

DISABILITY COMMISSIONER (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Disability Commissioner (Scotland) Bill introduced in the Scottish Parliament on 8 February 2024. It has been prepared by the Parliament's Non-Government Bills Unit on behalf of Jeremy Balfour MSP, the member who introduced the Bill.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the Member who introduced the Bill (SP Bill 43–LC);
- a Financial Memorandum (SP Bill 43–FM);
- Explanatory Notes (SP Bill 43–EN).

POLICY OBJECTIVES OF THE BILL

3. The Bill will establish a Disability Commissioner for Scotland, whose primary purpose will be to promote and safeguard the rights of disabled people. The Commissioner will be independent from Government.

4. The member's intention is that the Commissioner will advocate for disabled people at a national level, using the functions set out in this Bill to promote awareness and understanding of the rights of disabled people. The Commissioner will also review law, policy and practice relating to the rights of disabled people with a view to assessing their adequacy and effectiveness and promote best practice by service providers. The Commissioner may also promote, commission, undertake and publish research on matters relating to the rights of disabled people.

5. The Commissioner will have the power to undertake investigations into devolved matters, if they consider that the issue relates to disabled people or a disabled person. These investigations will seek to encourage the consideration of the rights, views, and interests of disabled people in the decision-making and actions of service providers.

6. By establishing a commissioner and giving the Commissioner the legal framework to undertake the functions set out in the Bill, the member considers that the Bill will provide a dedicated champion of and for disabled people, who can influence positive change.

7. In determining the functions that the Commissioner should have, and the role that they should play, the member has drawn inspiration from the Children and Young People's Commissioner Scotland (CYP Commissioner). The member notes the high profile of the CYP Commissioner, and the influence and impact that they have on many matters relating to children's rights. The member envisions that the Disability Commissioner should have a similar profile and impact as that of the CYP Commissioner, in relation to disabled people.

BACKGROUND

Definition of disability

8. Section 6 of the Equality Act 2010 ("the Equality Act")¹ sets out that a person is considered to have a disability, and is therefore protected by law from disability discrimination, if they have a "physical or mental impairment" that has a "substantial" and "long-term" adverse effect on their "ability to do normal day-to-day activities."

9. Under the Equality Act, an impairment is "substantial" if it "is more than minor or trivial." UK Government guidance on the Equality Act² provides an example of this as "it tak[ing] much longer than it usually would to complete a daily task like getting dressed. ". An impairment is considered to be "long-term" if it is experienced for 12 months or more, with the guidance giving the example of a "breathing condition that develops as a result of a lung infection."³ Further to this, anyone who has cancer, an HIV infection, Multiple Sclerosis, or a visual impairment is automatically protected from discrimination under the Equality Act.

10. UK Government guidance relating to the Equality Act provides examples of both physical and learning disabilities which should be taken into account in determining questions relating to the definition of disability. For example, it notes that someone with a learning disability may find it difficult to understand bus routes, making it difficult for them to travel alone, while someone who suffers chronic physical pain may also have difficulties in travelling. Further to this, the guidance notes that someone with a mental health condition may, for example, experience panic attacks, making it difficult for them to travel to work when experiencing such a condition.

11. The definition of disability in the Equality Act is sometimes referred to as the "medical model of disability." Another definition is the "social model of disability", which sets out that people are disabled by barriers in society, rather than by their impairment. Inclusion Scotland's website states:

"The social model was developed by disabled people, and it is supported by organisations led by disabled people. It says disability is caused by barriers that arise because society

¹ [Equality Act 2010 \(legislation.gov.uk\)](https://www.legislation.gov.uk) accessed 8 January 2024.

² [Equality Act 2010: guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk), accessed 8 January 2024.

³ [Definition of disability under the Equality Act 2010 - GOV.UK \(www.gov.uk\)](https://www.gov.uk), accessed 8 January 2024.

(including buses!) is not designed to accommodate people who have impairments. It is these barriers that disable people who have impairments. They stop us from being included in society and participating on an equal basis. If these barriers are removed, a person may still have an impairment but would not experience disability.”⁴

12. Many disabilities are fluctuating, in that they may not be constantly experienced but instead come and go, or ‘flare up.’ Examples of such conditions may include arthritis, fibromyalgia, depression, epilepsy, schizophrenia and bipolar affective disorder.⁵

13. Disability may also be ‘non-visible’, which can be defined as “a disability or health condition that is not immediately obvious. It can defy stereotypes of what people might think disabled people look like.”⁶ People with non-visible disabilities can face challenges in accessing the support “as others cannot ‘see’ the reason why a person may be struggling or behaving in a specific way – this could lead to negative judgement or misunderstanding.”⁷

14. Further to this, someone may have multiple impairments that affect them in different ways. Statistics published by the University of St Andrews state that one in four disabled people have two impairments and one in ten have three or more impairments.⁸

15. While the proposed Disability Commissioner’s remit will cover all disabilities, the member is clear that disabled people are not a homogenous group and that there are many different types of disabilities that affect people in different ways and that every disabled person has different experiences, challenges, and priorities. He therefore considers it vital that the Commissioner’s office continually and consistently consults with a variety of disabled people and organisations that work with and for disabled people and incorporates the views of disabled people into its work, in order to address these varying needs and views.

Scotland’s Disabled Population

16. The 2017 Scottish Health Survey estimated that 32% of adults and 10% of children were living with limiting long term conditions.⁹ While the Scottish Health Survey did not report on the types of conditions that those responding to the survey had, the 2011 Scottish Census stated that the most common health problems and disabilities in Scotland were deafness or partial hearing loss and physical disabilities.¹⁰

17. In terms of the number of disabled people in the UK as a whole, research from the House of Commons Library suggests that there were 16 million disabled people in the UK in 2021/22, representing 24% of the population. The prevalence of disability was shown to rise with age, with 11% of children, 23% of working age adults and 45% of those who were state pension age

⁴ [The Social Model of Disability - Inclusion Scotland](#), accessed 8 January 2024.

⁵ [Equality Act 2010 Guidance \(publishing.service.gov.uk\)](#), accessed 8 January 2024.

⁶ [Living with Non-Visible Disabilities - The Disability Unit \(blog.gov.uk\)](#), UK Government, published 17 December 2020, accessed 8 January 2024.

⁷ [Non-visible disabilities: Living with a ‘hidden’ disability - homecare.co.uk advice](#), accessed 8 January 2024.

⁸ [Facts on Disability | University of St Andrews \(st-andrews.ac.uk\)](#), accessed 8 January 2024.

⁹ [Scottish Health Survey 2017: Volume 1: Main Report \(www.gov.scot\)](#), accessed 15 January 2024.

¹⁰ [Health | Scotland’s Census \(scotlandscensus.gov.uk\)](#), accessed 15 January 2024.

or older found to be disabled.¹¹ Scottish figures from 2019 estimated that 32% (approximately 1.46 million people)¹² of the adult population would be considered ‘disabled’, while 68% would be considered ‘not disabled’.¹³

Barriers faced by disabled people

18. Evidence suggests that disabled people face many barriers in their day-to-day lives in areas such as access to education and appropriate housing, welfare, and employment.

19. Scottish Government research from 2023 found that families with at least one disabled member were more likely than families without a disabled member to live in relative poverty after housing costs¹⁴ and that disabled people were significantly more likely to experience food insecurity (18% compared to 5% of non-disabled people)¹⁵ Further to this, the Resolution Foundation reported that 41% of disabled people in the UK said that they could not afford to keep their homes warm, compared to 23% of the non-disabled population.¹⁶

20. One factor contributing to the higher poverty rates experienced by disabled people is the barriers that they may face in obtaining and retaining employment. In 2022, the employment rate for disabled people in Scotland was estimated to be 50.7% compared to 82.5% for non-disabled people and the rate of economic inactivity was calculated to be 46% for disabled people compared to 15.1% of the non-disabled population.¹⁷ Disabled people are also more likely to earn less than non-disabled people, with the UK disability pay gap in 2020 estimated to be 24.8%.¹⁸

21. Responses to the Scottish Parliament’s Economy and Fair Work Committee’s inquiry into the disabled employment gap¹⁹ demonstrate that the barriers faced by disabled people in the labour market and employment are complex and multiple, with issues highlighted to the Committee including discrimination, insufficient accessible transport, employers lacking understanding of their responsibilities to disabled employees and the support that they should be putting in place and a lack of funding for employability services.

¹¹ [UK disability statistics: Prevalence and life experiences - House of Commons Library \(parliament.uk\)](#), accessed 15 January 2024.

¹² Calculated based on Scotland’s population being 5.45 million. 84% of the population being adults (4.58 million people) and 32% of 4.6 million equalling (1.46 million).

¹³ [Scotland’s Wellbeing - Measuring the National Outcomes for Disabled People \(www.gov.scot\)](#), accessed 15 January 2024.

¹⁴ [Poverty and Income Inequality in Scotland 2019-22 \(data.gov.scot\)](#), Scottish Government, published 23 March 2023, accessed 8 January 2024.

¹⁵ [Scotland’s Wellbeing - Measuring the National Outcomes for Disabled People \(www.gov.scot\)](#), Scottish Government, published July 2019, accessed 8 January 2024.

¹⁶ Press release on Resolution Foundation website, [44 per cent disability income gap makes people with disabilities more likely to struggle to heat their homes and cut back on food this winter • Resolution Foundation](#), published 4 January 2023, accessed 8 January 2024.

¹⁷ Labour Market Statistics for Scotland by Disability, Scottish Government, [Labour Market Statistics for Scotland by Disability: January to December 2022 - gov.scot \(www.gov.scot\)](#) published 31 May 2023, accessed 8 January 2024.

¹⁸ [Disability pay and employment gaps 2020 | TUC](#), published on TUC website 12 November 2020, accessed 8 January 2024.

¹⁹ [Published responses for Disabled employment gap inquiry - Scottish Parliament - Citizen Space](#), accessed 8 January 2024.

22. Enable, a member-led disabled people’s organisation focussed on improving the lives of people with learning disabilities and their families, responded to the inquiry noting that “few people with learning disabilities go onto further education and often do not leave school with many qualifications” and that this could have a detrimental impact on their ability to obtain employment.²⁰ Further to this, it was noted in some responses to the inquiry that there is a lack of transition support for young people who are moving from education into employment.

23. A lack of suitable, affordable housing is a further challenge faced by some disabled people. Research from the Equalities and Human Rights Commission found that, in 2015, 61,000 people needed adaptations made to their homes, and in 2018 almost 10,000 disabled people in Scotland were on housing waiting lists.²¹

24. It is apparent that the various barriers faced by disabled people can negatively impact upon their day-to-day lives and physical and mental wellbeing. An analysis of the National Performance Framework outcome indicators from the perspective of disability, published by the Scottish Government in 2019, noted that there was “lower mental wellbeing among disabled adults along with higher engagement in health risk behaviours, and higher rates of difficulties among disabled children.”²² It also set out that disabled people were more likely to be worried about crime and that there were lower rates of cultural participation and attendance among disabled people.

25. Many respondents to the member’s consultation on the proposal for this Bill considered that the needs of disabled people are not given sufficient priority, including in policy making and legislation, with existing strategies and services sometimes considered to be insufficient. Further to this, a report by the Scottish Independent Living Commission concluded that the cumulative impact of the various barriers faced by disabled people should be taken into account in policymaking, stating:

“In our view, in Scotland at present there is a tendency to focus on specific issues without considering how this interacts with other matters and how the lack of intersectional focus fundamentally impacts the barriers disabled people face.”²³

Covid-19 pandemic

26. Evidence suggests that the issues discussed above in paragraphs 19-26 have been compounded by the Covid-19 pandemic and the cost-of-living crisis.

27. At the height of the Covid-19 pandemic, disabled people and their carers faced issues such as having little or no access to social care, difficulties in accessing food and medicine,

²⁰ Enable Scotland’s response to Scottish Parliament’s Economy and Fair Work Committee’s inquiry into the disabled employment gap [Response 1045491638 to Disabled employment gap inquiry - Scottish Parliament - Citizen Space](#), accessed 8 January 2024.

²¹ [housing-and-disabled-people-britains-hidden-crisis-main-report_0.pdf \(equalityhumanrights.com\)](#), Equality and Human Rights Commission, accessed 8 January 2024.

²² [National Performance Framework - disability perspective: analysis - gov.scot \(www.gov.scot\)](#), published 21 March 2021, accessed 8 January 2024.

²³ [silc-supplement-to-ukim-report-for-shrc.pdf \(scottishhumanrights.com\)](#), accessed 8 January 2024.

concerns that they may lose their jobs and the challenges of self-isolating and shielding.²⁴ Many disabled people, particularly those who were shielding, experienced heightened anxiety during this time, fearing that they may be vulnerable to serious illness in contracting the virus. This in turn could lead to social isolation, if people were reluctant to leave their homes as a result or did not have any face-to-face contact with family members and friends for long periods of time.²⁵

28. The impact of the Covid-19 pandemic is not limited to its apparent peak in 2020/21, but instead continues to have a long-term effect on disabled people. Many disabled people's organisations have expressed the view that the pandemic exacerbated existing inequalities experienced by disabled people, with Inclusion Scotland stating:

“COVID-19 has meant that 2020 delivered thousands of additional deaths of disabled people globally, and intensified social isolation and mental ill-health, personal and community poverty, and economic and social instability and insecurity for disabled people. While it has also seen communities rally to support local disabled residents and neighbours, the advent and impact of Coronavirus and the consequences of the ensuing pandemic have revealed the trenchant inequalities in Scotland for disabled people that existed before COVID-19 arrived.

Our own research, and that of other Disabled People's Organisations, has shown that disabled people and their families were harder hit by Covid-19, not only because they may be at greater risk of severe illness – but equally or more so – because Covid-19 has ‘supercharged’ the existing inequality they already face and made new inequality likely.”²⁶

29. Inclusion Scotland also published a report in 2021, stating that the impact of the pandemic had put the rights of disabled people at risk, for example in threatening their right under the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”)²⁷ to live independently, to employment, to health and to life. The report set out that at times of crisis, such as during the pandemic, steps should be taken to ensure that disabled people are communicated with, consulted, and involved in decision-making processes.²⁸ More recent reports refer to the lasting impact that the pandemic has had, with reference made to disabled people and their carers still shielding, but without the support that was in place during the height of the pandemic. Issues noted include confusion over vaccinations and frustration that guidance stating that facemasks are no longer required in healthcare settings was issued with an apparent lack of consultation with disabled people.²⁹

²⁴ Research and publications by Inclusion Scotland relating to the Covid-19 pandemic, [Our Research - Inclusion Scotland](#), accessed 8 January 2024.

²⁵ Research and publications by Inclusion Scotland relating to the Covid-19 pandemic, [Our Research - Inclusion Scotland](#), accessed 8 January 2024.

²⁶ Response to Jeremy Balfour's consultation on his proposed bill, [consultation-summary-disability-commissioner-final.pdf \(parliament.scot\)](#), accessed 8 January 2024.

²⁷ [Convention on the Rights of Persons with Disabilities \(CRPD\) | Division for Inclusive Social Development \(DISD\) \(un.org\)](#), accessed 8 January 2024.

²⁸ Rights at Risk, Covid-19, disabled people and emergency planning in Scotland, Inclusion Scotland, [Rights-At-Risk-Main-Report.pdf \(inclusionScotland.org\)](#), accessed 8 January 2024.

²⁹ [silc-supplement-to-ukim-report-for-shrc.pdf \(scottishhumanrights.com\)](#), accessed 8 January 2024.

Cost of living crisis

30. Along with the lasting effects of the Covid-19 pandemic, the member also considers that disabled people have been disproportionately impacted by the cost-of-living crisis.

31. In addition to the rising costs of food, energy and housing, disabled people often must purchase special assistive equipment or pay extra for accessible transportation. This has been highlighted by organisations such as SCOPE, a disability charity for England and Wales, which estimated that in 2023, on average, households with at least one disabled adult or child will need an additional £975 a month to have the same standard of living as non-disabled household.³⁰

32. Further to this, a survey by Euan's Guide,³¹ an accessibility review website that gives disabled people the opportunity to rate the accessibility of the places they visit, suggested that disabled people are being forced to choose between “eating and breathing” as they choose between cutting back on the use of essential medical aids or on other essentials such as food or energy.³² In some cases, this can be exacerbated, as some disabled people need to have warm homes due to health conditions or need to charge medical equipment thus requiring more home energy.³³

33. As with the Covid-19 pandemic, reports suggest that the cost-of-living crisis has had a detrimental impact on the wellbeing and mental health of many disabled people. For example, a study by the Glasgow Disability Alliance and the Glasgow Centre for Population Health, having spoken directly to disabled people, noted:

“The impacts of the current crisis on health and wellbeing were described as completely corrosive. The daily hardship and decisions concerning which essential items to sacrifice were described as extremely stressful and directly caused long-term anxiety symptoms.”³⁴

34. The member's view is that, had a Disability Commissioner been in place prior to the advent of the Covid-19 pandemic and the cost-of-living crisis, they could have played an important role in advocating for disabled people and ensuring that their views, rights and interests were given full consideration by the Government and others in decision-making roles. This may have had a mitigating effect on the negative impacts that the pandemic and cost-of-living crisis have had on disabled people.

³⁰ [Disability Price Tag 2023: the extra cost of disability | Disability charity Scope UK](#), accessed 8 January 2024

³¹ [Euan's Guide - Disabled Access Reviews \(euansguide.com\)](#), accessed 8 January 2024.

³² Article on cost-of-living crisis, on Euan's guide website, [Cost of living \(euansguide.com\)](#), published 22 January 2023, accessed 8 January 2024.

³³ [Inclusion-Scotland-Briefing-Disabled-People-Poverty-and-the-Cost-of-Living-Crisis-Version-1-November-22nd.pdf \(inclusionScotland.org\)](#), accessed 8 January 2024.

³⁴ *The Impacts of the cost-of-living crisis on disabled people: a case for action*, Chris Harkins, Tressa Burke, David Walsh [CoL Disabled people.pdf \(gcph.co.uk\)](#), published August 2023, accessed 8 January 2024.

CURRENT LAW AND PRACTICE

Previous law

Disability Discrimination Act 1995 and Disability Rights Commission Act 1999

35. The Disability Discrimination Act 1995 (“the 1995 Act”)³⁵ established a National Disability Council in the UK, which was then superseded by the Disability Rights Commission under the Disability Rights Commission Act 1999.³⁶ The Commission had functions to work towards the elimination of discrimination against disabled persons; to promote the equalisation of opportunities for disabled persons; to take such steps as it considered appropriate to encourage good practice in the treatment of disabled persons; and to keep under review the working of the 1995 Act. It had various means of achieving these functions, such as investigations, notices, seeking an interdict from the court, providing assistance in proceedings and drafting codes of practice.

36. The Disability Rights Commission was dissolved, together with the Equal Opportunities Commission and the Commission for Racial Equality and replaced by the Equality and Human Rights Commission (“EHRC”) under the Equality Act 2006.³⁷ This UK legislation also amended the 1995 Act concerning disability discrimination. The law on discrimination, including disability discrimination, was then harmonised and updated with the introduction of the Equality Act 2010.³⁸

The Equality Act 2006 - Equality and Human Rights Commission

37. As noted above, the EHRC was established in 2007 under the Equality Act 2006. The EHRC has a general duty to encourage and support the development of a society in which: people’s ability to achieve their potential is not limited by prejudice or discrimination; there is respect for and protection of each individual’s human rights; there is respect for the dignity and worth of each individual; each individual has an equal opportunity to participate in society; and there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

38. In exercising its powers, the EHRC shall: (a) promote understanding of the importance of equality and diversity; (b) encourage good practice in relation to equality and diversity; (c) promote equality of opportunity; (d) promote awareness and understanding of rights under the Equality Act 2010; (e) enforce the Equality Act 2010; (f) work towards the elimination of unlawful discrimination, and; (g) work towards the elimination of unlawful harassment. In promoting equality of opportunity between disabled persons and others, the EHRC may, in particular, promote the favourable treatment of disabled persons.

39. The EHRC has a specific function to monitor the law in this area and to monitor and report on changes for the purpose of encouraging and supporting changes in society which support its duties. In pursuance of its duties, the EHRC can publish information, undertake

³⁵ [Disability Discrimination Act 1995 \(legislation.gov.uk\)](#), accessed 8 January 2024.

³⁶ [Disability Rights Commission Act 1999 \(legislation.gov.uk\)](#), accessed 8 January 2024.

³⁷ [Equality Act 2006 \(legislation.gov.uk\)](#), accessed 8 January 2024.

³⁸ [Equality Act 2010 \(legislation.gov.uk\)](#), accessed 8 January 2024.

research, provide training and advice and act jointly with, cooperate with or assist others undertaking these activities.

The Equality Act 2010

40. The Equality Act 2010 lists and defines the protected characteristics, which include disability and prohibits discrimination (both direct and indirect), harassment and victimisation of people with a protected characteristic. It includes a duty to make reasonable adjustments for disabled people, and provision relating to the employment and education context, amongst others. It also included the public sector equality duty which requires public bodies to have due regard to the need to achieve the objectives set out under section 149 of the Equality Act 2010 to:

- eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Other bodies/officeholders

41. In addition to the EHRC, there are various other bodies with remits which may, depending on the circumstances, relate to the rights and interests of disabled people.

42. The Scottish Human Rights Commission (“SHRC”) was created by the Scottish Commission for Human Rights Act 2006³⁹ and has operated since 2008. The SHRC has a general duty to promote human rights and encourage best practice in relation to human rights. For the purpose of fulfilling its general duty, the SHRC can publish information and guidance, conduct research and provide education/training as well as monitor the law, policies and practices of Scottish public authorities. Whilst the SHRC has no power to assist in individual cases or raise legal proceedings, it may conduct inquiries into the policies and practices of a Scottish public authority. The SHRC has the power to act jointly, co-operate with or assist others.

43. In terms of human rights action, the cross-over between the EHRC and the SHRC’s functions in Scotland is governed by section 7 of the Equality Act 2006. A Memorandum of Understanding⁴⁰ was agreed between the EHRC and the SHRC in May 2009, outlining a “framework agreement for co-operation and communication between the SHRC and the EHRC”. It is intended to clarify the respective roles and responsibilities of the Commissions, particularly in relation to the operation of the EHRC in Scotland. The EHRC has responsibility for equality in Scotland and human rights in Scotland in relation to reserved policy areas (such as immigration). Human rights in relation to devolved areas (such as the police) is the responsibility of the SHRC. In practice, the two areas may overlap.

³⁹ [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](https://legislation.gov.uk), accessed 8 January 2024.

⁴⁰ [Memorandum of Understanding between the Scottish Commission for Human Rights \(SHRC\) and the Equality and Human Rights Commission \(EHRC\) | EHRC \(equalityhumanrights.com\)](#), accessed 8 January 2024.

44. The Children and Young People’s Commissioner (“CYP Commissioner”) was established by the Commissioner for Children and Young People (Scotland) Act 2003⁴¹ with the general duty to promote and safeguard the rights of children and young people. The Commissioner was also given specific duties, including promoting awareness and understanding of the rights of children and young people; keeping under review law, policy and practice relating to the rights of children and young people; promoting best practice by service providers; and promoting, commissioning and undertaking research on related matters. As part of this, the Commissioner can carry out what are known as general and individual investigations, and report to Parliament.

45. The Mental Welfare Commission (“MWC”) was established by the Mental Health (Care & Treatment) (Scotland) Act 2003⁴² to protect the welfare of persons who have a mental disorder (which includes mental illness, personality disorder or learning disability). The MWC has duties under the 2003 Act and the Adults with Incapacity (Scotland) Act 2000,⁴³ which provides a framework for safeguarding the welfare/ managing the finances of adults who lack capacity due to mental illness, learning disability, dementia, or an inability to communicate. The MWC monitors these Acts, provide advice and carry out investigations.

46. The Scottish Public Services Ombudsman (“SPSO”) under the Scottish Public Services Ombudsman Act 2002⁴⁴, has various functions, including the final stage for complaints (service failure) about various public authorities, including the NHS and providing an independent review service for the Scottish Welfare Fund.

47. The member acknowledges that there is some overlap between the proposed functions of the Disability Commissioner and those of other organisations such as the EHRC, SHRC and the Mental Welfare Commission. The member considers that unnecessary duplication of work should be avoided where possible. In the case of the power to carry out investigations, the Bill specifies that the Commissioner may not carry out an investigation if the Commissioner is satisfied that the investigation is properly the function of another organisation, with the exception to this being when the Commissioner has consulted with the other organisation and considers that in the circumstances, that the matter would most effectively and expediently be investigated by the Disability Commissioner. This is still subject to the limitations on the Commissioner’s powers of investigation, which include not carrying out an investigation if it would relate to a reserved matter.

48. The member’s view is that memorandums of understanding could be put in place between relevant organisations in order to set out which types of work can be carried out by each organisation and setting out procedures for how potential overlaps of work should be dealt with.

⁴¹ [Commissioner for Children and Young People \(Scotland\) Act 2003 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁴² [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁴³ [Adults with Incapacity \(Scotland\) Act 2000 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁴⁴ [Scottish Public Services Ombudsman Act 2002 \(legislation.gov.uk\)](#), accessed 8 January 2024.

International human rights treaties

49. At an international level, the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”)⁴⁵ aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The UNCRPD was ratified by the UK in 2009 but is not incorporated into domestic law. However, the UK is required to report to the Committee on the Rights of Persons with Disabilities on how the rights within the Convention are being implemented. The Initial UK State Report⁴⁶ was submitted in November 2011 and the UK was first reviewed in 2017. The UK Government was due to submit its next report in July 2023, but it understood this has been delayed until 2024.⁴⁷ The Scottish Government’s delivery plan for the UNCRPD A Fairer Scotland for Disabled People: delivery plan⁴⁸ was published in 2016.

50. In March 2021, the National Taskforce for Human Rights Leadership for a new human rights framework for Scotland recommended incorporation of the UNCRPD (and other human rights instruments) into Scots law. The Scottish Government has committed to doing this by way of a new Human Rights Bill to be introduced in the current parliamentary session. The consultation for this proposal was published on 15 June 2023.⁴⁹

Wider legislation and prospective legislation

51. There is a wide range of legislation that has an impact on the lives and rights of disabled people, for example, in the field of social care (Social Care (Self-directed Support) (Scotland) Act 2013),⁵⁰ social security (Social Security (Scotland) Act 2018),⁵¹ or parking (Disabled Persons’ Parking Badges (Scotland) Act 2014).⁵² Depending on the legislation other bodies/officers may have a role in relation to the rights of disabled people, such as the Care Inspectorate or Social Security Scotland/ the Scottish Social Security Commission.

52. In September 2021, the Scottish Government’s Programme for Government stated that it would carry out scoping work on a Learning Disability, Autism and Neurodiversity Bill. Analysis of the scoping exercise was published in February 2023.⁵³ The Bill was also referenced in the 2023 Programme for Government, and a consultation on the Bill opened in December 2023 and is due to close in April 2024.⁵⁴ The 2023 Programme for Government set out that the

⁴⁵ [Convention on the Rights of Persons with Disabilities \(CRPD\) | Division for Inclusive Social Development \(DISD\) \(un.org\)](#), accessed 8 January 2024.

⁴⁶ [Initial UK State Report on UNCRPD](#), published November 2011, accessed 8 January 2024.

⁴⁷ *Ministers Skip UN meeting on disability rights*, published BBC website 29 August 2023. <https://www.bbc.co.uk/news/uk-politics-66648764>, accessed 8 January 2024.

⁴⁸ [A Fairer Scotland for Disabled People: delivery plan](#), Scottish Government, published 2 December 2016, accessed 8 January 2024.

⁴⁹ [Supporting documents - A Human Rights Bill for Scotland: consultation - gov.scot \(www.gov.scot\)](#), published 15 June 2023, accessed 8 January 2024.

⁵⁰ [Social Care \(Self-directed Support\) \(Scotland\) Act 2013 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁵¹ [Social Security \(Scotland\) Act 2018 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁵² [Disabled Persons’ Parking Badges \(Scotland\) Act 2014 \(legislation.gov.uk\)](#), accessed 8 January 2024.

⁵³ [Learning Disability, Autism and Neurodiversity Bill: Scoping Analysis 2022 \(www.gov.scot\)](#), published 27 February 2023, accessed 8 January 2024.

⁵⁴ [LDAN Bill Consultation document \(www.gov.scot\)](#), Scottish Government, consultation document, accessed 9 January 2024.

relate to one or more of the following policy areas: age, disability, gender, LGBTI, race and human rights. Organisations could apply through an open application process and successful candidates “are paid quarterly following submission of finance forms showing expenditure for the payment period and forecast expenditure for project year.”⁶²

International commissioners

58. While there is currently no disability commissioner in any part of the UK, some international examples can be found. For example, a Health and Disability Commissioner⁶³ was established in New Zealand in 1994 by the Health and Disability Commissioner Act.⁶⁴ The Commissioner’s role differs from what the member envisions for the Scottish Disability Commissioner as it includes a wider remit of health and disability. Further to this, its focus appears to be on consumer rights, with its website stating that:

“The purpose of the Health and Disability Commissioner is to promote and protect the rights of consumers as set out in the Code of Health and Disability Services Consumers’ Rights (the Code).

HDC is an independent watchdog, providing people using health and disability services with a voice, resolving complaints, and holding providers to account for improving their practices at an individual and system-wide level.

The Health and Disability Commissioner is independent of providers, of consumers, and of government policy, allowing HDC to be an effective watchdog for the promotion and protection of consumers’ rights.”

59. The New York’s Mayor’s Office for People with Disabilities (“MOPD”)⁶⁵ was established in 1973. Unlike the proposed Scottish Disability Commissioner, the MOPD is not independent from Government and instead acts as a liaison between the New York City Government and disabled people in New York. It’s focus appears to be on advocacy, highlighting issues of importance to disabled people and making disabled people aware of available resources that may be of use to them.

60. In India, the Office of Chief Commissioner for Persons with Disabilities (CCPD)⁶⁶ was set up in 1995 under The Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act to safeguard the rights of disabled people. The role of the Commissioner includes monitoring the implementations of law relating to disabled people, reviewing safeguards in law that are designed to protect the rights of disabled people and undertaking research relating to the rights of disabled people. Unlike the proposed Scottish Disability Commissioner, which will be independent of Government, the CCPD is part of the Department

⁶² [Equality and Human Rights Progress Report - October 21-March 22 \(inspiringscotland.org.uk\)](https://inspiringscotland.org.uk) accessed 8 January 2024.

⁶³ [The Health and Disability Commissioner \(hdc.org.nz\)](https://hdc.org.nz), accessed 8 January 2024.

⁶⁴ [Health and Disability Commissioner Act 1994 No 88 \(as at 01 July 2022\), Public Act Contents – New Zealand Legislation](#), accessed 8 January 2024.

⁶⁵ New York City [Mayor’s Office for People with Disabilities \(nyc.gov\)](https://nyc.gov), accessed 8 January 2024.

⁶⁶ [Home | Office of Chief Commissioner for Persons with Disabilities \(ccdisabilities.nic.in\)](https://ccdisabilities.nic.in), accessed 8 January 2024.

of Empowerment of Persons with Disabilities under the Ministry of Social Justice and Empowerment.

DETAILS OF THE BILL

61. The Bill provides for the establishment of an independent commissioner to promote and safeguard the rights of disabled people in Scotland. The member's intention is the Commissioner is funded and accountable to the Scottish Parliamentary Corporate Body ("SPCB") and appointed by His Majesty the King on nomination of the Scottish Parliament.

62. The Commissioner may only hold the post for a period of up to eight years, with the length of the appointment to be determined by the SPCB. The Parliament may vote to remove the Commissioner from office prior to this, should the SPCB determine that the Commissioner has breached the terms and conditions of appointment or if it has lost confidence in the Commissioner's willingness, suitability, or ability to perform the role.

63. The Commissioner's remit will cover all disabilities, including learning and physical disabilities, fluctuating or so-called 'non-visible' disabilities, rather than focus on a certain type or certain types of disability. The Bill uses the definition of disability that is set out in the Equality Act 2010 and thus any person covered by that definition will be included in the remit of the Commissioner.

Functions of the Commissioner

64. The Commissioner's general function will be to promote and safeguard the rights of disabled people. In doing so, the Commissioner should also carry out several other functions that are intended to help the Commissioner achieve the general function. These are to:

- Promote awareness and understanding of the rights of disabled people;
- Keep 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;
- Promote, commission, undertake and publish research on matters relating to disabled people.

65. The member is of the view that the detail of how the Commissioner will promote awareness and understanding of the rights of disabled people should be for the Commissioner to determine. However, he considers that this could be achieved in a number of ways. For example, the Commissioner could produce guidance and reports highlighting issues that are faced by disabled people. The Commissioner could also run campaigns, highlighting issues of relevance and calling for changes to be made that would have a positive impact on the rights of disabled people.

66. The member notes the high profile of the CYP Commissioner, an influential, recognisable public figure whose views on the rights of children are considered to hold weight. The CYP Commissioner has published their position on matters such as child poverty, climate

justice and domestic abuse, in addition to making statements on proposed new laws and calling for action on matters such as the universal rollout of free school meals in Scotland.⁶⁷ Statements and interviews made by the Commissioner have the power to make headlines, start conversations and influence change. The member envisions a similar status and influence being held by the Disability Commissioner.

67. The Commissioner will also have a duty to keep 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. While it is for the Commissioner to determine how this would work in practice, the member's view is that the Commissioner may review any legislation passing through the Scottish Parliament, to ensure that disabled people's interests, views and rights are considered in proposed legislative changes. This may include the Commissioner having involvement in policy development through responding to consultations or publishing reports on proposed legislation, involvement in scrutiny through responding to Committee inquiries with written or oral evidence or reviewing existing legislation and reporting on the need for updates or change. Other examples could be writing to, or meeting with, Scottish Ministers, or with other organisations or bodies on issues of relevance to disabled people.

68. The member is clear that, while the Commissioner may undertake any of the above actions, they will not be able to enforce changes to law, policy and practice. The member's view is that, should the Commissioner recommend action, this should create an impetus for change and encourage those in decision-making roles to implement changes which will have a positive impact on disabled people.

69. The Commissioner will also promote best practice for service providers. The Bill defines best practice as "such practice in relation to the rights of disabled people as appears to the Commissioner to be desirable." A service provider is defined in the Bill as "any person providing services for disabled people or a disabled person other than an excluded provider."⁶⁸

70. The member wishes the Commissioner to have flexibility regarding how the promotion of best practice will be carried out. One way in which this may be achieved is through publishing guidance or providing training. The member's view is that the Commissioner should engage with disabled people, organisations working with and for disabled people and other key stakeholders to ensure that their views are being heard and any issues they are facing are addressed.

71. The Commissioner also has a function to promote, commission, undertake and publish research on matters relating to disabled people. As with the other functions of the Commissioner, the member considers that it will be for the Commissioner to identify relevant areas of research before promoting, commissioning, or undertaking such research. The research could be carried out by, or in conjunction with, disabled people and organisations working with and for disabled people. The findings of the research could then be used to identify issues and areas of concern,

⁶⁷ [Statement: Commissioner calls on Scottish Government to prioritise rolling out universal free schools meals. - The Children and Young People's Commissioner Scotland \(cypcs.org.uk\)](#), accessed 8 January 2024.

⁶⁸ The Bill defines an excluded provider as "a person providing services for a disabled people or a disabled person who does not principally provide those services for remuneration or as part of their employment but because of their existing family relationship, community or neighbourhood links, or friendship with the disabled person or disabled people concerned."

and the Commissioner could use their profile to highlight such matters and call for action to be taken.

72. As covered in more detail later in the document, in addition to carrying out the functions set out above the Commissioner may undertake investigations into devolved matters, if they consider that the issue relates to disabled people or a disabled person. The member's view is that the carrying out of investigations will help the Commissioner to achieve their general function of promoting and safeguarding the rights of disabled people by seeking to encourage the consideration of the rights, views, and interests of disabled people in decision-making and actions by service providers. The understanding and awareness of the rights of disabled people could also be promoted by any reports and recommendations made by the Commissioner following an investigation.

United Nations Convention on the Rights of Persons with Disabilities

73. As set out above in paragraphs 50 and 51, the UNCRPD is an international human rights treaty that aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. While it is not incorporated into Scots law, the Scottish Government has committed to doing so as part of a future human rights bill.

74. In exercising any functions under the Bill, the Commissioner must have regard to any relevant provisions in the UNCRPD. In particular, the Commissioner should have regard to, and encourage others to have regard to the principles which reflect the following Articles of the UNCRPD:

- “Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;” (Art 3.a. UNCRPD);
- “Full and effective participation and inclusion in society;” (Art 3.c. UNCRPD);
- “...in decision-making processes concerning issues relating to persons with disabilities, to closely consult with and actively involve persons with disabilities...”. (Art 4.3 UNCRPD).

75. The Member identified these principles together with the general obligation to involve disabled people in decisions affecting them as key to the Commissioner’s remit.

76. Ways in which the Commissioner could have regard to and encourage others to have regard to the relevant provisions could include publishing briefing and/or position papers, and consultation responses relating to the UNCRPD, as well as providing accessible information on the UNCRPD and how it relates to disabled people in Scotland on the Commissioner’s website.

77. Further to this, the member notes the role that the CYP Commissioner plays in relation to the United Nations Convention on the Rights of the Child (UNCRC). Examples of this include, highlighting issues of importance that the Commissioner considers the UN Committee on the Rights of the Child should ask member states to report on, and publishing a report in response to the UK Government’s report to the UN Committee. The CYP Commissioner also spoke to the Committee in Geneva regarding the issues it raised in its report.

78. The member, whilst cognisant of the existing role of other organisations, such as the EHRC and SHRC in relation to the UNCRPD, considers that the Disability Commissioner could undertake a similar role to the CYP Commissioner in regard to the UNCRPD, by promoting awareness of it, feeding into the reporting process by highlighting issues of importance in regard to the rights, needs and views of disabled people and scrutinising the work of the Scottish Government in fulfilling its duties under the UNCRPD.

Inclusive Communication

79. In exercising their functions, the Commissioner should have regard to the importance of communicating in as inclusive a way as possible. The Bill defines this as “communicating in a way that ensures that disabled people who have difficulty communicating or accessing information in relation to speech, language or otherwise can express themselves and access or receive information in ways that best meet their needs.”

80. Additionally, so far as practicable, any reports published by the Commissioner must be made available in a range of formats accessible by disabled people.

81. Examples of inclusive communication that the Commissioner may choose to use could include providing multiple means for someone to get in touch, such as face-to-face meetings, by telephone (including text relay⁶⁹), text message, video calling and email, and by making information available via multiple formats, for example, large print, braille, BSL, audio or easy read.⁷⁰ The Commissioner’s website should make clear that such resources are available and how they can be accessed.

82. The member considers that in determining how best to ensure inclusive communication, the Commissioner should consult with disabled people and organisations working with and for disabled people, who will be best placed to advise how best this should be achieved and that any such consultation should be on an ongoing basis.

Involving disabled people

83. The needs and rights of disabled people should always be at the forefront of the work of the Commissioner. The member believes that disabled people are best placed to set out what matters affect them and what changes to policy and legislation they would wish to see. The Commissioner should therefore engage with, listen to and consult with disabled people and disabled persons organisations as much as possible.

84. The Bill requires the Commissioner to encourage the involvement of disabled people in the work of the Commissioner. In particular, the Commissioner should ensure that disabled people are aware of the functions of the Commissioner, how to get in touch with the Commissioner and how the Commissioner may respond to any issues raised. Further to this, the

⁶⁹ [Text relay - Ofcom](#) can be defined as: “Text relay offers text-to-speech and speech-to-text translation services. A relay assistant in a call centre acts as an intermediary, enabling people with hearing or speech impairments to communicate with other people over the telephone.”

⁷⁰ Easy Read can be described as where text is presented in an accessible, easy to understand format, using pictures to support understanding of the text. The format was created to help people with learning disabilities understand information easily.

Commissioner must consult disabled people and organisations which work with and for disabled people on the work that the Commissioner is undertaking.

85. The Bill also sets out that the Commissioner must prepare and keep under review a strategy for involving disabled people in the work of the Commissioner and consult organisations working with and for disabled people in doing so.

86. The member expects that the Commissioner’s website will play an important role in providing clear information on how disabled people can engage with the Commissioner. Information on how to get in touch with the Commissioner, and the ways in which people may engage with the Commissioner could also be shared with organisations working with and for disabled people, including DPOs, who could provide details to their memberships.

87. While it will be for the Commissioner to determine how best to engage with disabled people, an example of how this could be achieved can be found in the work of the CYP Commissioner, who works with a network of young advisors whose views are incorporated into the work of the CYP Commissioner. For example, the young advisors played a lead role in the CYP Commissioner’s investigation into school counselling. The member considers that disabled people could take on a similar advisory role in working with the Disability Commissioner. However, the member would not wish consultation to be limited to those who took on such a role and would expect the Commissioner to ensure that there were various ways in which disabled people could engage with their work.

88. In ensuring disabled people are involved in the work of the Commissioner, particular consideration must be given as to how to involve people who may not have means of making their views known or who, due to their disability, find it difficult to communicate their views. The member’s view is that the Commissioner should take steps to ensure that the views of all disabled people who wish to engage with the Commissioner work, can be considered.

Investigations

89. In addition to the Commissioner’s functions, as set out earlier in the document, the Commissioner will have statutory powers to carry out investigations into by what means, and to what extent, a service provider has regard to the rights, interests and views of disabled people or a disabled person in making decisions and taking actions that affect the disabled people (general investigation) or person (individual investigation).

Who can the Commissioner investigate?

90. As noted above, the Commissioner may investigate the decisions and actions of service providers. The Bill defines a service provider as “any person providing services for disabled people or a disabled person other than an excluded provider.” This should extend to service providers in the public, private and third sector including individuals (who are not excluded providers).

91. The member’s view is that a person who, for example, carries out caring duties for a disabled family member or friend should not be subject to investigation. This is reflected in the Bill as an “excluded provider,” which means “a person providing services for a disabled people

or a disabled person who does not principally provide those services for remuneration or as part of their employment but because of their existing family relationship, community or neighbourhood links, or friendship with the disabled person or disabled people concerned.”

Limitations on who the Commissioner can investigate

92. The Commissioner cannot carry out an investigation if it relates to a reserved matter, or a matter which is subject to legal proceedings.

93. As noted earlier in this document, there may be occasions in which the Disability Commissioner wishes to investigate a matter which another organisation also has the power to investigate. For example, the Disability Commissioner may wish to carry out an investigation into whether local authorities across Scotland are considering the rights, interests and views of disabled people in their decision-making and actions relating to access to education for disabled children. As this would involve disabled children, it may be a matter in which the CYP’s Commissioner also takes an interest and wishes to investigate.

94. Under the Bill’s provisions, should such an occasion arise, providing the matter is not reserved or subject to legal proceedings, the Commissioner would be able to undertake the investigation if they have consulted with any other body who has the function to carry out an investigation, in this example the CYP Commissioner, and in having done so, determined that it would be more effective and expedient if the Disability Commissioner undertook the investigation.

95. The member is of the view that there may be instances where the Disability Commissioner will be best placed to carry out an investigation, despite another body also being able to do so. This may be, for example, due to the Commissioner having the time or resources to carry out an investigation when another body does not, or due to the Commissioner having a specific interest in carrying out the investigation.

96. As noted earlier in this document, some organisations have memorandums of understanding in place to set out a procedure, should both parties have an interest in undertaking the same work. For example, SHRC and EHRC’s memorandum of understanding⁷¹ states:

“Where common areas of interest within their respective remits are identified, the Commissions will liaise to establish whether it is possible to arrive at common policy positions. In the event that the Commissions do take the same position, they pledge to co-operate insofar as possible to avoid unnecessary duplication of work.

Where the Commissions do not arrive at a common policy position, they will keep each other informed of their respective positions and, if appropriate, their reasoning. In particular they will make best efforts to notify each other prior to making public any such position or reasoning.

⁷¹ Memorandum of Understanding between SHRC and EHRC [Memorandum of Understanding between the Scottish Commission for Human Rights \(SHRC\) and the Equality and Human Rights Commission \(EHRC\) | EHRC \(equalityhumanrights.com\)](https://equalityhumanrights.com), accessed 8 January 2024.

Where either Commission identifies an issue falling within the remit of both Commissions, each Commission will discuss any proposed action with the other, and the Commissions will endeavour to agree how best the work can be carried out in order to maximise resources and avoid unnecessary duplication of work.”

97. The memorandum of understanding also sets out that the two commissions will meet regularly to share information and share information. The member believes that such an arrangement may be beneficial between the Disability Commissioner and other bodies with which they may have related functions and interests.

General investigations

98. Under the Bill, a general investigation is one which examines whether, by what means, and to what extent a service provider has regard to the rights, interests and views of disabled people in making decisions or taking actions that affect disabled people. It is proposed that for a general investigation, the Commissioner would need to be satisfied on reasonable grounds that the matter to be investigated raises an issue of particular significance to disabled people generally, people with particular disabilities or particular groups of disabled people.

99. This distinction has been included in order to make clear that investigations might focus on groups of people distinguished by matters other than their disability (for instance, their location) as well as groups of people distinguished by their specific disability (such as mobility difficulty, visual impairment or learning disability). For example, the Commissioner could investigate access to education for those in a particular local authority area (for particular groups of disabled people) or access to education for those with visual impairments, covering all local authority areas in Scotland.

Individual investigations

100. The Bill sets out that an individual investigation is an investigation into whether, by what means, and to what extent a service provider had regard to the rights, interests and views of a disabled person in making a decision or taking an action that affected that disabled person.

101. An example of such an investigation could be where concerns are raised about the care received by a disabled person who resides in a small, charity-run care home. The Disability Commissioner could investigate whether that charity running the care home, as the service provider, had the regard to the rights, interests and views of the disabled person in question in making a decision or taking an action that affected that person.

102. The Bill sets out that, in such circumstances, and whenever the Commissioner is considering carrying out an individual investigation, the Commissioner should give consideration as to whether the matter at hand could be resolved without an investigation having to take place. The member’s view is that, where possible, attempts should be made to reach a satisfactory outcome without having to go through the process of carrying out an investigation.

How will the investigation process work?

103. The Bill requires that the Commissioner must draw up terms of reference for each investigation before it is initiated. Having done so, the Commissioner must then take whatever steps they consider appropriate to ensure those most likely to be subject to the investigation are aware of the terms of reference.

104. The member considers that there should be a presumption of transparency in the carrying out of general investigations, with the default position being that such investigations are carried out in ‘public’, so that disabled people are aware of what and who is being investigated and what the findings of the investigation are. The member considers it important that there is an option for the investigation proceedings to be kept private and that the decision to do this should be at the discretion of the Commissioner where necessary or appropriate. An individual investigation would be conducted in private as the member considers this more appropriate in order to ensure the individual’s privacy is respected.

105. During the course of their investigation, the Commissioner may, with some exceptions, require any person to give evidence on any matter within the terms of reference of an investigation or to produce documents which have a bearing on the investigation. The member’s view is that this will ensure the Commissioner has sufficient authority to ensure the information required is provided in order to allow a full investigation to take place.

106. Aside from the parameters set out above, and any relevant legislative requirements such as data protection, it will be for the Commissioner to determine how the investigation will be carried out. It is noted, for example, that investigations carried out by the CYP Commissioner have focussed on writing to authorities, asking them for information. The Commissioner may choose to work in a similar way or may decide it is more appropriate to speak to such organisations in person.

What happens after an investigation?

107. At the conclusion of any investigation, the Commissioner must prepare a report containing the Commissioner’s findings in relation to the issue investigated and any recommendations made as a result of the findings. The report may include a requirement on a service provider to respond to a recommendation, within such a time period as the Commissioner reasonably requires, setting out what they have done or propose to do in response and if they do not intend to do anything, the reasons for that. The Bill contains provisions as to the publication of these reports and any responses to them.

108. The report may include recommendations but may not in of itself require action to be taken or changes to be made. The member’s view is that the report would be used to highlight, advocate for the rights of disabled people, and influence those in positions of power to make changes. One example would be the Parliament (most likely the relevant committee) taking action (for example by undertaking an inquiry or writing to the Scottish Government) as a result of the report. Another example would be the Commissioner meeting with the relevant Minister to discuss the recommendations made in the report and call for them to be implemented. The Commissioner may also undertake media work to highlight the findings and recommendations made as a result of any investigations.

Strategic plan, annual reports and other reports

109. While it will largely be at the Commissioner's discretion what they wish to report on and when they publish any such reports, the Bill places requirements on the Commissioner to publish a strategic plan every four years as well as an annual report. Both should relate to the exercise of the Commissioner's functions, as set out in this Bill.

110. Prior to publishing the strategic plan or any revision to the plan, the Commissioner must consult with the SPCB and any others such persons as the Commissioner considers appropriate. This may, for example, be disabled people's organisations.

Protection from actions of defamation

111. In line with other legislation relating to the creation of independent SPCB-supported commissioners, the Bill provides for protection from defamation. As such, any statement made to, or by, the Commissioner or a member of the Commissioner's staff⁷² in investigating or communicating with a person as part of the investigation is subject to absolute privilege. Any other statement made to, or by, the Commissioner (or the Commissioner's staff) is subject to qualified privilege.⁷³

ALTERNATIVE APPROACHES

112. The member notes that there are several existing commissioners funded by the Scottish Parliament Corporate Body and considers that new public bodies should only be established when necessary. The member therefore considered whether his policy aims of promoting and safeguarding the rights of disabled people could be achieved as effectively in another way. For example, he considered whether this could be achieved by strengthening existing functions and processes of bodies such as the SHRC or by creating a new post within the Scottish Government with specific responsibility for monitoring and reviewing the needs of disabled people.

113. The member also acknowledges all the work carried out by disabled person's organisations and considered whether calling for the Scottish Government to provide additional funding for such organisations would fulfil his goal of promoting and safeguarding the rights of disabled people. The member notes that it is for the Scottish Government to determine whether to increase funding to organisations who work with and for disabled people and acknowledges that, given current budgetary pressures, such funding may not be forthcoming.

114. The public consultation that the member ran on the role of the Commissioner strongly indicated that the independence of the Commissioner was important and that a commissioner should represent all disabled people. It was also considered important that the Commissioner's remit be focused on disabled people, rather than spread over, for example, multiple protected characteristics. Therefore, after careful consideration, the member determined that the alternative options outlined above would not fulfil his policy aim of creating a permanent independent advocate and champion for all disabled people.

⁷² This only applies when the person is working in their capacity as commissioner, or member of the Commissioner's staff.

⁷³ Absolute and qualified privilege are defined in [Defamation and Malicious Publication \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://legislation.gov.uk), accessed 8 January 2024.

115. Whilst the member was not convinced that there were credible alternative approaches to legislation to achieve his aims, he did consider policy options in relation to how the Disability Commissioner will function. For example, the member determined that the Commissioner should not be able to carry out investigations into family members or friends who provide care to a disabled person. The member made this choice as he does not consider it appropriate for such individuals to be subject to investigation and thus wishes to protect them from the scrutiny and loss of privacy that such an investigation may involve. The member also took the view that investigations into individuals should be held in private, while investigations into organisations should be held in public, with an option to be held in private if the Commissioner deems it appropriate to do so.

116. The member believes that it is in the public interest to conduct investigations into organisations in public in order to create transparency and ensure that disabled people are aware of what and who is being investigated and what the findings of the investigation are. He also notes precedent for taking evidence from organisations in public, for example as part of inquiries carried out by Parliamentary committees. He considers, however, that there may be more sensitivities involved in an investigation into an individual and that one person should not be subject to the exposure that such an investigation may bring.

CONSULTATION

117. On 11 May 2022, Jeremy Balfour MSP lodged a draft proposal for a member's bill in the following terms—

“A draft proposal for a Bill to establish a Disability Commissioner for Scotland.”

118. The draft proposal was accompanied by a consultation exercise. The consultation period ran from 12 May 2022 until 3 August 2022 and 207 responses were received.

119. Over half of all responses were from people with lived experience of disability. Just under a quarter of responses came from organisations, with a large majority of those coming from third sector organisations (82% of organisational responses). This was reflected in the content of responses, where people's first-hand experiences, and those of third sector organisations supporting disabled people, were evident throughout.

120. The vast majority (90%) of respondents were supportive of the proposal to establish a Disability Commissioner. There were similar levels of support expressed for the other elements of the proposed bill, including that the Commissioner should: cover all disabilities (92%), have a role in reviewing relevant laws and policies (93%) promote best practice and learn from service providers, key stakeholders and the third sector (89%) and encourage the involvement of disabled people and disabled persons organisations in the Commissioner's work (95%).

121. The array of challenges faced by disabled people was highlighted throughout responses, with the need for the Commissioner to have a full understanding of those challenges frequently referred to. Many respondents expressed the view that the Commissioner could play a valuable role in action as a “champion” and a “voice” for disabled people and expressed the need for the Commissioner for independent from Government and for their remit to be focused on the rights and needs of disabled people.

122. A number of responses also noted the work already being carried out by organisations working with and for disabled people. Further to this, it was suggested that caution was required in order to ensure that the work of the Commissioner did not overlap with or replicate the work of other public bodies such as EHRC and SHRC.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

123. An Equality Impact Assessment (EQIA) has been carried out and a summary of its findings is provided below. Following the Bill's introduction, the member in charge of the Bill will send a copy of the EQIA to the lead committee in order to assist its scrutiny of the Bill at Stage 1.

124. As highlighted earlier in the document, evidence suggests that disabled people are more likely to live in poverty, with Scottish Government research showing that families with at least one disabled member were more likely than families without a disabled member to live in relative poverty after housing costs.⁷⁴ The same research shows that disabled people are significantly more likely to experience food insecurity than non-disabled people (18% compared to 5%), rates of material deprivation are higher among disabled people and living costs are generally higher than for non-disabled people.

125. As noted earlier in the document, the employment rate is lower for disabled people than non-disabled people. In addition, a higher proportion of disabled people than non-disabled people leave school with little or no qualifications.⁷⁵

126. The Disability Commissioner's primary purpose would be to promote and safeguard the rights of disabled people in Scotland in order to work towards rectifying such inequalities. The member's view is that the Commissioner, in championing the rights of disabled people, would be able to influence change that would have a positive effect on the lives of disabled people in Scotland.

127. The Bill provides that the Commissioner would seek to involve disabled people in their work and to communicate in an inclusive way. This would ensure that everyone would be able to make their views known in order for the needs of disabled people to be prioritised in the Commissioner's work.

128. In terms of other protected characteristics, figures from 2017 demonstrate that women are more likely than men to be disabled. It is noted that disabled women may face specific challenges, with research undertaken by Engender and Inclusion Scotland stating, for example, that disabled women and girls are more than twice as likely to experience violence during their lifetimes than non-disabled women. The Engender research also noted that disabled women face

⁷⁴ [Poverty and Income Inequality in Scotland 2019-22 \(data.gov.scot\)](#), Scottish Government, published 23 March 2023, accessed 8 January 2024.

⁷⁵ [Scotland's Wellbeing - Measuring the National Outcomes for Disabled People \(www.gov.scot\)](#), accessed 8 January 2024.

discrimination regarding their reproductive and parenting choices, with some women noting that rather than receiving support in parenting, they lived in fear of their children being taken away from them because they are disabled.⁷⁶

129. As noted earlier in the document, older people are more likely to be disabled. Older disabled people may be more likely to have mobility issues, preventing them from carrying out day-to-day tasks. Further to this, older people may be less likely, or less able, to access the internet. A 2023 briefing by Age UK reports⁷⁷ that many older people are not accessing the internet, with around 2.7 million people aged over 65 (around a fifth of people of that aged group) in the UK not accessing the internet.⁷⁸ Further to this, it reported that 3.7 million people aged over 65 had never used the internet. Being unable to access the internet may have an impact on older people with disabilities. For example, if they have mobility issues, it may be helpful to order groceries online to be delivered. Another example would be if a person with a learning disability found it difficult to go out and meet new people, they may find it easier to join an online club and socialise online.

130. Some of the discrimination experienced by disability people may be compounded when the person in question has an additional protected characteristic. For example, a LGBT+ disabled person may face discrimination and abuse due to their disability and their sexuality.

131. The member's view is that the Commissioner should advocate for, and promote and safeguard the rights of, all disabled people and in doing so take account of any intersecting protected characteristics.

Human rights

132. The Scotland Act 1998 places a duty on the Scottish Ministers to act in accordance with the European Convention on Human Rights (ECHR). It is the member's view that all of the Bill's provisions are fully compatible with Convention rights.

133. The member's view is that the Bill, through the creation of the Commissioner, will contribute positively to the realisation of disabled people's rights under the European Convention on Human Rights including:

- a) Article 1 - that the rights in the Convention shall be secure to everyone – given that the Commissioner's remit will include promoting and safeguarding the rights of disabled people.
- b) Article 2 – the right to life – which requires states to take appropriate steps to safeguard life, including those whose care is entrusted to the care of the state, for example in a care home.

⁷⁶ Gender Matters in Disability briefing, Engender and Inclusion Scotland, [GM \(engender.org.uk\)](https://engender.org.uk), accessed 8 January 2024.

⁷⁷ [Offline and Overlooked | Campaigns | Age UK](#), accessed 11 January 2024

⁷⁸ [policy-briefing---facts-and-figures-about-digital-inclusion-and-older-people.pdf \(ageuk.org.uk\)](#), Age UK, accessed 8 January 2024.

- c) Article 3 – the prohibition of inhuman or degrading treatment – which for example covers the conditions in which an individual is detained.
- d) Article 5 – right to liberty and security – including having procedural safeguards in place to protected against arbitrary deprivation of liberty.
- e) Article 8 – the right to respect of private and family life – given that this right can include matters such as legal capacity and medical treatment.
- f) Article 14 – prohibition of discrimination when taken together with other rights in the Convention.
- g) Article 1 of Protocol 1 – protection of property – which can include non-contributory benefits.
- h) Article 2 of protocol 1 - right to education – for example, through ensuring that disabled people enjoy their right to education on an equal footing with others.

134. Furthermore, the Bill includes specific provision that the Commissioner have regard to the UNCRPD and encourage others to have regard to principles within the UNCRPD. The role of the Commissioner will therefore support a human rights-based approach to decision-making in relation to disabled people.

135. As noted earlier in the document, the Scottish Government has committed to introducing a new Human Rights Bill in the current parliamentary session. This would incorporate the UNCRPD (and other human rights instruments) into Scots law.

136. The investigatory powers of the Commissioner, including the powers regarding evidence gathering (documentation in person) may concern sensitive information about an individual's disability and health. The privacy of such information is an important element of article 8 right to private and family life. For this reason, individual investigations are conducted in private and there is the option for general investigations to also be conducted in private when necessary and appropriate. Furthermore, in relation to the publication of investigation reports and any responses to them and will be subject to data protection legislation. The publication of an individual response is at the Commissioner's discretion and in relation to responses to reports, the Commissioner must consider the appropriateness of publication.

Island communities

137. The Bill's provisions will apply equally to all parts of Scotland. The Commissioner will have to take account of the needs of people living in remote, rural and island communities, communicate with them and advocate on their behalf.

138. The Commissioner may need to take steps to ensure that they can have face-to-face engagement with people in island communities. In addition, it may be that disabled people in such communities have particular issues that they would wish the Commissioner to highlight, for example, if a disabled person is reliant of public transport and the transport is less frequent or reliable than in more populous areas, if or there are less services available to help disabled people on islands.

Sustainable development

139. The principles of sustainable development include human rights and wellbeing, equalities and equity and participation and accountability. In considering these and the other principles of sustainable development, the member is satisfied that the Bill can be delivered sustainably.

140. The aim of the Bill is to improve the wellbeing of disabled people by creating a disability commissioner, whose role is to ensure that disabled people's rights are safeguarded and promoted. As part of their role, the Commissioner would review laws and policies, both at a national and local authority level, to ensure that they provide best practice for all disabled people.

141. The Commissioner would represent and promote the rights of disabled people, helping their views to be heard and for them to engage in decision-making on matters that affect them. As part of their role, the Commissioner would actively engage with disabled people to ensure that their voices are heard and represented in the actions that the Commissioner takes. In doing so, the Commissioner would be required to communicate in an inclusive way, paying particular attention to disabled people who do not have other adequate means by which they can make their views known.

142. In promoting the rights of disabled people, it is hoped that the Disability Commissioner could affect changes which would have a long-term positive impact on disabled people by, for example, working to lessen the challenges that they experience. This in turn, would have a positive impact on society as a whole.

143. Other principles of sustainable development include environmental considerations. As noted earlier in this memorandum, some disabled people may need to use high levels of home energy in order to keep their homes sufficiently warm or to charge medical equipment. One possible example of the work of the Commissioner could be to highlight disabled's people needs in this regard.

This document relates to the Disability Commissioner (Scotland) Bill (SP Bill 43) as introduced in the Scottish Parliament on 8 February 2024

DISABILITY COMMISSIONER (SCOTLAND) BILL

POLICY MEMORANDUM

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