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16 May 2024

Dear Convener,

Disability Commissioner (Scotland) Bill

I am pleased to provide a Memorandum from the Scottish Government in response to the Committee's call for views on the Disability Commissioner (Scotland) Bill. I look forward to having sight of the Committee's plans for taking evidence on this important Bill and to engaging with the Committee as required.

Yours sincerely

Shirley-Anne Somerville

MEMORANDUM FROM THE SCOTTISH GOVERNMENT TO THE EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE

Introduction

1. This memorandum has been prepared by the Scottish Government to assist the Equalities, Human Rights and Civil Justice Committee in their consideration of the Disability Commissioner (Scotland) Bill, introduced by Jeremy Balfour MSP on 8 February 2024.

Background

2. Mr Balfour's Bill as introduced aims to establish a Disability Commissioner to promote and safeguard the rights and interests of disabled people, in particular by:

- promoting awareness and understanding of the rights of disabled people,
- keeping under review the law, policy and practice relating to the rights of disabled people with a view to assessing the adequacy and effectiveness of such law, policy and practice,
- promoting best practice by service providers, and
- promoting, commissioning, undertaking and publishing research on matters relating to the rights of disabled people.

Consultation

3. A consultation was lodged along with Mr Balfour's draft proposal and ran from 12 May 2022 to 3 August 2022 with 207 responses. The consultation included an outline of the general aims of the Bill but no draft Bill was provided. The consultation summary indicates that 90% of respondents either supported, or partially supported, the proposal to establish a Disability Commissioner. Other elements of the Bill were responded to in similarly positive terms, including agreement among 93% of respondents that the Commissioner should have a role in reviewing relevant laws and policies, 89% that the Commissioner should promote best practice, and 95% that disabled people and disabled people's organisations should be encouraged to be involved in the Commissioner's work.

4. There were however neutral responses from two key organisations. The Equalities and Human Rights Commission (EHRC) and the Law Society of Scotland both raised concerns around the potential duplication of functions already undertaken by other bodies, and the potential for the Bill to stray into areas outwith devolved competence. Even among those supportive of the Bill's intentions, concerns were raised about various elements of the proposal including: the scope of the proposed functions and ability for an individual Commissioner to cover such a wide remit, the influence the Commissioner would actually have on service provision in practice, and the potential duplication of responsibilities already held by existing bodies.

Financial Impact

5. The Financial Memorandum estimates that the costs associated with the Bill are likely to be in the region of £314,000 - £378,000 for set up and thereafter £575,000 - £878,000 annually. Mr Balfour has drawn on the estimated figures for proposed, and recently established, commissioners to inform the Memorandum. The cost estimates seem to broadly reflect what would be expected with the introduction of a new Commissioner role.

6. Mr Balfour has proposed that the Scottish Parliamentary Corporate Body (SPCB) fund the Commissioner. This means that costs of up to around £1.2M for set-up and year one running costs will fall to be paid from the SPCB budget, which is funded from the Scottish Consolidated Fund (SCF). The cost of taking this forward reduces the total funding envelope available for Scottish Government priorities. With no specific additional funding provided and recognising the level of commitments in future financial years this is going to represent an opportunity cost.

7. Given when in the year the Bill has been introduced and the extremely full legislative timetable, it is likely that the costs associated with establishing the Commission will require to be met in financial year 2025/26. These are costs which have not been budgeted for in future indicative allocations. There is currently no confirmation of future year budget envelopes across the Scottish Government and SPCB, and we are operating in an extremely challenging financial climate. This is expected to continue into future years.

8. The Deputy First Minister wrote to the Convenor of the Finance and Public Administration Committee, in relation to the Commissioner Landscape inquiry. The letter noted that the government's Ministerial Control Framework (MCF) aims to ensure that decisions around the creation of new public bodies are made based on evidence and value for money against the backdrop of significant pressure on public spending. In general, there is an assumption against creating a new public body set out in the MCF and for a new Commissioner role to be created, it would have to be shown that no existing body could perform the same functions.

9. While the majority of the costs seem to have been reasonably estimated, there are two areas which may warrant further consideration. Only £16,000 to £31,000 has been allotted for investigations annually, with no details provided as to the number or extent of the investigations this would facilitate. Given the fairly extensive investigatory powers the Bill enables the Commissioner to undertake into service providers, both in relation to disabled people in general and particular disabled individuals, this appears to be a very limited budget.

10. Secondly, the Memorandum attributes minimal additional costs to Local Authorities, other public bodies, individuals and businesses arising from the Bill. However, it appears that conclusion is mainly drawn from the fact that Local Authorities etc would not be obliged to implement any recommendations made following a Commissioner's investigation. The Commissioner would attempt to influence and encourage change, rather than creating any legal obligations. While it is not feasible to quantify any potential costs of implementing a Commissioner's recommendations at this stage, it seems reasonable to acknowledge the potential for Local Authorities

etc. to incur not insignificant additional costs if they decide to act on a Commissioner's advice.

The Scottish Government's Position

11. The broad intention of the Bill aligns with the Scottish Government's missions, despite the approach itself raising a number of concerns. We will therefore be holding a neutral position on the Bill. This will provide an opportunity for the following concerns about the feasibility and desirability of a commissioner role as the vehicle to advance disability equality to be explored:

- the potential for the Commissioner to duplicate functions already undertaken by existing bodies;
- the complex landscape which this additional Commissioner would be added into;
- the limitations of the approach proposed in the Bill in terms of value for money and efficiency.

12. The potential for a Disability Commissioner to carry out activities which can already be undertaken by existing bodies was raised frequently in the consultation on the proposed Bill, notably by both the EHRC and the Law Society of Scotland. The Scottish Human Rights Commission (SHRC) has previously expressed concern regarding a weakening of its mandate through a proliferation of Commissions, with a preference that its remit and resources are strengthened to better protect and promote the human rights of all groups.

13. Although a new Commissioner for disabled people would have a single focus on disabled people's rights there are a number of existing commissions that protect the rights of disabled people. The SHRC and the EHRC already play an important statutory role in relation to the rights of disabled people. These commissions have a remit to ensure the protection of the rights of a wide range of people, although they focus on specific groups from time to time. For example, the EHRC in Scotland focused on disabled people's experiences of accessing transport in 2019/20, and actively sought out subjects for strategic litigation focused on the rights of disabled people. The EHRC also has investigatory powers, which have been used to focus on disability issues from time to time.

14. Recommendations made by the National Taskforce for Human Rights Leadership have prompted proposals for inclusion in the Human Rights Bill. Specifically, we are proposing to extend the powers of SHRC to bring or intervene in civil proceedings under the Bill, provide for an enhanced investigative power, relax the restriction on provision of advice in relation to legal proceedings and make provision for SHRC to support courts in delivering structural remedies for breaches of rights in the Bill. The SHRC have additionally sought to generate discussion around the idea of adopting a model whereby Commissioners are appointed on a thematic basis, and we continue to monitor this and engage with them on it.

15. The commissioner landscape in Scotland has evolved since the start of devolution, with seven independent commissioners now in operation and a Patient Safety Commissioner incoming following passage of related legislation in September

last year. A further six commissioners have been proposed or are currently being considered. The total budget for commissioners directly responsible to Parliament in 2023/24 was £16.6m million, with individual costs ranging from £0.3m to £6.7m. Against this backdrop, the Finance and Public Administration Committee of the Scottish Parliament is undertaking a review to consider whether a more coherent and strategic approach is needed for the creation of such commissioners in Scotland. The call for views closed mid-March 2024 and the report is expected to publish in May/June 2024.

16. The Committee is currently taking oral evidence in relation to the review and will publish its findings in summer. It is especially notable, given the similarities between the Commissioner role proposed in the Bill, and the model employed by the Commissioner for Children and Young People in Scotland (CCYPS) that in their written response to the Committee's inquiry, the CCYPS urged caution on the commissioner model, saying:

“The model of our office is frequently cited as the model new Commissioner proposals want to emulate. To some degree, this is evidence of the impact our office has had and may have partly inspired some of the proposals...Whilst we recognise that the Commissioner model can be very effective, there is currently a real risk of creating a further fragmented and ineffective infrastructure which would not only be costly but could actually serve to create more barriers to justice. Whilst it could be seen as a ‘symbolic’ easy win to create new issue-based Commissioner roles, the real impact lies in changing practice, budgets and implementation.”

17. In adopting a neutral position, the Scottish Government is keen to emphasise that our concerns relate to the proposal for a Commissioner in this particular context, rather than Commissioners in general being inherently problematic. The Committee will be aware that two commissioners are currently being or have recently been consulted upon by the Scottish Government. In May 2023, we published an independent research report by Research Scotland on 'The Role of commissions and commissioners in Scotland and the UK', to inform the development of proposals for a Learning Disabilities, Autism and Neurodivergence (LDAN) Bill. The recently closed consultation on the LDAN Bill included various options for increased accountability, one of which is a new Commissioner. In addition, a consultation is ongoing on a Wellbeing and Sustainable Development Bill which considers the case for a Future Generations Commissioner.

18. It is important for the Committee to appreciate the differences between the rationale for the proposed LDAN Commissioner, and Mr Balfour's proposal. People with learning disabilities, who have autism, or who are neurodivergent experience poorer outcomes than disabled people in general, for example, in educational attainment, suicide rates, life expectancy and employment rates. The LDAN Bill is positioned in a still developing area, with widespread public misunderstanding, and a need for leadership capable of bringing about cultural change. It is also worth noting that many autistic or neurodivergent people do not consider themselves disabled, and not all conditions under the umbrella term neurodivergent meet the definition of 'disability' within the Equality Act 2010. The Scottish Government is of the view that

there is a much stronger rationale for a Commissioner representing the needs of this specific group than there is in relation to disabled people in general.

19. As discussed above, Mr Balfour estimates the set up and first year running costs of the Commission to be in the region of £1M. In the context of disability equality, this is a significant sum which could be better directed towards more strategic approaches to achieving the Bill's aims.

20. Extensive work is underway with DPOs to bring about significant progress in advancing disability equality. We are soon to publish the first phase of a Disability Equality Strategy aimed at tackling the systemic barriers that affect the daily lives of disabled people and impact on disability poverty. Setting up a Disability Commissioner would divert resources from this valuable work without the evidence base to suggest it would be an effective way of achieving change.

21. Measures set out in the first phase of the Disability Equality Strategy relating to both governance and disability competence will be capable of enabling senior leaders across the public sector to take up the leadership role central to this Bill. The intention of increasing the capacity of the Scottish Government to promote best practice and hold others to account is a key element of the Strategy which will also contribute to achieving the aims of the Bill.

22. Given the information set out above, and particularly the likelihood that there are existing bodies able to undertake the functions Mr Balfour has proposed, it is our position that the Bill does not meet the Scottish Government's required threshold to warrant the creation of a new body. We will however engage with Mr Balfour to discuss the other ways in which the Scottish Government is working to achieve his laudable aims. Close engagement will also take place with stakeholders to ensure we continue to take into account their views during the Committee's consideration of the Bill.

Scottish Government
May 2024