

Scotland's Commissioner Landscape: A Strategic Approach

Evidence to the Scottish Parliament Finance and Public Administration
Committee from the Scottish Human Rights Commission

11 March 2024

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

www.scottishhumanrights.com

Executive Summary

The Scottish Human Rights Commission welcomes the opportunity to submit written evidence to the Public Finance and Administration Committee to inform its Inquiry into Scotland's Commissioner Landscape: A Strategic Approach.

Key points:

- The Commission welcomes the scope of the Inquiry itself, and refers the Committee to its earlier publication: *At a Crossroads: What next for the Human Rights Landscape in Scotland?* (June 2023)¹. This discussion paper considered the context around the emergence of multiple different mechanisms for the establishment of new Commissions/ers.
- Whilst there are many factors which have resulted in the calls for new Commissions/ers, in the main, for those proposals which impact on the human rights of groups of people, the Commission considers that persistent lack of access to justice, at individual and systemic level, is the driving methodology behind the calls for the creation of new public bodies to address this. The Commission shares those concerns.
- Far too many people in Scotland still experience denials of their basic human rights and dignity every day – and lack effective access to the mechanisms and means to challenge them
- Access to justice is a core foundation of the internationally accepted human rights legal framework². Human rights remain an aspiration without accountability, monitoring, and routes for people to access justice when things go wrong. Yet, research published by the Commission has confirmed that the majority of people in Scotland do not know where to turn if they have a human rights problem³.
- We encourage the Committee to fully consider what impact the creation of multiple new Commissions or Commissioners with varying different mandates would have, and is having, on an already complex system. We suggest that in the robust application of the tests for establishing new Commissions, Parliament may also wish to include

consideration of the role of existing office holders as a potential route to achieve the policy intent of the proposals.

- For example, it is possible for the Commission to deliver stronger accountability for the human rights of groups of people who have their rights protected by international human rights instruments (for example, through the establishment of specific monitoring teams focused on for example, CRPD, CEDAW, CERD), increase diversity and representation in the membership of the Commission itself, and provide more effective routes of remedy. There is a body of evidence from international NHRIs which demonstrate this⁴.
- The forthcoming Human Rights Bill creates an opportunity for the Scottish Parliament to consider this for the first time since the Commission was created in 2006. The Committee may of course also wish to consider its own role in recommending changes to our mandate at any time.
- We suggest that a review cycle of existing Commission/er mandates to assess fitness for purpose within a changing landscape is something which Parliament should consider.
- In order to avoid further complexity in the system, any extended powers must be applicable to the full range of human rights already defined in the Scottish Commission for Human Rights Act 2006, Section 2.⁵.
- Finally, whilst this may be out of scope of the Inquiry, we remind the Committee that the creation of new public bodies and/or the development of the mandate of existing ones alone will not address the issues raised by the emergent trend of proposals for new Commissions/ers. There must also be targeted action and, crucially, adequate resources to widen access to frontline advice and advocacy, to increase human rights capacity across relevant regulatory and scrutiny bodies, and to strengthen awareness of human rights.

The Commission offers specific comment on the Inquiry questions as follows:

Commissioner landscape

The Commissioner landscape has evolved since devolution, with seven commissioners in operation and one more recently being agreed to by Parliament. Several additional commissioners are now also being proposed.

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?**

The choice of the Commissioner model over others is for its advocates and ultimately the Scottish Parliament to decide. It appears relevant that the current Commission/er model provides for independence from the state. For example, Schedule 1 para 3 of the SCHRA 2006:

3(1)The Commission, in the exercise of its functions, is not to be subject to the direction or control of—

(a)any member of the Parliament,

(b)any member of the Scottish Executive, or

(c)the Parliamentary corporation⁶

In human rights terms, this independence is considered best practice by the United Nations, which sets out the standards through which National Human Rights Institutions (NHRIs) may be accredited as internationally recognised bodies to monitor state implementation of human rights treaties. These standards are known as the Paris Principles⁷. The model of the SHRC as an office holder of the Scottish Parliament is one of the reasons the Commission has been accredited as A-Status by the Global Alliance of National Human Rights Institutions (GANHRI).

To understand better why there has been an increase in such proposals, the Commission has undertaken research⁸ addressing the direct experiences of rights holders which have informed civil society advocacy campaigns for new Commissions/ers and informed MSP and Scottish

Government proposals. These experiences can be summarised variously as follows:

- Implementation gap between legislation and policy
- The desire for a visible Champion
- Dissatisfaction with existing accountability mechanisms
- Perceived 'easy win' for Government
- Influence of comparative policies elsewhere in the UK which have delivered Commission/ers
- Lack of awareness of the SHRC and the role of National Human Rights Institutions among the public and policymakers

The Commission has considered its own role in this system. In our June 2023 publication, *At a Crossroads: What next for the Human Rights Landscape in Scotland?* we suggested that one option for all stakeholders to consider may be to learn from other NHRI models internationally and enhance the scale of the Commission to better monitor human rights enjoyment in Scotland, aligned with enhanced powers which at least mirror those in place in the mandate of other UK NHRIs⁹.

Currently, the Commission is prohibited from providing advice to individuals¹⁰; can undertake Inquiries only under very limited circumstances¹¹; and does not have any powers of investigation, nor to raise legal proceedings in its own name. The Committee may wish to consider the impact of amending the mandate and general functions of the SHRC to address some of the access to justice concerns raised.

In respect of diversity and representation, the Commission's independent Governance Review in 2023¹² recommended that the Parliament should consider a review of the SCHRA 2006 to extend the number of members of the Commission and provide for greater opportunity for representatives of different people and communities across Scotland. This would reflect international experience, for example in Australia, New Zealand, and the Netherlands¹³.

In respect of reach, the Commission has a broad human rights mandate, with responsibility for monitoring enjoyment of all human rights in Scotland. This includes the specific rights afforded to all people through the European Convention on Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Rights of Persons with Disabilities; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Elimination of All Forms of Racial Discrimination; the UN Convention Against Torture; the European Social Charter; and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence. The Commission fulfils its duty to monitor the Convention on the Rights of the Child by working with the Children and Young People's Commissioner Scotland.

The Commission has an operational headcount of 15 people, plus a part time Chair and up to four members of the Commission. SPCB have just approved a 2024/25 budget of £1.456m.

We encourage the Committee to consider whether the Commission's current legislative mandate and resourcing model does adequately a) provide for mechanisms for meaningful human rights accountability within the domestic legal framework, including through the Scottish courts, and b) ensure sufficient diversity of representation in its membership.

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

Beyond the cost implications of setting up and maintaining the infrastructure costs of numerous new public bodies, including the associated governance and audit requirements (see question 5 below), the Commission considers that there is risk of duplication, complexity, and dilution of accountability as a result of a proliferation of smaller bodies inadequately resourced to achieve their mandate. It also risks the creation of a hierarchy of human rights accountability, with some groups of people being represented via a new Commission/ers, whilst others are not.

It is notable that the current rights-based Commission/er proposals, and indeed existing Commissions/ers, have been constructed with different mandates, powers and general functions. The Commission would encourage the Committee to consider whether proceeding in this way risks further complexity in the access to justice system in Scotland, in a landscape where we already know that people do not know where to turn if they have a problem. There may also be unintended consequences for civil society organisations and academic institutions which are funded and constituted to monitor the experiences of particular groups.

From an accountability perspective, should Parliament decide to progress in this way, a focus on alignment of mandates would be helpful for rights holders to avoid further confusion, and the Commission would seek agreements via MoU processes to ensure that the work of those bodies was reflected in its monitoring and reporting to the United Nations and the Council of Europe, as well as in its own assessment of the use of its powers.

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?

It is not for the Commission to indicate which body should or should not be a parliamentary supported body. This is a matter for Parliament. However, in a human rights context, we suggest that the main criteria that guides such consideration should be the role that a body plays in holding the state to account, and the nature of the powers it has at its discretion to enact this. See answer to question 1 above where this is explored further.

In respect of the models of Commissions/ers being proposed and considered by MSPs, Scottish Government, there is little evidence of a coherent approach.

The variation of mandates and powers (proposed and as passed) are an indicator of this, as is the variation in scale and budget of each, and there appears to have been little consideration of how new proposals will engage with, or at least ensure non duplication of, existing public bodies.

There are various models which could be considered by Parliament in respect of rights-based bodies:

- Alignment of mandates to ensure consistency of human rights protections offered
- Non duplication clauses
- Sunset clauses which consider whether an issue requires a permanent public body or a short life focus to address, perhaps through the Committee Inquiry system
- Amending the mandate and resource of existing office holders of the Scottish Parliament to facilitate stronger monitoring and accountability functions to address the human rights concerns experienced by particular groups of people

For example, in the case of human rights protections and accountability, this could include a permanent or temporary extension of an existing office holder monitoring function, or a dialogue to consider how Parliament may wish to resource an existing office holder to utilise existing discretionary powers of Inquiry or Investigation to address a specific area of concern. The Commission has explored these options further in its 2023 paper where we suggested that the Commission could deliver a stronger monitoring function for the human rights of particular groups of people via a defined 'rapporteurship' model, aligned with greater participation of rights holders, and greater diversity in the membership of the Commission to better reflect different groups of Scottish society¹⁴.

Finally, it is important for the process to be cognisant of other legislative developments which may have an impact. For example, via the UNCRC (Incorporation) (Scotland) Act 2024, and the forthcoming Human Rights Bill, the Scottish Government has, and is exploring, further extended powers and general duties of the Scottish Human Rights Commission, the Children and Young People's Commissioner and the Scottish Public Services Ombudsman. It is not clear how these developments would interact with current proposals for new public bodies to uphold human rights of particular groups.

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?

Once established via an Act of the Scottish Parliament, it is unusual for a Commission or Commissioner to be disbanded. It is therefore vital that they should be created only once it is very clear that they are needed; the existence and application of robust criteria is a vital part of the Parliamentary scrutiny process to provide that assurance.

The test for setting out new bodies and office holders of the Scottish Parliament's Corporate Body in 2009 determined, among others, the following criteria:

Any future bodies should not duplicate a role already being carried out.

For bodies to be designated as Parliamentary Commissioners, they should meet certain criteria (principles of clarity of remit; distinction between functions; complementary; simplicity and accessibility; shared services; and accountability).

The Finance Committee had further recommended that "new proposals for office-holders should provide strong evidence that the proposer has

explored all possible opportunities to have an existing body carry out the additional function, or make use of existing resources.”

Given the variation in scale and mandate of new Commissions/ers as considered by the Parliament, it would appear that these criteria are not being applied well. Consideration might be given to a multi-Committee scrutiny process for proposals, which involves the lead policy Committee, the Public Finance and Administration Committee and the Scottish Parliament Corporate Body to assess whether these tests have been met. If they have not, then Parliament may wish to consider a definitive position on whether a proposal should proceed, or make recommendations on alternative mechanisms to achieve the policy intent.

Further, we suggest that it may be helpful to add another point to the criteria, which is to consider whether the mandate of an existing Parliamentary Commission/er could be amended to achieve the policy intent via Committee initiated amendments, or via a regular mandate review process (see Question 7 below).

Governance, accountability and scrutiny

The Commissioners under consideration as part of this inquiry are entirely separate to Government. The Scottish Parliamentary Corporate Body provides governance and oversight, and Commissioners are accountable to Parliament, including through scrutiny by the relevant Parliamentary committees.

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

Governance and assurance is strong in terms of ensuring management and spend of public funds economically, efficiently, and effectively.

The members of the Commission and the Chair provide strategic leadership of the Commission, and the Executive Director is accountable for delivery of the Commission’s Strategic Plan through the staff team and effective and efficient use of its budget. The Commission meets at least 9 times per year, and considers updates and proposals around

work programme, performance to strategy, key human rights advice and outputs from the Commission, and any key risks emerging.

The Commission has an Audit and Risk Committee in place which meets four times per year and is Chaired by an independent member of the SPCB's Audit Advisory Board (AAB).

The Executive Director is the Accountable Officer, and reports to both the Commission meetings and the Audit and Risk Committee.

The minutes of all Commission meetings and Audit and Risk meetings are published on our website.

The Commission has an annual internal audit programme to provide assurance on our corporate governance, and we are subject to an annual external audit by the Auditor General.

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

Under section 7 of the Scottish Commission for Human Rights Act 2006, the Commission must, before the beginning of each 4-year period, lay before Parliament its strategic plan, setting out information as to how the Commission proposes to fulfil its general duty during that period.

The Commission must also lay before Parliament an annual report on the exercise of its functions. The report must, in particular, include a summary of any inquiries conducted by the Commission during the reporting year, and a summary of any other activities undertaken by it during that year in pursuance of its general duty. In preparing its annual report, the Commission must comply with any directions given by the Parliamentary corporation as to the form and content of the report.

In reality, it is rare that substantial comments would be given by the SPCB on either the Commission's strategic plan or annual report. This level of scrutiny is, we believe, appropriate and strikes the correct balance between the need for oversight and scrutiny on a public body and the need for the Commission, as Scotland's National Human Rights

Institution, to remain entirely independent in its functions and decision making in line with the Paris Principles.^[1]

Members of the Commission and its Executive are held to account on delivery of activities outlined in the Annual Report by the Equalities, Human Rights and Civil Justice Committee via a public evidence session.

We suggest that it may be helpful for the lead Committee to also have a scrutiny role in respect of the budget too, as there is a disconnect at present between accountability for outcomes and finance. Currently, the SPCB is held to account by the Public Finance and Administration Committee for the budget performance of the Commission, which does not align necessarily with accountability for outcomes.

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

See answer to Question 6 above.

In respect of continuous improvement, once a Commission is established, there is little opportunity to review its mandate for effectiveness. The introduction of a regular review of office holders' general duties, powers and resources would also provide for Parliament to consider whether any elements of the mandate require updating, and to action this on the recommendations of a report of a Committee of Parliament. There is currently no mechanism for this, beyond waiting for an appropriate legislative vehicle to create an opportunity.

Value for money and effectiveness of current approach

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

This is a question for the Committee and others to judge on the basis of our collective impact, published accounts and annual reviews.

However, it would be accurate to say that duplication of costs related to the running of multiple offices would be exacerbated by the creation of many new public bodies.

To mitigate our own role in this, as of 2023/24, the Commission has a shared services agreement in place with the Scottish Public Services Ombudsman which includes shared facilities, and delivery of the transactional and reporting elements of the core corporate governance functions of finance, HR, payroll, and mandatory training

Within the current economic climate, the creation of more office holders risks a proliferation of underfunded bodies which are unable to fulfil their mandate as well as facilitating all of the governance and accountability arrangements around the use of public money as outlined in Q5 above. It would be difficult to foresee how this creates a value for money model; albeit that a shared corporate services approach would provide some opportunity for a shared central cost base.

In respect of the human rights of the people of Scotland, the ultimate test of value for money is whether the Commission is delivering an impact on improving justice in the human right system and in the progressive realisation of human rights. In this respect, the limited legal powers of the Commission compared to other NHRIs in the UK has perhaps prevented it from delivering the most effective model of human rights accountability. This may have had an impact on stakeholder awareness and confidence of the current model.¹⁵

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

As above, the budget setting and scrutinising process could be improved further by alignment with the scrutiny of performance, outcomes and future plan. At present, there is a disconnect between the assigned lead subject matter committee, and the SPCB.

This has an impact on informed decision making. In the case of the Commission, there is limited flexibility to access the resources required to enact some core elements of its existing mandate – for example, to undertake an Inquiry or interventions through the courts.

It is recognised that it would not always be prudent or possible to include such projections in a core operating budget, and that contingency funding is available for such work. However, the effect of the current system is that such requests for contingency are considered by SPCB within the same context as funding requests from other office holders to meet additional employee and corporate costs which emerge and create variance to budget in-year.

It would be helpful for the Committee to explore how better to reflect a process for considering additional costs related to using powers of accountability in a different way to general cost pressures experienced by all office holders, and for the SPCB and Public Finance and Administration Committee to be aware of this in its consideration of variance to budget in their consideration of our budget performance.

This would serve to enable the existing Commissions to further exercise independent decision making in respect of its current, and future, powers to act on human rights violations.

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?

In respect of rights-based Commissioners, there is an existing requirement not to duplicate. Section 5 of the SCHRA 2006 makes this clear¹⁶. The Commission has established Memorandum of Understanding with the Equality and Human Rights Commission (EHRC) Scotland in respect of areas of potential overlap in our respective mandates as we operate jointly in Scotland. As a result of the evolving mandated powers of the Commission, the Children and Young People's Commissioner and the Scottish Public Services Ombudsman via the UNCRC (Scotland) Act 2024 and the proposed Human Rights Bill, a formal MoU between rights based and investigatory bodies could be helpful. Should new Commissions/ers be established, similar arrangements would be sought to manage the impact of potential duplication.

More broadly however, in order to avoid duplication in the system, it is essential for Parliament in its consideration of new Commissioners to be clear on the specific functions of an office holder of Parliament, as distinct from civil society organisations which provide individual and collective advocacy work, and policy focused bodies which synthesise evidence and inform best practice.

Thereafter, for rights-based bodies, the key consideration is accountability. We encourage the Committee to consider the universality and indivisibility of human rights, and of human rights protections.

This is not to say that new bodies must never be created, nor that there is a binary option for proposed new Commissions/ers should pass or fail the Parliamentary process.

The Committee structure of the Parliament should collaborate more to consider what is necessary to strengthen the access to justice framework for rights holders, educate and embed best practice in human rights decision making across rights holders, and enhance the monitoring and visibility of the human rights of particular groups of people.

All options should be considered in this context, which include invitations for existing office holders to suggest how they may be able to address all or part of the issues raised, and how.

The Commission's June 2023 publication presented a number of models, including learning from other international NHRIs and enhance the scale of the Commission's monitoring functions to better scrutinise human rights enjoyment in Scotland of particular groups of people, aligned with a more diverse membership of the Commission, and enhanced powers to pursue accountability for all.

Alternatively, if the will of Parliament is to create new bodies, in the interests of the people we serve, it must be clear how these new office holders will interact with and inform the work of existing bodies with overarching rights-based and investigatory mandates.

For further information on any element of this response, please contact:

Jan Savage, Executive Director

Jan.savage@scottishhumanrights.com

¹ [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

² [Guide on Article 13 - Right to an effective remedy \(coe.int\)](#)

³ [Attitudes to Human Rights in Scotland 2023 \(scottishhumanrights.com\)](#)

⁴ [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

⁵ [A Stronger Human Rights Commission for Scotland \(scottishhumanrights.com\)](#)

⁶ [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)

⁷ [UN Paris Principles & Accreditation - ENNHRI](#)

⁸ [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

⁹ The Northern Ireland Human Rights Commission (Northern Ireland); and the Equality and Human Rights Commission (England and Wales)

¹⁰ [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)

¹¹ [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)

¹² [shrc-governance-review-final-report-06072023.pdf \(scottishhumanrights.com\)](#)

¹³ [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

¹⁴ [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

¹⁵ See further; [crossroads_what-next-for-human-rights-protection-in-scotland-shrc-june-2023.pdf \(scottishhumanrights.com\)](#)

¹⁶ [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)