

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 session¹—

Commissioner landscape and types

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

¹ Comments have not been attributed to individuals and some comments do not necessarily represent all participants' views.

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

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

Accountability, scrutiny, and performance

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

Prioritisation and collaboration

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

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

Growth in Commissioner landscape

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

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

Committee Clerking Team
May 2024