



The Scottish Parliament  
Pàrlamaid na h-Alba

## REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

### AGENDA

3rd Meeting, 2009 (Session 3)

Tuesday 24 February 2009

The Committee will meet at 10.00 am in Committee Room 4.

1. **Review of SPCB Supported Bodies:** The Committee will take evidence from—

Professor Alan Miller, Chair of the Scottish Human Rights Commission;

and then from—

Karen Carlton, Commissioner for Public Appointments in Scotland.

2. **Review of SPCB Supported Bodies (in private):** The Committee will consider the main themes arising from the evidence.

Claire Menzies Smith  
Clerk to the Review of SPCB Supported Bodies Committee  
Room T2.60  
The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5417  
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The papers for this meeting are as follows—

**Agenda item 1**

[Scottish Human Rights Commission written evidence \(RSSB\(D\)\)](#) RSSB/S3/09/3/1

Table of recommendations - Scottish Human Rights Commission RSSB/S3/09/3/2

[Commissioner for Public Appointments in Scotland written evidence \(RSSB\(A\)\)](#) RSSB/S3/09/3/3

Table of recommendations - Commissioner for Public Appointments in Scotland RSSB/S3/09/3/4

**Agenda item 2**

Scotland's Commissioner for Children and Young People written submission RSSB/S3/09/3/5

SPICe paper (to follow) RSSB/S3/09/3/6

Scottish Public Services Ombudsman written submission RSSB/S3/09/3/7

Mr Frank French written submission RSSB/S3/09/3/8

Scottish Public Services Ombudsman written submission on Mr French's proposals RSSB/S3/09/3/9

Scottish Parliamentary Corporate Body written submission RSSB/S3/09/3/10

**Background information**

Note of meeting - Scottish Human Rights Commission RSSB/S3/09/3/11  
(P)

Note of meeting - Commissioner for Public Appointments in Scotland RSSB/S3/09/3/12  
(P)

| <b>Summary of Recommendations made</b>  | <b>SCOTTISH HUMAN RIGHTS COMMISSION</b><br><br><b>[Does recommendation apply, anything in existing legislation]</b>  | <b>SHRC written submission</b><br><br><b>[Note identity/location any evidence received to date]</b>   | <b>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</b> |
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| <b>Crerar Report</b>  | <b>Applicability</b>   | <b>Evidence to date</b>   | <b>Action to be Taken</b>  |
| <p>The unique role of external scrutiny is to provide independent assurance that services are well-managed, safe and fit-for-purpose, and that public money is being used properly.</p> | <p>The Commission's role is to promote human rights and encourage best practice in relation to devolved human rights issues in Scotland. The Commission will promote widespread awareness, understanding of, and respect for human rights; review and recommend changes to any policies or practices of any Scottish public authorities and provide advice and guidance.</p> | <p>The Crerar review pre-dated the establishment of SHRC. While the Crerar review makes no mention of human rights in Scotland, SHRC welcomes the key principles relating to role of external scrutiny.<br/>(WE/20081219/page3/Crerar Review Recommendations)</p>   |  |
| <p>Scrutiny priorities must reflect the public and user interest.</p>   | <p>The Commission has the power to conduct inquiries into the policies or practices of Scottish public authorities. The Commission may also intervene in civil proceedings before a court, except children's hearings, on an issue arising which it considers relevant to its general duty and raises a matter of public interest.</p>                                       | <p>SHRC particularly welcomes the public focus principle recommended by the Crerar review. This links closely with SHRC's commitment to working with public authorities to develop a human rights based approach for service delivery, with the aim of creating a human rights culture in Scotland that is meaningful for people in their day to day lives.</p> |  |

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|   |  | <p>SHRC will also be working directly with the people of Scotland, especially those groups in society whose human rights are not otherwise being sufficiently promoted.<br/>(WE/20081219/page3/Creerar Review Recommendations)</p>   |  |
| <p>The primary responsibility for demonstrating compliance and performance should rest with service providers.</p>  |  | <p>An important part of the work of SHRC will be to provide public authorities with the tools that they need to ensure that they are meeting their obligations in relation to human rights. This will also link in with the Creerar review principle of emphasis on performance management and self-assessment.<br/>(WE/20081219/page3/Creerar Review Recommendations)</p> |  |
| <p>External scrutiny should operate as a coherent system. The features of this should include:<br/>Strategic priorities agreed by Ministers and Parliament,</p> |  |  |  |

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| We propose a revised model of accountability where independence from Ministers is balanced by responsibility to the Parliament. Parliament should become more proactive in seeking assurance.  | The Commission is independent of the Scottish Parliament and the Scottish Government in the exercise of its functions. |   |  |
| The complexity of organisational structures is a constraint on a strategic approach to developing and delivering an appropriate scrutiny regime across public services. There is a need to remove constraints to joint working and to simplify the scrutiny governance infrastructure. |  |   |  |
| Cost/benefit analysis should become a routine element of any decisions about the use of external scrutiny; and Scrutiny bodies should report to [Ministers and] the Parliament against cost and impact   |  |   |  |

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| measures.   |   |  |  |
| <p>All reviews of specific inspection and regulatory functions should also assess the scope for amalgamating bodies with common interests, re-allocating responsibilities to one organisation where there are unnecessary direct overlaps and opportunities to share resources (including staff) to deal with overlaps.</p> |   | <p><i>SHRC response to SPCB proposal</i></p> <p>The proposed Rights Body would consist of the functions of SCCYP and SHRC. The proposal is based on a continued commitment to the distinct functions of the current bodies as identified by Parliament, but delivered by a single body. The SPCB has acknowledged that consolidation would not necessarily result in a reduction of the costs necessary to deliver the functions.</p> <p>SHRC considers that it would be preferable that any changes to current arrangements be based on a thorough evaluation of current arrangements for the promotion and protection of human rights in Scotland. The mandate of the SCHR Act</p> |  |

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|  |  | <p>extends to the promotion and protection of all human rights of everyone in Scotland.</p> <p>In the view of the SHRC the Committee should consider:</p> <ul style="list-style-type: none"> <li>• Whether the promotion and protection of children's rights requires a distinct approach</li> <li>• Whether other marginalised groups would be adversely affected by any changes, bearing in mind the statutory duty of SHRC to adequately promote and protect the rights of all those within society whose rights are not otherwise being sufficiently promoted</li> <li>• How the practical implications, including resources and relations with relevant stakeholder groups, as well as the SHRC's ongoing consultation on our strategic plan will be effected.</li> </ul> |  |

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|  |   | <p>It is of paramount importance that the independence of SHRC in determining priorities based on evidence of the current realisation of human rights in Scotland is protected.</p> <p>As with the current bodies, it would be important to ensure that any new Rights Body is set up on the basis of the Paris Principles and is accountable to the Parliament for each of its distinct functions. Additional budgetary controls, such as allowing the Parliament to direct the proposed Rights Body to allocate specific resources to specific functions within its remit would compromise the independence and therefore international recognition of the Body.<br/>(WE/20081219/page6/SPCB evidence)</p> |   |



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| <b>Sinclair Report</b>   |  |  |   |
| moving complaints handling from small to large offices produce efficiencies of scale (last bullet) |  |  |   |
| Waterwatch complaints function to SPSO (para 74)   |  |  |   |
| Prison Complaints Commissioner to SPSO (para 74)   |  |  |   |
| Other bodies for transfer to SPSO (para 74)  |  |  |   |
| SPSO to oversee fit for purpose complaints system (para 75)  |  |  |   |
| SPSO to be suitably accountable and also appropriately independent (See para 82)                   |  |  |   |
| Enforcing compliance with SPSO decisions (para 83)   |  |  |   |
| role for SPSO as design authority (para 84)  |  |  |   |
| A single set of principles for all complaints handling (para 86)                                   |  |  |   |
| How is the SPSO authority and resources for SPSO to oversee fit for purpose complaints function    |  |  |   |

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| (para 88)  |  |   |   |
| Mediation to be mandatory before a complaint is allowed to progress to the SPSO (or other review body) |  |   |   |
| Resourcing SPSO to cater for new functions   |  |   |   |
| <b>Finance Committee</b>   |  | The Finance Committee report pre-dated the passing of the SCHR Act and many of the recommendations of the Finance Committee were either contained in the SCHR Act as introduced or accepted as amendments to the SCHR Act. These include provisions relating the requirement to lay a strategic plan, giving the SPCB power of direction over location decisions, and an explicit requirement on SHRC to consider sharing of services.<br>(WE/20081219/page3/Finance Committee Recommendations) |   |

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| <p>Parliament to determine what the format of any information it requires from a commissioner should be if it chooses to do so, namely the form and content of annual reports</p> |  | <p>In evidence to the Finance Committee, the Procedures Committee raised concerns that ‘if the Parliament was able to “direct” this could be seen to impact on the independence of the office.’</p> <p>In the SCHR Act, the power of direction is given to the SPCB as to the form and content of SHRC’s annual report. The SPCB has not yet made any such direction, but SHRC does not consider that this power of direction compromises its independence insofar as directions relate to the structure of the report, rather than directing the focus of SHRC activities. (WE/20081219/page3/Finance Committee Recommendations)</p> | <p>SCHR must lay an annual report before the Parliament on the exercise of its functions. The report must summarise any inquiries conducted and any other activities.</p> <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p> |
| <p>Powers of direction should be given to the SPCB for budget setting</p>   |  | <p>The SCHR Act provides that SHRC is required to put proposals for its use of resources</p>  | <p>The SPCB is to pay the remuneration and allowances of each member of the SCHR and</p>   |

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|  |  | <p>and expenditure to the SPCB for approval. Proposals need to include consideration of sharing premises, staff, services or other resources with other public bodies or officeholders. The SPCB is required to pay any expenses 'properly' incurred by SHRC, but those expenses must be approved in advance through the budget proposal.</p> <p>SHRC considers that this approach provides the correct level of financial accountability without impacting its independence. However, any additional powers of direction over budget setting would in the view of the SHRC compromise our operational independence and international standing in accordance with the Paris Principles, particularly Principle B2 which states:</p> | <p>any expenses incurred by the SCHR in the exercise of its functions, so far as those expenses are not met out of sums received and applied for by the SCHR to meet expenses incurred by it in publishing or otherwise disseminating information or ideas, providing advice or guidance, conducting research or providing education or training.</p> <p>The SPCB must designate a member of the SCHR or a member of staff as the 'accountable officer' with responsibility for signing accounts, ensuring the propriety of finances and ensuring that resources are used economically, efficiently and effectively.</p> <p>Before the start of each financial year, the SCHR must prepare proposals for its use of resources</p> |

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|  |   | <p>“The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.”</p> <p>(WE/20081219/page4/Finance Committee Recommendations)</p> | <p>and expenditure during the year and send these to the SPCB for approval. In terms of paying any expenses incurred by the SCHR in the exercise of its functions (as outlined in the above paragraph), the SPCB does not require to pay those which exceed or are otherwise not covered by the financial proposals (but it may choose to do so).</p> |
| <p>The SPCB to have power of approval on premises location</p> |   | <p>many of the recommendations of the Finance Committee were either contained in the SCHR Act as introduced or accepted as amendments to the SCHR Act. These include provisions relating to giving the SPCB power of direction over location decisions</p> <p>(WE/20081219/page3/Finance Committee Recommendations)</p>   | <p>The SPCB was expressly given the power to determine the initial location of the SCHR’s office premises. For any future office, the SCHR’s determination of the location of its office premises is subject to the approval of the SPCB.</p>   |

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| <p>Provisions requiring a three year rolling business plan and strategic plans</p> |   | <p>Section 7 of the SCHR Act requires SHRC to produce a strategic plan every 4 years. The plan must set out how SHRC intends to fulfil our general duty during that period. In particular it must set out:</p> <ul style="list-style-type: none"> <li>(a) the Commission's objectives and priorities for the period to which the plan relates,</li> <li>(b) a statement of any areas of the law which it proposes to review under section 4(1)(a) during that period,</li> <li>(c) details of the other activities or kinds of activities which it proposes to undertake during that period, and</li> <li>(d) a timetable for each review and other activity or kind of activity referred to in paragraphs (b) and (c).</li> </ul> <p>SHRC is required to provide a</p> | <p>The SCHR must, before the beginning of each four year period, lay before the Parliament a strategic plan, setting out information as to how the SCHR proposes to fulfil its general duty during that period. In particular, the strategic plan must set out: the SCHR's objectives and priorities for the period to which the plan relates; a statement of any areas of the law which it proposed to review; details of the other activities or kinds of activities which it proposes to undertake and a timetable for each review and activity.</p> <p>Before the strategic plan is laid before Parliament, the SCHR must provide a draft of it to, and invite comments on it from the SPCB and such other persons as the SCHR considers appropriate.</p> |

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|   |   | <p>draft of strategic plan to the SPCB for comment prior laying it before Parliament. SHRC can also consult any other person that we feel is appropriate.</p> <p>SHRC considers that this is a useful process as it allows us to engage with the Parliament and the people of Scotland in a formal process of determining the priorities for our work. While we must consult the SPCB, responsibility for the strategic plan remains with SHRC, so independence is not compromised.</p> <p>It is not clear whether the Finance Committee recommendation refers to a strategic plan which would set the general direction for SHRC during the medium term, or to an operational plan which would set the objectives, activities</p> | <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p>   |

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|  |  | <p>and budget of a shorter period within the strategic planning cycle.</p> <p>It is the view of SHRC that it would be desirable to ensure that operational planning periods would coincide with budget periods whether annual, biennial or triennial. In principle we would favour a longer period of secured budget.</p> <p>It may be desirable to have a strategic plan that covers a longer period, at least 5 years. This would allow SHRC to engage in a process of consultation and development at the beginning of the process, and a full evaluation at the end of the process, while allowing a suitable length of time to focus on the operational element of the plan. This could be accompanied by appropriate</p> |  |



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|   |  | oversight by the Parliament through the annual reporting cycle.<br>(WE/20081219/pages4-5/Finance Committee Recommendations) |   |
| SPCB prior approval for staff numbers, terms and conditions |  |   | Subject to the approval of the SPCB regarding both numbers and terms and conditions of staff, the SCHR may appoint staff. Again, with the approval of the SPCB, the SCHR may make arrangements for the payments of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff.<br><br><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i> |
| Consent from SPCB to acquire and disposal of land           |  |   | The SCHR may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of its   |

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|  |  |   | <p>functions. In particular, the SCHR may enter into contracts and, with the consent of the SPCB, acquire and dispose of land.</p> <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p>  |
| Power to SPCB to direct sharing of services as appropriate/necessary |  | The SCHR Act requires SHRC to explore the sharing of resources in relation to all of its work. To date this has been done by co-locating our office and working with the Parliament to access shared IT resources.<br>(WE/20081219/page5/Finance Committee Recommendations) | The SCHR may enter into arrangements with any other public body or office-holder for the sharing of premises, staff, services or other resources. In considering its requirements as to premises, staff, services and other resources, the SCHR must have regard, with a view to ensuring the economic, efficient and effective use of resources, to the desirability of entering into such arrangements. The Commission is co-located with the Equality and Human Rights Commission in Glasgow. The Commission is currently |

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|  |   |  | <p>supported in its work by 8 members of staff.</p> <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p>   |
| <p>Parliamentary committees to take evidence more regularly from commissioners and ombudsman and establish memoranda of understanding with the relevant commissioners/ombudsman to ensure evidence sessions on annual reports.</p> |   | <p>SHRC is required by SCHR Act to lay strategic plans and annual reports before Parliament. The Parliament and its Committees have the power to take evidence from SHRC and we will engage with Parliament on human rights issues.</p> <p>(WE/20081219/page5/Finance Committee Recommendations)</p> | <p><i>Not appropriate for inclusion in legislation. Cover in Committee report?</i></p>   |
| <p>Independent assessor to oversee the procedures of reappointing commissioners and ombudsman.</p>   | <p>The Chair's first term in office will end on 2 March 2013 and the 3 part-time members on 30 April 2012.</p> <p>Each member of the Commission is eligible for re-appointment, but re-appointment for a third term is not competent.</p> | <p>SHRC agrees with this recommendation.</p> <p>(WE/20081219/page5/Finance Committee Recommendations)</p> <p><i>Term of office</i></p> <p>There are clear advantages of a longer single term of office without the need for</p>  | <p>The member appointed to chair the SCHR is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament. The other members (of which there can be up to a maximum of four) are appointed by the SPCB.</p> |

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|   |   | <p>reappointment. While we consider that the reappointment process adopted into the Standing Orders of the Parliament following the Procedures Committee inquiry into procedures relating to Crown appointments in 2006 is robust, we consider that a single term better protects the independence of the officeholder.</p> <p>In relation to the length of time, it is important that an individual is in post long enough to meet the duties of their empowering legislation in a meaningful way. Under the SCHR Act members of SHRC can serve for a total of 10 years.</p> <p>The chair of SHRC was appointed in 2007 to serve a 5 year term, the other members of SHRC were appointed in 2008 to serve a 4 year term. Each of the members</p> | <p>The period of office of each member of the SCHR is determined by the SPCB, but it cannot be for more than five years. Each member is eligible for re-appointment to the same office (whether the re-appointment is for a consecutive period or otherwise), but re-appointment for a third period is not competent.</p> <p><i>Outstanding Committee decision</i></p> |

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|  |  | <p>of SHRC has the option of seeking reappointment for an additional term. We note that the SPCB referred to transitional arrangements for existing officeholders if the terms of office were changed. We consider that these transitional arrangements should allow existing officeholders to continue on the basis on which they were appointed.</p> <p>Alternatively, we would support a transitional arrangement which allowed existing officeholders to have their appointed reaffirmed for a single term equal in length to the remainder of the existing term and subsequent term left to them had they sought reappointed under current arrangements.</p> <p>It is important to retain provisions for the removal of an officeholder in situations where they breach their terms of appointment or the</p> |  |

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|   |   | Parliament loses confidence in the officeholder and passes a resolution to that effect.<br>(WE/20081219/page7/SPCB evidence)  |  |
| The Committee considers that there is a strong case for integrating the Human Rights Commission with the SPSO.  |   | The Finance Committee report recommended that the functions of SHRC should be included within the remit of the Scottish Public Services Ombudsman. Amendments to this effect were lodged at Stage 2 and at Stage 3 of the SCHR Act. These amendments were rejected by Parliament in favour of the establishment of a new and independent Commission.<br>(WE/20081219/page3/Finance Committee Recommendations) | <i>Rejected by the Parliament during the Human Rights Bill.</i>                                  |
| The Committee endorses the approach taken in New Zealand and recommends that future proposals for representatives of specific interest groups within society should not be designated |   |   | <i>Not applicable for this Bill.</i>   |

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| as Parliamentary commissioners.   |  |  |   |
| <b>SCPA Report</b>  |  |  |   |
| The Auditor General for Scotland should be appointed on a fixed term. Legislation should be amended to provide that, in future, the Auditor General for Scotland is appointed for a single non-renewable term of eight years. |  |  |   |
| Counter-productive to be unduly restrictive on whether the holders of any particular posts should be ineligible for appointment as Auditor General.   |  |  |   |
| A presumption that the Auditor General will hold no other positions of any kind should be included by the SPCB as a term and condition for any future Auditor General.  |  |  |   |
| While still in post, an Auditor General should not be permitted to apply for a post with any body which is subject to audit by the  |  |  |   |

| <b>Summary of Recommendations made</b>  | <b>SCOTTISH HUMAN RIGHTS COMMISSION</b><br><br>[Does recommendation apply, anything in existing legislation] | <b>SHRC written submission</b><br><br>[Note identity/location any evidence received to date] | <b>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</b> |
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| Auditor General, or which is associated with the Auditor's General's role.  |  |  |  |
| The SPCB should specify at the start of each fixed term a mechanism that will be used throughout the fixed term to determine routine increases in the salary.   |  |  |  |
| Difficulty in the event of the incapacity of an Auditor General, where temporary provision may need to be made for certain functions of the post to be delegated.   |  |  |  |
| Formal statutory provision for the position of Deputy Auditor General   |  |  |  |
| The SCPA considers that it is essential to retain the functions and processes of the Accounts Commission, namely considering the output of the audit of local authorities and joint boards and, where necessary, making |  |  |  |



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| recommendations to Scottish Ministers. However, the SCPA believes that there may be merit in delivering these functions within a simplified audit structure. |  |  |   |
| statements of the Auditor General (and of staff of Audit Scotland when acting on his/her behalf) to have absolute privilege                                  |  |  |   |
| <b>Any other proposals received/considered</b>   |  |  |   |
|  |  | <i>Model of operation</i><br>SHRC is currently the only officeholder which functions as a body corporate. There was considerable discussion during the passage of the SCHR Act as to whether a named individual or a body corporate was the most appropriate model. Ultimately the Parliament determined that the body corporate model was better suited to a Human Rights |   |

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|  |   | <p>Commission.</p> <p>In the view of SHRC the current model ensures greater accountability in the operation of SHRC, diversity in backgrounds and experience of Commissioners, appropriate to our mandate. Our early experience underlines the values of the Paris Principles which emphasis the importance of ensuring diversity within a National Human Rights Institution. (WE/20081219/page6/SPCB evidence)</p> <p><i>Legal Status</i><br/>SHRC is a body corporate and therefore not in the same situation as individual officeholders whose legal status may be unclear. However, we do support the proposal to clarify the legal position and to ensure that</p> |   |

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|  |  | officeholders are properly indemnified. The Paris Principles strongly recommend that provisions be included in national law to protect legal liability for actions undertaken in the official capacity of a NHRI.<br>(WE/20081219/page7/SPCB evidence) |  |

| <p style="text-align: center;"><b>Summary of Recommendations made</b></p>   | <p style="text-align: center;"><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p>   | <p style="text-align: center;"><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>   | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
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| <p style="text-align: center;"><b>Crerar Report</b></p>   | <p style="text-align: center;"><b>Applicability</b></p>   | <p style="text-align: center;"><b>Evidence to date</b></p>   | <p style="text-align: center;"><b>Action to be Taken</b></p>                                     |
| <p>The unique role of external scrutiny is to provide independent assurance that services are well-managed, safe and fit-for-purpose, and that public money is being used properly.</p> |   |  |  |
| <p>Scrutiny priorities must reflect the public and user interest.</p>   | <p>The Commissioner is responsible for preparing and publishing a Code of Practice for Ministerial appointments to public bodies to ensure that appointments are made on merit after fair and open competition.</p> |  |  |
| <p>The primary responsibility for demonstrating compliance and performance should rest with service providers.</p>  |   | <p><u>The future of regulation</u><br/>I support the view of the Crerar Review that external scrutiny can act as a catalyst for improvement and that primary responsibility for improvement must lie with the service provider itself. In the case of public appointments,</p> |  |

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|   |   | <p>responsibility must lie with the Scottish Government. There is a unique aspect to the scrutiny carried out by my office, in that we provide a system of contemporaneous advice and regulation through the involvement of an OCPAS Assessor in every appointment round. As appointments cannot easily be revoked once they have been made – at least not without damaging the reputation of the appointee, the public body involved and the appointments process itself – the OCPAS Assessor’s involvement is essential to safeguard the public’s interest in fairness and transparency. Their involvement also reduces the need for retrospective, paper-based audit. I am working towards an</p> |  |

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|   |   | <p>increasingly flexible and proportionate framework of regulation, which encourages the Scottish Government to take greater responsibility for self-assessment and continuous improvement.</p> <p>(WE/20081217/page2/para9)</p> |   |
| <p>External scrutiny should operate as a coherent system. The features of this should include: Strategic priorities agreed by Ministers and Parliament,</p> | <p>The Commissioner oversees Ministerial compliance of the Code and informs Parliament if the Code is breached and must promote equal opportunities and diversity for appointments by preparing and publishing a strategy in consultation with the Parliament and the Scottish Ministers.</p> |  |   |
| <p>We propose a revised model of accountability where independence from Ministers is balanced by responsibility to the Parliament. Parliament should</p>    | <p>The Commissioner is independent of the Scottish Parliament and Scottish Government in the exercise of her functions.</p>   |  |   |

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| <p>become more proactive in seeking assurance.</p>  |  |  |   |
| <p>The complexity of organisational structures is a constraint on a strategic approach to developing and delivering an appropriate scrutiny regime across public services. There is a need to remove constraints to joint working and to simplify the scrutiny governance infrastructure.</p> |  | <p>Compliance burden and collaborative working<br/>The Committee may be interested to note that my office is already working collaboratively with the Equalities and Human Rights Commission (EHRC), the Scottish Government and chairs of public bodies to drive forward <i>Diversity Delivers</i>, my equal opportunities strategy for public appointments in Scotland. A short summary of the strategy is provided as Annex 2 to this paper; the strategy itself is provided as Annex 3. Equality issues (including the scrutiny of public sector equality duties) are integrated into the regulatory role of my office. In this way, public appointments are subject to one system of scrutiny instead of two.</p> |   |

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| <p>Cost/benefit analysis should become a routine element of any decisions about the use of external scrutiny; and Scrutiny bodies should report to [Ministers and] the Parliament against cost and impact measures.</p>   |  | <p>(WE/20081217/page3/para11)</p>  |   |
| <p>All reviews of specific inspection and regulatory functions should also assess the scope for amalgamating bodies with common interests, re-allocating responsibilities to one organisation where there are unnecessary direct overlaps and opportunities to share resources (including staff) to deal with overlaps.</p> |  | <p><u>Alternative structures for SPCB supported bodies</u></p> <p>I am aware that the SPCB has proposed reducing the number of supported bodies from six to three, thereby merging the role of Commissioner for Public Appointments into a broader <i>Complaints and Standards</i> body. Until further details are supplied by the SPCB I find it difficult to comment in any depth, however, I have some concerns about how</p> |   |



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|   |  | <p>these proposals might operate in practice.</p> <p>My overriding concern when considering the SPCB's proposal is that administrative streamlining does not come at the expense of operational effectiveness and public benefit. I note that options for the governance arrangements for the new bodies are a single officeholder or a body corporate in the form of a Commission with a chair and perhaps 3 or 4 other board members. Amongst other issues, this raises questions about where expertise and authority would lie.<br/>(WE/20081217/pages4-5/paras16-17)</p> <p>An alternative to the SPCB's proposals is the option of</p> |   |

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|  |   | retaining individual posts and functions whilst maximising the opportunities for shared services and – where appropriate accommodation. In this model back office functions would be streamlined without compromising the independence and authority of office holders or diluting their functional expertise.<br>(WE/20081217/page5/para18) |  |
| <b>Sinclair Report</b>   |   |  |  |
| moving complaints handling from small to large offices produce efficiencies of scale (last bullet) |   |  |  |
| Waterwatch complaints function to SPSO (para 74)   |   |  |  |
| Prison Complaints Commissioner to SPSO (para 74)   |   |  |  |
| Other bodies for transfer to SPSO (para 74)  |   |  |  |
| SPSO to oversee fit for purpose  |   |  |  |

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| complaints system (para 75)   |   |  |  |
| SPSO to be suitably accountable and also appropriately independent (See para 82)                          |   |  |  |
| Enforcing compliance with SPSO decisions (para 83)  |   |  |  |
| role for SPSO as design authority (para 84)   |   |  |  |
| A single set of principles for all complaints handling (para 86)  |   |  |  |
| How is the SPSO authority and resources for SPSO to oversee fit for purpose complaints function (para 88) |   |  |  |
| Mediation to be mandatory before a complaint is allowed to progress to the SPSO (or other review body)    |   |  |  |
| Resourcing SPSO to cater for new functions  |   |  |  |
| <b>Finance Committee</b>  |   |  |  |
| Parliament to determine what the  |   |  | There is no requirement to   |

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| <p>format of any information it requires from a commissioner should be if it chooses to do so, namely the form and content of annual reports</p> |   |  | <p>prepare strategic plans. The PA Commissioner must lay an annual report before Parliament on the exercise of the functions of that office.</p>  |
| <p>Powers of direction should be given to the SPCB for budget setting</p>  |   |  | <p>SPCB pays: the salary and allowances of the PA Commissioner; any expenses incurred by the PA Commissioner in the exercise of the PA Commissioner's functions; and any sums payable in respect of any person who is appointed as acting Commissioner or who has ceased to hold the office of acting Commissioner. The SPCB must designate the PA Commissioner or a member of staff as the 'accountable officer' with responsibility for signing accounts, ensuring the propriety of finances and ensuring that resources are used economically,</p> |

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|   |   |  | efficiently and effectively.  |
| The SPCB to have power of approval on premises location                     |   |  | There is no provision regarding the location of the PA Commissioner's office.   |
| Provisions requiring a three year rolling business plan and strategic plans |   |  | There is no requirement to prepare strategic plans. The PA Commissioner must lay an annual report before Parliament on the exercise of the functions of that office.  |
| SPCB prior approval for staff numbers, terms and conditions                 |   |  | Subject to the consent of the SPCB as to numbers only, the PA Commissioner may appoint staff and may determine their terms and conditions. The PA Commissioner may, with the approval of the SPCB, make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff. Those in employment |

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|  |   |  | <p>with the PA Commissioner are eligible for membership of the Civil Service Pension Scheme.</p> <p>The PA Commissioner may appoint assessors to assist the PA Commissioner in the exercise of the office's functions. The PA Commissioner may, with the approval of the SPCB, pay to any assessor such fees and allowances as the PA Commissioner may determine.</p> <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p> |
| <p>Consent from SPCB to acquire and disposal of land</p> |   |  | <p>There is no provision regarding general powers.</p> <p><i>Agreed consistent approach required per Human Rights</i></p>  |

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|   |  |   | <p><i>legislation. Committee Bill</i></p>  |
| <p>Power to SPCB to direct sharing of services as appropriate/necessary</p> |  | <p>In my evidence to the earlier inquiry by the Finance Committee I indicated my support for the recommendation that office holders share services. Whilst I acknowledge it is possible to share services whether or not office holders share accommodation, I am also in favour of sharing accommodation. Since my appointment I have explored several opportunities to share accommodation and services with other public sector bodies. Indeed I have remained in short-term leased accommodation for the last four years to enable such a move. I can see many benefits in sharing accommodation and core services with other supported</p> | <p>There is no provision regarding the sharing of premises, staff or other resources.</p> <p><i>Agreed consistent approach required per Human Rights legislation. Committee Bill</i></p> |

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|  |  | <p>bodies, but also invite the Committee to consider that co-location may not be essential for every shared service. The provision of external financial and legal advice, for example, could be shared by the supported bodies without the need for co-location. The Committee may also be interested to note that most of the SPCB supported bodies already participate in a Commissioners' Operational Group which meets regularly to share experience and practice issues in core areas such as pensions, financial reporting, human resources and risk management.</p> <p>(WE/20081217/page6/para20)</p> |   |
| <p>Parliamentary committees to take evidence more regularly from commissioners and ombudsman</p> |  | <p>I support the proposal to take evidence on my Annual Report and I have already approached</p>  | <p><i>Not appropriate for inclusion in legislation. Cover in Committee report?</i></p>                  |



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| <p>and establish memoranda of understanding with the relevant commissioners/ombudsman to ensure evidence sessions on annual reports.</p> |  | <p>the Standards, Procedures and Public Appointments Committee to discuss regular updates on my work for the Committee.<br/>(WE/20081217/page5/para19)</p> |  |
| <p>Independent assessor to oversee the procedures of reappointing commissioners and ombudsman.</p>                                       |  |  | <p>The PA Commissioner is an individual appointed by Her Majesty, on the nomination of the Scottish Parliament. The PA Commissioner's term of office is determined by the SPCB, but may not exceed five years.</p> <p>A person is eligible for re-appointment; however, a person may be appointed as PA Commissioner for no more than 3 periods of office and appointment for a third period is competent only if, by reason of special circumstances, such appointment is desirable in the public interest.</p> |

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|   |   |   | <i>Outstanding Committee decision</i>  |
| The Committee considers that there is a strong case for integrating the Human Rights Commission with the SPSO.  |   |   | <i>Rejected by the Parliament during the Human Rights Bill.</i>                                  |
| The Committee endorses the approach taken in New Zealand and recommends that future proposals for representatives of specific interest groups within society should not be designated as Parliamentary commissioners. |   |   | <i>Not applicable for this Bill.</i>   |
| <b>SCPA Report</b>  |   | I note with interest the SCPA's recommendations and recognise that useful comparisons can be drawn between the terms and conditions of the Auditor General and those of other office-holders supported by the SPCB. My comments are made in relation to my own post as Commissioner for |  |

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|  |   | Public Appointments in Scotland. (WE/20081217/page1/para2)   |  |
| <p>The Auditor General for Scotland should be appointed on a fixed term. Legislation should be amended to provide that, in future, the Auditor General for Scotland is appointed for a single non-renewable term of eight years.</p> |   | <p><u>Term of appointment</u><br/>Currently, appointment to the post of Commissioner is made for an initial term of up to five years, renewable for one further term. I note the SCPA's recommendation of a single, non-renewable term of appointment for the role of Auditor General. I believe a similar arrangement is appropriate for the role of Commissioner. This would ensure the Commissioner could operate free of any perception that his/her judgements might be influenced by a wish to secure re-appointment.</p> <p>The SCPA has recommended a single term of eight years for the post of Auditor General. The length of the term for the</p> |  |

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|  |   | <p>Commissioner for Public Appointments should be sufficient to ensure quality candidates are attracted to apply and to allow the post-holder the necessary time to become established and to embark upon major projects, in full confidence that they could be completed within the term of office. Given the part-time nature of the Commissioner's role, I believe eight to ten years in office is an appropriate term.</p> <p>The Committee may, however, consider it appropriate to retain the option of re-appointment. In this event, the recommendations made by the Procedures Committee to ensure any reappointment decision is not automatic and is based on scrutiny of performance provide a</p> |  |

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|  |  | <p>sound basis for reappointment. (WE/20081217/page1/paras3-5)</p>   |   |
| <p>Counter-productive to be unduly restrictive on whether the holders of any particular posts should be ineligible for appointment as Auditor General.</p>   |  |  |   |
| <p>A presumption that the Auditor General will hold no other positions of any kind should be included by the SPCB as a term and condition for any future Auditor General.</p>  |  |  |   |
| <p>While still in post, an Auditor General should not be permitted to apply for a post with any body which is subject to audit by the Auditor General, or which is associated with the Auditor's General's role.</p> |  | <p><u>Future employment</u><br/>Currently, the Commissioner is disqualified from any form of appointment or employment with any of the public bodies within his/her jurisdiction for a period of three years after leaving post. In effect, this applies to most public bodies in Scotland. This</p> |   |

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|   |  | <p>restriction prevents public bodies from benefiting from experience gained by the post-holder and may discourage potential applicants. This is particularly true of those people who will not have reached retirement age when their term of office is due to end. This restriction therefore has the potential to limit the diversity and pool of applicants applying for the post.</p> <p>I would support an alternative approach, similar to that recommended by the SCPA for the Auditor General, whereby no restriction is made on the Commissioner's employment after his/her term has ended, but the Commissioner is prohibited from applying for a role with a body subject to his/her jurisdiction until</p> |   |

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|  |   | <p>after s/he has left office. I would also support the SCPA recommendation that the terms and conditions of the post should compensate for the gap in employment that would result from this provision.<br/>(WE/20081217/page2/paras6-7)</p>   |  |
| <p>The SPCB should specify at the start of each fixed term a mechanism that will be used throughout the fixed term to determine routine increases in the salary.</p> |   | <p><u>Salary</u><br/>I note the SCPA's recommendation in relation to determining the appropriate salary for the Auditor General and the Audit Scotland recommendations that the SPCB establish a Remuneration Committee to consider the remuneration of office holders. It would be beneficial for the salary of the Commissioner for Public Appointments in Scotland to be benchmarked against the remuneration offered to the</p> |  |

| <p align="center"><b>Summary of Recommendations made</b></p>   | <p><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p> | <p><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>  | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
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|  |   | <p>Commissioners for Public Appointments in Northern Ireland and in England and Wales. While some adjustments may be appropriate to take account of variances in the roles, benchmarking against the Commissioner's counterparts in other jurisdictions would ensure that the role in Scotland continues to attract the appropriate calibre of applicants.</p> <p>(WE/20081217/page2/para8)</p> |  |
| <p>Difficulty in the event of the incapacity of an Auditor General, where temporary provision may need to be made for certain functions of the post to be delegated.</p> |   |   |  |
| <p>Formal statutory provision for the position of Deputy Auditor General</p>   |   |   |  |



| <p align="center"><b>Summary of Recommendations made</b></p>  | <p><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p><b>[Does recommendation apply, anything in existing legislation]</b></p> | <p><b>OCPAS written submission</b></p> <p><b>[Note identity/location any evidence received to date]</b></p>                     | <p><b>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</b></p> |
|---|--|---|---|
| <p>The SCPA considers that it is essential to retain the functions and processes of the Accounts Commission, namely considering the output of the audit of local authorities and joint boards and, where necessary, making recommendations to Scottish Ministers. However, the SCPA believes that there may be merit in delivering these functions within a simplified audit structure.</p> |  |   |   |
| <p>statements of the Auditor General (and of staff of Audit Scotland when acting on his/her behalf) to have absolute privilege</p>  |  |   |   |
| <p><b>Any other proposals received/considered</b></p>   |  |   |   |
|   |  | <p><u>Simplifying regulation</u><br/>While it is clearly for Scottish Ministers and the Scottish Parliament to decide which</p> |   |

| <p style="text-align: center;"><b>Summary of Recommendations made</b></p> | <p style="text-align: center;"><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p> | <p style="text-align: center;"><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>   | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
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|   |   | <p>bodies should be subject to the Commissioner's jurisdiction, I have been struck by the confusion caused to members of the public by the fact that appointments to some public bodies are regulated and others not. Indeed, ex-OCPAS Assessors are often engaged as consultants in unregulated appointment rounds, to provide some independent assurance to the public that is otherwise lacking. The Committee may consider it useful to explore the basis on which bodies are brought within the jurisdiction of the Commissioner (or any new body resulting from this inquiry) and whether the public interest would be served by making other bodies subject to the same proportionate system of</p> |  |

| <p style="text-align: center;"><b>Summary of Recommendations made</b></p> | <p style="text-align: center;"><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p> | <p style="text-align: center;"><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>  | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
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|   |   | <p>regulation.<br/>(WE/20081217/page3/para10)</p> <p><u>Induction and familiarisation</u><br/>At present, there is no provision for induction or familiarisation for the role of Commissioner. While it would clearly be inappropriate for the SPCB to direct an independent office-holder on how to carry out his/her functions, it would be beneficial for newly appointed office-holders to be inducted on the mechanics of their relationship with the Scottish Parliament. Currently, the only available guidance is contained in the founding legislation for each office, the Scottish Public Finance Manual and the financial memorandum with the SPCB. A robust and structured induction and familiarisation process would</p> |  |

| <p><b>Summary of Recommendations made</b></p> | <p><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p><b>[Does recommendation apply, anything in existing legislation]</b></p> | <p><b>OCPAS written submission</b></p> <p><b>[Note identity/location any evidence received to date]</b></p>   | <p><b>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</b></p> |
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|   |  | <p>ensure a smooth transition between an office-holder and their successor and would speed the process of a new Commissioner becoming established in the post. It would also encourage applicants from outside the public sector, who may have substantial skills to offer but who may not be familiar with parliamentary processes.<br/>(WE/20081217/page3/para12)</p> <p><u>Legal status and indemnity</u><br/>I welcome the SPCB's intention to address the Commissioner's personal liability for contracts. It is important that the functions and staff of the office are protected when a Commissioner leaves and that the successor inherits their obligations and liabilities.<br/>(WE/20081217/page4/para13)</p> |   |

| <p align="center"><b>Summary of Recommendations made</b></p> | <p><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p> | <p><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>   | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
|--|---|--|--|
|  |   | <p><u>Statutory powers</u><br/> The Public Appointments and Public Bodies etc. (Scotland) Act 2003 (the Act) requires the Commissioner to prepare and publish a strategy to ensure equal opportunities in public appointments. However, the Commissioner has no statutory power to ensure this strategy is implemented and no formal mechanism exists to report any failure or refusal to implement the strategy. The Scottish Parliament's Equal Opportunities Committee has already indicated its interest in taking evidence from the Scottish Ministers on their progress in implementing the strategy. I would support the introduction of a power of enforcement for the</p> |  |

| <p><b>Summary of Recommendations made</b></p> | <p><b>COMMISSIONER FOR PUBLIC APPOINTMENTS IN SCOTLAND</b></p> <p>[Does recommendation apply, anything in existing legislation]</p> | <p><b>OCPAS written submission</b></p> <p>[Note identity/location any evidence received to date]</p>  | <p>[Note by whom and when decisions made, if it needs legislation state whose bill it is in]</p> |
|---|---|---|--|
|   |   | <p>Commissioner (or any new body) and a formal reporting arrangement, to ensure the detailed recommendations contained in the strategy are implemented.<br/>(WE/20081217/page4/para14)</p> <p><u>Removal from office</u><br/>Under the terms of the Act, the Commissioner may be removed from office when two-thirds of all MSPs vote for this, however, the Act does not set out the grounds for removal. It would provide greater openness and clarity if these grounds were specified in the legislation.<br/>(WE/20081217/page4/para15)</p> |  |

## REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

### RESPONSE BY SCOTLAND'S COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

This paper was produced in response to a request from the Convener of the Review of Scottish Parliament Corporate Body Supported Bodies (RSSB) Committee for further detail in relation to some of the issues raised by the Commissioner in her oral evidence on 3<sup>rd</sup> February 2009. The requested supplementary information is presented in tabular form below for ease of reference.

The information included here is by no means an exhaustive list of the Commissioner's and her office's activity since SCCYP's establishment under the terms of the Commissioner for Children and Young People (Scotland) Act 2003 ('the 2003 Act') in 2004. Instead, this paper uses 12 examples from SCCYP's work to demonstrate the range of work undertaken by the office and the impact and added value that has resulted from those pieces of work. Many of the examples are taken from the *Safe, Active, Happy Action Plan*, SCCYP's policy priorities, which formed the bulk of the office's work programme since its launch in May 2006 and which was based on a large-scale consultation exercise involving around 16,000 children and young people across Scotland.

We believe that these examples illustrate how the office's work delivers outcomes and tangible benefits to 'customers' (mainly children and young people as well as other stakeholders such as the children's voluntary sector, Parliament and Government) and adds significant value to the work of others. Crucially, the examples also illustrate how the Commissioner and her office have been accessible to children and young people and responsive to their views, experiences, concerns and aspirations.

#### SCCYP's Functions

The general function of the Commissioner is to promote and safeguard the rights of children and young people, having particular regard to the United Nations Convention on the Rights of the Child and involving children and young people in its work.

In particular, SCCYP works to (relevant provision(s) of the 2003 Act in brackets):

- **Raise awareness** and promote understanding of the rights of children and young people across Scotland, including among children and young people themselves (s.4 (1), s.4(2)(a));
- Keep under **review the law, policy and practice** relating to the rights of children and young people with a view to assessing the adequacy and effectiveness of such law, policy and practice (s.4 (2) (b));
- Promote **best practice** in relation to children and young people's rights by service providers (s.4 (c));
- Promote, commission, undertake and publish **research** on matters relating to the rights of children and young people (s.4 (d)).
- Ensure that the Commissioner and her office are **accessible and responsive to children and young people** (s.6(1), s.6 (2) (a));
- **Consult children and young people** and organisations working for and with children and young people on its work priorities (s.6 (2) (b) and (c));
- Have particular **regard to marginalised groups of children and young people** who do not have other adequate means to make their views known (s.6 (3))
- Exercise these functions in a manner that encourages **equal opportunities** (s.5 (4)).

### **The Commissioner's Perspective**

I believe that our work to date has made a considerable impact on the lives of children and young people in Scotland and that it will continue to do so as the laws, policies, practices, ideas and culture shifts put in motion continue to show their fruits. I believe that the work also shows the added value of the Commissioner's office in its current setup. I am aware that the SPCB's stated intention is not to alter our functions but to explore whether a reconfiguration of them would aid or impede the carrying out of those functions whilst promoting best value.

The table of examples below reflects the policy work of my office to a greater degree than the work involved in consulting and involving children and young people, though it makes reference to this aspect of SCCYP's work throughout. We have worked extensively with our Reference Group, the Young People's Health Advisory Group and our Care Action Group, not just to take policy issues forward, but also to explore the best ways of consulting and involving children and young people with a view to developing our own practice and disseminating to others the fruits of our hard-won experience. This work is currently being evaluated and we plan to publish a reflection on it once this is completed.

I am firmly of the view that children and young people respond better to an agency that focuses on their needs and communicates with them on their terms than a generic organisation, which may be perceived as an 'adult-centred' body, and I believe that the outcomes and results that my office has achieved evidence this. This is also the view and experience of other children's organisations as their written evidence to the RSSB Committee clearly demonstrates. SCCYP's experience has led to insights and expertise that can be put to good use to further extend the effectiveness and impact of the office of Commissioner and its relevance to children and young people, which will help my successor in the post to develop these matters further.

If one took some of the policy-related functions in isolation or in groups, it would be difficult in some cases to argue that they could not be carried out by, for example, a single 'rights body'; however, the point about having a separate independent office of Commissioner for Children and Young People is that it can promote the rights of this vulnerable group, who have no political power, without having to justify it against other, more powerful interests and priorities, and it can take on and develop work that no one else will do and add real value for children and young people's rights as demonstrated by the examples below.

The danger in a merged body is that children's rights and interests may be marginalised in favour of other pressing needs. Indeed, I believe we can already see this happening at local level where budget cuts are impacting on services for children, especially children's rights services. In some places, the latter are maybe regarded as a luxury rather than a core activity that is underpinned by international law to which the UK has signed up and Scotland has committed to. I believe that the question that needs to be answered before any reconfiguration of functions under another governance arrangement is agreed to is not only whether SCCYP's current functions *could* be delivered by a wider 'rights body', but more to the point whether they *would* be delivered. Would the new body be equally accessible and responsive to the issues presented to it by children and young people, and will it be equally free to pursue important and under-exposed issues as it has done to date?



|   | <b>Activity</b>   | <b>Outcomes</b>  | <b>Added Value</b>   | <b>Customer benefit</b>   |
|---|---|--|--|---|
| 1 | <p><b>Sweet 16? The Age of Leaving Care in Scotland</b> (Laid before Parliament on 25 March 2008) – The report draws attention to the fact that, despite law and policy to the contrary, 8 times as many young people left care at 16 as left at 18. The report analysed the reasons for this and its consequences for young people leaving care and made 23 recommendations.</p> | <p>Dialogue with local authorities prior to publication of the report resulted in positive changes for young people leaving care, including increased advocacy arrangements, moves towards more appropriate accommodation, improved priority in housing allocation, and a greater commitment by local authorities to corporate parenting. The Scottish Government's (SG) response indicates full or partial acceptance of all but one of the recommendations. This may lead to some legal reform to extend to registered social landlords the duty to help local authorities fulfil their statutory responsibilities to care leavers. We have received anecdotal evidence of changes in policy and practice in response to the report. We are now seeking further evidence of impact and remaining issues, with a view to publishing a follow-up report in March. We also identified a way of using current law to help care leavers under 18 return to care in certain circumstances. This is very recent but we already have reason to believe it is making an impact.</p> | <p>The Commissioner learned of this issue through contact with a number of individual young people and front line workers. This shows the added value of the Commissioner's participatory approach, which enables SCCYP to respond to rights violations without having to persuade others of their significance or seek authority or project funding for the purpose. As a consequence of the status and reputation of the office, workers were willing to speak confidentially to the Commissioner even when they feared repercussions from their employers. The office's exclusive focus on children and young people's rights allows the Commissioner to get to know and be known and trusted by this constituency.</p> | <p>Young people leaving care are better supported and protected due to changing policy and practice as a result of the report. Workers in the sector have somewhere to take their questions and express their views without fear of comeback from their employers. MSPs, Scottish Ministers and senior managers in local authorities are aware of an important issue affecting some of Scotland's most vulnerable groups of young people. The report was debated in Parliament on 25 June 2008.</p> |
| 2 | <p><b>Sweet 16? Leaflet</b> – The research leading to the above report highlighted an information need amongst young people and front line workers in the care sector. SCCYP staff worked with Who Cares? Scotland and young people to develop an information leaflet that has been widely disseminated.</p>  | <p>Young people and workers are better informed. Reports indicate that the information in the leaflet and the report is being used effectively as an advocacy tool by young people and professionals who work with young people.</p>   | <p>As a voluntary organisation, Who Cares? Scotland would not have had the available resources to produce the leaflet and conduct this research. SCCYP was able to work in an effective partnership which drew on the strengths and resources of both agencies.</p>  | <p>Young people are better informed and empowered to advocate for their own rights and those of others. Workers are better informed about the age of leaving care and the potential adverse consequences for young people of leaving care before they are ready. They will therefore be better able to support young people.</p>  |

|          | <b>Activity</b>   | <b>Outcomes</b>   | <b>Added Value</b>  | <b>Customer benefit</b>   |
|----------|---|---|---|---|
| <b>3</b> | <p><b>Handle with Care: A Report on the Moving and Handling of Children and Young People with Disabilities</b> (Laid before Parliament on 27 Feb 2008)</p> <p>– The report showed how ‘blanket’ or risk-averse ‘no manual handling’ policies result in unnecessary use of hoists and slings, in some cases with severe, adverse impact on the dignity and quality of life of children and young people with disabilities. Launched at the Parliament by one of the young people involved in the research, young people also influenced the illustrations used in the report so as to reflect their experiences accurately. A DVD resource has been produced with young people’s and parents’ voices on the issue.</p> | <p>The Minister has promised revised guidance taking account of the views of stakeholders, including children and young people as presented in the report. The report has also attracted interest from across the UK and abroad.</p>  | <p>This was a subject raised with the Commissioner by children and young people with disabilities. It was also an issue that no one else was addressing at the time.</p> <p>The status and reputation of the office helped SCCYP engage with relevant professional bodies. The reputation of the Commissioner and her office as a dedicated advocate for children’s rights ensured that children, young people and their parents had the trust to approach and engage with SCCYP on this sensitive issue.</p> | <p>Young people with disabilities were able to communicate their experiences to decision-makers and get a result that is likely to show future practical benefit. Parents of young people with disabilities were given a chance to express their views on how their children were treated. Young people and their parents were involved in creating a tool to advocate for their own rights and those of others who feel that their dignity and quality of life is being affected by inappropriate practice in relation to moving and handling.</p> |
| <b>4</b> | <p><b>Young People’s Health Advisory Group (YPHAG):</b> A group of 8 young people aged 14-21 were recruited in partnership with NES (NHS Education for Scotland), on behalf of NHS Scotland, with a view to exploring ways in which they can work effectively with young people and impact on government policy.</p>  | <p>The independent evaluation of the group concluded that YPHAG has had a significant impact on the way in which SCCYP, NES, the Scottish Government and other organisations engage with children and young people as they develop health policy. It highlighted the impact on age-appropriate care policy, with YPHAG members sitting on a young people’s group to inform the design of the new Edinburgh Children’s Hospital. The evaluation also evidences the group’s impact on the training and professional development of health</p> | <p>This was an innovative and experimental pilot project. SCCYP’s expertise in working with young people was important in setting up the group, particularly in recruiting and supporting members and agreeing the governance of YPHAG. Our involvement ensured that the group took article 12 of the UNCRC (children’s right to be heard in decisions that affect their life) as its core value. This may well have been underplayed if SCCYP had not been involved from the outset. Working so</p>          | <p>Young people are more informed about NHS policy and how to get heard in the health service. The group has been responsible for a culture shift in these agencies in favour of involving children and young people. The group has furthered implementation of the UNCRC by acting as a model for developments elsewhere. Medical professionals are more informed about the needs and rights of young people accessing health services.</p>  |

|   | Activity   | Outcomes  | Added Value   | Customer benefit   |
|---|--|---|---|--|
|   |  | professionals. It further comments on the group's work to make health information for children and young people more accessible by creating a young persons' version of current NHS policies that affect children and young people in Scotland. It notes that a number of organisations have used YPHAG as a model to establish their own advisory group of children and young people and that it has attracted interest across the UK and internationally.   | closely with NES to set up a successful model, we have helped YPHAG pave the way for other young people's health groups with a real impact on policy and practice.  | The NHS is more aware of the possibility to meaningfully involve young people in the development of appropriate health policy and practice.  |
| 5 | <b>Not Seen. Not Heard. Not Guilty: The Rights and Status of the Children of Prisoners in Scotland</b> (Laid before Parliament on 7 February 2008) – This report set out the experience of children from the point of arrest of a parent, through the court process and period of imprisonment to release, including release on Home Detention Curfew. It made 28 recommendations. Research included visits to prisons and Young Offenders Institutions, a survey of criminal justice social workers, and dialogue with the Scottish Prison Service (SPS). | The discussions leading up to publication of the report resulted in SPS reinstating some parenting classes for offenders that were due to be stopped. SPS has committed to implement the recommendations through a revision of the Prison Rules and in new Standards for Children and Families which will inform future specifications for service delivery. SPS now use SCCYP's Children's Rights Impact Assessment (CRIA – see below) tool as part of all policy impact assessments. Justice Albie Sachs, a judge at the South African Constitutional Court will present his landmark judgment on a relevant case in South Africa at a seminar in June in support of SCCYP's recommendation to conduct a CRIA at the point of sentencing where offenders have children. | Again it was individual young people who brought the plight of a sizeable group of children and young people (circa 16,500) to the Commissioner's attention. The children of prisoners are a hidden and extremely vulnerable group who receive little attention. The independent nature of SCCYP's office and funding allowed her office to pursue this initiative without the need for outside sanction or resourcing. The office's status facilitated access to prisons and prison staff. It also allowed the Commissioner to attract a speaker of international reputation to help shape law and policy in Scotland. | The children of prisoners will benefit through greater recognition of their rights in terms of visits and decisions to release. SCCYP is hopeful that practice will change to the benefit of children and young people if the report's recommendation regarding Children's Rights Impact Assessment at the point of sentencing is implemented. |
| 6 | <b>Children's Rights Impact Assessment (CRIA)</b> (Laid before parliament on 31 October 2006) – The CRIA is a tool produced by SCCYP to assess policies, laws and decisions regarding their  | The CRIA tool has been trialled by the Scottish Government (SG) and is referred to in their current consultation on an action plan for the implementation of the UNCRC in Scotland. The SG is currently considering an initial limited roll-out to its Children, Young People and Social Care   | This tool can be used across the whole spectrum of law, policy and practice. The fact that SCCYP is the dedicated children's commissioner means that her office can use its capacity, resources and expertise to develop  | Agencies are aware of children and young people's UNCRC rights and are supported to fulfil their responsibilities under international law as committed to by both the Scottish and UK Governments. Children and young people benefit   |

|          | <b>Activity</b>   | <b>Outcomes</b>  | <b>Added Value</b>   | <b>Customer benefit</b>   |
|----------|---|--|--|---|
|          | impact on children and young people and their rights. It allows the impact to be predicted, monitored and, if necessary, avoided or mitigated.  | and Schools Directorates with a view to learning lessons and considering plans for wider usage.<br>It is used by the Scottish Prison Service as part of their policy impact assessment. There has been international interest in the model.  | tools such as the CRIA as well as promote and support its use in public services and other key organisations to make children's rights a reality in their policies and practice.   | by the fact that policies require agencies' staff to respect their rights and practice is improved.   |
| <b>7</b> | <b>Cartoon Illustrations of the UNCRC</b> – SCCYP staff and young people chose and commissioned an illustrator to produce two sets of cartoons illustrating the articles of the UNCRC; one designed for younger children and the other for teenagers. Much thought went into illustrating the articles in a way that was meaningful and sensitive.  | The illustrations have been used widely, not only by SCCYP but by the Scottish Government and other agencies, to help spread awareness and understanding of children's rights. Posters and booklets featuring the illustrations have been circulated to all schools in Scotland. SCCYP has received almost 300 requests for access to the illustrations from organisations and individuals. The Council of Europe and agencies from 18 other countries have asked to use them. | SCCYP's duty to raise awareness and understanding of the UNCRC, together with its participatory approach and independent funding, allowed it to commit the capacity and resources to develop this popular and age-appropriate children's rights education resource. SCCYP's communication networks allowed it to be effectively disseminated.  | Agencies are more able to present children's rights in a manner that is meaningful and attractive to children and young people, thus increasing their service users' rights awareness and that of their staff.<br>Children and young people are encouraged and supported to learn more about children's rights.   |
| <b>8</b> | <b>Family Law (Scotland) Act 2006</b> – The Commissioner responded to the Scottish Executive consultation that led to this Act. When the Bill was going through Parliament, she met civil servants to help shape the "Parenting Agreements" that were being developed to supplement the new proposals. The Commissioner was also consulted about the commitment to develop a Grandparents' Charter. | The Commissioner advised that there were difficulties with the concept of a Grandparents' Charter with regard to their legal grounding and it was refocused to become a Grandchildren's Charter.   | The Commissioner broadly agreed with the aims of the Bill and was aware that other agencies were working on it. Therefore, to add value, she focused on issues that others were not addressing. SCCYP's input helped the Scottish Executive to see the issue of a Grandparents Charter from the perspective of the best interest of children; this helped resolve a difficult issue. | Avoidance of a situation in which family battles could be intensified by increasing the number of people with rights in relation to children, especially when they had no corresponding legal responsibilities.<br>Children would have been adversely affected by this development. The Commissioner's intervention focussed on the common and widely shared interest in the welfare of children and allowed a way forward to be identified that was acceptable to all parties. |
| <b>9</b> | <b>Promoting Proportionate Protection</b> – SCCYP has undertaken a number of pieces of work with a view to  | SCCYP's work, and the media attention attracted by the research reports, have raised a debate in Scotland which, we believe, is giving people confidence to re-  | When the Commissioner first presented this topic as a possible focus for her work, she had to explain her rationale to children's agencies,  | This is a challenging issue but I believe some progress has been made, and will continue to be made, in reducing extreme risk   |

|    | Activity   | Outcomes  | Added Value  | Customer benefit  |
|----|--|---|--|---|
|    | countering the more extreme end of risk aversion by adults that can inhibit the development of children and young people. This has included research into adult attitudes to contact with children and young people, disclosure systems in other countries, and policies and practices for outdoor play for looked-after children and young people.                    | evaluate their policies and practices with a view to striking the right balance between the protection of children from harm and allowing for the kinds of stimulating and attractive play that support happy and healthy development in both younger children and teenagers. According to the forthcoming <i>Evaluation of Safe, Active, Happy</i> the phrase 'proportionate protection' has become an accepted concept among a wide range of stakeholders.  | who were then persuaded of its value. Agencies were then keen for the Commissioner to lead on this as it was a sensitive topic which they would have had difficulty in pursuing due to the challenge of presenting it to their funders. This is because it seems to run counter to some measures that are presented as child safety or child protection, some of which are in reality designed to protect adults from blame if things go wrong.  | aversion and promoting happy and healthy child development. While we can observe progress in how this agenda is taken up by the children's sector, local authorities and Ministers, its outcomes are somewhat intangible. However, even the fact that the term 'proportionate protection' has become commonplace is evidence of a culture shift   |
| 10 | <b>Play</b> – SCCYP has worked with Play Scotland and other agencies to promote respect for the right to play, leisure and recreation set out in article 31 of the UNCRC. SCCYP's work on this is influenced by the top priority given to 'things to do' in our policy priority consultation with 16,000 children and young people.                                    | A strategic approach to play for children aged 0-8 is now a commitment in the Scottish Government/COSLA's Early Years Strategy. The adoption of this approach has been a result of the effective partnership effort with Play Scotland, Barnardo's and others. In the first draft of the strategy, the word 'play' was not mentioned.   | With Play Scotland taking a lead on this, SCCYP added value by adding its weight to this important agenda through making representations and facilitating access to Ministers, the media and the UN Committee on the Rights of the Child. Further, the Commissioner met the Chairs of the Task Groups working on the Early Years Framework to emphasise the need for this to be given a high profile.  | Children will have enhanced opportunities for play as the Early Years Framework begins to have an impact. Ministers have emphasised that this is a first step and other initiatives will follow to broaden the age range beyond early years.  |
| 11 | <b>Asylum:</b> The Commissioner raised awareness of the impact on children of detention and 'dawn raids' and pursued cases where children's rights were breached. Also, the Commissioner had extensive contact with immigration officials in Scotland to pursue the rights of the children classified as 'legacy cases', who had been in the UK for a number of years. | The permissible period of detention of children in Scotland was reduced to a maximum of 72 hours. The Commissioner's intervention helped the then Scottish Executive and Parliament move towards accepting some responsibility for the welfare of these children. One case in particular resulted in the Home Office changing its view and apologising to the family concerned. SCCYP's actions also had a strong influence in catalysing the setting up of a new asylum model across the UK. The process of review of 'legacy cases' | The issue of the impact of dawn raids was brought to the Commissioner's attention by a group of girls from Glasgow whose friend was removed. SCCYP facilitated change through access to Ministers (including the then First Minister), civil servants and the media. The Commissioner's emerging reputation at the time ensured trust in her and her office by the affected children and families, and SCCYP's ability to mediate their experiences to those in power was key to progress on this issue. | Children and families and their supporters reported the benefit of feeling that someone in a position of authority was listening to them and promoting their cause at a time when responsibility for the welfare of asylum seekers was widely seen as located at Westminster alone. Clear benefits for the particular families who were helped and the asylum seeking community in Scotland as a whole. |

|    | <b>Activity</b>  | <b>Outcomes</b>   | <b>Added Value</b>   | <b>Customer benefit</b>  |
|----|--|---|--|--|
|    | The Commissioner reported to the Scottish immigration authorities an unethical practice used by detaining officers that she had heard about from a young person.   | involving children was speeded up and over 90% of these cases in Scotland have been resolved with leave to remain granted.<br>The unethical practice by detaining officers was changed.   |  |  |
| 12 | <b>Detective Kits - SCCYP</b> devised and disseminated a 'Detective Kit' for upper primary school children to help them map out 'things to do' in their area and identify a wish list. It was complemented by a website that used games to teach children about children's rights and the UN reporting process. The resource has been much appreciated by schools and children and results are currently being analysed. | With 2,360 copies of the Detective Kits completed and returned, this initiative raised the profile of children's rights and awareness of the Commissioner's office among children and teachers. It further helped SCCYP understand the children's perspective on 'things to do', an ongoing theme and work priority for the office, and to ensure that children's findings will feed into policy development. | SCCYP's focus on children's rights justifies the attention to this kind of activity as it helps fulfil SCCYP's awareness-raising duties. This has been an experiment which will help SCCYP assess various methods for the engagement of children of this age and inform future work. | Children had an enjoyable and educational activity about their rights.<br>Schools learned more about children's rights and will be more aware where to find additional information.<br>SCCYP received information about children's perspectives on 'things to do' across Scotland. |

### Other work

There have been a number of other pieces of work that had to be left out to achieve the relative brevity of this paper but that are nonetheless worth mentioning to give a fuller picture of SCCYP's work; again, this is not an exhaustive list. We would be delighted to provide details on any of these pieces of work if the Committee considers that this would aid its deliberations. Other work includes:

**Projects:** Young Offenders in Secure Units and Prisons, Schools in the Community, Leisure and Recreational Facilities for Disabled Children, and others.

### Review of law, policy and practice:

- Parliamentary work – written and oral evidence, briefings, etc: Sexual Offences (Scotland) Bill, Protection of Vulnerable Groups (Scotland) Act 2007, Adoption and Children (Scotland) Act 2007, Prohibition of Female Genital Mutilation (Scotland) Act 2005, and others.
- Consultation Responses: The Commissioner has responded to policy consultations and calls for evidence on a wide range of issues affecting children and young people since her appointment, including 32 from the Scottish Executive/Scottish Government and 15 from committees of the Scottish Parliament, as well as 15 from the UK Government and the Westminster Parliament. The office has a prioritisation process for responses to consultations, which includes an assessment of the added value the office can give. Nevertheless, policy makers are often keen to receive a response from the Commissioner and she tries to accommodate that wherever possible within the limits of the capacity of the office.

- **Advocacy:** The Commissioner has intervened in a number of cases where concerns were raised with the office about the practice of public authorities and its impact on the rights of children and young people; examples include: use of Mosquito devices, facilitating the City of Edinburgh Council's consultation with gypsy/traveller young people about their sites, involving young people in regeneration areas, several cases in relation to school closures, and others.
- **UNCRC monitoring:** SCCYP led on the joint report of the UK Children's Commissioners to the UN Committee on the Rights of the Child on the implementation of the UNCRC in the UK. The report was presented to the Committee in June 2008 and the Commissioner gave evidence to the Committee alongside NGO partners and young people later that year.

**Participation:** SCCYP's participation team has organised a number of consultative and other events for children and young people and worked with partners in a range of sectors. In addition, there are three groups of young people who have been involved in a number of projects; they are the Care Action Group, YPHAG (see above), and the SCCYP Reference Group.

18 February 2009



## **Review of SPCB Supported Bodies Committee**

### **Models of Governance for public sector scrutiny bodies**

This paper was requested by the Review of SPCB Supported Bodies Committee to provide information on the different governance models for public sector scrutiny bodies. In particular, the Committee sought information on the different arrangements for such bodies as proposed by the SPCB in its evidence to the Committee, i.e. Commissions versus Commissioners versus Ombudsman.

### **Ombudsman and Commissioner**

In the UK, the terms Ombudsman and Commissioner seems to be used interchangeably. For example, in its consultation on Public Sector Ombudsmen In Scotland in 2000 the Scottish Executive said:

Perhaps the first point to consider is whether the name "Commissioner" is still appropriate. "Commissioner" is part of the formal legal title of each of the present public sector Ombudsmen but they are more commonly known as "Ombudsmen". Use of the title "Commissioner" is almost exclusively limited to the UK public sector whereas "Ombudsman" is used throughout the world. The Executive is inclined to drop the use of "Commissioner" as it seems to cause confusion with other types of office and does not clearly indicate what the job is.  
Scottish Executive (2000) para 9.6

At a UK level the Parliamentary Ombudsman is actually the Parliamentary Commissioner for Administration as set out in its establishing statute, the Parliamentary Commissioner Act 1967.

The International Ombudsman Institute recognises that there are a number of terms used around the world to identify ombudsmen. So a public institution whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, is eligible to become an Institutional member of the organisation. Whatever its title, the organisation does have to exercise fully the functions, and meet the criteria, set out by the Institute (see Annex A).



The British and Irish Ombudsman Association also recognises that organisations' names may differ, but to be a Voting member of the Association an office must be recognised by the Association as satisfying the Association's Criteria (see Annex B) irrespective of whether or not the term 'Ombudsman' is included in the title or description of such office.

### **Body Corporate**

A body corporate is a collection of persons which, in the eyes of the law, has its own legal existence (and rights and duties) separate from those of the persons who form it from time to time. It has a name or title of its own and may also have a common seal for use on official documents. Also known as corporations, bodies corporate are not necessarily companies, but companies are by definition bodies corporate.

Charity Commission: Glossary of terms used in OGs

The Scottish Human Rights Commission is currently the only officeholder which functions as a body corporate (RSSB(D) p. 7). The Bill establishing the Commission was introduced by the Scottish Executive as the Scottish Commissioner for Human Rights Bill, but following amendments to the Bill by the Scottish Executive at Stage 3, changes were made so that instead of a Commissioner a body corporate, to be known as the Scottish Committee for Human Rights, would be established. As a consequence, the Bill was renamed the Scottish Commission for Human Rights Bill. The Scottish Executive put forward these amendments following recommendations in the Justice 1 Committee's Stage 1 report on the Bill and the Finance Committee's report on its Inquiry into Accountability and Governance.

### **Corporation Sole**

The concept of corporation sole exists within the England, Wales and Northern Ireland. A corporation sole is a corporation that is constituted in a single person. Corporations sole are always holders of a particular office. So for example the Commissioner for Older People in Wales and the Commissioner for Children and Young People for Northern Ireland are corporations sole.

The Commissioner for Children and Young People for Northern Ireland has an Executive Board of staff consisting of the Commissioner, the Chief Executive, the Head of Research, Policy and Service Review, the Head of Communications and Participation, and the Corporate Services Manager. The Board's primary purpose is to provide leadership, vision, continuity of purpose, and accountability in taking forward and delivering the mission of the Office of the Northern Ireland Commissioner for Children and Young People.

The UK Parliamentary Ombudsman has developed an Executive Board which is non-statutory.

The concept of a corporation sole does not exist in the Scottish legal system.

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**30 January 2009**

## Annex A

### **International Ombudsman Institute**

#### Institutional member

A public institution whether titled Ombudsman, Mediator, Parliamentary Commissioner, People's Defender, Human Rights Commission, Public Complaints Commission, Inspector General of Government, Public Protector or like designation, shall be eligible to become an Institutional member provided it exercises fully the following functions and meets the following criteria::

- it is created by enactment of a legislative body whether or not it is also provided for in a Constitution;
- its role is to protect any person or body of persons against maladministration, violation of rights, unfairness, abuse, corruption, or any injustice caused by a public authority;
- it does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held;
- it has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in actions of the kind specified in subparagraph ii) above;
- it has the power to make recommendations in order to remedy or to prevent any of the conduct described in subparagraph ii), and, where appropriate, to propose administrative or legislative reforms for better governance;
- it is held accountable by reporting publicly to the Legislature or other appropriate authority;
- its jurisdiction is national, regional or local;
- its jurisdiction applies to public authorities generally or is limited to one or several public authorities, or to one or several public sectors; and
- its incumbent or incumbents are appointed or elected, according to the relevant legislative enactment, for a defined period and can only be dismissed, for cause, by the legitimate and competent authorities.

## Annex B

### **British and Irish Ombudsman Association**

#### **A. Introduction**

The term 'Ombudsman' should only be used if four key criteria are met. Those criteria are independence of the Ombudsman from those whom the Ombudsman has the power to investigate; effectiveness; fairness and public accountability.

Detailed criteria which should in the longer term be achieved by all recognised ombudsman schemes are set out in part B.

Given the considerable range of ombudsmen schemes in the public and private sectors and the variations in their constitution, jurisdiction, powers and accountability, the detailed criteria need to be interpreted with sufficient flexibility to encompass those variations.

Independence, for example, may be achieved in several ways. Hence, in the private sector the body which appoints the Ombudsman and to whom the Ombudsman reports, can be regarded as independent, provided that those of its members who are representatives of organisations subject to the Ombudsman's jurisdiction, constitute a minority of the membership.

Initially, recognition of existing schemes will be dependent on whether, broadly speaking, they meet the key criteria; it will not be withheld if, in some respects, the detailed criteria are not met. However, over time it is expected that the constitution of all schemes would be developed to the extent necessary to meet the detailed criteria. For example, in the longer term the power by those subject to investigation to veto the proposed appointment or reappointment of an Ombudsman should, where it exists, be removed.

In due course, it is expected that in the private sector all, or virtually all, firms in an industry with an ombudsman scheme or schemes should participate in the scheme or schemes, even though in the short term, especially when a scheme is first established, a lesser number of firms may participate.

The decision on which schemes are recognised as meeting the key criteria will be made by the Executive Committee or a General Meeting on the recommendation of the Validation Committee. The Validation Committee will also consider according to the rules which schemes meet the detailed criteria in full and which do not. In respect of the latter, the Validation Committee will in due course review its initial recognition, when requested to do so, having regard to the extent to which progress has been achieved towards meeting the detailed criteria in full.

#### **B. Detailed Criteria**

##### **Definition of Core Role of an Ombudsman**

The core role of an Ombudsman is to investigate and resolve, determine or make recommendations with regard to complaints against those whom the Ombudsman is empowered to investigate by the exercise of powers and in accordance with procedures described in these criteria.

## **Independence**

- (a) The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge.
- (b) The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.
- (c) The appointment should be either for a minimum of three years or until a specified retirement age. If the former, it may be renewable. The initial term of office and any renewal should normally commence before the age of 65 years and be of sufficient duration not to undermine independence.
- (d) The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman's appointment, but this does not exclude their minority representation on the body which is authorised to terminate.
- (e) The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.
- (f) The Ombudsman alone (or an appointed deputy) must have the power to decide whether or not a complaint is within the Ombudsman's jurisdiction. If it is, the Ombudsman (or an appointed deputy) must have the power to determine it.
- (g) Unless otherwise determined by statute the Ombudsman should be required to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.
- (h) The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved.

## **Accessibility**

- (a) The right to complain to the Ombudsman should be adequately publicised by those subject to complaint.
- (b) Those subject to complaint should be required to have proper internal complaints procedures.
- (c) The office of the Ombudsman should be directly accessible to complainants unless otherwise specified by or under statute.
- (d) The Ombudsman's procedures should be straightforward for complainants to understand and use.
- (e) Those complaining to the Ombudsman should be entitled to do so free of charge.

## **Powers and Procedures**

The Ombudsman should:

- (a) Be entitled to investigate any complaint made to the Ombudsman which is within the Ombudsman's jurisdiction without the need for any prior consent of the person or body against whom the complaint is made. This does not preclude a requirement that before the Ombudsman commences an investigation, the complainant should first have exhausted the internal complaints procedures of the person or body being investigated.
- (b) Save as otherwise provided by law, have the right to require all relevant information, documents and other materials from those subject to investigation.
- (c) Be entitled but not obliged, to disclose to the complainant or to the person being investigated such information, documents and other materials as shall have been obtained by the Ombudsman from the other of them unless there shall be some special reason for not making such disclosure, for example, where sensitive information is involved or disclosure would be a breach of the law.
- (d) Proceed fairly and in accordance with the principles of natural justice.
- (e) Be required to make reasoned decisions in accordance with what is fair in all the circumstances, having regard to principles of law, to good practice and to any inequitable conduct or maladministration.
- (f) In all cases which it is decided not to accept for investigation, notify that decision to the complainant and the reasons for it.
- (g) In all cases investigated, notify in writing the decision and the reasons for it to the parties concerned.

## **Implementation of Decisions**

Either

(a) Those investigated should be legally bound by the decisions or recommendations of the Ombudsman;

or

(b) There should be a reasonable expectation that the Ombudsman's decisions or recommendations will be complied with. In all those cases where they are not complied with, the Ombudsman should have the power to publicise, or require the publication of such non-compliance at the expense of those investigated.

## **Annual Report**

The Ombudsman should publish an Annual Report. The Ombudsman should be entitled in that report, or elsewhere, to publish anonymised reports of investigations.



## Review of the SPCB Supported Bodies Committee

### Commissions and Commissioners

In a previous paper to the Committee, models of governance for public sector bodies were explored. In particular the paper looked at the roles of Ombudsman, Commissions and Commissioners and concluded that these terms are often used interchangeably. However, while commissions and commissioners can describe a variety of functions, including both investigatory and regulatory functions, the designation 'ombudsman' is used almost exclusively to refer to a person who is appointed to investigate and (sometimes) resolve complaints or disputes about the delivery of particular services, most often public services.

Overall this briefing indicates that it is not the title of the organisation which determines its constitution but its parent Act. This briefing explores further some of the issues relating to the roles of commissions and commissioners, and in particular looks in more depth at the examples of the Scottish Commission for Human Rights and the UK wide Equality and Human Rights Commission. In the debate surrounding the establishment of the Scottish Commission for Human Rights there was lively discussion as to the relative merits of establishing a commission or a commissioner and these arguments are reviewed in brief in this paper. At a UK level, the Equality and Human Rights Commission has brought together several equalities bodies and functions, and some of the claimed benefits of this are highlighted.

**Definition of a Commission:** According to Bealey (1999) a commission is "a group of people appointed for some special purpose. They may be temporary and ad hoc: they may be permanent and trusted with some special function. Many permanent commissions have regulatory functions, such as in Britain, the Monopolies and Mergers Commission. Sometimes they comprise a public enterprise like the British Forestry Commission".

**Definition of Commissioner:** There is no exclusive definition of the term 'Commissioner'. Most commonly, it is used to refer to officials appointed or commissioned by the state to perform certain duties or functions in relation to a public service. A Commissioner could be a member of a commission, such as the recently established Scottish Legal Complaints Commission which replaced the former Scottish Legal Services Ombudsman (The SLCC was



established by the Legal Profession and Legal Aid ( Scotland ) Act (2007) and opened for business on 1 October 2008), or the role of Commissioner can exist as a 'stand-alone' post such as Scotland's Commissioner for Children and Young People (The SCCYP was established by the Commissioner for Children and Young People (Scotland) Act 2003). The Commissioner designation is also used in a variety of other organisations in the private and voluntary sectors.

## **Scottish Commission for Human Rights**

The Scottish Commission for Human Rights is an example of a permanent Commission established by statute to carry out a particular function, in this case, to promote human rights and, in particular, to encourage best practice in relation to human rights (Scottish Commission for Human Rights Act 2006).

### **Background**

The Scottish Executive carried out two public consultations on the possibility of establishing a Human Rights Commission, in 2001 and 2003. The consequent Bill was originally introduced in Parliament as the "Scottish Commissioner for Human Rights Bill" (SP Bill 48). The Bill, as introduced, proposed to give the Commissioner the power to appoint a chief executive (Sch 1 section 11). The chief executive was to be designated the accountable officer (Sch 1 section 12).

In its Stage 1 report the Justice 1 Committee was sufficiently concerned over aspects of the Bill not to recommend the general principles of the Bill to the Parliament. Among the concerns the Committee had was that there was no statutory duty on the Commissioner to produce, and lay before the Parliament, a strategic plan for a 3 year rolling period.

The Committee was also not convinced that the Scottish Executive had provided a compelling case to explain why it had changed its initial approach from establishing a Commission to a Commissioner (Justice 1 Committee 2006 para 148). The Committee accepted that the:

“...approach chosen by the Executive of one Commissioner and up to two deputy Commissioners (with support staff) will have the advantage of creating a readily identifiable figurehead for the promotion of human rights in Scotland. Effective decision making and clear accountability for those decisions would also be positive features of this structure.

However, the Committee expressed its concern that:

“...to entrust the task of promoting awareness, understanding and respect for human rights to one person, even with deputies, is potentially fraught with difficulties. Even the most eminently qualified candidate with a legal or human rights background cannot possibly claim to fully understand and, therefore, represent the interests of all groups in Scottish society. Input into strategy formulation and decision

making by a small collective group of part-time Commissioners or human rights experts (perhaps forming a Commission, advisory group or other body) may be more likely to result in balanced and representative outcomes.”

(Justice 1 Committee 2006 para 146-147)

The Committee, therefore, recommended that the Executive reconsider whether a Commissioner would be preferable to a Commission or an alternate statutory body (Justice 1 Committee 2006 para 149).

The Committee report also outlined the SPCB’s written request that it should be the SPCB which should appoint the Accountable Officer and that the Accountable Officer should also be the Commissioner him or herself (Justice 1 Committee 2006 para 125).

In his response to the report the Minister, Robert Brown MSP, agreed to a number of the changes suggested by the Justice 1 Committee including:

- Creating a Commission rather than a Commissioner
- Requiring the Commission to publish a strategic plan
- Providing that the SPCB will appoint the Commission’s accountable officer.

The Minister also decided that, although the Committee’s report did not touch on the statutory requirement for a chief executive, the Scottish Executive would remove such a requirement and leave it up to the Commission to decide if they wished to create such a role.

Amendments laid by the Minister at Stage 2 included those to:

- establish a body corporate to be known as the Scottish Commission for Human Rights (and referred to in this Act as the “Commission”) (amendment 1)
- establish a Commission consisting of a member appointed to chair the Commission and no more than 4 other members. The member appointed to chair the Commission is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament. The other members are to be individuals appointed by the SPCB (amendment 2)
- give the SPCB the power to designate a member of the Commission or of the Commission’s staff as the accountable officer (amendment 2)
- require the Commission to lay before the parliament every four years a strategic plan setting out how the Commission proposes to fulfil its general duty during that period (amendment 21, later replaced by amendment 146)

As well as the amendments put forward by the Minister, amendments were also laid by Finance Committee Convener Des McNulty. The Finance Committee had carried out an Inquiry into Accountability and Governance, including the current and future roles and possible governance arrangements of Parliamentary commissioners and ombudsman Finance Committee (2006).

Mr McNulty's amendments, taken on the first day of Stage 2, reflected his preference that the role of the new body should be combined with that of the public services ombudsman (amendment 120). Mr McNulty also moved an amendment (125) to remove the power to appoint a chief executive.

On day one of Stage 2 the Justice 1 Committee disagreed with amendment 120 and amendment 1, to establish a body corporate, was rejected by the Convener (Pauline McNeill MSP), using her casting vote, thereby maintaining the status quo.

On day two of Stage 2 the Committee agreed to amendments 125 and 146, respectively removing the statutory need for a chief executive and adding a statutory requirement for a strategic plan. In rejecting amendment 1, but agreeing to amendment 125, Schedule 1, paragraph 12 had to be amended, so that the role of accountable officer would be decided by the SPCB from either the Commissioner, a deputy Commissioner or member of the Commissioner's staff.

At Stage 3 the Minister reintroduced amendments to establish a body corporate Commission (amendment 1) and on the membership of the Commission (amendment 100). These amendments were agreed to (amendment 1, after a division) and so the Bill became the "Scottish Commission for Human Rights Bill", establishing a Commission. It was passed by the Parliament on 2 November 2006, and received Royal Assent as the Scottish Commission for Human Rights Act 2006 (asp 16) on 8 December 2006.

### **Timeline since enactment**

|                  |   |
|------------------|---|
| 29 November 2007 | the Parliament agreed to nominate Professor Alan Miller for appointment as the first chair of the Scottish Commission for Human Rights, for an initial period of five years   |
| 1 May 2008       | the Presiding Officer, on behalf of the SPCB, announced the appointment of Professor Kay Hampton, Ms Shelagh McCall and Mr John McNeill as the part-time members of the Scottish Commission for Human Rights.   |
| 25 June 2008     | The SPCB approved the proposed staffing structure of the Commission and the terms and conditions for its staff. The SPCB noted that the Commission would be required to submit a further request should it wish to increase the number of staff from 8 to 10 as they had intimated. |
| 14 August 2008   | the SPCB designated Professor Miller as the accountable officer for the Commission  |

The Commission is currently carrying out a consultation on its first strategic plan to guide its work until April 2012 and has sought comments on it by the 31 March 2009.

## **Equality and Human Rights Commission**

The (UK) Commission for Equality and Human Rights was established as a body corporate by the Equality Act 2006 (c.3). It is a non-departmental public body (NDPB) which took on its role from 1 October 2007 and operates under the name of the Equality and Human Rights Commission.

The Commission has a statutory duty to prepare a strategic plan (section 4). The Commission also has a statutory duty to appoint a chief executive (Sch 1 part 1 para 7).

The Board of Commissioners, led by the Chair, Trevor Phillips, is responsible for setting the strategic direction of the Commission.

The Chief Executive and Commissioner, supported by the senior management team, is accountable to the Board of Commissioners for making sure that they achieve their business aims and for advising on emerging strategic priorities. The Chief Executive is designated as the Commission's Accounting Officer and is also accountable to the UK Parliament and the Principal Accounting Officer of the Government Equalities Office (GEO).

The Commission's three statutory committees for Disability, Scotland and Wales are each chaired by a member of the Board of Commissioners: Jane Campbell (Disability), Morag Alexander (Scotland) and Neil Wooding (Wales).

The Equality and Human Rights Commission took over the role and functions of the Commission for Racial Equality (CRE), the Disability Rights Commission (DRC) and the Equal Opportunities Commission (EOC), with new responsibilities for sexual orientation, age, religion and belief, and human rights. The legacy Commissions had similar Boards.

On their website (Equality and Human Rights Commission), the Commission lists several benefits in having a single commission including the following:

- bringing together equality experts means they can act as a single source of information and advice
- being a single point of contact for individuals, businesses and the voluntary and public sectors
- helping businesses by promoting awareness of equality issues, which may prevent costly court and tribunal cases
- tackling discrimination on multiple levels - some people may face more than one type of discrimination
- giving previously under-represented groups, such as older people, a powerful national body to tackle discrimination

Overall, the Commission claims that a single commission enables the good work of previous commissions to continue but from a more powerful base, while learning valuable lessons from each other.

The public face of the Commission can be the Chief Executive, Board members or the Chair, depending on the subject being discussed.

The Commission is currently working on its 3 year strategic plan for 2009-2012, which must be published on 1 April 2009. As part of the development of the plan the Commission carried out consultation events and an online consultation in November and December 2008.

The Commission carries out its work across all the strands of its work. It works not in strand specific ways but in thematic or sectoral ways.

## **Constitutional arrangements**

Whether designated as a Commission, Commissioner or Ombudsman the status, powers, duties and responsibilities, financial powers, powers of appointment and other constitutional aspects of such organisations tend to be set out in the statute establishing the body in question. While these constitutional arrangements allow for different degrees of autonomy, they also place different constraints on the exercise of powers, duties and responsibilities.

While not intending to be representative of all statutorily appointed commissions, commissioners and ombudsmen, the table below illustrates the different constitutional provisions made for three statutory organisations termed respectively Ombudsman, Commission and Commissioner.

What seems clear from this table is that it is not the title of the organisation which determines its constitution but its parent Act. The three organisations whose key statutory characteristics are listed below are marked more by the similarities in their constitutional make-up than by any differences suggested by the Commission, Commissioner or Ombudsman titles applied to them.

**Table 1: Statutory provision**

|                          | <b>Scottish Public Services Ombudsman</b>   | <b>Scottish Commission for Human Rights</b>   | <b>Scottish Commissioner for Children and Young people</b>   |
|--------------------------|---|---|--|
| Status                   | <p>The Ombudsman, deputy Ombudsmen and Ombudsman’s staff are not to be regarded as servants or agents of the Crown or as having any status, immunity or privilege of the Crown; and the Ombudsman’s property is not to be regarded as property of, or property held on behalf of, the Crown. The Ombudsman, in the exercise of that officer’s functions, is not subject to the direction or control of—</p> <p>(a) any member of the Parliament,<br/>           (b) any member of the Scottish Executive,<br/>           (c) the Parliamentary corporation.</p> | <p>The Commission—</p> <p>(a) is not a servant or agent of the Crown, and<br/>           (b) has no status, immunity or privilege of the Crown</p>  | <p>Neither the Commissioner nor any member of the Commissioner’s staff is to be regarded as a servant or agent of the Crown or as having any status, immunity or privilege of the Crown. The Commissioner’s property is not to be regarded as property of, or property held on behalf of, the Crown.</p>                                 |
| Appointment / Membership | <p>For the purposes of this Act there is to be an officer known as the Scottish Public Services Ombudsman (in this Act referred to as the “Ombudsman”) who is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament.</p>  | <p>There is established a body corporate to be known as the Scottish Commission for Human Rights (and referred to in this Act as the “Commission”). The Commission consists of the following members—</p> <p>(a) a member appointed to chair the Commission, and<br/>           (b) not more than 4 other members.</p> <p>The member appointed to chair the Commission is to be an individual appointed by Her Majesty on the nomination of the Scottish Parliament.</p> <p>The other members are to be individuals appointed by the Parliamentary corporation.</p> | <p>There is to be a Commissioner for Children and Young People in Scotland.</p> <p>The appointment of the Commissioner is otherwise on such terms as the Parliamentary corporation may determine.</p> <p>The terms may include provision as to the circumstances in which the Commissioner may hold any other office or appointment.</p> |

|                                 |   |   |  |
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| <p>Terms of office / tenure</p> | <p>The Ombudsman and a deputy Ombudsman each—<br/> (a) holds office for such period not exceeding five years as the Parliamentary corporation, at the time of appointment, may determine,<br/> (b) may be relieved of office by Her Majesty at the request of the officer in question,<br/> (c) vacates office on 31st December in the year of service in which the officer in question attains the age of 65,<br/> (d) may be removed from office by Her Majesty in pursuance of a resolution of the Parliament which, if passed on a division, must be voted for by a number of members equivalent to not less than two thirds of the total number of seats for members of the Parliament, and<br/> (e) in other respects, holds office on such terms and conditions as the Parliamentary corporation may determine.<br/> A person whose period of office as Ombudsman or deputy Ombudsman expires under sub-paragraph (1)(a) is eligible for reappointment; but reappointment to the same office for a third consecutive period is competent only if, by reason of special circumstances, such reappointment is desirable in the public interest.<br/> Subject to sub-paragraph (2), nothing in this paragraph prevents a person who</p> | <p>Each member of the Commission—<br/> (a) holds office for such period not exceeding five years as the Parliamentary corporation, at the time of appointment, may determine, and<br/> (b) is eligible for reappointment to the same office (whether the reappointment is for a consecutive period or otherwise) but reappointment for a third period is not competent.<br/> (2) The member appointed to chair the Commission may be—<br/> (a) relieved of office by Her Majesty at the member's request, or<br/> (b) removed from office by Her Majesty if condition A or B is satisfied.<br/> (3) Any other member of the Commission may be—<br/> (a) relieved of office by the Parliamentary corporation at the member's request, or<br/> (b) removed from office by the Parliamentary corporation if condition A or B is satisfied.<br/> (4) Condition A is that—<br/> (a) the Parliamentary corporation is satisfied that the member has breached the member's terms of appointment, and<br/> (b) the Parliament resolves that the member should be removed from office for that reason.<br/> (5) Condition B is that the Parliament resolves that it has lost confidence in the member.</p> | <p>(1) The Commissioner is to be an individual appointed by Her Majesty on the nomination of the Parliament.<br/> (2) A person is disqualified from appointment as the Commissioner if that person is, at the date when the appointment is to take effect, or in the year prior to that date has been—<br/> (a) a member of the Parliament;<br/> (b) a member of the House of Commons; or<br/> (c) a member of the European Parliament.<br/> (3) The Commissioner is to be appointed for such period, not exceeding five years, as the Parliamentary corporation may determine.<br/> (4) A person who has been appointed for one period as the Commissioner may be appointed for a second period (whether or not consecutive) but not for any additional period. The appointment of the Commissioner is otherwise on such terms as the Parliamentary corporation may determine.<br/> (3) The terms may include provision as to the circumstances in which the Commissioner may hold any other office or appointment.</p> |
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|                      | previously held office as Ombudsman or deputy Ombudsman (except such a person who ceased to hold office by virtue of subparagraph (1)(c)) from being appointed again to that office or to the other office.  |  |   |
| Pay and remuneration | <p>(1) The Ombudsman and a deputy Ombudsman are each entitled to—</p> <p>(a) a salary of such amount, and</p> <p>(b) such allowances,</p> <p>as the Parliamentary corporation may determine.</p> <p>(2) The salary payable to a person holding office as Ombudsman or deputy Ombudsman is to be abated by the amount of any pension payable to that person in respect of any public office in the United Kingdom or elsewhere to which that person was previously elected or appointed.</p>                                | <p>Each member of the Commission is entitled to—</p> <p>(a) such remuneration, and</p> <p>(b) such allowances,</p> <p>as the Parliamentary corporation may determine.</p> <p>In other respects, each member of the Commission holds office on such terms and conditions as the Parliamentary corporation may determine.</p>  | <p>The Commissioner is entitled to—</p> <p>(a) a salary of such amount; and</p> <p>(b) such allowances,</p> <p>as the Parliamentary corporation may determine.</p>  |
| Staff                | <p>(1) The Ombudsman may appoint such staff, on such terms and conditions, as the Ombudsman may determine.</p> <p>(2) The Ombudsman may make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff and (without prejudice to that generality) may—</p> <p>(a) make contributions or payments towards provision for such pensions, allowances or gratuities, and</p> <p>(b) establish and administer one or more pensions schemes.</p> | <p>(1) The Commission may, with the consent of the Parliamentary corporation as to numbers, appoint staff.</p> <p>(2) The appointment of staff is to be on such terms and conditions as the Commission may, with the approval of the Parliamentary corporation, determine.</p> <p>(3) The Commission may, with the approval of the Parliamentary corporation, make arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff.</p> | <p>(1) The Commissioner may, with the consent of the Parliamentary corporation as to numbers, appoint staff to assist in carrying out the Commissioner's functions.</p> <p>(2) The Commissioner may, with the consent of the Parliamentary corporation, determine the terms of appointment of such staff, including arrangements for the payment of pensions, allowances or gratuities to, or in respect of, any person who has ceased to be a member of staff of the Commissioner.</p> |



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| Financial provision | The Parliamentary corporation is to pay—<br>(a) the salary and allowances of the Ombudsman and any deputy Ombudsman,<br>(b) any expenses incurred by the Ombudsman in the exercise of the functions of the Ombudsman,   | The Parliamentary corporation is to pay—<br>(a) the remuneration and allowances of each member of the Commission, and<br>(b) any expenses incurred by the Commission in the exercise of its functions, so far as those expenses are not met out of sums received and applied by it under section 3(3).  | The Parliamentary corporation is to pay—<br>(a) the salary and allowances of the Commissioner; and<br>(b) any expenses properly incurred by the Commissioner in the exercise of the Commissioner's functions.   |
| Accountable Officer | (1) The Parliamentary corporation is to designate the Ombudsman, a deputy Ombudsman or a member of the Ombudsman's staff as the accountable officer for the purposes of this paragraph.<br>(2) The functions of the accountable officer are—<br>(a) those specified in sub-paragraph (3),<br>and<br>(b) where the accountable officer is not the Ombudsman, the duty set out in sub-paragraph (4),<br>and the accountable officer is answerable to the Parliament for the exercise of those functions.<br>(3) The functions referred to in sub-paragraph (2)(a) are—<br>(a) signing the accounts of the expenditure and receipts of the Ombudsman,<br>(b) ensuring the propriety and regularity of the finances of the Ombudsman,<br>(c) ensuring that the resources of the Ombudsman are used economically, efficiently and effectively. | (1) The Parliamentary corporation must designate a member of the Commission or of the Commission's staff as the accountable officer for the purposes of this paragraph.<br>(2) The functions of the accountable officer are—<br>(a) signing the accounts of the expenditure and receipts of the Commission,<br>(b) ensuring the propriety and regularity of the finances of the Commission,<br>(c) ensuring that the resources of the Commission are used economically, efficiently and effectively, and<br>(d) the duty set out in sub-paragraph (3),<br>and the accountable officer is answerable to the Parliament for the exercise of those functions | (1) The Parliamentary corporation is to designate the Commissioner or a member of the Commissioner's staff as the accountable officer for the purposes of this paragraph.<br>(2) The functions of the accountable officer are—<br>(a) signing the accounts of the expenditure and receipts of the Commissioner;<br>(b) ensuring the propriety and regularity of the finances of the Commissioner;<br>(c) ensuring that the resources of the Commissioner are used economically, efficiently and effectively; and<br>(d) where the accountable officer is not the Commissioner, the duty set out in sub-paragraph (4).<br>(3) The accountable officer is answerable to the Parliament for the exercise of those functions. |

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| Accounts and Audit | <p>(1) The Ombudsman must—</p> <p>(a) keep accounts, and</p> <p>(b) prepare annual accounts in respect of each financial year, in accordance with such directions as the Scottish Ministers may give.</p> <p>(2) The Ombudsman must send a copy of the annual accounts to the Auditor General for Scotland for auditing.</p> <p>(4) If requested by any person, the Ombudsman must make available at any reasonable time, and without charge, in printed or in electronic form, the audited accounts, so that they may be inspected by that person.</p> | <p>(1) The Commission must, in accordance with such directions as the Scottish Ministers may give—</p> <p>(a) keep proper accounts and accounting records,</p> <p>(b) prepare annual accounts in respect of each financial year, and</p> <p>(c) send a copy of the annual accounts to the Auditor General for Scotland for auditing.</p> <p>(2) If requested by any person, the Commission must make available at any reasonable time, and without charge, in printed or electronic form, the audited accounts, so that they may be inspected by that person.</p> | <p>(1) The Commissioner must keep proper accounts at all times and prepare annual accounts in respect of each financial year.</p> <p>(2) The Commissioner must send a copy of the annual accounts to the Auditor General for Scotland for auditing.</p> <p>(4) If requested by any person, the Commissioner must make available at any reasonable time, and without charge, in printed or electronic form, the audited accounts, so that they may be inspected by that person.</p>   |
| General Powers     | <p>(1) The Ombudsman may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of the Ombudsman's functions.</p> <p>(2) Without prejudice to that generality, the Ombudsman may in particular—</p> <p>(a) acquire and dispose of land and other property, and</p> <p>(b) enter into contracts.</p>  | <p>(1) The Commission may do anything which appears necessary or expedient for the purpose of, or in connection with, or which appears conducive to, the exercise of its functions.</p> <p>(2) In particular, the Commission may—</p> <p>(a) enter into contracts, and</p> <p>(b) with the consent of the Parliamentary corporation, acquire and dispose of land.</p>   | <p>(1) The Commissioner has a general power to do anything necessary or expedient for the purposes of, or in connection with, the exercise of the Commissioner's functions.</p> <p>(2) In particular, the Commissioner may enter into contracts and acquire and dispose of property.</p> <p>(3) The Commissioner may charge for such services as may be specified by the Scottish Ministers, by order made by statutory instrument, as chargeable services for the purposes of this Act.</p> <p>(4) A statutory instrument containing an order under sub-paragraph (3) is subject to annulment in pursuance of a resolution of the Parliament.</p> |

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**18 February 2009**

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## REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

### RESPONSE BY SCOTTISH PUBLIC SERVICES OMBUDSMAN TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE

Thank you for your letter of 29 January following my evidence to the Committee on 20 January. Here is my response to the points you raise.

**1. In your evidence you indicated that 'people are clear about who they should go to if something has gone wrong and they need to appeal to a higher body'. Could you let us have sight of any external or internal survey material that supports your evidence?**

The general point I was making in response to Mr Hepburn's question was that the SPSO has achieved a degree of public recognition as the appropriate place for reviewing unresolved disputes. This is not to say that there does not remain some confusion in the minds of the public – I accept that, with the number of external review bodies that exist at present, some uncertainty is inevitable. However, I would ask the Committee to note that, as part of the evidence gathering in support of Professor Crerar's Scrutiny Review, research conducted in 2007 by Ipsos MORI<sup>1</sup> found a:

'surprisingly high level of awareness of the SPSO, given that it was set up in 2002'. The researchers believed that this had implications for the Review stating that '[the SPSO's] high profile makes it pivotal in referring members of the public to appropriate complaints procedures in cases that it cannot itself investigate and a strong candidate for offering more general information about scrutiny.'

The research also suggested that:

'While some service users wished they had known a bit more about scrutiny, particularly about scrutiny outcomes, when they were choosing a service, in general participants seemed content to get the information they needed (e.g. to make a complaint) when they needed it. ...What they need is accessible and useful information at the right time.'

**2. Do you have any material to support your evidence that public awareness of an Ombudsman is higher than that for a commissioner?**

The first wave of British public sector, final stage complaint handlers created in the 1960s and 1970s were all officially designated Commissioners rather than Ombudsmen. Those that continue to exist in the form in which they were created<sup>2</sup> all now choose to refer to themselves publicly as Ombudsmen because they recognise that the significance of this term is more generally

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<sup>1</sup>MacLardie, Murray & Sewel: *Scrutiny and the public - qualitative study of public perspectives on regulation, audit, inspection and complaints handling of public services in Scotland*  
<http://www.scotland.gov.uk/Topics/Government/PublicServiceReform/IndependentReviewofReg/QualitativeFullReport>

<sup>2</sup>The Parliamentary Commissioner for Administration, the Health Service Commissioner for England and the Commissioners for Local Administration in England

understood than that of 'Commissioner'. This view was endorsed in a response<sup>3</sup> which JUSTICE (the all-party law reform and human rights organisation) made to a 1999 Cabinet Office request for views on how the arrangements for the Parliamentary Commissioner for Administration, the Health Commissioner and the Commission for Local Administration were working. JUSTICE submitted that:

'The Parliamentary Commissioner should be officially designated as the Parliamentary Ombudsman. Likewise, the Health Service Commissioner should be the Health Service Ombudsman. These are titles by which they are more likely to be recognised.'

It is notable that final stage complaints handlers created from the 1980s onwards have tended to be officially designated as Ombudsmen. Recently when a review of one of those organisations, the Financial Ombudsman Service, suggested that it might be given a different title, there was wide public support for retaining the Ombudsman designation<sup>4</sup>. A typical comment was:

'The word has been adopted/accepted around the globe. So why should we try to find another to describe this function, when this one does the job so well? Keep the name 'ombudsman'. It rocks.!'

I have already drawn the Committee's attention to a similar argument advanced, in relation to his own office, in paragraph 15 of the written evidence submitted by the Scottish Information Commissioner. This argument is also endorsed by the British and Irish Ombudsman's Association in their submission to the Committee which states:

'We also feel that statutory complaint-handling schemes that meet the BIOA criteria for full membership should ideally be referred to as Ombudsmen, rather than some other title such as commissioner, adjudicator, etc, as a plethora of titles of persons doing essentially the same job is confusing. We believe that, despite its Scandinavian origins, the word 'Ombudsman' has increasing public understanding and acceptance, not just within the United Kingdom but also worldwide'.

The British and Irish Ombudsman Association (BIOA) has gone further in making the case for protecting the title of Ombudsman. The view that such protection is needed is reflected in draft legislation currently being considered in the Republic of Ireland in relation to the use of the title Ombudsman.

**3. You helpfully provided us with your views on the SPSO considering systemic issues. It would be helpful if you could elaborate on your thinking and indicate any mechanisms or legislation that should be put in place to avoid systemic investigations becoming the focus of the office to the detriment of individual complaints.**

<sup>3</sup> <http://www.justice.org.uk/images/pdfs/en.PDF>

<sup>4</sup> Details on the FOS website at:

[http://www.financial-ombudsman.org.uk/news/updates/ombudsman\\_keep\\_name.html](http://www.financial-ombudsman.org.uk/news/updates/ombudsman_keep_name.html)

As I explained in my submission of 12 January 2009, I see potential value in enabling the Ombudsman to undertake investigations in the absence of an individual complaint or beyond the stated terms of a specific complaint for two main reasons. These are to enable us to pursue systemic failings and to pursue a complaint where it leads. In their written evidence to the Committee, Waterwatch Scotland (WWS) pointed out that they are not limited to dealing with individual complaints. They said that many of their successes to date had been as a result of this ability to raise and pursue systemic issues proactively, to the benefit of customers and the greater industry. They also commented that this approach allows WWS to identify potential issues 'bubbling under the surface' and remedy them within a short timescale.

A recent review of European Ombudsmen<sup>5</sup> found that 83% have 'own initiative' investigation powers. These include the Irish Ombudsman who operates under legislation which in other respects is quite similar to that governing the SPSO. My Irish opposite number uses the 'own initiative' power very rarely but has found it of value, for example, in probing whether a problem identified in the investigation of a submitted complaint about an individual authority exists in other similar authorities and in exploring apparent anomalies in the way different authorities approach the delivery of the same service.

Theoretically, systemic investigations might become the focus of an Ombudsman office to the detriment of individual complaints for two reasons: external pressure to undertake such investigations; and the Ombudsman him or herself becoming unduly focussed on systemic investigations. Neither problem has arisen in Ireland or to the best of my knowledge in other European countries. And I would argue that if own initiative powers were given to the SPSO there are existing provisions in the 2002 SPSO Act that would guard against their abuse. Section 2(3) of the Act which provides that it is for the Ombudsman to decide whether to initiate, continue or discontinue an investigation supplies a basis for resisting inappropriate external pressure to undertake systemic investigations. Similarly, the provision that the Ombudsman may be removed in pursuance of a resolution of the Parliament (paragraph 4(1)(d) of Schedule 1 to the Act) provides the ultimate sanction against the inappropriate use of own initiative powers.

**4. There were a number of questions around ongoing performance should your jurisdiction be enhanced. Could you clarify how any extension of jurisdiction could be handled to avoid adversely impacting upon performance levels both within the other bodies and within the SPSO.**

We understand that bringing together different complaint handling regimes can introduce concerns about the impact on performance. Indeed, because of the way the SPSO has developed, we understand this point very well, and have direct experience of merging predecessor offices and functions into a

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<sup>5</sup>*European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea.* Gabriele Kuksko-Stadlmayer (ed.). Springer Wien New York 2008.

'one-stop-shop' from 2002 onwards and further extensions to our jurisdiction since then. I would submit that the way that the SPSO has dealt with previous increases in caseload and extensions to jurisdiction indicate that we are capable of managing change of this kind and that there is a successful model for ensuring that there is no impact on performance levels of either bodies within the SPSO's jurisdiction or the SPSO itself.

For example, on 1 April 2005 NHS Scotland introduced a revised internal complaints procedure which made it quicker and simpler for people to bring complaints to the SPSO. This led to a near doubling in the number of complaints about the NHS coming to us. We had prepared for this change by estimating its likely impact on us and negotiating additional funding to support the new work and also by working with the NHS to raise awareness of the Ombudsman and understanding of how the new arrangements would operate. Similarly, in preparation for complaints about further and higher education coming within our remit in October 2005 we worked closely with the then Scottish Executive and representatives of colleges, universities and students to ensure understanding of our role and how we would work with them. In both cases the transfer to the new arrangements took place smoothly and without adverse impact on either the organisations concerned or the SPSO.

In addition, since that time we have made further, significant improvements as a result of changes to our structure, processes and the development of staff. Taking a user-centred approach, we are now much better placed to sift cases so that relatively straightforward cases can be handled very quickly, within days or weeks. Inevitably, some of the more complex cases that we handle do require more time and more detailed investigation but they are also subject to targets. These improvements have impacted positively on our throughput times.

We have therefore successfully integrated a range of different regimes in the past and continued to improve our systems. The key risks centre on expertise, resources and user reassurance – provided that effective arrangements are put in place to secure the appropriate transfer of expertise and resources, and provided that the respective constituencies are engaged in a constructive dialogue about the changes, we feel confident that the extensions of our jurisdiction being proposed could be successfully accommodated with no diminution in service to users.

Where problems have occurred in the past they have not been due to the integration of new functions, but rather as a result of delays in receiving resources to cope with the more general increase in complaints (demand) over the period (see discussion on budget under Question 8).

**5. Can you confirm how many additional staff could be accommodated within your current offices?**

We currently occupy two linked buildings at 4-6 Melville Street offering a total of 600 sq m of usable space. The lease ends in 2018, with an option to sub-let. The layout is semi-open plan and all staff (except the Ombudsman)



currently share offices. We also have two medium-sized and three small meeting rooms (two of which double up as interview rooms for public use). We would face severe operational constraints if we lost any of this meeting space to desks. The buildings are listed so the scope for further alteration is limited. Taking all these factors into account, we consider the buildings could reasonably accommodate six more people. Beyond this, additional staff could only be accommodated by exploring the potential for more hot-desking /sharing of workstations or by introducing formal working from home arrangements. We would also ask the Committee to note that we are close to agreeing an arrangement with the Scottish Human Rights Commission under which two workspaces in our office will be made available to them for a 12 month period from March 2009.

**6. In your evidence you suggest that a Commission model would blur visibility and leadership from the public perspective. Can you provide any examples which explain or demonstrate how this would arise?**

Some of the comments we have made above in relation to your second question are also relevant here.

It appears that the SPCB proposal for a commission model is founded on the premise that this would improve decision-making. We remain unconvinced by that argument and we do have concerns about the adverse impact on public perception and accountability.

The Committee are right to focus on public perception. It may help to refer to my experience in dealing with complainants as Ombudsman. Accessibility and accountability are rightly of concern to those bringing complaints to the SPSO. I am frequently struck by the number of requests to have matters dealt with by me, personally. I will often meet complainants, or staff from organisations complained about, or MSPs with an interest in a complaint to help understand the issues or to help explain my decisions. In such cases, I consider that it is extremely significant and useful that my authority is undiluted by reference to some form of decision-making committee. This does mean that at times I face criticism by both members of the public and public bodies. I note the concerns of the SPCB that office-holders should be protected and I appreciate the reasons behind this. However, I do not feel this is a compelling reason. Any individual appointed to this role should expect to be able to make and stand by difficult decisions.

Although I consider that the exercise of my responsibilities as Ombudsman has been assisted by the clarity of a single position I have never felt isolated in my duties. In practice, decision-making inevitably involves other staff. I discuss significant cases with my Directors, managers and individual investigators at regular case conferences. For straightforward complaints, decision-making is often delegated, although an internal review process does allow complainants to have their case considered further. It is not clear what benefit adding other office-holders to this structure would bring to the decision-making itself. In our written evidence we referred to the research finding that 40 out of 47 ombudsmen across Europe were organised

'monocratically'.<sup>6</sup> Some countries do have a group of ombudsmen or deputy ombudsmen – who are not necessarily appointed office-holders – who are each responsible for particular areas where the office-holder covers a wide range of functions. However it is, in my experience, almost always possible for service users to locate one identifiable individual with responsibility for each decision.

Kevin Dunion, in his oral evidence on 3 February pointed to parallels with Information Commissions which do exist abroad and said that in his view these caused delays and increased costs. Specifically he said: 'Those commissioners have to reach decisions collectively. I have observed that that occasions great delay - because the commissioners can disagree on outcomes - and that decisions that are taken on a majority basis do not engender public confidence'.

Commissions do exist in Scotland and the SPCB has suggested that the Scottish Legal Complaints Commission may offer a model for the way ahead. As I understand it, the Commission is structured to ensure that lawyers and non-lawyers are represented. This is so that both constituencies of the commission feel confident that there is no particular bias to one or other view. Given the body is funded by the legal profession but is there to listen to the complaints of consumers, this structure does have clear logic but the parallel with public service complaints is not strong.

Another model is the Scottish Human Rights Commission. However, this is not a complaint handling body making decisions in that respect: it has an advocacy role. Further, to some extent, it has a 'representative' function in terms of the different areas of human rights. Clearly it is helpful to have different views expressed when deciding on priorities, but the situation is not comparable.

An Ombudsman's principal role is to make decisions about individual complaints and to be impartial and independent of those complained about. Indeed, individuals who come to us are often already concerned that we may be biased to the public service and I do not feel a situation where we might have public services represented in the decision-making would be appropriate. Our key strength is our independence from the bodies.

I would have concerns about the effect on accountability of a Commission structure. The line of accountability at the moment is very clear. We are not advocates, the SPSO's role is to assess whether the correct policies and procedures have been followed by service providers and that there is no service failure. This is a matter of judgement and, in my experience, complainants are more likely to be concerned about whether we have access to sufficient expertise in specific areas to make that judgement rather than the number of people involved. However, it is the essence of the role of the Ombudsman to make decisions and, while those decisions are inevitably made after internal discussion, I feel the public are best served when one

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<sup>6</sup> Gabriele Kucsko-Stadlmayer (ed.). *op cit.*

individual is ultimately responsible for them. As indicated, there are internal mechanisms for case conferences and for reviewing decisions, and, of course, the decisions of the Ombudsman can be subject to Judicial Review.

**7. Eric Drake indicated that accountability to the SPCB 'creates potentially unnecessary tension and dilutes the relationship that should exist between the Ombudsman and Parliament collectively'. Could you provide examples to support that evidence?**

The key point here is that the SPCB is a body under the jurisdiction of the SPSO. In principle, if not in practice, this creates the possibility of perceived conflicts of interest and the potential for tension between the two organisations.

In his oral evidence to your Committee Kevin Dunion described the Parliamentary office-holders as being 'forced on the SPCB, or billeted with it perhaps'. It seems to me that a risk of that arrangement is that the SPCB sees the office holders as first and foremost competitors for its resources. I explore the unhelpful tensions this can create in my answer to the Committee's next question. Potentially more damaging still is the risk that our status as the SPCB's 'foster children' inhibits the Parliament as a whole from either holding us to account or interacting with us in a way that allows our work to effectively support the Parliament in holding government to account.

When the Ombudsman concept was first imported into the UK with the establishment in 1967 of the UK Parliamentary Ombudsman it was seen as being closely akin to the Comptroller and Auditor General: an officer of Parliament whose investigative work would help Parliament hold the executive to account. In recognition of that parallel arrangements were made for the Ombudsman to report to a Select Committee of Parliament. That Committee is currently the Public Administration Select Committee (PASC) which is appointed to examine Ombudsman reports and matters in connection therewith, and to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service<sup>7</sup>. The Committee has been robust, both in publicly holding the Ombudsman to account<sup>8</sup> and in pursuing with government issues arising from the Ombudsman's investigations<sup>9</sup>.

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[http://www.parliament.uk/parliamentary\\_committees/public\\_administration\\_select\\_committee/remit.cfm](http://www.parliament.uk/parliamentary_committees/public_administration_select_committee/remit.cfm).

<sup>8</sup> See, for example

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpublicadm/1144/8103002.htm>, the record of the 30 October 2008 public oral evidence session on *The work of the Ombudsman 2007-8* at which the Ombudsman acknowledged 'We had a bad year last year. When I sat here 12 months ago, I did not see it coming and that has been a source of great concern to me. I absolutely agree that we want to be exemplary and I am well aware that these are not exemplary results'.

<sup>9</sup> For example the PASC session on 11 February 2009 when the Economic Secretary to the Treasury was questioned in relation to the Ombudsman's *Equitable Life* report: described in media reports (see <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/insurance/4593286/Equitable-Life-debate-leads-to-Treasury-name-calling.html>) as 'a grilling' involving 'heated exchanges'.

The UK Parliamentary Ombudsman is directly funded by government but has agreed with the relevant government departments a statement<sup>10</sup> which sets out their responsibilities in providing the necessary resources and support to her to ensure the effective operation of her office in accordance with the intentions of Parliament; and her responsibilities in demonstrating proper accountability for the public monies provided to her.

These arrangements, I would argue, provide a framework within which the Parliamentary Ombudsman is financially accountable without being subject to undue influence, interference or micro-management from funders; and even more importantly ensure that she is subject to clear, public and robust accountability to Parliament while at the same time her work can systematically and effectively support Parliament in holding government to account.

I would also argue that these arrangements provide a more effective and appropriate balance between the principles of accountability and independence than exists in Scotland. Following their comparative research on Ombudsmen in the UK and other countries, Kirkham et al<sup>11</sup> have argued that it is questionable whether the arrangements in Scotland (and Wales and Northern Ireland) as compared with the UK Parliamentary Ombudsman 'will facilitate the long-term understanding and appreciation of the work of an ombudsman necessary to enable the respective chambers to provide a supportive role on a par with PASC'.

Examples of unnecessary tension have arisen when the SPSO has received specific complaints about the SPCB and made recommendations to them about changes in their practice. In addition, there can be unnecessary tensions in relation to the budget, when there is an overall constraint on the SPCB in terms of a percentage formula. As the Finance Committee recognised, the work of the SPSO is demand-led. The current arrangements however are not well adapted to allowing funding to reflect increased demand in a timely way and this has had a direct impact on timescales for handling complaints.

**8. When discussing budgetary constraints you highlighted tensions that arose when there was a large increase in the number of complaints you received. You also explained issues around establishing a maximum period to handle any complaint. Would including within the legislation a requirement similar to that for the Standards Commissioners (sections 7(11) and 8(3) refer) that once a complaint is not concluded within a set time a report is made to the Parliament together with an explanation address both of these points? Such a provision would afford an opportunity to in effect alert Parliament of such a tension? I would also welcome any suggestions you have as to an appropriate time-period.**

<sup>10</sup> [http://www.ombudsman.org.uk/about\\_us/governance/statement\\_of\\_responsibility.html](http://www.ombudsman.org.uk/about_us/governance/statement_of_responsibility.html)

<sup>11</sup> Richard Kirkham, Brian Thompson, Trevor Buck, 'When Putting Things Right Goes Wrong: Enforcing the Recommendations of the Ombudsman', in *Public Law*, 2008

The kind of budgetary tensions that can arise in the current arrangements have been described above. We can see why the Committee may be exploring a linkage between excessive investigation periods and resourcing, and there is of course a relationship. Indeed the Committee will not be surprised to learn that we are supportive of the principle behind this suggestion. We do, however, have some reservations.

The SPSO sets target turnaround times for our casework and we currently include information about time taken to consider complaints in our Annual Reports<sup>12</sup>. We aim to issue determinations as quickly as possible and in the last complete business year we issued 88% of our decisions within 12 months. We also report quarterly performance information to the SPCB which helps inform our annual budgetary discussions. A legislative requirement in this respect may prove to be somewhat disproportionate and inflexible.

It would be particularly inflexible in a 'one-stop-shop' model. Given the range of issues covered by the SPSO, the nature and complexity of the complaints we receive vary considerably. This poses some practical difficulties in applying the same timescales through a statutory provision to such a wide range of complaints. However, as indicated above, this does not mean that timescales and targets cannot be set and this is something that we currently do.

Furthermore, we would submit that the parallel with the Standards Commissioners is not a strong one. Sections 7(11) and 8(3) of the Scottish Parliamentary Standards Commissioner Act 2002 relate to the activities of a Commissioner considering complaints against Members of the Parliament and reporting on them to a committee of the Parliament. As discussed, the remit of the Ombudsman is wider and the types of complaint investigated much more varied. Given that, I question whether similar provisions in respect of the Ombudsman would be either appropriate or practicable.

I hope that my comments are helpful to the Committee. My office will be happy to provide any additional information that the Committee requires.

Professor Alice Brown  
Ombudsman  
13 February 2009

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<sup>12</sup> See 2007-08 Annual Report, page 9.

<http://www.scottishombudsman.org.uk/files/webfm/Publications/Annual%20reports/SPSO%20Annual%20Report%202007-08.pdf>

## **REVIEW OF SPCB SUPPORTED BODIES COMMITTEE**

### **RESPONSE BY MR FRANK FRENCH TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE**

I would like to thank the RSSB committee for inviting me to expand on my recommendations to make the SPSO more accountable and effective.

Administrative Justice is an important check and balance to ensure that the public are being fairly treated by the authorities and a basic human right.

The Scottish Parliament recognised this fact and set up the Scottish Public Services Ombudsman in 2002 to deliver administrative justice for the public.

In 2003 I had issues with my local Council and I was asked to attend a meeting with the Head of Legal Services and Head of Planning. At that meeting I said I intended to submit a complaint about the Council to the Scottish Ombudsman. The Head of Legal Services and Head of Planning both laughed and Head of Planning said the new Ombudsman (Professor Brown) does not investigate complaints of maladministration. How right they were.

I was not deterred by this and went ahead and submitted my complaints of maladministration to the SPSO. Over a three year period my complaints appeared to be investigated by an Investigation Officer, Investigation Manager and Deputy Ombudsman. Unfortunately all irrefutable evidence I provided to support my valid complaints of maladministration were either ignored or dismissed with illogical and unreasonable justifications. At the end of the three year period I found out that the SPSO had treated all my complaints as "enquiries" and had not "formally investigated" any of them, thus allowing them to dismiss my complaints without ever having to report them to Parliament. This is administrative justice SPSO style.

I decided to investigate the performance of the SPSO and found out that the SPSO only "formally investigated" 27 complaints out of 4168 made by the public in the 2 year period 2003 to 2005.

The Head of Planning had valid reasons to laugh when I said I intended to submit a complaint to the SPSO as he knew there was no way that the SPSO would investigate my complaint as the statistics show that 99.3% of complaints were rejected before even reaching the "investigation stage".

My experience of using the services of the SPSO is not unusual as evidenced by the SPSO's own statistics and customer satisfaction surveys.

At the present time the SPSO does not provide administrative justice to all members of the public with valid complaints. The SPSO does not provide the checks and balances envisaged by the Scottish Parliament which would make Scotland a more fair and equitable society to live in.

The SPSO has undoubtedly denied the majority of the public any form of justice.

I have made the following recommendations to change the act that governs the SPSO so that the Scottish Public Services Ombudsman can be held to account if they do not provide a quasi judicial service to the public and fail to ensure that the authorities are following the administrative laws and rules of Scotland.

**1: The Scottish Parliament should define and specify in the Act a working definition of what they consider constitutes "maladministration" so that the Ombudsman can be held accountable by the Parliament and public.**

The Scottish Public Services Ombudsman does not want the public to know what constitutes a valid complaint of maladministration so that they can dismiss any valid complaints without being challenged. The SPSO's decision is final and cannot be challenged by anyone (note the SPSO state on their web site that a judicial review can only challenge the process not the decision of the Ombudsman).

Professor Brown has publicly stated at the Local Government and Communities Committee meeting on the 14<sup>th</sup> November 2007 that she wants to avoid any strict legal interpretations of maladministration. Basically Professor Brown does not want to be held to account or challenged when she dismisses valid complaints of maladministration.

The SPSO was asked to provide what guidance they give to their investigators as to what would constitute maladministration. The SPSO confirmed that they provide no guidance on what they consider to be maladministration to their investigators.

Professor Brown on the 14<sup>th</sup> November 2007 said to Parliament that the only test they use "is whether the average person on the street would think that something was reasonable". In 2003 to 2005 Professor Brown thought 99.3% of the public's complaints were unreasonable and dismissed them before reaching the investigation stage. Would the average person on the street think Professor Brown's actions were reasonable?

The New South Wales Government in Australia have defined in the act what is maladministration and the NSW Ombudsman has produced a very detailed working definition of what they consider constitutes maladministration (attachment 1).

It would appear that the SPSO are scared to define maladministration as they could then be held to account and their decisions to dismiss valid complaints challenged.

If the Scottish Parliament wish to have a Scottish Ombudsman which provides an effective administrative justice service to the public then it is imperative that the SPSO Act 2002 be amended to provide a working definition of what the Scottish Parliament consider is maladministration.

**2. The Scottish Parliament should amend the Act so that the Ombudsman must formally investigate and report to Parliament all complaints about their service. The Scottish Parliamentary Corporate Body should be given the power to review these complaints and take any appropriate action to ensure that the SPSO are providing the service expected by Parliament.**

The SPSO claim they provide a transparent and accountable service to the public and that all organisations should welcome complaints, investigate them and report them both internally and externally.

The SPSO tells the public that no one complains about their decisions.

However, recently the SPSO have had to admit that in the last 5 years they have received 641 complaints about their decisions which they have not investigated, or reported externally.

The SPSO obviously does not wish to acknowledge or accept that the average member of the public disagrees with her decisions.

The SPSO are currently not accountable to anyone, not the Parliament, not the MSPs, not the RSSB and not even the Scottish Judicial system can challenge their decisions no matter how unreasonable and unjustifiable these decisions may be.

The SPSO will only become accountable if they too are made to investigate and report complaints about their service to the public and then report them to the SPCB. The SPCB must also be given the power to rectify any injustices found and to hold the Ombudsman to account if they are not providing a quasi judicial service to all members of the public who submit valid complaints to them.

**3. The Scottish Parliament should amend the Act so that Audit Scotland have to conduct an “economy, efficiency and effectiveness examination audit” every year to ensure that the SPSO is delivering the service expected by the Parliament and Public.**

Audit Scotland is currently the only agency that has the legal power to investigate the effectiveness of the SPSO.

Numerous members of the public have written to Audit Scotland asking them to perform an effectiveness audit to determine if SPSO is providing the quasi judicial administrative justice service they claim to be providing.



In all replies Audit Scotland has said it would not be an appropriate time for them to audit the SPSO.

Public petition PE1163 was raised specifically to ask that Audit Scotland perform an effectiveness audit of the SPSO due to the serious concerns of the public at the way their valid complaints were being rejected by the SPSO.

Again Audit Scotland has said it would not be an appropriate time for them to audit the SPSO.

Audit Scotland have been informed that the SPSO only made 27 formal investigations over a 2 year period at a cost to the public purse of £100,000 per complaint.

Audit Scotland have never performed an effectiveness audit on the SPSO since its inception in 2002 and have refused to consider doing an effectiveness audit even when advised that 99.3% of the public's complaints are being rejected by the SPSO prior to the investigation stage.

Professor Brown claims that her test of what constitutes maladministration is whether the average person on the street would think that something was reasonable or not. Only half of the investigations resulted in decisions. This means that Professor Brown thought 99.6% of the public complaints were not reasonable.

It is obvious that the SPSO were not providing an administrative justice service to all members of the public in 2003 to 2005 yet Audit Scotland do not want to perform an effectiveness audit to determine why this happened.

The SPSO act should be changed so that there is a legal requirement for Audit Scotland to perform an effectiveness audit on the SPSO (not just a financial audit as they currently do every year) to check and verify that the public's complaints are being properly determined.

**I would go further and suggest that the RSSB committee may wish to recommend to the Scottish Parliament that they instruct Audit Scotland to immediately perform an "effectiveness audit" of the SPSO by reviewing the complaints the public have recently submitted to the RSSB committee, the complaints contained within public petitions PE525, PE745, PE1076, PE1163, PE1212, PE1193 and determine why 99.3% of complaints were rejected in 2003 to 2005 without being investigated.**

**4. The Scottish Parliament should change the Act so that there is a right for the public to appeal a decision made by the Ombudsman. As the Ombudsman claims they provide a quasi-judicial service which is required to provide administrative justice, then the appeals should be reviewed by a judge appointed by the Scottish Parliament.**

The SPSO claim they provide a quasi judicial service to the public and provide administrative justice.

Professor Brown confirmed to Parliament on the 14<sup>th</sup> November 2007 that the SPSO team has very little legal training.

The SPSO has no lawyers working for them.

The Deputy Ombudsman wrote to me claiming that the SPSO cannot interpret the law.

How can the SPSO provide a quasi judicial service to the public when no lawyers work for them and the Deputy Ombudsman says the SPSO cannot interpret the law?

If the average member of the public thinks that the authorities have acted unreasonably and the SPSO rejects their complaint then there must be another avenue for the exact legal interpretation of their complaint to be decided. It is obvious that the way the SPSO has been staffed precludes it from providing any form of a judicial service to the public.

The average member of the public cannot afford to challenge the decision of the SPSO in the courts.

The SPSO act should be amended so that there is a right to appeal to a judge appointed by the Government who can review the decisions made by the SPSO to determine if it was a just and legal decision.

**5. The Scottish Parliament should change the Act so that the Ombudsmen and Deputies cannot be recruited from the ranks of the people they are meant to be investigating.**

A lot of the staff recruited by the SPSO are ex Council employees. This means that there is more likely to be a bias against the member of the public making the complaint.

This bias was evident in the correspondence between the authorities and the SPSO where the letters started with "Hi and a happy New Year....."

This bias was also evident in the way the SPSO refused to accept any written correspondence from the authorities to the complainant which conclusively proved the authorities were telling the SPSO a completely different story to the one they had told the public.

For the SPSO to be effective the recruitment of employees of the organisations they are investigating to senior positions in the SPSO should be prohibited.

Mr Whittet a retired Senior Police Officer who is well versed in conducting investigations for the courts stated in his public petition PE1076 that:

Irrefutable evidence was provided to the SPSO, but it was ignored and a flawed and misleading report subsequently produced and published.

I have never read such a biased report.

I consider the dismissal of my complaints wholly unjust and mockery of the principles of justice.

Maladministration did occur, including maladministration on the behalf of the Ombudsman and her staff.

I have never encountered such incompetence, maladministration and dismissive treatment as that perpetrated by the Scottish Public Services Ombudsman.

There would also appear to be deficiencies in the investigating skills and legal training of the people the SPSO have currently recruited and the Scottish Parliament may wish to give the SPSO some guidance on improving the investigative skills and legal training of the SPSO's employees.

18 February 2009

## Attachment 1: New South Wales Ombudsman's working definition of maladministration

### Contrary to law (s.26(1)(a))

- Decisions or actions contrary to:
  - an Act or Regulation
  - the common law
  - a lawful and reasonable order from a person or body authorised to make such an order
- Failure to comply with:
  - obligations under an Act or Regulation
  - the common law
  - a legally binding document or contract
- Continuation of practices or procedures which the courts have found to be unlawful
- Decisions or actions ultra vires, ie not authorised (the decision-maker had no power to make the decision or to do the act)
- Breach of natural justice/procedural fairness, including:
  - failure to give or inadequate notice
  - failure to give or inadequate opportunity to be heard
  - bias
- Incorrect
  - interpretation of the law
  - application of the law
- Legal requirements or procedures not observed
- Improper exercise of a delegated power:
  - decision or action not authorised by delegation
  - fettered discretion/acting under the direction or at the behest of another, ie acting under dictation
- Criminal or corrupt conduct
- Decisions or actions induced or affected by fraud
- Acceptance of bribes or secret commissions
- Unauthorised disclosure of confidential/secret/private information
- Breach of trust or fiduciary responsibilities

### Unreasonable (s.26(1)(b))

- Decisions or actions:
  - inconsistent with adopted guidelines or policy and that inconsistency is not adequately explained
  - inconsistent with other decisions or actions which involve similar facts or circumstances
  - made or taken without obvious relationship to the facts or circumstances
  - not justified by any evidence
  - partial, unfair or inequitable
  - made or taken by a person with a conflict of interests
  - arbitrary
  - so unreasonable that no reasonable person could so decide or act (ie irrational)
  - unconscionable
  - based on information that is factually in error or misinterpreted
  - unreasonably delayed
- Inconsistent decisions or actions not adequately explained
- Policy applied inflexibly without regard to the merits of individual cases
- Application of procedure which fails to achieve the purpose for which it is intended
- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account

- Important facts omitted from reports or deliberations, or ignored
- Denial of procedural fairness, including inadequate:
  - notice of proposed action, decision or hearing
  - advice as to rights
  - reasons for decisions or actions
  - consultation
  - opportunity to be heard
- Failure to give notice of rights where reasonable to do so
- Wrong, inaccurate or misleading advice leading to detriment, whether inadvertent or deliberate
- Failure to apply an Act, Regulation or the common law
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority) including restraints imposed upon persons or property that are not necessary to preserve and protect rights of others
- Abuse of power, eg use of power for unauthorised purpose
- Failure to rectify identified mistakes, errors, oversights or improprieties
- Failure to appreciate impact on the public or an individual, or giving undue weight to agency's convenience, interests.
- Failure to properly comprehend complaint or to respond appropriately to complaint
- Breach of trust
- Failure to properly investigate
- Negligence or the absence of proper care and attention

### Unjust (s.26(1)(b))

- Decisions or actions:
  - not justified by any evidence
  - partial, unfair or inequitable
  - made or taken by a person with a conflict of interests
  - arbitrary
  - so unreasonable that no reasonable person could so decide or act (ie irrational)
  - unconscionable
- Refusal of otherwise valid claims based on minor procedural defects
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- Abuse of power
- Negligence or the absence of proper care and attention
- Unfair or inequitable application of law so that burden or benefit does not reach all those to whom it is intended to apply

### Oppressive (s.26(1)(b))

- Decisions or actions:
  - unconscionable
  - punitive, harsh, cruel or offensive
- Means used not reasonably proportional to ends to be achieved (ie excessive use of authority)
- Abuse of power/discretionary authority
- Imposition of unreasonable preconditions to the provision of a legal entitlement
- Intimidation or harassment
- Use of superior position or knowledge to place a person at an unreasonable disadvantage or to obtain compliance with wishes in respect of an otherwise unrelated matter

### Improperly discriminatory (s.26(1)(b))

- Inconsistent application of laws, policies, etc. when there is no reasonable, justifiable or appropriate reason to do so
- Inconsistent application of policies or practices
- Distinctions applied not authorised by law, or failure to make a distinction which is authorised or required by law
- Failure to perform duties impartially and equitably

### Law or practice unreasonable, unjust, oppressive or improperly discriminatory (s.26(1)(c))

- Application of law or practice does or will produce a result that is unreasonable, unjust, or oppressive.

### Improper motives (s.26(1)(d))

- Decisions or actions:
  - for a purpose other than that for which the power was conferred, ie the intent of a law, policy or procedure is ignored or disregarded in order to achieve a particular outcome
  - motivated by favouritism or personal animosity
  - for personal advantage
  - made or taken by a person with a conflict of interests
- Misuse of confidential information to obtain improper advantage
- Bad faith
- Dishonesty
- Seeking or accepting gifts or benefits in connection with the performance of official duties
- Misuse of public property, official services or facilities
- Favouritism or promotion of personal objectives other than those which merit and equity dictate

### Irrelevant grounds/ considerations (s.26(1)(d))

- Relevant considerations not adequately taken into account
- Irrelevant considerations taken into account
- Policy applied inflexibly without regard to merits of the case
- Abuse of power
- Exercise of discretionary power at the direction or at the behest of another, ie acting under 'dictation'
- Actions influenced by irrelevant remarks or other inappropriate information recorded on files

### Mistake of law (s.26(1)(e))

- Mistake of law:
    - incorrect interpretation of the law
    - incorrect application of the law
  - Ignorance of the law
- Note: A mistake of law can be distinguished from acting contrary to the law as the former is an attempt to follow the law but is based on a mistake.*

### Mistake of fact (s.26(1)(e))

- Decisions or actions based on information that is factually in error or misinterpreted
- Important facts omitted from reports or deliberations, or ignored
- Failure to properly investigate
- Failure to properly listen to complainant's version of the facts
- Failure to read file or other documentation correctly

### Failure to give reasons (s.26(1)(f))

- Statement of reasons not given:
  - when required by law
  - when it is otherwise reasonable to do so
- Statement of reasons given but inadequate because:
  - all relevant issues are not addressed
  - the relevant criteria on which the decision is based are not stated
  - the relevant findings or material questions of fact are not stated
  - the reasons are not comprehensible to the likely recipient

### Otherwise wrong (s.26(1)(g))

- Negligent conduct
- Result of decisions or actions is uncertain
- Previously unavailable or unknown facts become known which cast doubt on the correctness of original decisions or actions
- Failure to give effect to lawful government or agency policy
- Rudeness or lack of courtesy
- Failure to give accurate, frank, impartial, complete and/or timely advice
- Failure to honour commitments
- The use of an inappropriate manner in dealing with the public
- Knowingly sending members of the public on a fruitless enquiry
- Failure to return phone calls and correspondence
- Failure to respond to reasonable requests
- Failure to meet acceptable or industry standards for public administration, good judgment, integrity and the like.

**REVIEW OF SPCB SUPPORTED BODIES COMMITTEE****RESPONSE BY SCOTTISH PUBLIC SERVICES OMBUDSMAN TO MR FRANK FRENCH'S SUBMISSION (DATED 18 FEBRUARY 2009)**

Thank you for your letter of 4 February asking me to provide comments on Mr Frank French's suggested changes to SPSO as set out in his written submission to the Committee. You also mentioned that Mr French would be invited to the next meeting of the Committee on 24 February to talk about his list of five proposed changes to SPSO. I note your confirmation that Mr French has been advised that he will be asked to restrict his comments to the submission he has made and will not be invited to comment on the details of his specific complaint to the SPSO.

Whilst it would, of course, not be appropriate for me to disclose any particulars of Mr French's original complaint which was decided upon in November 2003, I believe it to be relevant for the Committee to understand the background and context within which Mr French offers his views of the SPSO.

I have therefore set out in Annex 1 some examples of Mr French's interactions with this office. If it would be helpful for the Committee, I am able to provide more details of the level and types of contact Mr French has had with us over the past six years. In responding to these contacts we always remain professional as we would do with anyone but I have to record my concern at the time and public resources this has consumed.

As requested, I have commented below on the five specific suggestions in Mr French's submission. However, I would like to clarify that in general terms I consider his submission to the Committee includes a number of inaccuracies and unsupported assertions. I have not provided evidence to refute any of the other points raised in Mr French's submission at this stage, but I would be happy to provide a detailed response if the Committee requires.

**1. The Scottish Parliament should define and specify in the Act a working definition of what they consider constitutes "maladministration" so that the Ombudsman can be held accountable by the Parliament and public.**

The Scottish Public Services Ombudsman Act 2002 provides that the SPSO can only consider a complaint where a member of the public claims to have sustained hardship or injustice as a result of service failure or maladministration. Various definitions of maladministration have been proposed at different times. Two of the best known, the 'Crossman catalogue' and the 'Reid list' were set out in an annex to the guidance which the Scottish Executive produced on the SPSO Act in October 2002<sup>1</sup>. A statutory definition of maladministration would, in our view, unduly reduce the flexibility of the application of this term and as a result the types of issues that could be raised by complainants. Therefore, it could result in a restriction of the grounds for complaints which is contrary to the spirit of a user-focused service. Such

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<sup>1</sup><http://www.scotland.gov.uk/Publications/2002/10/15564/11760#ab>. A link to this guidance is provided on the SPSO website <http://www.spsso.org.uk/about-us/glossary-terms/maladministration-and-service-failure>.



a danger was recognised by a former Parliamentary Ombudsman, Sir William Reid, who commented in his Annual Report for 1993<sup>2</sup> that to define maladministration would be to limit it as it could effectively prevent those with legitimate grievances which were outside the definition obtaining a remedy. Instead, our approach, and that of other offices of Ombudsmen, has been to concentrate on what constitutes good administration and what we would expect a body to have done in administering its procedures and policies. For example, we have cooperated with other members of the British and Irish Ombudsman Association in developing guidance for public bodies and promote such guidance on our Valuing Complaints website<sup>3</sup>.

**2. The Scottish Parliament should amend the Act so that the Ombudsman must formally investigate and report to Parliament all complaints about their service. The Scottish Parliamentary Corporate Body should be given the power to review these complaints and take any appropriate action to ensure that the SPSO are providing the service expected by Parliament.**

We recognise that people may have valid grounds for complaining about our service and that it is important that such concerns should be investigated, answered and learned from (notwithstanding our experience that a very large proportion of what are presented as service complaints are in fact attempts to pursue by a different route dissatisfaction with a decision we have made on a specific complaint). We made the decision early in the existence of the SPSO to introduce a process that could be used by complainants and others when they are dissatisfied with the service we have provided. We were one of the first offices of Ombudsmen that introduced such a scheme and to use it as a way of increasing our accountability but also as evidence from which we can learn lessons to improve the service we provide. Statistics and quarterly reports on services complaints received by us are provided on our website and we have also posted anonymised responses to individual complaints<sup>4</sup>. Information about service complaints is also reported to our Audit Advisory Committee (itself another feature of our enhanced accountability). Our arrangements for dealing with service complaints have continued to evolve over time and have recently been further refined with the introduction of an Independent Service Reviewer. A report from the reviewer will be included in our Annual Report for 2008-09 in addition to the report from our Audit Advisory Committee which was included in the report for 2007-08. We strive to be a listening organisation. In February 2008 we published the report of our first comprehensive complainant experience survey, and in April 2008 we began a rolling satisfaction survey which is sent to all complainants within a month of their receiving a decision from us. Mr French has given a selective account of the survey results; the Committee may be interested to read the survey in full and the actions which we committed to in light of the findings.<sup>5</sup> Turning to the proposal from Mr French, summary information about our service complaints is already available on our website and we could be questioned on this by the Local Government and Communities Committee when we present our Annual Report to Parliament. To go further, as he suggests, to give power to the SPCB to review these complaints would in our view be disproportionate, and in fundamental conflict with the

<sup>2</sup> HC Paper 112 1993-94, paragraph 7.

<sup>3</sup> <http://www.valuingcomplaints.org.uk>

<sup>4</sup> All of this material can be accessed at <http://www.spsso.org.uk/how-complain/complaining-about-spsso>

<sup>5</sup> <http://www.spsso.org.uk/outreach/research/user-experience-survey>

Ombudsman's independence. The SPCB is a body under the jurisdiction of the SPSO.

**3. The Scottish Parliament should amend the Act so that Audit Scotland have to conduct an “economy, efficiency and effectiveness examination audit” every year to ensure that the SPSO is delivering the service expected by the Parliament and Public.**

Like any other Scottish public body, the SPSO is subject to external audit by auditors appointed by Audit Scotland. We have received favourable audits since our inception and have continued to make improvements in line with the recommendations of the auditors. In addition, we have an internal audit system which has evolved over time and includes the appointment in February 2008 of the Audit Section of the Scottish Legal Aid Board as internal auditors under an innovative and cost-effective shared services agreement. Our Audit Advisory Committee also has a remit which includes supporting the Ombudsman (as Accountable Officer) in monitoring the adequacy of the SPSO's governance and control systems. Their meetings are attended by our external and internal auditors. I consider that we have robust audit systems in place and have included an external element which other similar offices of Ombudsmen do not yet have. What is proposed by Mr French in this regard would, I contend, be disproportionate and costly.

**4. The Scottish Parliament should change the Act so that there is a right for the public to appeal a decision made by the Ombudsman. As the Ombudsman claims they provide a quasi-judicial service which is required to provide administrative justice, then the appeals should be reviewed by a judge appointed by the Scottish Parliament.**

Ombudsmen are, by definition, the final stage in complaints processes. Complainants are normally expected to have pursued their complaint with the body they are complaining about before they can be looked at by an Ombudsman. As the final, external and independent stage in the process, Ombudsmen make decisions on specific complaints with a view to helping parties draw a line under and move on from a dispute. The idea of some sort of ‘Ombudsman for the Ombudsman’ therefore raises conceptual difficulties but it also adds another stage to what may have already been a prolonged process in which the complaint has been examined and reviewed by a number of people. Our decisions are in any event subject to judicial review by the Court of Session. The right of an appeal to a judge appointed by the Scottish Parliament, as suggested by Mr French, would add another stage to the process which would incur significant costs. It would also run the risk of conflicting with the fundamental role of an Ombudsman and the principle of independence.

**5. The Scottish Parliament should change the Act so that the Ombudsmen and Deputies cannot be recruited from the ranks of the people they are meant to be investigating.**

This is a matter for the Scottish parliament but in my view the key point in terms of appointing an Ombudsman or Deputies is that the process should attract as wide a range of people with the relevant experience and knowledge as possible to come forward to be considered in an open and transparent selection system. There would be dangers that what is proposed by Mr French would compromise such a process.

Also given the wide jurisdiction of the SPSO, such a proposal could exclude an extremely large pool of people who have worked in public services. However, it is important that relevant measures are in place to avoid genuine conflicts of interest both in terms of recruiting an Ombudsman or Deputies and then in relation to what complaints they deal with as individuals once appointed. We have had such measures in place since the SPSO was established.

Professor Alice Brown  
Ombudsman

19 February 2009

## Annex 1

The context and background to Mr French's involvement with the SPSO is set out in the examples cited below. In our view Mr French's concerns about the SPSO are rooted in his dissatisfaction with the outcome of his complaint - this is a phenomenon well-known to other ombudsmen, for example the English Local Government Ombudsmen has experienced a sustained campaign of criticism since 2003 by the Ombudsman Watch Group and calls for the abolition of the office.

### 1. Initial complaint

Mr French first brought his complaint to the Ombudsman in February 2003. As is normal it was considered by one of our Complaints Investigators and she obtained further information from the body which was the subject of the complaint. In November 2003 she wrote to Mr French with her conclusion that the crux of his complaint concerned a difference of judgement and opinion and that there were no grounds to pursue the complaint further. Mr French did not accept this decision and it has been reviewed twice, by a Manager (who reached the same view as the Complaints Investigator) and then by one of the former Deputy Ombudsmen.

On 1 January 2006, Mr French wrote to the Deputy Ombudsman who was then reviewing the case as follows:-

'This is a reminder in case over the festive season you have forgotten about my complaints and previous emails. A positive and definitive response is required to my complaint by the 16<sup>th</sup> January 2006. If no response is received, then that will be clear indication that you intend to do nothing and I will therefore start a new campaign to achieve justice by setting up a similar organisation to the Ombudsman Watch Group for the English Local Government Ombudsman.....I am hoping that this will not be necessary and that you will take the appropriate actions to resolve my complaint. If however, you decide to take no action, before the 16<sup>th</sup> January 2006, then I want you to know that I have the time, the money, the patience and the determination to mount a sustained and effective campaign until I receive justice from the Ombudsman no matter how long it takes, be it one year or ten years. I look forward to the 16<sup>th</sup> January 2006, as I will then know if you have taken appropriate action or I will know that I must start a campaign to make effective changes to the Scottish Public Services Ombudsman.'

After making further enquiries and seeking professional planning advice, the Deputy Ombudsman wrote to Mr French in June 2006 reaffirming the original decision. Mr French remained dissatisfied.

### 2. Setting up of Ombudsman Watch

Following this decision, and as threatened, Mr French established a 'Scottish Ombudsman Watch' website. In his email of 1 January 2006, Mr

French set out the objectives of the English Local Government Ombudsman Watch, which he said were also applicable to the SPSO:-

- Make all Ombudsmen's decisions subject to full appeal;
- Replace all ex Local Authority staff in the Ombudsman's office;
- Replace the internal complaints system with an impartial and fair external complaints system;
- Make the Local Government Ombudsman responsible and accountable for their acts of maladministration;
- Stop tinkering around the edges with a Regulatory Reform Order and introduce wholesale reform of this discredited organisation.

Our understanding is that Mr French maintains the website and sends emails to supporters, MSPs and the press in the name of Scottish Ombudsman Watch.

In addition to this, in his own name Mr French has lobbied MSPs and since 2006 has made 13 freedom of information (FOI) requests to this office. Information that he is given in response to FOI requests is often then placed on the Ombudsman Watch website.

### **3. Impact on public resources, users' access to services and staff**

Mr French has made it clear in his correspondence that he intends to continue to his campaign until his complaint is re-opened and he receives the decision that he is looking for. This sustained campaign has a number of implications for SPSO resources, for users' access to services and also for the staff of the SPSO.

In a letter sent in November 2006 to a former member of the SPCB, correcting what we considered to be seriously misleading information provided to him by Mr French, we made the point that:

'the SPSO has dedicated considerable time and resources to the examination of the complaint and the subsequent reviews. In financial terms this must now represent thousands of pounds of public money. In terms of Best Value this is a matter of real concern. The substantive complaints were determined and closed, but the complainant's persistent pursuance of his case has led to a completely disproportionate allocation of this office's resources. ....This level of activity creates circumstances that deflect the office away from dealing with the current 'live' caseload.'

We are aware of at least three incidents where people who had either brought a complaint to us or wished to do so have mistaken the Ombudsman Watch website for the SPSO website. On these occasions, the member of the public sent information about their complaint to Ombudsman Watch in error, which Mr French then forwarded on to SPSO. This is of concern given the confidential, sensitive nature of some of our complaints, especially those relating to health issues. It is likely that the

incidence of this occurring is higher than SPSO is able to gather statistics on.

On a number of occasions Mr French has included personal remarks in his correspondence and telephone calls to the SPSO. For example, in February 2007, on the day I was being interviewed for re-appointment to my post as Ombudsman, he left a phone message with my PA stating

` It is Frank French here. I would like to let her know that I am the one that has scuppered her re-appointment and have galvanised the public against her re-appointment'. And in an email sent to me this month he wrote 'soon you will be departing the SPSO and returning to just being a plain old housewife...I want you to know that even after you are gone I will continue to campaign for an effective and accountable SPSO and will push for a public enquiry and apology from the Government for the way you ignored and dismissed valid complaints of maladministration. Time is on my side. Your public dis-service will eventually have to be acknowledged by the authorities. What a legacy!'

While I can thole these sort of comments directed at me personally I am seriously concerned at the potentially adverse impact of Mr French's activities on the service we provide to the public, and to the morale of my staff. This is illustrated by the following extract from a file note made by a member of my staff:

`... on Thursday I had a worrying call from a potential complainant who I had assisted with advice on coming to our office with her complaint (I spoke to her on Wed and Thurs). She was extremely grateful for my advice and assistance in explaining our remit - she was notably upset about her late mother's healthcare experience.

`I informed her of our investigation reports so that she could consider if we could achieve what her family wanted - she must have used Google to locate our website - she called me again on Friday filled with worry and anxiety having accessed Ombudsman Watch's website instead of ours. She was asking how many cases we uphold etc and was now questioning about whether or not to complain to us. I remained independent and did not comment on their site but reconfirmed our role etc. She told me that as a result of finding Ombudsman Watch she was considering whether or not to just pay a lawyer to look at her case.

`This is obviously really disheartening for a complainant who may have otherwise approached our office and for me as a staff member trying to be as helpful as possible.'

#### **4. Seeking resolution**

Mr French is quite clear, as stated above, that his campaign against the SPSO is rooted in a determination to see the original decision on his complaint overturned. I am satisfied that that decision was soundly based

and has been fully, indeed exhaustively, explained to him. And as I have highlighted in the main body of this letter, I would argue that his proposed changes to the SPSO are not in the best interests of users of public services.

As I noted earlier, in our dealings with Mr French, we have at all times sought to remain professional and to respond to any reasonable requests made of us (as we would do with anyone). It is regrettable for Mr French, the SPSO and the public purse that his campaign has continued for this length of time and consumed so much of his own time and public resources.

## **REVIEW OF SPCB SUPPORTED BODIES COMMITTEE**

### **RESPONSE BY SCOTTISH PARLIAMENT CORPORATE BODY (SPCB) TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE**

Thank you for your letter of 23 January 2009 seeking the views of the SPCB on inviting the Senior Salaries Review Body (SSRB) to undertake a review of the salary benchmark for officeholders prior to advertising each post.

We note from the recent Committee meeting on 20 January that the use of the SSRB was strongly supported by the Auditor General for Scotland (AGS) instead of the SPCB inviting its own Audit Advisory Board (AAB) to advise the SPCB on officeholder salaries.

The SPCB fully recognises the role of the SSRB in reviewing salaries. The SPCB currently uses the recommendations contained in the SSRB reports on the annual uprating of senior Civil Service salaries, which takes into account a number of factors including the measure of inflation. The SPCB therefore has no difficulty in using the SSRB, but what we proposed might be a more flexible arrangement.

The SPCB considers the expertise the SSRB has is primarily in reviewing the salaries of Members of Parliament, the judiciary, senior civil servants and senior members of the armed forces. These reviews are planned well in advance, and each review takes time to complete. It is highly unlikely that the SSRB would agree to undertake one off reviews for single posts prior to the officeholder posts being advertised. That is not to say that, with sufficient notice and planning, the SSRB could not undertake a review, say every 4 years, of each of the SPCB supported posts as a group. The timing of any review would, however, have to be agreed with the SSRB and would be dependent on what other reviews it had planned for that year.

You advise in your letter that the Committee would be interested in the experiences the SPCB has had in the past of using the SSRB. Since the establishment of the Parliament in 1999, the SPCB has invited the SSRB to assist it with two separate salary reviews. The first of these was a review of salaries and allowances payable to MSPs. The SSRB reported in December 2001 and made a number of recommendations which led to a debate in Parliament on 21 March 2002. This was the last time salaries were debated by MSPs as it was agreed, at that time, to link MSP salaries to the salaries of MPs at Westminster. No further review of MSP salaries has therefore been undertaken by SSRB.

The second review was in June 2004, when the SSRB presented a report to the SPCB following a review of the salaries of Commissioners and Ombudsman supported by the SPCB. This review also covered the AGS. The SPCB considered the recommendations and accepted them as having been made by an impartial body.

Following its decision the SPCB received a number of representations from some of the officeholders expressing concerns about the content, general quality, analysis and recommendations made in the report. One of the SPCB's reasons for an



alternative model was the concerns raised by the officeholders following the last review.

The Committee has also asked the SPCB why it favours an internal body. The first reason is flexibility. As mentioned earlier in this letter, the SSRB is responsible for a number of other reviews which, given its remit, would take priority over any review that was commissioned to look at officeholder salaries. Having an internal body, such as the AAB, would provide more flexibility in the timing of any such review. In using the SSRB we would have to fit in with its timetable which might not be convenient to the SPCB nor the officeholders the SPCB supports.

The AAB brings a broad experience, knowledge and understanding of Parliament and also, importantly, has the objectivity that non-executive members of such bodies typically bring. The AAB would be available if the SPCB wished to consult on salary levels and/or uprating in the same way as it does on other financial matters.

It should also be recognised that for the reviews undertaken for us by the SSRB, the SSRB commissions consultants with experience of both private and public sector salaries to undertake the actual research and put forward recommendations. We therefore see little difference if research was commissioned by the SPCB and, together with the advice of the AAB, a view could be reached in the same way as the SSRB.

Another option suggested has been for a remuneration committee to be established. The SPCB is not keen on creating a new committee, in particular, one with any kind of statutory footing to advise or, indeed, even set salaries for the AGS and other officeholders.

In conclusion I should add that while the AAB would provide greater flexibility the SPCB would have no difficulty in commissioning reviews from the SSRB if that is what the Committee decides to recommend.

Please do not hesitate to contact me should you wish any further information.

5 February 2009