

Consultation response

Proposed Disability Commissioner (Scotland) Bill

Consultation details

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Summary

1. The Equality Act 2006 places a number of duties on us and gives us various powers. The Equality Act 2010 provides a single legal framework to tackle discrimination and harassment, and contains provisions to protect disabled and other people from unlawful treatment and promote a fairer and more equal society. Together, the Equality Acts set out a robust legal framework with an independent regulator to address discrimination against, and promote equality for, disabled people. It is essential that any new Disability Commissioner complements, and does not duplicate, existing roles and functions.
2. We have a number of questions about how this role might work and therefore, at this stage and in lieu of the necessary detail, we do not have a particular view in favour of or against the proposed Bill. While recognising that the proposals are in an early form, it is not immediately clear to us which of the powers or functions proposed for the new Commissioner are not already held or covered by one or more existing organisations. We are not immediately persuaded that legislation is necessary, given the existing legal framework and associated institutions. The principle of legal certainty means that new legislation should avoid 'cross-over in remit and responsibilities', as anticipated in the proposals.
3. Our role covers all conditions and impairments which are specified, or meet the definition, in the Equality Act 2010. It would be open to the Scottish Parliament to apply a broader definition in this context should it so wish. The Scottish Government has committed to the introduction of a Learning Disabilities, Autism and Neurodiversity Commissioner. This would appear to overlap significantly with these proposals.
4. The Equality Act 2006 explicitly gives us a statutory duty to 'monitor the law'. Similar provision is in place with respect to the SHRC. There is therefore significant scope for overlap with the proposals and, potentially, different or even conflicting advice.

5. If a Commissioner was to be introduced, involving disabled people in its work would be essential to its role. As well as being good practice for any such Commissioner, this would support the Commissioner's compliance with the Public Sector Equality Duty, helping ensure the role achieves its stated aims.
6. The investigatory power in the proposals appears both to overlap with our powers and at the same time be significantly weaker. There is a risk that this proposed power strays into consideration of conduct prohibited by the Equality Act 2010 and therefore outwith devolved competence.
7. Any Commissioner of this type would need to consider intersectional issues and impacts. We would expect any Bill introduced to Parliament to be accompanied by a thorough Equality Impact Assessment. Any inclusive communication requirement should complement and not conflict with the existing reasonable adjustment duty.

About the Equality and Human Rights Commission

Who we are

8. The Equality and Human Rights Commission is Britain's equality and human rights regulator. Our human rights powers in Scotland extend to reserved matters. The Scottish Human Rights Commission has a mandate to promote and protect human rights in Scotland that fall within the competence of the Scottish Parliament.

How we have approached this consultation

9. We welcome the opportunity to respond to this consultation. We have set out our response in line with the questions asked in the consultation, but have only answered those questions where we think we can add value.
10. We have also set out our mandate, as provided by the Equality Act 2006, and a brief summary of relevant elements of the Equality Act 2010, which we promote and enforce.

Our mandate

11. As a statutory non-departmental public body established by the Equality Act (EA) 2006, the Commission operates independently. We identify injustice and inequality, and we influence progress by sharing our evidence, insights and expertise. We encourage innovation and change to improve all areas of people's lives.
12. We use our unique powers to challenge discrimination and harassment against disabled people, promote equality of opportunity and protect the human rights of disabled people. We work with other organisations and individuals to achieve our aims, but are ready to take tough action against those who abuse the rights of others.

The Equality Act 2006

Our duties and powers

13. The EA 2006 places a general duty on us 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.
14. Section 8 of the EA 2006 requires us to promote understanding and good practice in relation to equality and diversity, as well as to enforce the EA 2010. Section 8(3) specifically provides that in promoting equality of opportunity between disabled people and others, we may promote the favourable treatment of disabled people.

15. Section 9 requires us to promote understanding and good practice in relation to human rights. As noted above, our mandate on human rights in Scotland is shared with the Scottish Human Rights Commission (SHRC). Section 7 precludes us from taking 'human rights action' in relation to matters within the Scottish Parliament's competence without consent from the SHRC. The working relationship between the Commissions is informed by a memorandum of understanding.
16. The EA 2006 confers on us a range of general powers, including to publish ideas and information, undertake research, provide education or training, and give advice and guidance;¹ to publish statutory codes of practice;² and to undertake inquiries.³
17. We also have a range of enforcement powers. These include the ability to undertake investigations,⁴ legally assist individuals,⁵ and assess public bodies' compliance with the Public Sector Equality Duty.⁶

The Equality Act 2010

18. The Equality Act (EA) 2010 came into force in October 2010 and provides a single legal framework to tackle discrimination and harassment. The EA 2010 contains provisions to protect disabled and other people from unlawful treatment and promote a fairer and more equal society. As noted above, the Commission enforces the EA 2010.

The Public Sector Equality Duty

¹ Equality Act 2006, s. 13

² Equality Act 2006, s. 14

³ Equality Act 2006, s. 16

⁴ Equality Act 2006, s. 20

⁵ Equality Act 2006, s. 28

⁶ Equality Act 2006, ss. 31-32

19. The [Public Sector Equality Duty \(PSED\)](#), set out in section 149 of the EA 2010, requires public authorities, in the exercise of their functions, to have due regard to the need to:
- Eliminate discrimination, harassment and victimisation that is prohibited under the EA 2010
 - Advance equality of opportunity between people who share a protected characteristic and those who do not; and
 - Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

This is known as the general duty. The broad purpose of the PSED is to integrate consideration of non-discrimination, equality and good relations between and for disabled people and other protected groups into the day-to-day business of public authorities. For more detailed information, see our [Technical Guidance on the PSED in Scotland](#).

There are [Scottish specific duties](#) to support implementation of the general duty and which apply to [certain listed authorities in Scotland](#).

Discrimination, victimisation and harassment

20. The EA 2010 sets out the legal framework for understanding, addressing and preventing discrimination, victimisation and harassment in Scotland. This applies in relation to disability, and includes specific provision for discrimination arising from disability. Protection from direct discrimination because of disability is asymmetric, which means that disabled people can be treated more favourably than people who are not disabled.⁷ More information on discrimination, victimisation and harassment is set out in Annex A.

Reasonable adjustments

⁷ Equality Act 2010, s. 13(3)

21. The EA 2010 requires employers and service providers (including education providers, housing providers, clubs and associations) to take positive steps – make ‘reasonable adjustments’ – to ensure that disabled people can access work and services. The reasonable adjustment duty is intended to ensure that, so far as is reasonably practicable, the access enjoyed by disabled people is the same as that enjoyed by other employees and service users. More information is provided in Annex B.
22. Together, the Equality Acts set out a robust legal framework with an independent regulator to address discrimination against, and promote equality for, disabled people. It is essential that any new Disability Commissioner complements, and does not duplicate, existing roles and functions. We address this in more detail in our answers below.

Consultation questions

Aim and approach

Question 1: view of the proposed Bill

23. We fully support the proposing Member's desire to ensure that disabled people's voices are heard across society, including in relation to the development of legislation and policy. As will be seen below, we have a number of questions about how this role might work and therefore, at this stage and in lieu of the necessary detail, we do not have a particular view in favour of or against the proposed Bill.
24. However, we do agree that any role of this type should in principle be accountable to the Scottish Parliament.

Question 2: need for a specific Commissioner focusing solely on people with a disability

25. As the proposal notes, there are a number of existing organisations, both statutory and otherwise, operating in this space. This includes the Commission, as the national equality body for Scotland, England and Wales, and one of Scotland's two National Human Rights Institutions (NHRIs); the Scottish Human Rights Commission (SHRC), Scotland's other NHRI; the Children and Young People's Commissioner for Scotland (CYPCS); the Mental Welfare Commission; and a vibrant civil society, including a wide range of national, regional and local disabled people's organisations (DPOs) representing both disabled people generally and disabled people with specific conditions and types of impairment.
26. While recognising that the proposals are in an early form, it is not immediately clear to us which of the powers or functions proposed for the new Commissioner are not already held or covered by one or more of these existing organisations.

27. We note also the importance of considering intersectionality in this context; that is, how other characteristics disabled people possess affect their lives. For example, a law or policy may impact differently on disabled women and men; services may meet the needs of White disabled people but not the needs of disabled people from certain ethnic minorities. Any Commissioner focused 'solely' on disabled people would have to be cognisant of such intersections and build this into their work.

Question 3: necessity of legislation

28. Again recognising that the proposals are at an early stage and that the 'specific role and responsibilities of the Disability Commissioner will develop as the policy for the proposed Bill is taken forward', we will await publication of a draft Bill. However, we are not immediately persuaded that legislation is necessary, given the existing legal framework and associated institutions.
29. The principle of legal certainty means that new legislation should avoid 'cross-over in remit and responsibilities', as anticipated in the proposals. Planning to deal with any such duplication by means of Memorandums of Understanding would tend to suggest that the new legislation in question may lack sufficient precision and demarcation. In this context, we observe that the EHRC and SHRC were established at approximately the same time by different parliaments. CYPSC pre-dates the establishment of both Commissions.

Scope of the role

Question 4: coverage of disabilities

30. Section 8(4) of the EA 2006 makes clear that, for the purposes of the Act, 'disabled person' has the same meaning as in the EA 2010. Our role therefore covers all conditions and impairments which are specified, or meet the definition, in that Act.

31. Without wishing to stray outwith our mandate in Scotland, we note in passing that the definition of disability in the Convention on the Rights of Persons with Disabilities is slightly different and arguably somewhat broader, and that it would be open to the Scottish Parliament, within the Scotland Act 1998 (as amended), to apply a broader definition in this context should it so wish.
32. However, we also note that the Scottish Government has, in its [Programme for Government 2021-22](#), committed to the introduction of a Learning Disabilities, Autism and Neurodiversity Commissioner. This would appear to overlap significantly with these proposals.

Question 5: reviewing laws and policies

33. This would be an appropriate function for a Commissioner of the type proposed. However, the EA 2006 explicitly gives us a statutory duty to ‘monitor the law’, including advising Scottish Ministers in relation to the effect of Acts of the Scottish Parliament.⁸ Similar provision is in place with respect to the SHRC.⁹ There is therefore significant scope for overlap and, potentially, different or even conflicting advice.
34. It is not clear from the proposals whether ‘able to review’ means that the proposed Commissioner could (or should) engage with a legislative process in the same way as anyone else seeking to influence such a process, or if the suggestion is that the proposed Commissioner should have a specific role in the legislative process. More information on what should happen if the proposed Commissioner ‘assesses the adequacy’ of a law or policy and finds it to be inadequate would also be welcome.

⁸ Equality Act 2006, s. 11

⁹ Scottish Commission for Human Rights Act, s. 4

Question 6: promoting best practice and learning

35. Again, the EA 2006 places a duty on us to ‘encourage good practice’ in relation to equality and diversity¹⁰ and human rights.¹¹ We can also publish statutory codes of practice in connection with any matter addressed by the EA 2010 (including both compliance with that Act and the promotion of equal opportunity), as noted elsewhere in this response. As above, our general powers include the provision of education or training and advice or guidance. There would again therefore appear to be a substantial overlap between our role and the proposals.

Question 7: encouraging involvement of disabled people and DPOs in the Commissioner’s work

36. If a Commissioner was to be introduced, involving disabled people in its work would be essential to its role. As well as being good practice for any such Commissioner, we would expect that any Commissioner of this type would be subject to the Public Sector Equality Duty, including the Scottish specific duties. The involvement of disabled people in its work would support the Commissioner’s compliance with the duty, helping ensure the role achieves its stated aims. For example, the Commissioner would be required to collect and consider relevant evidence to inform its decision-making regarding new or revised policies and practices.¹² It would also be obliged to involve people sharing relevant protected characteristics – in this case, principally disabled people – in the preparation of its equality outcomes.¹³
37. However, we acknowledge the burden felt by many civil society organisations (who typically have limited resources), including DPOs, in engaging with law and policy matters – so-called ‘consultation fatigue’. Without careful planning or even cooperation, there is a risk that a new Commissioner could add to that burden.

¹⁰ Equality Act 2006, s. 8(1)(b)

¹¹ Equality Act 2006, s. 9(1)(b)

¹² The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, reg. 5

¹³ The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012, reg. 4

38. Finally, if the need for the proposed Commissioner to pay ‘particular attention to groups of disabled people who do not have other adequate means by which they can make their views known’ is intended to be reflected in the Bill, it will be helpful to have a clear definition of ‘adequate means’.

Question 8: scope of investigations

39. As noted elsewhere in this response, we have powers of investigation in relation to suspected unlawful acts under the EA 2010. We can compel evidence and it is an offence not to comply, enforceable in the courts. The investigatory power in the proposals appears both to overlap with our powers and at the same time be significantly weaker. It is also unclear how any issues identified by an investigation by the proposed Commissioner would be addressed. For example, following a CYPCS investigation into restraint in Scottish schools, we worked with CYPCS to use our legal powers to support a judicial review of the Scottish Government to address some of the findings. This approach would not have been available to CYPCS alone.
40. There is a risk that this proposed power, not least in relation to ‘individual’ investigations, strays into consideration of conduct prohibited by the EA 2010 – particularly discrimination – and therefore outwith devolved competence.
41. We would also welcome more detail about what it means for an investigation to be ‘carried out in public’. We have in the past conducted evidence sessions in public, but our experience is that there can be legal and other reasons why this is not desirable or, in some cases, possible.
42. We do not have any particular view on whether an investigatory power should apply to public bodies, service providers or both, but note that in either case the proposals lack power to compel action to address any identified issues.

Financial implications

Question 9: financial impact

43. Any new Commissioner of this type should be adequately resourced to fulfil their functions, in line with comparable roles.

Equalities

Question 10: impact on different groups

44. As noted above in relation to question 2, any Commissioner of this type would need to consider intersectional issues and impacts – for example, the experiences of disabled women or people from ethnic minorities.
45. Although we recognise that as a Member of the Scottish Parliament the proposing Member is not themselves subject to the PSED, we would nevertheless expect any Bill introduced to Parliament to be accompanied by a thorough Equality Impact Assessment
46. We note that, as above in relation to question 7, we would expect that a Commissioner of this type would be listed for the purposes of the PSED, which we enforce. This is already the case with the Children and Young People’s Commissioner for Scotland.

General

Question 12: further comments

47. With regards the need to communicate in an inclusive way, we note that a Commissioner would be subject to the EA 2010 reasonable adjustment duty (see Annex B) which would already require anticipatory action to ensure that communication is accessible for disabled people. This would be particularly important for the credibility of a role seeking to represent disabled people.
48. We also note that the Scottish Government is considering introducing a new regulation under the Scottish specific duties relating to inclusive communication, as part of its reform of the Public Sector Equality Duty.
49. In both cases, it is essential that any inclusive communication requirement complements and does not conflict with the existing reasonable adjustment duty.

Annex A – discrimination, victimisation and harassment

The EA 2010 identifies four broad forms of discrimination, as well as prohibiting harassment and victimisation:¹⁴

- **Direct discrimination.** This occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. Direct discrimination cannot be justified except in the case of age discrimination.
- **Indirect discrimination.** This occurs when an apparently neutral policy¹⁵ is applied that puts people sharing a protected characteristic at a particular disadvantage, and that puts an individual at that disadvantage. Indirect discrimination can be justified if it is ‘a proportionate means of achieving a legitimate aim’.
- **Discrimination arising from disability.** This occurs where a disabled person is treated unfavourably, where this treatment is because of something arising in consequence of the disabled person’s disability, and where it cannot be shown that this treatment is a proportionate means of achieving a legitimate aim. There is no discrimination if it can be shown that the person or organisation alleged to have discriminated, did not know and could not be expected to know that the disabled person had the disability.
- **Failure to make reasonable adjustments.** The duty to make reasonable adjustments comprises three requirements:
 - Where a provision, criterion or practice puts disabled people at a substantial disadvantage compared to those who are not disabled, to take reasonable steps to avoid the disadvantage.

¹⁴ This is a brief summary of the forms of discrimination and does not cover all the steps necessary to identify discrimination. See our [Codes of Practice and technical guidance](#) for more information on discrimination and on the EA 2010 generally.

¹⁵ ‘Policy’ is used here as shorthand for the statutory definition which applies to a “provision, criterion or practice”.

- Where a physical feature puts disabled people at a substantial disadvantage, compared with people who are not disabled, to avoid that disadvantage.
- Where not providing an auxiliary aid puts disabled people at a substantial disadvantage compared with people who are not disabled, to provide that auxiliary aid.
- **Harassment.** Harassment occurs where a person engages in unwanted conduct related to a relevant protected characteristic that has the purpose or effect of violating another's dignity or creating an intimidating, hostile, humiliating or offensive environment for another.
- **Victimisation.** This occurs where a person carries out a 'protected act' and is subjected to a detriment as a result. A 'protected act' could be bringing discrimination proceedings or giving evidence in relation to discrimination proceedings under the EA 2010.

Annex B – the duty to make reasonable adjustments

The reasonable adjustments duty requires employers and service providers (including education providers, housing providers, clubs and associations) to take positive steps to ensure that disabled people can access and remain in work or access services. The duty is intended to ensure that, so far as is reasonably practicable, the access enjoyed by disabled people is the same as that enjoyed by the rest of the public. It comprises three requirements:

- Where a provision, criterion or practice puts disabled people at a substantial disadvantage compared to those who are not disabled, to take reasonable steps to avoid the disadvantage
- Where a physical feature puts disabled people at a substantial disadvantage, compared with people who are not disabled, to avoid that disadvantage
- Where not providing an auxiliary aid puts disabled people at a substantial disadvantage compared with people who are not disabled, to provide that auxiliary aid.

‘Substantial’ here means ‘minor’ or ‘trivial’ and is a low threshold. What is a ‘reasonable’ adjustment will depend very much on the particular circumstances of each case but will include:

- The type of service being provided or work being done
- The nature of the employer or service provider and its size and resources; and
- The effect of the disability on the individual disabled person.

The duty is ‘anticipatory’ in relation to the provision of services. This means a service provider cannot wait until a disabled person wants to use its services, but must think in advance (and on an ongoing basis) about what disabled people with a range of impairments might reasonably need, such as those who have mental ill health, a visual impairment, a hearing impairment, a mobility impairment or a learning disability.