EVIDENCE TO THE REVIEW OF SPCB SUPPORTED BODIES COMMITTEE FROM PROFESSOR ALICE BROWN, SCOTTISH PUBLIC SERVICES OMBUDSMAN

Thank you for giving us the opportunity to contribute to this review. Our response is attached.

I am content for it to be made public in the usual way.

The Scottish Public Services Ombudsman

The Scottish Public Services Ombudsman (SPSO) provides a ‘one-stop-shop’ for individuals making complaints about organisations providing public services in Scotland. Our service is independent, impartial and free.

We are the ‘last resort’ in handling complaints about councils, housing associations, the National Health Service, the Scottish Government and its agencies and departments, the Scottish Parliamentary Corporate Body, colleges and universities and most Scottish public authorities.

We normally consider complaints only after they have been through the formal complaints process of the organisation concerned. Members of the public can then bring a complaint to us by visiting our office, calling or texting us, writing to us, or filling out our online complaint form.

The Scottish Public Services Ombudsman was set up in 2002, replacing three previous offices - the Scottish Parliamentary and Health Service Ombudsman, the Local Government Ombudsman for Scotland and the Housing Association Ombudsman for Scotland. Our role was also extended to include other bodies delivering public services.

We aim not only to provide justice for the individual, but also to share the learning from our work in order to improve the delivery of public services in Scotland. We have a programme of outreach activities that raise awareness of our service among the general public and promote good complaint handling in bodies under our jurisdiction.

The current Ombudsman, Professor Alice Brown, has announced her intention to demit office on 31 March 2009.

EXECUTIVE SUMMARY

- The SPSO welcomes the review being carried out by the Committee and supports further simplification of the complaint handling landscape aimed at improving the effectiveness of the system from the perspective of the complainant.
The SPSO welcomes the proposal to give the SPSO the explicit role of overseeing the design of internal complaints handling procedures in public service organisations. It also supports the logic behind the proposal for the Ombudsman to assume the complaint handling responsibilities of Waterwatch Scotland and the Scottish Prison Complaints Commissioner – this is consistent with the integration principles underpinning the establishment of the SPSO as a ‘one-stop-shop’.

The SPSO welcomes the opportunity for further discussion of the detailed legislative implications of making the changes suggested by the Scottish Government, and would draw attention to the complexity of some of the issues involved.

The SPSO recognises that there are a range of options for configuring the various functions delivered by the bodies supported by the SPCB (and other related bodies) and would draw the Committee’s attention to the experience in other countries and the need to take account of the differing considerations attaching to the various functions performed by these bodies, particularly in relation to accountability and independence.

The SPSO welcomes the Scottish Government’s recognition of the importance of independence in providing public assurance, and draws the Committee’s attention to some inherent tensions in the current relationship between the SPCB and office-holders, and various suggestions for enhanced accountability arrangements.

For its accountability to Parliament, the SPSO supports a similar arrangement to that being carried out by the Scottish Commission for Public Audit of Audit Scotland.

If the Committee is attracted to a model adding additional functions to the traditional Ombudsman role, the SPSO is not persuaded that a Commission model would offer the most appropriate form of governance.

The SPSO agrees that, in the long term, there is likely to be scope for some modest efficiency savings by building on existing sharing of services.

The SPSO also welcomes the recognition by the Scottish Government and the SPCB that there are transitional resourcing implications for changes of this magnitude.

Finally, if there is to be legislation in this area, the SPSO has some proposals for legislative changes to permit service enhancement in some key areas of our operations.

**INTRODUCTION**

1. I am grateful to the Committee for this opportunity to submit written evidence to help with its work. In my 2007-08 Annual Report I wrote about the timeliness, some ten years on from devolution, of a review of the whole
architecture of governance that underpins the work of the Parliament, the Government and public services and to decide on the appropriate framework in a country of five million people. I wish the Committee well with its contribution to this task.

2. Over the last six years, as the first Scottish Public Services Ombudsman, I have come to understand very clearly that the role provides an important constitutional safeguard and I, therefore, consider this review to be of great significance. An Ombudsman and an Auditor General are standard components of a modern democracy and form key pillars of the integrity system that gives the public reassurance about the actions of government and the wider public sector.

3. The Scottish Parliament’s original aspirations of an integrated external complaint handler for public services in Scotland (the ‘one-stop-shop’ model) have, I believe, been justified by our experience since 2002. The model has been an influential one and has been copied in other parts of the UK and beyond. I consider, however, that there is scope to extend this design principle and to further simplify structures and processes for the benefit of the public, whilst preserving the crucial features of the current model.

4. In this document I will address:
   - The background to the Committee’s work
   - Design principles
   - The benefits of simplification
   - The proposals for improving the handling of complaints about public administration and services (the Crerar and Sinclair recommendations)
   - A body with functions additional to the traditional Ombudsman role (the SPCB’s proposals)
   - Accountability and independence
   - Process and resourcing issues
   - Other legislative issues

5. I will be happy to provide further details if that would be helpful, or to assist with the review in any other way. I am aware that Sir Neil McIntosh the Chair of our independent Audit Advisory Committee has also written to you offering assistance with the review.

BACKGROUND

6. A considerable amount of preparatory work has been conducted on some of the issues currently being considered by the Committee. The Finance Committee’s 2006 report into Accountability and Governance\(^1\) made important recommendations in relation to the governance and terms and conditions of SPCB supported bodies. The SPSO contributed written and oral evidence\(^2\) to

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\(^1\) www.scottish.parliament.uk/business/committees/finance/reports-06/fir06-07-Vol01-00.htm  
\(^2\) www.scottish.parliament.uk/business/committees/finance/inquiries/actgov(fc-actgov-05.pdf
that Committee, in which we set out: the arrangements for holding the Ombudsman’s office to account; our active stance on shared services; our concerns about the tension in the arrangement whereby responsibility for budgetary oversight of my office rests with the SPCB, a body within my jurisdiction; and our view that the arrangement through which the Scottish Commission for Public Audit has been given responsibility for examining Audit Scotland’s proposals for its use of resources and expenditure seemed to us to demonstrate a more appropriate balance between budgetary control and independence.

7. More recently, the Crerar Review into the regulation, audit, inspection and complaints handling of public services in Scotland\(^3\) and subsequent Scottish Government Action Group reports, including Douglas Sinclair’s Fit-For-Purpose Complaints System Action Group (FCSAG) report\(^4\), have reached conclusions that are of central relevance.

8. In the SPSO’s response to the Crerar review\(^5\) we set out our views on improving complaint handling and we were pleased to see that the FCSAG report, which has been welcomed by the Scottish Government, endorsed our core arguments about preserving the role of the SPSO as an external reviewer of complaints.

9. The FCSAG report also proposes, amongst other recommendations, that the complaints functions now undertaken by Waterwatch and the Scottish Prison Complaints Commissioner should be conducted by the SPSO. The group also endorsed Professor Crerar’s suggestion that the SPSO be given the explicit role of overseeing the design of internal complaint handling procedures by service providers – again, we welcome this innovative recommendation. The Cabinet Secretary for Finance and Sustainable Growth has indicated (in his Parliamentary statement on 6 November 2008) the Scottish Government’s preference that these specific recommendations be progressed\(^6\).

10. Finally, by way of context, the Committee may wish to be aware that the Administrative Justice Steering Group chaired by Lord Philip is working on a report on the administrative justice landscape in Scotland. This is due to be published in the Spring of 2009. The SPSO is a decision-making body, exercising quasi-judicial authority as an alternative to the courts. Public sector ombudsmen are described in a recent paper by the Law Commission\(^7\) as one of ‘the four broad pillars’ of administrative justice. It is for this reason that consideration of the future role for the Ombudsman also needs to be considered as part of the administrative justice spectrum. In this connection, the Committee may well wish to seek input from the Scottish Committee of the Administrative Justice and Tribunals Council which has a remit to keep under review the administrative justice system as a whole.

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\(^3\) www.scotland.gov.uk/Resource/Doc/198627/0053093.pdf
\(^4\) www.scotland.gov.uk/Resource/Doc/923/0063564.doc
\(^5\) www.spsso.org.uk/news/article.php?id=252
\(^6\) www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-08/sor1106-02.htm#Col12077
\(^7\) Law Commission, Administrative Redress: Public Bodies and the Citizen, July 2008
DESIGN PRINCIPLES

11. In supplementary evidence to the Finance Committee’s 2006 Accountability and Governance inquiry\(^8\), I proposed six ‘design principles’ that could be used when considering the establishment of new bodies or changes to the remit of existing organisations. I think they still have some force and they may be of interest to the Committee, so for ease of reference I am reproducing them in this submission. The principles are:

1. Clarity of Remit: a clear understanding of the office-holder’s specific remit
2. Distinction between functions: a clear distinction between different functions, roles and responsibilities including audit, inspection, regulation, complaint handling, advocacy
3. Complementarity: a dovetailing of jurisdictions creating a coherent system with appropriate linkages with no gaps, overlaps or duplication
4. Simplicity and Accessibility: simplicity and access for the public to maximise the ‘single gateway’/’one-stop-shop’ approach
5. Shared Services: shared services and organisational efficiencies built in from the outset
6. Accountability: the establishment of clear, simple, robust and transparent lines of accountability appropriate to the nature of the office

12. I would submit that these principles might serve as a useful checklist for the Committee’s consideration of possible models for the future.

THE BENEFITS OF SIMPLIFICATION

13. The Committee will recognise the importance of keeping some high-level objectives at the front of its mind as it conducts its review. A number of possible goals have been stated.

- In their oral evidence to the Committee on 9 December 2008\(^9\), the SPCB referred to three desirable outcomes from reconfiguring the delivery of the functions delivered by bodies funded by them. These were: “better value for the public purse; higher standards of output from individuals in the bodies concerned; and services for the general public that are more understandable and easier to use”.

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\(^8\) www.scottish.parliament.uk/business/committees/finance/reports-06/fir06-07-Vol02-02.htm#supsvbgf
\(^9\) www.scottish.parliament.uk/s3/committees/rssb/or-08/rssb08-0202.htm
• In giving evidence to the Committee on the same day the Cabinet Secretary for Finance and Sustainable Growth also indicated the Scottish Government’s wish to bring about simplification of the complaints process in public services by reducing the number of bodies handling and determining complaints so that we “create a more accessible, simpler structure so that members of the public can pursue their legitimate concerns”.

• We endorse the simplification ideals. The SPSO’s response to the Crerar Review identified the principles against which we believe any proposals for reforming complaints handling in public services should be tested. We argued that changes should:
  - Improve the quality of service delivered by complaint handlers;
  - Improve public confidence in handling; and
  - Obtain efficiencies and economies of standardisation and scale.

14. In our view, in formulating any new structure for complaint handling in public services in Scotland, amongst all these objectives, primacy should be given to improving the effectiveness of the system from the perspective of the complainant. Both the SPCB and the Scottish Government have identified potential opportunities to reduce the number of bodies currently determining complaints, with a view to improving access for service users and simplifying the system. In achieving these benefits, however, it will be important to ensure that there is no diminution in the service offered to members of the public.

15. A secondary benefit, for the wider public, would derive from any efficiencies that may result from a greater sharing of functions and services between ‘office-holders’. The SPSO has, over a number years, worked with other organisations to identify and exploit appropriate opportunities for the sharing of services (see for example the Audit Scotland report: Ombudsman/Commissioners – Shared Services, 2006[^10]). It is however possible that some re-configuration could facilitate some further efficiencies, albeit of a relatively modest nature. The SPCB’s evidence to the Committee indicated that the six bodies supported by the SPCB currently employ about 96 full time equivalent staff.[^11] The projected 2009/10 combined budget for the Commissioners and SPSO is £7.9 million[^12] – though this figure excludes the expenditure of other external complaint handling bodies which may also be affected. It must also be recognised that there are significant components of the budgets of complaint handling and investigative bodies which are demand-led, and that the resourcing requirements are therefore prone to fluctuations.

[^10]: [www.scottish.parliament.uk/business/committees/finance/reports-06/fir06-07-Vol02-03.htm#asocssas](http://www.scottish.parliament.uk/business/committees/finance/reports-06/fir06-07-Vol02-03.htm#asocssas)
[^11]: Col 8, SPCB oral evidence to Review of SPCB Committee, 9 December 2008, [www.scottish.parliament.uk/s3/committees/rssb/or-08/rssb08-0202.htm](http://www.scottish.parliament.uk/s3/committees/rssb/or-08/rssb08-0202.htm)
[^12]: Col 216, [http://www.scottish.parliament.uk/s3/committees/finance/reports-08/fir08-07-vol1-03.htm](http://www.scottish.parliament.uk/s3/committees/finance/reports-08/fir08-07-vol1-03.htm)
PROPOSALS FOR IMPROVING THE HANDLING OF COMPLAINTS ABOUT PUBLIC ADMINISTRATION AND SERVICES (THE CRERAR AND SINCLAIR RECOMMENDATIONS)

16. The SPSO handles complaints about maladministration and service failure in most public services in Scotland in line with the ‘one-stop-shop’ model agreed by the Scottish Parliament in 2002. Douglas Sinclair’s FCSAG Report provides a comprehensive and detailed prescription for simplifying further the main elements of the system for dealing with public service complaints. As outlined above, we welcome the suggestion - based on a proposal included in the Crerar Review - that the SPSO should work with service providers and sectoral interests to oversee the development of sector-by-sector complaint handling systems based on a set of principles approved by the Parliament. The SPSO believes that this new statutory role will contribute significantly to the simplification of complaint handling in the public sector to the substantial benefit of complainants.

17. As indicated in paragraph nine above, the Scottish Government has given support to the other major element of the FCSAG proposals – the transfer of the complaint handling functions of the Scottish Prisons Complaints Commission and Waterwatch to the SPSO. We note that they follow the logic of the integrated service model on which the SPSO was founded and that they could offer simplification and efficiency benefits for service users and the wider public.

18. The FCSAG report also indicated that the same arguments supporting the transfer of the complaints function of Waterwatch and the Scottish Prison Complaints Commission also held for police complaints but noted that the recent creation of the Police Complaints Commissioner position meant that it should be allowed time to develop and bed in before its position as a stand-alone body be considered.

19. If the Committee is minded to endorse the FCSAG proposals it will be important to resolve any legislative difficulties. Waterwatch Scotland’s current responsibilities and duties are in some instances broader and in others narrower than those conferred on the Ombudsman by the 2002 Scottish Public Services Ombudsman Act. To avoid a diminution in the service to the public and to ensure that complainants receive an enhanced or, at least, equivalent service, it is the SPSO’s view that it will be necessary for the Committee to consider the respective statutory powers of both organisations and consider whether, if it is their intention to proceed as envisaged by the Scottish Government, there is a requirement to transfer the current Waterwatch scheme across to the SPSO.

20. The SPSO’s preference is for the legislation to be harmonised to ensure the strengths of each are retained. Our existing discretion to consider complaints which allows flexibility of approach and powers to compel evidence should be extended to water complaints. In addition, the ability which Waterwatch currently has to undertake reviews of systemic problems should be extended generally to the SPSO and hence cover also the other bodies currently under
the Ombudsman’s jurisdiction. 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. The Committee may also wish to know that powers to review systemic problems are generally held by Ombudsmen internationally, and by all European Ombudsmen with the exception only of those in Belgium, Luxembourg and the UK.

21. We await with interest the Cabinet Secretary for Finance and Sustainable Growth’s detailed response to the remaining recommendations proposed in the FCSAG report to Ministers, and would be happy to assist the Committee with any detailed consideration of the legislative implications.

A BODY WITH FUNCTIONS ADDITIONAL TO THE TRADITIONAL OMBUDSMAN ROLE (THE SPCB’S PROPOSALS)

Structure

22. In its letter to the Committee of 3 December 2008, the SPCB endorsed the Sinclair/FCSAG recommendations but went significantly further. It proposed the creation of a new body incorporating: the current complaints handling role of the SPSO alongside any extensions of powers or of jurisdiction; the existing responsibilities for investigating complaints about the conduct of MSPs; complaints about the conduct of elected members of local authorities or members of devolved public bodies; and the functions of the Commissioner for Public Appointments in Scotland. The issues surrounding this proposal are less well-rehearsed or researched and we expect that the Committee will want to examine the arguments very carefully. This section of our response provides the SPSO’s initial reaction to the proposals.

23. A key consideration here is the variation in roles and functions of the different office-holders and organisations supported by the SPCB. A range of advisory, advocacy, investigatory and decision-making functions are involved, and securing the appropriate structural model for the effective discharge of these various duties and powers is at the core of the challenge for the Committee. Undoubtedly, reviewing the arrangements which, in the past, have been arrived at by the Parliament in a piece-meal fashion is helpful. It is not however helpful to confuse or over-simplify the differing nature of the roles that different institutions perform.

24. There are other models where responsibility for investigating alleged breaches of codes of conduct have been added to the core function of an Ombudsman’s office, e.g. in Wales (Councillors) and in Northern Ireland (Assembly Members). It is, therefore, possible to combine the functions. The core role of the Ombudsman as a decision-maker of last resort on public service complaints remains, but what the Ombudsman’s office is generally doing in these cases is fulfilling the investigative role on behalf of others: in Scotland the decision-making bodies are currently the Standards Committee (for
complaints about MSPs) and Standards Commission (for complaints about Councillors and public appointees).

25. To assist the Committee, Annex A provides a summary of different structural models of existing Ombudsmen in various countries with powers or functions additional to the core complaint handling function. The Annex outlines those organisations’ different structures. The Committee will need to consider the appropriate model for any new body to follow if it chooses to accept the SPCB’s proposal, and we will be happy to draw on our experience and expertise to advise the Committee on the practicality of any possible model. The Committee will note that the international experience suggests that, because regulation of public appointments involves activities largely different in nature to those associated with the handling and investigation of complaints, it is less common for the functions to be combined with the Ombudsman role – that seems to suggest that these functions are best discharged by retaining a degree of specialist capacity, though that might be possible as part of a larger body, or on a shared services basis.

26. It also has to be recognised that while the SPCB’s proposals are predicated on three groupings of functions which they describe as a Complaints and Standards body, a Rights body, and an Information body there are overlaps of function and activity between those groupings and other arrangements would be possible. In some European countries, for example in some of the new accession states, the national Ombudsman has an explicit Human Rights role. In Parliamentary discussions leading to the establishment of the Scottish Human Rights Commission, questions about the relationship between the SPSO and the new commission were fully explored. In our evidence to the Justice 1 Committee at the time we sought to secure an appropriate delineation of responsibilities between our complaint handling role, and the Commission’s advocacy role, mirroring the relationship we have with the Scottish Commissioner for Children and Young People. The SPSO frequently and increasingly has to consider issues of human rights when investigating complaints and we have worked closely, and in my view successfully, with both rights advocacy bodies. The roles are different however and we would not recommend to the Committee that it contemplate a reconfiguration bringing together rights advocacy and complaint handling responsibilities.

Governance

27. The second key consideration concerns the governance structure of any new, or reconfigured body or bodies. The SPCB evidence briefly discusses the merits of what it has identified as two possible models for the governance status of any new body: an officeholder as against a “body corporate in the form of a Commission with a chair and perhaps 3 or 4, other board members”. This is a critical issue, and we submit that there are other permutations which the Committee may wish to consider. The various overseas models outlined in Annex A offer some options which might be considered. It will be noted that none of these involve a Commission heading a body undertaking a disparate

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13 www.scottish.parliament.uk/business/committees/justice1/or-05/j105-4202.htm
range of functions in the way that the SPCB appear to propose. We have significant doubts about the viability of such an arrangement.

28. In the oral evidence on 9 December the SPCB suggested that “if the decision maker had the ability to consult a reflective body, which could act as a sounding board, that might produce more comprehensive decisions in future”. We are not aware of any evidence that would substantiate this conclusion. In our view the model of a multifunction Ombudsman combined with non-traditional functions, which operates successfully in New South Wales, would be a preferable option.

29. The Committee may also be interested to know that recent research across Europe identified that 40 out of 47 Ombudsmen are organised ‘monocratically’ – ie there is only one Ombudsman: where there are multiple appointments they have separate functions. Deputies (predominantly officials rather than appointees) are often part of the structure but in 50% of cases there is only one office-holder.

ACCOUNTABILITY AND INDEPENDENCE

Accountability and independence

30. The Committee has been asked to consider issues relating to the governance and accountability of SPCB supported bodies. These matters can seem arcane, but we would suggest that they are of crucial importance to the public who need to be assured of the complete objectivity of office-holders reaching decisions on the actions of public bodies or figures. We strongly support the statement made by the Cabinet Secretary for Finance and Sustainable Growth in his evidence to the Committee on 9 December 2008 when he said “it is important that members of the public feel that the instrument by which they pursue their legitimate complaint is properly independent and can act without fear or favour”. Accountability, therefore, has to be appropriate to the role of the office-holder and balanced with the need for actual and perceived independence.

31. The issue of independence hinges on a number of criteria including the selection, resourcing and oversight of an office-holder. A balance needs to be struck between appropriate accountability as a public body and undue influence, interference or micro-management from funders. There is a considerable body of analysis and evidence on the key tests of independence and these are discussed at more length in Annex B, but the Committee will wish to be assured that, in any reconfiguration of roles, the important question of independence for decision-making bodies is put beyond any doubt. The British and Irish Ombudsman Association have given considerable thought to these matters and their criteria on independence (see Annex B) are very relevant: the Committee may wish to have input from BIOA to inform its consideration in this area.

32. The four bodies that the SPCB has proposed combining into a new Standards and Complaints body all currently have different models of accountability.
Three are bodies set up by and accountable to the Parliament and one is accountable to Scottish Government Ministers. In considering the SPCB’s proposal, the Committee will require to be content that any proposals allow for accountability to be appropriately allocated between the Parliament, the Scottish Government and the office-holder.

Terms & Conditions

33. The SPCB’s written evidence to the Committee makes a number of references to the terms and conditions of the various office holders responsible to the SPCB and Parliament.

34. We have previously argued our concerns about the tension in the arrangement whereby responsibility for budgetary oversight of the SPSO, and other oversight functions, rest with the SPCB, a body within our jurisdiction. In our view, the arrangement through which the Scottish Commission for Public Audit has been given responsibility for examining Audit Scotland’s proposals for its use of resources and expenditure seemed to us to demonstrate a more appropriate balance between budgetary control and independence. Proposals for enhanced and more appropriate accountability arrangements have also been advanced by Audit Scotland in their 2006 report on Ombudsman/Commissioners – Shared Services (see above) and the Committee may wish to revisit the suggestion for a Remuneration Committee for office-holders. Finally in this respect, the Committee may wish to be aware of a recent report by the UK Study of Parliament Group14 which rehearses (pp 41-42) the arguments around specialised Parliamentary accountability mechanisms.

35. The SPCB have suggested legislating to provide the SPCB with a power to approve the number and terms and conditions of staff of all office-holders. The Committee may wish to consider whether this power would be compatible with the Council of Europe’s Parliamentary Assembly’s adopted recommendations15 which state a requirement for there to be: ‘guaranteed sufficient resources for discharge of all responsibilities allocated to the institution, allocated independently of any possible interference by the subject of investigations, and complete autonomy over issues relating to budgets and staff’.

36. At the Committee’s meeting on 9 December 2008 both the Cabinet Secretary for Finance and Sustainable Growth and the SPCB discussed with Committee members the question of whether office-holders should have fixed term appointments and not be eligible to seek reappointment. We would endorse the principle of fixed-term appointments for a period of around 7 years. This would help protect the independence of the office-holder and is in line with the

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recommendations of the Committee on Standards in Public Life\textsuperscript{16} and the House of Commons Public Administration Select Committee\textsuperscript{17}.

37. In addition, the SPCB’s evidence under point ten of its suggested legislative changes to harmonise legislation impacting on the SPCB, states on the issue of employment restrictions that it wishes ‘to consider reducing 3 year disqualification from appointment to listed/specified authority’. We welcome this suggestion.

38. The Scottish Commission for Public Audit raised this issue in its recommendations on the Auditor General’s employment once the holder of that position leaves the post. It stated that:

‘… In considering the future employment of an Auditor General after leaving post, the SCPA is mindful that any undue restrictions would, in effect, dictate that a former Auditor General must retire or work in the private sector. This could significantly reduce the pool of candidates. However, the SPCA accepts that the future employment of a former Auditor General has the potential to cause public disquiet. The SCOPA, therefore, recommends that, while still in post, an Auditor General should not be permitted to apply for a post with any body which is subject to audit by the Auditor General, or which is associated with the Auditor General’s role. This may inevitably lead to a situation of an individual being disadvantaged by having a gap between leaving the Auditor general position and taking up any other post. The SCPA recommends, therefore, that the SPCB should consider how the terms and conditions associated with the post can compensate for this…’

39. Currently the SPSO Act is significantly more restrictive, barring former post holders from employment in sectors under the Ombudsman’s jurisdiction for a period of three years\textsuperscript{18}. This restriction currently applies to the former Deputy Ombudsmen whose term of office came to an end in September 2007, and will apply to me when I step down in March 2009. In order to ensure as wide a pool as possible for applications for my replacement we would support amendment of the SPSO legislation in line with that being suggested for the Auditor General.

**PROCESS AND RESOURCING**

40. The Committee will want to consider the practical issues of putting any changes into effect – not least because the Committee is charged with considering a Bill to give statutory force to its conclusions. We note that, in response to a question from the Convener of the Committee on 9 December 2008, the Cabinet Secretary for Finance and Sustainable Growth indicated

\textsuperscript{16} Committee on Standards in Public Life 2002. Standards of Conduct in the House of Commons. Eighth Report, Cm 5663

\textsuperscript{17} House of Commons 2007. Public Administration Select Committee, Fourth Report (Session 2006-07): Ethics and Standards: the Regulation of Conduct in Public Life

\textsuperscript{18} In Schedule 1 of the of the Scottish Public Services Ombudsman Act (2002), 1(3) states that – A person who has ceased to hold office as Ombudsman or deputy Ombudsman is, during the period of 3 years beginning with the date on which that person ceased to hold that office, disqualified—from appointment or, as the case may be, election as—the holder of any office which is a listed authority (i) a member, officer or member of staff of a listed authority, and (b) from appointment to any paid office by a listed authority.
that he was content for Scottish Government officials to work alongside the Committee Clerks in relation to the timing of both a potential Committee Bill and the Public Sector Reform Bill. To our current knowledge both of these potential pieces of legislation are likely to contain proposals that will affect the working of the SPSO and complaints handling in public services in Scotland. We would be happy to offer any assistance that we might be in a position to provide, and wish to seek assurances that such a dual-fronted approach to the passage of legislation will result in a workable set of proposals that will bring about tangible improvements for customers and complainants in each of the sectors in which changes are proposed.

41. The Cabinet Secretary for Finance and Sustainable Growth in his evidence to the Committee on 9 December 2008 indicated that there would be a requirement for additional resources in the set-up stage of any new organisation. We welcome this acknowledgement and would be happy to assist in any estimate of the likely practical implications of any changes.

OTHER LEGISLATIVE ISSUES

42. We have in this evidence drawn attention to a number of areas in which there will need to be careful consideration of the best way to give legislative force to the policy intentions agreed by the Committee. We would however like to draw the Committee’s attention at this stage to discussions we have been having with the Scottish Government about minor and technical amendments that would remove some ambiguities in our current legislation and also provide possible enhancements to the 2002 Act which, in our view, would secure important service improvements for the public. As stated above, it is not completely clear to us at this stage what the best legislative vehicle may be for effecting these changes, but we would be happy to provide the Committee with fuller details on this if it is appropriate.

CONCLUSIONS

43. The SPSO welcomes the review being carried out by the Committee. It provides an opportunity, some ten years after devolution, for the Parliament to consider the appropriate governance framework required for Scotland. The aim should be to improve services for the public by providing greater coherence and simplicity of structures and standardisation of other arrangements.

44. We are supportive of the recommendations made in different reports (Crerar, Sinclair, SPCB), and endorsed by the Cabinet Secretary, to simplify further the complaint handling landscape in Scotland and thereby help to improve public services.

45. There are examples from other countries where they have simplified the governance structure further by including a role for the Ombudsman in investigating codes of conduct and standards issues. We would be happy to work with the Committee if it wishes to take forward the proposals put forward by the SPCB in this regard. It is important that the model structure agreed for
the future is based on sound principles and takes account of the key considerations of clarity, complementarity of functions and independence for decision-makers.

Professor Alice Brown
Scottish Public Services Ombudsman
19 December 2008
Models for combining offices or functions

Looking at Ombudsman in the UK and internationally, it is possible to identify three separate models that have been used to combine roles and functions or offices. (For a discussion of models that incorporate human rights functions see recent speeches by the European Ombudsman, Professor P. Nikiforos Diamandouros\textsuperscript{19}).

- **Shared Services**
  Different offices, including the Ombudsman’s office retain separate legislation, governance and accountability but there is a very strong shared service agenda and one person can hold more than one office – this is the Irish model discussed below.

- **Multifunction Ombudsman**
  The Ombudsman is given a wide range of functions and roles which, elsewhere, would often be the preserve of different offices. The additional roles are ones which strongly build on the core, investigatory role of an Ombudsman – this is the position in Wales and New Zealand.

- **Multifunction Ombudsman combined with non-traditional functions**
  The Ombudsman is empowered to not only take on wide investigatory responsibilities but other public service oversight roles such as scrutiny and advice. This is the New South Wales model.\textsuperscript{20}

1. **Models used in UK and Ireland**

   **Shared Services**

   **Ireland**

   A single office in Ireland houses the Ombudsman, the Information Commissioner and the Secretariat to the Standards in Public Office Commission. There is a single corporate services unit; IT system and management system. There is a one budget, a shared business plan and strategy for the bodies. Each body has a seat and vote on the management board. Staff work for only one body at a time but skills are shared and they can be transferred between organisations if the workload requires this. All staff are informed at the time of appointment that this may be the case. The same organisation provides support to the Referendum Commission which is an ad-hoc organisation which only sits during the period a referendum is ongoing.

   Each body has completely separate legislation, although it was envisaged from the time of the creation of each that the support and management systems would be the


\textsuperscript{20} The Deputy Ombudsman of New South Wales has made detailed comments on the advantages of this model and these are included in full below.
same. The Information Commissioner and the Ombudsman are appointed by the President. The legislation allows for this to be the same person and that has always been the case. The Ombudsman by virtue of her office is an ex officio member of the Commission. The Commission is chaired by a High Court Judge and membership includes the Auditor General the Clerks of both Dáil Éireann and Seanad Éireann and a former member of the Houses of the Oireachtas. The Commission provides support and guidance on compliance with relevant legislation as well as considering complaints that legislation relating to ethical conduct and electoral matters. The Commission also deals with complaints about breaches of Disability Rights legislation.

**Multifunction**

**Wales**

Until 2005, complaints relating to alleged breaches of conduct by members of local authorities were dealt with by the Commission for Local Administration in Wales. The Public Services Ombudsman (Wales) Act 2005 simply abolished this post and replaced the Commission with the Ombudsman. There is one organisational structure and staff conduct both types of investigation. There is no separation of bodies at senior level as in the Irish Model.

There are separate processes reflecting differences in the underlying legislation. Most notably, the Ombudsman in considering a standards complaint is limited to consideration and investigation. Having decided to investigate the Ombudsman can make four findings: (a) no evidence of a breach of the Code; (b) no action necessary; (c) referral to the Standards Committee of the relevant authority; (d) referral to the Adjudication Panel for Wales. The Adjudication Panel is responsible for further investigating the matter and, if appropriate, deciding on sanction. The Panel is an independent body and can also hear Appeals by members against decisions of local Standards Committees that they have breached the Code of Conduct.

2. Models used internationally

**Multifunction**

**New Zealand**

The New Zealand Ombudsman operates in a traditional fashion as an independent investigative body. It has, though, been given very broad functions and powers. The Ombudsman can investigate complaints about administrative decisions as well as the traditional process and service failings normally considered by Ombudsman. They also have a duty not only to investigate individual complaints but any systemic issues arising from such complaints. To fulfil this function, they carry out inspections and reviews of specific aspects of the bodies under jurisdiction.

The Ombudsman has also been given the responsibility for investigating complaints relating to the provision of information by public bodies under Freedom of Information Legislation and also provides information and guidance to employees who wish to report serious wrong-doing in their workplace (“whistle-blowing”) and is one of the

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21 Following resolution of both Dáil Éireann and Seanad Éireann
authorities to whom serious wrong-doing can be reported. Their jurisdiction is beginning to extend into regulation and oversight and they now also have responsibility to ensure compliance with international obligations to prevent torture and to undertake visits of prisons in order to do so. However, they largely remain an investigatory body.

**Multifunction Ombudsman combined with non-traditional functions**

**New South Wales**
The New South Wales Ombudsman describe themselves as an independent review body. The first NSW Ombudsman was appointed in 1975 and they have a wide range of functions and are generally regarded as amongst the more progressive, innovative Ombudsmen. Their functions include the traditional Ombudsman role of investigating complaints but they also have responsibility for oversight of the handling of complaints about police and the handling of child abuse allegations and convictions by public bodies. They have a review responsibility in relation to FOI requests, the delivery of certain services; the deaths of certain categories of vulnerable people in care; and the implementation of certain legislation. They also audit the interception of telecommunication records and complaint handling systems. The Ombudsman is independent but their work is scrutinised by a joint parliamentary committee.

In response to the request for a written submission by the Committee, we approached the NSWO for their views on the models available for any Ombudsman with more than one function and whether they also had a role in relation to public appointments. The Deputy Ombudsman helpfully provided the following detailed comments about not only their own office but the wider Australian experience. We felt the Committee would appreciate seeing these in full:

“A number of the eight Australian Parliamentary Ombudsmen have a range of jurisdictions that go beyond the traditional role of administrative review of official conduct. Two different approaches have been adopted to achieve these expansions of jurisdiction:

- the ‘multiple hats’ model where separate legal entities are established and the Ombudsman is appointed to head each - for example, the Queensland Ombudsman used to also be the Information Commissioner (until the Government of Queensland took the role away from the Ombudsman), the Northern Territory and Tasmanian Ombudsman are also the Health Care Complaints Commissioners for their jurisdictions, the Commonwealth Ombudsman also wears a number of separate legal hats (e.g. Postal Industry Ombudsman, Defence Force Ombudsman, Taxation Ombudsman, etc);

- the ‘single hat’ model where all functions are given to the Ombudsman in his/her capacity as Ombudsman - for example the various jurisdictions of the NSW Ombudsman.

“There was also a relatively short lived model that was tried in Victoria where the Deputy Ombudsman was given the separate statutory position of Police

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Complaints Commissioner - needless to say this was not a well thought out approach and was dropped in favour of the Ombudsman taking over this role.

“We have given this issue a lot of thought over the years when consideration was being given to new functions being added to the Office - as you are probably aware we have a wide range of jurisdictions (I have attached a document setting out the various types of roles performed) [summarised above], including the review of FOI decisions, oversight of police complaints, dealing with complaints about the conduct of any persons or bodies licensed or funded to provide a community service (including approx 7,000 private sector organisations), a child protection in the workplace function (including a similar number of private sector organisations, e.g. all schools, child care centres, etc), a child death review role, witness protection appeals, corrections, local government, etc.

“We are of the view that the ‘single hat’ model is the best one for a range of reasons. These include:

- removing the potential for conflict of interests/conflict of duties issues to arise for the Ombudsman (e.g., where complaints are made to the Ombudsman about the conduct of a separate organisation or legal entity that the Ombudsman also heads under a different title);

- improving awareness/accessibility (it is easier for the public to become and remain aware of the existence of an Ombudsman than of a number of separate organisations with different names and jurisdictions);

- if you have privacy legislation, by preventing various problems from occurring when issues cross jurisdictional boundaries (which we find is happening increasingly);

- it is easier to move resources between functions as priorities change or short term pressures arise;

- it is harder for governments to remove jurisdictions from the Ombudsman (by merely changing the person appointed to the role) if they get annoyed by certain reports or recommendations.

“A variation on this model is our community services jurisdiction. This function was given to the Ombudsman when the former Community Services Commission was amalgamated into the Office. To address concerns expressed by some in the community (and by some staff of the Commission) that the Commission and its focus would be subsumed into the Office without trace, the legislation was amended to provide that there would be a separate statutory Division created within the Office (called the Community Services Division, headed by a Deputy Ombudsman with the title ‘Community and Disability Services Commissioner’) to perform the Ombudsman’s community services functions. The important points to note about this model are that:

- the community services functions are the functions of the Ombudsman;
- the staff of the Division are staff of the Ombudsman;

- the Community and Disability Services Commissioner is a Deputy Ombudsman;

- the powers and functions of the Commissioner come from the Ombudsman; and

- interestingly, the Commissioner acts under the ‘direction’ of the Ombudsman, not under a ‘delegation’.

“In the 6 years since we took over this function we have found that this model has worked very well. If in future we are to get a new major jurisdiction, this is the approach we will adopt.

“As to your enquiry about the standards of public appointment function, we have no equivalent function in NSW, although I think there may be something similar in Victoria, Western Australia and possibly Queensland, and in New Zealand. Complaints about public appointments are not dealt with by this office. The only avenues of complaint (or equivalent) that come to mind are appeals by unsuccessful candidates (in some cases) and complaints to our corruption body about alleged corrupt practices in employment.

“I hope this information is of some assistance.”
Governance, accountability and independence

The question of the independence of the Ombudsman’s office was raised in 2001 during the Parliament’s consideration of the SPSO Bill. When Michael Buckley, one of the three ombudsmen whose functions were subsumed by the SPSO, gave evidence to the Health and Committee Care Committee he was asked, ‘Do you feel that there will be a conflict of interest, that there will be undue pressure on you and that you will not be able to be independent in your role as Ombudsman if the Parliamentary corporation pays you?’ His response was, ‘It is possible that that impression will gain currency. I will put that more strongly. No one would dream of allowing the Executive to determine the pay and pension of the Ombudsman—everyone would say that that must be wrong. The Executive could reduce the salary, it could make the salary far too small and it could apply pressure on the Ombudsman. The Parliamentary corporation is not a body about which one expects to receive a large number of complaints. In practice, I accept that the position causes less concern. Nevertheless, it is wrong in principle for a body that is within the jurisdiction of an Ombudsman to be able to determine the Ombudsman’s terms of service. There is, in that, the appearance of a conflict of interest. There is the appearance that the Parliamentary corporation could bring pressure to bear on an Ombudsman to do one thing rather than another because, in a certain sense, the corporation has the role of an employer, in that it can determine pay and pensions’.

The same issue was addressed in 2001 by the Finance Committee in their consideration of stage one of the SPSO Bill. In particular they focused on the question of whether it was possible to maintain operational independence when the terms and conditions of the office holder were set by a body under the SPSO’s jurisdiction. Ultimately the Committee were satisfied with the then Minister’s reassurances in this regard and with the Parliament itself being required to finally endorse such arrangements as the SPCB proposed.

The general question of the accountability and governance of those bodies funded by the SPCB was considered again by the Finance Committee in their 2006 inquiry and report. In our evidence to the Committee we highlighted a potential conflict of interest arising from the Ombudsman’s budget being set by the SPCB, a body under the SPSO’s jurisdiction, and we identified different models adopted in other countries to avoid such potential conflicts. In our view, the arrangement through which the Scottish Commission for Public Audit has been given responsibility for examining Audit Scotland’s proposals for its use of resources and expenditure seems to us to demonstrate a more appropriate balance between budgetary control and independence.

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22 www.scottish.parliament.uk/business/committees/historic/health/or-01/he01-3002.htm
23 Col 2522, www.scottish.parliament.uk/business/committees/historic/x-lg/or-01/lg01-3402.htm#Col2518
24 Col 10497, www.scottish.parliament.uk/business/officialReports/meetingsParliament/or-02/sor0321-02.htm#Col10496
25 www.scottish.parliament.uk/business/committees/finance/reports-06/fr06-07-Vol01-00.htm
It is worth noting that, in 2003 the Council of Europe’s Parliamentary Assembly adopted a recommendation on the Institution of Ombudsman\textsuperscript{26} noting the role of Ombudsmen in ensuring appropriate public administration. Section 7 noted that there are certain characteristics essential for any institution of Ombudsman to operate effectively. These included the:

‘guaranteed independence from the subject of investigators, including in particular as regards receipt of complaints, decisions on whether or not to accept complaints as admissible or to launch own-initiative investigations, decisions on when and how to pursue investigations, consideration of evidence, drawing of conclusions, preparation and presentation of recommendations and reports, and publicity’.

These principles have also been articulated in rather more detail by the British and Irish Ombudsman Association (BIOA) whose functions\textsuperscript{27} include encouraging, developing and safeguarding the role and title of Ombudsmen in both the public and private sectors; and formulating and promoting standards of best practice to be met by Ombudsmen in the performance of their duties. BIOA has in its constitution a set of criteria by which Ombudsmen, whether in public or private sectors in Britain and Ireland, must abide if they wish to maintain their membership of the body.

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<td>‘(a) The jurisdiction, the powers and the method of appointment of the Ombudsman should be matters of public knowledge’</td>
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<td>‘(b) The persons who appoint the Ombudsman should be independent of those subject to investigation by the Ombudsman. This does not exclude minority representation of those subject to investigation on the appointing body, provided that the body is entitled to appoint by majority decision.’</td>
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<td>‘(c) The appointment should be either for a minimum of three years or until a specified retirement age. If the former, it may be renewable. The initial term of office and any renewal should normally commence before the age of 65 years and be of sufficient duration not to undermine independence.’</td>
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<td>‘(d) The appointment must not be subject to premature termination other than for incapacity or misconduct or other good cause. The grounds on which dismissal can be made should always be stated, although the nature of the grounds may vary from scheme to scheme. Those subject to investigation by the Ombudsman should not be entitled to exercise the power to terminate the Ombudsman’s appointment, but this does not exclude their minority representation on the body which is authorised to terminate.’</td>
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\textsuperscript{26} Parliamentary Assembly of the Council of Europe Recommendation 1615(2003)1, ‘The Institution of Ombudsman’.

\textsuperscript{27} www.bioa.org.uk/rules.php
‘(e) The remuneration of the Ombudsman should not be subject to suspension or reduction by those subject to investigation, but this does not exclude their minority representation on the body authorised to determine it.

(f) The Ombudsman alone (or an appointed deputy) must have the power to decide whether or not a complaint is within the Ombudsman’s jurisdiction. If it is, the Ombudsman (or an appointed deputy) must have the power to determine it.

‘(g) Unless otherwise determined by statute the Ombudsman should be required to report to a body independent of those subject to investigation, but this does not exclude their minority representation on that body. That body should also be responsible for safeguarding the independence of the Ombudsman.

‘(h) The office of the Ombudsman must be adequately staffed and funded, either by those subject to investigation or from public funds, so that complaints can be effectively and expeditiously investigated and resolved’.

The criteria may be of interest to members of the Committee in their work and in particular in relation to the necessity to ensure the independence of the Ombudsman’s office and the associated issue of terms and conditions. Were an organisation not to meet the BIOA criteria then they may be ineligible to retain full membership of BIOA.