

**EVIDENCE TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE
FROM KEVIN DUNION, SCOTTISH INFORMATION OFFICER**

I am pleased to respond to your invitation to submit my views on the areas to be addressed by the SPCB Supported Bodies Committee.

In doing so I am aware of the SPCB's submission to the Committee dated 3 December 2008, and the oral evidence given to the Committee on 9 December 2008 by representatives of the SPCB. My submission addresses some of the proposals put forward by the SPCB. I am also mindful of the comments and recommendations made in previous reports by the Finance Committee¹ and Audit Scotland²

However I understand that the SPCB has been asked by the Committee to expand upon its views and once I have sight of this additional detail this may affect my own position.

In my submission I have focussed on my own role, particularly in light of the SPCB's recommendation. I believe it is important that the arrangements for governance and scrutiny are proportionate (I have a budget of c. £1.5m and 24 staff) and appropriate, striking the correct balance between my independence and the need for transparency and accountability.

I look forward to discussing these issues with the Committee on 3 February 2009.

Introduction

1. It is right that Commissioners and the Ombudsman should be scrutinised - like any other public authority we should be transparent and accountable for the fulfilment of our statutory responsibilities. Where suggestions as to how our roles could be improved are made then these should be seriously addressed.

2. However before substantial changes are made to what I believe is already an efficient and well-ordered function, it is essential that there is explicit consideration of the following:

- what specific changes are being proposed
- the evidence base as to the benefits of any proposed change
- the costs and likely consequences of such changes must be fully factored in
- the benefit to the public should be made apparent.

3. In this submission I have focussed on the consequences for the role of the Scottish Information Commissioner.

Context

¹ The Scottish Parliament Finance Committee Report on Accountability and Governance (7th Report 2006)

² Audit Scotland Report – SPCB – Ombudsman/Commissioners Shared Services (April 2006)

4. We are not starting with a clean slate. The various Commissioners and Ombudsman have come into being at different times and by different routes. Some have evolved; others are entirely new manifestations. All however reflect the explicit will of Parliament that such functions should be performed.

5. The Scottish Information Commissioner was brought into being by the Freedom of Information (Scotland) Act 2002 (FOISA). I took up post on 23 February 2003. There was a strong political desire that FOISA should fully come into force on 1 January 2005, the same day as for the rest of the UK, even though the Westminster legislation had been passed in 2000 and responsibilities for implementation had been given to an existing regulator. I shared this sense of urgency. Starting from scratch, office premises were identified and a lease signed within 2 months; staff recruitment exercise completed within 4 months and my organisation was fully operational within 6 months of my taking up post. There was then the considerable challenge of approving publication schemes for all the 10,000 public authorities covered by FOISA (ranging from Government through to individual GPs) prior to implementation. This was done and FOISA was able to come into force on 1 January 2005.

6. The volume of appeals made to my office has been significantly higher than projected both in number and as a proportion of the total for the UK. It had been expected that between 150-300 appeals per annum would be made in Scotland, and that this would be 10% of the total for the UK Information Commissioner. As Table 1 below shows uptake has been far higher than projections. Two-thirds of these appeals come from ordinary members of the public.

Table 1	2005-6	2006-7	2007-8
Applications/complaints received			
UK	2713	2592	2646
Scotland	636	505	414
Cases closed			
UK	1666	2601	2658
Scotland	357	559	563
Decisions issued			
UK	187	339	395
Scotland	146	232	228
Cases carried forward			
UK	1290	1371	1363
Scotland	348	294	147

7. We have instituted strong case management systems, set targets for case closure and are now in a position where we have no backlog of cases, and cases received from 1 April 2008 will be closed within 6 months on average. This is a very strong performance, and compares well to the position for the rest of the UK.

8. My role is quasi judicial. Unlike complaints handling bodies I have powers to enforce my decisions and to refer authorities who do not comply to the Court of Session where the penalty for non-compliance is that for contempt of court. I have issued over 700 formal decisions some of which have been high profile and have broken new ground.

9. I also have a statutory duty to promote compliance, good practice and awareness of the legislation. The Scottish public's awareness of its right to information has grown strongly. Prior to FOISA coming into effect 44% of the Scottish public were aware of the legislation; by October 2008 this has grown to 78%, and 67% of people think FOISA is directly useful to them.

10. Although the Scottish legislation has only been in effect for less than 3 years our reputation is strong. We now regularly receive international delegations and requests for assistance from countries introducing or reviewing right to know legislation. There have been delegations from Canada, India, China, Ireland, Latin America and Eastern Europe. We have also advised on improvements to FOI legislation for Jamaica, Cayman Islands and Malawi, working directly and also with the British Council and the Carter Centre in Atlanta USA. Testimony given by the Executive Director of the National Security Archive to the US House of Representatives on how to improve enforcement of their federal FOI laws has drawn attention to the success we have had in Scotland.³

11. It is important to recognise that the Scottish Parliament has passed a well crafted law, which has been successfully brought into effect and is gaining international recognition. Any proposed changes to the structure, governance and accountability of the Scottish Information Commissioner should enhance and not detract from this performance and reputation.

Structure

Commissioner or Commission?

12 The role of an independent Commissioner, "not subject to the direction or control of the Parliamentary corporation, of any member of the Scottish Executive or of the Parliament" is enshrined in the legislation⁴. The Commissioner's role is to promote and enforce the Freedom of Information Act 2002 and the Environmental Information (Scotland) Regulations 2004. All Scottish public authorities are subject to the legislation and to the Commissioner's jurisdiction. This includes the Scottish Government, the Scottish Parliament, the Scottish Parliamentary Corporate Body

³ Testimony of Thomas Blanton, Executive Director , National Security Archive, George Washington University to U.S. House of Representatives 17 September 2008

" For example, one of the most effective information commissioners internationally is Kevin Dunion of Scotland, ... Dunion organized an effective dispute resolution process, issued more than 600 final opinions in the first three years of the Scottish law, and has received judicial endorsement of his major findings."

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⁴ Freedom of Information (Scotland) Act 2002 42(7)

and also bodies such as the Scottish Public Services Ombudsman, the Scottish Human Rights Commission, etc.

13. In my view it would compromise the role of the Scottish Information Commissioner should the post be part of a wider Commission alongside other office-holders who were subject to the Commissioner's jurisdiction. It would almost certainly colour public perception as to the relationship between the Commissioner and any of those office-holders who were the subject of an appeal by a dissatisfied applicant for information.

14. Given this quasi judicial role (which is distinct from complaint handling) and the evidence that the functions of the role are being carried out effectively, I am of the view that the Scottish Information Commissioner's function should remain separate, as recommended by the SPCB.

15. That being so, I do not see the need to alter the construction of this post from a Commissioner to a Commission (nor do I think this is being proposed by the SPCB for my post). Current international practice is to have a single office-holder. This provides clarity and consistency as to decisions and identifiable leadership and accountability. A very small number of countries do have Commissions, principally reflecting population size (such as Mexico and India) or political culture (such as Jamaica). These can operate successfully, but in some cases have been identified as the cause of significant delay in dealing with cases.

16. Restructuring to have a Commission with a Chair and appointed Commissioners, supported by a Chief Executive, would be disruptive and increase costs, and could well decrease efficiency in coming to case decisions. As Commissioner I am supported by proficient, professional staff providing advice on cases and in particular my Head of Investigations is a qualified solicitor providing in-house legal advice. Our Investigation Procedures incorporate a full internal review procedure which ensures the production of well considered, consistent and legally enforceable decisions. If on occasion I require a second opinion this is provided by retained external legal advisers. This has proven to be efficient and cost effective.

Legal Status of the Commissioner - Personal Liability

17. I am pleased that the SPCB wishes to use this opportunity to resolve the issues regarding legal status of the Commissioner. However I am not convinced this matter can be fully resolved in the way suggested by the SPCB in its submission to the Committee.

18. My legal advice, which was taken at the SPCB's suggestion and has been shared with it, is that the Scottish Information Commissioner is the individual who holds that post and has no legal identity separate from that individual. The SPCB proposal to indemnify the individual holding the post against claims arising out of the discharge of the office-holder's duties is welcome so far as it goes.

19. However there are further complications, which are likely to become apparent when a Commissioner demits office, especially should this occur unexpectedly or unwillingly. For example, as there is no distinct legal entity, my staff are employed

by me as an individual and, should I leave office suddenly, they would have no employer. It may be made a contractual obligation upon any subsequent Commissioner to become the employer of existing staff, and this same obligation may have to be placed upon any interim Commissioner (who could be an existing member of staff). This situation may also require the application of TUPE regulations transferring the employment of staff members to an interim Commissioner and then repeating the process when a permanent Commissioner is appointed – and even this process is not assured. Clearly, this position is cumbersome and unsatisfactory, and could be stressful for all concerned.

20. Contracts, leases etc are also signed in my name, and cannot be in the name of the Scottish Information Commissioner as a distinct and separate entity. Liabilities and charges arising from these could be indemnified. However on leaving office there would still be the necessity to secure, for example, the transfer of the lease to a new Commissioner (and any interim Commissioner) assuming the landlord was willing to do so. Furthermore I am advised that in the event of the death of a Commissioner whilst in post, the lease for an office would form part of their estate (along with the liabilities attached to it).

21. My understanding is that a remedy would lie in the creation by statute of a body corporate (as distinct from the English common law provision of a corporation sole) in which the Commissioner is the sole member. I would welcome the Committee making a recommendation to this effect, or some other recommendation which would resolve the types of issues which I have raised and which indemnity alone would not resolve.

Terms and Conditions

Term of Office

22. A single term of office has its merits. It removes uncertainty as to whether the Commissioner will be re-appointed and could be seen to bolster the independence of the Commissioner. A period of 7 or 8 years seems appropriate.

Removal from Office

23. I do not see the merit of altering the provision under Part 3 in the Freedom of Information (Scotland) Act 2002 which requires removal from office to be voted for by no less than two thirds of the total number of all MSPs. Involuntary removal from office in this fashion would be a serious matter and I think the provision in FOISA makes an appropriate threshold compared to that in section 3 of the Commissioner for Children and Young People (Scotland) Act 2003 which relies upon the number of MSPs present and voting.

Property / Location

24. The 2006 Finance Committee Report⁵ specifically notes the power given to the SPCB with regard to approval on premises location in the Scottish Commission for Human Rights Act 2006, and recommends the legislation for existing Commissioners and Ombudsman be amended to provide the SPCB with similar power in order to ensure it can approve future determination of location.

25. In its report the Finance Committee remained “very concerned by some of the location decisions taken by commissioners e.g. the Freedom of Information Commissioner” (sic). However the basis for the Committee’s concern is not clear, and has not been made explicit.

26. As indicated earlier there was an urgent need for me to locate premises following my appointment. It was quickly apparent that I could not co-locate with the SPSO who was at that time negotiating a lease on premises in Edinburgh in which to combine staff from existing separate offices. In any case I was encouraged by the SPCB to locate outwith Edinburgh and I was the only Commissioner or Ombudsman to do so until the recent co-location of the Scottish Human Rights Commission with the Equalities and Human Rights Commission in Glasgow. I considered a number of premises in different locations, including Kirkcaldy and Dundee, none of which were suitable, and settled upon my current location as it offered excellent value for money and appropriate security for my operational requirements. In April 2003 I attended a meeting of the SPCB at which I summarised the search which had been conducted to establish what was available and I indicated at that point that a lease on favourable terms was being negotiated on premises in St Andrews. Members of the committee gave no indication that they were dissatisfied with this decision. If a preferred location was the priority (and no location was indicated) then a longer period of search could have been undertaken - but this would certainly have meant that the Scottish freedom of information legislation could not have come fully into effect at the same time as the UK legislation and that was the clearly expressed priority at that time.

27. There is no practical reason for my office to be located in Edinburgh and, drawing upon the 2009-10 budget submissions for commissioners and ombudsman, I am of the view my property costs per employee represent excellent value for money at £4,200 per annum, compared with £5,800 for the SPSO and £8,800 for OCPAS.

28. I have reservations about co-locating with public bodies over which I have jurisdiction and also whether the assumed savings in shared costs would materialise. Typically it is argued that back of office activities could be shared, generating savings. Firstly such activities are a very small part of my expenditure. Secondly these activities are not divorced from front-line investigations which depend upon professional administration such as case management and records management systems and the secure storage and retrieval of documents in dispute. Security is vital for these functions. It is a criminal offence⁶ for me or my staff to reveal

⁵ The Scottish Parliament Finance Committee Report on Accountability and Governance (7th Report 2006)

⁶ Freedom of Information (Scotland) Act 45(3)

information gathered in the course of an investigation. It is also the case that we receive documents and submissions containing classified material (e.g. one of the cases I investigated recently related to nuclear security). I am security vetted, as are many of my staff and shortly this will be a requirement for all staff, including administrators. Authorities such as the police require the strongest assurances as to the security of sensitive information. It would not be appropriate to share offices or systems where security could be compromised, even by colleagues from other organisations passing by the desks or computer screens of investigative staff, far less by sharing computer and storage facilities.

29. For reasons mentioned earlier I am of the view that it would affect public perception of my independence were I to share premises and facilities with those bodies which come under my jurisdiction and which are currently the subject of FoI requests and appeals.

30. Finally whether or not co-location was ever desirable the existing circumstances almost certainly mean that a direction to co-locate or to move for some other reason would be costly, especially in the current climate so far as being able to assign the existing lease, and given the need to compensate staff. It would be highly disruptive and I do not see any obvious benefit to the public which warrants this.

Commissioner's Terms and Conditions

31. The terms and conditions on which Commissioners are appointed are somewhat sparse. They reflect some basic aspects of terms and conditions similar to SPCB staff such as for holiday entitlement, expected hours of work etc. However these are not amplified further. The Commissioner does not have any employment rights, which is all the more reason then that there should be a fuller exposition of terms and conditions and to have a structure in place allowing Commissioners to raise any issues regarding terms and conditions which affect them. I note for example that Audit Scotland⁷ recommended the establishment of a remuneration committee and I recommend that such a committee, dealing also with terms and conditions generally, be established.

Governance and Accountability

32. By way of context, I am supported in my work by a small team of 24 staff, and my annual budget is c. £1.5m. The staff structure reflects the key functions of the organisation: Enforcement – 16 staff; Policy and Practice - 4 staff; Operational Management (including finance and administration) – 4 staff.

33. The governance and accountability arrangements have to balance a proper regard for the Commissioner being held to account for the discharge of functions and use of public funds, and ensuring that this is both proportionate and does not have the effect or appearance of exercising direction or control, or compromising the independence of the Commissioner.

⁷ Audit Scotland Report – SPCB – Ombudsman/Commissioners Shared Services (April 2006)

34. In practice governance and accountability has developed considerably since I have taken up office and the Committee should be aware of the range of measures which are now in place. In brief, in addition to my annual budget submission the SPCB receives my strategic plan, a monthly projection of costs in justification for the draw down from budget, and a dashboard of case performance against targets. All except the monthly projection of costs are published on my website, together with my annual operational plans, quarterly progress reviews, and a monthly financial statement.

35. In addition my accounts are audited by Audit Scotland and are laid before Parliament, as is my Annual Report. I have appointed a firm of accountants as internal auditors who regularly check financial controls, risk management, adherence to procedures etc. The reports from Audit Scotland and my internal auditors are scrutinised by an external Audit Advisory Board (AAB) (drawn from members of the Scottish Parliament's own AAB). This Board also scrutinises my annual budget proposals which are then subject to further scrutiny and comment by SPCB before being approved by the Scottish Parliament's Finance Committee.

36. The SPCB has to approve explicitly the recruitment of any additional staff or the creation of new posts. My salary and expenses are paid or reimbursed directly by the SPCB.

37. In my view the arrangements are working well but could be still further enhanced, and I offer some suggestions below.

38. Strategic Management - establishing a Management Group, chaired by the Commissioner and comprising the 3 senior staff and 2, or at most 3, non-executives, recruited with the support of my AAB, and the Commissioner for Public Appointments. These non-executives would support me in areas such as strategic development, risk management and operational planning and review, and in ensuring best value (including consideration of shared services). They would complement the experience and skills available within the current senior management team. They would have no role or influence with regard to individual investigations and decisions. I believe this would be a low cost way of improving upon the current arrangements and that this could be achieved without legislative change and with modest additional expenditure.

39. Strategic Planning - I would be happy to lay future strategic plans before Parliament and to prepare these on a rolling 3-year basis. The SPCB in its submission suggests that, when drafting strategic plans, I should invite comments from it and others. I believe this could be a purposeful and valuable dialogue as long as such comments did not become de facto instructions or gave the impression of direction or control.

40. Financial Planning - the benefit of engaging the SPCB in strategic planning would be to provide a strong underpinning to forward financial planning which the current annual settlement lacks, especially with regard to non-recurring or capital expenditure. The rolling strategic plan should be matched with a rolling financial plan which would make provision for such non-recurrent expenditure. This would inform the annual budget which would improve on the current approach of a flat rate

percentage increase on the previous year's budget and would avoid necessary variations in expenditure being interpreted as unreasonable budgetary expectations. This would also provide the basis for end of year arrangements which many public authorities already can take advantage of.

41. Financial Provision - I note that the SPCB goes further and proposes a change to legislation making the Commissioners' and Ombudsman's financial expenditure plans subject to approval by the SPCB. I would wish to be clear about the basis for this. If the SPCB is to be given the authority to withhold approval for specific elements or amounts of expenditure, even though these are legitimate and within budget, then this could be said to be exerting direction and control. It should be acknowledged that the Commissioner has been appointed by the Scottish Ministers as an Accountable Officer in his own right making him directly accountable to the Scottish Ministers for his financial management and subject to the same accounting and external auditing requirements of other public bodies. The Commissioner should be allowed to exercise the operational judgement which goes with this responsibility, within the arrangements for financial planning and control which are already in place and shown to be effective.

42. General Powers – I agree that it makes sense for the SPCB to approve the acquisition or disposal of land

43. I publish and lay before Parliament my Annual Report and I would welcome the opportunity to formalise an arrangement under which I would present this to the SPCB or to the appropriate Parliamentary Committee.

44. Appointment of Staff - FOISA already provides that the appointment of staff, their terms and conditions and arrangements regarding pensions etc are approved by the SPCB and I see no need for change to statute.

45. Given the relatively modest size of my budget, and the comprehensive governance arrangements which already exist, this approach would allow members of the SPCB and its officials to engage at a strategic level, and avoid the dangers of micromanagement or suggestions of direction and control.

Shared Services

46. I am committed to constantly reviewing our operations to identify opportunities to improve economy, efficiency and effectiveness.

47. In practise the scope to find savings within my budget is limited. Salaries represent almost 80% of my costs the remainder of my budget (c. £300,000) funds ongoing and largely committed costs, such as rent, rates etc.

48. I believe the way forward is to develop the existing collegiate approach and I would suggest the SPCB's officials could have a useful role to play here, as well as colleagues in the offices of Commissioners and Ombudsman. We have benefitted from this approach in terms of procurement, IT, and training.

49. Although this could be made even more effective by an explicit arrangement, I am not convinced it requires legislative change regarding the sharing of services as proposed by the SPCB. There is nothing in FOISA which would prevent the sharing of services and presumably any developments in this area would be subject to a business case analysis and discussion with the office-holders.

50. With regard to HR, my staff are employed on terms and conditions which are very closely modelled on the Parliament's and we are therefore already effectively enjoying the benefits of a shared service as I do not employ staff or external advisers for the purposes of negotiation.

Conclusion

51. I believe that governance and scrutiny arrangements can be refined still further but fundamentally we have in place a sound system which is delivering effective performance so far as the role of the Scottish Information Commissioner is concerned.

Kevin Dunion
Scottish Information Commissioner
19 December 2008