



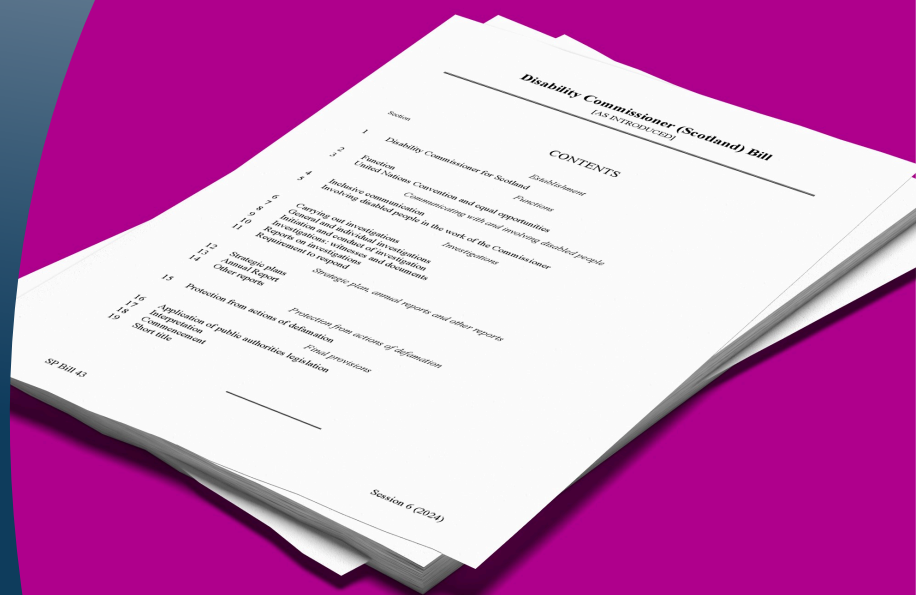
SPICe Briefing

Pàipear-ullachaidh SPICe

Disability Commissioner (Scotland) Bill

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The Bill aims to establish an independent Disability Commissioner for Scotland whose primary purpose will be to promote and safeguard the rights of disabled people. The Commissioner will be an advocate for disabled people and have powers to review law and policy, promote best practice, and undertake investigations.



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Summary

The Disability Commissioner (Scotland) Bill is a Member's Bill, introduced by Jeremy Balfour MSP on 8 February 2024.

The aim of the Bill is to establish a Disability Commissioner for Scotland, whose primary purpose will be to promote and safeguard the rights of disabled people. The intention is to provide a champion for disabled people, to help address barriers experienced, such as in education, housing and employment. It also recognises the impact of the Covid-19 pandemic and the cost of living crisis on disabled people.

The approach taken has been modelled on the Children and Young People's Commissioner Scotland.

The general functions of the Commissioner will be 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
- promote best practice by service providers
- promote, commission, undertake and publish research on matters relating to the rights of disabled people.

The definition of 'disability' and 'disabled person' will have the same meanings as in the Equality Act 2010.

The Commissioner will also be required to:

- communicate with disabled people in range of accessible ways and in accessible formats
- involve disabled people in their work, including consultation with disabled people and disabled people's organisations.

The Commissioner will have the power to carry out investigations on the extent to which a service provider has regard to the rights of disabled people. They will be able to write reports and make recommendations, and can publicise any response or failure to respond. However, there is no enforcement power.

The Commissioner will be independent from the Scottish Government and funded by the Scottish Parliament Corporate Body.

In response to the Member's consultation, the vast majority of respondents were supportive, or partially supportive, of the proposal to establish a Disability Commissioner. The main reasons for support focus on having a champion who can address the challenges faced by disabled people. Many respondents were keen that the Commissioner must recognise that disabled people are not a homogeneous group and will need to take account of different experiences, including people with 'hidden' or 'fluctuating' conditions. The limited opposition focused on the perceived costs and that more emphasis should be

placed on people with a learning disability because they experience the greatest level of exclusion and discrimination among disabled people.

There is also a wider context to consider:

- The Scottish Government proposal for a Learning Disabilities, Autism and Neurodiversity Commissioner, and what it would mean to also have a Disability Commissioner for all disabled people.
- The commission landscape covering equality and human rights in Scotland. This is already considered to be crowded, with a range of existing commissions/ commissioners that protect the rights of disabled people.
- The whole commissioner landscape in Scotland. This is a complex landscape that has evolved over time and comes with financial costs. The Finance and Public Administration Committee is currently conducting an [inquiry](#) on the matter.

The Scottish Government has indicated that its position on the Bill is neutral, but has also said "it is our position that the Bill does not meet the Scottish Government's required threshold to warrant the creation of a new body."

Introduction

The [Disability Commissioner \(Scotland\) Bill](#) is a Member's Bill, introduced by Jeremy Balfour MSP on 8 February 2024.

The aim of the Bill is to 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.

The Equalities, Human Rights and Civil Justice Committee has been designated lead Committee on the Bill. It issued a [call for views that ran between 28 March 2024 and 17 May 2024](#). There are 100 [published responses](#) which the Committee will consider throughout Stage 1.

Background

Jeremy Balfour MSP lodged a draft proposal for the Bill on 11 May 2022. A consultation on the Proposed Disability Commissioner (Scotland) Bill ran from 12 May 2022 to 3 August 2022.¹ The foreword of the consultation summarises the Member's vision for a Disability Commissioner.

The consultation document sets out the barriers faced by disabled people, who, according to the document, represent around a fifth of Scotland's population - one million people. The document outlines that these barriers are experienced in a range of areas, including education, housing, welfare and employment. Statistics are used to show that disabled people, when compared with non-disabled people, are less likely to hold any formal qualification or to be in work, and are more likely to live in income poverty.

Reference is also made to the experiences of disabled people during the Covid-19 pandemic and the impact of lockdown measures. These have been widely reported to have exacerbated existing inequalities and barriers experienced by disabled people.

Taking this all into account, Jeremy Balfour calls for a Disability Commissioner that would be a "champion of disabled people to help combat the many inequalities they face daily and which have been highlighted by the COVID-19 pandemic."

The intention is that a Disability Commissioner would:

- follow a similar model as that of the [Children and Young People's Commissioner Scotland](#)
- represent disabled people who meet the disability definition in the Equality Act 2010
- be independent of the Scottish Government, and be funded by the Scottish Parliament Corporate Body (SPCB)
- have a legal framework to allow for them to promote and safeguard the rights of all disabled people
- advocate on behalf of disabled people
- carry out investigations on devolved matters, to ensure the rights of disabled people are respected and upheld
- work with disabled people and involve them in policy and decision making
- work with existing public bodies and organisations where there might be some cross-over of powers, "but with the Disability Commissioner being the first port of call and a champion of Disabled rights".

A final proposal for the Bill was lodged on 6 December 2022. A proposal for a Member's Bill must achieve support from at least 18 other MSPs, from at least half the number of political parties in the Parliamentary Bureau.² The proposal achieved the support of 41 Members; 27 from the Scottish Conservative and Unionist Party, 11 from Scottish Labour, and two from the Scottish Liberal Democrats.

On the same day, a summary of the consultation responses was published.³ There were 207 responses, 48 from organisations and 158 from individuals, with 90% of respondents indicating support for the proposal of a Disability Commissioner. Views raised in the consultation responses are considered in more detail [below](#).

Legislative Context

This section provides an overview of the legislative context for the Bill.

A [range of Scottish legislation](#) protects the rights of disabled people in specific areas. For example:

- the Transport (Scotland) Act 2019 banned pavement parking, double parking, and parking at dropped kerbs to improve access for disabled people
- the Social Security (Scotland) Act 2018 set up the principles, operational and administration functions, rules, and accountability of the Social Security Scotland agency and its new and devolved disability and low-income benefits.

Responsibility for disabled people in Scotland depends on whether the subject matter is reserved or devolved. If the subject matter is about health, education or housing, it is devolved to Scotland. If it is about employment or discrimination, it is reserved to the UK Government under Schedule 5 of the Scotland Act 1998.

Equality Act 2010

The UK [Equality Act 2010](#) (the Equality Act), which is mainly reserved, brought together over 100 separate pieces of legislation into a single Act to create a legal framework which protects the rights of individuals and which advances equality of opportunity for all. It extends across the whole of Britain and provides protection against discrimination to nine '[protected characteristics](#)', including disability.

The Equality Act provides protection for people with protected characteristics across employment, education, and goods, services and public functions. This means, for example, that it is [disability discrimination](#) to treat a disabled person less favourably compared with a non-disabled person, or for them to be put at a disadvantage for a reason related to their disability. There is also a positive duty on employers, service providers and education providers, to make 'reasonable adjustments' for disabled people to make sure they do not face substantial disadvantage in comparison to someone who is not disabled.

The [Public Sector Equality Duty \(PSED\)](#) requires all public authorities, and any organisation carrying out functions of a public nature, to consider the needs of protected groups, for example, when delivering services and in employment practices.

The PSED requires public bodies to have due regard to the need to:

- eliminate discrimination, harassment and victimisation
- advance equality of opportunity between different groups
- foster good relations between different groups.

There are also a set of specific equality duties in Scotland, which aim to help public authorities improve their performance on the general duties.

It is the role of the Equality and Human Rights Commission to monitor and enforce the Equality Act 2010.

The Member proposes that the Bill will use the Equality Act definition of disability.

Equality Act: definition of disability: Section 6 defines disability as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

Schedule 1, and associated regulations, provide further detail on the meaning of the definition:

- **'Long-term'** means at least 12 months.
- **'Substantial'** means "more than minor or trivial" (section 212 (1)).
- **Normal day-to-day activities** - this is not defined in the Act. UK Government guidance ⁴ suggests it would include things people do on a regular basis, such as shopping, reading and writing, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks. There are also work-related activities, such as interacting with colleagues, following instructions, using a computer, and preparing written documents.
- Three medical conditions come under the definition of disability automatically upon diagnosis: **Cancer, HIV infection, and Multiple Sclerosis (MS)**.
- **Progressive conditions** - conditions which have effects that increase in severity over time, fall within the definition, if it is likely to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities in the future. The effect does not need to be continuous or substantial, and therefore covers conditions that fluctuate over time, for example, dementia or motor neurone disease.
- A person is "deemed to have a disability," and hence to be a disabled person, "where that person is certified as blind, severely **sight impaired**, sight impaired or partially sighted by a consultant ophthalmologist." ⁵ This does not apply to sight impairments that can be corrected with glasses or contact lenses.
- **'Severe disfigurement'** is considered to be a disfigurement that has a substantial adverse effect on the ability of the person to carry out normal day-to-day activities. This does not apply to tattoos or piercings.
- **People who have had a disability in the past** also have protection, as long as they met the disability definition in the past. There are some exceptions in relation to transport.
- Where **a child under the age of six** has an impairment, they are to be treated as if that impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities where it would affect the ability of a person aged 6 years or over to carry out normal day-to-day activities.
- There are also **exclusions to the definition of disability** which include: hay-fever, addictions to substances such as alcohol and nicotine, a tendency to set fires, a tendency to steal, a tendency to physical or sexual abuse of other persons, exhibitionism, and voyeurism.

United Nations Convention on the Rights of People with Disabilities (UNCRPD)

The purpose of the UNCRPD is to promote and protect the full and equal enjoyment of all human rights and fundamental freedoms of disabled people, and to promote respect for their dignity.

The UNCRPD refers to 'persons with disabilities' rather than disabled people. The definition used differs with the Equality Act definition of disability because it refers to barriers that may hinder participation in society:

UNCRPD: definition of persons with disabilities ...those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others. (Article 1)

The UNCRPD⁶ was ratified by the UK 2009. Like other international human rights treaties, it does not give individuals legal rights in the UK courts. While the UK Government has pledged to make sure domestic policies comply with UN treaties, people normally cannot take public bodies to court if their legal rights under a UN treaty are breached in some way.

Potential Scottish Human Rights Bill

The Scottish Government has had plans to introduce a Scottish Human Rights Bill since the end of session 5, March 2021.⁷

The aim behind the Bill is to introduce a new human rights framework for Scotland by incorporating four United Nations Human Rights treaties into Scots Law. These are the:

- [International Covenant on Economic, Social and Cultural Rights](#)
- [United Nations Convention on the Rights of Persons with Disabilities \(UNCRPD\)](#)
- [Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\)](#)
- [International Convention on the Elimination of All Forms of Racial Discrimination \(CERD\)](#)

A consultation on the Bill was launched on 15 June 2023 and closed on 5 October 2023.⁸ The Programme for Government 2023-24 said that the Bill would be introduced in the coming year - 2023-24.⁹

Analysis of the consultation responses shows broad overall support from those who responded for a Scottish Human Rights Bill, especially where the rights of specific groups, such as disabled people, can gain further protection.¹⁰

However, there has been a change in government leadership, and it is not currently clear when a Scottish Human Rights Bill will be introduced. The new First Minister, John Swinney MSP, had indicated he will set out his Programme for Government before the summer recess,¹¹ but these plans have now been delayed by the subsequent announcement of a UK election on 4 July.¹²

Commission/Commissioner landscape

There is currently a broader discussion on commissions and commissioners. This section of the briefing explains the role of a commission or commissioner, and the current commissioner landscape in Scotland, and what the current issues are.

What is a commission or commissioner?

A commission or commissioner may be created to provide a voice to under-represented groups such as children, or to focus on a particular issue such as ethical standards.¹³

A **commission** is usually a public body that is independent from government, and they will have a role in scrutinising a particular issue or protect the rights of a particular group of people.

A **commissioner** is an individual, independent from government, who will advocate for a certain group or issue and will be supported by a team of staff.

Sometimes these models can be combined, where commissions have a group of commissioners who serve on their Board.

The roles and responsibilities of commissions or commissioners are usually set out in legislation, and powers can vary.

Parliamentary commissioners are appointed by the Scottish Parliamentary Corporate Body (SPCB) with the approval of the Scottish Parliament. While the officeholders are independent in the functions they undertake, they are accountable to and report directly to the Scottish Parliament.¹⁴

A commissioner may have some cross-over with other bodies:

- An ombudsman is an individual or organisation appointed to look into complaints about organisations and help to resolve disputes.
- A regulatory body is an organisation appointed by the government to establish and/ or ensure compliance with standards.
- An inspectorate is an organisation that ensures that official regulations about places or activities are obeyed.

Finance and Public Administration Committee (FPAC) inquiry

The Scottish Parliament's Finance and Public Administration Committee (FPAC) is currently conducting an inquiry on [Scotland's Commissioner Landscape: A Strategic Approach](#).

To assist the inquiry, SPICe has published a briefing on [Scotland's Commissioner Landscape](#). This refers to a 2006 report on Accountability and Governance by the former Finance Committee in Session 2, which recommended that MSPs should follow specific criteria when deciding whether to propose the creation of a Commissioner:¹⁵

Clarity of Remit: a clear understanding of the office-holder's specific remit.

Distinction between functions: a clear distinction between different functions, roles and responsibilities including audit, inspection, regulation, complaint handling, advocacy.

Complementarity: a dovetailing of jurisdictions creating a coherent system with appropriate linkages with no gaps, overlaps or duplication.

Simplicity and Accessibility : simplicity and access for the public to maximise the 'single gateway'/'one-stop-shop' approach.

Shared Services: shared services and organisational efficiencies built in from the outset.

Accountability: the establishment of clear, simple, robust and transparent lines of accountability appropriate to the nature of the office.

For the inquiry, 'commissioner' means any office holder (Commission, Ombudsman or Commissioner) whose terms and conditions of appointment and annual budget are set by the SPCB. The inquiry is focused on the evolving commissioner landscape in Scotland, and is also seeking:

- clarity around the different types of Commissioners and their relationships with government and parliament
- to establish the extent to which a more coherent and strategic approach to the creation and development of Commissioners in Scotland is needed and how this might be achieved
- to provide greater transparency to how the governance, accountability, budget-setting, and scrutiny arrangements work in practice, and whether any improvements are required, and
- to identify where any lessons might be learned from international Commissioner models.

A [summary of the written submissions to FPAC](#) has been published by SPICe.

What is the current commissioner landscape?

The answer to this question depends on what type of commission/commissioner is being considered.

FPAC is focusing on those appointed by the SPCB. There are currently seven 'officeholders' directly responsible to the Scottish Parliament.

- Commissioner for Ethical Standards in Public Life in Scotland
- Scottish Biometrics Commissioner
- Scottish Commissioner for Children and Young People

- Scottish Human Rights Commission
- Scottish Information Commissioner
- Scottish Public Services Ombudsman, and
- Standards Commission for Scotland

The total budget for commissioners directly responsible to Parliament in 2023/24 was £16.6 million. The range for individual organisations is between £0.3 million and £6.7 million.

FPAC is also aware of the future landscape and has referred to:

- The [Patient Safety Commissioner for Scotland Act 2023](#). The [Bill was passed](#) on 27 September 2023 and received Royal Assent on 7 November 2023. The Commissioner is due to be appointed in 2024.
- The [Victims, Witnesses, and Justice Reform \(Scotland\) Bill](#), currently at Stage 2, which seeks to establish a Victims and Witnesses Commissioner.

In addition to the proposal for a Disability Commissioner, FPAC also refer to two other proposals from Members:

- [Older People's Commissioner](#) - A draft proposal for a Member's Bill to establish an independent commissioner to promote and safeguard the rights and interests of older people. Lodged by Colin Smyth MSP on 23 June 2023. The consultation closed on 23 October 2023.
- [Wellbeing and Sustainable Development Commissioner](#) - A draft proposal for a Member's Bill to ensure policy development and implementation by public bodies is in line with principles of sustainable development and wellbeing by introducing a duty for public bodies to promote these principles and establishing a Commissioner for sustainable development and wellbeing. Lodged by Sarah Boyack MSP on 13 December 2022. Final proposal was lodged on 7 November 2023 and has the support of 21 MSPs, and therefore the Member has the right to introduce the Bill.

And there are two further commissions/commissioners under consideration by the Scottish Government:

- Future Generations Commissioner - The Scottish Government sought views on a commissioner in its consultation on the Wellbeing and Sustainable Development Bill. ¹⁶ This ran from 6 December 2023 until 14 February 2024.
- Learning Disability, Autism and Neurodiversity Commissioner / Commission. The Scottish Government sought views on a commissioner / commission in its consultation on the Learning Disabilities, Autism and Neurodivergence Bill. ¹⁷ This ran from 21 December 2023 until 21 April 2024.

The SPICe Briefing to support the FPAC inquiry provides some insight into the commissioner landscape in Scotland, for example:

- The commissioner landscape is complex - not just in Scotland, but in the UK and globally. This is due to a range of factors such as diverse historical contexts, different

administrative powers and political cultures.

- Commissioner remits and budgets have increased over time in order to respond to different events and pressures.
- The establishment of new commissioners in Scotland might add to the complexity in an already crowded landscape.

The Commissioner landscape on equality and human rights

The SHRC has considered a range of calls for new commissions/commissioners and what this means for the human rights landscape in Scotland.¹⁸ In addition to the proposals above, it notes there have been calls for:

- Women's Commissioner - In 2020, the National Advisory Council of Women and Girls called for the SHRC to appoint a Commissioner focused on the rights of women and girls.¹⁹ The SHRC did not support the proposal. As a National Human Rights Institution (NHRI), the SHRC must comply with the [Paris Principles](#), a set of standards that require an NHRI to have a broad mandate to promote and protect all human rights. Appointing a commissioner with a specific mandate could jeopardise its status as a NHRI.²⁰
- LGBT (Conversion Practices) Commission - This was proposed in 2020 by the Expert Advisory Group on Ending Conversion Practices.²¹ However, the Scottish Government's consultation on ending conversion practices, which closed on 2 April 2024, does not mention a commission.²²
- Commissioner for Violence Against Women and Girls - This was recommended by the Independent Strategic Review of Funding and Commission of Violence Against Women and Girls Services, in June 2023.²³ The [Equally Safe Strategy](#) has been refreshed and does not mention a commission; however, the Equally Safe Delivery Plan is due to be published in 2024.

The SHRC identifies some common themes as to why a commission/commissioner might be called for. These include:

- To fill an **implementation gap** between policy and legislation - to give commission/ers a role in securing implementation.
- The need for a **champion** - someone who is 'visible' and can show an issue is important.
- The **dissatisfaction with accountability mechanisms** - for example, with the difficulty in accessing remedies when there are potential breaches of human rights.
- A **perceived 'easy win' for government** - that it is seen as a first step or easier win than legislative reform or policy change.
- The **influence of comparative policy and new public bodies elsewhere in the UK** - the general trend of following other jurisdictions in creating particular legislation or practices that have been presented as having had positive impact elsewhere in the United Kingdom.

- **Lack of awareness of the SHRC and the role of NHRIs** (National Human Rights Institutions) - many of the proposals for commissions/ers have not commented on the SHRC and its current powers.

The view of the SHRC is that all these calls for various commission/commissioners is evidence of an "unsatisfactory accountability landscape" in Scotland. As an existing public body with a role to promote and protect human rights in Scotland, it will "now seek to explore the SHRC's current, and potential future role, in improving this position."

Research commissioned by the Scottish Government considered the role of commissions and commissioners in relation to a Learning Disability, Autism and Neurodiversity Commissioner or Commission.¹³ The research conducted interviews with existing commissions/commissioners. This is of particular relevance to this Bill because it considers commissions and commissioners with powers to protect human rights, these include:

- - Role is to promote awareness, understanding and respect for all human rights to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights.
- [The Mental Welfare Commission for Scotland](#) (MWCS) - accountable to Scottish Ministers rather than the Scottish Parliament - Role is to protect and promote the human rights of people with mental illness, learning disabilities, dementia and related conditions. Dual role of looking into individual situations where an incident has occurred in mental health and learning disability services, and also working systematically to influence and improve law and policy to help safeguard people and improve services.
- [Children and Young People's Commissioner for Scotland](#) (CYPCS) - Role is to promote awareness, understanding and respect for all children and young people in Scotland, and to encourage best practice.
- - Role is to promote equality and diversity, enforce equality laws and promote and protect human rights by encouraging good practice and promoting mutual respect – across Great Britain.

Overall, the research found 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. A key issue was that a new commissioner must avoid duplication with 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 organisations which champion disabled people
- better resourcing existing commissions and commissioners for human rights and equality – to ensure better compliance with existing rights
- having champions and advocates within public bodies
- supporting good practice through standards, guidance and practical tools – which could sit with another body rather than a commissioner

- investing in co-production of policy and practice with people with autism, learning disability and neurodiversity.

Disabled People in Scotland

Disabled people often face barriers in everyday life. These can affect access to all areas of life, including education, employment and housing. This section refers to data and research to highlight the different experiences between disabled people and non-disabled people in some key areas.

It is estimated that 26% of all people in Scotland are disabled (based on the disability definition in the Equality Act 2010).²⁴

The first results of Scotland's Census 2022 have been published, which show the population of Scotland was estimated to be 5,436,600 on Census Day 2022.²⁵ This is the largest population ever recorded in Scotland. The data also shows Scotland's ageing population, with over one million people aged 65 and over (1,091,000). This is over a quarter of a million higher than the number of people under 15 (832,300). The number of people in older age groups (65 plus) increased by 22.5% since 2011. This is important because the proportion of adults with a long-term limiting mental or physical health condition or disability is increasing as the population ages.

Census 2022 information on the disabled population is not due to be published until September 2024.²⁶

A useful resource for statistics on equality groups is the Scottish Government's [Equality Evidence Finder](#). It provides evidence by equality and policy area based on statistics and research. It is not clear how up to date the tool is, but where possible, more recent data has been sourced for this section.

The **prevalence of disability** varies with age and by sex.

Data from the Scottish Health Survey in 2021²⁷ shows that around a third of adults (32%) had a long-term limiting mental or physical health condition in 2017; 34% of women were disabled and 29% of men were disabled.

The same data shows that 10% of children had a long-term limiting mental or physical health condition or disability in 2017; 10% of girls were disabled and 11% of boys were disabled.

Employment

The employment rate for disabled people has been consistently lower than the employment rate for non-disabled people.²⁸

The employment rate for disabled people aged 16 to 64 was estimated at 54.4% in October 2022 to September 2023. This was significantly lower than the employment rate for non-disabled people which was 83.1%.

The disability employment rate gap is the difference between the employment rates for disabled and non-disabled people aged 16 to 64. It has gradually decreased from 38.2 percentage points (pp) in October 2013 to September 2014 to 28.7 pp in October 2022 to September 2023.

The Economy and Fair Work Committee is currently undertaking an inquiry on the [Disability employment gap](#).

Education

Pupils with a recorded Additional Support Need (ASN) are less likely to achieve [SCQF](#) (Scottish Credit and Qualifications Framework) Levels 4 to 6 or better than pupils without an ASN. Similarly, pupils who are declared or assessed disabled are less likely to achieve SCQF Levels 4 to 6 or better than pupils who are not. In both cases, the gap is wider at higher SCQF levels.²⁹

School leavers in 2021/22 with an Additional Support Need (ASN) were less likely to be in a positive initial destination (93%) than leavers without a recorded ASN (97.3%). This result is consistent with previous years. These statistics relate to leavers from mainstream schools and special schools.³⁰

Of pupils with ASN:

- 25.3% went on to higher education, compared with 51% of those without ASN.
- 36.2% went on to further education, compared with 18.8% of those without ASN.
- 5.2% went on to training, compared with 1.5% of those without ASN
- 24.2% went into employment, compared with 25.4% without ASN

Poverty

Poverty rates remain higher for households in which somebody is disabled compared to those where no-one is disabled. The gap has remained steady over the last few years.

In 2020-23, the relative poverty rate after housing costs for people in households with a disabled person was 24% (560,000 people each year). This compares with 18% (560,000 people) in a household without disabled household members.³¹

Social Security

The Scottish Government continues to roll out new benefit payments; under powers that were devolved in 2016. This includes the Adult Disability Payment which replaces the UK Government's Personal Independence Payment and the Child Disability Payment which replaces the UK child Disability Living Allowance. Pension Age Disability Payment which replaces the UK Attendance Allowance is due to start later this year.

As of 31 January 2024 there were 192,575 in receipt of Adult Disability Payment. Of these, 83,190 were new applications and 109,385 had transferred from the Department of Work and Pensions.³²

As of 31 March 2024 there were 80,590 children and young people in receipt of Child Disability Payment. Of these, 36,880 were new applicants and 43,710 had transferred from the Department of Work and Pensions.³³

Culture

In 2019, cultural attendance (visiting a cultural event or place) was lowest among adults

with a physical or mental health condition that caused long term major reduced daily capacity (52% compared to 87% attendance for those with no condition). For those whose condition caused minor reduced daily capacity, the attendance rate was 76%, and for those whose condition caused no reduced daily capacity, the attendance rate was 85%.³⁴

Discrimination

In 2019, adults with a long-term limiting physical/mental health condition were more likely to have experienced discrimination in the previous 12 months (12%) compared to adults without any health conditions (6%).³⁴

Hate crime

The total number of charges reported containing at least one element of hate crime was 5,738 in 2022-23, 2% fewer than in 2021-22.³⁵

The number of disability aggravated charges increased by 3% to 722 in 2022-23. This is the highest number of charges reported since the legislation creating this aggravation came into force in 2010 and follows an increase of over 50% in the number of charges reported in 2021-22 compared to 2020-21.

Impact of the Covid-19 pandemic and cost of living crisis

In addition to the barriers faced by disabled people in everyday life, the Policy Memorandum to the Bill reflects on the impact that Covid-19 and the cost of living crisis has had, and continues to have, on the lives of disabled people in Scotland.³⁶

The Scottish Human Rights Commission (SHRC) has written a joint report with other GB Commissions to the United Nations, warning of a crisis for disabled people's rights.³⁷

As has often been reported, it states that the "Covid-19 pandemic highlighted and exacerbated existing inequalities experienced by disabled people. Disabled people were at a greater risk of death from COVID-19 compared to non-disabled people. They also experienced greater barriers to full and equal participation in society, including through unequal access to healthcare, to public health information in accessible formats and to vital food and medicines."

For Scotland, the Covid-19 pandemic had a "profound impact on social care delivery in Scotland." According to the report, this led to significant gaps in the realisation of human rights for people who rely on such support, including both users and unpaid carers. Reference is also made to the reduction/removal of care packages during the pandemic, and that the challenges of reducing budgets and increasing demand continued to worsen at a pace exacerbated by the pandemic.

The report states that the cost of living crisis and high inflation have added additional pressures. Disabled people and their households are particularly affected, because they are more likely to live in poverty and to face higher costs related to their conditions or impairments.

Overview of issues

This section provides an overview of issues on the Bill.

It refers to:

- The summary of consultation responses on the Disability Commissioner (Scotland) Bill. ³
- The FPAC Inquiry on [Scotland's Commissioner Landscape: A Strategic Approach](#).
- The SHRC report on calls for new commissions/commissioners and what this means for the human rights landscape in Scotland. ¹⁸
- A letter from the Scottish Government to the Equalities, Human Rights and Civil Justice Committee. ³⁸

Views on the proposal for a Disability Commissioner

There were 207 responses to the Member's consultation on a Disability Commissioner (Scotland) Bill. Of these, 67% were from individuals with lived experience of disability, just under a quarter came from organisations, with a large majority of these coming from third sector organisations.

The vast majority (90%) of respondents were supportive or partially supportive of the proposal to establish a Disability Commissioner. There were similar levels of support for other areas of the Bill.

Reasons for support included:

- The challenges faced by disabled people, who are not given enough respect or support, and therefore a Commissioner is necessary and overdue.
- There would be a positive impact in having a Commissioner to promote the rights of disabled people. Disabled people would have "a voice", "a champion", and someone to "fight their corner". It would promote an inclusive society.
- Without legislation, the needs of disabled people would not be given the focus and attention that is required.
- It is felt by some that existing legislation that relates to disabled people is not fully enforced by councils or public bodies.
- While some third sector organisations review laws and policies, this is often done in a piecemeal way, with the implication that the Disability Commissioner would take a more consistent approach.

Considerations included:

- The Commissioner should be independent, to be able to review law, policy and practices and carry out investigations.

- The Commissioner must recognise that disabled people are not a homogeneous group and will need to take account of different experiences, including people with 'hidden' or 'fluctuating' conditions.
- Different views on the definition of disability. The Equality Act definition is often viewed as the 'medical model' (which suggests people are disabled due to their condition or impairments), whereas a 'social model' (which suggests people are disabled by social, attitudinal and physical barriers),³⁹ like the UNCRPD could be more inclusive.
- More work needs to be done to encourage cultural change to promote and protect the rights of disabled people.
- A reviewing role may not go far enough if the Commissioner does not have power to effect real change.
- Some concerns about what might constitute 'best practice' and how it might be promoted so that it makes a difference.
- It is vital that the Commissioner engages with disabled people and relevant organisations. This will be necessary to highlight important issues and to represent all disabled people.
- There was a view that the Commissioner should have the power to investigate public bodies and service providers in order to successfully perform their role. However, there was some concern that without enforcement powers then this work would be "toothless".

Reasons for opposition included:

- The perceived cost of establishing a commissioner, and ongoing administrative costs.
- More emphasis should be placed on people with a learning disability because they experience the greatest level of exclusion and discrimination among disabled people.

Two organisations indicated a neutral view on the proposal - the Equality and Human Rights Commission (EHRC) and the Law Society of Scotland.

The EHRC set out the duties and powers in the Equality Act 2006, which established the EHRC, and the legal framework to tackle discrimination in the Equality Act 2010. It made the following points:

- It is essential that a new Disability Commissioner complements, and does not duplicate, existing roles and functions.
- Not persuaded that legislation is necessary, given the existing legal framework and associated institutions.
- The EHRC covers disability as defined in the Equality Act 2010, and it would be open to the Scottish Parliament to apply a broader definition in this context.
- The Scottish Government has committed to the introduction of a Learning Disabilities, Autism and Neurodiversity Commissioner. This would appear to overlap with a proposal for a Disability Commissioner.

- The EHRC and SHRC are both required to monitor legislation, and therefore there is significant scope for overlap, and potentially providing different or even conflicting advice.
- The need for the Disability Commissioner to understand the intersectionality between different characteristics such as disability and ethnicity or sex.

The Law Society of Scotland made the following points:

- The consultation is focused on the definition of disability in the Equality Act 2010, which is reserved. It is suggested that Scottish proposals should be focused on the UNCRPD because it has a broader concept of disability, and there is an intention to incorporate the UNCRPD into Scots law.
- Scotland already has a crowded landscape of commissioners and organisations which do, could or should discharge functions relevant to the purposes of the Bill. There is also the proposal for a Learning Disabilities, Autism and Neurodiversity Commissioner.
- The Bill "could become a recipe for confusion, overlapping responsibilities, and inefficient use of resources."
- It recommends a clear policy decision as to what the future landscape should look like, and how it should fulfil the requirements of the UNCRPD in relation to all disabled people.

Wider context

In addition to considering whether to create a Disability Commissioner for Scotland there are wider issues, [discussed above](#), concerning:

- The Scottish Government proposal for a Learning Disabilities, Autism and Neurodiversity Commissioner.
- The commission landscape covering equality and human rights in Scotland.
- The whole commissioner landscape in Scotland.

A letter from the Scottish Government to the Equalities, Human Rights and Civil Justice Committee, ³⁸ says it is holding a neutral position on the Bill and also says "it is our position that the Bill does not meet the Scottish Government's required threshold to warrant the creation of a new body". It highlights the following:

- The submissions to the Member's consultation from the EHRC and the Law Society of Scotland and their concerns around duplication and straying into areas outwith devolved competence.
- The complex landscape a new Commissioner would be added into.
- The [financial impact](#) of establishing a Disability Commissioner in terms of value for money and efficiency.
- It is proposed to extend the powers of the SHRC under the Scottish Human Rights Bill. This will include powers for the SHRC to bring or intervene in civil proceedings

under the Bill, enhanced investigative powers, and relaxing the restriction on the provision of advice in relation to legal proceedings. Further that the SHRC has sought to generate a discussion whereby Commissioners are appointed on a thematic basis.

- There is a stronger rationale for a Learning Disabilities, Autism and Neurodiversity Commissioner: "People with learning disabilities, who have autism, or who are neurodivergent experience poorer outcomes than disabled people in general, for example, in educational attainment, suicide rates, life expectancy and employment rates. Not all the conditions under the umbrella term neurodivergent meet the disability definition in the Equality Act 2010."
- In response to the FPAC inquiry, the Children's Commissioner said: ⁴⁰

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

The Bill

This part of the briefing summarises each section of the Bill.

As set out in the Policy Memorandum, the Member has drawn inspiration from the Children and Young People's Commissioner.³⁶ Therefore the Bill follows a similar model to the [Commissioner for Children and Young People \(Scotland\) Act 2003](#).

The main difference between the Bill and the 2003 Act is that the latter includes a provision to ensure the anonymity of children in any reports made under the Act. There is no such similar provision in the Bill.

Sections 1-3 - Establishment and Functions

Section 1 establishes the office of the Disability Commissioner, with further details set out in Schedule 1.

Schedule 1 makes provisions on the status; appointment, disqualification, terms of office, remuneration, and pension of the Commissioner. For example, the Commissioner:

- is independent of the Scottish Parliament and Scottish Ministers
- can hold office for up to 8 years
- can appoint staff
- must prepare a budget and keep accounts.

Section 2 sets out the general functions of the Commissioner, which will be 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
- promote best practice by service providers
- promote, commission, undertake and publish research on matters relating to the rights of disabled people.

This section also provides that 'disability' and 'disabled person' are defined with the same meanings as in the Equality Act 2010.

Section 3 requires the Disability Commissioner to have regard to the UN Convention on the Rights of Persons with Disabilities, and in particular have regard to the principles of:

- respect for the inherent dignity of disabled people, their individual autonomy including the freedom to make their own choices, and their independence
- full and effective participation and inclusion of disabled people in society
- close consultation and active involvement of disabled people in decision-making

processes concerning issues relating to them.

The Disability Commissioner must also act in a manner that encourages equal opportunities, and "the observance of the equal opportunity requirements."

Sections 4-5 - Communicating with and involving disabled people

Section 4 requires the Disability Commissioner to communicate with disabled people in a range of ways that is accessible in terms of speech, language or other ways. Any reports will be required to be accessible in a range of formats.

Section 5 requires the Disability Commissioner to involve disabled people in their work, including consulting with disabled people and disabled people's organisations on the work undertaken by the Commissioner. Particular attention must be given to those:

- "who may not have other adequate means by which they can make their views known" or
- "who, because of the nature or impact of their disability, may find it difficult to form, articulate or communicate their views."

The Commissioner will be required to prepare and keep a strategy under review for involving disabled people in their work.

Sections 6-11 - Investigations

Section 6 provides that the Disability Commissioner may carry out general and individual investigations. There are limits to this:

- Where the Commissioner is satisfied that the investigation is the function of another person. However, this will not apply when the Commissioner has consulted with the other person who has the function to investigate, and concludes that it is more effective for the Commissioner to carry out the investigation. There is no requirement for the Commissioner to obtain the agreement of the other party in order to carry out the investigation.
- Where it would relate to a reserved matter.
- Where it is subject to legal proceedings.

Section 7 describes general and individual investigations.

- General - to what extent a service provider has regard to the rights of disabled people. The Commissioner must be satisfied that the matter to be investigated is of significance to all disabled people, people with particular disabilities, or particular groups of disabled people.
- Individual - to what extent a service provider has regard to the rights of a disabled person.

A 'service provider' means any person providing a service to disabled people, other than an excluded provider. An 'excluded provider' means any person providing a service to disabled people who does not principally provide these services for remuneration, or as part of their employment, but because they are family, friends, or through "community or neighbourhood links."

The Commissioner may take other steps they consider appropriate if they consider the matter can be resolved without an investigation. This applies to individual investigations, but not general investigations.

Section 8 requires the Commissioner to draw up terms of reference for an investigation.

General investigations are to be conducted in public, except where the taking of evidence in private is considered necessary or appropriate.

Individual investigations are to be conducted in private.

Under section 9, the Commissioner may require any person to give evidence (a witness) or provide documents as part of an investigation. This section also makes reference to similar powers in the [section 23 of the Scotland Act 1998](#) which includes restrictions on this power in relation to Ministers of the Crown, judges and members of tribunals.⁴¹

Schedule 2 provides further detail under section 9, in relation to provisions on witnesses and documents.

Section 10 provides that the Disability Commissioner must prepare a report at the conclusion of an investigation. In the case of a general investigation, a report **must** be laid before the Scottish Parliament, in the case of an individual investigation, the Commissioner **may** lay a report before the Scottish Parliament. If a report is laid before the Scottish Parliament, it must publish the report as soon as practicable after laying the report.

Section 11 provides that in relation to any recommendation made in an investigation, the Commissioner may require a response. The Commissioner may then publicise any response, or any failure to respond.

Sections 12-14 - Strategic plan, annual reports and other reports

Section 12 requires the Commissioner to prepare and publish a strategic plan in each "4 year period", following a consultation. This period will begin on 1 April following this section coming into force.

Section 13 requires the Commissioner to prepare and publish an annual report on its functions.

Section 14 gives the Commissioner the power to publish other reports as they consider appropriate.

Section 15 - Protection from actions of defamation

This section provides for protection from actions of defamation for statements made to or by the Commissioner (or their staff). It will mean that statements made to or by the Commissioner, or their staff, will benefit from "absolute privilege" in relation to an investigation. This means that such statements cannot form the basis of an act of defamation for any person referred to in those statements.

Sections 16-19 - Final Provisions

These sections include technical provisions, such as 'interpretation' and commencement of the Bill which would be 6 months after receiving Royal Assent.

Schedules

Schedules 1 and 2 set out further details for the Commissioner's office, and supplementary provisions for witnesses and documents. These are referred to above under Section 1 and Section 9 respectively.

Schedule 3 adds the Disability Commissioner to the list of bodies in other pieces of legislation, such as the Freedom of Information (Scotland) Act 2002 and Public Services Reform (Scotland) Act 2010.

There is no mention of inclusion in other legislation, such as the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 or the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162 (as amended). Both of these place a reporting duty on listed public authorities.

Costs

In drafting the Financial Memorandum, the Member has considered the costs of existing and recently established and the estimated costs of proposed commissions.⁴² There has also been consultation with SPCB officials.

- Overall set up costs (2025-26) are estimated between - £314,539 and £378,539.
- Ongoing (annual) costs are estimated between - £574,717 and £878,005.

There are no costs estimated for local authorities or other bodies, and extra costs are not anticipated. However, following an investigation, the Commissioner may recommend changes to a local authority, as a service provider. This may require additional resources[AL(1)] to implement the change, but there is no obligation on the local authority to make the change and the Commissioner has no power to require it.

FPAC has said the total budget for commissioners directly responsible to Parliament in 2023/24 was £16.6 million. The range for individual organisations is between £0.3 million and £6.7 million. Therefore, the estimated costs for the Disability Commissioner (between £0.6 million and £0.9 million per year) would be at the lower end of this range.

The Scottish Government has said that the estimated cost of the Disability Commissioner broadly reflects what would be expected with the introduction of a new Commissioner role.
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However, the Scottish Government does raise concerns these costs have not been budgeted for in future indicative allocations and notes "we are operating in an extremely challenging financial climate". It suggests there should be further consideration of costs regarding investigations as the estimate appears limited. It also queries the minimal costs on local authorities, which does not acknowledge that there may be costs if they decide to act on the Commissioner's advice. Further, £1 million in the first year (including set up costs), in the context of disability equality, is a significant sum that could be better directed towards more strategic approaches to achieving the Bill's aims.

In a letter to FPAC on its Commissioner Landscape inquiry, the Scottish Government referred to its Ministerial Control Framework (MCF).⁴³ This aims to ensure that decisions around the creation of new public bodies are made based on evidence and value for money against a backdrop of significant pressure on public spending. The MCF would

require it be shown that no existing body could perform the same functions.

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