



The Scottish Parliament
Pàrlamaid na h-Alba

The Presiding Officer

Richard Leonard MSP
Convener
Public Audit Committee

By email

6 May 2022

Dear Convener,

SPCB SUPPORTED OFFICEHOLDERS

Thank you for your letter of 31 March 2022 about SPCB supported officeholders.

Please find enclosed a paper that sets out the statutory role of the SPCB in relation to its governance relationship with each of the various offices. We have also set out the practical measures we have in place to support the officeholders.

We recognise that there could be areas which could be enhanced and we have also set these out in the paper. This includes committee engagement.

I hope you find this information helpful and please do not hesitate to contact me should you wish to discuss this further or would like further clarification on any aspect.

Yours sincerely

Rt Hon Alison Johnstone MSP
Presiding Officer

Introduction

1. The SPCB supports 7 independent officeholders (listed in Annex A), as well as funding the Electoral Commission for its devolved electoral activity in Scotland. The Scottish Government has also recently indicated that there could be an oversight role for the SPCB with the establishment of other independent officeholders being planned.
2. The primary purpose of the SPCB is to provide the Parliament and Members with the property, staff and services needed to carry out all parliamentary and representative functions. The oversight of independent officeholders is now becoming a more significant time commitment for the SPCB as well as accounting for a substantial part of the SPCB's overall budget.
3. At the outset, it is worth stating that the SPCB has been supporting officeholders for over 20 years and has never seen such a hard-hitting report about the conduct of an officeholder as in the recent Auditor General's Section 22 report into the governance of the Commissioner for Ethical Standards in Public Life in Scotland. In that time officeholders have, with this recent exception, undertaken their roles in a diligent, effective and efficient manner.
4. We therefore consider that care needs to be taken about introducing any new measures or overly to complicate the existing governance arrangements which have, in general, worked well over the years. Regard also needs to be had to the statutory independence of officeholders, particularly in relation to their functions and their status as employers.

Section 22 Report

5. The Auditor General for Scotland recently published a Section 22 report on the accounts and governance of the Commissioner for Ethical Standards in Public Life in Scotland (ESC). The Section 22 report is based on a draft wider scope audit report of the ESC which remains unpublished. The Section 22 report recommendations do, however, mirror those contained in the draft wider scope audit report. In total 22 recommendations were made and most of these are a matter for the ESC to respond to.
6. Some of the recommendations, do however, relate directly to the SPCB/Parliament, and these are:

Recommendation 3.4 The Commissioner's Office should engage with the SPCB and Parliament to determine the reporting route for concerns about a Commissioner where that person is not responsive. Care will need to be taken relating to the independence of the Commissioner, however the power invested has clearly been abused and a process should be agreed to ensure this situation does not reoccur.

Recommendation 3.7 We recommend that the governance structures in place for this type of organisation are reviewed. The Commissioner's Office needs to engage with the SPCB and Parliament to identify improvements.

This should include improved communications between the different organisations who are involved in the governance of the organisation and stakeholders.

Recommendation 3.12 In view of the wider governance issues identified in this report, we recommend that the SPCB, in consultation with the Commissioner and other Officeholders, review whether the governance structure in place remains sufficient and appropriate.

7. It is worth noting that while the recommendations above refer to the SPCB, there has been no contact from the auditors about these, either prior to or following their publication.

Statutory duties

8. Officeholders are not, except as provided in the legislation, subject to the direction or control of any member of the Parliament, any member of the Scottish Government, or the SPCB.

9. The role of the SPCB in supporting the officeholders is set out in the legislation that establishes each of the offices. The statutory duties of the SPCB include the following:

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

Removal from office

10. The officeholders can be removed from office if (a) the SPCB is satisfied that the officeholder has breached their terms and conditions of appointment and the Parliament resolves that the officeholder should be removed from office for that breach or (b) the Parliament resolves that it has lost confidence in the officeholder's willingness, suitability or ability to perform the functions of the office, and, in either case, the resolution is voted for by a number of members not fewer than two thirds of the total number of seats for members of the Parliament.

11. As can be seen from the above, statute sets out the role of the SPCB in relation to officeholders.

Existing governance arrangements

12. In order to fulfil its duties, the SPCB has put in place practical governance arrangements for the officeholders.

13. Officeholders are not employees. They are appointees. They are provided with an appointment letter when they take up office setting out their terms and conditions of appointment. It also sets out their functions and that it is a matter for them to familiarise themselves with their statutory powers and all other statutes applying to their office and to undertake any necessary personal development to ensure they can fulfil their functions and duties.

14. The officeholders are subject to annual evaluation which is undertaken by an independent assessor for the SPCB. The annual evaluation process is designed to provide independent information to the SPCB on whether an officeholder is fulfilling the functions of their post; evaluates an officeholder's performance against the objectives they have set; provides constructive feedback on what is working well and what is not; and ensures any development needs are identified quickly and support provided.

15. When the officeholders are appointed as accountable officers, they receive a letter from the Presiding Officer and a detailed Memorandum setting out their duties. This appointment is a personal one and cannot be delegated to others. Accountable officers are directly answerable to the Parliament in the exercise of the following functions:

- a) signing their accounts of their expenditure and receipts;
- b) ensuring the propriety and regularity of their finances; and
- c) ensuring that their resources are used economically, efficiently and effectively.

16. The Memorandum sets out what governance arrangements should be in place including a sound system of internal control, strong corporate governance arrangements and access to an Advisory Audit Board for independent advice

on their corporate governance and risk management arrangements and internal control systems.

17. In addition to their accountable officer responsibilities, the officeholders must adhere to a suite of strategic engagement documents issued by the SPCB and these are discussed below. In particular all officeholders should ensure that from the outset, proper financial systems are in place and applied and that procedures and controls are reviewed from time to time to ensure their continuing relevance and reliability.

Officeholders Finance Manual – effective strategic engagement between the SPCB and an officeholder is essential in order to ensure that the two parties work together as effectively as possible. The finance manual sets out a framework within which the officeholder, as the accountable officer, and the SPCB, as the funding body, are required to operate to ensure that appropriate funding is available to enable them to undertake their statutory functions.

Officeholders Framework Document - the purpose of the framework document is to support the efficient administration of the relationship between an officeholder and the SPCB. It sets out the roles and responsibilities which underpin the relationship and forms a key part of the accountability and governance framework.

Contingency Funding Procedures – there is a Memorandum of Understanding between the SPCB and the officeholders on access to the Officeholders' Contingency Fund. The fund is held by the SPCB for exceptional one-off expenditure which cannot be met from an officeholder's approved budget for any given year. Contingency funding from the fund may be available for e.g. legal advice/representation; temporary staff cover for parental leave absences, business continuity emergencies and projects to improve efficiency and effectiveness. Requests for contingency funding can be made at any time of the year but funding should not normally be drawn down until it is clear that the expenditure cannot be met in full or part from savings made throughout the year. Applications are considered by the SPCB on a case by case basis.

Budget Process Agreement – the agreement sets out an understanding between the SPCB, the Finance and Public Administration Committee and the officeholders in relation to administrative arrangements to be observed in connection with the annual budgeting process. It sets out the roles of each of the parties and the arrangement for in-year budget revision requests.

Shared Services Agenda – under the shared services agenda we look for opportunities to share services to reduce costs. We have successfully co-located three officeholders at Bridgeside House in Edinburgh (Ombudsman, Children's Commissioner and Scottish Human Rights Commission) and just recently completed a project to enable the Scottish Biometrics Commissioner to be co-located at this office as well. The Ombudsman is providing the Scottish Biometrics Commissioner with finance, HR and facilities management services on a shared services basis. Other shared services initiatives include the SPCB providing the officeholders with access to their contracts for goods and

services, a Data Protection Officer and business continuity and health and safety training at no additional cost and access to the SPCB's external independent AAB members also at no additional cost.

Certificates of Assurance are submitted by the accountable officers to the SPCB's Chief Executive prior to the signing of the SPCB's Annual Accounts. They provide assurances that there are no significant matters arising from an officeholder's annual accounts that require to be raised specifically in the SPCB's Statement of Internal Control. They also provide an assurance that there are sound systems of internal controls and that they are working well. It is expected that these certificates are discussed with the external auditors prior to being submitted.

Six monthly finance meetings are held with the officeholders' staff to discuss budgets, forecasting, contingency funding and the shared services agenda.

18. We would be happy to share any of the documentation covered in this section with committees.

Committee Oversight

19. While the SPCB has responsibility for funding the various offices and oversight of the governance arrangements, the officeholders are accountable to the Parliament for their functions through the laying of annual and other reports and committee monitoring and scrutiny.

20. In 2009, an ad-hoc committee of the Parliament – The Review of SPCB Supported Bodies Committee - undertook a review of the arrangements around officeholders. The Committee made 43 recommendations which were enacted in the Scottish Parliamentary Commission and Commissioners etc Act 2010. In its Report, the Committee recommended that, given the important functions undertaken by the officeholders, they should be subject to committee monitoring and scrutiny on the exercise of their functions on at least an annual basis. Changes were made to Standing Orders (Rule 3.6 refers) to provide that where an officeholder's annual report or strategic plan is laid before the Parliament, the Clerk will refer that document to the committee within whose remit the subject matter falls for consideration.

21. In previous parliamentary sessions, we have shared with committee clerks a paper on what the SPCB consider should be considered by the committees when scrutinising officeholders. These include:

Outcomes - What was their biggest success and why

Where did they make a difference - Examples of where they make a demonstrable difference?

How they measure their success or otherwise - what processes and procedures do they use to obtain information about their impact; how can they improve.

Other reports laid - Did they lay any other reports and if so, why, and has it made a difference.

Strategic Plans/ KPIs - Were all their KPI's met; if not, why not

Details of petitions/complaints

Moving forward

22. The Committee Conveners will wish to know that when the Section 22 report was published, we made early contact with each of the officeholders and sought and were provided with written assurances on the following-

- That they all have governance processes in place and that they are operating effectively
- they have a defined performance management framework in place to monitor performance against key performance indicators
- they have an Advisory Audit Board
- they have an effective risk management framework which has been approved by the AAB and that their risk management policy and risk register are reviewed regularly with the AAB
- they have an internal audit function in place
- they have a whistleblowing policy in place for staff to raise concerns within the organisation.

23. Also, in light of the Section 22 Report, the Ombudsman had independently undertaken a paper-based exercise to review all the recommendations and her office's response to them, and we have shared the template she used to record her findings with the other officeholders. We have encouraged the other officeholders to undertake a similar exercise to provide themselves with assurances about their governance arrangements. We also expect their external auditors and their Advisory Audit Board to discuss the Section 22 Report recommendations with them.

24. We have also met with each of the officeholders to discuss and seek feedback on their relationship with the SPCB and areas for improvement in terms of governance. The feedback has been positive, with officeholders confirming that the arrangements in place are proportionate and working well whilst noting that they are subject to a number of internal and external checks and the need to not overly burden small organisations which would distract them from fulfilling their functions.

Enhanced governance arrangements

15. We intend to enhance some of the governance arrangements and some of these are straightforward such as-

- reviewing all induction material provided to a new officeholder by their office to satisfy ourselves that the governance relationship with the SPCB/ Parliament is accurately stated

- introducing a Code of Conduct
- ensuring arrangements have been made by the officeholders to have access to an internal audit function
- seeking copies of external audit reports
- at official level, meeting formally with officeholders on an individual basis quarterly and arranging for the SPCB Portfolio Member and the Chief Executive to meet with the officeholders at least annually.

26. Other areas require more careful consideration given the statutory framework establishing officeholders and a judgement has to be made on whether to go further than the above, balancing the likelihood of a similar situation happening again against the additional bureaucracy that extra measures will bring, potentially increasing workloads and impacting on the governance arrangements already in place which have, as stated, worked well. The additional measures that are being considered are as follows:-

(i) Committee engagement

In addition to the paper mentioned above that has been shared with committee clerks, we would propose that consideration is given to a Memorandum between the SPCB and parliamentary committees. In discussion with committee conveners, we would expect this to set out the roles and responsibilities of both parties, focussing on governance for the SPCB and scrutiny and accountability for committees.

The document could also cover the escalation process for what are considered to be very serious (but not criminal) conduct issues raised by external stakeholders or where a committee loses confidence in an officeholder's willingness, suitability or ability to perform the functions of the office. Any escalation would be about conduct and not complaints regarding functional issues/ decisions taken by an officeholder as we recognise that it is important that committees are not in any way seen as appellate bodies for decisions.

(ii) Dealing with staff complaints

Complaints covered here would not be HR-related complaints about terms and conditions of employment where internal structures are in place for staff but would be complaints made by staff about the conduct of an officeholder. We consider the most appropriate route would be that the staff use the whistleblowing policies already in place within their organisation as this gives them the employment protection they might not have if the SPCB or parliamentary committees stepped into the process.

The auditors seemed to support this approach when giving evidence to the Public Audit Committee earlier this year and noted that the whistleblowing policy in place at the ESC now included the option for staff to raise a concern with Audit Scotland if they did not wish to do so with the Commissioner.

All officeholders have whistleblowing arrangements in place, and we consider it might be more appropriate to rely on these and ensure the processes are kept up to date and for evidence of that to be provided to the SPCB. We would also expect the policy to set out an external route for complaints, with all

whistleblowing disclosures to be reported to the respective AAB for information and advice.

(iii) Terms of Appointment

We will review the officeholders' terms of appointment letters to set out what would constitute a breach of their terms of appointment, taking into account the statutory requirements for the post. One area we are looking at would be if an officeholder refused to engage with the evaluation process, and to make it more specific that this would constitute a breach of their terms of appointment leading to a potential removal from office.

(iv) Evaluation process

Whilst we consider the evaluation process meets its purpose and the officeholders agree that it helps them and provides a steer on areas for possible development we need to put in a mechanism for when an officeholder unilaterally dis-engaged from it.

(v) External audit

We propose to engage with Audit Scotland to consider if the remit of external audit is fit for purpose for all officeholders. We have had some feedback that audits currently concentrate too much on financial aspects and not enough on governance.

Conclusion

27. We hope the above is helpful and that it demonstrates that, in respect of governance arrangements for officeholders, the SPCB has a wide range of measures already in place. We recognise that some changes might be necessary going forward and we have outlined our proposals in this regard above.

28. However, it is important to note that effective scrutiny, be it in relation to governance or functions, can only be achieved with the full co-operation of an officeholder and meaningful engagement with officials, the SPCB and the committees of the Parliament.

Scottish Parliamentary Corporate Body
May 2022

ANNEX A

SPCB Supported Officeholders

Scottish Public Services Ombudsman
Scottish Information Commissioner
Commissioner for Children and Young People in Scotland
Scottish Human Rights Commission
Commissioner for Ethical Standards in Public Life in Scotland
Standards Commission for Scotland
Scottish Biometrics Commissioner