

The role of commissions and commissioners in Scotland and the UK

Executive Summary, 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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Summary

Introduction and context

This report sets out findings from research exploring the role of commissions and commissioners in supporting human 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 in Scotland, through the ongoing development of a new Learning Disability, Autism and Neurodiversity Bill.

There is very little published research 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 is undertaken in a context of broader work to protect, promote and uphold people's rights in Scotland, including:

- the Independent Review of Learning Disability and Autism in the Mental Health Act
- the Mental Health Law Review
- the new Human Rights Bill
- the development of a Learning Disability, Autism and Neurodiversity Bill.

In 2021, the First Minister announced that the Scottish Government would carry out scoping work on the remit and powers of a Learning Disability, Autism and Neurodiversity Bill. This includes further exploring the proposals for a commissioner or commission to help protect people's rights. Discussions held on this matter during 2022 highlighted that there is no overall agreement about whether or not a commissioner for learning disability, autism and neurodiversity is a good idea.

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

What is a commissioner?

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

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.

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.

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 government).

Commissioners in Scotland

Existing commissions and commissioners with powers to protect human rights and equality in Scotland include:

Commission	Who is it for?	Focus	Coverage
The Scottish Human Rights Commission (SHRC)	Everyone	Human rights for devolved matters	Scotland – accountable to Scottish Parliament
The Equality and Human Rights Commission (EHRC)	Everyone	Equality, and human rights for reserved matters	Great Britain – accountable to UK government
The Mental Welfare Commission for Scotland (MWCS)	People with mental illness, learning disabilities, dementia and related conditions	Human rights	Scotland – accountable to Scottish Government
The Children and Young People’s Commissioner Scotland (CYPCS)	Children and young people	Human rights	Scotland – accountable to Scottish Parliament

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.

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. Setting out powers in legislation can also help to clearly establish the role and remit of commissioners. UK-wide guidance on how to be an effective commissioner emphasises the importance of powers in fulfilling the role.

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, ideas and conduct research
- powers to provide advice, guidance, education and training
- powers to require a response from government or public bodies
- powers to gather data and make it public.

Powers to review law, policy and practice:

- powers to review and recommend changes to law, policies and practices in Scotland.

Powers to make inquiries and conduct investigations:

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

Powers to enter and inspect places:

- power of entry – 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.

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
- powers to take cases to courts and provide legal assistance
- powers to review individual cases and assess for compliance with the law.

Reflections on powers

Overall, commissions and commissioners valued having their powers set out in law. Interviewees reflected that the best powers are enabling and empowering, clear and straightforward, well written and achievable within the resources available.

Some interviewees highlighted that while it was useful to have some powers, they didn't often have to use them and instead focused on informed conversations and discussions, rather than implementing their powers directly. 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 felt that while using legal powers can be high profile and give a clear result, it can be seen as punishing people. A few highlighted that certain powers, such as inquiries or legal work, were very expensive to implement and so were used very carefully or not at all.

Interviewees reflected on specific powers:

Informing best practice, raising awareness and setting standards

For most this was a core part of their work. Work to set standards and promote best practice was felt to be hugely valuable in upholding people's rights and improving the situation for people with lived experience. However, it could be resource intensive to build relationships, engage, promote best practice and uphold standards. Most said this is the type of work they would do more of, if they had more resources. Commissions that were able to provide advice to individuals found that it helped to inform their wider work, including standards and guidance, based on lived experience.

Reviewing policy and legislation

Most commissions both proactively worked to influence policy and legislation based on priorities of people with lived experience, and reacted to ideas coming through government and Parliament, contributing to debate and discussion. Interviewees highlighted that policy work took longer to achieve and was harder to attribute than some of the other approaches they used. A few highlighted that where there was a single commissioner, individual commissioners could take very different approaches to influencing policy and legislation, with some working within the system to influence, and others preferring to sit outside and remain independent from the process.

Taking cases to court

Some commissioners have the power to investigate individual cases, provide legal assistance and take individual cases to courts, while others are specifically excluded from investigating individual cases. While powers to take legal cases were costly and resource intensive, not being able to take cases to court was felt to be restrictive and may leave people with no other source of support. Having the power to support individuals in this way was seen to be a very valuable way of gathering intelligence and learning about real problems on the ground.

Inquiries and investigations

Investigation and inquiry powers were seen to be very powerful, enabling commissions to hear from a wide range of people, gather evidence and compel people to comply. However, they were resource intensive. Interviewees highlighted that careful consideration had to be given to when and if to investigate or undertake an inquiry. A few highlighted that inquiries and investigations required coordination between commissions, as they could often not investigate something that was the remit of another organisation.

Lived experience and commissioners

Connecting with people with lived experience is a key role for most commissions and commissioners. 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. 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.

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

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.

Joint working

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.² 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.

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. Some said that they engaged with other commissions and commissioners more on an ad-hoc basis, as and when the need arose, for example on specific projects or strands of work. Some highlighted that their relationship with commissions and commissioners fluctuated, depending on their focus and priorities at the time.

Joint working arrangements were perceived to be simpler where organisations were clearly different, with different roles and responsibilities. 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.

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. 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.

Most interviewees valued that they were fully independent of government, feeling that this enabled them to be challenging and put their point across. Most felt that they had developed a positive relationship with Scottish Government.

²[How to be an effective commissioner, Institute for Government](#)

Establishing a new commissioner

Interviewees highlighted that their organisations had not yet undertaken detailed work exploring their views on the concept of a commissioner for learning disability, autism and neurodiversity, and they would be able to comment in more detail once the proposed role and responsibilities of a commissioner had been developed.

Overall, interviewees felt that any additional resource for people with learning disabilities, autism or neurodiversity would be welcomed. However, there were mixed views on whether a commissioner was the best way to address the issues. Concerns included:

- Creating commissioners for particular groups may lead to a large number of commissioners and a complex landscape.
- Focusing on particular groups makes it harder to think about human rights overall, and harder to account for intersectionality. It could also go against Paris Principles for national human rights institutions which are required to have a broad mandate to promote and protect all human rights.
- A new commissioner may be constrained as many issues would relate to discrimination, which is a reserved matter.

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.

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 disabled people's organisations
- better resourcing existing commissions and commissioners for human rights and equality
- having champions and advocates within public bodies
- supporting good practice through standards, guidance and practical tools
- investing in co-production of policy and practice with people with autism, learning disability and neurodiversity.