

Finance and Public Administration Committee
16th Meeting, 2024 (Session 6)
Tuesday 7 May 2024

Scotland's Commissioner Landscape: A Strategic Approach

Purpose

1. The Committee is invited to take evidence in round-table format from the following witnesses in relation to its inquiry into [Scotland's Commissioner Landscape: A Strategic Approach](#)—
 - Adam Stachura, Associate Director for Policy, Communications and External Affairs, Age Scotland,
 - Vicki Cahill, Policy and Public Affairs Lead, Alzheimer Scotland,
 - Jo McGilvray, Senior Policy Advocate, Carnegie UK,
 - Craig Dalzell, Head of Policy and Research, Common Weal,
 - Allan Faulds, Senior Policy Officer, Health and Social Care Alliance Scotland (the ALLIANCE), and
 - Rob Holland, Director, National Autistic Society Scotland.
2. The witnesses each submitted [written evidence](#) to the inquiry. 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.
3. A summary of the issues discussed with former Commissioners and Ombudsman during an informal session that took place on 16 April 2024 is attached at Annexe A.

Background

4. 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.
5. Legislation creating a patient safety commissioner has also recently been passed by the Scottish Parliament. A further six² are being proposed or considered. The

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.

Commissioners' budgets form part of the SPCB's own budget which is "top-sliced" from the Scottish Consolidated Fund.

6. 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).
7. 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.
8. 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.
9. 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.

Previous evidence sessions

Research Scotland

10. On [16 April 2024](#), the Committee heard evidence 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. The Report's

introduction acknowledges that “there is very little published research in Scotland and the UK on commissions or commissioners, and little evaluation exploring the pros and cons of different approaches, powers or ways of working for commissioners”. The Committee discussed Research Scotland’s findings, including the following issues—

- Most interviewees value the powers they have and see these as a key difference between commissioners and campaigning or lobbying bodies.
- Gaps in powers were highlighted by some interviewees, including the inability to self-initiate inquiries, to make binding recommendations or to share information.
- Most are content with their governance arrangements. The model of a single commissioner appeared to work particularly well given the clear lines of responsibility and decision-making.
- Interviewees value their independence from government and tend to have constructive relationships with government.
- There were mixed views on whether a commissioner is the best way to address the issues ‘on the ground’ for those with learning disabilities, autism, or neurodiversity, although there was broad agreement that additional support is needed in some form.
- Concerns were raised that “creating commissioners for particular groups would lead to a large number of commissioners and a complex landscape”, with many interviewees highlighting an already complicated picture. Some expressed concern that “people could end up being pushed between commissioners or being unsure which applied to them”.
- Interviewees suggested that other options for strengthening human rights for people with autism, learning disabilities and neurodiversity should be considered, including better resourcing for other bodies such as relevant existing commissions, and supporting good practice.
- Some interviewees suggested that a lead commissioner housed by an existing human rights commission or other organisation may be worth considering, as it could reduce costs through sharing services. Others however suggested this approach might divert resources and dilute the body’s focus on “human rights for everyone”.

Current officeholders

11. On 30 April 2024, the Committee took evidence from all current officeholders³ supported by the SPCB (Commissions, Commissioners and Ombudsman) in relation to the inquiry. The following issues were raised—

Growing Commissioner Landscape

- It was recognised that the landscape has evolved organically over time, with each officeholder being distinct and having different governance arrangements “for good reasons”.
- The Committee heard that the proposals to create new commissioners are often driven by systematic failures and frustrations in the system, as well as a view that a particular group needs a ‘champion’.

³ These officeholders are listed at footnote 1.

- 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 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.
- There is a perception that an officeholder 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’.
- The SHRC suggested that an alternative to creating new, separate officeholders would be for it to represent the rights of a range of groups through ‘leads’ or ‘rapporteurs’. It highlighted its broad remit and pluralistic approach in line other international human rights institutions.
- Witnesses had mixed views 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.
- One witness suggested that there should be a presumption against creating any new officeholder. Post-implementation reviews should be carried out, along with periodic reviews to assess whether the officeholder is still relevant and required.
- 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.

Accountability, scrutiny, and budget-setting

- Budget-setting arrangements are challenging for officeholders, 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 up a large proportion of their overall budgets, pay awards can impact significantly on their budgets.
- 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.
- Officeholders, along with all public sector organisations, find it challenging to undertake medium and long-term financial planning in the absence of multi-year budgets.
- It was suggested that, in examining performance, progress against their functions and four-year strategic plans should be assessed.
- Where it takes place, parliamentary scrutiny of performance is robust, however, officeholders would welcome more regular committee scrutiny.
- Witnesses noted that the SPCB, rather than committees, undertakes scrutiny of officeholder budgets. The SPSO suggested that it would be

helpful if committee scrutiny of performance linked into scrutiny by the FPA Committee of their budgets, efficiency and effectiveness.

- Asked whether rights were being prioritised over outcomes, some witnesses argued that “rights should provide the basis for improving outcomes”.
- Witnesses 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.

Overlap, duplication, and gaps in functions

- Witnesses 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.
- Some gaps in the functions of the SPSO and SHRC were also highlighted.

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 officeholders in sharing office premises and services. Discussions amongst officeholders 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 officeholders.
- Hybrid working provides greater opportunities to share offices. The SIC provided the example of recently freeing up space within his office to potentially accommodate new officeholders.

Written submissions

Age Scotland

12. In its [written submission](#), Age Scotland suggests that the commissioner model addresses “perceived gaps or inaction from government and public services on important matters”. It adds that “Government ministerial reshuffles or changes in political priorities can raise or diminish important areas, and an independent commissioner can be much more immune to political fluctuations”. It would like to see the landscape growing further with the creation of a Commissioner for

Older People and argues that the need for this post is demonstrated by the treatment of older people during the Covid-19 pandemic. This Commissioner “would be independent, though they would advise the Scottish Government on issues which affect older people and influence policy”, promote best practice for service providers, direct support by taking on casework and be underpinned by legal powers to hold public bodies to account.

13. Age Scotland notes that “the current landscape isn’t entirely coherent, but it might not need to be or may be hard to unpick”. It argues that creating an Older People’s Commissioner on the same basis as the Children’s Commissioner “would demonstrate coherence on a very similar post affecting age”, adding that “the natural and most accountable route would be through the Scottish Parliament”. It goes on to state that “there will undoubtedly be crossover and overlapping of functions across Commissioners, ... however, duplication is not necessarily the prominent issue but instead it is the gaps in representation and action at this level which are of most concern”.

Alzheimer Scotland

14. In its [written submission](#), Alzheimer Scotland highlights its concerns regarding the increasing demand for commissioners in recent years and believes that “this indicates the current failing of authorities and public bodies to deliver their functions and meet the needs of the population that they serve”. It goes on to note that commissioner costs “come from public funding which could otherwise be directed to facilitate the direct provision of the types of services and support that people could benefit from to improve their experiences”. It also argues that the financial cost of the commissioner landscape “must be seen against improved outcomes”.
15. Alzheimer Scotland welcomes the Scottish Parliament’s role in ensuring that commissioners “remain responsive to the needs and interests of the people they service” through robust, independent scrutiny. However, it expresses concern regarding the ability of the Scottish Parliament to undertake robust accountability measures if demands continue to increase. It further expresses concerns that, with more commissioners being created, “their broad remits will be unable to meet the specific needs of people who do not neatly fit into the responsibilities of a particular commissioner”. It goes on to suggest that there is a possible case “for strengthening the role of existing structures that promote the rights of the broadest groups of individuals, specifically the SHRC”

Carnegie UK Trust

16. Carnegie UK Trust (CUKT), in its [written submission](#), suggests that commissioners play an important role in “tackling issues and problems that threaten the collective wellbeing of Scotland’s citizens”, and offer external scrutiny and accountability to governments and public bodies. They also “act as an additional accountability mechanism” in the context of a unicameral Scottish Parliament.
17. CUKT shares the view of many other witnesses that commissioners are ‘appealing’ due to “a belief that existing mechanisms are not working for particular groups of rights holders, [... and] the commissioner model ... is seen to be successful in other jurisdictions”. Noting the rising costs of commissioners, Carnegie UK states that “it

is important to consider the cost savings that a commissioner function can bring” and suggests that if, for example, the SPSO did not exist, there would likely be greater pressure on Scotland’s court and judicial system and increased legal costs for public bodies.

18. It goes on to suggest that proposals for new commissioners present an important opportunity for a strategic approach to be taken, and alternatives to be explored where appropriate. It is however “a strong advocate for” the creation of a Future Generations Commissioner, suggesting that they would bring visibility, act as a figurehead “to inspire and excite” and support the shift towards long-termism in policymaking. It further argues that increasing the capacity of the Auditor General for Scotland (AGS) to have dedicated focus on wellbeing and sustainability would strongly complement the role of a Future Generations Commissioner.

Common Weal

19. Common Weal, in its [written submission](#), argues that the “ease of reshuffling of ministerial responsibilities was creating a risk that policy portfolios could easily become de-prioritised at critical times..., however, this was balanced by a risk that an over-reliance on commissioners to fill the gap ... could result in a loss of democratic accountability in Government”. This, it explained, was because, while Commissioners are responsible to parliamentary committees, “they are not easily accountable to Parliament as a whole in the same way a Minister is”.
20. It calls for the “regularisation of the role of commissioners to make their remits and appointments more transparent and to ensure the maximum level of democratic accountability in their role”. It suggests that “the Scottish Government is developing a risk-averse attitude in expanding the growth of commissioners as it allows Government to claim the credit when policies are adopted and are successful but to ignore ‘inconvenient’ advice or to pass the blame for failure”. It further suggests that commissioners should be placed under the control of parliamentary committees relevant to their remit and “it should be for those committees to instruct commissioners when to enact their powers”. Finally, Common Weal recommends that research is carried out into the effectiveness of commissioners as part of a review of commissioners, with a presumption against the creation of any new commissioners until that review has taken place.

Health and Social Care Alliance Scotland (ALLIANCE)

21. In its written submission, the [ALLIANCE](#) notes that the proposed commissioners “clearly relate to population groups that face specific challenges in society, very often related to barriers to realising their human rights” and concludes that the growth in commissioners “is rooted in this pattern of service failure”. It goes on to state that “by virtue of their independence, commissioners are perceived to be more able to honestly and openly challenge these failings where they arise, and therefore potentially encourage meaningful change to address them”.
22. Commissioners, it suggests, would benefit from greater coherence and consistency, as well as more certainty that they will have sufficient resources to fulfil their role and use their powers effectively. It argues that the proposed commissioners “will bring additional attention to the challenges faced by specific

groups, or in the case of the Future Generations Commissioner, the wider principles they stand for”. They could also have the positive effect of increasing public awareness, building pressure for change and improved policymaking, and therefore represent an investment rather than a cost.

23. However, the ALLIANCE also expresses concerns regarding the capacity and scope of the SPCB to properly manage the separate budgets of an increasing number of commissioners. The Session 2 Finance Committee’s criteria “is not necessarily being followed” in relation to some of the proposals for new Commissioners, specifically with regards to rights-based commissioners. The ALLIANCE also considers the ‘rapporteur’ model proposed by the SHRC to have merit.

National Autistic Society Scotland

24. In its [written submission](#), the National Autistic Society Scotland (NASS) welcomes the proposal to establish a Commission(er) to represent those with learning disabilities, autism and neurodiversity, which could, it suggests, “champion autistic needs and rights in governance and society and leverage finance into systems requiring investment”. It argues that this position should be fully independent of the Scottish Government.

25. Overall, NASS believes that the scrutiny and appointment arrangements led by the Scottish Parliament for officeholders “is a good approach and should remain in place for future appointments”. The overlap in functions “should not be seen as a problem; but rather a means of ensuring that individuals do not fall through a gap in ‘the system’”. NASS also makes the point that, while start-up and running costs would apply to the new Commission(er), failure to pursue a fresh approach could lead to considerable costs if the status quo approach of crisis intervention continues.

26. NASS concludes by noting that “for as long as issues/communities are not adequately championed by these existing models of accountability, the priority should not be on attempting to mould Scotland’s commissioner ‘landscape’ into something perceived as better managed or ‘streamlined’, rather, it should be on overall outcomes for these communities”.

Next steps

27. The Committee will continue taking evidence in relation to this inquiry at its next meeting.

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 session⁴—

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

⁴ Comments have not been attributed to individuals and some comments do not necessarily represent all participants' views.

functions, albeit the PSC has powers to initiate its own inquiries. It was suggested that the SPCB has the opportunity to identify overlaps 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**