

SCOTLAND'S COMMISSIONER LANDSCAPE CONSULTATION

COMMON WEAL RESPONSE

INTRODUCTION

Common Weal's interest in the Commissioner landscape in Scotland stems from our interactions around the Minister for Older People in previous Parliamentary sessions and our noting that said ministerial post had been dropped in the present session while a proposal for a Commissioner for Older People (as well as several proposals for other Commissioners) had arisen. We appreciate that this consultation is not the place to discuss the merits and demerits of individual Commissioners (or the office holders themselves) but it was this experience that led us to formulate our view that it was becoming evident in this Parliament that the ease of reshuffling of ministerial responsibilities was creating a risk that policy portfolios could easily become de-prioritised at critical times. However, this was balanced by a risk that an over-reliance on Commissioners to fill the gap (or even to stand alongside an equivalent Minister) could result in a loss of democratic accountability in Government as while Commissioners are responsible to Parliamentary Committees they are not easily accountable to Parliament as a whole in the same way that a Minister is.

Added to this, we are concerned that the ad hoc nature of Commissioner appointments is leading to Commissioners in ostensibly similar policy areas (for a hypothetical example, consider the roles of a Commissioner for Young People and a Commissioner for Older People who would both be tasked with advocating for particular age demographics) having very different actual roles (with one perhaps being tasked with monitoring for breaches in regulations or statutory rights while the other being merely an advisory body). We therefore welcome this consultation and call for the regularisation of the role of Commissioners to make their remits and appointments more transparent and to ensure the maximum level of democratic accountability

in their role:- In particular, consideration should be given to further empowering Parliament (not Government) to control and oversee Commissioners and for the Commissioners to act in the name of Parliament (not Government) as they give advice and uphold rights.

However we want to ensure that the advice given by Commissioners is not granted a platform above and beyond that of any other source of policy advice as this too would risk an undemocratic and technocratic influence over our politics and may crowd out other sources (such as independent think tanks). It is likely that the review of the Commissioners Framework will require a review of other areas of governance such as the role, appointment and powers of Committees and the ability for Parliament to hold Government to account (particularly when the party of Government holds majority control of Parliament). We would welcome and advocate other forms of input into public policy being similarly regularised and given a level of recognition. This could include direct citizen engagement via Citizens' Assemblies or other forms of direct, deliberative democracy.

Much of this will likely lie outwith the scope of this particular enquiry (which may be a signal that the scope of the review should be broadened so that it can meet its aims) and will certainly lie outwith the scope of this particular response though we would welcome the opportunity to feed these and related ideas into the review should they be requested.

RESPONSES TO QUESTIONS

Commissioner landscape

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

1. Why is the Commissioner model chosen over other approaches, such as a public body or government department, and why do you consider there has been such a growth in Commissioners in recent years?

The closest comparative public office to that of a Commissioner is a Government Minister or Cabinet Secretary in that both are given remit to oversee, develop and scrutinise Government policy. However Ministers are themselves accountable to Government, Parliament and the public in a way that is deeply political. The conduct of a Minister or the performance of one of their policies reflects on the Government's own performance. However, there is significant pressure to adopt and implement the policies advocated by Ministers in a way that is not the case with Commissioners.

We believe that the Scottish Government is developing a risk-averse attitude in expanding the growth of Commissioners as it allows Government to claim the credit when policies are adopted and are successful but to ignore "inconvenient" advice or to pass blame for failure.

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

Even the very generous salaries granted to Commissioners and the costs of running their offices are relatively insubstantial on the scale of a national budget and are unlikely to make a material difference to national finances.

While we welcome advice given to Parliament and Government from respected and authoritative sources, we are wary that the rise of Commissioners (especially in policy areas that do not have a well placed Minister or lack a Minister entirely) may erode the democratic accountability of Government and risks the "messy landscape" (to quote the Research Scotland report into the role of Commissioners) outright turning into one where technocratic (corrupt or otherwise) appointments replace democratically elected legitimacy. Reliance on Commissioners for advice may also crowd out advice from other sectors (such as independent

think tanks) particularly if the advice from Commissioners has a tendency to agree with or reinforce Government thinking rather than to argue against it.

While Commissioners are responsible to Parliament via the Committees, they cannot be held accountable to the whole of Parliament in the same manner that a Minister can. The process for appointing Commissioners is also a substantially less directly democratic process than the process of electing an MSP (though we equally note that the appointment of Ministers from the pool of MSPs is entirely in the gift of the First Minister and as of the time of writing the Scottish Parliament does not have a process by which the public can recall an MSP whose conduct falls below acceptable standards).

3. Currently, there is a mix of regulatory, investigatory, rights-based, and policy-focused Commissioners in Scotland.

What should the role of Commissioners be and which should report directly to Parliament (and why)?

The remit of Commissioners should be regularised across all positions. A Commissioner should essentially combine the powers of all current Commissioners and be able to develop policy, produce advice, investigate issues related to their remit and be responsible for identifying where statutory rights have been breached and how remedies can be applied.

Looking across the entire model of Commissioners, do you consider it to be a coherent approach? What, if any, improvements could be made to the Commissioner landscape in the future to ensure a coherent and strategic approach?

The Commissioners should be placed under the control of Committees relevant to their remit and it should be for those Committees to instruct Commissioners when to enact their powers. For example, a Committee could request advice on a policy (or enact a Standing Order for advice to be produced whenever such a policy appears in front of them) or could instruct a Commissioner

to begin an investigation into a breach of regulations (however, a Commissioner should have a Standing Order to investigate a breach of statutory rights regardless of Committee instruction or lack thereof).

In this sense, the role of Commissioners would be less a “Minister without accountability” to the Government and more the right hand of a Committee to better perform its function for the benefit Parliament. This may require a review of the remits of Committees themselves or even a broader review of Scottish Governance in general as some Committees will benefit from a Commissioner more than others and under the current system, a single Commissioner may see their remit spread across several Committees or a single Committee may require several distinct Commissioners. This speaks to the “messy landscape” that has been created in the Scottish Parliamentary system since it was reconvened in 1999. Indeed, the opaque nature of the landscape means that an attempt to clean up the “mess” will result in uncovering further incoherences that we cannot currently see.

4. Criteria were developed by the Session 2 Finance Committee to help guide decisions on whether to create a new commissioner. These criteria are considered by the Scottish Government and Members when proposing Commissioner related bills.

How are the criteria working in practice and where do you consider improvements can be made to the criteria, its use, or its status?

The fact that Commissioners have complicated and varying roles across their various remits and those remits are themselves often ill-defined suggests that the criteria are not working in practice. We recommend that the roles of Commissioners are reviewed and regularised and that the process for overseeing them also reviewed even if it requires broader reform of Parliament and the Committee system to do so.

Governance, accountability and scrutiny

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

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

The Scottish Parliamentary Committees are themselves too weak and too vulnerable to being co-opted or ignored by Government (especially in times of Government majority). The existing governance arrangements should be reviewed to restore power to Parliament (to which Government itself should be accountable, rather than the inverse).

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

The failures of accountability possibly lie more in the lack of power of Committees and of Parliament in general compared to Government (especially in times when Government has majority control of Parliament and can so easily impose party control over Committees). There should be a broader reform of Parliament as part of and in addition to the reform of Commissioners.

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

In general, Committees are too weak to provide adequate scrutiny of Commissioners at all levels from the decision to create a role, through the appointment process and onwards through

scrutiny of performance. This has not always been the fault of the Committees per se. As is discussed elsewhere in this consultation and the reports surrounding it, the Government itself often gathers far too little data on the performance of Commissioners to adequately scrutinise them, and the roles are often too ill defined for that data to be gathered even if there is the will to do so.

Value for money and effectiveness of current approach

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

It is difficult to answer this question without detailed reporting on how influential Commissioners have been in their roles. Commissioners staying silent against or merely justifying policies that Government was going to implement anyway may be seen as poor value, however those few and noteworthy moments of Commissioners speaking against what they see as Government making an error do highlight the value of independent experts. The Scottish Government itself has admitted a lack of research into the evaluation of effectiveness. We would recommend that this research is conducted as part of the review of the role of Commissioners. We would also recommend that until that review is complete, no new Commissioners are created and that existing Commissioners are not replaced at the end of their term.

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

With little research into the effectiveness of Commissioners and a “messy landscape” of roles across commissioners, we believe that there is strong evidence that the scrutiny process is inadequate (as a corollary, it is difficult to imagine that if processes and scrutiny were adequate then they would recommend creating the current system).

10. To what extent is there overlap and duplication of functions across Commissioners, and across other organisations in Scotland and how can this be avoided?

Our interest in this investigation was prompted rather by the lack of overlap between Commissioners and Ministers (specifically the dropping of a Minister for Older People and the proposal to create a Commissioner for Older People, however that specific is irrelevant to the concerns raised). We are concerned about the risk that Commissioners are becoming seen as quasi-Ministers who can be ignored

when convenient to Government's wishes and whose failings do not reflect on Government as a Minister's would. Other than this we are somewhat less concerned with duplication of function with other organisations so long as Commissioners are not seen as more authoritative in their advice for their proximity to Parliament or Government.

Response on behalf of Common Weal by

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