**The Health and Social Care Alliance Scotland (the ALLIANCE)**

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# Review of the Scottish Parliamentary Corporate Body (SPCB) Supported Bodies Landscape: ALLIANCE response

**24 February 2024**

## Introduction

The Health and Social Care Alliance Scotland (the ALLIANCE) welcomes the opportunity to respond to the call for views on the Review of the Scottish Parliamentary Corporate Body (SPCB) Supported Bodies Landscape[1]. Given the very limited time made available for this call for views, we have drafted a short response. The ALLIANCE previously engaged with the Scottish Parliament about Commissioners during the Finance and Public Administration Committee's inquiry in 2024, primarily through the lens of human rights.

Whilst the ALLIANCE continues to support calls previously made for an Older People's Commissioner and a Disabled People's Commissioner, we are also aware of the significant number of proposals for Commissioners, and the concerns around resource, capacity and fragmentation.

Commissioners have an essential role to play in upholding and realising human rights. It is essential that Scotland's Commissioner landscape is effective and accessible, and that Commissioners have adequate, appropriate resources and powers. The ALLIANCE recommends that:

- A human rights based approach should be taken to selecting, measuring and demonstrating outcomes.
- Scrutiny of rights-based Commissioners by the Scottish Parliament should extend beyond subject committees and engage the whole parliament in the discussion around human rights.
- Rights based Commissioners should have a consistent set of core powers relating to policy, investigations and legal interventions.
- The Scottish Human Rights Commission (SHRC) in particular should be given an expanded remit and suite of powers, including the provision of legal advice, the right to raise proceedings in its own name, and to compel evidence.
- A "rapporteurship" model of group or rights specific Rapporteurs for the SHRC should be considered.

## Question 1: How should public bodies measure and demonstrate outcomes, and how should these outcomes be selected and prioritised?

The ALLIANCE recommends taking a human rights based approach across government and public services. Although only certain human rights treaties are currently incorporated into domestic law, the Scottish Government nonetheless has a duty to uphold a range of international conventions to which the United Kingdom is a signatory. Human rights offer an internationally established and widely recognised framework for selecting, measuring and demonstrating outcomes. The UN has developed a conceptual and methodological framework that states can use to identify and prioritise appropriate structural, process and outcome indicators. These in turn can be used to measure and demonstrate the extent to which human rights are respected, protected and fulfilled[2].

All aspects of public service provision and government decision-making bear some relation to human rights. For example, Article 19 of the UN Convention on the Rights of Disabled People (UNCRPD), “living independently and being included in the community”, has direct relevance to the provision of social care, housing, and social security. Supporting people with learning disabilities to live in their own homes would be an outcome positively associated with this right, whereas institutionalisation would negatively impact it.

Similarly, Article 26 of the UN Convention on the Rights of the Child (UNCRC) states that “every child has the right to benefit from social security”, and that this should have regard for the circumstances of the person responsible for the child. Reducing child poverty and financial stress for parents and guardians through the Scottish Child Payment would be an outcome positively associated with this right. By contrast, the restrictions on social security payments from the Two Child Limit would be an outcome negatively associated with this right.

For rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) in particular, the principles of “maximum use of

available resource", "non-regression" and "progressive realisation" apply. These likewise offer a useful means of selecting and measuring outcomes, with services and decisions that would negatively impact ICESCR rights therefore representing poor outcomes. Although these principles are only directly contained within ICESCR, they represent a sensible way to approach treaty rights as a whole.

In addition to human rights which apply internationally, outcomes should also relate to the domestic National Performance Framework (NPF) and its accompanying National Outcomes. The ALLIANCE have also recently offered input into discussions relating to the NPF[3], including noting that there was a need to more consistently embed it across the Scottish Government's work[4]. This would apply equally to both the work of Commissioners, and to how those Commissioners could monitor and evaluate outcomes.

**Question 2: To what extent is the current model of parliamentary committee scrutiny of the performance and effectiveness of how commissioners exercise their functions appropriate? How could this be improved and/or standardised?**

In broad terms, we would consider committee scrutiny to be an appropriate mechanism for evaluating the performance and effectiveness of Commissioners. Given their focus on specific subject areas, committees are likely to have the capacity and context required to properly scrutinise Commissioners within their remit, as well as to produce detailed analysis of performance. However, we feel that it would be worthwhile extending scrutiny beyond committees, particularly in the context of rights based Commissioners.

We believe that it is important that the parliament as a whole is actively engaged in ongoing discussion around human rights, and that a human rights based approach is embedded in all of the parliament's work. We recommend revisiting the 2018 report, 'Getting Rights Right', by the previous Equalities and Human Rights Committee[5]. This set out a proposed human rights 'road map' for parliament and is intended to strengthen procedures and processes, make human rights more central to

parliament's work (including scrutiny), and to be an exemplar of international best practice.

In the meantime, we would encourage parliament to consider scheduling time for committee-led debates following the conclusion of committee scrutiny. This would give all MSPs the opportunity to scrutinise reporting from Commissioners, the contributions from others including rights holders and people with lived experience, and to be kept informed as to the state of human rights in Scotland.

### Question 3: How appropriate are existing lines of accountability for SPCB supported public bodies and how does the process work in practice? What other accountability models should be considered?

The ALLIANCE does not have detailed knowledge or recommendations relating to the current lines of accountability for Commissioners. However, we would recommend that for any public body, particularly those explicitly rooted in rights, accountability mechanisms should be co-produced alongside and involve rights holders and people with lived experience.

Some of the existing Commissioners clearly involve the people they are intended to support in their work, providing both accountability and direction for their work. We note that for example the CYPCS includes "participation" as one of their five key values, and that young advisors aged 12-17 share their views to help shape the Commissioner's work, as well as having active involvement in recruitment processes[6]. We believe this is a positive approach and would suggest similar approaches could be adopted across the Commissioner landscape.

### Question 4: What do you consider the purpose of an SPCB supported Commissioner to be? How does this differ from the role of Ministers, MSPs, or other bodies?

As discussed in more detail in our response to question 5, the ALLIANCE would draw a distinction between "regulatory" (e.g. the Biometrics Commissioner) and "rights based" Commissioners (e.g. the Commissioner for Children and Young People). Due to our areas of work and expertise, our primary focus in this response is on rights based Commissioners.

In general terms, the ALLIANCE would argue that the purpose of rights-based Commissioners should be to monitor and enforce compliance with human rights and equalities frameworks, including international treaty obligations. These bodies should be independent of government, hence establishment as an SPCB supported body. By ensuring that human rights are upheld and realised, and breaches identified and remedied, Commissioners have the potential to contribute to both the wellbeing of the population in general, and to deliver savings for the public purse.

In our response to the Finance and Public Administration Committee's inquiry last year, we also noted that rights based Commissioners were often framed as "champions[7]." This is framing that the ALLIANCE has itself used when offering support to calls for new Commissioners and reflects a desire to have someone separate from existing structures that is able to hold them to account and push for change. Inherent to this framing is the idea of having a single, visible figure to take up a cause.

Independence from government and politicians in general is often a key part of this. People and organisations do not want to see the Scottish Government or MSPs "marking their own homework", and an independent SPCB supported Commissioner can be seen as suitably detached from partisan politics and from the need to adhere to government narratives.

We also noted in our prior response that calls for Commissioners were clearly arising from a pattern of service failure. For example, the proposal for the Disability Commissioner must be understood in the context of long-established inequalities experienced by disabled people and people living with long term conditions, which have been greatly exacerbated both by the COVID-19 pandemic[8] and the cost of living crisis[9].

This can create a powerful incentive to legislate for Commissioners, even where the fundamental issue is one of inadequate funding and resource. For both the Scottish Government and MSPs considering member's bills, a Commissioner can be seen as a quick or "easy" win, allowing them to be seen to take action in support of a particular group or idea, even if it would not address the root problems.

## Question 5: Are the powers/remit of existing Commissioners appropriate?

In the call for views as part of their inquiry into Scotland's Commissioner Landscape last year, the Finance and Public Administration Committee identified four categories of Commissioner: regulatory, investigatory, rights based and policy-focussed Commissioners. In our own response[10], the ALLIANCE stated that we felt that "regulatory" and "rights based" best fit the remit and purpose of Commissioners, whereas "investigatory" and "policy-focussed" were more about the powers they may have.

We suggested that the remit of "regulatory" Commissioners should be to monitor and enforce compliance with domestic legislative frameworks, standards and codes of conduct. "Rights based" Commissioners on the other hand should monitor and enforce compliance with human rights and equalities frameworks, including international treaty obligations. Human rights are an essential and applicable framework for both categories, but we nonetheless recognise there is a clear distinction between what would be expected of the Scottish Public Services Ombudsman (SPSO) versus the Scottish Human Rights Commission (SHRC), for example.

A Commissioner whose purpose is solely or largely develop and/or scrutinise policy would be at risk of a mismatch between expectations and reality. Calls for Commissioners are often couched in terms of "championing" a particular group, and it is hard to see how such an expectation could be met by a purely policy-focussed Commissioner with no powers of investigation. Similarly, it's unclear what a purely investigatory Commissioner that has no role in regulation or human rights would be meaningfully able to do with the result of its investigations.

We believe that there is a case to be made for greater consistency in both the role that Commissioners fulfil and the powers that they exercise in doing so. We note the point made by the Scottish Public Service Ombudsman that a standard model for Commissioners "is not something that would be easy to establish[11]." This may be especially true for regulatory Commissioners, which are largely outwith the ALLIANCE's area

of expertise. However, we feel that there is greater scope for consistency amongst rights based Commissioners.

For any such Commissioner to have sufficient “teeth”, we would argue that it should have investigatory powers, as well as the power to intervene in strategic litigation. We would also consider informing and shaping the development of relevant policy to be something that should be within the remit of any Commissioner. These could be considered core, default powers for all rights based Commissioners.

Beyond that core set of powers, additional powers should be considered on a case-by-case basis, as appropriate for a given Commissioner. The ALLIANCE have repeatedly called for the SHRC to be strengthened, including in our response to the proposed Human Rights Bill consultation[12]. At present, the SHRC has more limited powers than other National Human Rights Institutions (NHRIs) in the UK. In addition to the power to conduct investigations, already mentioned above, the SHRC has itself called for exploring an expansion of its mandate to include[13]:

- Providing legal advice
- Raising legal proceedings in its own name
- Conducting inquiries in less limited circumstances
- Requiring and compelling information
- Making unaccompanied and unannounced visits to any human rights duty bearer
- Holding public hearings and require duty bearers to be present
- Issuing binding guidance
- Recruiting more members of the Commission to represent more voices and experiences of Scottish society

It is important that any extension of the SHRC’s powers and mandate be accompanied by sufficient resource and sustainable funding. It is equally important to understand this funding as an investment. A strong, well-functioning NHRI that is more able to address human rights failures and abuses ultimately acts as a preventative measure, reducing the costs to the public purse over the longer term.

**Question 6: Criteria were developed by the Session 2 Finance Committee to help guide decisions on whether to create a new commissioner. These criteria (Clarity of Remit, Distinction between functions, Complementarity, Simplicity and Accessibility, Shared Services and Accountability) are considered by the Scottish Government and Members when proposing Commissioner related bills. Are these criteria currently adequate and how could they be improved?**

The ALLIANCE has supported, and continue to support the principles behind, calls by our members for roles such as an Older People's Commissioner and a Disability Commissioner. We recognise that the groups such Commissioners are intended to stand up for have often been forgotten or left behind in decision-making, and that having a powerful advocate could help make a real difference.

At the same time, we understand there has been rapid growth in the number of proposals for new Commissioners. We have paid close attention to the concerns expressed by the SPCB itself as well as the Finance and Public Administration Committee, whose inquiry into Scotland's Commissioner Landscape we participated in last year. We recognise the pressures on public finances, the limited capacity of the SPCB, and the risks of creating a confusing and fractured landscape.

In addition, as a third sector intermediary for health and social care, we can take a wider view of the landscape. Accordingly, we have started giving greater consideration and weight to the possibility of delivering on the aspirations of calls for Commissioners without necessarily creating many new public bodies. In relation to the criteria set out by the Session 2 Finance Committee, we would draw particular attention to two of the recommendations in their report:

- "that no new officeholder should be proposed unless it can be clearly demonstrated that the function cannot be carried out by an existing body."
- "that bodies with similar roles and responsibilities should be amalgamated wherever possible; the potential to pool the resources

of existing bodies (such as sharing staff) should be considered wherever possible."

Even though these recommendations arising from the criteria listed in the question are extremely clear, they have not necessarily been followed in some of the recent proposals for new Commissioners. For example, we would agree that there are currently no public bodies which specifically uphold the rights of older or disabled people and that the proposed Commissioners would fulfil those functions.

However, we would also argue that it cannot be clearly demonstrated those functions could not be carried out by the SHRC – if the SHRC was adequately resourced and organised in a way that enabled it to do so. Indeed, equipping the SHRC to carry out these functions would clearly align with the criteria to amalgamate responsibilities and pool resources. This is where a "rapporteurship" model may be especially valuable, which we discuss in more detail in our response to question 8.

All of that said, it could equally be argued that the effectiveness of the criteria only becomes clear at a Stage 1 vote on legislation. For example, several of the recently proposed Commissioners have arisen from Members' Bills. It may very well be that Parliament will collectively bear the criteria in mind and, should such bills be formally introduced, vote against Commissioners it feels go against them at stage 1.

That does not – and cannot, as a matter of democratic principle - stop individual MSPs from suggesting bills to create Commissioners in the first place. MSPs retain the right to propose and consult on such bills, and should they garner the support of enough colleagues, to introduce them and therefore necessitate parliamentary time for consideration. None of that guarantees the passage of the bill, nor does it mean that Parliament collectively is not adhering to the criteria. As noted in our response to question 4, there are strong incentives for MSPs to lodge bills to create rights based Commissioners, even where success is unlikely.

## Question 8: What should the optimal operational model and structure for commissioners look like, and what key features should it include?

The ALLIANCE does not have a position on the operational model and structures of Commissioners as a whole. With specific regards to the SHRC however, the ALLIANCE have previously suggested that a "rapporteurship" model has merits[14]. This was given as one possibility in the SHRC's 'At a Crossroads – which way now for the human rights system in Scotland?' report in 2023[15].

This model, inspired by the approach taken by NHRIs including Costa Rica, Mexico, the Netherlands and Peru, would see teams within the SHRC given a particular focus on specific groups or UN human rights treaties. They argue that this model allows for continuous and comprehensive monitoring of key human rights issues, the recruitment of champions and experts in their field, and stability in leadership combined with flexibility in resource.

We would particularly draw attention to the SHRC's specific use of the word "champion" in this section, which reflects the language used in many of the calls for Commissioners. We therefore believe this model has the potential to deliver on the principle of those calls, without the costs of establishing a range of separate Commissioners offices or accompanying risks of fragmentation, and with the benefit of building up knowledge, expertise, skills and effective ways of working within a single organisation.

This is also likely to support an intersectional approach to rights, reducing the risks of siloed working that might exist between separate Commissioner's offices. It may also be worth considering whether to formally adopt the term "Champion" rather than "Rapporteur" under this model, both to reflect the widespread use of that term in calls for commissioners and as a matter of using terminology that will be more accessible and understandable for rights holders. Alternatively, given that the SHRC already consists of multiple individual members, each of these could simply be titled a "Commissioner" within the SHRC.

The SHRC argue that this structure would not necessarily need new legislation, and it may be wise for reasons of flexibility not to enshrine organisational structure too rigidly in statute. Nonetheless, it is likely to have resource implications, albeit not nearly so much as would be required for separate Commissions. We would recommend the committee seriously consider this approach, and how best to implement and resource it.

## About the ALLIANCE

The Health and Social Care Alliance Scotland (the ALLIANCE) is the national third sector intermediary for health and social care, bringing together a diverse range of people and organisations who share our vision, which is a Scotland where everyone has a strong voice and enjoys their right to live well with dignity and respect.

We are a strategic partner of the Scottish Government and have close working relationships with many NHS Boards, academic institutions and key organisations spanning health, social care, housing and digital technology.

Our purpose is to improve the wellbeing of people and communities across Scotland. We bring together the expertise of people with lived experience, the third sector, and organisations across health and social care to inform policy, practice and service delivery. Together our voice is stronger and we use it to make meaningful change at the local and national level.

The ALLIANCE has a strong and diverse membership of over 3,700 organisations and individuals. Our broad range of programmes and activities deliver support, research and policy development, digital innovation and knowledge sharing. We manage funding and spotlight innovative projects; working with our members and partners to ensure lived experience and third sector expertise is listened to and acted upon by informing national policy and campaigns, and putting people at the centre of designing support and services.

We aim to:

- Ensure disabled people, people with long term conditions and unpaid carers voices, expertise and rights drive policy and sit at the heart of design, delivery and improvement of support and services.
- Support transformational change that works with individual and community assets, helping people to live well, supporting human rights, self management, co-production and independent living.
- Champion and support the third sector as a vital strategic and delivery partner, and foster cross-sector understanding and partnership.

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