

# **PATIENT SAFETY COMMISSIONER FOR SCOTLAND BILL**

[AS AMENDED AT STAGE 2]

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## **REVISED EXPLANATORY NOTES**

### **INTRODUCTION**

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Patient Safety Commissioner for Scotland Bill (which was introduced in the Scottish Parliament on 6 October 2022) as amended at Stage 2. Text has been added or amended as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **OVERVIEW**

4. The purpose of the Bill is to establish the office of Patient Safety Commissioner for Scotland (“the Commissioner”). The Commissioner will advocate for systemic improvement in the safety of health care (which includes forensic medical examinations) in Scotland and promote the importance of the views of patients and other members of the public in relation to the safety of health care.
5. In order to promote and enhance patient safety and ensure that the patients’ views on the safety of health care are heard, the Commissioner’s functions will include conducting formal investigations into possible safety issues and gathering, analysing and reporting on information from patients and members of the public about safety concerns. In order to ensure the investigations are fully informed, the Commissioner will be able to require people to provide relevant information.

## **CROWN APPLICATION**

6. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. This Bill applies to the Crown in the same way as it applies to everyone else.

## **COMMENTARY ON PROVISIONS**

### ***Section 1: Establishment***

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

### **Purpose and principles**

#### ***Section 2: Functions***

8. Subsection (1) of section 2 provides for the Commissioner's general functions. They are (a) to advocate for systemic improvement in the safety of health care, and (b) to promote the importance of the views of patients and other members of the public in relation to the safety of health care.

9. Definitions of "health care" and "patient" are provided in section 21 and you may find it helpful to refer to that provision of the Bill and paragraphs 54 to 57 of these Notes now.

10. Subsection (2) of section 2 gives examples of things which the Commissioner may do in order to achieve its purposes, including gathering information, including patient feedback, relating to safety issues in health care, making recommendations for systemic improvements in the safety of health care, and promoting co-ordination among health care providers and public authorities with functions relating to health care. The list is not exhaustive of the activities in which the Commissioner might engage.

11. Subsection (3) makes clear that the Commissioner is to focus on improving the safety of health care in the future, not directly addressing past incidents.

12. This does not mean, however, that the Commissioner cannot consider past incidents in order to inform actions which the Commissioner and others may take to advance the safety of health care in future (see subsection (4)).

#### ***Section 3: Principles***

13. Section 3 requires the Commissioner to have a statement of principles which are to inform the exercise of the Commissioner's functions. The Commissioner can update the statement of principles. The Commissioner must make the latest version of the statement available to the public. The preparation of a statement of principles is subject to the consultation duty in section 7A.

### ***Sections 5 and 7: Strategic planning***

14. Sections 5 and 7 deal with strategic planning by the Commissioner. A strategic plan is a document in which, amongst other things, the Commissioner sets out what the Commissioner intends to focus on over the lifetime of the plan. The lifetime of a strategic plan is for the Commissioner to set, but it cannot exceed 4 years (section 7(2)). The preparation of a strategic plan is subject to the consultation duty in section 7A.

### ***Section 7A: Duty to consult on principles and strategic plan***

15. When preparing a statement of principles in accordance with section 3 or a strategic plan in accordance with section 7 the Commissioner must consult the Scottish Parliamentary Corporate Body (“SPCB”), the advisory group which the Commissioner is required to establish by section 16 and any other person the Commissioner considers appropriate having regard to the importance of these documents reflecting patients’ concerns.

## **Formal investigations**

### ***Sections 8 and 9: Initiating a formal investigation***

16. Sections 8 and 9 deal with setting up a formal investigation. The Commissioner can look into matters without setting up a formal investigation (see section 8(3)), but by initiating a formal investigation into an issue the Commissioner is able to exercise the information-gathering power that section 13 provides and can impose a duty to respond to recommendations made at the end of the investigation under section 11.

17. Section 8(1) provides that a formal investigation begins when the Commissioner makes its terms of reference publicly available. Section 9 sets out minimum requirements for what must be included in an investigation’s terms of reference, and requires that before finalising an investigation’s terms of reference the Commissioner must at least consult the Commissioner’s advisory group (see section 16).

18. As soon as practicable after a formal investigation begins, section 8(2) requires the Commissioner to take reasonable steps to bring the investigation to the attention of anyone upon whom the Commissioner anticipates imposing a requirement to supply information under section 13 during the course of the investigation or a requirement to respond to a recommendation under section 11 at the end of the investigation.

### ***Section 10: Investigation report***

19. Subsection (1) provides that, following the conclusion of an investigation under section 8, the Commissioner must prepare a report on the investigation and lay a copy of it before the Scottish Parliament.

20. The report must set out the Commissioner’s findings in relation to the issue which has been investigated and the reasons for them, together with the Commissioner’s recommendations in light of those findings (subsection (2)).

21. A copy of the report must be given to each person to whom a recommendation in the report is addressed (subsection (3)).

22. Recommendations may be addressed to any person the Commissioner considers appropriate, even if they were not identified in the Commissioner's terms of reference for an investigation as a person to whom the Commissioner was expecting to address a recommendation (subsection (4)(a)). This applies even if the Commissioner did not take steps to bring the investigation's terms of reference to that person's attention in accordance with section 8(3)(b).

### ***Section 11: Requirement to respond to report***

23. If a report contains a recommendation which is addressed to a person and states the period within which the Commissioner expects a response to the recommendation, that person must respond to the recommendation (subsection (1)).

24. A person will have complied with a requirement to respond to a recommendation if they have given the Commissioner a response in writing before the expiry of the period for response specified in the report (subsection (2)).

25. Subsection (3) provides that a written response to a recommendation is a document which sets out what actions or intended actions the person proposes to take to give effect to the recommendation and if the person intends to take no action, the reasons for that.

26. The Commissioner may make publicly available (in whatever way the Commissioner considers appropriate) a person's written response to a recommendation and may publicise a person's failure to respond.

### **Gathering and use of information**

#### ***Section 12: Power to require information***

27. Section 12 empowers the Commissioner to require certain persons to supply information to the Commissioner. Those persons are providers of health care and bodies constituted by virtue of the National Health Service (Scotland) Act 1978. The latter group includes Scottish NHS bodies which have functions relating to health care but which do not provide health care directly themselves (such as Healthcare Improvement Scotland and Public Health Scotland). Failure to supply requested information may result in the Commissioner taking action under section 14.

28. The Commissioner's power under section 12 cannot be used to require a person to supply information about individuals. The power could be used, for example, to require a health care provider to supply details of its protocols and procedures for dealing with a particular type of incident. But it could not be used to access the medical records of patients, or the personnel information of staff, involved in a specific incident of that type. In order to access information about individuals, the Commissioner would have to exercise the power conferred by section 13 in the context of a formal investigation.

29. The Commissioner's power under section 12 also cannot be used to require a person to supply information that the person could not be compelled to give in court. This means, for example, a person cannot be required under section 12 to answer questions that may incriminate the person in the commission of a crime.

***Section 12A: Information under the Health and Care (Staffing) (Scotland) Act 2019***

30. Under section 2(3) of the Health and Care (Staffing) (Scotland) Act 2019, every Health Board and Common Services Agency for the Scottish Health Service (commonly called National Services Scotland) is required to provide the Scottish Ministers with information on the steps which those organisations have taken to comply with their duties to have regard to:

- The guiding principles for health and care staff;
- the guiding principles for health and care staff when securing the provision of health care by contracting with another person; and
- the need for the person with whom they are contracting to secure the provision of health care to have appropriate staffing arrangements in place.

31. Section 12A amends section 2(3) of the 2019 Act to require that that information be provided to the Patient Safety Commissioner for Scotland at the same time it is provided to the Scottish Ministers

***Section 13: Further power to require information in a formal investigation***

32. The Commissioner's power to require information under section 12 is limited in that it can only be used to impose requirements to supply information on health care providers and bodies constituted by virtue of the National Health Service (Scotland) Act 1978. The latter group includes Scottish NHS bodies which have functions relating to health care but which do not provide health care directly themselves. It cannot be used to require the supply of information about individuals. Section 13, by contrast, allows the Commissioner to require anyone to supply information (not just the persons specified in section 12), and it allows the Commissioner to require that a person supply information about individuals. As with a failure to supply information requested under section 12, the Commissioner may deal with a failure to supply information requested under section 13 by taking action under section 14.

33. The Commissioner's power under section 13 is limited in that it can only be exercised in the context of a formal investigation that has been initiated in accordance with section 8. In preparing the terms of reference for a formal investigation, the Commissioner is required to provide information about the access to individuals' information that the Commissioner expects to need in the course of the investigation (see section 9). And on launching a formal investigation, the Commissioner must bring its terms of reference to the attention of anyone upon whom the Commissioner expects to impose a requirement to provide information under section 13. The fact that the Commissioner did not anticipate needing particular information when producing the terms of reference for an investigation does not, however, prevent the Commissioner from requiring that the information be supplied during the course of the investigation and nor does the Commissioner's not bringing the investigation's terms of reference to a person's attention preclude the Commissioner from imposing a requirement on the person to supply information (see section 13(4)).

34. The Commissioner's power to require a person to supply information under section 13 is further constrained by:

- subsection (2) of that section, which requires the Commissioner to be satisfied that requiring the person to supply the information is proportionate to the seriousness of the issue under investigation, and
- subsection (1)(c), which prevents the Commissioner from requiring a person to supply information that the person could not be compelled to provide in court (see paragraph 29 above).

#### ***Section 14: Failure to supply required information***

35. Section 14 sets out the actions the Commissioner may take where a person who was required to supply information under sections 12 or 13 and has refused to supply or failed to do so without reasonable excuse.

36. The actions available to the Commissioner in such circumstances are to publicise the person's refusal or failure to supply the information and/or to report the matter to the Court of Session.

37. The Commissioner may report the matter to the Court of Session where a requirement to supply information has been imposed on a person by a written notice under section 12 or 13 and the Commissioner suspects that that person has deliberately altered the information.

38. After receiving a report and hearing any relevant evidence or representations, the Court may (either or both) make an order for enforcement as it considers appropriate and/or deal with the matter as if it were a contempt of court.

#### ***Section 15: Confidentiality of information***

39. Section 15 contains a confidentiality provision that covers: the Commissioner (including any former Commissioners), the Commissioner's staff (or past staff), a member of the advisory group established under section 16 and an agent (or former agent) of the Commissioner. These persons would be guilty of an offence if they knowingly or recklessly disclose information which has been obtained in the course of the Commissioner's activities, and which is not at the time of disclosure, and has not previously been, in the public domain. Accidental disclosure of confidential information (unless as a result of recklessness on the part of the discloser) would not therefore constitute an offence under this provision.

40. There are exceptions set out in subsection (2) under which disclosure is authorised where it is made, for example, with the consent of the person from whom the information was obtained, or where it is necessary for the purposes of exercising the Commissioner's functions, or where it is made for the purposes of legal proceedings (whether criminal or civil – and including the purposes of the investigation of any offence or suspected offence) or assisting Healthcare Improvement Scotland, the Commissioner for Patient Safety in relation to England or the Scottish Public Services Ombudsmen in exercising their statutory functions.

41. A person who commits an offence is liable to a fine on summary conviction or conviction on indictment. The fine on summary conviction is up to the statutory maximum, which is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 as the prescribed sum under section 225(8) of the Criminal Procedure (Scotland) Act 1995 (currently £10,000). The maximum fine on indictment is unlimited.

## **Miscellaneous provisions**

### ***Section 16: Advisory group***

42. Section 16 requires the Commissioner to establish and maintain an advisory group. The purpose of the group is to give the Commissioner advice and information about matters relating to the Commissioner's functions.

43. Subsection (3) provides that the members of the group are to be chosen by the Commissioner. However, this is subject to the provisos set out in subsection (4), namely that the appointment has been approved by the SPCB, will not result in the maximum number of members (to be set by the SPCB) being exceeded and is consistent with the principle that at least half of the group's members are persons who appear to the Commissioner to be representative of patients.

44. Subsection (5) allows the Commissioner to pay members of the group such remuneration and allowances as the Commissioner, with the approval of the SPCB, determines.

45. Subsection (6) makes it clear that the procedure of, terms of appointment to and membership of the group is to be determined by the Commissioner.

46. The establishment and operation of the advisory group does not prevent the Commissioner from obtaining advice from other people it considers appropriate to consult (subsection (7)).

### ***Section 17: Reports***

47. Aside from the reports which the Commissioner has a duty to lay before the Scottish Parliament, section 17(1) permits the Commissioner to lay before the Parliament any other report prepared by the Commissioner if the Commissioner considers it appropriate to do so.

48. Subsection (2) provides that the Commissioner must ensure any report prepared which is to be laid before the Parliament does not name or otherwise identify an individual who has given information to the Commissioner but who has not consented to being named in the report.

### ***Section 18: Protection from actions of defamation***

49. Certain statements made to or by the Commissioner or a member of the Commissioner's staff are to have absolute privilege (meaning they cannot form the basis of an action of defamation for any person referred to in those statements) (subsection (1)(a) and (b)). The statements which will benefit from absolute privilege are any made to the Commissioner and any which appear in the Commissioner's report on an investigation.

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

### ***Section 19: Directions about premises and sharing of resources***

51. Section 19 requires the Commissioner to comply with any direction given by the SPCB in respect of: the location of the Commissioner's office and the sharing of staff, premises, resources or services with other public bodies. Any such direction is to be published by the SPCB.

52. However, the Commissioner is only subject to possible control by the SPCB to the extent explicitly specified in this provision or in paragraph 3(2) of schedule 1. Aside from these specified matters (which do not infringe upon the core work of the Commissioner), the Commissioner is not an agent of the Crown and there is no general obligation to comply with directions. The Commissioner is therefore independent and is not subject to the general control of the Parliament, the Government, or the SPCB.

### **Final provisions**

#### ***Section 20: Modification of other enactments***

53. Section 20 introduces schedule 2 which amends enactments relating to public authorities in order to bring the Commissioner within their provisions.

#### ***Section 21: Interpretation***

54. Section 21 provides definitions of the key terms of "health care", "forensic medical examination" and "patient". The definition of "health care" mirrors other commonly used definitions of health care in the statute book and ties it to the "prevention, diagnosis or treatment of illness" therefore excluding purely cosmetic procedures and treatments from the Commissioner's remit.

55. "Forensic medical examination" is to be construed as defined in the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 which states that it is "a physical medical examination carried out for purposes including the collection of evidence for use in connection with—

- (a) any investigation of the incident which gave rise to the need for the examination, or
- (b) any proceedings in relation to the incident."

56. "Patient" is to be construed in accordance with the National Health Service (Scotland) Act 1978 which relies on the ordinary meaning of the word and, for the sake of clarity since pregnant women and breastfeeding mothers cannot (in most instances) be described as being "ill" when receiving antenatal, neonatal and postnatal health care, specifically includes "an expectant or nursing mother and a lying-in woman" in the meaning of patient in section 108.



57. As forensic medical examinations under the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 are also included in the definition of health care in the Bill, any person to whom a forensic medical examination is provided is also a patient.

***Section 22: Ancillary provision***

58. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision in connection with the Act or any regulations made under it.

***Section 23: Regulation-making powers***

59. Subsection (1) provides that regulations made under the Bill once it becomes an Act may make different provision for different purposes.

60. Subsection (2) makes clear that regulations under section 22 may modify any enactment, including this Bill once it becomes an Act.

61. Subsection (3) provides that regulations under section 22 which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure. Regulations under section 22 which do not modify primary legislation are subject to the negative procedure.

***Section 24: Commencement***

62. Subsection (1) of section 21 provides that this section and sections 22, 23 and 25 come into force on the day after Royal Assent.

63. Subsection (2) provides that the rest of the Act will come into force on such day as the Scottish Ministers by regulations appoint.

***Section 25: Short title***

64. Section 25 provides for the short title of the Bill, by which it may be cited.

**Schedule 1: The office of the Patient Safety Commissioner for Scotland**

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

***Part 1: Status and independence***

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

67. Paragraph 2 provides that the Commissioner is not to be regarded as being a servant or agent of the Crown and does not enjoy any status, immunity or privilege of the Crown. The

Commissioner's property belongs to the Commissioner (as Commissioner) and not to the Crown. The Commissioner's staff are not to be treated as civil servants.

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

***Part 2: Appointment, termination and terms and conditions***

69. Paragraphs 4 and 5 provide for the following: that the Commissioner will be appointed by the King on the nomination of the Scottish Parliament; that a Commissioner may serve only one term of office; and that a person is disqualified from being appointed Commissioner if at the time of the appointment or in the year preceding the appointment, the person is or has been a member of the Scottish Parliament, of the House of Commons, of the House of Lords or is or has been employed by, a member of the board of, a partner, director or an owner of any person providing health care or forensic medical examinations. It should be noted that "person" is defined widely in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and includes bodies as well as individuals, whether or not incorporated.

70. The list of disqualifications is to ensure that the Commissioner is free from political and market influences, given that the role will involve scrutinising laws, rules and safety regulations over which these institutions have influence or control. Provision is also made to disqualify employees, office-holders, members or owners of any person which provides health care. This is to prevent anyone being appointed as Commissioner who currently is (or has recently been) a member, employee, appointee or owner of a person which the Commissioner may investigate in connection with its purposes under section 2 of the Bill. These disqualification criteria continue to apply during the Commissioner's time in office (see paragraph 7(1)(b) of schedule 1).

71. Under paragraph 6, a Commissioner may hold office for a single term of up to eight years, as determined by the SPCB at the time of appointment. This is consistent with the tenure arrangements set out in the Scottish Parliamentary Commissions and Commissioners etc. (Scotland) Act 2010.

72. Paragraph 7 sets out the circumstances under which a Commissioner's appointment may terminate early. A Commissioner may resign, or may become disqualified from holding office under paragraph 5. The Commissioner can also be removed from office where either the SPCB is satisfied that the Commissioner has breached their terms and conditions of appointment and the Parliament resolves to remove the Commissioner as a result, or where the Parliament resolves that it has lost confidence in a Commissioner's willingness, suitability or ability to perform the Commissioner's functions. A resolution in either scenario requires the support of at least two thirds of (normally) the total number of members of the Parliament. However, the number of votes required is based on the number of seats, so the percentage does not reduce if a seat is temporarily vacant pending a by-election.

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

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

75. Paragraph 10 sets out restrictions on subsequent appointments held by a Commissioner once they have left office. Unless permission is granted by the SPCB, a former Commissioner may not, within the specified period, subsequently be any of the following: be employed or appointed in any capacity by the Patient Safety Commissioner; be an employee or appointee of any person or body which has been or is being investigated by the Commissioner or hold office in such a body; hold any other office, employment or appointment or engage in any other occupation which that person could not have held or engaged in under paragraph 11(2)(a) when they were the Commissioner. Paragraph 11(2)(a) covers any specific absolute prohibitions on simultaneous appointments which are contained in the Commissioner's terms and conditions. The restrictions under paragraph 10 run from the date of leaving office until the end of the financial year following the one in which the person ceased to be the Commissioner. Therefore, if the Commissioner left office on 1 December 2023, the restriction would subsist until 31 March 2025. The restriction in paragraph 10(1) is in place to avoid a subsequent appointment being seen to compromise the independence of the Commissioner. For example, this could arise if a former Commissioner were to become an office-holder of an authority which they would have been able to investigate when in post as the Commissioner.

76. Under paragraph 11, the SPCB may determine the terms and conditions of the Commissioner's appointment insofar as not already set out in the Bill, including prohibiting the Commissioner from holding any other office, employment or appointment – or requiring that the Commissioner first obtain the approval of the SPCB before holding any other office, employment or appointment. Again, this is to avoid an appointment being seen to compromise the independence of the Commissioner.

77. Paragraph 12 makes provision for the appointment of a temporary or acting Commissioner to hold the office either during a period when the post is vacant or where the Commissioner is unable to perform their functions. During that period, the SPCB may appoint as temporary Commissioner a member of the Commissioner's staff or another person who is not disqualified from holding the post under paragraph 5 of this schedule. However, staff are exempted from the normal disqualification provisions to allow for greater flexibility and in recognition of the short-term nature of the appointment. The SPCB will determine the terms, conditions and duration of the appointment and may relieve the individual from the post at its discretion (by notice in writing), or at the request of the individual.

### ***Part 3: General powers***

78. Paragraph 13 permits the Commissioner to do anything which appears to it to be necessary or expedient to the carrying out of its functions.

79. Paragraph 13(2) permits the Commissioner to charge a reasonable fee for providing anything in connection with its purposes.

80. Paragraph 14 outlines the restrictions on the Commissioner's general powers in relation to the acquisition and disposal of land, namely that the Commissioner may not acquire or dispose of land without the consent of the SPCB.

81. Paragraph 15 provides that the Commissioner may not charge a body constituted by virtue of the National Health Service (Scotland) Act 1978 for anything the Commissioner provides to such a body.

#### ***Part 4: Staff***

82. Paragraph 16 allows the Commissioner to appoint staff, subject to the consent of the SPCB as to the number of staff appointed, and to determine their terms and conditions subject to the approval of the SPCB.

83. Paragraph 17 allows the Commissioner to pay pensions, allowances and gratuities to current or former members of staff, including the establishment of one or more pension schemes and the payment of allowances or gratuities by way of compensation for loss of employment. Approval for such arrangements must be obtained from the SPCB.

84. Under paragraph 18, while the Commissioner can delegate any responsibility to any person, ultimately the Commissioner remains responsible for carrying out those delegated responsibilities. Having delegated functions, the Commissioner is still able to decide to carry out those responsibilities personally.

#### ***Part 5: Accounts and accountability***

85. Paragraph 19 requires the Commissioner to prepare a budget before the start of each financial year and seek the approval of the SPCB by such a date as the SPCB determines. Under sub-paragraph (2), the Commissioner may seek to revise the budget during the year by submitting revised proposals to the SPCB for approval. When preparing a budget or a revised budget, the Commissioner is required to ensure that resources will be used economically, efficiently and effectively and must, under sub-paragraph (4), certify this in any budget or revised budget proposal.

86. Paragraph 20 requires the SPCB to designate either the Commissioner or a member of the Commissioner's staff as the accountable officer (in accordance with section 17 of the Public Finance and Accountability (Scotland) Act 2000). The functions of the accountable officer are set out in sub-paragraph (2) and include: the signing of the accounts; ensuring that the finances are kept in good order; and ensuring that resources are used economically, efficiently and effectively. Sub-paragraph (3) provides a degree of protection for an accountable officer who is not also the Commissioner should they be required to act in any way which is inconsistent with their responsibilities. Before any such action can be taken, the accountable officer must obtain written authority from the Commissioner and send a copy of the authority to the Auditor General for Scotland as soon as possible. Under sub-paragraph (4), the accountable officer is directly answerable to the Parliament for the exercise of those functions specified in sub-paragraph (2).

87. Paragraph 21 sets out the accounting and auditing requirements that apply to the Commissioner. The Commissioner must keep proper accounts and accounting records and prepare annual accounts for each financial year. A financial year is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and is a year ending with 31 March. In fulfilling these duties, the Commissioner must comply with any directions given by the Scottish Ministers, who are responsible for such matters under section 19 of the Public Finance and Accountability (Scotland) Act 2000 (“the 2000 Act”).

88. In accordance with paragraph 21(1)(c), a copy of the accounts is to be sent to the Auditor General for Scotland for auditing. The provisions of sections 21 and 22 of the 2000 Act then require the Auditor General to audit the accounts or appoint someone suitably qualified to do so. They also require the accounts to be sent to the Auditor General not later than 6 months after the end of the financial year in question. Once the accounts have been audited, the 2000 Act makes provision for them to be sent to the Scottish Ministers, whereupon Ministers are required to lay them before the Parliament within 9 months of the end of the financial year in question.

89. Under paragraph 21(3), the Commissioner must make a copy of their audited accounts available for inspection, free of charge, to anyone on request.

90. Paragraph 22 requires the Commissioner to prepare and publish a report on the Commissioner’s activities each financial year, which must include a summary of any investigations conducted in that financial year, details of any recommendations arising from those investigations, a summary of any engagement or promotional activity in relation to its functions over the reporting year and an outline of work to be undertaken in the following reporting year. The report is to be laid before the Parliament within seven months of the last day of the financial year to which the report relates – meaning by 31 October.

## **Schedule 2: Application of public authorities legislation**

### ***Scottish Public Services Ombudsman Act 2002***

91. Paragraph 1(2) of schedule 2 adds the Commissioner to the list of authorities in schedule 2 of the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”). The effect is to:

- make the Commissioner open to investigation by the Ombudsman (see section 5 of the 2002 Act),
- oblige the Commissioner to have a complaints handling procedure that complies with the statement of principles published by the ombudsman under section 16A of the 2002 Act,
- permit the Commissioner to be made subject to the further requirement to have a complaints handling procedure that complies with a model complaints handling procedure prepared by the ombudsman, per sections 16B and 16C of the 2002 Act.

92. Paragraph 1(3) of schedule 2 adds the Commissioner to the list of authorities in schedule 5 of the 2002 Act with which the Scottish Public Services Ombudsman may share information it holds where that information may be of use for the purposes of the Commissioner’s functions.

This is an exception to the general rule in section 19 of the 2002 Act which permits the Ombudsman to use information held by it only for the purposes of its own work.

### ***Freedom of Information (Scotland) Act 2002***

93. Paragraph 2 of schedule 2 adds the Commissioner to the list of Scottish public authorities in schedule 1 of the Freedom of Information (Scotland) Act 2002. This means that the Commissioner will be subject to the requirements which that Act places on public bodies, including requirements to provide information to the public on request and to have in place a scheme for the pro-active publication of information it holds.

94. Being a public authority within the meaning of the Freedom of Information (Scotland) Act 2002 also makes the Commissioner a “Scottish public authority” to which the Environmental Information (Scotland) Regulations 2004 apply.

95. It also means that the Commissioner falls within the definition of a “public body” under section 44 of the Climate Change (Scotland) Act 2009. This means that the Commissioner must act in a way calculated to contribute to the delivery of climate change targets and any climate change adaptation programme and in the way that the Commissioner considers is most sustainable. The Commissioner can also be made subject to further climate change duties, including reporting duties.

96. In addition, as a public authority within the meaning of the Freedom of Information (Scotland) Act 2002, the Commissioner is a “public authority” or “public body” for the purposes of the General Data Protection Regulation by virtue of section 7 of the Data Protection Act 2018 (subject to the power under that section to remove that status not being exercised). The General Data Protection Regulation (also commonly referred to by the acronym “GDPR”) is Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data. There are particular rules applied to bodies classified as “public authorities” (over and above those applied to all data processors) in the GDPR and the Data Protection Act 2018. An analysis of those rules is beyond the scope of these Notes.

### ***Public Services Reform (Scotland) Act 2010***

97. Paragraph 3(2) of schedule 2 adds the Commissioner to the list of bodies in schedule 5 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). This means that it is a body in relation to which an order can be made under section 14 of that Act where it would improve the exercise of public functions, having regard to efficiency, effectiveness and economy. An order under section 14 of the 2010 Act can (subject to restrictions, and only after the Scottish Parliament has approved a draft of the order):

- modify, confer, abolish, transfer or provide for the delegation of any function of a public body,
- amend the constitution of a public body.

98. Paragraph 3(3) of schedule 2 adds the Commissioner to the list of bodies in schedule 6 of the 2010 Act. The effect of this is that the Scottish Ministers cannot propose any provision by

order under section 14 (the powers to improve the exercise of the Commissioner's functions having regard to efficiency, effectiveness and economy discussed above) or section 17(1) (power to remove or reduce burdens) unless requested to do so in writing by the SPCB. It also means that the Scottish Ministers cannot lay any subsequent draft order containing such provision unless the SPCB consents.

99. Paragraph 3(4) of schedule 2 adds the Commissioner to the list of bodies in schedule 8 of the 2010 Act. This means that the Commissioner will be subject to the duties to report after each financial year on:

- expenditure (see section 31 of the 2010 Act), and
- the steps it has taken to promote and increase sustainable growth and improve the Commissioner's efficiency, effectiveness and economy (see section 32 of the 2010 Act).

#### ***Public Records (Scotland) Act 2011***

100. Paragraph 4 of schedule 2 makes the Commissioner subject to the duties created by the Public Records (Scotland) Act 2011 to produce, implement and keep under review a records management plan.

#### ***Procurement Reform (Scotland) Act 2014***

101. Paragraph 5 of schedule 2 adds the Commissioner to the list of contracting authorities subject to the duties created by the Procurement Reform (Scotland) Act 2014 regarding their procurement activities and some specific measures aimed at promoting good, transparent and consistent practice in procurement.

*This document relates to the Patient Safety Commissioner for Scotland Bill (SP Bill 19A) as amended at Stage 2*

**PATIENT SAFETY COMMISSIONER FOR  
SCOTLAND BILL**  
[AS AMENDED AT STAGE 2]

**REVISED EXPLANATORY NOTES**

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