

The role of commissions and commissioners in Scotland and the UK

Final report, March 2023

Autism and Learning Disability team



CHILDREN, EDUCATION AND SKILLS

**The role of commissions and
commissioners in Scotland and the UK**

Research Scotland report for
Scottish Government March 2023

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1. Introduction

About this report

This report sets out findings from research exploring the role of commissions and commissioners in supporting rights in Scotland and the UK. The research was commissioned by Scottish Government and undertaken by Research Scotland in 2022/23.

The research will inform discussion and consultation about the potential creation of a Learning Disability, Autism and Neurodiversity Commissioner or Commission in Scotland, through the ongoing development of a new Learning Disability, Autism and Neurodiversity Bill.

The Scottish Government will consult on the possibility of the establishment of a Commissioner or Commission in the second half of 2023. This report does not indicate that a Commissioner or Commission will definitely be established, but aims to inform discussion and consultation on the issue.

Research aims

There is very little published research in Scotland and the UK on commissions or commissioners, and little evaluation exploring the pros and cons of different approaches, powers or ways of working for commissioners.¹

The aim of this research was to better understand the role of commissions and commissioners which safeguard and uphold people's rights, what helps and hinders in performing these roles, how these roles intersect and what lessons can be learned from this. The research was to provide a nuanced understanding of how commissions or commissioners effectively complete their functions, working jointly with others.

¹[How to be an effective commissioner, Institute for Government](#)

Method

The research was undertaken between autumn 2022 and spring 2023. It involved:

- **A brief literature review** – This review explored existing commissions and commissioners in Scotland and the UK. It focused on commissioners with a role around protecting people's rights. It largely drew on grey literature – information available on commissioner's websites including annual reports and strategic plans. The main purpose of this review was to understand the role, ways of working and partners of various commissions and commissioners in Scotland and the UK, to inform research tools and discussions with commissions, commissioners and partners.
- **Research tool development** – Based on findings from the literature review, discussion guides were developed to form a broad framework for interviews with commissions, commissioners and their partners. The interview guide was semi-structured, with set questions and themes to explore but with scope to follow up on interesting points emerging, and to explore key issues in depth. These discussion guides were drafted, agreed with the Scottish Government and then piloted during the first interview.
- **Interviews with commissions, commissioners and partners** – The original aim was to hold up to 15 interviews online with commissions, commissioners and their partners, each lasting 60 minutes. During the desktop review, it became clear that it would be useful to focus on a smaller number of more in-depth interviews (11), with a targeted number of commissions or commissioners.

It was agreed with the Scottish Government to focus on in-depth interviews with five commissions, commissioners or partners:

- Mental Welfare Commission for Scotland (MWCS)
- Scottish Human Rights Commission (SHRC)
- Equality and Human Rights Commission (EHRC)
- Children and Young People's Commissioner (CYPCS)
- Scottish Public Services Ombudsman (SPSO).

These interviews explored their role, scope, powers, remit and what works and what is challenging. As there was a wide range of topics to cover with each interviewee, the maximum length of these discussions was extended from 60 minutes to up to 90 minutes. A total of eight interviews were held with these organisations. In some cases, commissions indicated that one member of staff could cover all issues requiring exploration. All commissions offered very senior and experienced staff members for the interview.

A further three interviews were held outwith Scotland – with the Older People’s Commissioner for Wales and the Northern Ireland Older People’s Commissioner. Again, either very senior staff or the commissioner themselves took part in these interviews.

The researchers would like to thank those who took part in the interviews for their valuable time. Many indicated that this was an extremely busy time for them and their capacity was limited, and the time each interviewee has given to this research project is highly valued.

- **Reporting** – This final report is for consideration by the Scottish Government and wider Lived Experience Panel. The report brings together findings from the literature review and interviews.

The interviews were analysed using manual thematic coding – carefully reading all the notes, coding themes emerging and grouping these into areas for exploration within the report. All views and experiences are reported anonymously. Anonymous quotes are used to highlight key points.

Where useful, example boxes are provided highlighting approaches used by certain commissions or commissioners, these have all been taken from existing information available online, or developed from interview discussions and have been checked and approved by the relevant interviewee.

2. Context

Introduction

Discussions about the creation of a Learning Disability, Autism and Neurodiversity Commissioner or Commission are set within the wider context of work to protect, promote and uphold people's rights in Scotland. This chapter explores the context in relation to:

- the Independent Review of Learning Disability and Autism in the Mental Health Act
- wider support for a commission or commissioner
- development of a Learning Disability, Autism and Neurodiversity Bill
- the Mental Health Law Review.

Independent Review of Learning Disability and Autism in the Mental Health Act

The proposed Learning Disability, Autism and Neurodiversity Bill and Commissioner/ Commission is not a direct response to the recommendations of the Independent Review of Learning Disability and Autism in the Mental Health Act. However, it is worth noting that the review played a role in advancing the idea of creating a commissioner to uphold the rights of these groups.

In December 2019, the final report of this Independent Review² confirmed that reform was required in Scotland's mental health law, for autistic people and people with learning disabilities. It recommended that a series of steps be taken to bring about positive change to promote the rights of people with learning disabilities and autistic people:

- learning disability and autism be removed from definition of mental disorder in Scotland's Mental Health Act
- a new law be created to support access to positive rights

²[The independent review of Learning Disability and Autism in the Mental Health Act, National Records of Scotland](#)

- a new commission or commissioner be established to promote and protect the rights of autistic people and people with intellectual disability across all settings.

“We recommend that a new commission be established with authority to promote and protect the human rights of autistic people and people with intellectual disability across all settings.”

The Independent Review was clear that further work would need to be undertaken to develop the role of a new commission or commissioner for people with autism and learning disabilities. Within the report, key roles mentioned for consideration for a commission or commissioner included:

- setting standards for accessible communication for autistic people and people with a learning disability – along with powers to enforce compliance with these standards
- setting standards for services and environments that Health and Social Care Partnerships must have in place for autistic people and people with learning disabilities – with Partnerships required to give their policies to the commission, services being inspected against these standards, and a commissioner, regulator or inspectorate having enforcement powers in relation to these standards
- setting standards for dignity, accessibility, equality and non-discrimination for autistic people and people with learning disabilities across public services and the justice system – based on the Convention of the Rights of Persons with Disabilities and the European Convention on Human Rights – with breaches of standards reported to a new commissioner or other relevant body
- monitoring deprivation of liberty for autistic people and people with learning disabilities, including detention, restraint and seclusion.

The Independent Review stated that in considering development of a new commission or commissioner, all relevant functions should be considered – including monitoring for compliance with human rights, intervening for individuals, intervening for groups of people, raising local

and national issues about law, policy and practice, and regulation and inspection.

The Independent Review also made clear that the new commission or commissioner should:

- be set up in law
- have the authority and responsibility it needs to raise any issue of human rights
- have the ability to take complaints and support people to challenge professional decisions, through supporting individuals to raise those complaints with the relevant authorities, regulators and commissioners
- be sufficiently independent and have sufficient authority to be able to challenge any organisation on any issue.

Finally, the review highlighted that duties could fall with existing commissions, commissioners, regulators or inspectorates, or a new commission or commissioner.

“These functions might be supported as part of the implementation of the Convention on the Rights of Persons with Disabilities, within a broader disability commission, by existing human rights commissions and inspectorates in Scotland, or by another body.”

Wider support for a commission or commissioner

More widely, there has been a campaign led by three charitable organisations – Enable Scotland, National Autistic Society Scotland and Scottish Autism – for the creation of a commissioner for learning disability, autism and neurodiversity³.

The concept of a dedicated commissioner was also highlighted by the Cross Party Group on Autism. It recommended in its report *The Accountability Gap* that “the accountability gap could be solved by establishing a new autism commissioner role, who would uphold autistic people’s rights and ensure that effective policy and laws are implemented appropriately at a local level.”

³[Campaign Progress, Our Voice Our Rights](#)

A broader proposal for a disability commissioner for Scotland has been proposed through a proposal for a Members Bill brought forward by Jeremy Balfour MSP⁴. This commissioner would promote and safeguard the rights and interests of disabled people. The consultation on the topic found that most respondents (77%) supported the proposed bill and most (88%) supported the creation of a dedicated commissioner. Most felt that the commissioner should have a role in reviewing laws and policies, promoting best practice and learning, and investigating Scottish public bodies and service providers. The proposals received some support from MSPs and the right to introduce a Members Bill on the topic was secured in December 2022.

A number of disabled people's organisations - including organisations representing people with autism, learning disabilities and neurodiversity - have published responses on the consultation, which are [available here](#).

A Learning Disability, Autism and Neurodiversity Bill

In this context, in March 2021, the Scottish Government's Towards Transformation Plan committed to explore further the proposals for a commission or commissioner to help protect people's rights. In September 2021, as part of the Programme for Government for 2021/22, the First Minister announced that Government would carry out scoping work on the remit and powers of a Learning Disability, Autism and Neurodiversity Bill.

During 2022, Scottish Government held a series of workshops and consultative events to explore initial views around the development of the Bill, and the potential role of a Learning Disability, Autism and Neurodiversity Commissioner. Overall, these discussions highlighted that there wasn't overall agreement about whether or not it was a good idea to have a commissioner.

The discussions highlighted that some felt a commissioner was essential to tackle systemic disadvantage of autistic people, people with a learning disability and neurodivergent people, and bridge the gap between good intention and policy and practice on the ground. Some felt a commissioner would be symbolic in showing issues were important, could champion when people's rights had been abused, and could have formal powers to investigate poor practice and act when appropriate.

⁴[Proposed Disability Commissioner \(Scotland\) Bill, The Scottish Parliament](#)

The discussions also demonstrated some concerns about having a commissioner. Concerns raised included:

- There are lots of commissioners already which should hold up the rights of people with learning disabilities, autism and neurodiversity. There was some concern about avoiding duplication with existing commissioners.
- One commissioner for autistic people, people with learning disabilities and neurodiverse people may not work. There was some concern about whether this was a grouping that would work, and whether all would be listened to within a single commissioner.
- Some people think a commissioner's job is to punish organisations, and some don't want people to be punished.
- Some people think a more 'bottom up' approach could help to make change happen, through empowering people to have a voice locally, and enabling organisations to involve people with lived experience and deliver best practice.
- A commissioner would cost money. Some feel it would be better to spend money on support for people with learning disabilities, autism and neurodiversity.

During 2022 and early 2023, a number of disabled people's organisations also gathered views and published position statements in relation to the Learning Disability, Autism and Neurodiversity Bill. These organisations had varied views on the need for a commissioner:

- The Scottish Commission for People with Learning Disabilities⁵ felt that a commissioner was critically important and urgently required, in order to hold duty bearers to account and ensure people with learning disabilities can realise their human rights. It also highlighted that the commissioner (and wider Bill) must link directly with the Scottish Human Rights Bill.
- Autism Understanding Scotland and Scottish Ethnic Minority Autistics had conversations with autistic people about the Bill, and produced a position statement⁶. This states that more work needs to be done asking autistic people what they want, as

⁵ [Position Statement: Navigating a Complex Landscape, The Human Rights Bill for Scotland and the Learning Disability, Autism and Neurodiversity Bill, Scottish Commission for People with Learning Disabilities, July 2022](#)

⁶ [Our Position on the Creation of a Commissioner for Learning Disability, Autism, and Neurodiversity, Autism Understanding Scotland](#)

there is not evidence that a commissioner would address the issues that autistic people are facing. It argues that neither a Bill nor a commissioner is necessary, as existing mechanisms could be used to uphold people's rights, with more resources and greater involvement of autistic people. A further open letter in February 2023, jointly with Diversified Scotland, Autistic Mutual Aid Society Edinburgh and Autism Rights Group Highland further commented on the proposed creation of a commissioner. It raised considerable concern about the potential creation of a commissioner and stated further that the campaign for a commissioner had been done to their communities, not with them. It highlighted existing commissioners and routes to formal investigations, and raised concerns that a new commissioner would not be able to take on all of the individual cases concerning rights breaches⁷.

- Scottish Autism and National Autistic Society Scotland gathered the views of autistic people, families and professionals during 2022. It found that there was clear support across all groups for the establishment of a commissioner, with 96% of all respondents supporting creation of a commissioner to promote and protect the rights of autistic people and people with learning disabilities⁸.
- Enable Scotland ran a survey and series of events during late 2022, to support people to say what they think the priorities of the Bill should be. It is also running workshops on key issues around the Bill, in partnership with members of the Cross Party Group on Learning Disability, which aims to ensure that human rights and aspirations of people with learning disabilities are considered by the Scottish Parliament and public policy makers.

On 27 February 2023, Scottish Government published a scoping report on the establishment of a Learning Disability, Autism and Neurodiversity Bill. The report is an analysis of 30 workshops carried out with people with learning disabilities and autistic people, by Scottish Government and its partners. The report is available [online here](#). This report highlighted that while some of the disabled people's organisations involved in initial discussions and scoping events around the proposed

⁷ [An open letter to Kevin Stewart MSP, Minister for Mental Wellbeing and Social Care, Autism Understanding Scotland](#)

⁸ [Closing the Accountability Gap: views from autistic people, family carers and professionals on the Scottish Government's proposed Commissioner, National Autistic Society Scotland and Scottish Autism, January 2023](#)

Bill were supportive of, or open to exploring the idea of, a commissioner, the majority of disabled people's organisations were more sceptical.

Mental Health Law Review

In September 2022, the final report of the Scottish Mental Health Law Review was published. While this report generally endorsed the recommendations of the Independent Review of Learning Disability and Autism in the Mental Health Act, and recommended a shift to a needs and rights based framework, it signalled an important change of direction for mental health law. It concluded that the term ‘mental disorder’ should no longer be used, and indicated that a new definition of who mental health law is for should be developed.

As part of this, the review involved detailed discussion and listening to people about the inclusion of learning disability and autism within mental health legislation. Different opinions were listened to, and ultimately, the review concluded that mental health law should apply to people with learning disabilities and autism, to provide the widest possible gateway to accessing rights, and to ensure rights can be respected, protected and fulfilled. This was based on an understanding that the legislation is about enabling people’s rights, and should be as inclusive as possible in its scope.

The review indicated that it was reluctant to focus rights on a particular diagnosis or label, and recommended the law covering “a person with a mental or intellectual disability whether short or long term”. The review highlighted that this was an inclusive definition which could include people with learning disabilities, people with autism, people with personality disorders and a wider group of people.

The review sought to avoid a large number of groups requiring individual pieces of legislation to obtain their rights, but recognised that dedicated legislation, such as a Learning Disability, Autism and Neurodiversity Bill, may also be useful.

At the time of this brief literature review (late 2022) the implications of this review on the wider legal and policy context was not yet evident.

New Human Rights Bill for Scotland

More broadly, work to enhance the rights of people with learning disability, autism and neurodiversity has the potential to connect, align and overlap with plans to develop a new Human Rights Bill for Scotland. This would include specific rights from:

- the International Covenant on Economic, Social and Cultural Rights
- the Convention on the Elimination of All forms of Discrimination against Women
- the Convention on the Elimination of All Forms of Racial Discrimination
- the Convention on the Rights of Persons with Disabilities.

The Mental Health Law Review will be a key consideration in relation to the incorporation of the Convention on the Rights of Persons with Disabilities within this Bill.

There have been some suggestions that a commissioner for promoting and protecting women's rights should be established, based on recommendations from the First Minister's National Advisory Council on Women and Girls.

The report informing the development of the new Bill also recommended that the Scottish Human Rights Commission should be given additional powers including taking test cases, conducting investigations and potential further extended powers⁹.

⁹[National Taskforce for Human Rights: leadership report, Scottish Government](#)

3. Commissions and commissioners

Introduction

This chapter explores the existing evidence about the role of commissions and commissioners in upholding people's rights, in Scotland and the UK. It explores what a commission or commissioner is, and sets out the existing commissions and commissioners in Scotland which uphold people's rights.

There is very little published research in Scotland and the UK on commissions or commissioners, and little evaluation exploring the pros and cons of different approaches, powers or ways of working for commissioners.¹⁰ This chapter draws largely on the websites, strategies, annual reports and plans produced by commissions and commissioners in Scotland and the UK.

What is a commission or commissioner?

A commission or commissioner is usually created to give under-represented groups a voice or to focus on a particular issue.

“Parliamentary commissioners and ombudsmen are typically responsible for safeguarding the rights of individuals, monitoring and reporting on the handling of complaints about public bodies, providing an adjudicatory role in disputes and reporting on the activities and conduct of public boards and their members.¹¹”

Commissions and commissioners can focus on under-represented groups – like children, older people, women, victims of crime or disabled people – or a particular issue – like domestic abuse, social mobility and disadvantage, biometrics, ethical standards or health.

In Scotland there is a range of commissions and commissioners. However, there is very little published research on commissioners, and no handbook or blueprint within government for designing the role.¹²

¹⁰[How to be an effective, Institute for Government](#)

¹¹[Public bodies in Scotland: guide, Scottish Government](#)

¹²[How to be an effective, Institute for Government](#)

A **commission** is an independent public body which functions independently of the government. Commissions are independent, arm's length bodies which scrutinise a particular issue or work to secure the rights of a particular group of people, or in relation to a particular theme.

An example of a commission in Scotland is the Mental Welfare Commission for Scotland which is an independent body that protects and promotes the rights of people with mental health conditions. It has a Chair and a Board that set the strategic direction. Another example is the Standards Commission, an independent body which encourages high ethical standards in public life. It comprises a convenor and four commission members.

A **commissioner** is an individual who advocates for a certain group, generally supported by a team of staff. These are very individual roles, and the individual appointed can make quite a difference to how the role is undertaken.

Examples of a single commissioner role in Scotland include the Children and Young People's Commissioner Scotland, the Scottish Information Commissioner and the Scottish Biometrics Commissioner. Each commissioner has a staff team supporting them.

Often these models can be **combined**. For example, commissions often have groups of commissioners who serve on their Board.

Examples of commissions which have more than one commissioner include the Equality and Human Rights Commission, and the Scottish Human Rights Commission. Each have a group of commissioners – with a chair – and a staff team supporting them. The Equality and Human Rights Commission also has a Scotland Committee, whose role is to advise on the exercise of the Commission's functions as they affect Scotland.

The roles and responsibilities of commissions and commissioners are generally set out in the law, and the powers commissions have can vary.

Commissions and commissioners function independently of the government, and can hold the government to account. Commissioners are generally appointed by the Scottish Parliament (not the Scottish

Government). Commissioners are generally appointed for a set time period (usually 3-5 years) and there are normally rules about how many terms they can serve as commissioner.

Commissions and commissioners are responsible for employing their own staff, who are not civil servants, and managing their own budgets from funding provided by the Scottish Parliament.

A commissioner is not an ombudsman, tsar, regulatory body or inspectorate, but can have cross-over with some of these roles.

- An **ombudsman** is an individual or organisation appointed to look into complaints about organisations and help to resolve disputes. A commissioner may have a role in complaints or appeals if this is within their remit, but can also have many other roles.
- A **tsar** is an individual appointed by government or a government minister in a personal appointment. These high level officials are paid and granted broad powers to address a particular issue and act as champions and ambassadors. The minister and the tsar devise and agree terms and conditions themselves.
- A **regulatory body** is an organisation appointed by the government to establish and/ or ensure compliance with standards. It can be a public organisation or government agency.
- An **inspectorate** is an organisation that ensures that official regulations about places or activities are obeyed. This generally involves visits to places or organisations to make sure things are being done correctly.

Note: Parliamentary commissions

This report is exploring the role of commissions and commissioners established by the Westminster or Holyrood parliaments. It is worth noting that there is an organisation in Scotland called the Scottish Commission for People with Learning Disabilities. This is a third sector organisation, and is a charity, not a public body. It is governed by a Board of Trustees and run by a team of staff.

The Scottish Commission for People with Learning Disabilities works to defend and protect the rights of people with learning disabilities by:

- building the capacity and participation of people with learning disabilities
- working to involve people with learning disabilities in the development of strategies and solutions, including policy and legislation
- building evidence and data to inform service delivery and decision making.

Being an effective commissioner

Although research on commissions and commissioners is limited, UK guidance on how to be an effective commissioner produced by the Institute for Government¹³ emphasises that commissioners require sufficient powers, resources and independence. It provides useful advice on establishing commissioners. This includes:

1. Give the commissioner a well-defined but not overly restrictive remit and be clear where they fit in.
2. Ensure the role has adequate resources and powers to fulfil its remit.
3. Appoint an individual who has credibility with represented groups and can manage complicated relationships.
4. Reinforce the independence of the commissioner – it must be able to investigate without needing to seek money or permission from government, publish reports under its own authority, and have a direct link to parliament and relevant committees.
5. Take commissioner recommendations and input seriously – make a formal commitment to respond to reports within a timescale, and involve the commissioner in relevant policy discussions.

Existing equality and human rights commissioners

In Scotland, a range of commissions and commissioners exist to protect and promote human rights and equality. There are Scottish bodies, and

¹³[How to be an effective, Institute for Government](#)

there are bodies that cover Great Britain or the UK which have powers that extend to Scotland.

Existing Scottish commissions and commissioners with powers to protect human rights include:

- **The Scottish Human Rights Commission (SHRC)**
Promotes awareness, understanding and respect for all human rights, everywhere in Scotland, and encourages best practice.
- **The Mental Welfare Commission for Scotland (MWCS)**
Protects and promotes the human rights of people with mental illness, learning disabilities, dementia and related conditions in Scotland. It has a dual role of exploring situations where something has gone wrong, and working to improve policy to safeguard people in the future.
- **The Children and Young People's Commissioner Scotland (CYPCS)**
Protects and promotes the human rights of children and young people.

Appendix One sets out more detail on the role, set up, powers and activities of some of these commissions and commissioners.

The **Scottish Public Services Ombudsman (SPSO)**, which is the final stage for complaints about public service organisations in Scotland, also has a role in protecting rights. The SPSO can consider whether the organisation concerned has taken its obligations seriously and provided a reasonable explanation of their interpretation of the law. It can do this through assessment and investigation, and share a final decision on the complaint. However, it cannot determine whether that is lawful or not.

Existing Great Britain wide commission and commissioners with powers to protect human rights which extend to Scotland include:

- **The Equality and Human Rights Commission (EHRC)**
Promotes equality and diversity, enforces laws, promotes and protects human rights across Great Britain by encouraging good practice and promoting mutual respect. There is also a specific statutory committee for Scotland and its role is set out in legislation. For full details please see Appendix One (Section Two).

Other UK wide commissions and commissioners which cover Scotland and uphold people's rights include The Independent Anti-Slavery Commissioner and the Social Mobility Commission¹⁴.

- The Social Mobility Commission is a UK wide body which exists to create a UK where an individual's future isn't determined by the circumstances of their birth. It has a statutory responsibility to promote social mobility in England, and more widely across the UK to carry out and publish research and produce and annual monitoring report on progress towards improving social mobility in the UK.
- The Independent Anti-Slavery Commissioner encourages good practice in preventing, investigating and prosecuting slavery and human trafficking offences.

¹⁴[How to be an effective, Institute for Government](#)

4. Powers of commissioners

Introduction

This chapter explores the powers and approaches of commissions and commissioners in Scotland and the UK. It explores the broad types of powers that commissions and commissioners have and how they feel about the range of powers available to them.

Broad powers of commissioners

As there is no single role for a commission or commissioner, they are set up in many different ways, with different powers. However, commissions and commissioners are normally provided with powers which stem from legislation relevant to their field.

UK-wide guidance on how to be an effective commissioner emphasises the importance of powers in fulfilling the role.

“There are two key initial things to get right when establishing a commissioner post: powers and resources.”¹⁵

Setting out powers in legislation can also help to clearly establish the role and remit of commissioners, which is important as there is no standard set of powers for commissioners.

The powers given to a commission or commissioner can be tailored specifically to the situation, and what is needed. However, the range of powers that commissions and commissioners in Scotland have include:

Powers to **inform best practice, raise awareness and set standards**:

- powers to disseminate information or ideas
- powers to provide advice, guidance, education and training
- powers to conduct research
- powers to produce statutory guidance
- powers to require a response from government or public bodies within a specified time frame

¹⁵[How to be an effective, Institute for Government](#)

- powers to gather data and make it public – which can be reinforced by imposing a duty on bodies to make information available to the commissioner.

Powers to review law, policy and practice:

- powers to review and recommend changes to law in Scotland
- powers to review and recommend changes to policies and practice of public authorities.

Example: Powers to review law, policy and practice

The Children and Young People's Commissioner Scotland has powers to review the law, policy and practice as well as promoting best practice, raising awareness and understanding and conducting research on children's rights¹⁶.

Powers to make inquiries:

- power to conduct inquiries – into key issues, particular organisations or groups or organisations
- powers to compel people to give evidence or produce documents.

Powers to conduct investigations:

- powers to investigate suspected unlawful acts
- powers to assess compliance or check best practice.

Powers to enter and inspect places:

- power of entry – important power to enable commissioners to gain entry to institutions that may be closed-off – with or without notice
- power to interview and talk to people in certain places.

Example: Powers of entry and interview

The Scottish Human Rights Commission has the power to enter, inspect and interview people in places of detention in Scotland. However, this only applies as part of a formal inquiry initiated under the terms of their Act¹⁷.

¹⁶[What laws give the Commissioner power?, Children and Young People's Commissioner Scotland](#)

¹⁷[Scottish Commission for Human Rights Act 2006](#)

The Mental Welfare Commission for Scotland has powers to visit people in hospital, at home, in care homes and in other settings, and can explore care and treatment and compliance with mental health legislation. It can review case notes and files, conduct recorded interviews with people, and make recommendations for change¹⁸.

Powers to **enforce rights under law**:

- powers to issue unlawful act or compliance notices
- powers to enter into agreements about future actions
- powers to report people or organisations which do not comply to another route – including reporting non-compliance to courts, to Scottish Ministers or to others
- powers to take cases to courts and provide legal assistance
- powers to review individual cases and assess for compliance with the law.

Example: Powers to enforce rights under law

The Equality and Human Rights Commission has powers under the Equality Act 2006 to make inquiries into any topic related to equality, diversity and human rights, and conduct investigations where it is suspected an unlawful act has been committed. It can assess public bodies' compliance with the Public Sector Equality Duty, and issue notices requiring action to comply, where a body has been assessed as having failed to do so. It can also produce statutory guidance in relation to matters of equality. Although the EHRC has a wide range of enforcement powers, its focus is initially on helping organisations achieve compliance through advice, guidance, information and research.

In practice, commissions and commissioners can get things done in a range of different ways, depending on the powers they have available to them.

Having very limited powers, or no statutory basis for the role, can make it difficult for some commissions and commissioners to get things done.

¹⁸[Law and Rights, Mental Welfare Commission for Scotland](#)

Example: Strengthening powers

The Children’s Commissioner in England was originally given the responsibility to “represent the views and interests of children” along with the power to advise ministers, conduct research, gain entry to premises where children are cared for, and initiate inquiries. The framing of the role as representing views and interests as opposed to promoting their rights under a legal framework, such as the UN Convention on the Rights of the Child, was criticised in parliament. The powers, remit and function were strengthened by the Children and Families Act 2014.¹⁹

Example: Ambassador role

Scotland had an Active Nation Commissioner between 2018 and June 2022. The Commissioner worked independently of the Scottish Government to act as a national advocate for walking, wheeling and cycling in Scotland, raising the profile of sustainable methods of travel and promoting their benefits. The role was not supported by a legislative framework, and focused on challenging policy and strategy constructively. In June 2022, the commissioner moved on to become a new Ambassador for Active Travel, providing an independent perspective on progress.

Reflections on broad powers of commissioners

Through this research, commissions and commissioners reflected on their powers overall, how effective these are and what helped and hindered in terms of upholding human rights and bringing about change.

Having powers set out in law

Overall, commissions and commissioners valued having their powers set out in law.

“Generally having powers set out in law is helpful.” Interviewee

“I think when you put something under legislation, it makes people do it.” Interviewee

¹⁹[How to be an effective, Institute for Government](#)

Interviewees reflected that the best powers are:

- enabling and empowering – using words like the commission ‘may’ undertake a certain function, leaving scope for other approaches
- clear and straightforward
- well written
- achievable within resources.

Some interviewees highlighted that while it was useful to have some powers, they didn’t often have to use them. For example, while it was useful to have powers, commissions often used these to have an informed conversation and explain to people why it was important that they change or improve their practice or approach, rather than implementing the powers directly.

“From a policy perspective, being able to back up the carrot of policy arguments with the stick of legal powers is a very, very good thing.”
Interviewee

“The fact that we haven’t used some of them doesn’t necessarily mean that they’re not helpful.” Interviewee

A few mentioned that they felt that if they had to use some of their powers, this would be a failing as the discussions and conversations they are having would not have had the desired effect.

A few talked about the decisions they had to make, to find the balance of when they collaborate, when they work on something jointly, and when they use their legal powers. A few interviewees felt that in the early days of a commission, they probably used their legal powers more, but once they had built up a profile and understanding, they used these less and worked in a more collaborative way.

“But we deliberately try to work as upstream as we can. Obviously if you get to the point that you are using your legal powers, its because there have been failings at earlier stages.” Interviewee

One interviewee felt that having powers was a key difference between commissioners and campaigning and lobbying organisations. This interviewee felt that powers were felt to be essential to get things done, even if they weren’t always used.

“I always feel that the Commission has to have something extra that other organisations in the sector don’t have. So (for us) its those legal powers. It means you can get behind the truth of issues. You can get to the places that charities can’t get to.” Interviewee

Interviewees identified some challenges around:

- Using legal powers can be high profile and gives a clear result, but can be seen as punishing people.

“What we’re trying to do is not to punish people. It’s to try to improve behaviours so that there are better outcomes for people day to day.” Interviewee

- Some powers applying to certain listed or named organisations – but often services cut across different organisations making it hard to look at the impact on the individual as a whole.
- Some lack of clarity in powers, or barriers around the language used.

“It depends on how well written it is. Bits of our legislation are nice and clear and straightforward and others are really grey and murky. And I think that does make a big difference.” Interviewee

- Some change over time in context, not reflected in powers – for example, the shift from written information to other formats, and the shift from institution based care to community care – which a few commissions said meant that a small tweak in legislation may be helpful.
- Some powers being very limiting – for example having the power to intervene in civil litigation, but not being able to do anything to make cases come to court, or having the power to investigate individual issues, but not having the power to look at issues more collectively.
- Some powers being very expensive to implement – for example having the power conduct an inquiry or investigation, or provide legal support to individuals. This means that some powers are used very carefully and sometimes not at all because they are so costly and resource intensive.

- Some powers not having teeth – for example having the power to inquire, but for any recommendations made not having any legal backing.

A few interviewees highlighted that while it was helpful to have a legislative basis to work from, it was important to remember that the context constantly evolves – so having either flexibility built into the legislation, or ability to update the legislation would be helpful.

While almost all commissions and commissioners felt that they had the powers to bring about change, one interviewee felt that its powers were largely persuasive and were a significant barrier to upholding human rights for the people they worked with.

“If commissions are being set up, they should have more teeth otherwise there is a question as to what value they add.” Interviewee

Having resources to bring about change

Most interviewees felt that they had the resources that they required to bring about change, and could discharge their duties effectively. All said that they had to prioritise and make careful decisions about their work, and that they could do more with more resources. A few interviewees emphasised that their work was unending, and that they could always do more.

“The single biggest challenge is having enough capacity to meet demand... Managing expectation is our single biggest challenge and would be one that all of us share.” Interviewee

A few interviewees said that if more resources were available, they would use this to focus more on relationship building, collaborative and early engagement activities such as:

- culture change, good practice and standards
- collaboration and active engagement with other bodies
- research and policy influencing.

“If we had more practitioners then we could do more.” Interviewee

One interviewee highlighted the importance of having clarity about resources and budget in advance, so that priorities could be managed within the resources available.

One interviewee felt very under resourced to perform its role and fulfil its mandate, and felt that although it prioritised, it could only do a proportion of the work needed, and was often reactive rather than proactive which was very limiting for promotion of human rights. It felt that there was a gap between what it should achieve, its powers and the resources required to carry out these powers.

“I really wouldn’t want to see an expectation set up in other commissions that they can do things that they’re not resourced to do.” Interviewee

Gaps in powers

Interviewees were asked if there were any gaps in their powers. The suggestions made were all very specific to each commission and commissioner. For example:

- A few did not have power to make binding recommendations which meant they used discussion and persuasion to bring about change.
- One highlighted that it did not have powers of entry, and felt it would be useful to have these, for example through doing spot inspections.
- One did not have power to decide what issues it was going to look into, and had to deal with individual cases in response to issues reported to them.
- One had restrictions on its information sharing powers, with limited powers to share with some organisations – such as other commissions and commissioners. It felt that it would be useful to have more open information sharing possible, to support joint working.

“We don’t have ‘own-initiative’ powers. We can’t say we’re going in to look at this.” Interviewee

One interviewee reflected on the fact it did not have enforcement powers. They felt this hadn’t been a particular issue, as it allowed the organisation to engage with individual bodies in discussion about the outcomes they wanted to achieve, and when, and leave it a bit more flexible to work out how they get there. Ultimately any failure to achieve the agreed outcomes could be reported to parliament, and although the organisation hadn’t used this, it was felt to be a very useful power to have.

Views on governance

Most interviewees felt that their governance arrangements worked well.

A few highlighted that being a stand-alone public body was resource intensive, with many administrative and reporting responsibilities even for small organisations, and that it was important to consider the impact of this for any new organisation.

Where there was a single commissioner, interviewees felt that this worked well. This meant that there was one person responsible for decision making and clear lines of accountability which ensured the commissioner had power. This meant that the commissioner was clearly the leader and the figurehead for the work of the organisation. Having support through advisory groups, on areas such as lived experience, key priorities and risk, was felt to be essential – although it was ultimately up to individual commissioners to decide whether to take this advice or not.

This meant that getting the right individual appointed as a commissioner was very important. Interviewees stressed that different commissioners could have different approaches, but that all commissioners needed to be confident to put their opinion forward and have their voice heard.

Where commissions had more than one commissioner, extra effort was needed to clarify governance and decision making responsibilities.

Interviewees also highlighted that the roles of commissioners and senior staff need to be clearly defined, so that all can add most value.

One interviewee said it was vital to have the governance and organisation set up properly before announcing the new commission or commissioner, as people will immediately have expectations and these need managed carefully.

5. Reflection on specific powers

Introduction

This chapter explores interviewee reflections on the specific powers of their commission and how they are used in practice.

Powers to inform best practice, raise awareness and set standards

Interviewees reflected on their powers to inform best practice, raise awareness and set standards. For most commissions this was a core part of their work and included:

- identifying best practice, within Scotland, the UK and beyond
- exploring areas of challenge
- producing guidance notes
- setting standards – including statutory standards.

One interviewee also indicated that the media was a key part of the role of a commissioner, getting across big issues.

“Probably the area that is most effective is the media. When there are big issues to be tackled you use the media as effectively as possible to move those areas forward.” Interviewee

Work to set standards and promote best practice was felt to be hugely valuable, in terms of upholding people’s rights. A few interviewees highlighted that this type of work was aimed at improving the situation for people with lived experience, meaning there would ultimately be less need to approach commissions with problems, issues or complaints.

Interviewees highlighted that it was resource intensive to build relationships, engage and promote best practice and uphold standards. Sometimes it could be hard to balance this with the resources needed to react to poor practice and issues identified.

Example: Raising standards

The Scottish Public Services Ombudsman (SPSO) sets standards for complaints handling, and has a statutory duty to monitor these standards and share good practice. This is preventative work, to make sure that organisations can better deal with complaints and supports complaints resolution²⁰. This work allows the SPSO to make a significant difference to individual experiences, with complaints better dealt with and complaints standards increasing. Ultimately, over time, this type of work should reduce the volume of complaints coming to the ombudsman – but it is resource intensive and the bulk of their resources continue to be dedicated to dealing with complaints received.

Example: Producing guidance notes

The Mental Welfare Commission for Scotland regularly creates guidance notes²¹, often in response to enquiries coming through on its advice line. For example, during the pandemic the Commission received a lot of questions about people who needed the Covid-19 vaccination but couldn't consent or had issues that might impact on their decisions regarding vaccination. As a result the Commission produced guidance looking at case law from across the UK and good practice guidance, interpreting it within legal frameworks in Scotland.

For most commissions, their work to enhance best practice and raise awareness comes from a statutory duty to monitor the implementation of the law, and forms part of a suite of powers.

Example: A range of powers

The Equality and Human Rights Commission has four main strands of powers²², tools and tactics:

- Evidencing the issues – including identifying, researching and producing a 'State of the Nation'

²⁰[Scottish Public Services Ombudsman Act 2002, legislation.gov.uk](https://legislation.gov.uk)

²¹[Guidance & advice, Mental Welfare Commission for Scotland](#)

²²[Equality Act 2006, legislation.gov.uk](https://legislation.gov.uk)

report to be laid before the Westminster Parliament every 5 years.

- Influencing standards – policy work, advice to central and devolved governments on impact of potential and existing legislation.
- Compliance with standards – good practice, guidance, capacity building.
- Legal enforcement and intervention – legal powers to compel compliance, holding to account and taking action against organisations who break equality law.

A range of factors must be considered in choosing which lever to use. This decision needs to be pragmatic. For example, inquiries take a long time so if there is an urgency about the issue, this is not the right tool. Litigation is expensive and it is important to consider how to make maximum impact with public money.

While some commissions were not able to provide advice to individuals, for some, this was a key part of their role. Three commissions operated email advice support services, advice lines or advice and assistance teams for individuals. These three commissions found that providing support to individuals through advice helped to inform wider work, including the standards and guidance notes that are required, based on lived experience.

Example: Providing individual advice

The Mental Welfare Commission for Scotland has a statutory duty to provide advice to anyone who seeks it around operation of mental health legislation²³. The Commission runs an advice line, and focuses this advice particularly on situations where rights are affected. The advice line receives around 3,500 to 4,000 calls a year, with many enquiries now also coming by email. About half of the contacts are from people with lived experience, and half are from practitioners and professionals.

The advice covers any aspect someone has a concern about, and feeds in to the wider work of the Commission.

²³MWCS can advise on rights and good practice in relation to mental health and incapacity law, and care and treatment.

For example, an inquiry or group of inquiries may lead to exploration of an issue and production of guidance to clarify the situation. Professionals can also use the advice line to explore best practice and approaches from a rights based perspective.

If issues emerge from the advice line that escalate, the Commission may choose to become an interested party and work with the individual and others to support them around decisions, care and treatment in a way that protects the person's rights²⁴.

These calls cause the Commission to lean in on certain issues and ask questions. It is an excellent source of information and very useful for understanding and influencing the issues that people are experiencing, as they are experiencing them.

Example: Providing advice and assistance

The Older People's Commissioner for Wales provides advice and assistance to older people. The power to do so is set out in legislation²⁵. The Commissioner's Advice and Assistance Team can help to connect older people, either directly or through family members and others who make contact on their behalf, with support and services throughout Wales, and help to ensure their rights are upheld.

Reviewing policy and legislation

Most commissions took both a proactive and reactive approach to reviewing policy and legislation. This meant that they both reactively considered ideas coming through in government and parliament, contributing to debate and discussion as ideas were developed, and proactively worked on influencing areas identified as important to people with lived experience.

Commissions and commissioners took part in working groups, met with senior officials and ministers, produced consultation responses,

²⁴Section 50 of the Adults with Incapacity (Scotland) Act 2000

²⁵Section 8 of the Commissioner for Older People (Wales) Act 2006

campaigned, wrote letters and held reviews to influence policy and legislation. Interviewees highlighted that having wider powers around enforcement, litigation and investigation helped to influence the policy and legislative context. For example, monitoring implementation of legislation to uphold people's rights provided an important locus to focus activity around, based on where issues were emerging.

Interviewees highlighted that policy work took longer to achieve, and was harder to attribute than some of the other approaches they used. The change in policy and legislation comes about over time through influence, which can be quite intangible.

The ability to report to parliament on findings around policy and legislative review was felt to be a very useful power.

Example: Monitoring the implementation of legislation

The Mental Welfare Commission for Scotland has statutory duties to monitor how mental health law is working²⁶. This helps to inform what needs to change and how the Commission can influence this.

“It is monitoring with a purpose, with an intention to check how the law is working, identify places where it is failing and then make recommendations to close those gaps wherever we see them.”

A few interviewees highlighted that in organisations with a single commissioner, different commissioners could result in very different approaches to influencing policy and legislation.

“It's very personal to how they like to work.” Interviewee

For example, within the one organisation over time the approach changed based on the commissioner. Recently, one commissioner has not wanted to work alongside the government in internal policy reference groups, wishing the organisation to stay independent and scrutinise government policy from outwith the process. A previous commissioner took a different view, working with government and trying to influence

²⁶MWCS has duties under the Mental Health (Care and Treatment) (Scotland) Act 2003 and Adults with Incapacity (Scotland) Act 2000

from within, with lots of commission staff on working groups. Both approaches were felt to have had their own successes and challenges.

Powers to take cases to court

Some commissioners have the power to investigate individual cases, provide legal assistance and take individual cases to courts. This means that commissions and commissioners need to establish clear established criteria for when to get involved in individual cases, to maximise impact. Using cases to highlight systemic issues can bring issues to life, connect with important issues and draw attention to learning from key cases.

Example: Legal support

The Equality and Human Rights Commission can support individuals to bring cases where they've experienced discrimination and a breach of relevant rights under the Equality Act 2010²⁷. It supplies clear information to help people understand and assert their rights, as well as offering direct support to bring legal cases. The EHRC also undertakes work to build capacity among others providing legal advice to individuals.

The Equality and Human Rights Commission does not get involved in every case, and takes a strategic litigation approach focusing on agreed priority areas within its strategic plan. It seeks out cases to support, to ensure that those who breach the rights of others understand that they will not get away with flouting the law. If issues identified don't fit with strategic plan priorities, the EHRC looks at the scale of the issue and the impact that EHRC action would have when it decides whether to get involved²⁸. It has a team of solicitors and case workers that run test cases on equality issues.

Some commissions and commissioners are specifically excluded from investigating individual cases, and expected to focus on systemic issues. This can help prevent commissioners getting involved in detailed case

²⁷[Equality Act 2010, legislation.gov.uk](https://www.legislation.gov.uk/ukpga/2010/154)

²⁸[Legal review policy and procedure, Equality and Human Rights Commission](#)

work and avoid overlap with other roles. However, sometimes this can limit the power of commissioners.

Example: Strategic legal and policy work

The Scottish Human Rights Commission does not handle complaints or provide a service to individuals. The law prohibits the Commission from giving advice or assistance on individual legal claims or potential legal proceedings²⁹. Resources are focused on strategic legal and policy work instead. The Commission works closely with other organisations and services that do provide advice on human rights issues, so that it can refer people to them. The Commission can choose to conduct a formal inquiry into any policies and practices of Scottish public authorities, but it has a statutory duty to avoid duplicating the work of others as far as is practical. It also must consult the Scottish Law Commission before undertaking a review of any area of the law. The National Taskforce on Human Rights Leadership published recommendations for a new human rights framework for Scotland in early 2021, and this recommended additional powers be given to the SHRC including taking test cases, conducting investigations and potential further powers³⁰. This report is informing the development of a new Human Rights Bill for Scotland.

Interviewees reflected on their powers to support individuals. Interviewees felt that commissions generally got involved in cases:

- to clarify an area of law
- if the issue affects a lot of people
- where the impact is particularly concerning.

Having the power to support individuals in some way was seen to be a very valuable way of gathering intelligence and learning about real problems on the ground.

“If we’re telling people don’t bring us your individual problems, then we don’t hear about individual problems and that blocks off a really important avenue for intelligence gathering.” Interviewee

²⁹Scottish Commission for Human Rights Act Section 6

³⁰National Taskforce for Human Rights: leadership report, Scottish Government

One interviewee indicated that over time, their organisation had become more involved in legal support for individuals, as the cases coming to the commissioner had become more complex.

However, interviewees highlighted that powers to take legal cases and to intervene in civil litigation are costly and resource intensive. Interviewees stressed that these powers need to be accompanied by resources.

Interviewees highlighted that powers to intervene in civil litigation only (rather than supporting individuals to bring their own cases) could be restrictive, as it depends on the right case being brought before court in the first place.

There were some perceived gaps in legal support available to individuals, with commissions with no power to bring individual cases feeling there was nowhere else to signpost people to within the system.

Powers to inquire and investigate

Interviewees reflected on their powers to inquire and investigate. Investigations were generally used when there was a concern about people's rights not being upheld and organisations acting unlawfully.

Interviewees generally felt that investigation powers were significant and very powerful.

“Our powers of investigation allow us to call anyone in. Any time we call for information there are actually criminal consequences for not providing it... So we have quite powerful investigation powers and we can compel anyone to come to give evidence.” Interviewee

One interviewee felt that using the powers of investigation raised the profile of their organisation, demonstrating both to the public and to public bodies that the commissioner had teeth.

“It was a huge bit of work for the office, but it raised the profile of the organisation and showed the public we had teeth. And for the public bodies involved it was a bit of a wake up call to the powers.” Interviewee

A few highlighted that their commission had powers of investigation, but could not investigate something that is the remit of another organisation.

“Our powers of investigation state that we cannot investigate something that is the remit of another organisation, so it does have constraints on it. And that’s something that can be challenging for people to understand...” Interviewee

There was some concern among a few interviewees that as new commissioners were created, this would limit the powers of existing commissioners in relation to investigation.

“Each new Commissioner that’s created may constrain what existing Commissioners are able to do and there’s nowhere more obvious than with our investigation powers.” Interviewee

Some interviewees indicated that investigations were resource intensive, taking time and resources. A few said that other tools were available to them before they got to this stage – meaning that investigations could be rarely used. For example, for the Equality and Human Rights Commission an investigation is used where an organisation is suspected of undertaking an unlawful act. This was relatively rarely used, because there were so many other tools the EHRC could use before it gets to this stage. Another interviewee highlighted that although the commissioner used powers of investigation soon after it was established, this helped to set the scene for dealing with public authorities, showing that the commissioner has teeth and empowering it to work in a softer way with organisations, which often received a better response.

Example: Individual case review and investigations

The Mental Welfare Commission for Scotland identifies areas of concern or particular situations that require further review. It does this through:

- the Commission’s advice line
- the Commission’s visiting function
- the notification system that requires services to inform the Commission of the use of certain aspects of mental health legislation
- the notification of death system where services inform the Commission of deaths of patients in certain situations.

If a serious problem is identified, the Commission may follow this up with a visit or an investigation. The Commission normally has approximately 10 to 12 cases

which is actively reviewing at a higher level of review, and from these one or two cases a year are identified where they suspect there will be learning for across Scotland from the incident. These lead to detailed investigations.

The Commission prioritises investigations where other people may be having similar problems, or where there may have been mistakes that others could learn from. The Commission publishes the results and recommendations from investigations, and follows up with services to find out what changes they have made in response. If issues are not resolved, it can escalate concerns to Scottish Ministers. Investigation reports are [available here](#).

Some commissions also had powers to undertake inquiries and reviews. These were generally broader, exploring a theme across a sector or a group of bodies. These were resource intensive and time consuming, with clear rules about how inquiries were reported and how they were conducted. Interviewees indicated that careful consideration had to be given to when and if to undertake an inquiry. One interviewee indicated that their commission had not used their powers of inquiry as it would be a very large scale undertaking and its recommendations wouldn't have any legal force.

Powers to enter and inspect

Most of the commissions and commissioners involved in this research had some powers to enter certain facilities as part of undertaking their role. This included:

- power to enter places to speak with people with lived experience – for example while undertaking an investigation or inquiry
- power to inspect and review quality of care and service, for example in care homes or places of detention.

Example: Visiting programme

The Mental Welfare Commission for Scotland has a visiting programme to visit the places where people may be detained under the Mental Health Act. The visits involve seeing about 1,200 people a year and reviewing the quality of care. Some visits are announced and some are unannounced (about a quarter). For each visit a report is published with recommendations, which the organisation must respond to.

Unannounced visits are often due to intelligence from the phone line, or where there's a pattern, or a potential problem. Themed visiting programmes are also used, to explore particular issues or places.

The Commission also maintains a register of Designated Medical Practitioners who review the treatment of people who do not consent or cannot consent to particular treatments specified under the Mental Health Act. The Commission's designated medical practitioners carry out around 2,000 visits a year and make changes to around a third of the treatment plans they review. The Commission feels that this is a vital and tangible safeguard, which it administers and provides guidance on.

6. Lived experience and commissioners

Introduction

This chapter explores learning about how commissions and commissioners work with and involve people with lived experience. It draws on evidence from a brief literature review, and interviews with commissions and commissioners in Scotland, Northern Ireland and Wales.

Ways of including lived experience

Connecting with people with lived experience is a key role for most commissions and commissioners. The way in which this is done varies.

In some cases, individual commissioners bring strong lived experience themselves. For example, the former UK wide Victim's Commissioner brought lived experience through the murder of her husband, which led to her significant involvement in campaigning activity.³¹ In other cases, commissioners bring expertise in the subject matter, for example running a prominent organisation or service in their field.

Most commissions and commissioners have clear plans and strategies for involving a wide range of people with lived experience, regardless of the personal experience of commissioners. This includes:

- ensuring membership of the Board and/ or other key decision making groups for people with lived experience
- creating lived experience panels or groups to inform and influence the decisions of commissions and commissioners
- networks of lived experience advisors, champions or human rights defenders
- ongoing engagement through interviews, focus groups, panels and national events.

Perceptions on including lived experience

³¹[How to be an effective, Institute for Government](#)

The commissions and commissioners involved in this research took different approaches to including lived experience within their work.

Some said that participation and including people with lived experience was central and core to their work.

“Engagement is a vital part of our work... For me, my boss is the (people with lived experience).” Interviewee

These commissions were constantly evolving their practice in this matter, and strongly focused on developing and using best practice in their engagement with people with lived experience. Approaches used included:

- employing participation specialists to develop best practice in engaging with people with lived experience
- ensuring that all members of staff across the team live the values of working directly with people with lived experience to make sure their voices and views are heard in all their work
- paying people with lived experience for their time, particularly if they are doing the work that a professional might do (for example being involved in recruitment)
- co-design and co-production of principles for projects and approaches
- peer review of the commissioner’s work by people with lived experience
- people with lived experience being directly involved in investigations
- people with lived experience being involved in the governance of the organisation including audit and recruitment
- outreach work with community groups, forums and other groups of people with lived experience where they meet.

These organisations highlighted that ensuring lived experience was embedded throughout the organisation was resource intensive, but recognised as very important across the organisation.

“We are constantly immersed in what people (with lived experience) are saying and what matters to them. That’s really resource intensive but it’s absolutely fundamental to the work that we do.” Interviewee

Through involving people with lived experience, some interviewees felt that they were more in tune with issues on the ground, and more likely to hear from the groups they worked with.

“People with lived experience and carers, people that are actually walking in the shoes of those that we work alongside will perhaps on occasion be more willing to hear from those that have walked in their shoes rather than those with the professional badge on.” Interviewee

Example: Human rights defenders

The Children and Young People’s Commissioner Scotland must encourage children and young people to be involved in his work, and must have a strategy around involving children and young people³². There is a team of 40 young advisors, aged 14 to 17. The team acts as human rights defenders and work on three themes:

- A mental health group – informing and leading a new investigation into children and young people’s mental health.
- A governance group – informing how the Commissioner spends money, what work it does and who it hires.
- A European Network of Young Advisors group.

The Commission works to ensure that lived experience is embedded across the organisation, across all teams.

Example: Engagement strategy

The Mental Welfare Commission for Scotland has an engagement and participation strategy³³, which sets out how it will involve people who use services and carers. The Commission has a legal requirement to have a person with lived experience and a carer on the Board³⁴. A service user

³²[How to be an effective, Institute for Government](#)

³³[Engagement and Participation Strategy 2019/2022, Mental Welfare Commission for Scotland](#)

³⁴[Public Services Reform \(Scotland\) Act 2010, legislation.gov.uk](#)

is also included on all executive appointment panels. The Commission has an Advisory Committee including members from 40 key national stakeholder organisations, including lived experience and carer organisations.

The Commission has a team of four people with lived experience, covering autism, learning disability, carers and mental ill health, who work within the engagement and participation team. They are involved across the Commission's work, including identifying and verifying issues that feed into decision making about priorities; undertaking preparatory work on themes and scoping work; and feeding back on issues emerging at local level.

The team also takes part in investigations and helps to shape the questions explored during visits and investigations and feed into decision making about priorities based on their work and intelligence gathered.

“It has brought that part of it to life I think for us as a commission.”

The Commission also gathers lived experience input on an ongoing basis through meeting people with lived experience and carers groups on key topics as it undertakes its work.

All of the interviewees said that they talked to people with lived experience who were affected by issues they were exploring – for example through projects, investigations or inquiries.

A few commissioners highlighted that their work was very broad, so they often spoke to third sector organisations to hear their views, and through this hear the views of their members with lived experience.

A few highlighted that they were on a journey around involving people with lived experience, with a focus on ensuring that people's voices are heard from very early stages – informing priorities and decision making, rather than giving their experience on particular topics once these have been decided. Interviewees highlighted that this required time, resources and engagement activity to ensure a wide range of people have the opportunity to have their voice heard.

“It requires time, relationships and trust.” Interviewee

7. Joint working

Introduction

This chapter explores how commissions and commissioners in Scotland work together. It also draws on how they interact with others such as the Scottish Public Services Ombudsman, the Scottish Government and third sector organisations.

As commissions and commissioners work to uphold the rights of individuals, they often have overlapping remits with other commissions and commissioners, and other statutory bodies such as regulators, inspectorates or ombudsmen.³⁵ Commissioners need to work collaboratively to fulfil their role, and some have this power to act jointly or to assist people and organisations built into their role formally. In some cases, commissioners have a statutory duty to avoid duplicating the work of others.

Views on joint working between commissions

The interviewees involved in this research highlighted close joint working arrangements between commissions and commissioners in Scotland.

Some had written agreements or working agreements about certain issues. For example:

- The Equality and Human Rights Commission has a Memorandum of Understanding with the Scottish Human Rights Commission. There is a lot of complexity with both equality and human rights legislation and powers, and both Great Britain wide and Scottish organisations.
- The Mental Welfare Commission for Scotland and Scottish Public Services Ombudsman have a Memorandum of Understanding to allow them to share information in a clear and straightforward manner. The MWCS is a named body in the SPSO's legislation around information sharing, and the organisations can share information effectively.

³⁵[How to be an effective, Institute for Government](#)

- The Scottish Human Rights Commission and Children and Young People's Commissioner Scotland have working agreement that they will talk about issues relating to children to agree who is best placed to take a particular issue forward.

Some said that they engaged with other commissions and commissioners more on an ad-hoc basis, as and when the need arose. For example, The Scottish Public Services Ombudsman worked with the Children and Young People's Commissioner Scotland on a Child Friendly Complaints process, using its work to inform the baseline scoping of the project and supporting the SPSO with contacts for young people and young people's organisations to take the project forward.

Some highlighted that their relationship with commissions and commissioners fluctuated, depending on their focus and priorities at the time.

"We have different relationships with different commissions at different points." Interviewee

Joint working arrangements were perceived to be simpler where organisations were clearly different. For example, a few interviewees highlighted that the SPSO with its clear focus on complaints was an easily defined, separate mechanism which was easily explained to individuals. Most commissions and commissioners highlighted that they signposted people to SPSO where appropriate.

"Those links with other commissioners and other officers are really strong for us, even outwith Scotland." Interviewee

Example: Coordinated work on the same issues

The Scottish Public Services Ombudsman took forward a case about access to British Sign Language within an NHS Board. The Equality and Human Rights Commission discussed the case at a training session for advisors, highlighting how similar cases could be raised under the Equality Act 2010. One of the advisors subsequently made the Commission aware of another case. The Commission then used its statutory powers to fund court action against the Board, reaching an agreement about British Sign Language provision. More information is [available here](#).

The Equality and Human Rights Commission also followed up with another NHS Board to seek assurances that legal requirements were being met for all patients, following a complaint raised with the Scottish Public Services Ombudsman. The Commission also followed up more widely with the Director General of Health and Social Care. More information is [available here](#).

The Equality and Human Rights Commission also worked with the Mental Welfare Commission on concerns about immediate re-detentions under the Mental Health (Care and Treatment) (Scotland) Act.

Some interviewees also highlighted that joint working arrangements helped when commissions and commissioners had different powers. It also brought together expertise and resources, through working together.

Example: Complementary powers

The Equality and Human Rights Commission has different powers than the Children and Young People's Commissioner Scotland and this leads to close joint working at times. They have a practical dialogue about cases, as the EHRC can take cases and CYPCS can't yet. Their work can also link together and follow up.

For example, in 2018 the Children and Young People's Commissioner Scotland looked at the use of restraint in schools and uncovered a lot of inconsistent and bad practice. The CYPCS published a report, and the EHRC with its stronger powers was able to follow up by supporting a judicial review that a parent had raised on this issue. They worked together to identify key issues and the outcomes they wanted. This resulted in national guidance, which was the outcome the CYPCS wanted to see.

"We were pleased to have worked closely with the Children's Commissioner to use our unique legal powers to achieve this change."

Interviewees stressed that even where there were formal joint working arrangements or Memoranda of Understanding, there were still grey areas so there was a need for a structure for talking to one another and working through these.

"We know how to speak to each other." Interviewee

More widely, interviewees highlighted the importance of talking and communicating with other commissions and commissioners, on an informal basis.

"There's just a constant exchange between the commissions about the work we're doing and where we might be able to collaborate or cooperate on different things. Sometimes that needs formal Memoranda of Understanding or agreement but most often it isn't that...it's more about how we deal with issues, that's a constant ongoing dialogue."
Interviewee

"Regardless of the type of relationship, the key is good communication. It really doesn't matter what your Memoranda of Understanding or your legislation says if you're not talking to each other." Interviewee

Some of the organisations involved shared a space and services like HR and procurement as they were Scottish Parliamentary supported organisations within the same building. However, these interviewees felt that due to hybrid and home working, being in the same physical space wasn't as important as it used to be and didn't affect day to day working.

A few interviewees highlighted that despite close working there could be some confusion about where lines are drawn between different mandates of commissions and commissioners, both internally and externally. One interviewee felt that they were restricted in information sharing, which made joint working challenging. For example, when working together recently, one commissioner had to sign a confidentiality agreement to say they couldn't use the information in any of their other work – which was felt to be quite a big ask of an organisation aiming to support human rights.

Views on joint working with others

Some of the commissions and commissioners also had arrangements in place to avoid duplicating the work of others, and ensure effective joint working with public sector organisations more broadly.

Example: Avoiding duplication

The Scottish Human Rights Commission has a statutory duty to avoid duplicating the work of others, as far as is practical³⁶. It must consult the Scottish Law Commission before undertaking a review of any area of the law. The Scottish Human Rights Commission also has the power to act jointly with or assist any person in undertaking its duties.

The Children and Young People's Commissioner Scotland also must avoid duplication and is limited in its powers to investigate, if another body in Scotland is able to do so³⁷.

Example: Memoranda of understanding

The Mental Welfare Commission for Scotland has a range of memoranda of understanding agreements in place to ensure effective joint working³⁸. It has a memorandum of understanding in place with the Care Inspectorate, Scottish Social Services Council, Health and Safety Executive, Healthcare Improvement Scotland, the Mental Health

³⁶Scottish Commission for Human Rights Act Section 5

³⁷Commissioner for Children and Young People (Scotland) Act 2003, legislation.gov.uk

³⁸How we work with other organisations, Mental Welfare, Commission for Scotland

Tribunal for Scotland and the Office of the Public Guardian (Scotland). It also has a memorandum of understanding with the Directorate for Population Health within Scottish Government, which sets out the broad framework within which the commission will operate and defines key roles and responsibilities which underpin the relationship between the Commission and the Scottish Government Directorate for Population Health³⁹.

More broadly, interviewees highlighted that they worked with third sector organisations on a regular basis. Commissions and commissioners liaised regularly with third sector organisations to hear their views, and the views of people with lived experience. As commissions and commissioners often had a broad remit, they found that third sector organisations which focus on a particular target group or issue were likely to have expertise and insight into what's happening on the ground on a particular matter.

“We build listening to others into the bricks because we couldn't operate without it.” Interviewee

Commissions and commissioners also often involved third sector organisations through Advisory Committees and working groups.

Interviewees mentioned that they had to be aware of the resources available within the third sector, the demands on their time and their ability to get involved in issues and projects. One interviewee highlighted that they ensure all engagement is fully scoped, planned and organisations are paid for their time.

“When we do work with the third sector, we're very well aware how constrained their resources are. So when we work with them we try to plan out how we might work with them, write the project and actually contract them and pay them for their time.” Interviewee

One organisation highlighted that with more resources it could engage more with third sector organisations, but that this had been affected by their capacity, the capacity of third sector organisations, and the Covid-

³⁹Framework document agreed between the Scottish Government Directorate for Population Health and the Mental Welfare Commission for Scotland, February 2018

19 pandemic. This organisation had identified within its new business plan the need to have a more active engagement strategy with the third sector in the future. Another highlighted that resources available within the organisation were focused on other areas of their work, and that with just a little more resource they could engage much more effectively with third sector organisations and other partners.

Relationship with government

Most interviewees valued that they were fully independent of government, feeling that this enabled them to be challenging and put their point across.

“It means we’re totally independent of government, we’re able to be as critical and openly challenging of government as we need to be because of our legislative underpinning. This gives us enormous power and is a massive help.” Interviewee

Most felt that they had developed a positive relationship with Scottish Government, where their input and expertise is valued, and they are listened to – even if the Scottish Government disagrees or doesn’t act on their input.

“I think we probably get reasonably well listened to, particularly at practical level.” Interviewee

“The relationship works well. They respect the independence that the commission has.” Interviewee

Most of the commissions involved in this research reported to Scottish Parliament and engaged with different parts of the Scottish Government on a project basis. A few mentioned that they had one key point of contact within the Scottish Government, so that they had a clear route in to different departments and teams as needed – as without this it could feel a bit disjointed.

One commission highlighted that it was accountable to a Scottish Government Directorate, rather than the Scottish Parliament, but that this was likely to change in the future.

One indicated that recently it produced a report jointly with the Scottish Government, because it was so important to show a joint position. This

was deliberate, but it was important to demonstrate that the commission continued to be totally independent from government.

8. Views on a new commissioner

Introduction

This chapter explores interviewee views on the establishment of a potential new commission or commissioner for learning disability, autism and neurodiversity. These issues were only explored with interviewees based in Scotland.

Concept of a commissioner

Interviewees highlighted that their organisations had not yet undertaken detailed work exploring their views on the concept of a commission or commissioner for learning disability, autism and neurodiversity, and that it was challenging to comment without understanding the detail of the role and responsibilities. All interviewees expected that as the Bill developed, their organisation would input to this through discussions and responding to consultations.

Overall, interviewees felt that any additional resource for people with learning disabilities, autism or neurodiversity would be welcomed, feeling people often faced inequalities and disadvantage. However, there were mixed views on whether a commissioner was the best way to address the issues. A few said it was important to think about what difference having a commission or commissioner would make tangibly, on the ground for people with lived experience.

“We absolutely do need extra resource and investment for this community, it’s just about how best to get it there.” Interviewee

“This is an area where public services need to be better, but it’s about how we get that solution.” Interviewee

Commissioners highlighted that demand for their support from people with learning disabilities, autism or neurodiversity was significant, and already an important part of their work.

There was some concern that creating commissioners for particular groups would lead to a large number of commissioners and a complex landscape. Many interviewees highlighted that the landscape was quite complicated and busy.

“It’s already a very complicated and messy landscape.” Interviewee

“I don’t think that given the chance to start things from scratch you would choose to create the institutional landscape that you have now.”
Interviewee

“If there’s a new body we’ll just be referring cases between ourselves, which doesn’t make sense.” Interviewee

Interviewees were also aware that commissioners for other groups or issues were also being considered by Scottish Government, and that this may further complicate the landscape. A few were concerned that people could end up being pushed between commissioners, or being unsure which applied to them.

“I think at the moment one of the things we are potentially concerned about isn’t about individual commissioners, it’s about the number that are being considered.” Interviewee

Some were concerned that focusing commissioners narrowly on particular groups rather than thinking about human rights in the round could create issues. A few felt that it made it much harder to account for intersectionality, and how individuals are impacted by their range of characteristics. A few felt that focusing more on human rights and equality for everyone, rather than setting up roles for particular groups of people, may be more effective.

One interviewee highlighted that the focus on creating more bodies to promote and support human rights did not support the findings of the Crerar Review in 2007, which reviewed regulation, audit, inspection and complaints handling of public services in Scotland. It found that scrutiny arrangement in Scotland were complex, and aimed to simplify and reduce bodies.

Two interviewees highlighted the importance of the Paris Principles which set out the minimum standards that national human rights institutions must meet to be considered credible and operate effectively. This includes having a broad mandate, to be able to promote and protect all human rights. They were concerned that focusing on the rights of a particular group may not meet these principles.

Finally, one interviewee felt that discussion about a commissioner had arisen from discussions about the scope of the Mental Health Act. This interviewee felt that it was important to keep disability within the Mental Health Act, and offer protections to people with autism, learning disability and neurodiversity through this route, rather than through a specific commissioner. This interviewee felt that focusing the language on support for decision making, and a concept of fusion of rights for people was helpful, rather than focusing in on a particular condition or disorder.

Avoiding duplication

Interviewees stressed that it was important to ensure that any new commissioner complemented existing activity, and did not duplicate activity or take powers away from existing commissioners. For example, a few interviewees highlighted that they could investigate only issues which were not under the remit of another body. Having more commissioners, could create more issues with this.

“The current government is very enthusiastic about commissioners, so it’s becoming very confusing what a commissioner is. There are so many different models now that the phrase commissioner is starting to lose its value in terms of what it is. People are struggling to understand what’s the difference between different commissioners... The more commissions that are set up, the more it muddies the landscape as to what we’re all actually doing.” Interviewee

Another interviewee was concerned about whether a commissioner would be able to explore or investigate many issues, as it was likely that many would relate to discrimination, which is a reserved matter and covered by the Equality and Human Rights Commission (set up by the UK government, not the Scottish Government).

“There would also be significant limitations on what a new commissioner could do in this space, because of the Equal Opportunities reservation.” Interviewee

Interviewees said that it would depend on the role of the commissioner and how the legislation was crafted, but highlighted that avoiding duplication was essential to achieve the best outcome for people with lived experience. A few said that the legislation would need to be carefully crafted, and that requirements for coordination and

communication between commissioners would need to be effectively resourced. Interviewees felt that this coordination would be possible, but messy, complex and challenging.

“When any new legislation is being developed we will need to make sure that any new offices don’t reduce or limit the remit of existing offices.”
Interviewee

Other options

Interviewees highlighted a range of other possible options for strengthening human rights for people with autism, learning disability and neurodiversity. These included:

- better resourcing existing organisations which champion disabled people
- better resourcing existing commissions and commissioners for human rights and equality – to ensure better compliance with existing rights
- having champions and advocates within public bodies
- supporting good practice through standards, guidance and practical tools – which could sit with another body rather than a commissioner
- investing in co-production of policy and practice with people with autism, learning disability and neurodiversity.

“If we see better compliance with Public Sector Equalities Duties, better compliance with reasonable adjustments duty, more use of co-production, better resourcing for existing bodies, there’s loads that can be done before we get anywhere near introducing a new commissioner.”
Interviewee

A few interviewees indicated that adding a resource to existing human rights organisations which was the equivalent to that of establishing a new commissioner would be transformative.

Some also suggested that having a lead or commissioner housed by an existing commission or other organisation may be worth considering. Some felt that this would give the commissioner some support and ballast, and reduce costs and administration duties as a public sector organisation through sharing services.

However, a few were unsure of the rationale for a specific lead or commissioner for some groups, without having the same for other groups. It was felt that this could create challenges through diverting resources from other issues, and diluting organisations' focus on all human rights for everyone. Two organisations highlighted that as they were national human rights organisations they needed to meet the Paris Principles which included having a broad mandate covering human rights for all.

Example: Hosting specific commissioners

The Scottish Human Rights Commission produced a position paper to the recommendation on the Women's Commissioner for Scotland in March 2022. The National Advisory Council on Women and Girls had called on the SHRC to appoint a commissioner to focus on promotion and protection of women's rights, accompanied by resourcing to allow this work to happen. The SHRC responded in detail, and part of this involved highlighting that if the Commission was restructured to apply a thematic approach covering the Convention on the Elimination of Discrimination Against Women, in order to comply with the Paris Principles for National Human Rights Organisations, it may also be necessary to appoint commissioners with thematic mandates covering the other key international human rights treaties, and ensure that all were adequately resourced. More detail is [available here](#).

Appendix One:

Detailed overview of four existing human rights commissions, commissioners and ombudsmen in Scotland

1. The Scottish Human Rights Commission (SHRC)

Role: To promote awareness, understanding and respect for all human rights to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights.

Organisation and governance: Independent public body, accountable to the Scottish Parliament. The Commission consists of a commissioner appointed to chair the Commission, and not more than four other commissioners. There are currently three part time commissioners and a full time chair.

Appointment: The chair of the Commission is an individual appointed by His Majesty on the nomination of the Scottish Parliament. The other members are appointed by the Parliamentary corporation. Each commissioner can hold office for up to 5 years, and can be reappointed once only.

Staff and costs: Full time chair, three part time commissioners and 11 full time equivalent staff posts. Costs approximately £1m a year to run. Three teams – business management, communications and legal and policy.

Powers:

- Disseminate information or ideas
- Provide advice, guidance, education and training
- Conduct research
- Review and recommend changes to any area of law in Scotland
- Review and recommend changes to any policies or practices of Scottish local authorities
- Conduct inquiries into policies and practices of Scottish public authorities – a particular authority, all authorities generally, or authorities of a particular description
- Compel people to provide oral evidence or produce documents – any Scottish public authority or any member, officer or member of staff of a Scottish public authority
- If people refuse or fail to comply with a requirement to give evidence, the Commission can report this to the Court of Session which may make an order for enforcement or deal with the matter as if it were a contempt of Court.

- Entry, inspection and interview in places of detention
- Intervene in civil litigation.

Legislation: Powers are set out in the Scottish Commission for Human Rights Act 2006.

Individual cases: The SHRC does not handle complaints or provide a service to individuals. The law prohibits the SHRC from giving advice or assistance on individual legal claims or potential legal proceedings. Resources are focused on strategic legal and policy work instead. SHRC works closely with other organisations and services that do provide advice on human rights issues, so that they can refer people to them. The SHRC does have the power to intervene in Scottish civil court proceedings, but only if it is relevant to the general duty and raises a matter of public interest.

Planning and prioritising: Must produce a strategic plan every four years setting out how it proposes to fulfil its duty, its priorities and activities, and any laws it proposes to review.

Formal collaboration:

- May act jointly with or assist any person in undertaking its duties
- Has a statutory duty to avoid duplicating the work of others – as far as is practical
- Must consult the Scottish Law Commission before undertaking a review of any area of the law
- Has a [Memorandum of Understanding](#) with the EHRC and communicates, collaborates and meets regularly
- The Scottish Public Services Ombudsman can investigate the SHRC.

Examples of activities:

- Contributing to Scottish Government working groups
- Responding to consultations
- Providing evidence to Parliament Committees
- Making recommendations to strengthen laws and policies
- Hosting national conferences/ high level seminars/ workshops
- Publishing research on key topics
- Providing training on human rights
- Supporting projects to enable change
- Inspecting and monitoring places of detention

- Key projects – e.g. work on historic child abuse to bring together survivors and duty bearers within a human rights framework.

Other information: The Commission is accredited as an ‘A Status’ National Human Rights Institution within the UN system, which means they can make direct contributions to the UN Human Rights Council. The SHRC (and EHRC) are designated as part of the UK’s Independent Monitoring Mechanism for the UN Convention on the Rights of Persons with Disabilities.

The SHRC general duty applies to devolved, reserved and international areas. However, its specific powers relate to Scotland – in relation to inquiries, laws, policies, practice and places of detention in Scotland.

2. The Equality and Human Rights Commission (EHRC)

Role: To promote equality and diversity, enforce equality laws and promote and protect human rights by encouraging good practice and promoting mutual respect – across Great Britain.

Organisation and governance: A statutory non-departmental public body. There is also a specific statutory committee for Scotland, and its role is set out in legislation. The EHRC is governed by a Board of between 10 and 15 Commissioners which includes a Chair and a dedicated Scotland Commissioner. The Scotland Commissioner is the Chair of the Scotland committee, and there are currently six other members. In law, the Commissioners are the Commission, and the staff provide the support.

Appointment: The Commissioners are appointed by the Minister for Women and Equalities or Secretary of State. Members of the statutory committee for Scotland are recruited and appointed through the EHRC.

Staff and costs: 218 staff, cost of £17.1m in 2021/22⁴⁰.

Powers: In Scotland the EHRC has powers to:

- produce statutory guidance
- conduct inquiries – into any topic related to equality, diversity and human rights
- conduct investigations – where it is suspected an unlawful act has been committed
- produce reports on investigations – with failure to act on recommendations enabling the EHRC to issue an unlawful act notice
- issue unlawful act notices - if the Commission finds an organisation has committed an unlawful act, it can issue a notice with details of the breach and necessary action to avoid it being repeated
- issue agreements - a formal agreement with a person or organisation the Commission believes has committed an unlawful act, and the person agrees not to commit an unlawful act and puts an action plan in place

⁴⁰ [Annual report and accounts 2021-22, Equality and Human Rights Commission](#)

- undertake assessments – the EHRC can assess public bodies subject to the equality duty to check compliance or identify areas of best practice, with robust powers to request information and evidence
- serve compliance notices – if the EHRC believes a public authority has not complied with the equality duty it can serve a compliance notice requiring the organisation to comply and setting out steps that it needs to take
- make applications to court including judicial reviews and interventions – including applying for court orders to require public bodies to comply, and not complying with the court order is a criminal offence
- provide legal assistance to individuals
- take judicial reviews and intervene in relevant cases before the court in relation to human rights.

A full list of [enforcement](#) and [litigation powers](#) are on the EHRC website.

In Scotland, the EHRC only has the power to take human rights action in relation to devolved matters if it obtains the consent of the SHRC.

The EHRC has a range of enforcement powers, but its focus is initially to help organisations to achieve change through advice, guidance, information and research. Although the focus is on pre-enforcement engagement, it uses its legal and enforcement powers when it is the best way to achieve change. This may be to clarify the law, highlight priority issues or challenge policies and practices that cause significant disadvantage.

Legislation: The powers of the EHRC are set out in the Equality Act 2006. The EHRC is also responsible for enforcing the Equality Act 2010.

Individual cases: The EHRC can support individuals to bring cases where they've experienced discrimination or a breach of relevant rights, only in line with its [litigation and enforcement policy](#). The EHRC supplies clear information to help people understand and assert their rights, as well as offering direct support to bring legal cases. It takes an approach of strategic litigation, with a legal directorate of solicitors and caseworkers that run test cases on equality and human rights issues.

The EHRC only gets involved in a case where it could clarify an area of law, or if it is affecting a lot of people or the impact is particularly egregious. Sometimes it focuses in on particular characteristics or

sectors. For example, at the time of this report it was running a [race legal support fund](#).

Planning and prioritising: The EHRC prioritises the issues it works on – trying to concentrate on a smaller number of issues over the longer term, to take a deeper look at each issue and devote more resources to a particular problem. This means difficult decisions about focus, to achieve lasting change. It lays a strategic plan in front of the UK Parliament every three years, setting out its priorities.

Formal collaboration: EHRC has formal agreements through Memoranda of Understanding with the SHRC, the Office of the Scottish Charity Regulator (OSCR) and the Scottish Public Services Ombudsman (SPSO). The EHRC also joins forces with those who are responsible for overseeing a particular sector, such as regulators, inspectorates or ombudsman. The EHRC works with the SHRC with the EHRC taking oversight of human rights issues relating to reserved matters, and the SHRC having oversight for devolved matters. There is a proviso in the legislation that if the EHRC gets the consent of the SHRC to work on devolved human rights matters then it can, and that does happen.

Lived experience: The EHRC consults widely on the issues in its strategic plan and holds round table discussions with people with protected characteristics. It also hears the voices and experiences of people with lived experience through engaging with third sector organisations representing or working for people with lived experience.

Examples of activities:

- Large scale research projects
- Advise government and parliament
- Provides consultation responses, parliamentary briefings and evidence to committees
- Investigation into allegations of antisemitism
- Inquiry into inclusive justice making recommendations to UK and Scottish Governments
- Investigated equal pay at the BBC
- Contacted a business after a whistle-blower suggested the owners used a booking policy that excluded Gypsies and Travellers
- Reached legally binding agreements with a wide range of organisations to improve services and avoid acts of harassment or discrimination

- Worked with Mental Welfare Commission for Scotland to pursue legal action when discovered a number of people were being held in two care homes in Glasgow without consent or lawful authority.

Other information: The EHRC has been awarded an A status as a National Human Rights Institution by the United Nations. The EHRC was created in 2007 and joined up the work of three previous Commissions – the Disability Rights Commission, the Commission for Racial Equality and the Equal Opportunities Commission.

The EHRC is a body set up by the UK Parliament and the Scottish Parliament has no locus to amend its powers.

3. Mental Welfare Commission for Scotland (MWCS)

Role: Protects and promotes the human rights of people with mental illness, learning disabilities, dementia and related conditions. Dual role of looking into individual situations where an incident has occurred in mental health and learning disability services, and also working systematically to influence and improve law and policy to help safeguard people and improve services.

Organisation and governance: The Commission is a non-departmental public body, run by a Board led by a Chair. There is a legal requirement to have at least one person with lived experience of mental health services and one who has lived experience of being a carer on the Board.

Appointment: The Board and Chair are appointed by Scottish Ministers in line with the Commissioner for Public Appointments in Scotland's Code of Practice.

Staff and costs: There is a staff team of around 60 including a leadership team, engagement team, practitioner team and administrative and corporate team, including a legal team. Budget of £4.9 million a year.

Powers: Carry out statutory duties by focusing on five main areas of work:

- Visit people – in hospital, at home, in care homes and in prison settings, with approximately a quarter of visits to hospital unannounced
- Monitor the Mental Health (Care and Treatment) (Scotland) Act 2003 on a statutory basis and the welfare parts of the Adults with Incapacity (Scotland) Act 2000
- Investigate – reviewing individual cases where there may be deficiencies in mental health care and treatment to identify learning, particularly if other areas may be having similar problems or could learn from the case
- Information and advice – provide advice and information about rights and best practice in relation to legislation that informs mental health services - the Mental Health Act 2003, Adult Support and Protection 2007, and the Adults with Incapacity Act 2000
- Influence and challenge.

Legislation: Originally set up in 1960 under the Mental Health Act. Current duties embodied in Mental Health (Care and Treatment) (Scotland) Act 2003 as amended by the Public Services Reform (Scotland) Act 2010, Victims and Witnesses (Scotland) Act 2014 and the Mental Health (Scotland) Act 2015; and in the Adults with Incapacity (Scotland) Act 2000.⁴¹

Individual cases: The law says that people providing care and treatment must let the Mental Welfare Commission for Scotland know if someone has been detained under the Mental Health Act, placed under compulsory treatment or if a welfare guardian has been appointed to make decisions on someone's behalf. The Commission's systems alert to relevant issues, and staff can inform the responsible professionals and the person concerned if they think there is a problem. This is one route to determining if a serious problem is identified, that might be followed up with a query, visit or investigation.

The Commission is particularly keen to investigate where they feel other people may be having similar problems, or where there have been mistakes that others could learn from so the same things don't happen again. The Commission can investigate by reviewing individual case notes and all files, and can conduct interviews with the people involved. The Commission will publish results and recommendations from investigations, and follow up with services to find out what changes they have made in response. It can escalate very serious issues that are not resolved to Scottish Ministers.

Planning and prioritising: The Commission finds out about potential cases through visits to individuals or services, following up on calls to advice line, or something in an individual's paperwork that concerns them.

Formal collaboration:

- Memorandum of Understanding with the Office of the Public Guardian (Scotland)⁴² which is part of the Scottish Courts and

⁴¹ [Mental Welfare Commission for Scotland Annual Report and Accounts for Year Ended, 31 March 2021, Mental Welfare Commission for Scotland](#)

⁴² [Data Sharing Agreement, Office of the Public Guardian \(Scotland\) And The Mental Welfare Commission for Scotland, June 2022, Mental Welfare Commission for Scotland and Office of the Public Guardian \(Scotland\)](#)

Tribunals Service and was established in April 2001 following the passing of the Adults with Incapacity (Scotland) Act

- Memorandum of Understanding with the Mental Health Tribunal for Scotland⁴³ which authorises and reviews compulsory measures for the detention, care and treatment of people in Scotland who have a mental disorder
- Memorandum of Understanding with Healthcare Improvement Scotland⁴⁴
- Memorandum of Understanding with the Health and Safety Executive⁴⁵
- Memorandum of Understanding with Scottish Public Service Ombudsman⁴⁶
- Memorandum of Understanding with Scottish Government⁴⁷
- Memorandum of Understanding with Care Inspectorate⁴⁸
- Memorandum of Understanding with Scottish Social Services Council⁴⁹

Lived experience: The Commission has an engagement and participation strategy⁵⁰, including how to involve people who use services and carers. There is a statutory requirement to have at least one person with lived experience of mental health services and one person with experience as a carer on the Board. A service user is included on all executive appointment panels.

The Advisory Committee includes members from 32 key national stakeholder organisations, including lived experience and carer organisations. The Commission also engages people with lived

⁴³ [Memorandum of Understanding Between the Mental Welfare Commission for Scotland and Mental Health Tribunal for Scotland](#)

⁴⁴ [Liaison Agreement between the Mental Welfare Commission for Scotland and the Health and Safety Executive, Mental Welfare Commission for](#)

⁴⁵ [Liaison Agreement between the Mental Welfare Commission for Scotland and the Health and Safety Executive, Mental Welfare Commission for](#)

⁴⁶ [Data Sharing Agreement Between The Scottish Public Services Ombudsman and The Mental Welfare Commission, Mental Welfare Commission](#)

⁴⁷ [Framework document agreed between the Scottish Government Directorate for Population Health and the Mental Welfare Commission for Scotland, February 2018, Scottish Government](#)

⁴⁸ [Memorandum of Understanding Between The Care Inspectorate and The Mental Welfare Commission, Mental Welfare Commission for Scotland](#)

⁴⁹ [Memorandum of Understanding in respect of the exchange of information between The Mental Welfare Commission and The Scottish Social Services Council](#)

⁵⁰ [Engagement and Participation Strategy 2019/2022, Mental Welfare Commission for Scotland](#)

experience through visits as part of its policy work and guidance development, which involves meeting with people with lived experience and carers groups, focus groups on key topics. MWCS also employs four engagement and participation officers with lived experience, covering mental ill health, carers, autism and learning disability.

Examples of activities:

- Runs an advice line 5 days a week with 3,500 to 4,000 phone calls/ emails a year
- Runs a national visiting programme seeing about 1,200 individuals each year
- Produces guidance and advice notes
- Produces an annual monitoring report on how mental health and adults with incapacity laws are working regionally and nationally
- Produces themed visit reports on areas of care and treatment where there are particular concerns
- Investigates very serious cases where they have real concerns and there could be learning across Scotland
- Makes recommendations to Scottish Ministers and service managers to help shape policy.

Other information: A Memorandum between Mental Welfare Commission for Scotland and Scottish Government sets out the broad framework within which the Commission will operate and defines key roles and responsibilities which underpin the relationship between the Commission and the Scottish Government directorate for population health.

4. The Scottish Public Services Ombudsman (SPSO)

Role: The SPSO has four statutory functions.

- It is the final stage for complaints about most devolved public service organisations in Scotland (but not the Police).
- It has powers and responsibilities to publish complaints handling procedures and monitor and support best practice in complaints handling.
- It carries out independent reviews of decisions that councils make on community care and crisis grant applications.
- It is the Independent National Whistleblowing Officer, the final stage of the process for those delivering NHS services to raise concerns about the health services they deliver in Scotland.

Organisation and governance: The Ombudsman is a public official appointed on the nomination of the Scottish Parliament. The Ombudsman appoints staff directly, with approval of the Scottish Parliamentary Corporate Body.

Appointment: The Ombudsman is a crown appointment, nominated by the Scottish Parliament and appointed by the King, for a period of no more than eight years.

Staff and costs: SPSO has approximately 71 full time equivalent staff and has been growing. Total staff costs in 2020/21 were approximately £4.6 million.

Powers: The SPSO may investigate any matter following a complaint, provided it is made by a member of the public and is on a matter the Ombudsman is entitled to investigate. The Ombudsman can also take action to help with resolving the complaint.

If someone does not cooperate with an investigation, the Ombudsman can apply by petition to the Court of Session to deal with the matter as if it were a contempt of court. The SPSO can also declare the complaints handling procedure of a public authority to be non-compliant, give reasons and specify modifications.

Legislation: Powers are set out in the SPSO Act 2002.

Individual cases: The SPSO may investigate complaints made by members of the public, in relation to public services. It also has the power to take any action it considers appropriate to resolve a complaint. It receives more than 4,000 complaints about public services each year.

Each year the SPSO investigates around 30% of the complaints it receives that are within its jurisdiction. This is approximately 15% of all complaints.⁵¹

The SPSO treats each complaint on its own merits. If the SPSO receives multiple complaints about the same issue, the Ombudsman may investigate a representative complaint, then use the findings and learning from that to inform what action they will take on other complaints.

During an investigation, the SPSO will gather about the complaint. The SPSO can talk to people, ask for information, ask for documents and seek expert advice. In the fields of health and social care the SPSO can also look at professional decisions made by clinicians and social workers.

The evidence is used to reach conclusions and make findings. If the findings identify service failing then the Ombudsman will make recommendations to address them. The Ombudsman shares the decision in a letter sent to the parties, or for more serious matters in a report which is put before Parliament.

Planning and prioritising cases: The SPSO has a triage system when complaints come in:

1. Can we investigate - is the matter within jurisdiction and raised by a member of the public about a public organisation
2. Should we investigate – could the issues be resolved without investigation, what has already been done, what more can be achieved for the complainer and could it affect other people or organisations.

Cases which are time sensitive are prioritised. At all stages, the SPSO tries to support the resolution of the complaint.

⁵¹ SPSO 2020-24 Strategic Plan [Scottish Public Services Ombudsman, Scottish Public Services Ombudsman](#)

Formal collaboration: The SPSO has a data sharing agreement in place with the Mental Welfare Commission for Scotland which is a named body within the legislation in terms of information sharing. Members of the public are signposted to the EHRC from the SPSO website to understand their choices if they feel they have been discriminated against, and signposted to the EASS (Equalities Advice and Support Service) if they want more advice and information. SPSO can check what organisations did in response to complaints about being discriminated against, but is not a legal route to determine whether someone has acted unlawfully or breached legislation.

Lived experience: Through SPSO projects the Ombudsman engages with people with lived experience, and co-designs activities and plans. For example, the Child Friendly Complaints Officer worked with children and young people to create principles and approaches.

Examples of activities:

- Investigating complaints
- Making reports and recommendations on complaints
- Raising awareness of complaints handling processes and good practice
- Supporting public bodies to develop their complaints handling practice
- Developing child friendly complaints processes.

Other information: In some cases that meet public interest criteria, the Ombudsman lays the full report of the investigation before Scottish Parliament and publishes it online.



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