1. **Decisions on taking business in private:** The Committee will decide whether to take item 6 in private and also whether its consideration of a draft report on the affirmative instrument being considered later in the meeting and a draft Stage 1 report on the Long Leases (Scotland) Bill should be taken in private at future meetings.

2. **Long Leases (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from:

   Dale Strachan, Partner, and Catherine Reilly, Solicitor, Brodies LLP;

and then from:

   Fergus Ewing MSP, Minister for Community Safety;

   Simon Stockwell, Bill Team Manager, Scottish Government.

3. **Domestic Abuse (Scotland) Bill:** The Committee will consider the Bill at Stage 2.

4. **Subordinate legislation:** The Committee will take evidence on the draft Retention of Samples etc. (Children's Hearings) (Scotland) Order 2011 from:

   Fergus Ewing MSP, Minister for Community Safety;

   Keith Main, Policy Manager, Aileen Bearhop, Principal Policy Officer, and Carolyn Magill, Principal Legal Officer, Legal Directorate, Scottish Government.

5. **Subordinate legislation:** Fergus Ewing MSP (Minister for Community Safety) to move S3M-7742—
That the Justice Committee recommends that the Retention of Samples etc. (Children's Hearings) (Scotland) Order 2011 be approved.

6. **Work programme:** The Committee will consider its work programme.

7. **Long Leases (Scotland) Bill (in private):** The Committee will consider the main themes arising from the oral evidence heard earlier in the meeting.

Andrew Mylne  
Clerk to the Justice Committee  
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The Scottish Parliament  
Edinburgh  
Tel: 0131 348 5195  
Email: andrew.mylne@scottish.parliament.uk
The papers for this meeting are as follows—

**Agenda item 2**

All written submissions on the Long Leases (Scotland) Bill

Copy of the Long Leases (Scotland) Bill and all accompanying documents

SPICe briefing: Long Leases (Scotland) Bill

Letter from the Finance Committee on the Financial Memorandum of the Long Leases (Scotland) Bill  J/S3/11/5/1

Paper by SPICe (private paper)  J/S3/11/5/2 (P)

**Agenda item 3**

Copy of the Domestic Abuse (Scotland) Bill and all accompanying documents

**Agenda item 4**

SSI cover note  J/S3/11/5/3

The Retention of Samples etc. (Children’s Hearings) (Scotland) Order 2011 (SSI 2011/draft)

**Agenda item 6**

Paper by the Clerk  J/S3/11/5/4

**Papers for information**

Letter from the Minister for Community Safety on the Legal Services (Scotland) Act 2010  J/S3/11/5/5
Justice Committee

5th Meeting, 2011 (Session 3), Tuesday 8 February 2011

Long Leases (Scotland) Bill

Letter from the Convener of the Finance Committee on the Financial Memorandum of the Long Leases (Scotland) Bill

As you are aware, the Finance Committee examines the financial implications of all legislation, through the scrutiny of Financial Memoranda (FM). The Committee agreed to adopt level one scrutiny in relation to the Long Leases (Scotland) Bill. Applying this level of scrutiny means that the Committee does not take oral evidence or produce a report, but it does seek written evidence from affected organisations.

The Committee received one submission on the FM (please see the annexe).

Andrew Welsh MSP
Convener
Finance Committee
28 January 2011

Annexe

SUBMISSION FROM THE KEEPER OF THE REGISTERS OF SCOTLAND

By way of background, Registers of Scotland (RoS) is a non-Ministerial Department and is headed by me, as Keeper of the Registers of Scotland. The Keeper is a non-Ministerial office holder in the Scottish Administration and is the Chief Executive of RoS. RoS is a key part of the infrastructure that supports the Scottish economy, underpinning the property market by registering and providing State-backed indemnity protection for property transactions in Scotland, worth up to £50 billion each year. Set up as a Trading Fund in 1996, RoS is self financing from fees levied on its customers.

RoS’s work is dominated by the two main registers that relate to rights in land: the General Register of Sasines (established in 1617) and the Land Register of Scotland (established by the Land Registration (Scotland) Act 1979). I also have responsibility for 14 judicial and Crown registers. Our work is demand-led, fluctuating in response to activity in the property market, particularly the housing component. We typically handle around half a million registration transactions each year.

Sheenagh Adams
Keeper of the Registers of Scotland
QUESTIONNAIRE

Consultation

1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

I submitted a written response to the Scottish Government consultation and was represented at a seminar held by the SG Justice Directorate on 12 May 2010. I was given the opportunity to provide Justice Directorate with information regarding the financial impact of the Bill on the operation of the Scottish property registers.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Yes

3. Did you have sufficient time to contribute to the consultation exercise?

Yes

Costs

4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

My estimate of the administrative costs to RoS is accurately reflected in paragraphs 280-282.

Paragraphs 283-286 refer to the registration fees that will be charged by RoS for the registration of notices and other documents prescribed in the Bill. Paragraph 284 refers to a consultation on changes to fees, and these changes have now been implemented¹. As a result, the fee charged for registration of a notice would be £60 per Land Register title sheet and/or per deed recorded in the Sasine Register, and the total cost to applicants is estimated to be £60,000. Registration fees are intended to cover the cost of processing the applications in question, and the increase in fees will not therefore offset the administrative costs referred to in paragraphs 283-286.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

¹ Fees in the Registers of Scotland Amendment Order (SSI 2010/404)
As noted in paragraph 282, the administrative costs to RoS will require to be recovered from registration fees in the Land and Sasine Registers, and so costs will be met by all applicants for registration rather than merely those benefiting from the conversion of ultra-long leases to ownership.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

*The Financial Memorandum does not define a margin of uncertainty with regard to the administrative costs to RoS of around £200,000. The estimate is not supported by a full case analysis and actual cost may exceed that amount.*

Paragraph 286 notes the assumptions made with regard to the estimated total cost to applicants. I consider these assumptions are correctly reflected, subject to the increase in the application fee from £30 to £60 as noted above and the consequential increase in the total cost.

**Wider Issues**

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

*N/A*

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

*The administrative costs to RoS may increase if any amendment is made to the Bill in respect of the criteria that define whether a leasehold interest will convert to ownership.*
Justice Committee

5th Meeting, 2011 (Session 3), Tuesday 8 February 2011

SSI cover note

SSI title and number: The Retention of Samples etc. (Children’s Hearings) (Scotland) Order 2011 (SSI 2011/draft)

Type of Instrument: Affirmative

SSI drawn to Parliament’s attention by Sub Leg Committee: No

Purpose of Instrument:

1. The purpose of the instrument is to list the relevant sexual and violent offences which will trigger the retention of DNA samples, fingerprint data and other relevant physical data from children who are referred to a children’s hearing and either accept that they have committed that offence, or are found by a sheriff to have done so.

2. As explained in the Executive Note, the instrument is made under provisions inserted into the Criminal Procedure (Scotland) Act 1995 by section 80 of the Criminal Justice and Licensing (Scotland) Act 2010. The question of which offences should trigger the retention of DNA samples etc. from children was considered in some detail during Stage 1 of the Bill for the 2010 Act – when the relevant provision was numbered as section 59 of the Bill. The Stage 1 report1 deals with the topic in paragraphs 346-375, including with a recommendation that the Scottish Government provide a draft list of relevant offences prior to Stage 2. Accordingly, the Cabinet Secretary wrote to the Committee on 8 April 2010 explaining the process then being undertaken by the Forensic Data Working Group and attaching a draft list of offences. The letter was circulated to the Committee as paper 2 for the meeting on 13 April 20102.

Affirmative Instrument – Procedure

3. The draft Order was laid on 18 January 2011 and referred to the Justice Committee. The Order is subject to affirmative procedure (Rule 10.6). It is for the Justice Committee to recommend to the Parliament whether the Order should be approved. The Cabinet Secretary for Justice has, by motion S3M-7742 (set out in the agenda), proposed that the Committee recommends the approval of the Order. The Cabinet Secretary for Justice will attend in order to speak to and move the motion. The debate may last for up to 90 minutes.

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4. At the end of the debate, the Committee must decide whether or not to agree to the motion, and then report to the Parliament accordingly, by 28 February 2011. A draft report will be considered at the next meeting.
Background

1. The Committee reviewed its work programme at last week’s meeting (1 February).

2. One of the issues set out in the paper for that meeting was how to respond to a request by the Police Complaints Commissioner for Scotland (PCCS), Professor John McNeill, to give evidence to the Committee. Professor McNeill’s letter to the Convener – set out in Annexe A – makes clear that he has made this request partly in order to explain the general approach he has taken to carrying out his functions, and partly in order to express his concern about a recent proposal by the Cabinet Secretary to transfer his functions to the Scottish Public Services Ombudsman (SPSO).

3. As noted previously, the only date on which such an evidence session could now be held (given the Committee’s other work programme commitments) is 22 February.

4. At last week’s meeting, a decision on the PCCS request was deferred pending publication by the Commissioner of his response to the Cabinet Secretary. That PCCS response is now available, and is attached at Annexe B.

5. This paper also sets out some further information about the PCCS, and about the process that would be required to give effect to the Cabinet Secretary’s proposal, that may be helpful in informing the Committee’s decision.

Status and organisation of the PCCS

6. The PCCS was established under section 33 of the Police, Public Order and Criminal Justice (Scotland) Act 2006 as a non-departmental public body (NDPB). The PCCS took over the powers of Her Majesty’s Inspectorate of Constabulary Scotland (HMICS) to review the handling of complaints about the police on 1 April 2007.

7. The current Commissioner took up his duties on 17 August 2009, replacing the first Commissioner (Jim Martin).

8. The PCCS currently employs 16 members of staff to help the Commissioner carry out his duties. Its main function is to review the manner in which a police force (or other police authority) has handled an individual complaint from a member of the public, and it has the power to direct the relevant police authority to reconsider the complaint. The PCCS also has a role in scrutinising the complaints-handling procedures of police authorities more generally. The Commissioner is appointed by, and is accountable to, the Scottish Ministers (in practice, the Cabinet Secretary for Justice).

1 The document is also available from the PCCS website: http://www.pcc-scotland.org/assets/0000/2886/PCCS_ResponseFINAL.pdf.
9. As the PCCS is a statutory body, it could only be abolished by means of legislation. Similarly, as the SPSO is also a body whose functions are set out in statute, transferring to it the current functions of the PCCS would also require legislative change.

10. There are two main options for bringing forward the legislation that would be necessary to fulfil the Cabinet Secretary’s proposal:

- new primary legislation (for example, as a provision in any Session 4 Bill that may be introduced to restructure police forces in Scotland); or

- by means of an order under section 14 or 17 of the Public Services Reform (Scotland) Act 2010.

Procedure under 2010 Act

11. Section 14 of the 2010 Act allows Ministers to make provision in order to improve the exercise of public functions (having regard to efficiency, effectiveness or economy). In this context, “public functions” is defined as the functions of any public body listed in schedule 5 to the Act – which includes both the PCCS and SPSO. The provision that may be made by a section 14 order includes the transfer of some or all of the functions of a listed body to another listed body, a body created for the purpose or a local authority. The order may also abolish a listed body if (as a result of the order) it has no remaining functions.

12. Section 17 of the 2010 Act allows Ministers to make provision – again including the transfer of functions from one person or office-holder to another, or the abolition or creation of an office – to reduce any burden (which includes financial cost, administrative inconvenience etc.) that they consider results from legislation. In this instance, the bodies that may be affected are not limited to those listed in schedule 5.

13. Various preconditions apply before the power to make an order under either section 14 or 17 may be exercised. These preconditions are similar, though not identical in relation to the two types of order. Common preconditions include that the aims of the provision are proportionate to the policy objectives and that the provision won’t remove any necessary protections of civil liberties, health and safety etc.

14. In addition, before any order under section 14 or 17 may be made, Ministers must first consult (under section 26 of the 2010 Act) and then lay before the Parliament a draft of the order together with an explanatory document (under section 27 of the Act). The draft order is then subject to affirmative resolution of the Parliament. Put simply, the power to make an order under either section 14 or 17 is subject to a detailed form of “super-affirmative” procedure.

15. The section 26 consultation process requires those persons consulted (which must include office-holders whose functions are to be transferred) to be sent a copy of the draft order and draft explanatory document and to be given 60 days (excluding periods of Parliamentary recess and dissolution) to comment.

16. A further constraint (under section 19 of the 2010 Act) is that Ministers may not propose to make provision under section 14 or 17 that would affect a body or office-
holder listed in schedule 6 to the 2010 Act unless requested to do so by the SPCB, and may not lay a draft order without the SPCB’s consent. The bodies listed in schedule 6 are the various commissioners and ombudsmen which are directly accountable to the SPCB under their founding statutes – which includes the SPSO.

17. In his response to the Cabinet Secretary, the PCCS points out that the Cabinet Secretary’s current consultation exercise clearly does not satisfy the requirements of a section 26 consultation.

18. It is also understood that the SPCB has not yet decided whether to request the making of a section 14 or 17 order to give effect to the Cabinet Secretary’s proposal.

19. In view of the 60-day timescale for such a consultation, there is now no prospect of any draft order to transfer the functions of the PCCS to the SPSO being laid before the Parliament prior to dissolution.

**Conclusion**

20. The Committee is invited to note the contents of this paper, and to decide whether to invite Professor John McNeill to give oral evidence on 22 February.
Annexe A

Letter to the Convener from Professor John McNeill, Police Complaints Commissioner for Scotland

I am writing to thank you once again for the supportive comments you made in your letter of 7 December, on the approach that I am taking to carrying out my duties as Police Complaints Commissioner for Scotland.

In that letter you raise the possibility of me giving evidence to the Justice Committee. I would welcome this opportunity and hope that a date can be found before the dissolution of the current Parliament.

As you will be aware, the Justice Secretary is currently consulting on a proposal to move the functions of the PCCS to the Scottish Public Services Ombudsman, a move that I believe would be a retrogressive step. I will send a copy of my response to the members of the Justice Committee at the beginning of February. You may consider it helpful for me to attend the Committee around that time to answer any questions arising from the proposal and my response.

I look forward to hearing from the Committee Clerk, if a suitable window can be found.

Professor John McNeill
19 January 2011
Police Complaints Commissioner for Scotland: response to the Scottish Government’s consultation on the proposed transfer of his functions to the Scottish Public Services Ombudsman

Executive Summary

1. The uniqueness of police complaints from a legal and civil liberties perspective demands dedicated and specialised oversight. This may be lost in the event of the transfer of the Commissioner’s functions to a general complaints oversight body.

Any transfer of the functions will also place Scotland out of step with the rest of the UK and other progressive jurisdictions in Europe and elsewhere, all of which have dedicated and specialised police complaints oversight bodies (pages 1-3).

2. No clear and persuasive rationale has been given by Ministers for the proposed transfer. Far from simplifying the police complaints process, any transfer will result in the process becoming more complicated for complainers, as well as less effective and efficient (pages 3-8). In addition, Ministers have given no consideration to the financial implications of any transfer and, in particular, whether there will be a greater or lesser burden on the tax-payer as a result (pages 8-9).

3. The timing of the proposal is entirely out of step with the impending consultation on the future of policing in Scotland. The introduction of a single force would have major implications for the way in which complaints about the police are dealt with. Accordingly a decision on the future shape of police complaints oversight must be taken after, not before, the decision on the number of police forces Scotland should have (pages 9-10).

January 2011

Full response

On 14 December 2010, the Cabinet Secretary for Justice wrote to the Police Complaints Commissioner for Scotland (“the Commissioner”) advising of his proposal to transfer the functions of the Commissioner’s office to the Scottish Public Services Ombudsman (“the SPSO”). The Commissioner, along with other stakeholders, was asked to comment on this proposal by 19 January 2011, a period of little over four weeks including the festive break.

On 17 January 2011, civil servants advised that because of “timings issues” faced by a number of the consultees the deadline for responses had been extended to 31 January.

The Commissioner considers that the timescale for responses, even with this extension, was inappropriate given the significance of the proposal. The limited scope for scrutiny contrasts markedly with that applied to the proposed transfer to the SPSO of the Scottish Prisons Complaints Commissioner and Waterwatch. Both proposals were considered in detail by an ad-hoc Parliamentary Committee (known
as the “RSSB”) set up to review the bodies supported by the Scottish Parliamentary Corporate Body. Prior to making its recommendations, the RSSB obtained a substantial amount of written and oral evidence from relevant parties (including the SPSO and the organisations themselves). Although the RSSB had a wider remit than simply considering whether either body’s functions should be transferred, scrutiny of the proposals was far in excess of that afforded by the present exercise.

It is unclear whether the current consultation purports to be one under section 26 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). If it does, then the requirements of that Act have clearly not been satisfied. Any consultation under the 2010 Act requires various steps to be taken, including the provision to all consultees of an explanatory document giving reasons for the proposed transfer and how it would improve the exercise of public functions. The Commissioner considers that a consultation under the 2010 Act would have allowed proper scrutiny of the current proposal, not least because it would have required Ministers to explain more clearly the rationale for the proposed transfer (see item 2 below).

The Commissioner has three substantive objections to the proposal.

1. The unique nature of police complaints

The police are unique among public bodies. Their powers of arrest, detention and search and their licence to use force, even of a lethal nature, are quite simply unparalleled in our society.

The powers which have been granted to the police enable them to protect the community and the rights of individuals. In the vast majority of cases, the police fulfil these duties fairly and professionally. However, trust in the police, and the willingness of the public to assist them in the exercise of their functions, is wholly dependent on their powers being exercised responsibly and in accordance with the law. Integral to the accountability of the police in this connection is a system of effective complaints oversight. Such oversight represents the most important means by which members of the public can seek to hold the police to account for their acts and omissions.

The uniqueness of complaints about the police requires that the oversight mechanism is not only independent of the police, but also dedicated and specialised. The distinction between complaints about the police and those about other public bodies was recognised by Her Majesty’s Inspectorate of Constabulary for Scotland (“HMICS”) in 2000:

“It is important to distinguish between the word ‘complaints’ as it is normally understood and the way in which the term is applied in relation to policing. Many areas of the public sector have complaints systems which deal predominantly with quality of service issues. Complaints against the police are often a more serious matter and frequently make an allegation which if true would merit serious sanction or even criminal prosecution. Complaints against the police are governed by detailed legislation and government guidelines. These apply whenever it is alleged that an officer has committed … a breach of the police code of conduct.” (HMICS: “A Fair Cop? The Investigation of Complaints Against the Police in Scotland”)
The distinction was also acknowledged by the previous Scottish Public Services Ombudsman in her submission to the Justice 2 Committee on 8 November 2005, regarding the proposed establishment of the Commissioner’s office:

“Given the one-stop shop approach to complaints handling advocated by the Scottish Executive in 2001 it might be questioned why it is proposed to establish a Police Complaints Commissioner … separate from the SPSO. However, what could be defined as “traditional” police activities … are significantly different from the types of activities usually considered by public service ombudsmen. That difference in many, but not all, jurisdictions has been seen as justifying establishing separate arrangements for dealing with complaints about the Police or at least those relating to their operational activities.”

Dealing effectively with police complaints requires knowledge of criminal law and procedure; the police misconduct regime; and the internal policies and procedures applied by policing bodies in respect of all aspects of policing. For this reason, the majority of complaints handling staff within the Commissioner’s office have a law degree; the Head of Complaints is a qualified solicitor.

Transfer of the functions risks losing the expertise which has been developed within the Commissioner’s office. Such a loss of specialism would undermine the current high quality of complaint handling reviews and would hamper the successful efforts which have been made to deal with the huge increase in demand (almost 200%) which the Commissioner’s office has experienced for its service over the last 18 months.

The need for dedicated police complaints oversight has been recognised throughout the UK, as well as in Ireland, much of the rest of Europe, New Zealand, South Africa and much of Australia. Indeed, those countries within Europe which do not yet have a dedicated police complaints body have been criticised by groups such as Amnesty International and the European Committee for the Prevention of Torture (see eg the 2008 Amnesty publication, “Police Complaints Investigation Mechanisms in the Spanish Context”).

Accordingly, as well as undermining the effectiveness of the current oversight system, the transfer of functions to a general complaints oversight body would place Scotland out of step with the rest of the UK and many other progressive jurisdictions. This is at a time when those countries within Europe which do not have dedicated bodies are being urged to establish them.

2. The absence of any clear and persuasive rationale for the transfer

In his letter of 14 December 2010, the Cabinet Secretary stated the following:

“The overall intention of recommendations from [the Fit-for-Purpose Complaints Handling Action Group – “the Sinclair group”] was to make complaints handling a two-tier process, by rationalising intermediate complaints handling bodies between services and the [SPSO], into the SPSO
itself. The PCCS is one of the intermediate bodies identified by the Sinclair Group.

… It was suggested [by the Sinclair Group] that the case for merging the PCCS with the SPSO should be considered during the next Parliamentary session. The budget reductions faced by the Justice portfolio next year have caused me to bring forward my consideration of this.

I am minded to move the functions of the PCCS to the SPSO, in line with Sinclair Recommendations, to simplify the process for handling complaints against police organisations. Primary responsibility for handling complaints would remain with the organisation being complained against, with direct recourse to the SPSO for those who do not believe that their complaint has been dealt with appropriately.

… [This] reflects the approach being taken across Government to ensure that external scrutiny of public bodies is proportionate, efficient and effective.”

The above represents the extent of information provided to consultees on the proposed transfer of the functions. As the Commissioner did not believe this to be sufficient to enable a meaningful response to the consultation, on 16 December 2010 he wrote to the Cabinet Secretary seeking the following further information.

• whether the rationale for the transfer is financial, or part of the broader strategy of rationalising public bodies, or both; and
• details of the likely financial implications of the move, specifically the cost of dissolving the Commissioner’s office, and the additional budget likely to be allocated to the SPSO.

On 23 December 2010, the Cabinet Secretary responded to the Commissioner as follows:

“I can confirm that my decision to reconsider the future of the PCCS is driven by the work taking place across Government to ensure that external scrutiny of public services is efficient and effective. Our original intention had been to defer reviewing the PCCS until after the next Scottish Parliamentary election. However, the budget cuts we face have significant implications for every area of spending and it is therefore prudent to bring forward plans to look again at police complaints handling in Scotland. …

Regarding the likely financial implications of any decision to move the functions of the PCCS into the SPSO … [this] will be considered in light of the views expressed during the consultation process and discussions with the SPSO and the Scottish Parliamentary Corporate Body.”

Accordingly, there would appear to be three possible rationales for the proposed transfer:

(a) the “simplification” of the police complaints process;
(b) the need to ensure that external scrutiny of public bodies is “proportionate, effective and efficient”; and

(c) the need to deal with the reduced budget available to the Justice portfolio.

The Commissioner comments on each of these in turn.

Rationale (a): The “simplification” of the police complaints process

The Sinclair Group saw the police complaints process as consisting of the following four stages:

1. “informal resolution”;
2. formal complaint dealt with by the policing body concerned;
3. review by the Commissioner
4. review by the SPSO

In the Commissioner’s view, however, this presents a somewhat misleading description of the present system. Currently, all written expressions of dissatisfaction are recorded by the police as complaints. This reflects the definition of a complaint within the Police, Public Order and Criminal Justice (Scotland) Act 2006 (“the 2006 Act”). While the police may attempt conciliation, this will normally be done as part of the handling of the complaint itself rather than as an initial, separate stage in the process. Accordingly, stage (1) does not represent a discrete tier of the police complaints process.

It is also important to view stage (4) (SPSO involvement) in its proper context. Although the Commissioner is one of the bodies within the SPSO’s jurisdiction, in the absence of alleged “maladministration” this does not extend to questioning the merits of decisions made by the Commissioner in complaint handling reviews. “Maladministration” is not defined in the SPSO’s founding legislation but it is commonly understood to include matters such as delay or perversity in decision making, partiality and rudeness by staff. In the period of almost four years since the establishment of the Commissioner’s office, the SPSO has not challenged the merits of any complaint handling review conducted by the Commissioner. Indeed, the number of complaints about the Commissioner’s office which have been dealt with by the SPSO over the last four years is very small.

Recourse to the SPSO is designed to be an extraordinary remedy for complainers. It is not intended to represent a standard appeal route for complainers who simply disagree with the outcome of their complaint. In light of this, it does not seem appropriate to characterise the SPSO as a discrete fourth stage in the police complaints process. Unlike the Commissioner, to whom complainers may apply simply because they disagree with the police response to their complaints, the SPSO requires there to be an allegation of maladministration (and injustice or hardship arising from this) before it may act.

Accordingly the Commissioner does not believe that the Sinclair Group was correct to describe the police complaints system as consisting of four separate stages. In
the Commissioner’s view, the system is essentially a two-tier one consisting of the following:

(1) formal complaint dealt with by the policing body concerned;
(2) review by the Commissioner.

This raises serious doubts about whether the proposed transfer of functions is likely to result in any simplification of the police complaints process. According to the Cabinet Secretary, following any transfer the policing body would continue to have primary responsibility for handling complaints, with dissatisfied complainers having direct recourse to the SPSO. In other words, any transfer would result in replacing the current two-tier system (the police and the Commissioner) with another two-tier system (the police and SPSO).

It might be argued that the transfer of functions would simplify the police complaints process by abolishing the Commissioner’s office and therefore reducing the number of bodies subject to the SPSO’s jurisdiction. However, it is important to emphasise that in terms of its own procedures the SPSO is itself subject to independent, external review regarding aspects of its handling of complaints.

Service complaints about the SPSO itself, such as those about delay or rudeness by staff, are initially dealt with by the SPSO internally, but where a complainer remains dissatisfied, they are passed to an “Independent Service Delivery Reviewer”, an individual external to the SPSO. In other words, under any new system complainers who are dissatisfied with the police handling of their complaints will be able to apply to the SPSO; and those complainers who are dissatisfied with the SPSO’s handling of their complaints may ultimately have aspects of this considered by the Independent Service Delivery Reviewer. While there are differences between, on the one hand, the SPSO’s oversight of public bodies and, on the other, the Independent Service Delivery Reviewer’s oversight of the SPSO, the fact remains that, from the complainer’s perspective, any transfer will not simplify the police complaints process.

In addition, due to the sheer number of complaints dealt with by the SPSO, in practice most of the work in relation to these is delegated to staff known as Complaints Reviewers. According to the SPSO’s procedures, decisions made by complaints reviewers may be subject to internal review. This may occur, for example, where a complainer alleges that the complaints reviewer’s decision is based on a factual inaccuracy. A decision is thereafter reached by senior staff, or the Ombudsman himself, as to whether the original decision should stand or the complaint be reopened.

By contrast, the Commissioner personally scrutinises each and every complaint handling review and decision letter issued by his office. There is accordingly no need for a formal “appeal” mechanism within the Commissioner’s office. Complaints about the Commissioner’s service are dealt with internally, with complainers who remain dissatisfied being referred to the SPSO. Complainers who simply disagree with the Commissioner’s decision are informed that their only recourse is to judicial review.

The absence of any internal appeals mechanism within the Commissioner’s office therefore promotes simplicity both in terms of his own involvement and within the
police complaints system overall. Far from simplifying matters, any transfer of the functions may well render that process complicated and more time-consuming.

Rationale (b): Proportionality, effectiveness and efficiency

In his letter of 14 December 2010, the Cabinet Secretary explains that the proposed transfer reflects the approach being taken across Government to ensure that scrutiny of public bodies is proportionate, effective and efficient.

There is, however, no evidence to suggest that the transfer of the Commissioner’s functions will achieve any of those aims. On the contrary, any transfer may well undermine the efficiency and effectiveness of the present system. The Commissioner has already commented that any transfer is unlikely to simplify the current process. The following comments touch upon that issue but also relate to efficiency and effectiveness more generally.

It is clear that the establishment of a dedicated, independent police complaints oversight body in Scotland has had a marked effect upon public confidence in the complaints process. In 2006/07, the final year in which HMICS dealt with complaints about the police, it received a total of 84 complaints from the public, 38 of which resulted in a full review. By contrast, the Commissioner expects that by the end of the current financial year his office will have received 600 enquiries from members of the public, resulting in approximately 180 applications for review. The Commissioner expects that in the same period he will complete around 130 full reviews, over three times as many as were concluded by HMICS in 2006/07.

These figures demonstrate not only the effectiveness of the present system but also the visibility and accessibility of the Commissioner’s office. There is a serious risk that by subsuming the Commissioner’s functions into a general public services complaints body, this visibility will be lost.

Research conducted into European police oversight bodies in 2008 provides support for this view. The research included an evaluation of questionnaires sent to all police oversight bodies in the European Union. Although they considered that further research was necessary, the report authors reached the following conclusion:

“A striking outcome of the questionnaire concerns the difference in the numbers of police related complaints between specialised bodies and national Ombudsmen. The actual number of complaints in relatively small countries as Ireland and Northern Ireland with specialised bodies exceeds by far the numbers in all other Member States in which Ombudsmen with a general mandate are competent to deal with police complaints. This result seems to indicate that a specialised body (a Police Ombudsman) attracts greater public awareness than a general Ombudsman."

The Commissioner also has serious concerns about the compatibility of his functions with those currently exercised by the SPSO. Firstly, unlike the Commissioner, who

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2 Police Oversight Mechanisms in Europe: Towards a Comparative Overview of Ombudsmen and their Competencies. The report author is Professor Monica den Boer of VU University Amsterdam, who is Dean of the Police Academy in the Netherlands.
may deal with a complaint simply on the basis that a complainer disagrees with the police response, the SPSO may do so only where a complainer alleges maladministration and that he has suffered injustice or hardship as a result. Accordingly, any transfer may well result in complainers facing obstacles to having their complaints dealt with, which are not present within the current system. In short, the remits of the respective organisations are not the same.

Even more fundamentally, although the SPSO has the power to investigate complaints made about a multitude of public bodies it will not (assuming the Commissioner’s functions are transferred in tact) have the same power to investigate complaints about the police. Although the Commissioner has the power to obtain information from policing bodies, unlike the SPSO he has no power to interview witnesses, obtain evidence from third parties or instruct experts. Accordingly, following any transfer, the SPSO will have the difficult task of explaining to complainers why their complaints about the police cannot be investigated, whereas complaints about other public bodies can. At best, this will be confusing for complainers; at worst, it may give rise to a perception among the public that complaints about the police are not taken as seriously as those against other public bodies.

The possibility of confusion arising from the transfer of functions to the SPSO was acknowledged by the previous Ombudsman in her written submission to the RSSB, the Parliamentary committee set up to review the bodies supported by the Scottish Parliamentary Body. The submission concerned the transfer to the SPSO of Waterwatch and the need to harmonise the respective legislative provisions:

“Not to do so would leave the SPSO with variable levels of investigatory power in different sectors and as regards different bodies under jurisdiction. In our view this would complicate rather than simplify the complaints landscape and be contrary to the stated purpose of the exercise.”

In order to avoid this anomaly, any transfer of the Commissioner’s function would require to be accompanied by the granting to the SPSO of new and expansive powers to investigate police complaints, of the kind which it already possesses in relation to complaints about other public bodies. In other words, with regard to police complaints, the SPSO would require to be given the same powers to obtain evidence as the Court of Session (see section 13 of the SPSO’s founding legislation). Although this would bring Scotland more into line with the police complaints oversight bodies in the rest of the UK, it would mark a radical change to the way in which such complaints are dealt with in Scotland. Clearly any such proposal would require a much greater degree of consultation with stakeholders than the present exercise is designed to achieve.

In the Commissioner’s view, the above factors raise serious doubts about the continued effectiveness of police complaints oversight following any transfer of his functions.
Rationale (c): Budgetary considerations

As noted above, the Cabinet Secretary stated in his letter dated 14 December 2010 that budget reductions faced by the Justice portfolio had caused him to bring forward his consideration of the future of the Commissioner’s office. However, following a request from the Commissioner for further information regarding the likely costs involved in any transfer, the Cabinet Secretary stated that budgetary factors would be considered in light of the consultation exercise and further discussions with the SPSO and Scottish Parliamentary Corporate Body. In other words, no consideration has yet been given to the cost of any transfer and whether SPSO oversight will offer value for money.

In the Commissioner’s view, any proposal to transfer the Commissioner’s functions ought to have been preceded by a detailed assessment of whether any savings were likely to be incurred by such a move. In terms of section 14 of the 2010 Act, in making any order transferring the functions of a public body the Scottish Ministers require to have regard to, among other things, the “economy” of the transfer. As noted above, it is unclear whether the present consultation purports to be one under the 2010 Act but, even if it is not, it is disappointing that Ministers have not abided by the spirit of this legislation.

As matters stand, the cost of any transfer and, in particular, whether it is likely to place a greater or lesser burden on the tax payer than is presently the case, remains wholly unclear. This is precisely the kind of issue that ought to have been considered by the Scottish Ministers before any proposal was made to transfer the functions. In any event, it clearly must be considered before a final decision on the proposal is taken.

The Commissioner fully acknowledges the Ministers’ intention to reduce the number of public bodies in Scotland. However, this is not something that can reasonably be achieved without a detailed consideration of the financial consequences of decisions made in this connection.

(3) The timing of the proposal

The timing of the current proposal is at odds with the recent decision by the Government, approved by the Lord President, to accommodate the newly created post of the Judicial Complaints Reviewer within the Commissioner’s offices in Hamilton. It is understood that this decision reflected a reluctance on the part of officials to locate the post within the SPSO structure. Clearly any transfer of the Commissioner’s functions to the SPSO will signify the abandonment of these plans; indeed, it may well throw the establishment of the new post into doubt.

The current proposal is also entirely out of step with other developments occurring within policing in Scotland.

Within the near future the number of police forces in Scotland will be reduced, possibly to a single force. Any such fundamental reorganisation of the police service will involve a reconsideration of current local and central accountability structures. A key element to that accountability involves independent complaints oversight of the
kind currently provided by the Commissioner. Reorganisation on the scale envisaged will require a fresh assessment to be undertaken of the form which complaints oversight should take within the new structure.

For example, the introduction of a single force would have an obvious impact upon the ability of the Crown Office and Procurator Fiscal Service to instruct one police force to investigate serious criminal allegations in respect of another. Similarly, such a move would inhibit the Deputy Chief Constable of one force requesting another force to investigate a serious non-criminal complaint. In such circumstances, consideration will clearly require to be given as to who should perform this role. In Northern Ireland and the Republic of Ireland, which have single police forces, this function is performed by the respective police complaints oversight bodies.

On 12 January 2010, the Cabinet Secretary announced a widespread consultation on the proposed reduction in the number of police forces. As the consultation will also consider the issue of accountability, there appears to be no reason why it cannot also consider the form which independent complaints oversight should take in the new landscape. This would allow a full and proper assessment to be undertaken of this issue, taking into account the substantial reorganisation that is about to take place.

In conclusion, the future of police complaints oversight in Scotland cannot reasonably be determined before deciding on the future shape of Scotland’s police service. Indeed, there is a substantial risk that any decision to transfer the Commissioner’s functions will require to be followed, in the fullness of time, by the decision to recreate a dedicated complaints oversight body of the kind which exists in the rest of the UK and in Ireland.

January 2011
Justice Committee

5th Meeting, 2011 (Session 3), Tuesday 8 February 2011

Letter from the Minister for Community Safety to the Convener

Legal Services (Scotland) Act 2010

I am writing in relation to the implementation of the Legal Services (Scotland) Act 2010 (“the Act”). Given the cross party support for this legislation, and the Justice Committee’s work in scrutinising the Bill over the course of the last year, I thought it would be appropriate to set out an overview of our initial plans for implementation and the likely timescales involved. I discussed these recently with representatives from the main parties.

Implementation of Parts 2 and 3 of the Act, which deal with the regulation of licensed providers, confirmation agents and non-solicitor will writers, is likely to be a reasonably lengthy process. Further consultation with potential regulators will be required, as will the development of regulations to set out certain details about the regulatory frameworks. We therefore anticipate that these Parts may not be fully operational until late 2011. However, in relation to the introduction of regulation for non-solicitor will writers, we are keen to expedite this process if possible, and I intend to write again to the Committee following further consideration of the implementation timetable.

One of the key areas in which regulations will require to be made is in relation to the definition of “regulated profession” under section 49 of the Act. This definition is required as a result of restrictions on the external ownership of licensed providers which were inserted at Stage 2, which provide that a majority share in the ownership or control of such entities must lie with solicitor investors or investors who are members of other regulated professions. Given the significance of this definition in influencing who will be able to control firms providing legal services under the Act, we intend to publish a public consultation in February to seek views on what professions should be included.

We also intend to lay an initial commencement order prior to the dissolution of the Parliament. This will cover certain sections in the Act, mostly in Part 4, which do not relate to the regulation of licensed providers, confirmation agents or non-solicitor will writers, and do not require any significant consideration before commencement. These are likely to include the various minor changes to the Solicitors (Scotland) Act 1980; the sections relating to McKenzie friends; the powers to set out the framework for the regulation of the Faculty of Advocates; the section requiring the Scottish Legal Aid Board to monitor the availability and accessibility of legal services; and the provisions allowing Citizens Advice Bureaux to directly employ solicitors. We are in the process of consulting with the bodies which will be affected by the early commencement of these sections, and no major issues have been raised so far.

The commencement order will also include certain sections in Part 2, particularly around the application and approval process for approved regulators, in order to encourage bodies interested in becoming approved regulators to begin preparatory
work on their regulatory schemes while work on the full implementation of Part 2 is ongoing, and to enable them to submit applications (though we do not expect bodies to apply until later this year). We have had constructive discussions with both of the bodies which have expressed an interest in applying to date (the Law Society of Scotland and ICAS). They support our proposed approach, and intend to liaise closely with the Scottish Government as work on their regulatory schemes progresses.

Given the constructive approach of the Justice Committee throughout the Bill process, I would welcome any comments or suggestions in relation to the implementation of the Act. Otherwise, we will proceed with implementation in line with the general approach described above.

I hope this has been helpful.

Fergus Ewing MSP
Minister for Community Safety
2 February 2011