

DISABILITY COMMISSIONER (SCOTLAND) BILL

EXPLANATORY NOTES

INTRODUCTION

1. As required under Rule 9.3.2A of the Parliament’s Standing Orders, these Explanatory Notes are published to accompany the Disability Commissioner (Scotland) Bill, introduced in the Scottish Parliament on 8 February 2024.
2. The following other accompanying documents are published separately:
 - a Financial Memorandum (SP Bill 43–FM);
 - a Policy Memorandum (SP Bill 43–PM);
 - statements on legislative competence made by the Presiding Officer and the Member who introduced the Bill (SP Bill 43–LC).
3. These Explanatory Notes have been prepared by the Non-Government Bills Unit on behalf of Jeremy Balfour MSP, the Member who introduced the Bill, in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

OVERVIEW

5. The Bill will establish a Disability Commissioner for Scotland (“the Commissioner”), whose primary purpose will be to promote and safeguard the rights of disabled people. The Commissioner will be appointed by and accountable to the Scottish Parliamentary Corporate Body (SPCB) but will be independent from Government.
6. The Commissioner will advocate for disabled people at a national level, using the functions set out in this Bill to promote awareness and understanding of the rights of disabled people. The Commissioner will also review law, policy and practice relating to the rights of disabled people with a view to assessing their adequacy and effectiveness, and promote best practice by service providers. The Commissioner may also promote, commission, undertake and publish research on matters relating to disabled people.

7. The Commissioner will have the power to undertake investigations into those who provide services to disabled people where the investigation is related to matters within the remit of the devolved institutions. Investigations will ask how the service provider has given effect to the rights, views and interests of disabled people. These investigations may be into a service provider at a general level or they may deal with the circumstances of an individual disabled person.

8. The model for the Commissioner, including their investigatory powers, is similar to that of the Children and Young People’s Commissioner Scotland.

9. The Bill consists of 19 sections and three schedules.

COMMENTARY ON SECTIONS

Section 1 – Disability Commissioner for Scotland

10. Subsection (1) establishes the office of the Disability Commissioner for Scotland. Subsection (2) introduces schedule 1 which makes detailed provision for the status, remuneration, terms of appointment and various matters of an administrative nature in relation to the Commissioner.

Functions

Section 2 – Function

11. Section 1 sets out the functions of the Commissioner. The general function of the Commissioner, set out in subsection (1), is to promote and safeguard the rights of disabled people.

12. Subsection (2) sets out the functions that the Commissioner should undertake in exercising the general function. These are to (a) promote awareness and understanding of the rights of disabled people; (b) keep under review the law, policy and practice relating to the rights of disabled people with a view to assessing the adequacy and effectiveness of such law, policy and practice; (c) promote best practice by service providers; and (d) promote, commission, undertake and publish research on matters relating to the rights of disabled people.

13. The definition of “service providers” for the purpose of the function set out in subsection (2)(c) (and in section 7 in relation to the Commissioner’s power to carry out investigations) is provided for in section 7(6) as follows: “any person providing services for disabled people or a disabled person other than an excluded provider.” The reference to an excluded provider, which is also defined in section 7(6), is to exclude from the definition of “service provider” those family members, friends or community members who may provide assistance to a disabled person on an informal basis.

14. Subsection (3) sets out that, for the purpose of the Bill, the meaning of the terms “disabled people” and “disability” mirror those provided for in Section 6 (disability) and Schedule 1 of the Equality Act 2010. The definition of “disability” as set out in section 6 of the Equality Act 2010 is:

“(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”

15. Schedule 1 to the Equality Act 2010 sets out detail of what is meant by “long-term” and “substantial” adverse effects and contains powers to make regulations and further detail about the issuing of related guidance.¹

Section 3 – United Nations Convention and equal opportunities

16. Section 3 provides that the Commissioner, in exercising their functions as set out in the Bill must have regard to any relevant provisions of United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”).²

17. The UNCRPD is an international human rights treaty that aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. It covers a very broad range of issues many of which relate to devolved areas. The UNCRPD was ratified by the UK on 8 June 2009 and places obligations on the UK government. These obligations are monitored through the United Nations Committee on the Rights of Persons with Disabilities. In public international law, the UNCRPD and its optional protocol have effect in relation to the United Kingdom subject to any reservations, objections or interpretative declarations made by the United Kingdom. For example, at present the UK has entered a reservation and a declaration in relation to Article 24 of the UNCRPD on Education. Any change in reservations or otherwise made by the UK Government will also apply to the Commissioner’s interpretation of the UNCRPD.

18. Subsection (3) sets out three principles of the UNCRPD to which the Commissioner must have particular regard and encourage others to have regard.

19. Under subsection 3(4), the Commissioner must act in a manner which encourages equal opportunities, and the observance of equal opportunity requirements. Section 17 sets out that “Equal opportunities” and “Equal opportunity requirements” have the same meaning as in section L2 of Part II of Schedule 5 to the Scotland Act.³ The meanings are set out as follows:

““Equal opportunities” means the prevention, elimination or regulation of discrimination between persons on grounds of sex or marital status, on racial grounds, or on grounds of disability, age, sexual orientation, language or social origin, or of other personal attributes, including beliefs or opinions, such as religious beliefs or political opinions.

“Equal opportunity requirements” means the requirements of the law for the time being relating to equal opportunities.”

¹ [Equality Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk)

² <https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>
[United Nations Convention on the Rights of Persons with Disabilities](#)

³ [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk)

Communicating with and involving disabled people

Section 4 – Inclusive Communication

20. Subsection (1) requires the Commissioner to have regard to the importance of communicating in an inclusive way when exercising their functions, including ensuring that people who may have difficulty in communicating or accessing information – as a result of speech or language conditions, or another reason - are able to communicate with the Commissioner’s office and access any information shared by the Commissioner’s office.

21. Subsection (2) requires that, as far as practicable, any report published by the Commissioner must be made available in a range of formats in order that as many disabled people as possible, regardless of their disabilities, may be able to access and understand the reports. Although not prescribed in the Bill, some examples may include braille, large print, BSL, audio or easy read.

22. The inclusion of “as far as practicable” is intended to allow for circumstances in which it may not be possible to produce the reports in certain formats, for example due to a lack of available translators, or where it would not be reasonable or proportionate to do so in light of the nature or subject matter of the reports.

Section 5 – Involving disabled people in the work of the Commissioner

23. Section 5 is intended to ensure that the Commissioner’s work is informed by the views of disabled people. Subsection (1) requires the Commissioner to encourage the involvement of disabled people in the Commissioner’s work.

24. Subsection (2) details the manner in which the Commissioner is to encourage the involvement of disabled people in the Commissioner’s work by listing a number of duties which the Commissioner must take reasonable steps to fulfil.

25. Subsection (2)(a) requires the Commissioner to take reasonable steps to ensure that disabled people are made aware of the existence of the Commissioner, the Commissioner’s functions, how to communicate with the Commissioner and what responses may be given by the Commissioner to issues raised.

26. Subsection (2)(b) and 2(c) require the Commissioner to take reasonable steps to consult disabled people, and organisations working with and for disabled people, on the work to be undertaken by the Commissioner.

27. While it is for the Commissioner to determine what constitutes “reasonable steps”, an example of what this could be is sharing relevant information with organisations working with and for disabled people, including those which are governed by disabled people, who could then provide details to their membership.

28. Subsection (3) requires the Commissioner to give some priority to disabled people who do not have adequate means to make their views known or who, due to the nature of their disability, may find it difficult to share their views. The Commissioner could do this, for

example, by focussing more resource on groups of disabled people who need additional support in order to make their views known.

29. Subsection (4) requires the Commissioner to prepare and maintain a strategy on the continued involvement of disabled people in the Commissioner’s work under this section.

Investigations

Section 6 – Carrying out investigations

30. Sections 6 and 7 give the Commissioner the power to carry out investigations into whether, by what means and to what extent a service provider has regard to the rights, interests and views of disabled people in making decisions or taking actions that affect disabled people or a disabled person. Subsection (1) of section 6 gives the Commissioner the power to carry out general and individual investigations as provided for in this section and section 7. The meaning of “general” and “individual” investigations for the purposes of this Bill are set out in section 7. Section 7(1) and (2) cover general investigations which is about the making of decisions of or the taking of actions that raise an issue of particular significance to disabled people generally, people with particular disabilities (for example, a group of people who all have a visual impairment) or particular groups of disabled people (for example, people distinguished by matters other than their disability such as their geographical location or age). In coming to a view in that regard the Commissioner must consider the available evidence and information, which could include research findings and consultation exercises with disabled people and organisations about their experiences. Ultimately, it is for the Commissioner to decide whether something is significant enough to be investigated provided that they have reasonable grounds upon which to do so.

31. Section 7(3) sets out that an individual investigation is about the effect of decision-making or actions on an individual disabled person. Under subsection (5) the Commissioner may seek other means of resolving the issue which is potentially to be investigated. The Commissioner may initiate an alternative course of action, should they consider this to be appropriate.

32. Subsections 6(2) and (3) deal with circumstances in which the Commissioner wishes to investigate a matter which another public body also has the power to investigate. Other relevant bodies may include the UK Equalities and Human Rights Commissioner, the Care Commission or the Children’s Commissioner. These subsections set out that in such circumstances the Commissioner should not investigate the matter unless the Commissioner has consulted with the other body or bodies which have the power to investigate and, having done so, has determined that it would be more effective and expedient for the Commissioner to investigate. Although not set out in the Bill, examples of when the Commissioner may determine that they are best placed to investigate a matter could include when the Commissioner has more time and resources available than the other body, or where a disabled person or an organisation working with or for disabled people has contacted the Commissioner to express concern about a particular issue given the Commissioner’s expertise.

33. Subsection (4) sets out circumstances in which the Commissioner may not carry out an investigation - namely when the matter is reserved (as set out in schedule 5 of the Scotland Act

1998) and when the investigation would relate to legal proceedings that are before a court or tribunal.

Section 7 – General and individual investigations

34. Section 7 sets out what is meant by general and individual investigations. Some of the detail contained in section 7 has been covered above in paragraph 31 above. Definitions of service provider and excluded provider to be used in relation to investigations, and throughout the Bill are set out in subsection (6). The Commissioner may investigate any person or organisation which provides a service to a disabled person or disabled people, this can include the private, public and voluntary sector and thus any individual who, or organisation or company which, provides services to disabled people could be investigated with the exception of those defined in the Bill as excluded providers. Therefore, individuals who care for, or provide another service to, disabled people primarily due to an existing relationship – for example a family member or friend – could not be subject to an investigation by the Commissioner. Investigations can concern a single service provider or a group of service providers. For example, an investigation could consider the way rights, interests and views of disabled people are considered by a single local authority or by local authorities in general.

Section 8 – Initiation and conduct of investigation

35. Section 8 sets out details of how an investigation should work in practice. Subsection (1) sets out the procedural requirements which need to be fulfilled before the Commissioner can undertake an investigation.

36. Subsection (1)(a) requires the Commissioner to draw up terms of reference for the proposed investigation. The terms of reference will define the scope of the investigation.

37. Subsection (1)(b) requires that the Commissioner takes steps to ensure that those who may be affected by the investigation are made aware of the Commissioner's plans to carry out an investigation and of the terms of reference. This may involve, for example, the Commissioner publicising the forthcoming investigation on their website, or writing directly to the service provider who will be subject of the investigation.

38. Subsection (2) makes it clear that general investigations by the Commissioner will be conducted in public unless the Commissioner considers that it is necessary or appropriate to take evidence in private. This could include, but is not limited to, circumstances in which a vulnerable person is giving evidence. Subsection (3) provides that individual investigations will be held in private. This provision has been included to ensure the privacy of the disabled person involved is protected.

Section 9 – Investigations: witnesses and documents

39. This section sets out the powers available to the Commissioner in gathering information and undertaking an investigation under sections 6 and 7.

40. Subsection (1) authorises the Commissioner to require any person to give evidence or produce documents they hold, which are within the terms of refence of the investigation.

41. Subsection (2) is based on section 23 of the Scotland Act⁴ and limits the Commissioner's powers to require the giving of evidence or the production of documents from certain persons. Section 23 imposes various restrictions on the Parliament's powers, for example, in relation to Ministers of the Crown, judges and members of tribunals.

42. Subsection (3) introduces schedule 2 (see paragraphs below), which contains further provision with respect to witnesses and documents. Schedule 2 also details the sanctions for non-compliance with a requirement under this section.

Section 10 – Reports on investigations

43. This section provides for the Commissioner to prepare reports following an investigation. Subsections (1) and (2) provide that, following the conclusion of an investigation, the Commissioner must prepare a report which includes the investigation's findings and any recommendations made as a result of the findings. Under subsection (3) a report cannot be finalised until, as far as it is reasonable and practicable, a draft report has been issued to any person who has been named or is otherwise identifiable in the report. This is included in order to let that person comment upon the draft report prior to its publications. An example of when it may be considered reasonable and practicable not to share a draft report with a person prior to the report's publication could be when several attempts to contact the person in question have been made over a period of time, with no response.

44. Subsections (4) to (6) set out that reports on general investigations must be laid before Parliament and then published as soon as practicable. Reports on individual investigations may be laid before Parliament. If a report on an individual investigation is laid before Parliament, it also must be published as soon as practicable after it has been laid.

Section 11 – Requirement to respond

45. Section 11 sets out the circumstances in which someone is required to respond to a report on an investigation and how the Commissioner should deal with such responses. Subsection (1) provides that the Commissioner may require a response to any recommendation made in a report on an investigation. The Commissioner must ensure that anyone required to respond has a copy of the report (subsection (3)). Subsection (2) sets out that a response should be in writing and provided within the timescale set out by the Commissioner. The response should set out what actions or intended actions the person proposes to take to give effect to the recommendation and if the person intends to take no action, the reasons for that.

46. Under subsection (4) if the Commissioner must make publicly available (in whatever way the Commissioner considers appropriate) part or all of a written response to a general investigation unless the Commissioner considers publication to be inappropriate.

47. The Commissioner must publicise a failure to respond to a recommendation made in a report of a general investigation in whatever manner that they consider appropriate.

48. With regard to individual investigations, subsection (6) provides that the Commissioner may take either of the actions set out in subsection (4).

⁴ [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk).

Strategic plan, annual reports and other reports

Section 12 – Strategic plans

49. Section 12 provides for the preparation and publication of strategic plans. Subsection (1) requires the Commissioner to prepare and publish a strategic plan every four years and that the plan should be laid before Parliament before the four-year period to which it relates begins. A “four-year period” begins on 1 April following this section coming into force 6 months after Royal Assent and subsequently every four years after that (subsection (7)). However, the Commissioner may vary the four-year period. Subsection (8) sets out to what extent the reporting period can be varied and requires the Commissioner to obtain approval from the SPCB before such a change can be made.

50. Subsection (2) requires the Commissioner to consult the SCPB and any other persons the Commissioner considers appropriate before the plan is published. While it will be for the Commissioner to determine which persons, if any, to consult with, subsection (3) provides that this could be a Parliamentary committee. Other examples may be disabled people, or organisations working with, or for, disabled people.

51. Subsection (4) sets out what a strategic plan is and what must be included in the plan, including the Commissioner’s objectives and priorities for the forthcoming four years, how those objectives and priorities will be achieved and how much they are estimated to cost.

52. Subsection (5) allows for the strategic plan to be reviewed and revised at any time. Should the Commissioner choose to do so the same requirements as set out in Subsections (1) to (4) (see paragraphs 49-51 above) apply (Subsection (6)).

Section 13 – Annual report

53. Section 13 provides for the preparation and publication of annual reports. Subsection (1) requires the Commissioner to prepare and publish an annual report that covers the functions exercised by the Commissioner during the preceding reporting year. The “reporting year” covers the period beginning 1 April each year until 31 March the following year (subsection (4)). The report must be laid before Parliament within 7 months of the reporting year ending and therefore no later than the October following the end of the reporting year.

54. Subsection (2) sets out the matters that must be included in the annual report. These will be included in every annual report. Each report must include a review of the issues the Commissioner has identified as being relevant to disabled people and of the activities undertaken by the Commissioner in order to fulfil their functions. The report must also contain any recommendations the Commissioner wishes to make as a result of the work they have undertaken in the preceding year and an overview of the Commissioner’s plans for the forthcoming year. The latter must include a strategy for involving disabled people in the work of the Commissioner in the year ahead. This ties in with the requirement set out in section 2(2)(d) (see paragraph 29).

Section 14 – Other reports

55. Section 14 provides for the preparation and publication of other reports. Subsection (1) enables the Commissioner to lay before the Parliament any reports other than those provided for elsewhere in the Bill, relating to their functions as they consider appropriate. The subject matter of reports could include, for example, research findings or reviews of policy or practice. Subsection (2) requires any report laid before Parliament to be published as soon as practicable after it is laid.

Protection from actions of defamation

Section 15 – Protection from actions of defamation

56. Section 15 sets out how the Bill provides for protection from actions of defamation for statements made to or by the Commissioner (or a member of the Commissioner’s staff). Subsection (1) provides that such statements are to have absolute privilege (meaning they cannot form the basis of an action of defamation for any person referred to in those statements). The statements which will benefit from absolute privilege are any statement made to the Commissioner and any statement made by the Commissioner or their staff in conducting an investigation, including where communicating with a person in relation to an investigation. In addition, any reports published under this Bill are subject to absolute privilege.

57. Any other statement made by the Commissioner (or a member of the Commissioner’s staff) will have qualified privilege. Under qualified privilege individuals can make statements and can assist in investigations without fear of an action for defamation provided statements are not motivated by malice or intent to injure. What is meant by a statement is “words, pictures, visual images, gestures or any other method of signifying meaning”. This definition is set out in section 36(b) of the Defamation and Malicious Publication (Scotland) Act 2021.

Final provisions

Section 16 – Application of public authorities’ legislation

58. Section 16 introduces schedule 3 which amends enactments relating to public authorities in order to bring the Commissioner within their provisions.

Section 17 - Interpretation

59. Section 17 provides definitions of key terms in the Bill.

Section 18 – Commencement

60. Subsection (1) provides that substantive provisions contained in sections 1 to 16 of the Bill will come into force after six months beginning with the day of Royal Assent. Subsection (2) provides that the rest of the Bill, being the interpretation, commencement and short title sections, will come into force on the day after Royal Assent.

Section 19 – Short title

61. Section 19 provides for the short title of the Bill, by which it may be cited.

SCHEDULE 1: THE OFFICE OF THE DISABILITY COMMISSIONER FOR SCOTLAND

62. Schedule 1 makes detailed provision concerning the status; appointment, disqualification, terms of office, remuneration, and pension of the Commissioner. It also provides for the ability to fill the role on a temporary basis, as well as for the appointment of other staff and accounts and accountability.

Part 1: Status and Independence

63. Paragraph 1 provides that the Commissioner is a juristic person distinct from the natural person holding the office of Commissioner.

64. Paragraph 2 provides that the Commissioner is not to be regarded as being a servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown. The Commissioner's property belongs to the Commissioner (as Commissioner) and not to the Crown. The Commissioner's staff are not to be treated as civil servants.

65. Paragraph 3 provides that the Commissioner is not subject to the direction or control of any member of the Scottish Parliament, the Scottish Ministers or the SPCB except as explicitly provided for in the Bill. The relevant provisions are set out in sub-paragraph (2).

Part 2: Appointment, termination and terms and conditions

66. Paragraphs 4 and 5 provide for the following: that the Commissioner will be appointed by the King on the nomination of the Scottish Parliament; that a Commissioner may serve only one term of office; and that a person is disqualified from being appointed Commissioner if at the time of the appointment or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, of the House of Commons, or of the House of Lords.

67. Paragraph 6 provides that the Commissioner may hold office for a single term of up to eight years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.⁵

68. Paragraph 7 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or may become disqualified from holding office under paragraph 5.

69. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the support of at least two

⁵ [Scottish Parliamentary Commissions and Commissioners etc. Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2010/12).

thirds of (normally) the total number of members of the Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

70. Paragraph 8 provides that the validity of any acts of the Commissioner is unaffected by any procedural defects in the Parliament's nomination or by the Commissioner subsequently becoming disqualified from acting as the Commissioner.

71. Paragraph 9 enables the SPCB to set and pay such remuneration, allowances, pension and gratuities to the Commissioner as it determines. It will be for the SPCB to decide whether payments are made and the amounts of any payments. The SPCB must indemnify the Commissioner for liabilities incurred by the Commissioner in the exercise of their functions.

72. Paragraph 10 makes provision for the appointment of a temporary or acting Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint as acting Commissioner a person who is not disqualified from holding the post under paragraph 5 of this schedule, or as they have previously held the post of Commissioner (as provided for under paragraph 4(3)). The SPCB will determine the terms, conditions and duration of the appointment. The acting Commissioner should have the same role, functions and responsibilities as the permanent Commissioner and be subject to the same terms as set out in this Bill, with the exception of those set out in paragraphs 6 (tenure), 7 (early termination) and 9(3) (payment of pensions, allowances and gratuities, including compensation for loss of office).

Part 3: General powers

73. Paragraph 11 permits the Commissioner to do anything which appears to it to be necessary or expedient to the carrying out of their functions.

74. Paragraph 12(1) permits the Commissioner to charge a reasonable fee for providing anything in connection with the carrying out of the Commissioner's functions. Paragraph 12(2) sets out that, any fee charged should be retained by the Commissioner and used to cover the costs incurred by providing the service for which the fee has been charged.

75. Paragraph 13 outlines the restrictions on the Commissioner's general powers in relation to the acquisition and disposal of land, namely that the Commissioner may not acquire or dispose of land without the consent of the SPCB.

Part 4: Staff and offices

76. Paragraph 14 allows the Commissioner to appoint staff, subject to the consent of the SPCB as to the number of staff appointed, and to determine staff terms and conditions subject to the approval of the SPCB.

77. Paragraph 15 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

78. Under paragraph 16, while the Commissioner can delegate any responsibility to any person, ultimately the Commissioner remains responsible for carrying out those delegated responsibilities. Having delegated functions, the Commissioner is still able to decide to carry out those responsibilities personally.

79. Paragraph 17 requires the Commissioner to comply with any direction given by the SPCB in respect of the location of the Commissioner's office and the sharing of any resources with any other public office or body. The SPCB may revoke or change a direction on this matter that has previously been given. Any such direction is to be published by the SPCB.

Part 5: Accounts and accountability

80. Paragraph 18 requires the Commissioner to prepare a budget before the start of each financial year and seek the approval of the SPCB by such a date as the SPCB determines. Under sub-paragraph (2), the Commissioner may seek to revise the budget during the year by submitting revised proposals to the SPCB for approval. When preparing a budget or a revised budget, the Commissioner is required to ensure that resources will be used economically, efficiently and effectively (sub-paragraph 3) and must, under sub-paragraph (4), certify this in any budget or revised budget proposal.

81. Paragraph 19 requires the SPCB to designate either the Commissioner or a member of the Commissioner's staff as the accountable officer (in accordance with section 17 of the Public Finance and Accountability (Scotland) Act 2000). The functions of the accountable officer are set out in sub-paragraph (2) and include: the signing of the accounts; ensuring that the finances are kept in good order; and ensuring that resources are used economically, efficiently and effectively. Sub-paragraph (3) provides a degree of protection for an accountable officer who is not also the Commissioner should they be required to act in any way which is inconsistent with their responsibilities. Before any such action can be taken, the accountable officer must obtain written authority from the Commissioner and send a copy of the authority to the Auditor General for Scotland as soon as possible. Under sub-paragraph (4), the accountable officer is directly answerable to the Parliament for the exercise of those functions specified in sub-paragraph (2).

82. Paragraph 20 sets out the accounting and auditing requirements that apply to the Commissioner. The Commissioner must keep proper accounts and accounting records and prepare a statement of annual accounts for each financial year. A financial year is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and is a year ending with 31 March. In fulfilling these duties, the Commissioner must comply with any directions given by the Scottish Ministers, who are responsible for such matters under section 19 of the Public Finance and Accountability (Scotland) Act 2000 ("the 2000 Act").

83. In accordance with paragraph 20(1)(c) a copy of the statement of accounts must be sent to the Auditor General for Scotland. The provisions of sections 21 and 22 of the 2000 Act then

require the Auditor General to audit the accounts or appoint someone suitably qualified to do so. They also require the accounts to be sent to the Auditor General not later than 6 months after the end of the financial year in question. Once the accounts have been audited, the 2000 Act makes provision for them to be sent to the Scottish Ministers, whereupon Ministers are required to lay them before the Parliament within 9 months of the end of the financial year in question.

84. Under paragraph 20(3), the Commissioner must make a copy of their audited accounts available for inspection, free of charge, to anyone on request.

SCHEDULE 2: INVESTIGATIONS: SUPPLEMENTARY PROVISIONS ON WITNESSES AND DOCUMENTS

Requirement to give evidence or produce documents

85. Paragraph 1 provides for the Commissioner to give further detail relating to section 8 of the Bill which gives the Commissioner the power to require persons to give evidence or produce documents relating to an investigation being undertaken by the Commissioner.

86. Sub-paragraph 1(1) makes provision for the Commissioner to give notice in writing to a person who is required to give information or produce documents in line with the equivalent notice provision for the Scottish parliament that is contained in section 24 of the Scotland Act 1998. The notice must set out the subjects to which the required evidence will relate. In addition, when a person is asked to appear before the Commissioner in person, details of the time and location of such an occasion should be provided to the attendee.

87. In cases where the person concerned is asked to provide documents, the date by which they are to be produced must be given.

88. Under sub-paragraph 2(2) notice must be sent by registered or recorded delivery post. In the case of an individual, it has to be sent to their last known address and in any other case to the person's registered or principal office.

Privileges

89. Paragraph 2 sets out restrictions to the Commissioner's powers to require evidence and documents. The power extends to the limits applicable to court proceedings in Scotland. This is in line with the provision that applies to the Parliament's own powers in section 23(9) of the Scotland Act 1998.⁶ These cover various privileges such as the privilege against self-incrimination and privileges in connection with litigation.

90. Sub-paragraph 2(2) provides a similar restriction to that of section 23(10) of the Scotland Act 1998 in relation to a Scottish Law Officer or a procurator fiscal declining to answer a question or produce a document in relation to the operation of the system of criminal prosecution in any particular case. Under the Scotland Act 1998 this applies to the fiscal if the Lord Advocate considers that answering or producing it might prejudice criminal proceedings in the

⁶ [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk).

case in question or would otherwise be contrary to the public interest and the Lord Advocate has authorised the fiscal to decline to answer the question or produce the document on that ground. Similarly, this applies to the Lord Advocate and the Solicitor General under section 27(3) of the Scotland Act 1998 if they consider that answering the question or producing the document might prejudice criminal proceedings in the case in question or would otherwise be contrary to the public interest.

Evidence on oath or affirmation

91. Paragraph 3 provides that a person giving evidence can be required to do so under oath (sub-paragraph (1)(b) and sub-paragraph (1)(a) authorises the Commissioner to administer such an oath).

92. Under sub-paragraph 3(3) a person will be able make an affirmation, as an alternative to taking an oath as provided for in the Oaths Act 1978. Sub-paragraph 3 makes it an offence for a person who has been required to take an oath by the Commissioner to fail to do so. The penalties for failing to take an oath when required to do so are set out in sub-paragraph 3(2) and are the same as those set out in paragraph 95 below.

Admissibility of statements in subsequent criminal proceedings

93. Paragraph 4 sets out that, when a person makes a statement in answer to any question by the Commissioner which the person was obliged to answer, any such statement would be inadmissible in any proceedings in a criminal court. The effect of this is that a person cannot incriminate themselves during the investigation process. The one exception to this provision is in the event that perjury proceedings (perjury being the offence of lying on oath or on an affirmation) are initiated in respect of the statement made to the Commissioner.

Offences

94. Paragraph 5 creates offences in relation to failures to comply with requirements imposed by the Commissioner as to the giving of evidence or the production of documents. These are the equivalent to those set out in section 25 of the Scotland Act 1998 in relation to failure to comply with requirements imposed by the Scottish Parliament. For example, it will be an offence for a person who is required by the Commissioner to give information or produce documents to fail to do so unless they have a reasonable excuse (see sub-paragraph 5(5)). If the person deliberately alters, suppresses, conceals or destroys any document that they have been required to produce, the defence of having a reasonable excuse for having done so does not apply.

95. Under sub-paragraph 6, a person found guilty by a summary criminal court of an offence under this section is liable to a fine not exceeding level 5 on the standard scale (currently £5,000) (section 225 of the Criminal Procedure (Scotland) Act 1995) or to imprisonment for a maximum period of three months.

Offences by bodies corporate and partnerships

96. Paragraph 6 allows for individuals who exercise control within an organisation, as well as the organisation itself, to be proceeded against and punished where the organisation commits an offence under the Bill.

97. Sub-paragraphs 3 and 4 set out the conditions that must be met in order for the person or organisation to have committed an offence under the Bill. Sub-paragraph 3 lists that the person or organisation must hold a certain position in an organisation and sub-paragraph 4 sets out that the person or organisation must have played a part in the offence or that the offence was a result of the person's neglect. The penalties are the same as those set out in paragraph 95 above.

Producing copies or extracts

98. Paragraph 7 clarifies that production of a copy or an extract can fulfil a requirement under section 9 to produce a document.

Allowances and expenses

99. Paragraph 8 makes provision for the payment of allowances and expenses to persons giving evidence or producing documents. The level of those allowances and expenses will be a matter to be determined by the Commissioner who must first seek agreement from the SPCB. The SPCB will be asked to agree a scheme for paying allowances and expenses (rather than agreeing each individual payment to those giving evidence or producing documents).

SCHEDULE 3: INVESTIGATIONS: PUBLIC AUTHORITIES' LEGISLATION

100. Schedule 3 adds the Commissioner to the list of bodies contained in various pieces of existing legislation.

Freedom of Information (Scotland) Act 2002

101. The Freedom of Information (Scotland) Act 2002 makes provision for the disclosure of information held by Scottish public authorities or by persons providing services for them.

102. Schedule 3 adds the Commissioner to the list of bodies contained in various pieces of existing legislation. These are: the Freedom of Information (Scotland) Act 2002, the Public Services Reform (Scotland) Act 2010, the Public Records (Scotland) Act 2011 and the Procurement Reform (Scotland) Act 2014.

103. Part 7 of schedule 1 of the Freedom of Information (Scotland) Act 2002, sets out a list of public authorities to which that Act applies. Paragraph 1 of schedule 3 of this bill, adds the Disability Commissioner to the list of public bodies (categorised as "other"). As a result, any relevant provisions of the Freedom of Information (Scotland) Act 2002, will apply to the Disability Commissioner for Scotland.

Public Services Reform (Scotland) Act 2010

104. The Public Services Reform (Scotland) Act 2010 makes provision for the purpose of simplifying public bodies, including the transfer and delegation of certain functions, the dissolution of certain bodies and provision in relation to the regulation of officers of court.

105. Schedule 5 of the Public Services Reform (Scotland) Act 2010 lists the persons, bodies and office-holders to which the order-making powers in section 14 of that Act (public functions: efficiency, effectiveness and economy) apply. Section 14 of the Act enables the Scottish Ministers, by order, to make any provision which they consider would improve the exercise of public functions by the bodies listed in schedule 5 (including the Scottish Ministers) having regard to efficiency, effectiveness and economy.

106. Paragraph 2 of schedule 3 of this bill, adds the Disability Commissioner to the list of bodies to be included in scheduled 5 of the Public Services Reform (Scotland) Act 2010. As a result, any relevant provisions of that Act will apply to the Disability Commissioner for Scotland.

Public Records (Scotland) Act 2011

107. The Public Records (Scotland) Act 2011 makes provision about the management of records by certain authorities.

108. The schedule of the Public Records (Scotland) Act 2011 sets out a list of the authorities which must comply with the records management duties that are set out in Part 1 of that Act. Paragraph 3 of schedule 3 of this bill, adds the Disability Commissioner to the list of bodies. As a result, any relevant provisions of the Public Records (Scotland) Act 2011, will apply to the Disability Commissioner for Scotland.

Procurement Reform (Scotland) Act 2014

109. The Procurement Reform (Scotland) Act 2014 makes provision about the procedures relating to the award of certain public contracts.

110. Part 3 of the schedule of the Procurement Reform (Scotland) Act 2014 sets out a list of “contracting authorities” to which the provisions in the Act apply. Paragraph 4 of schedule 3 of this bill, adds the Disability Commissioner to the list of such authorities. As a result, any relevant provisions of the Procurement Reform (Scotland) Act 2014, will apply to the Disability Commissioner for Scotland.

This document relates to the Disability Commissioner (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 8 February 2024

DISABILITY COMMISSIONER (SCOTLAND) BILL

EXPLANATORY NOTES

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