen to see how that develops and whether it gives us some oversight as a tool to track progress.

I do not know how long I have. I could talk for a while, Mr Gibson.

**The Convener:** Talk for as long as you like.

**Sue Webber:** Okay! *[Laughter.]* It was also interesting to learn about her new and innovative ways of engaging with young people to make sure that she was hearing their voices. I am fortunate enough that a couple of members of this committee were part of that evidence taking and I know that they will reinforce that.

The commissioner's powers are being expanded later this year with the incorporation of the United Nations Convention on the Rights of the Child. We will be able to gauge her powers of having some influence across the community.

Other than that, our scrutiny will be based mainly on the evidence that the commissioner's office shares with us, aligned to our other programmes of work on legislation, including evidence on bills, and inquiries that we are working on. That is where we are.

**The Convener:** The commissioner gives you a lot of evidence and the committee asks a lot of questions and so on, but how do you evaluate her effectiveness? Do you take it at face value or do you examine the commissioner in other ways to see whether she is delivering the work that she is supposed to do in relation to her remit? How do you assess that in relation to her budget and whether she is delivering efficiently and effectively against her budget?

**Sue Webber:** It is difficult because everything that the commissioner generally does is more subjective, which is why we were so keen to learn about that accountability tracker. You will know that, in terms of challenging her budget, there is a split in roles and responsibilities. As a committee, we take assurance that her role in coming in with a balanced budget is scrutinised adequately elsewhere within the parliamentary process—that is, by the Scottish Parliamentary Corporate Body. Apologies if I have that wrong.

The key performance indicators that we hear about so much—perhaps when we challenge Government ministers—are not quite as relevant to the children's commissioner role. We have to be a bit more subjective in doing that.

**Martin Whitfield (South Scotland) (Lab):** Thank you to the committee for the opportunity to talk about such crucial roles within Scottish society.

An interesting aspect of the committee that I have the pleasure of convening is that our commissioners are the oldest commissioners in Scotland. They were established by legislation at the outset of the Parliament. They fulfil a distinctly different role to some of the other commissioners because, in essence, they have a quasi-judicial position. My committee has another advantage, in that the commissioners' remits are tightly drawn and sit only with my committee, rather than crossing a number of committees. Looking from the outside—I will just comment, rather than go into this in depth—one challenge for some of the other commissioners is that they answer to a number of different bodies.

The commissioners that answer to my committee are the Scottish Information Commissioner and the Ethical Standards Commissioner. Of the two, the Scottish Information Commissioner is perhaps easier to understand. We get an annual report that shows the work in and the work out. We can scrutinise how successful the work has been over a period of time. As with so many institutions across Scotland, Covid threw up real challenges in both the number of complaints made regarding freedom of information requests and the response that the commissioner was able to make. As to how we monitor the work, although we do not have direct input on the budget, which sits elsewhere, we can interrogate and investigate the blockages that have led to delays.

I will pause there for one moment and speak about the other commissioner, then I will come back to that interesting point about blockages.

The Ethical Standards Commissioner reports to us in a number of ways, because the commissioner has a number of roles. One role relates to complaints that are made about MSPs. The SPPA Committee sits as part of that process, which was set up under the Ethical Standards in Public Life (Scotland) Act 2000 and the Scottish Parliamentary Standards Commissioner Act 2002. Again, we get an annual report of complaints in, complaints out, time taken and process. We talk about where blockages occurred. Again, Covid caused problems.

Also, in the previous session, a distinct series of complaints against a member at the time caused huge problems simply because of the volume of complaints and the complexity of the available information. The then commissioner and the current commissioner, who was an acting commissioner towards the end of that period, spent a lot of time scrutinising exactly what the legislation allowed them to do. The circumstance was unfortunate, but it led to that profitable exercise, which in turn led to a request to those who budget the commissioner for additional

funding, with explanations for why it was needed. That analysis was incredibly worth while because, in the discussions in the annual reports and when the commissioner comes before us, the understanding of where challenges occur is clear.

The Ethical Standards Commissioner also deals in part with councillors. That does not come to my committee. That is separate, but it takes up some of the work.

I come to the blockages. There is a challenge in the relationship between the Parliament and the commissioners, and the corporate body and the commissioners. It is sometimes difficult to identify who is responsible for certain aspects. For example, guidelines set out how a whistleblower within a commissioner's wider department can be dealt with. However, before you get to whistleblowing, there is a challenge about who takes responsibility for how a discomfort or a challenge in the culture is managed and dealt with, be that by the department, the corporate body or, indeed, the independent commissioner. It is important to remember that, underpinning this, is the commissioners' independence from the Government and independence from but accountability to the Parliament. There are employment conflicts and other mundane things that happen within organisations that, if they are not dealt with, become more intrinsic problems. It is difficult to see how those within commissioners' departments can share those things with either the Parliament, to whom they are accountable or, indeed, the corporate body. There are challenges.

There are benefits to looking at the two commissioners who answer to my committee simply because of the time that they have existed. They have been around the circle a few times. Also, it is important to remember that they fulfil distinct quasi-judicial roles in assessing freedom of information complaints, assessing complaints against elected officials and overseeing public appointments. They are different, but the same. That environmental challenge of signposting concerns early on probably applies to all commissioners. I will leave it at that.

**The Convener:** We are well aware of the issues that developed there. I know that you are talking about a vacuum of accountability, which you have said should be explored, but what is your instinct about where, ultimately, responsibility for that should lie: the Parliament, the Government or the commissioner?

**Martin Whitfield:** That is a relatively easy one because, at the end of the day, a number of commissioners fulfil the role of being a critical friend of the Government. They are independent, but accountable to the Parliament because, at the end of the day, commissioners are accountable to the people of Scotland. It would be worthy of the

Parliament to take on the responsibility. The vehicles that we have within the Parliament make that challenging to do at the moment. I will not sit here and say what the magic solution is because I do not know what it is. The committees are challenged by the time available to do the analysis—even just looking at the annual reports can be a problem—but the Parliament should take on board the responsibility for ensuring a solution.

**The Convener:** The difficulties with the Ethical Standards Commissioner and the increase in budget alerted us to the significant year-on-year increase in commissioner costs. It was between 8 and 10 per cent each year over the last couple of years, which has an increasing impact on the Scottish Parliament's budget.

How can the Parliament best deal with that seemingly exponential growth in budget costs? If you think about it, the cash increase in the Scottish budget this year was 2.6 per cent, but commissioners went up by 10 per cent, or more in some circumstances. Should we continue to review that annually? Should we cap it? How do we address that issue, given that so many other commissioners are in the pipeline? Sue, I will come to you after Martin.

**Martin Whitfield:** You need first to take a step back and talk about the transparency of funding of the Parliament's responsibilities. If you speak to most people about the Scottish Parliament's budget, they would basically say that it is for this building and the people and the support that sit around this table. In reality, it is far wider than that. I am not sure that the importance of where that funding goes is genuinely understood

11:00

To come specifically to the question of the commissioners, it is an old adage that if you ask people, they will always say that they want more money. The challenges that Covid threw up required, particularly in relation to the two commissioners that answer to my committee, a thorough look at how the work was done. The Ethical Standards Commissioner had an explosion of cases that had to be dealt with and processed properly following the requirements of statute and following the obligations that sit on the commissioner. That led to them reviewing the personnel who sit behind that. Rather than, say, cap the costs or set a minimum—and this goes back to who takes responsibility for this—the commissioners should have a real deep dive into what they are required to do, how to do it and how to make that more efficient.

**The Convener:** I understand what you are saying but, if you think about it, the national health service was allocated a 4.3 per cent increase and



the police were allocated a 5.6 per cent increase in resources, and they have to deal with that. The commissioners—it is not just the Ethical Standards Commissioner—all seem to be asking for significant increases in funding, and another half a dozen commissioners are in the pipeline. We, as a committee, are trying to address that. People will be thinking that, if front-line services like the NHS have to work within an envelope, the commissioners should be in the same place.

**Martin Whitfield:** My sense is that the commissioners who come before my committee understand that they are working within an envelope. However, the experiences that they have had show, in essence, that the vehicle that was expected to work within that envelope was perhaps not as fit for purpose as it should have been. There have been proposals from both commissioners about how they can streamline, not by cutting corners but by making their organisation more efficient. There is an obligation on them to do that.

As for the risk of the exponential spread of commissioners' costs, you need to look at what the commissioners do. For example, freedom of information is important in Scotland, and FOI requests are used a lot. There is a criticism whereby people suggest that it is the same group of people who constantly do it, but the FOI legislation is about moving to a period of transparency at the point of delivery, to actually reduce the number of FOI requests. So, there is a route map, but it requires a change in groupthink in certain organisations.

The Ethical Standards Commissioner is the backstop for the ethical standards that we, along with councillors and various public appointments, should be acting to. You have to ask whether we need someone to judge that, and historically, sadly, it is useful to have someone to be that judge or assessor. A funding requirement goes with that, because the cases are becoming more complex with the existence of social media platforms and things like that.

Again, the easy answer is that there is a set budget and that is it. The real answer is to ask what we want them to do and to empower the committees not to step on their independence but to provide that critical oversight to see where there is value for money. That then goes back to the blockage point that I was talking about. In a sense, there are aspects that are falling between the paving stones, which we have seen can cause massive problems. If they were avoided and had been avoided for a period of time, maybe we would be in a different position with regard to the outlay.

**Sue Webber:** It is, clearly, public money—we need to be mindful of that. We are in a very

challenging environment. When the public see spiralling costs and the Parliament carries on spending like that, they think that we are a little bit disconnected from reality. We need much more accountability. As I said, the SPCB has the governance procedures around that, and the Auditor General for Scotland has a role in inspecting the annual accounts, but we need a reality check in many of these offices about the tight financial envelope that we are all working within. That is my steer on that.

Martin Whitfield has alluded many times to the commissioners' independence, and I think it would be difficult for us to pick some of the budget areas and the activities that the scrutiny body carries out and make judgments about the value those bring from the spend. You are looking quizzical, but I am trying to form my—

**The Convener:** I am sorry to interrupt you, but that is one of the things that we are trying to grasp—how we evaluate the difference that the commissioners make. If a commissioner was not there, what would the difference be? For example, what would the difference be for children and young people? Could the work be done by the Government or any other organisation? There are issues of democratic accountability as well, of course.

**Sue Webber:** The role of the Children and Young People's Commissioner is specifically to give voices to young people, which is something that the Government makes assumptions about. The other week, when the commissioner was giving evidence to us, some of our questions about the challenges were about what we presumed to be important, but she kept bringing us back to the point that she was there to make representations on what the young people had said. She was quite clear in reinforcing that argument. The assumptions that we make about the challenges that young people face today—and all these things—can be quite sweeping sometimes.

Going back to budgets and the spend, you may struggle to pinpoint the value added—it is a fine balance—but there is potentially the chance to be a little bit more critical about some of the more tangible things like spending on travel and ancillary items.

Part of the commissioner's evidence—as a committee, we hear far too often about this—was about the massive implementation gap that exists between policy and what happens on the ground. The evidence outlines that the creation of another body or person to champion the needs of a specific group appears to be a reaction to ineffective policy implementation and a lack of access to justice.

We need to be mindful about how we proceed, with the potential for exponential growth in the number of commissioners or in their budgets.

**The Convener:** Yes, there is a perception that there are gaps, but there is also concern about duplication.

**Sue Webber:** Indeed.

**The Convener:** I will open up the session to colleagues around the table. The first will be Liz Smith, to be followed by Ross Greer.

**Liz Smith:** Ms Webber, do you think that the increasing demands on the children's commissioner have come about because of a failure within the education system?

**Sue Webber:** I alluded to the massive gap that people see between the policy and how it feels to the young people on the ground. There is a massive disparity there, and the commissioner plays an advocacy role in championing the rights of those children.

**Liz Smith:** Can you give us some examples of where there has been a huge gap between the delivery and what was promised?

**Sue Webber:** The only one that springs to mind right now is additional support for learning, but I am afraid I cannot talk an awful lot about that until tomorrow.

**Liz Smith:** What was the commissioner arguing for in the evidence that she gave to your committee, which you just cited? What gaps in delivery did she cite?

**Sue Webber:** I am not certain that the commissioner spoke an awful lot about that specifically to us, because the evidence was about her strategy going forward. She was taking a new approach. In the past, you have heard about the gaps in keeping the Promise and how care-experienced young people still feel let down. We had an informal session with them and we heard some quite critical voices. It is the role of the commissioner to champion those voices as well.

**Liz Smith:** At the moment, we are looking at the effectiveness of the commissioner landscape. When it comes to the particular commissioners, the statistics on what is happening to children and young people just now—whether those are about poverty, attainment or those who are able to fight their case, which is a difficult thing for children and young people to do—are not terribly impressive in showing that we are doing a better job for young people. That is, therefore, quite a challenge. As a committee, we have to identify whether that situation has come about because the commissioners are not doing a very good job or because public services are failing.

**Sue Webber:** The information gives us a sense that the services are failing. I am thinking of the evidence that we took for our scrutiny of the Disabled Children and Young People (Transitions to Adulthood) (Scotland) Bill and the evidence on secure accommodation that we took recently from the commissioner for our scrutiny of the Children (Care and Justice) (Scotland) Bill. What is happening on the ground does not match the intention of the policy—the mismatch is quite vast and seems to be growing—and the commissioner highlighted that.

I am talking about the new commissioner, but, looking back, the previous or outgoing commissioner was critical of many of the Government's policies when he was in post, and he shone a spotlight on, and was very critical of, their development and implementation. We are transitioning to a new commissioner, so I am trying to figure out how best to respond to your question. In the past, the previous commissioner very much challenged the implementation.

**Liz Smith:** The previous commissioner gave evidence to the committee about this gap, which is important in this debate because the gap matters. It matters in the lives of children and young people and it matters to the conclusions that we come to about whether the oversight that the commissioner has is the problem or whether the problem is a failure within the system.

Mr Whitfield, you represent two completely different scenarios here because Ms Webber deals with a commissioner whose main interest is advocacy and, Mr Whitfield, as you rightly said, you deal with regulation and investigation. Do those differences commissioners' roles change the public perception of whether they are successful?

**Martin Whitfield:** That is an interesting question. I go back to the choice that was made at the turn of the millennium of having commissioners for ethical standards and freedom of information. Commissioners were seen as being independent of the Government, much more than independent of Parliament, and that requirement was to give them a level of authority that would allow them to act in their quasi-judicial role.

The Ethical Standards Commissioner's involvement with MSPs meant that they had to be independent of the Parliament but they also had to be seen to be distinctly independent of the Parliament. That needed a phrase to carry a weight.

At the time, the concept of a commissioner was perhaps different to what it is now. In the intervening period, the public's view of commissioners and indeed commissions has changed so substantially as to undervalue or perhaps reinforce the value of someone who is

independent of Government and of Parliament undertaking the roles that we have given them by statute.

In respect of those who answer to my committee, the annual reports, conversations with the commissioners and the interaction with people who interact with the commissioners is such that those who apply for FOI adjudication or who come through the Ethical Standards Commissioner understand the commissioner's role, importance, significance and independence much more than the general public does.

**Liz Smith:** On that point, I have no scientific evidence for this whatsoever, but after 17 years in this place, I have the impression through casework that the public has a good understanding and is relatively appreciative of the work that the commissioners do. Whether they solve the problems is more difficult.

You raised a question earlier about how Covid had considerable implications. Do you feel that the public perception of the Information Commissioner or the Ethical Standards Commissioner deals with the issue satisfactorily?

**Martin Whitfield:** In some ways, there has been a frustration with the freedom of information and the Information Commissioner because an expectation has been created of an entitlement to information that is perhaps not accurate.

This goes back to whether the Information Commissioner can do themselves out of the freedom of information job. A substantial part of their work is shifting that fundamental balance, in essence, to publish and open up so that the information is there and constituents—and I am thinking here about my own case load—and others have the best understanding possible of a decision.

11:15

The Ethical Standards Commissioner's role is slightly different. On one level, it is for elected members to get it right and to understand the importance, the privilege and the Nolan principles that we talk about. The Commissioner was to be the independent guardian of those for the people of Scotland.

If we look purely at the responsibility for the standards of elected members, the Ethical Standards Commissioner would be more than happy to do themselves out of a job. However, that onus rests elsewhere.

**Ross Greer (West Scotland) (Green):** I am conscious that we are holding this inquiry while a wider debate goes on, marking the 25th anniversary of the Parliament, around Parliament's capacity. The Presiding Officer and Murdo Fraser

have both suggested that we look again at the number of MSPs, particularly in relation to our overall capacity to do committee scrutiny.

Mr Whitfield, a minute ago, you said something interesting about how the vehicles that are available to Parliament for scrutiny and accountability of the commissioners are not sufficient. Does that comment purely relate to capacity or could we reform other structural and process issues without opening the wider capacity question? It does need to be opened but for plenty of other reasons.

**Martin Whitfield:** Absolutely. It is always worth saying happy birthday to any institution but particularly a Parliament.

It is not just about the capacity of the MSPs or a simple numbers game. Structures exist within the Parliament. People who were here and are no longer here seem to level criticism against the committee system. That debate is always welcome.

The challenge with commissioners boils down to the level of responsibility in that the budget comes from one legal entity and the scrutiny of the role of the commissioner rests with the Parliament and its committees. I am not suggesting that we put the functions together, but the oversight committee's responsibility has to be specific and the vehicles have to exist for it to be able to see into the whole thing and hold it to account.

Earlier, I talked about blockages. When management goes from green to amber, the oversight committee's role is to ask questions. Because of the independence of commissioners, it is a difficult area to get into, but the independence of the commissioners who answer to my committee is in how they conduct their investigations, in their conclusions and in their reports, but not necessarily in how their organisation operates.

**Sue Webber:** In digging in and getting a bit more detail about the children's commissioner, the challenge is the work plan that we all have to work towards, specifically the education committee. Our heavy legislative agenda prevents us being proactive about going into more detail with the commissioner about some of the work that they do. If you want us to have that increased level of scrutiny, perhaps the capacity of the existing system needs to be reviewed. That does not necessarily mean that there needs to be another committee; perhaps the Parliament's whole work plan needs to be reviewed.

This comment might be more from me than from me as a convener. A leaner legislative programme would allow committees to do more in-depth work and have more of a proactive agenda.

**Ross Greer:** The Local Government, Housing and Planning Committee's written submission suggests that more direct scrutiny of the commissioner's budget separate from the scrutiny of the SPCB's overall budget would be beneficial. Nothing is immediately stopping any committee from deciding to do direct scrutiny like that, but it does not ordinarily happen.

What are your thoughts on that? On the one hand, you could say that it would allow for a more effective level of scrutiny than currently. Given our incredibly tight timescale for budget scrutiny and every committee's wide range of responsibilities, it would immediately come up against an acute version of the capacity issues that we have just discussed. Do you have any thoughts specifically on separating scrutiny of the commissioner budgets from that of the overall SPCB budget and specifically assigning that to committees as a specific part of their overall budget scrutiny?

**Sue Webber:** Do you want to go first, Martin, while I have a think?

**Martin Whitfield:** It is an interesting proposal because we need scrutiny outwith the existing scrutiny. If we put aside the current resource implications, if such scrutiny had occurred and had been conducted enthusiastically, some of the challenges that have occurred with commissioners in the past would have been spotted earlier, if I am honest. They would have come out. As well as the formal scrutiny that takes place, there is interaction between commissioners and committees at different levels and in different ways that could allow concerns to be raised and then explored.

One of the challenges is the compartmentalising everything that we do. We miss bringing together the overview. At the end of the day, committee scrutiny is about having a level of oversight, looking at the whole picture and picking up on the alarm bells as well as what works well.

**Sue Webber:** Whatever it was, however that budget scrutiny was to lie and wherever the responsibility for it lands, Mr Greer, we have to make sure that it can be delivered, that it is done well and the time is given for us to do it. That is all I will say on that one.

**Ross Greer:** Finally on capacity, if every one of the currently proposed commissioner models were to be agreed to, how would that impact your committee's workload? As a member of the education committee, I am aware that some of the proposed commissioners, whether for disabled people or learning disabilities, neurodiversity and autism, have direct relationships with substantial areas of the committee's scrutiny. Would the obligation to scrutinise the work of those commissioners aid the committee's ability to

scrutinise or would it displace other important work?

**Sue Webber:** Your question has answered itself, Mr Greer. Fitting it into our work plan would be a challenge, and there is also overlap. The children's commissioner represents disabled children and children who are neurodivergent. She is responsible for advocating for all those people. Far too much overlap would cause conflict for young people. Who is their advocate? Who is best placed to serve them going forward? It would make scrutiny within the committee system and the education committee more complex.

**Martin Whitfield:** That goes back to the challenge of commissioners straddling committees. Apart from the statutory committees, the committee system loosely reflects the Government, which makes commissioners problematic. It would help with any commissioner if a specific committee were assigned to do the oversight. That would be all the oversight. Otherwise, stuff will shift between the two and, rightly, committees will take what interests them and a level of scrutiny will be lost.

**John Mason:** Following on from that, another model that has been suggested to us—this would probably not affect some of your areas, Mr Whitfield—is the Scottish Human Rights Commission being given a bit more power so that it could cover human rights overall in areas such as disabilities and children, which would all fall within that, although there could be separate rapporteurs for those groups. Do you have any views on what the effect of that might be? You have mentioned the issue of complexity.

**Sue Webber:** I suppose that the issue goes back to the role of the Children and Young Person's Commissioner, which is specifically about hearing the voices of all young people without making the assumptions that adults might make. The current commissioner is looking at finding ways to proactively engage with some of the groups that you mentioned to make sure that their voices are heard.

Having a commissioner as massive and unwieldy—that might not be the right word—as that, with a remit as broad as that, would not allow for advocacy for young people, who often feel unheard at the best of times, without their perspective being diluted by all those other things. That is the key thing that sets them apart.

**John Mason:** Do you think that, because young people do not have a vote, there is a special argument for their commissioner—

**Sue Webber:** Whether they have a vote is irrelevant. Young people deserve to have someone to act as their voice in here, regardless of that.

**John Mason:** Do disabled people not have the same right?

**Sue Webber:** They do, but disabled young people are covered by the Children and Young People's Commissioner. As I said previously, the children's commissioner is for every young person, whether able-bodied or disabled.

**John Mason:** Okay. Let me play devil's advocate. The argument for a commissioner for disabled people is that, as not all disabled people are children, they still need a commissioner, even though there would be an overlap with the children's commissioner.

**Sue Webber:** I am here as the convener of the Education, Children and Young People Committee, and I am struggling not to give my party's view—but thank you for your question. I will leave it there.

**John Mason:** I realised that from one of your colleagues. Our earlier witnesses said when they were speaking for their committee and when they were speaking for themselves. We can take that on board if you want.

I have mentioned specific cases, but my underlying question is about how, on the one hand, we avoid having a huge organisation that would cover everything and how, on the other hand, we avoid having so much overlap. It seems that the more commissioners we have, the more overlap there will be, and your committee might suffer as a result of that.

**Sue Webber:** We already do. The Children and Young People's Commissioner said that the fact that there are areas of overlap prevents them from carrying out investigations and inquiries, albeit that that is peripheral and around the edges. I cannot remember the specific detail. The fact that there is already overlap with the public bodies that are responsible for exercising specific functions prevents the Children and Young People's Commissioner from carrying out investigations. Therefore, in my view, if we were to add more complexity, more commissioners and more areas of overlap, that would raise a big red flag.

**John Mason:** Okay. Mr Whitfield, you have suggested that a commissioner should report to a committee, which might simplify the system. Another suggestion that has come to us is that the commissioner should work more hand in glove with the relevant committee and that they should see themselves as doing the same work. It was even suggested that the committee should assign work to the commissioner. Do you have any thoughts on that?

**Martin Whitfield:** I am talking specifically about the commissioners who report to my committee or who are overseen by my committee. The

independence of those commissioners is crucial because of the questions that come in front of them and what they do.

In the area of freedom of information, a series of steps has to be gone through before an issue goes to the Scottish Information Commissioner. If someone puts in an FOI and the organisation looks at it and provides an insufficient answer, an appeal can be made. There is a structured process for how a constituent goes from submitting a letter to find out about, for example, the outflow of rubbish into a bay all the way through to when they feel that they need to go to the commissioner. That process is clearly articulated. The number that come to the commissioner for a decision represent a tiny minority of those that come into the system.

The commissioner's role in that quasi-judicial process is different from their role as an advocate. The advocacy role is about giving voice to a group who otherwise could not participate in a system or to individuals who feel that they are being stopped from participating in that system. There is a lot to be said for articulating the value of what it is that a certain group of people—regardless of whether they have a vote—are not able to contribute to in the system.

11:30

An issue that has constantly been raised, including by a number of commissioners, is the fact that the children's commissioner knows how to engage with young people so that they can contribute to a discussion, which rarely happens in the formal setting of a committee room. That advocacy role is massively important, because it allows for the individualisation of access.

The commissioners who answer to my committee have a set process to go through that involves a vast amount of work. That means that, when you get to the commissioner, you are at the top of the pyramid. The cases that go there go there for a reason, and that leads to an investigation. What becomes important is the learning circle about how we avoid getting into that position. In that regard, the code of conduct and the guidance for MSPs sit with my committee.

**John Mason:** Sticking with your committee, we have the Ethical Standards Commissioner and the Standards Commission for Scotland. Do we need both? They both defended themselves when they were here, but I remain unconvinced that we need two separate bodies.

**Martin Whitfield:** You are now drifting out of the area that my committee covers, but there is a question to be answered about the elements of the process. First, there is an investigation to collect the facts on the basis of which a decision will be

made. The next step is a matter of human rights and natural justice, whereby an institution outwith that process looks at it to make sure that it has been done correctly.

Is there a need for more than one body in that area? Yes, there is, because if we take away one of those, we will end up with people going to court. At the end of the day, that option is open to almost anybody who goes through any of these processes. Once you go to court, there are no winners. It is a case of ensuring that the process is as robust as possible.

Do we need two separate bodies? If we did not have two separate bodies, we would still need to have a process that reflected the rules of natural justice for the individuals concerned, whether we are talking about councillors or colleagues who sit in this place.

**John Mason:** Okay. I remain unconvinced.

**The Convener:** Thank you. That concludes the committee's questioning. Do you wish to make any further points before we wind up the session?

**Sue Webber:** I have one small point to make, convener. We are concerned that bringing more commissioners into the mix could create further confusion and could make things even more ineffective for young people by making it harder for them to figure out who to go to who could act as their champion. Such confusion in the landscape comes with costs and creates more barriers to justice. That is my final word.

**Martin Whitfield:** I go back to the interesting question about the use of the word "commissioners". What role do they fulfil? If we understand what the problem is, we can find a solution. Sometimes we struggle to understand what the problem is, and we perhaps impose a solution. I will leave it at that.

**The Convener:** Thank you for your contributions this morning. We will continue to take evidence as part of our inquiry at our meeting on 21 May. That concludes the public part of today's meeting.

The next item on the agenda, which we will discuss in private, is consideration of our work programme.

11:33

*Meeting continued in private until 11:58.*

This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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