

The 2020/21 audit of the

Commissioner for Ethical Standards in Public Life in Scotland



AUDITOR GENERAL 

Prepared by Audit Scotland
December 2021

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Introduction

1. I have received the audited annual report and accounts and the independent auditor's report for the Commissioner for Ethical Standards in Public Life in Scotland (the Commissioner's Office) for 2020/21. I am submitting these financial statements and the auditor's report under section 22(4) of the Public Finance and Accountability (Scotland) Act 2000, together with this report that I have prepared under section 22(3) of the Act.¹

2. The auditor issued an unqualified opinion on the Commissioner's Office's financial statements for 2020/21. I have prepared this report to draw the Scottish Parliament's attention to significant concerns about the operation of the Commissioner's Office in 2020/21 and the impact on the effectiveness of the Commissioner's key statutory functions.

3. My conclusions are limited to the consideration of the annual report and accounts and the auditor's annual audit report. I have referred to published minutes of the Standards Commission, where pertinent.

4. The Commissioner's Office plays a vital role in providing public trust, through its investigations into the conduct of individuals in public life in Scotland. The failures identified by the Commissioner's Office and the auditor's conclusions indicate risk to that trust as well as risk to the confidence of those who may wish to make complaints about the conduct of people in public positions.

Background

5. The Ethical Standards Commissioner (the Commissioner) is an independent regulator appointed and funded by the Scottish Parliamentary Corporate Body. The Commissioner's Office investigates complaints about the conduct of MSPs,

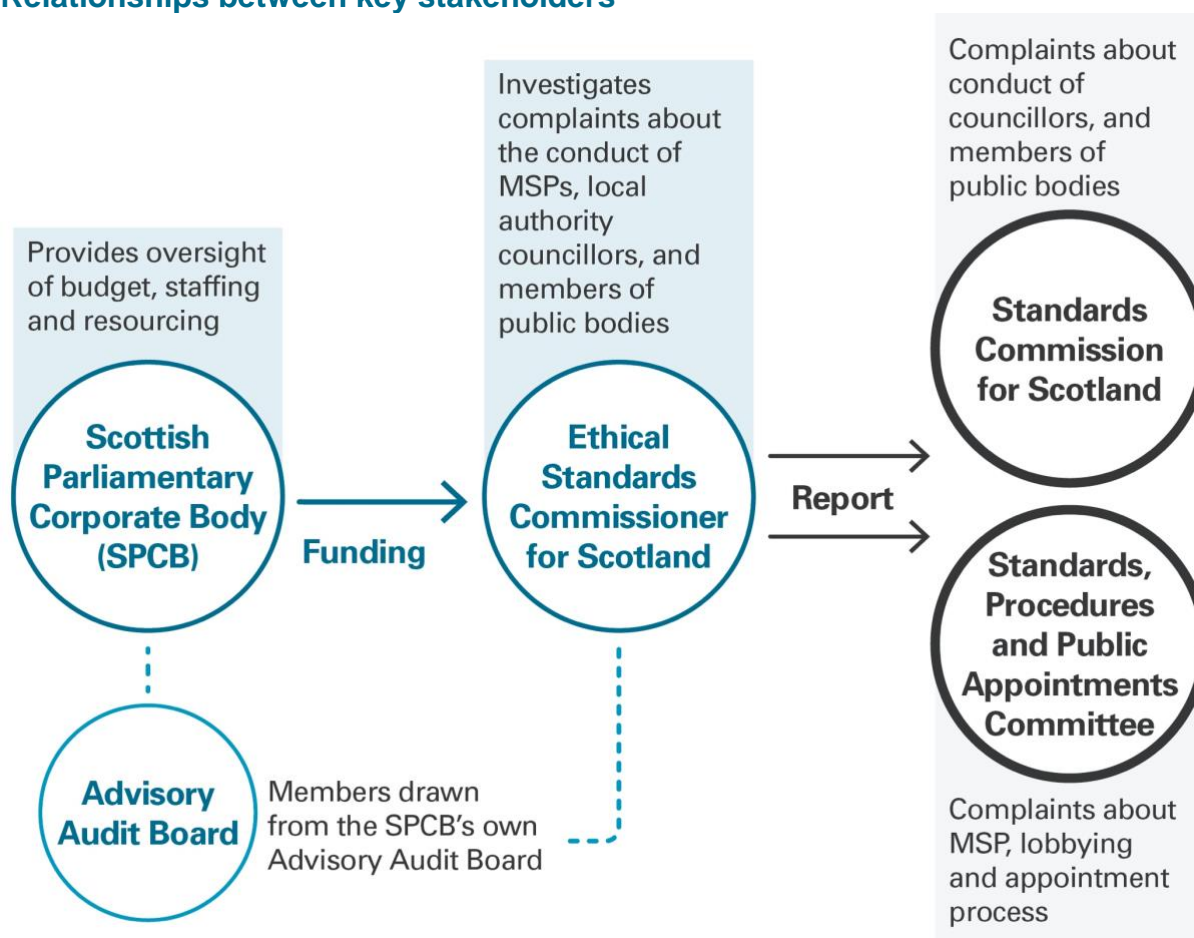
1. Section 22(3) of the Act states, "The auditor (unless the Auditor General) must send the account and the auditor's report to the Auditor General, who may prepare a report on the account."

local authority councillors, and members of public bodies. It also regulates how people are appointed to the boards of public bodies.

6. Where the Commissioner’s Office identifies a potential breach of the relevant Code of Conduct, it refers this to:

- the Standard Commission for Scotland (the Standards Commission) in the case of councillors and members of public bodies.
- The Scottish Parliament for MSPs.

Exhibit 1 Relationships between key stakeholders



Source: Audit Scotland

7. Further information on the Commissioner’s Office’s statutory functions and key legislation which underpins this is detailed on page 8 of the annual report and accounts.

8. The Commissioner has been on extended leave since early March 2021. On 20 April 2021, the Scottish Parliamentary Corporate Body (SPCB) appointed the Public Appointments Manager as Acting Commissioner, and the Head of Corporate Services as Acting Accountable Officer. Both the Public Appointments

Manager and the Head of Corporate Services were members of the Senior Management Team in 2020/21.

Leadership and governance

9. In the Governance Statement included in the annual report and accounts ([page 63](#)), the Commissioner's Office's Acting Accountable Officer states that she is "not satisfied that an effective scheme of governance operated during 2020/21." The auditor also concludes that the governance and scrutiny arrangements were ineffective during 2020/21, and that the Commissioner's Office's arrangements as they stand are not sufficient to deliver Best Value.

10. The annual report and accounts ([page 62](#)) state that working relationships with bodies that provide external oversight, namely the Standards Commission, the SPCB and Committees of the Scottish Parliament, "deteriorated to a significant degree." The auditor also highlights the breakdown in key relationships resulting in a lack of scrutiny and challenge during 2020/21.

11. The Standards Commission is an independent body, established under the Ethical Standards in Public Life etc. (Scotland) Act 2000. While the Commissioner's Office is independent, the Standards Commission can issue statutory directions under the Act to provide it with assurance that the Commissioner's Office is acquitting its functions in accordance with its founding legislation. The annual reports and accounts note that directions were issued by the Standards Commission in 2020/21 for the first time ([page 11](#)).

12. As disclosed in the annual report and accounts ([page 11](#)), these directed the Commissioner to:

- submit interim reports where an investigation takes more than a three-month period.
- report the outcome of each investigation undertaken pursuant to section 9 and 12 of the 2000 Act.
- carry out an investigation into every complaint about a Councillor and Member save in specific circumstances set out in the Direction.

13. The Standards Commission issued a further direction to the Commission on 1 March 2021 requiring an investigation into every complaint about a councillor or member of a devolved public body received on or after 2 March 2021. As part of this direction, the Standards Commission requested a list of all complaints received in the period from 12 November 2020 to 1 March 2021.

14. The [minutes](#) of the Standards Commission's meeting on 26 April 2021 state that the Standards Commission received information from the Commissioner's Office on 12 April 2021. The Standards Commission found that there had been failings in the handling of the majority of rejected cases as either:

- an investigation should have been carried out but was not, or;

- some investigation had been carried out before rejection, and so a report should have been made to the Standards Commission, for it to determine what action should be taken.²

15. The Standards Commission noted in its minutes that reports on the complaints in question had not been submitted to the Commission (for it to make the final decision on whether the complaint should be upheld), as required by the earlier direction. As such, the Standards Commission concluded there had been a contravention of the Direction and that the Convener of the Standards Commission should send the Scottish Parliamentary Corporate Body a formal complaint.

16. Furthermore, the auditor reports that, based on legal advice obtained by the Commissioner's Office, the current operation of the investigation process (as amended in August 2020) and the assessment process does not comply with the required legislation.

17. In the annual report and accounts ([page 6](#)), the Acting Ethical Standards Commissioner states that staff were not equipped fully to fulfil the Office's statutory functions. The auditor has recommended that a formal training programme for all staff be introduced, and that workforce planning arrangements should be put in place.

18. The annual report and accounts ([page 24](#)) note an increase in complaints against councillors and board members that were not pursued further, from 43 per cent in 2016/17 to 84 per cent in 2020/21. It notes that a "detailed explanation for this trend as shown from 2016/17 to 2018/19 cannot be provided due to loss of corporate memory from significant staff turnover beginning in 2018/19 onwards although it is likely attributable to a change to the way in which incoming complaints were initially assessed."

19. The Acting Commissioner has set out on pages 6 and 7 of the annual report and accounts the remedial action the Commissioner's Office is undertaking to address the concerns raised, including:

- ensuring that the directions issued by the Standards Commission were complied with
- meaningful re-engagement with the SPCB and on-going communications with the SPCB and the Parliament's Standards, Procedures and Public Appointments Committee.
- producing a revised three-year strategic plan
- producing a draft biennial business plan covering all office functions and addressing each of the auditor's recommendations.

20. The auditor recommends that a full investigations manual is constructed to ensure consistency and compliance across all cases. The auditor also states that, following this, all eligibility decisions and investigations carried out since August 2020 should be reviewed by an appropriate external investigator.

21. This is a significant task with funding and staffing implications. As set out in the annual report and accounts ([page 12](#)), the Commissioner's Office received 301 complaints (165 cases) against councillors and board members which were active during 2020/21. Of these, 277 complaints were completed (157 cases), with 227 (132 cases) not pursued further. There are a further 764 complaints against MSPs (55 cases) which were active during the year, albeit that a large number of these (730 complaints) were received late in the financial year and relate to a similar issue ([page 30](#)).

22. The auditor recommends that the Commissioner's Office recruits into current vacant roles as a matter of priority, and to consider whether temporary resource is required. The Commissioner's Office highlights in its response that it has made the case to the SPCB for additional posts. Also, in response to the auditor's recommendations, it states that a review of cases by an external investigator is contingent upon funding from the SPCB, and that it will carry out an audit internally first.

23. The auditor reports that had certain governance processes and functions been in place or operating effectively, issues identified from their audit work may have been identified earlier. In particular:

- There is no defined performance management framework in place. The auditor recommends that a framework should be implemented to include processes to monitor the organisation's performance against key performance indicators.
- The auditor found that the current risk management framework is ineffective and has not had independent oversight from the AAB during 2020/21. A risk management policy and risk register should be re-introduced and reviewed with the AAB regularly.
- There is no internal audit function in place, despite a commitment being given by the Commissioner in the Annual Report and Accounts in October 2019. The Acting Accountable Officer notes in the annual report and accounts that the Commissioner's Office had aimed to appoint an internal auditor in 2020/21 but due to limited staff capacity and the impact of Covid-19 were unable to do so ([page 62](#)). The auditor states that the issues identified during their external audit could have been identified earlier had an internal audit function been in place, and that such a function should be appointed as a matter of urgency.

24. Both the annual report and accounts and the auditor's report raises concerns around reporting routes for staff to raise issues within the organisation. The annual report and accounts note that a whistleblowing policy is in place, but it requires staff to first report internally with limited routes for reporting unresolved concerns ([page 61](#)). The document also notes that the

underlying structure of the organisation, with power concentrated in the Commissioner, makes it difficult for staff to find a safe route to report concerns. The auditor recommends that the whistleblowing policy should be reviewed to ensure that it is fit for purpose.

Conclusions

25. I am concerned to note the substantial weaknesses in governance at the Commissioner for Ethical Standards in Public Life in Scotland, disclosed in the annual report and accounts and highlighted by the external auditor in their annual audit report. It appears these have had a direct bearing on the effectiveness of the key statutory functions which the Commissioner's Office was established to perform.

26. The overarching risk is a loss of public trust in the ability of the Commissioner's Office to properly investigate and consider complaints made against the conduct of individuals in public life in Scotland.

27. Significant improvements are needed for the Commissioner's Office to provide effective strategic leadership, fulfil its statutory role and restore confidence in the effectiveness of this essential public office. There is also a pressing need to rebuild and re-establish relationships with bodies that provide external oversight, including the Standards Commission, the SPCB and Committees of the Scottish Parliament. Controls and processes designed to ensure challenge and scrutinise activities throughout the year should be introduced as a matter of urgency.

28. The auditor has made 22 separate recommendations, which the Commissioner's Office has accepted and is progressing. As the auditor notes, some of the issues identified cannot be achieved solely by the Commissioner's Office and would need collaborative input from the Scottish Parliamentary Corporate Body (SPCB) and the Parliament to address. These include determining the reporting route for concerns about a Commissioner, and identifying improvements required to governance arrangements, and whether governance arrangements are sufficient and appropriate.

29. It is vital that this progress continues and that the recommendations made by the auditor are implemented. I expect the auditor to continue to review the progress of Commissioner's Office in correcting governance and leadership issues as part of their audit responsibilities. I will continue to monitor the performance of the Commissioner's Office, with a view to further public reporting in the future.

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