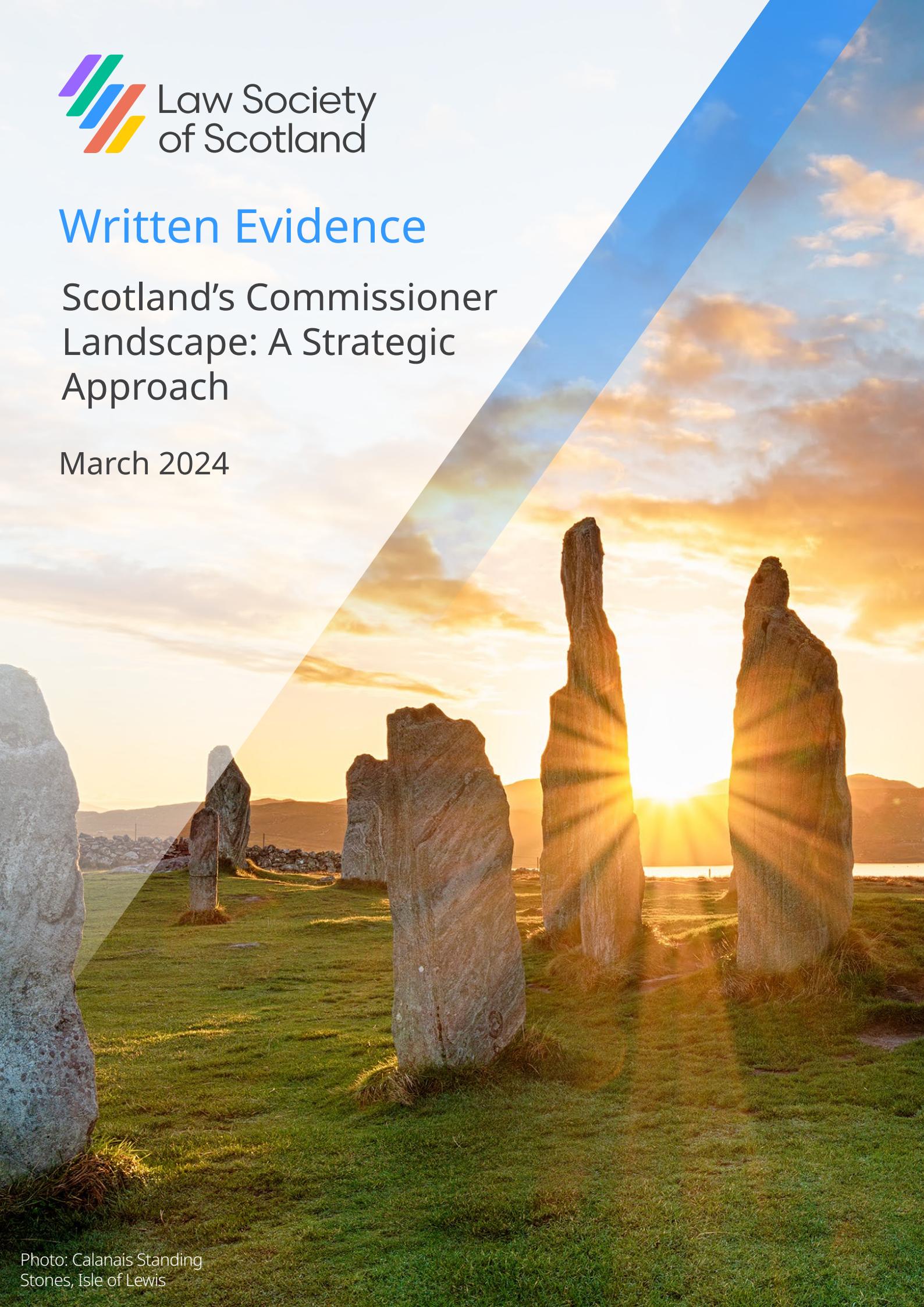


# Written Evidence

## Scotland's Commissioner Landscape: A Strategic Approach

March 2024



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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights sub-committee welcomes the opportunity to consider and respond to the Finance and Public Administration Committee call for views: *Scotland's Commissioner Landscape: A Strategic Approach*.<sup>1</sup> The sub-committee has the following comments to put forward for consideration.

## Questions in the call for views

1. Why is the Commissioner model chosen over other approaches, such as a public body or government department, and why do you consider there has been such a growth in Commissioners in recent years?

First of all we would like to set out the legislative landscape for Commissioners as we see it at the present time – some of the details have changed since a corresponding list was uploaded on the Parliament's website.

### *Current legislation on Commissioners*

#### *Over-arching legislation on Commissioners*

- [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(legislation.gov.uk\)](#)

#### *Sector Specific Commissioner legislation*

- [Standards Commission for Scotland \(2000\) Ethical Standards in Public Life etc. \(Scotland\) Act 2000 \(legislation.gov.uk\)](#)
- [Scottish Public Services Ombudsman \(2002\) Scottish Public Services Ombudsman Act 2002 \(legislation.gov.uk\)](#)
- [Scottish Commissioner for Children and Young People \(2004\) Commissioner for Children and Young People \(Scotland\) Act 2003 \(legislation.gov.uk\)](#)
- [Scottish Information Commissioner \(2005\) Freedom of Information \(Scotland\) Act 2002 \(legislation.gov.uk\)](#)

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<sup>1</sup> Scotland's Commissioner Landscape: A strategic approach - Scottish Parliament - Citizen Space



- [Scottish Human Rights Commission](#) (2008) [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)
- [Commissioner for Ethical Standards in Public Life in Scotland](#) (2013)) [Ethical Standards in Public Life etc. \(Scotland\) Act 2000 \(legislation.gov.uk\)](#) , [Scottish Parliamentary Standards Commissioner Act 2002 \(legislation.gov.uk\)](#) , [Public Appointments and Public Bodies etc. \(Scotland\) Act 2003 \(legislation.gov.uk\)](#) , [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(legislation.gov.uk\)](#) [The Public Services Reform \(Commissioner for Ethical Standards in Public Life in Scotland etc.\) Order 2013 \(legislation.gov.uk\)](#) and [Lobbying \(Scotland\) Act 2016 \(legislation.gov.uk\)](#)
- [Scottish Biometrics Commissioner](#) (2021) [Scottish Biometrics Commissioner Act 2020 \(legislation.gov.uk\)](#)
- Patient Safety Commissioner (2023) [Patient Safety Commissioner for Scotland Act 2023 \(legislation.gov.uk\)](#)

#### *Proposed legislation on further Commissioners*

- Victims and Witnesses Commissioner [Victims, Witnesses, and Justice Reform \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)
- Disability Commissioner [Disability Commissioner \(Scotland\) Bill as introduced \(parliament.scot\)](#)

#### *Potential legislation*

- Commissioner for Older People [final\\_consultation\\_commissionerolderpeople.pdf \(parliament.scot\)](#)
- Wellbeing and Sustainable Development Commissioner Wellbeing and Sustainable Development (Scotland) Bill [final\\_consultation\\_sarahboyack\\_proposedwellbeingandsustainabledevelopmentbill.pdf \(parliament.scot\)](#)
- [Wellbeing and Sustainable Development Bill: Consultation \(www.gov.scot\)](#) Scottish Government consultation includes the case for a Future Generations Commissioner

There are also a number of other commission/ers which have jurisdiction in Scotland, including the Equality and Human Rights Commission (a body corporate established by the Equality Act 2006); the Information Commissioner (established under UK data protection legislation); the Scottish Law Commission (established by the Law Commissions Act 1965); the Scottish Fiscal Commission (established by the Scottish Fiscal Commission Act 2016) and the Scottish Criminal Case Review Commission (established under the Criminal Procedure (Scotland) Act 1995 as amended by the Crime and Punishment (Scotland) Act 1997). Most of these commissions were created under UK Parliament legislation.

In addition, we note that there is a long history in the UK of independent auditors, directly accountable to parliament. In Scotland, this function is fulfilled by the [Auditor General for Scotland](#) and the [Accounts Commission](#), both supported by [Audit Scotland](#).



We include these wider examples to demonstrate the diversity of what one might describe as the broader commissioner landscape in Scotland.

### *Our Comments*

We welcome this inquiry, given the burden on the public purse and on public authorities of a proliferation of so-called “integrity branch mechanisms” (see below) and legitimate questions regarding their accountability.

There are currently 8 Commissioners for whom legislation has been passed by the Scottish Parliament. Of these only two have been created in the current decade, the Scottish Biometrics (2021) and Patient Safety Commissioners (2023) and only one in the previous decade, the Commissioner for Ethical Standards in Public Life in Scotland. In our view this is not a “significant growth in recent years” compared with the five Commission/ers established in the first decade of the Parliament.

The recognition of a fourth branch of government in addition to the three traditional branches- the Legislative, Judicial and Executive- has been occasionally proposed in constitutional law literature. James J. Spigelman in his article entitled *The Integrity Branch of Government*<sup>2</sup> proposes the recognition of such a branch, termed the integrity branch:

*“At a high level of generality, the purpose of the integrity branch is to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.”*

Spigelman identifies Parliamentary Committees, the head of state, and creations of the executive that have a nominally separate character, such as audit offices, independent corruption commissions, royal commissions and ombudsmen, as fulfilling an integrity function. Perhaps this increased recognition of the “integrity branch” is responsible for the increased interest in commissioners as a feature of our constitutional arrangements. Developments in England and Wales may be influential in relation to Scotland. In those jurisdictions the Children’s Commissioner for Wales was the first such Commissioner to be created (2001) followed closely by the Children’s Commissioner for England, the Older People’s Commissioner for Wales and The Victims’ Commissioner. These were followed by the Independent Anti-Slavery Commissioner (Modern Slavery Act 2015), the Future Generations Commissioner for Wales (Wellbeing of Future Generations)(Wales) Act 2015) and the Domestic Abuse Commissioner (Domestic Abuse Act 2021).<sup>3</sup>

Commissioners are generally created to provide independent scrutiny of government activity and promote a particular interest. Commissioners in Scotland are appointed as independent statutory office holders- usually by the Scottish Parliamentary Corporate Body (SPCB)- with the approval of the Parliament (or by the Crown on the nomination of the Parliament), to assist the Parliament in carrying out its function of holding the Government to account. The SPCB are

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<sup>2</sup> Australian Law Journal, Vol. 78, No. 11, p. 724, 2004: <https://ssrn.com/abstract=1809582>

<sup>3</sup> how-to-be-effective-commissioner.pdf (instituteforgovernment.org.uk).



responsible for their remuneration and terms of service. They submit an annual report to the Parliament and are accountable to the relevant Parliamentary committee. Whilst it can be argued that Commissioners in Scotland are therefore an offshoot of, and for, the Parliament their role may create questions about accountability and the extent to which the appointment and scrutiny of Commissioners is democratic.

Most Commission/ers are established by primary legislation although the Commissioner for Ethical Standards in Public Life in Scotland was approved when the Parliament agreed to the Public Services Reform (Commissioner for Ethical Standards in Public Life in Scotland etc.) Order 2013. This Order provides for the establishment of the Commissioner for Ethical Standards in Public Life in Scotland, replacing the then existing Commission for Ethical Standards in Public Life in Scotland and the specific offices of Public Appointments Commissioner for Scotland and Public Standards Commissioner for Scotland. As can be seen from the selection of Acts of the Scottish Parliament (ASPs) which provide the legislative basis for this commissioner, it would be helpful for those who wish to have an understanding of the legislation if it were consolidated into one ASP.

Turning to the Patient Safety Commissioner, this office arises from *'First Do No Harm: The Report of the Independent Medicines and Medical Devices Safety Review'* (the Cumberlege Review 2020).<sup>4</sup> The review examined how the healthcare system in England responded to reports about harmful side effects from medicines and medical devices, and made recommendations on how to respond to concerns more quickly and effectively in the future.

The issues the review covered relate to all four of the UK nations, and people from Scotland also gave evidence to the review. The Scottish Government accepted all of the recommendations in the report including:

*'Recommendation 2: The appointment of a Patient Safety Commissioner who would be an independent public leader with a statutory responsibility. The Commissioner would champion the value of listening to patients and promoting users' perspectives in seeking improvements to patient safety around the use of medicines and medical devices.'*

Scottish Ministers committed, in *'Protecting Scotland, Renewing Scotland: The Government's Programme for Scotland 2020-2021'*, to creating the role of Patient Safety Commissioner. Accordingly the legislation was introduced in October 2022 and the bill received the Royal Assent on 7 November 2023.

With regard to the Scottish Human Rights Commission Act 2006 we note that this a different type of ASP from the others on the list in as much as it creates a Commission rather than a Commissioner. The original bill's Explanatory Notes however clarify that the original intention was to provide for a Commissioner. Explanatory Note paragraph 4 states: "The Bill establishes a Scottish Commissioner for Human Rights (SCHR) (and provides for there to be up to two deputy Commissioners). The Commissioner will be independent, with the ability to choose which issues are investigated and reported upon. The Commissioner will be accountable to the Scottish Parliament and will submit annual reports summarising the actions and inquiries undertaken in

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<sup>4</sup> <https://www.gov.uk/government/publications/independent-medicines-and-medical-devices-safety-review-report>

the previous year.”<sup>5</sup> The parliamentary passage of the bill which led to the act was not an easy one. The Explanatory notes (which are missed-named on the parliamentary archive website) state “There was no majority view within the Justice 1 Committee on the general principles of the Bill at Stage 1, but these were agreed to in plenary. The Bill as introduced, and the Bill as amended at Stage 2, sought to establish a Commissioner for human rights. At Stage 2 the Executive brought forward amendments to change the Commissioner to a Commission but these were unsuccessful. However, similar amendments were laid at Stage 3, this time successfully. Non-executive amendments at Stage 2, which would have brought the Commissioner within the remit of the Scottish Public Services Ombudsman, were defeated. Similar amendments lodged at Stage 3 were overtaken by the Parliament agreement to establishing a Commission rather than a Commissioner. Provisions relating to the accountability of the SCHR (through strategic plans and annual reports, for example) were amended through in response to the Justice 1 Committee’s Stage 1 Report, as was the provision allowing access to places of detention without giving (14 days) notice first. The duty to monitor Scots law and the practices of public authorities was amended to become an authority to do so; the requirement to first consult the Scottish Law Commission was added at Stage 2.”<sup>6</sup>

## 2. What are the implications of this growth on Scotland’s finances, other organisations and wider society?

We have no comment to make on the impact on Scotland’s finances although we note that the Finance and Administration Committee notes that the total budget for commissioners directly responsible to Parliament in 2023/24 was £16.6m million with the smallest cost being £0.3m and the largest being £6.7m. The Scottish Parliament Annual Report and Accounts 2022/2023 state that the “*Scottish Parliamentary Corporate Body (SPCB), supports and funds a number of officeholders who deliver services to the public such as the Scottish Public Services Ombudsman and Scottish Information Commissioner. These bodies make up around 14% of the SPCB’s budget. This year there has been greater interaction with a number of committees about the governance arrangements in place to support these offices. The SPCB has worked and continues to work closely with both the officeholders and with parliamentary committees to ensure that there is a proper structure in place to meet the needs of oversight of these bodies while respecting their statutory independence*”. We note that the report also states: “*the SPCB became increasingly concerned about the potential expansion of the number of officeholders which could impact on the SPCB’s financial and staff resources. We are aware of a number of proposals for legislation to establish new bodies. We corresponded with the Scottish Government to make it aware of our concerns and this engagement is continuing.*” Clearly this is an issue which will need resolution particularly in an epoch of restricted public expenditure.

The Society has had regular contact over the years with a number of Commissioners including the Scottish Human Rights Commission and the Scottish Commissioner for Children and Young People on matters relating to legal reform and other matters.

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<sup>5</sup> b48s2-introd-en.pdf (parliament.scot)

<sup>6</sup> Criminal Procedure (Amendment) (Scotland) Bill (parliament.scot)

3. Currently, there is a mix of regulatory, investigatory, rights-based, and policy-focused Commissioners in Scotland.
  - What should the role of Commissioners be and which should report directly to Parliament (and why)?
  - Looking across the entire model of Commissioners, do you consider it to be a coherent approach? What, if any, improvements could be made to the Commissioner landscape in the future to ensure a coherent and strategic approach?

We have no further comments.

4. Criteria were developed by the Session 2 Finance Committee to help guide decisions on whether to create a new commissioner. These criteria are considered by the Scottish Government and Members when proposing Commissioner related bills.  
How are the criteria working in practice and where do you consider improvements can be made to the criteria, its use, or its status?

The Finance Committee Report on the Financial Memorandum of the Commissioner for Older People (Scotland) Bill dated 25 January 2007 contains “Conclusions of the Accountability and Governance report in relation to legislative proposals for new commissioners/ombudsman”.<sup>7</sup> These included:

- Such legislation should provide powers of direction to the SPCB for budget setting;
- No new officeholder should be proposed unless it can be clearly demonstrated that the function cannot be carried out by an existing body;
- Strongly supporting Audit Scotland’s recommendation that sharing services, including co-location wherever possible, should be “an explicit and integral component of the pre-legislative scrutiny phase.”;
- The SPCB should be involved in the estimation of costs for financial memoranda accompanying legislation for a new body and in ensuring sufficient financial monitoring measures are factored into such legislation; and
- Future proposals for representatives of specific interest groups within society should not be designated as Parliamentary commissioners.

To assess how the criteria are working in practice would involve a significant review of the parliamentary passage of each bill which produced a Commissioner. It has not been possible to conduct such research but perhaps the Committee could do so?

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<sup>7</sup> <https://archive.scottish.parliament.uk/business/committees/finance/reports-07/CommitteeReport-commissioner-for-older-peopleBill.pdf>



It is recognised that to conduct post-legislative scrutiny (PLS) of Acts of the Scottish Parliament is a valuable activity in terms of considering whether a law is functioning properly and achieving the objectives set by the legislature during its passage.

The legislation relating to two commissioners, the Scottish Commissioner for Children and Young People and the Scottish Information Commissioner has been subject to PLS:

- the Finance and Public Administration has conducted a PLS [inquiry into the Financial Memorandum for the Children and Young People \(Scotland\) Act 2014](#). The committee sent a [letter to the then Deputy First Minister](#) in October 2022 and [the government responded in December 2022](#).
- The Public Audit and Post-Legislative Scrutiny Committee also conducted a PLS [inquiry into the Freedom of Information \(Scotland\) Act 2002](#) (published 19 May 2020).

In order to improve coherency, consideration should be given to a more systematic approach involving all the Commissioner legislation as part of a future programme.

## 5. Are the existing governance and oversight arrangements adequate and, if not, what improvements are required?

The SPCB is required under section 21 of The Scotland Act 1998 to make arrangements for the Parliament to be provided with the property, staff and services required for its purposes. It also provides funding to SPCB-supported bodies (Commissioners and Ombudsman). As the body charged with these responsibilities the SPCB also receives Commissioners' draft strategic plans and contingency requests. For example, the SPCB received the draft strategic plans 2014-28 from — (a) the Standards Commission for Scotland, and (b) the Ethical Standards Commissioner: [SPCB \(2024\) Paper 01 \(parliament.scot\)](#) and contingency requests from the Scottish Public Services Ombudsman, the Standards Commission for Scotland, the Scottish Commissioner for Children and Young People and the Scottish Information Commissioner: [SPCB Minute 8 February 2024 \(parliament.scot\)](#).

These arrangements are satisfactory to a point. We note that the Auditor General for Scotland is responsible for auditing the SPCB's accounts which are issued with the SPCB Annual Report.

The SPCB has a scheduled annual meeting with the Finance and Administration Committee -- perhaps this could be increased. Consideration could also be given to a programme of regular committee evidence sessions with relevant commission/ers- either by the Finance and Public Administration Committee or by the relevant subject committee.

## 6. How appropriate are existing lines of accountability and how does the process work in practice? What other accountability models should be considered?

We have no further comments.



7. To what extent is the current model of Parliamentary committee scrutiny of the performance and effectiveness of how Commissioners exercise their functions appropriate?

We have no further comments.

8. Does the current Commissioner model in Scotland deliver value for money?

We are not in a position to make such an assessment.

9. Are the processes for setting and scrutinising the budgets of each Commissioner adequate?

We have no comments to make.

10. To what extent is there overlap and duplication of functions across Commissioners, and across other organisations in Scotland and how can this be avoided?

We have no comments to make.



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