

**The Auditor General for Scotland, the Accounts Commission for Scotland  
and Audit Scotland**

**Guide to Statutory Powers and Obligations**

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## Introduction

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The purpose of this document is to provide an explanatory guide in connection with the statutory powers and obligations of each of (i) the Auditor General for Scotland, (ii) the Accounts Commission for Scotland and (iii) Audit Scotland.

The powers and obligations of each body, including the statutory provisions from which these powers and obligations stem, are considered separately. It should be noted that while the intention is that this document is as comprehensive as possible, it only considers the relevant powers and obligations of each of the three bodies. It is beyond the scope of the document to consider all the obligations incumbent on other organisations (whether local councils, companies, public bodies or otherwise) which arise as a result of the exercise of any power by the Auditor General, the Accounts Commission or Audit Scotland.

The document will highlight how the bodies interact with one another while simultaneously providing an accessible reference point for each body's specific powers and obligations. Information on the particular statutory powers of each body is provided in the body of the text. A note of the relevant statutory provision from which the power or obligation stems (along with further explanations where appropriate) is included in the footnotes on each page.

The interpretation section below provides definitions for common terminology used throughout the document.

The primary pieces of legislation referred to throughout this document are as follows:

1. The Local Government (Scotland) Act 1973
2. The Scotland Act 1998
3. The Public Finance and Accountability (Scotland) Act 2000

These represent the primary legislation from which the powers and obligations of the three bodies stem but there are also many other additional enactments which are relevant. These additional enactments further develop the structure governing the three bodies, either by introducing separate provisions or by directly amending the above noted statutes.

The table of legislation below details the pieces of legislation which are referred to throughout this document and the respective abbreviated titles used.

This document was last updated on 29 September 2021 and is accurate as at that date.

## Interpretation

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In this document the following terms have the meanings stated adjacent to them:

**“Accounts Commission”** means the Accounts Commission for Scotland.

**“Auditor General”** means the Auditor General for Scotland.

**“Audit Scotland”** means Audit Scotland.

**“data protection legislation”** means UK GDPR; the DPA 2018; regulations made under the DPA 2018; regulations made under section 2(2) of the European Communities Act 1972 which relate to EU GDPR or the Law Enforcement Directive 2016/680.

**EU GDPR** means Regulation (EU) 2016/679 of the European Parliament and of the Council of 27th April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of

such data (General Data Protection Regulation) as it has effect in EU law.

|   |   |
|---|---|
| <b>“Fund”</b>                                       | means the Scottish Consolidated Fund.   |
| <b>“Her Majesty”</b>                                | means Her Majesty the Queen.  |
| <b>“Lord Advocate”</b>                              | means the Lord Advocate of Scotland.  |
| <b>“Parliament”</b>                                 | means the Scottish Parliament.  |
| <b>“SCPA”</b>                                       | means the Scottish Commission for Public Audit.   |
| <b>“Scottish Administration”</b>                    | means those Members of the Scottish Parliament chosen by the First Minister to form the Scottish Government.  |
| <b>“Scottish Ministers”</b>                         | means the devolved government of Scotland.  |
| <b>“SPCB”</b>                                       | means the Scottish Parliamentary Corporate Body.  |
| <b>“SPSO”</b>                                       | means the Scottish Public Services Ombudsman.   |
| <b>“Standing Orders of the Scottish Parliament”</b> | means the Standing Orders of the Scottish Parliament made in accordance with section 22 of and Schedule 3 to the SA 1998, as amended from time to time. |
| <b>UK GDPR</b>                                      | Means the UK GDPR as defined by section 2 of The Data Protection, Privacy and Electronic Communications (Amendment etc.) (EU exit) Regulations 2019     |

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|   |                     |
|---|---------------------|
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| Community Justice (Scotland) Act 2016 asp 10  | <b>CJSA 2016</b>    |
| Charities Accounts (Scotland) Regulations 2006  | <b>CASR 2006</b>    |
| Climate Change (Scotland) Act 2009  | <b>CCSA 2009</b>    |
| Criminal Justice and Licensing (Scotland) Act 2010  | <b>CJLSA 2010</b>   |
| Data Protection Act 2018  | <b>DPA 2018</b>     |
| Employment Rights Act 1996  | <b>ERA 1996</b>     |
| Environmental Information (Scotland) Regulations 2004   | <b>EISR 2004</b>    |
| Ethical Standards in Public Life etc. (Scotland) Act 2000   | <b>ESPLSA 2000</b>  |
| Equality Act 2010   | <b>EA 2010</b>      |
| Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012   | <b>EASDSR 2012</b>  |
| Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016/159 (Scottish SI)             | <b>EASDSAR 2016</b> |
| Freedom of Information (Scotland) Act 2002  | <b>FOISA 2002</b>   |
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|   |                    |
|---|--------------------|
| House of Commons Disqualification Act 1975                                  | <b>HCDA 1975</b>   |
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| Human Rights Act 1998   | <b>HRA 1998</b>    |
| Investigatory Powers Act 2016   | <b>IPA 2016</b>    |
| Islands (Scotland) Act 2018   | <b>ISA 2018</b>    |
| Law Reform (Miscellaneous Provisions) (Scotland) Act 1980                   | <b>LRMPSA 1980</b> |
| Local Audit and Accountability Act 2014                                     | <b>LAAA 2014</b>   |
| Local Government Act 1992   | <b>LGA 1992</b>    |
| Local Government in Scotland Act 2003                                       | <b>LGISA 2003</b>  |
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| Public Records (Scotland) Act 2011                    | <b>PRSA 2011</b>  |
| Public Services Reform (Scotland) Act 2010            | <b>PSRSA 2010</b> |
| Regulation of Investigatory Powers Act 2000           | <b>RIPA 2000</b>  |
| Scotland Act 1998                                     | <b>SA 1998</b>    |
| Scottish Public Services Ombudsman Act 2002           | <b>SPSOA 2002</b> |
| Serious Crime Act 2007                                | <b>SCA 2007</b>   |
| Small Business, Enterprise and Employment Act 2015    | <b>SBEEA 2015</b> |
| Superannuation Act 1972                               | <b>SA 1972</b>    |
| Wildlife and Natural Environment (Scotland) Act 2011  | <b>WNEA 2011</b>  |

# The Auditor General for Scotland

## 1. The Auditor General for Scotland – Introduction

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The Auditor General for Scotland is responsible for the auditing of directorates of the Scottish Government, government agencies such as the Scottish Prison Service, NHS Bodies, further education colleges and most Non Departmental Government Bodies (such as Scottish Enterprise).

The office of the Auditor General was established by section 69(1) of the SA 1998. Section 69(1) (which came into force on 6 May 1999) provides that the Auditor General shall be an individual appointed by Her Majesty on the nomination of the Scottish Parliament<sup>1</sup>.

The procedures for nomination and for appointment of the Auditor General are set out in the Standing Orders of the Scottish Parliament<sup>2</sup>. However, section 69(2) provides that no recommendation shall be made to Her Majesty for the removal of the Auditor General unless the Parliament so resolves by a majority of at least two-thirds.

Section 69(3) provides that the validity of any act of the Auditor General is not affected by any defect in his or her nomination by the Parliament.

Section 69(4) provides that the Auditor General shall not, in the exercise of any of his or her functions, be subject to the direction or control of any member of the Scottish Government or of the Parliament.

Notwithstanding the above, section 69(5) ensures that the Parliament can place requirements on the Auditor General in relation to the preparation of his or her own accounts. Provision is made for this in sections 19(8) and 25 of the 2000 Act.

Section 70(1) of the SA 1998 required “Scottish Legislation” to be enacted to enable the Auditor General (or auditors appointed by the Auditor General) to carry out the following functions<sup>3</sup>:

1. issue credits for payment of sums out of the Fund<sup>4</sup>;
2. examine, certify and report on parliamentary accounts;
3. carry out examinations into the economy, efficiency and effectiveness with which the Scottish Ministers and the Lord Advocate have used their resources in discharging their functions; and
4. carry out examinations into the economy, efficiency and effectiveness with which other persons determined under Scottish legislation to whom sums are paid out of the Fund have used those sums in discharging their functions.

The relevant legislation for the purposes of enacting these functions is the 2000 Act, in particular sections 21 to 25 which came into force on 1<sup>st</sup> April 2000.

### Pre-enactment provisions

Section 120 of the SA 1998 deals with any legislation in force prior to the commencement of the SA 1998 which required any accounts or documents to be examined by the Comptroller and Auditor General for the UK. From the date of commencement of the SA 1998, such provisions, insofar as they relate to Scottish functions, shall have effect as if references to the Comptroller and Auditor General were references to the Auditor General for Scotland. In effect this provision transfers responsibility for these functions to the Auditor General for Scotland.

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<sup>1</sup> SA 1998 - s.69(1)

<sup>2</sup> Standing Orders of the Scottish Parliament - Rule 3.11

<sup>3</sup> SA 1998 - s.70(1) (the functions themselves are detailed in 70(2))

<sup>4</sup> Provision for the issuing of credits is made in section 5(1) of the 2000 Act. A “credit” means a written authority from the Auditor General.

## Remuneration of the Auditor General

The amount of any salary and related allowances payable to the Auditor General are determined by the SPCB<sup>5</sup>, a body of the Scottish Parliament responsible for the administration of the Parliament itself.

The salary and any allowances, together with any expenses incurred by the Auditor General must be paid by Audit Scotland<sup>6</sup>. In addition, Audit Scotland must make arrangements for the payment of pensions, gratuities or other allowances to a person who has ceased to be Auditor General<sup>7</sup>.

## Appointment and Term of Office

A person appointed to the position of Auditor General will hold office for a period of 8 years<sup>8</sup> and will vacate office on the expiry of that period.

The Auditor General may be relieved of office by Her Majesty<sup>9</sup> subject to the caveat that such removal will only be at the request of Parliament following a resolution passed by a two-thirds majority.

A person having held the office of Auditor General shall not be eligible for re-appointment<sup>10</sup>.

In the event that the office of Auditor General is vacant, the SCPA may appoint a person to discharge the functions of the Auditor General. This person may be, but is not required to be, a member of staff of Audit Scotland. Such appointment will last until the appointment of a new Auditor General takes place or until the expiry of the period of 12 months beginning with the date on which the vacancy arose<sup>11</sup>.

A person so appointed shall, with some minor exceptions<sup>12</sup>, be treated for all purposes as the Auditor General and shall hold office on such terms as the SPCB may determine<sup>13</sup>. Any remuneration or other sums due as a result of the appointment will be paid by Audit Scotland<sup>14</sup>.

## Delegation of Functions

Any function of the Auditor General may be exercised on his or her behalf by any person (whether or not a member of staff of Audit Scotland) who is authorised by the Auditor General to do so<sup>15</sup>. The only caveat to this provision is that the Auditor General's functions under sections 21(4) and 23(8) of the 2000 Act may only be exercised on behalf of the Auditor General where he or she is incapable of exercising those functions personally.

Section 21(4) deals with the decision as to specifically who will audit any account sent to the Auditor General for audit. Section 23 deals with the initiation of an examination into the economy, efficiency and effectiveness of a particular body or office holder and, in particular, section 23(8) provides that only the Auditor General personally can initiate an examination and decide who is to carry out the examination.

## Accountable Officer

In general the Auditor General will be the accountable officer for Audit Scotland, although the SCPA can designate a member of staff of Audit Scotland as the accountable officer<sup>16</sup>. The accountable officer has the following functions<sup>17</sup>:

1. signing the accounts of the expenditure and receipts of Audit Scotland;

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<sup>5</sup> 2000 Act - s.13(1)

<sup>6</sup> 2000 Act - s.13(2)

<sup>7</sup> 2000 Act - s.13(3) and (4)

<sup>8</sup> 2000 Act - s.13(4A) (This 8 year time limit was imposed by the PSRSA 2010 s.118(4)(a). Previously an individual was required to retire from the office of Auditor General at the age of 65 but this provision was removed by the Employment Equality (Age) (Consequential Amendments) Regulations 2007/825 reg.4(2)(b))

<sup>9</sup> 2000 Act - s.13(5)

<sup>10</sup> 2000 Act - s.13(5A) (This provision was imposed by the PSRSA 2010 s.118(4)(c))

<sup>11</sup> 2000 Act - s.13(9)

<sup>12</sup> 2000 Act - s.13(10)(b)

<sup>13</sup> 2000 Act - s.13(10)(a)

<sup>14</sup> 2000 Act - s.13(11)

<sup>15</sup> 2000 Act - s.13(6)

<sup>16</sup> 2000 Act - s.18(1)

<sup>17</sup> 2000 Act - s.18(3)

2. ensuring the propriety and regularity of the finances of Audit Scotland; and
3. ensuring the resources of Audit Scotland are used economically, efficiently and effectively.

Where the accountable officer feels any action which he or she is required to take may be inconsistent with the functions specified above, they must obtain written authority from Audit Scotland before taking the action and, as soon as possible, send a copy of the authority to any person appointed to audit an account of Audit Scotland<sup>18</sup>.

## **2. Audit of Accounts by the Auditor General**

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The statutory rules and obligations relating to the preparation and audit of public accounts in Scotland are set out in the 2000 Act.

### Requirement to prepare accounts

Section 19 of the 2000 Act places a statutory duty on the Scottish Ministers, the Lord Advocate for Scotland and every other person or body to whom any sums are paid out of the Fund in any financial year, to prepare accounts of their expenditure and receipts for that year<sup>19</sup>. The Scottish Ministers must also prepare an account of payments into and out of the Fund for each financial year.

Accounts prepared in accordance with section 19 must be sent to the Auditor General for auditing<sup>20</sup>. The only exception is accounts prepared by Audit Scotland (including the accounts for the Auditor General) which must be sent to the SCPA for auditing<sup>21</sup>.

In addition, section 20 of the 2000 Act provides that the Scottish Ministers may prepare consolidated accounts for any financial year (in such fashion as they may determine) for the Scottish Administration and any body or office-holder or class of body or office-holder which (to the Scottish Ministers) appears to exercise functions of a public nature or appears to be entirely or substantially funded from public money<sup>22</sup>.

Such bodies must prepare such financial information as the Scottish Ministers may require, arrange for such information to be audited in accordance with Scottish Ministers' requirements and then send the information to the Scottish Ministers<sup>23</sup>.

Accounts prepared in accordance with the above must then be sent to the Auditor General who must examine the accounts and prepare a report on whether they have been prepared in accordance with the Scottish Ministers' determination<sup>24</sup>. The report must then be sent to the Scottish Ministers to be laid before Parliament<sup>25</sup>.

### Auditing of Accounts

Where accounts are required to be sent to the Auditor General in accordance with the above provisions, the accounts must be sent within 6 months of the end of the financial year to which the accounts relate<sup>26</sup>.

The accounts will then be audited either by the Auditor General or by a suitably qualified person appointed by the Auditor General<sup>27</sup>. As indicated above, it is for the Auditor General alone to determine personally who will audit any given account.

The chosen auditor (whether Audit Scotland or otherwise) must prepare a report setting out the auditor's findings in relation to the account<sup>28</sup>. Where the report is prepared by any auditor other than the Auditor General, the

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<sup>18</sup> 2000 Act - s.18(4)

<sup>19</sup> 2000 Act - s.19(1)

<sup>20</sup> 2000 Act - s.19(7)

<sup>21</sup> 2000 Act - s.19(8)

<sup>22</sup> 2000 Act - s.20(1) (It should be noted that while this power is granted to Scottish Ministers under the 2000 Act, the power has, to date, never been exercised.)

<sup>23</sup> 2000 Act - s.20(3)

<sup>24</sup> 2000 Act - s.20(4) and (5)

<sup>25</sup> 2000 Act - s.20(6)

<sup>26</sup> 2000 Act - s.21(2)

<sup>27</sup> 2000 Act - s.21(5) (A "suitably qualified person" means a person eligible for appointment as a statutory auditor under Chapter 2 of Part 42 of the Companies Act 2006 or a member of a body of accountants established in the UK or another EEA State.)

<sup>28</sup> 2000 Act - s.22(1) and (2)

report and the account must be sent to the Auditor General who may prepare a further report on the account if deemed necessary<sup>29</sup>.

Finally, the Auditor General must then send the account, the auditor's report and any report prepared by the Auditor General, to the Scottish Ministers. All audited accounts and any reports must be received by the Scottish Ministers in sufficient time to allow them to lay a copy of each account and any reports before Parliament, and to publish every such account and report, not later than 9 months after the end of the financial year to which the account relates<sup>30</sup>.

### Economy, efficiency and effectiveness examinations

In addition to his or her responsibilities in relation to audit, the Auditor General also has the power to initiate examinations into the economy, efficiency and effectiveness of certain bodies or office-holders<sup>31</sup>. The bodies and office-holders into which an examination can be carried out are as follows<sup>32</sup>:

1. Any body or office-holder subject to audit under sections 21 or 22 of the 2000 Act (i.e. the Scottish Ministers, the Lord Advocate for Scotland and every other person or body to whom any sums are paid out of the Scottish Consolidated Fund).
2. Any body or office-holder specified by an order of the Scottish Ministers<sup>33</sup>. The Scottish Ministers must reasonably believe that more than a quarter of the income of the body or office-holder was received from public funds or the amount of income received by the body or office-holder from public funds exceeded £500,000. The subsequent investigation into the body or office-holder should only relate to such periods during which the Auditor General reasonably believes that these amounts have been exceeded.
3. Any body or office-holder which agrees to such an examination.

In determining whether an examination is to be carried out, the Auditor General must take into account any proposals made by Parliament<sup>34</sup>. Furthermore, before initiating an examination in respect of Scottish Water, the Auditor General must consult the Water Industry Commission for Scotland<sup>35</sup>.

As indicated above, where the examination will be undertaken by an individual other than the Auditor General, it is for the Auditor General alone to determine personally who will undertake the examination<sup>36</sup>. Where the examiner is not the Auditor General, the examiner must report the results of the examination to the Auditor General who may report the results to parliament and/or publish the results of the examination<sup>37</sup>.

### Defamation

The PSRSA 2010 amended the 2000 Act by the insertion of a new section 23A. In terms of section 23A, reports in relation to the audit of accounts by the Auditor General which are sent to the Scottish Ministers under section 22(4) of PFASA 2000 and examinations under section 23 of PFASA 2000 are absolutely privileged for the purposes of defamation. No claim for defamation can therefore be brought against the Auditor General or other auditor or examiner in relation to the content of reports on audits of accounts sent to Scottish Ministers or examinations carried out under section 23. Absolute privilege is a complete defence against proceedings for defamation.

Any actions for defamation against the Auditor General in relation to the exercise of any other powers or in any other context will not fall within the meaning of section 23A of PFASA 2000 and therefore will not attract this privilege. There is a general statutory right (not specific to the Auditor) of absolute privilege in respect of fair

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<sup>29</sup> 2000 Act - s.22(3)

<sup>30</sup> 2000 Act - s.22(4) and (5)

<sup>31</sup> 2000 Act - s.23(1)

<sup>32</sup> 2000 Act - s.23(2)

<sup>33</sup> The most recent of such orders is the Public Finance and Accountability (Scotland) Act 2000 (Economy, efficiency and effectiveness examinations) (Specified bodies etc.) Order 2010 which came into force on 20<sup>th</sup> December 2010.

<sup>34</sup> 2000 Act - s.23(6)

<sup>35</sup> 2000 Act - s.23(7) (as modified by the Water Industry (Scotland) Act 2002 asp 3 (Scottish Act) Sch.7 para.27(2) and Water Services etc. (Scotland) Act 2005 asp 3 (Scottish Act) Sch.5 para.5)

<sup>36</sup> 2000 Act - s.23(8)

<sup>37</sup> 2000 Act - s.23(10) and (11)

and accurate contemporaneous reports of court proceedings. There is also a common law right to absolute privilege in relation to statements made in circumstances in which public policy permits the statement to be made including in the course of parliamentary proceedings to which the House of Lords or House of Commons exercises control. It applies to persons acting on the authority of a House of Parliament, witnesses giving evidence to a select committee and persons responsible for statements in a petition addressed to parliament and statements made in judicial proceedings. A similar absolute privilege is also applicable to statements made in the course of parliamentary proceedings in relation to the Scottish Parliament by virtue of section 41 of the Scotland Act 1998.

In some circumstances, the Auditor General may be able to rely on qualified privilege. Under common law, statements may attract qualified privilege if they have been made by a person under a legal, moral or social duty to speak, and are not made with malice. As the Auditor General could be regarded as having a duty to communicate on matters of public interest, these communications could be protected. The privilege would be lost and malice would be proven if the communications went beyond the duty and were intended to injure. In circumstances where the Auditor General cannot rely on privilege, proceedings for defamation may be brought. In those circumstances, the Auditor would have to demonstrate that there is a defence to any claim made in order to avoid a successful claim for defamation i.e. that the statement made is true, that it is a "fair comment" based on honestly held opinions based on fact or that the statement made is in the public interest.

As Audit Scotland publishes a wide range of reports on matters of public interest, which may be considered by the Scottish Parliament in some instances, it is likely that the contents of such reports could attract absolute privilege in relation to a defamation action under common law/s.41 Scotland Act 1998. Similarly, if Scottish Ministers were to present to Parliament recommendations made by the Accounts Commission then these could also attract absolute privilege in relation to a defamation action under common law/s.41 Scotland Act 1998.

#### Auditor General's Reports on Bills introduced to the Scottish Parliament

The Standing Orders of the Scottish Parliament require that the Auditor General must prepare a report on Bills which are proposed to the Parliament which include a provision charging expenditure on the Scottish Consolidated Fund. In such circumstances Rule 9.3 part 4 states that the Bill, must be accompanied by a report signed by the Auditor General for Scotland (referred to as "an Auditor General's Report") setting out the Auditor General for Scotland's views on whether the charge is appropriate<sup>38</sup>.

### **3. Access to Documents and Information**

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Section 24 of the 2000 Act provides for access by an auditor (whether the Auditor General, Audit Scotland or such other auditor as may be appointed) to information relating to public bodies or office-holders.

#### Access to Documents and Information in relation to Audit of Accounts

For the purposes of the audit of an account of a public body or office-holder an auditor is entitled to the following<sup>39</sup>:

1. To have access at all reasonable times to any document<sup>40</sup> which the auditor may reasonably require which is in the possession or under the control of the body or office-holder who prepared the account.
2. To require from any person holding, or accountable for, any such document any assistance, information or explanation which the auditor reasonably thinks necessary.
3. To require the body or office-holder who prepared the account to provide, at times specified by the auditor, accounts of such of the transactions of the body or office-holder as the auditor may specify.

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<sup>38</sup> Standing Orders of the Scottish Parliament - Rule 9.3 Part 4

<sup>39</sup> 2000 Act - s.24(1)

<sup>40</sup> For the purposes of s.24 of the 2000 Act the term "document" means anything in which information is recorded in any form.

The auditor is also entitled to have access to any document in the possession, or under the control, of a “relevant person”<sup>41</sup> which the auditor reasonably thinks is necessary for the purposes of the audit. In addition, the auditor may require from such relevant person any assistance, information or explanation which the auditor reasonably thinks is necessary.

#### Access to Documents and Information in relation to Examinations

For the purposes of an examination into the economy, efficiency and effectiveness of a public body or office-holder the examiner (whether the Auditor General, Audit Scotland or such other examiner as may be appointed) is entitled to the following:

1. To have access at all reasonable times to any document which the examiner may reasonably require which is in the possession or under the control of the body or office-holder in question.
2. To require from any person holding, or accountable for, any such document any assistance, information or explanation which the examiner reasonably thinks necessary.
3. To require the body or office-holder to provide, at times specified by the examiner, accounts of such of the transactions of the body or office-holder as the examiner may specify.

The examiner is also entitled to have access to any document in the possession, or under the control, of a “relevant person” which the examiner reasonably thinks is necessary for the purposes of the examination. In addition, the examiner may require from such relevant person any assistance, information or explanation which the examiner reasonably thinks is necessary.

#### **4. Other Statutory Provisions which apply to the Auditor General**

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##### Public Records (Scotland) Act 2011

This act applies to the Auditor General, the Accounts Commission and Audit Scotland. As listed bodies under the act, each body must<sup>42</sup>:

1. prepare a records management plan setting out proper arrangements for the management of its public records;
2. submit the plan to the Keeper of the Records of Scotland<sup>43</sup>; and
3. ensure that its public records are managed in accordance with the plan as agreed with the Keeper.

##### Climate Change (Scotland) Act 2009

Section 44 of the CCSA 2009 provides that all public bodies must, in the exercise of their functions, act as follows<sup>44</sup>:

1. in the way best calculated to contribute to the delivery of the targets set in or under Part 1 of the CCSA 2009<sup>45</sup>;
2. in the way best calculated to help deliver any programme laid before the Scottish Parliament under section 53 of the CCSA 2009; and
3. in a way that it considers is most sustainable.

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<sup>41</sup> A “relevant person” means a person or a class that has been specified by the Scottish Ministers in an order made by statutory instrument. In relation to audits and examinations this is currently set out in the Public Finance and Accountability (Scotland) Act 2000 (Access to Documents and Information) (Relevant Persons) Order 2003/530.

<sup>42</sup> PRSA 2011 - s.1

<sup>43</sup> One of the statutory titles of the Chief Executive of the National Records of Scotland.

<sup>44</sup> CCSA 2009 - s.44

<sup>45</sup> Part 1 of the CCSA 2009 deals with the setting of Emission Reduction Targets.



Section 53 of the CCSA 2009 provides that where the Secretary of State<sup>46</sup> lays a report before the UK Parliament reporting on the impact of climate change, the Scottish Ministers must subsequently lay a programme before the Scottish Parliament. The programme must set out various proposals and objectives for adapting to climate change (including an objective in relation to Scotland's contribution to international climate change adaptation in line with international best practice)<sup>47</sup> and address the risks identified in the report.

The Scottish Ministers must also give guidance to relevant public bodies in relation to their climate change duties and those bodies must have regard to such guidance<sup>48</sup>.

For the purposes of the CCSA 2009, the term public body means any Scottish Public Authority as defined in Section 3(1)(a) of FOISA 2002. Thus, the Auditor General, the Accounts Commission and Audit Scotland must all act in accordance with the act.

Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015/17 These regulations provide that the Accounts Commission, the Auditor General and Audit Scotland are all relevant public authorities for the purposes of section 54 and section 1193 of the Companies Act 2006<sup>49</sup>. Accordingly, the approval of the Scottish Ministers is required for the registration of a company or LLP with a name which gives the impression that the company or LLP is associated with the Accounts Commission, the Auditor General or Audit Scotland<sup>50</sup>. Prior to granting approval the Scottish Ministers must also seek the opinion of the Accounts Commission, the Auditor General or Audit Scotland (respectively) as to whether or not such approval should be granted<sup>51</sup>.

In addition a person must not carry on any business in the United Kingdom under a name which gives the impression that the business is associated with the Accounts Commission, the Auditor General or Audit Scotland, without the approval of the Scottish Ministers<sup>52</sup>.

#### Companies Act 2006 - Companies subject to public sector audit

Where a company has its registered office in Scotland and it appears to the Scottish Ministers that the company exercises functions of a public nature or is entirely or substantially funded from public funds, the Scottish Ministers may require that the accounts of the company be audited by the Auditor General<sup>53</sup>.

The current list of public sector companies in Scotland which require to be audited by the Auditor General, is provided in the Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2008. This order came into force on 6<sup>th</sup> April 2008.

#### Charities Accounts (Scotland) Regulations 2006

Regulation 10(1) of the CASR 2006 requires charities to have their accounts formally audited in certain circumstances<sup>54</sup>. In such circumstances the accounts must be audited by an auditor eligible for appointment as a statutory auditor under the CA 2006 or by an auditor appointed by the Accounts Commission or the Auditor General.

#### Gaelic Language (Scotland) Act 2005

The GLSA 2005 established a body, known as Bòrd na Gàidhlig (the Bòrd), to promote the use and understanding of the Gaelic language in Scotland<sup>55</sup>.

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<sup>46</sup> In this context Secretary of State means the UK Secretary of State for Energy and Climate Change.

<sup>47</sup> CCSA 2009 s.53(2A) as inserted by Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 asp 15 (Scottish Act) Pt 4 s.25

<sup>48</sup> CCSA 2009 - s.45

<sup>49</sup> CLBNTDR 2015 – reg 9 & reg 18

<sup>50</sup> CA 2006 - s.54

<sup>51</sup> CLBNTDR 2015 – reg 9(2) & reg 18(2)

<sup>52</sup> CA 2006 - s.1193

<sup>53</sup> CA 2006 - s.483

<sup>54</sup> For instance where the charity has gross income over £500,000.

<sup>55</sup> GLSA 2005 - s.1

In addition to developing a nationwide Gaelic language plan, the Bòrd also has the power to require Scottish public authorities to prepare and implement Gaelic language plans<sup>56</sup>. These plans set out how the public authority will use the language in connection with the exercise of its functions.

“Scottish public authority” is defined as any public body or office-holder with functions which can be exercised only in, or as regards, Scotland and would therefore include each of the Auditor General, the Accounts Commission and Audit Scotland. To date, no such request has been made by the Bòrd to any of the three bodies, however such a request could be made in the future.

In the event that the Bòrd was to request that the Auditor General, the Accounts Commission or Audit Scotland prepare a Gaelic language plan, it would need to do so by written notice giving the body in question no less than 6 months within which to prepare the plan<sup>57</sup>.

In deciding whether or not to require a public authority to prepare a Gaelic language plan, the Bòrd must have regard to:

1. the most recent national Gaelic language plan (if any);
2. the extent to which the Gaelic language is used by persons in relation to whom the functions of the authority are exercisable, and whether, in the Bòrd's opinion, there is potential for the authority to develop the use of the Gaelic language in connection with the exercise of those functions;
3. any representations made to it in relation to the use of the Gaelic language in connection with the exercise of those functions; and
4. any guidance given by the Scottish Ministers.

#### Pensions Act 2004

Section 86 of the PA 2004 permits the disclosure of restricted information by the Pensions Regulator to various offices and organisations (listed in Schedule 3 of the act) where the Pensions Regulator considers the disclosure would enable or assist that organisation in the exercise of its functions. The Auditor General is one of the offices to which such a permitted disclosure can be made.

#### Freedom of Information (Scotland) Act 2002

Schedule 1 of FOISA 2002 lists the Accounts Commission, the Auditor General and Audit Scotland as Scottish Public Authorities to which the act applies<sup>58</sup>.

FOISA 2002 provides that where a person requests information from a Scottish public authority (for instance Audit Scotland) that person is entitled to be given the information by the authority<sup>59</sup>.

The Accounts Commission, the Auditor General and Audit Scotland are therefore required to provide information requested by a person unless it falls into one of the exempt categories listed in part 2 of FOISA 2002. Information must usually be provided by not later than the twentieth working day after the request is received.

In addition, all Scottish Public Authorities defined in FOISA 2002 are subject to the Environmental Information (Scotland) Regulations 2004 which came into force on 1 January 2005. These regulations implemented Directive 2003/4/EC of the European Parliament on public access to environmental information.

Under the regulations each Scottish Public Authority must take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds. The authority must maintain this

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<sup>56</sup> GLSA 2005 - s.3

<sup>57</sup> GLSA 2005 - s.3(2)(a)

<sup>58</sup> FOISA 2002 - Sch.1(7) para. 57

<sup>59</sup> FOISA 2002 - s.1(1)

information with a view to the active and systematic dissemination of the information to the public and shall make that information progressively available to the public by electronic means<sup>60</sup>.

Furthermore a Scottish Public Authority that holds environmental information shall make it available when requested to do so by any applicant<sup>61</sup>. Such requests and the subsequent responses by a Public Authority are made on broadly the same terms as requests under FOISA 2002. For the purposes of the regulations, "Environmental Information" is broadly defined and can include, for example, policies, plans and programmes relating to the environment; reports on the state of the environment; and data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment.

#### Scottish Public Services Ombudsman Act 2002

The Accounts Commission, the Auditor General and Audit Scotland are each a "listed authority" for the purposes of the SPSOA 2002. As such, they are liable to investigation by the Scottish Public Services Ombudsman ("SPSO")<sup>62</sup>.

The Ombudsman is entitled to investigate any failure in a service provided by an authority or any failure of an authority to provide a service which it was a function of the authority to provide. Such investigations may take place either where a complaint has been made to the Ombudsman or the authority in question has requested the investigation.

Where an investigation uncovers maladministration or service failure, the SPSO will produce a report making recommendations for how the authority in question can address the identified issues. The report must be sent to the authority in question, the Scottish Ministers and, where the investigation was made as a result of a complaint, to the individual or party who made the complaint and the person who is alleged to have taken the actions complained of<sup>63</sup>.

In the event that an authority does not implement the recommendations made in the SPSO's report following a complaint, the SPSO may prepare a further "Special Report" to be laid before Parliament. Following this, Parliament may take such further action as it deems appropriate.

In addition to the investigatory procedures outlined above, section 119 of the PSRSA 2010 amended the SPSOA 2002 with the addition of new sections 16A to 16F which deal with complaints handling procedures ("CHPs").

In particular, section 16A requires each listed authority to have in place a "complaints handling procedure" in respect of actions taken by the authority<sup>64</sup>. The SPSO itself is required to publish a "statement of principles"<sup>65</sup> concerning how CHPs should operate and it is the responsibility of each listed authority to ensure its particular procedure complies with the statement of principles.

The SPSO may also produce model CHPs and specify that such model CHPs apply to particular listed authorities<sup>66</sup>. Where the SPSO provides that a model CHP applies to a particular authority it must notify the authority that the model CHP applies, following which the authority in question must ensure its CHP matches the requirement of the model CHP.

#### Human Rights Act 1998

Each of the Auditor General, the Accounts Commission and Audit Scotland are subject to the terms of the HRA 1998. As such it is unlawful for any of the three bodies to act in a way which is incompatible with the European Convention on Human Rights unless they are obliged to do so by UK statute.

#### Public Interest Disclosure Act 1998

The Public Interest Disclosure Act 1998 ("PIDA 1998") amended the Employment Rights Act 1996 ("ERA 1996") by the addition of Part IVA dealing with "Protected Disclosures". A protected disclosure is defined as any

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<sup>60</sup> EISR 2004 - reg. 4

<sup>61</sup> EISR 2004 - reg. 5

<sup>62</sup> SPSOA 2002 - Sch.2(2) para. 18, 19 and 20

<sup>63</sup> SPSOA 2002 - s.15

<sup>64</sup> SPSOA 2002 - s.16A(2)

<sup>65</sup> SPSOA 2002 - s.16A(1)

<sup>66</sup> SPSOA 2002 - s.16B(1)

disclosure of information made by a worker to one of a range of bodies and organisations (“prescribed persons”)<sup>67</sup>. The information must, in the reasonable belief of the worker, be made in the public interest and show one of the following:

1. that a criminal offence has been committed, is being committed or is likely to be committed;
2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
3. that a miscarriage of justice has occurred, is occurring or is likely to occur;
4. that the health or safety of any individual has been, is being or is likely to be endangered;
5. that the environment has been, is being or is likely to be damaged; or
6. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

The Public Interest Disclosure (Prescribed Persons) Order 1999 was amended by the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003 (as amended by the Public Disclosure (Prescribed Persons) (Amendment) Order 2018)<sup>68</sup> provides that, for the purposes of the PIDA 1998 and the ERA 1996, the Accounts Commission, the Auditor General and Audit Scotland are prescribed persons. A worker may therefore make a protected disclosure to the Accounts Commission, the Auditor General or Audit Scotland in relation to the proper conduct of public business, value for money, fraud and corruption in public bodies<sup>69</sup>.

Section 148 of the Small Business, Enterprise and Employment Act 2015 (“SBEEA 2015”) amends the ERA 1996 by the insertion of a new Section 43FA. That section provides that the Secretary of State may make regulations requiring a person prescribed for the purposes of section 43F (i.e. Audit Scotland, the Accounts Commission or the Auditor General) to produce an annual report on disclosures of information made to the person by workers.

The regulations must set out the matters that are to be covered in a report, but must not require a report to provide detail that would enable the identification of a worker who has made a disclosure or the identification of an employer or other person in respect of whom a disclosure has been made.

In accordance with the aforementioned power, the Secretary of State has published The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. These regulations come into force on 1 April 2017. From the commencement of the Regulations, Audit Scotland, the Auditor General and the Accounts Commission, as “prescribed persons” will be required to publish annual reports, detailing the protected disclosures which it has received in each 12 month period running from 1 April each year<sup>70</sup>.

The report must contain, without including any information in the report that would identify a worker who has made a disclosure of information, or an employer or other person in respect of whom a disclosure of information has been made:

1. the number of workers’ disclosures received during the reporting period that the relevant prescribed person reasonably believes are qualifying disclosures within the meaning of section 43B of the ERA 1996; and which fall within the matters in respect of which that person is so prescribed;
2. the number of those disclosures in relation to which the relevant prescribed person decided during the reporting period to take further action;
3. a summary of the action that the relevant prescribed person has taken during the reporting period in respect of the workers’ disclosures; and how workers’ disclosures have impacted on the relevant prescribed person’s ability to perform its functions and meet its objectives during the reporting period; and

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<sup>67</sup> PIDA 1998 - s.1

<sup>68</sup> The Public Disclosure (Prescribed Persons) (Amendment) Order 2018 - s.2(a)

<sup>69</sup> Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003/1993 Sch. 1 para. 1

<sup>70</sup> PPRDIR 2017 – s.3(1)

4. an explanation of the functions and objectives of the relevant prescribed person.

#### Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (“LRMPSA 1980”)

As a public official, the Auditor General is listed in Schedule 1 of the LRMPSA 1980 as an individual who is ineligible for or excused from jury duty.

#### UK General Data Protection Regulation and the Data Protection Act 2018

The UK GDPR and the Data Protection Act 2018 (as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419) apply to the Auditor General, the Accounts Commission and Audit Scotland. The Auditor General, the Accounts Commission and Audit Scotland must comply with the provisions of Data Protection Legislation when processing personal data.

The legislation provides that personal data shall only be processed in accordance with the principles set out in Data Protection Legislation and that individuals to whom that personal data relates shall be entitled to exercise certain rights in respect of their data including the right to be advised of the processing taking place and to obtain a copy of their data. The rights of data subjects may be restricted in the circumstances prescribed by Data Protection Legislation, for example, the right to erasure of personal data is not absolute and personal data may continue to be processed where there is a lawful basis for doing so.

Data Protection Legislation permits the processing of personal data by the Auditor General, the Accounts Commission and Audit Scotland where there is a lawful basis for doing so. Due to the nature of work undertaken, the lawful basis for the processing carried out, including sharing of information with other organisations, will often derive from statutory powers conferred specifically on the Auditor General, the Accounts Commission or Audit Scotland.

Data Protection Legislation is relevant for the purposes of determining the personal data which can be accessed by, provided to and used by the Auditor General, the Accounts Commission and Audit Scotland. Audit Scotland carries out data matching exercises in accordance with its statutory powers and processes personal data for these purposes. All personal data processed for the purposes of data matching must also be processed in accordance with Data Protection Legislation.

In accordance with Data Protection Legislation, the Auditor General, the Accounts Commission and Audit Scotland have produced and published a privacy notice which provides information as to the processing of personal data carried out.

#### Official Secrets Legislation

The provisions of the Official Secrets Act 1989 (“OSA 1989”) apply to the Auditor General as a “Crown Servant” in terms of section 12(1)(g) of the OSA 1989<sup>71</sup> and Audit Scotland and its staff<sup>72</sup>. The following sets out various provisions relating to the duties of non-disclosure of information (including any documents or articles) which are or have been in their possession by virtue of the position occupied by the holder.

##### 1. Security and intelligence

The Auditor General, Audit Scotland and staff must not make a damaging disclosure of any information relating to security or intelligence<sup>73</sup>. Such a disclosure is considered to be damaging if it causes or is likely to cause damage to the security and intelligence services<sup>74</sup>. For clarity, the meaning of ‘security or intelligence’ means the work of, or in support of, the security and intelligence services and ‘information’ relating to security or intelligence includes information held or transmitted by those services or persons in support of them<sup>75</sup>.

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<sup>71</sup> By virtue of Sch 2 of the Official Secrets Act 1989 (Prescription) Order 1990 as inserted by the Scotland Act 1998 (Consequential Modifications) (No 1) Order 1999/1042 Sch 1(II) para 18 (May, 6, 1999)

<sup>72</sup> OSA 1989 s12(2)

<sup>73</sup> OSA 1989 s.1(3)

<sup>74</sup> OSA 1989 s.1(4)

<sup>75</sup> OSA 1989 s.1(9)

## 2. Defence

Damaging disclosures of any information relating to 'defence'<sup>76</sup> are prohibited. This includes information relating to the armed forces, weapons, defence policy, strategy, military planning and measures for maintenance of essential supplies and services needed in a time of war<sup>77</sup>. For the purpose of this provision, a disclosure is 'damaging' if it damages or is likely to damage the capacity of the armed forces to carry out their tasks, leads to a loss of life or injury to members of the armed forces, causes serious damage to equipment, endangers the interests of the UK or the safety of UK citizens abroad or seriously obstructs the promotion/protection by the UK of its interests abroad<sup>78</sup>.

## 3. International Relations

Damaging disclosures of any information relating to international relations<sup>79</sup> or any confidential information obtained from a State<sup>80</sup> other than the UK, or an international organisation<sup>81</sup> are also prohibited. Such a disclosure is considered to be damaging if it is likely to or if it does endanger the interests of the UK abroad, seriously obstructs the promotion/protection by the UK of those interests or endangers the safety of British citizens abroad<sup>82</sup>. The fact that such information is confidential may be sufficient alone to establish that its unauthorised disclosure is 'likely to be damaging'<sup>83</sup>.

## 4. Crime and special investigation powers

Information must not be disclosed which:

- (i) results in the commission of an offence; or
- (ii) facilitates an escape from legal custody or the doing of any other act prejudicial to the safekeeping of persons in legal custody; or
- (iii) impedes the prevention or detection of offences or the apprehension or prosecution of suspected offenders; or

which is such that it would be likely to have any of those effects<sup>84</sup>.

## Disclosure of Information

Section 5 of OSA 1989 also set out a general prohibition against disclosure of information by any person who comes into possession of that information (which is protected under the provisions of this Act) as a result of unauthorised disclosures by a crown servant, government contractor<sup>85</sup> or any person to whom it was entrusted to keep confidential<sup>86</sup>.

Where a damaging disclosure of information falling within any of the above categories is made without lawful authority, it shall be an offence in terms of OSA 1989.

Any disclosures made shall, in terms of OSA 1989, only be made with lawful authority, if made in accordance with the Auditor General's official duty or, in the case of Audit Scotland and its staff, in accordance with official authorisation or for the purposes of the functions carried out<sup>87</sup>.

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<sup>76</sup> OSA 1989 s.2(1)

<sup>77</sup> OSA 1989 s.2(4)

<sup>78</sup> OSA 1989 s.2(2)

<sup>79</sup> 'International relations' defined at OSA 1989 s.3(5)

<sup>80</sup> 'State' defined at OSA 1989 s.13(1)

<sup>81</sup> OSA 1989 s.3(1). 'International organisation' defined at OSA 1989 s.13(1)

<sup>82</sup> OSA 1989 s.3(2)(a)

<sup>83</sup> OSA 1989 s.3(3)(a)

<sup>84</sup> OSA 1989 s.4(2)

<sup>85</sup> OSA 1989 s.12(2)

<sup>86</sup> OSA 1989 s.5(1)

<sup>87</sup> OSA 1989 s7(1), (2)

## **5. Accounts which must be sent to the Auditor General for auditing**

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As indicated in the introduction to this section, the Auditor General is responsible for the audit of a large number of public bodies. Individual responsibility for the audit of each public body will be assigned either to Audit Scotland or a private firm of auditors by the Auditor General.

The precise list of public bodies and their assigned auditors is dynamic and for that reason a formal list is not included here. An up to date list of bodies can be found on the Audit Scotland website here: <http://www.audit-scotland.gov.uk/about-us/audit-scotland/audit-appointments>.

### Wildlife and Natural Environment (Scotland) Act 2011

The Wildlife and Natural Environment (Scotland) Act 2011 requires that the Auditor General as a public body must prepare a biodiversity report within three years of such Act coming into force and thereafter at not more than three yearly intervals. Such report must cover the actions taken by the Auditor General in pursuance of its duties under s.1 of the Nature Conservation (Scotland) Act 2004<sup>88</sup>.

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<sup>88</sup> Nature Conservation (Scotland) Act 2004 – s.1

# The Accounts Commission for Scotland

## 1. The Accounts Commission for Scotland – Introduction

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The Accounts Commission was established under Section 97(1) of the LGSA 1973 and is the body responsible for the audit of all local authorities in Scotland.

In addition, the Accounts Commission is responsible for the audit of certain other public authorities in Scotland such as Valuation Joint Boards, Integration Joint Boards and Regional Transport Bodies<sup>89</sup>.

The Accounts Commission can assign individual responsibility for the audit of the accounts of a particular body either to Audit Scotland or to an independent firm of auditors. Once an audit has taken place, a report may be prepared by the auditor and submitted to the Accounts Commission for consideration.

In addition to these responsibilities in relation to audit, the Accounts Commission advises Scottish Ministers on matters relating to the accounting of local authorities and makes recommendations both to Scottish Ministers and local authorities on accounting practice.

## 2. Membership and Meetings of the Accounts Commission

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### Membership of the Accounts Commission

The Accounts Commission is made up of between 6 and 12 members appointed by the Scottish Ministers<sup>90</sup> following consultation with such local authorities or other organisations as they may think appropriate. The terms of a member's appointment are determined by the Scottish Ministers and members shall hold and vacate office in accordance with such terms<sup>91</sup>. Members are entitled to resign their appointment by giving written notice to the Scottish Ministers and a person who has previously held office as a member of the Accounts Commission is entitled to be reappointed<sup>92</sup>.

The Scottish Ministers shall appoint one member to be chairman of the Accounts Commission and another to be deputy chairman. Each of the chairman and deputy chairman may at any time resign office by giving notice in writing to the Scottish Ministers and, in the event that the chairman or deputy chairman ceases to be a member of the Accounts Commission, he shall cease to be chairman (or deputy chairman as the case may be)<sup>93</sup>.

Members of the Accounts Commission are entitled to remuneration in the form of such salary, fees or other allowances as are approved by the Scottish Ministers. Any such salary, fees or allowances shall be paid by Audit Scotland<sup>94</sup>.

### Meetings of the Accounts Commission

The quorum for any meeting of the Accounts Commission shall be any four members or such larger number as the Accounts Commission may determine from time to time<sup>95</sup>. In the event of an equality of votes at any meeting the chairman of the meeting shall have a second or casting vote<sup>96</sup>.

The proceedings of the Accounts Commission shall not be invalidated by any vacancy in its membership, nor by any defect in the appointment of any member, the chairman or the deputy chairman<sup>97</sup>.

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<sup>89</sup> Local Government etc. (Scotland) Act 1994 s.40(7)

<sup>90</sup> LGSA 1973 - s.97(1)

<sup>91</sup> LGSA 1973 - Sch. 8 para. 2(1)

<sup>92</sup> LGSA 1973 - Sch. 8 para. 2(2) and (3)

<sup>93</sup> LGSA 1973 - Sch. 8 para. 3

<sup>94</sup> LGSA 1973 - Sch. 8 para. 3A

<sup>95</sup> LGSA 1973 - Sch. 8 para. 4(1)

<sup>96</sup> LGSA 1973 - Sch. 8 para. 4(2)

<sup>97</sup> LGSA 1973 - Sch. 8 para. 4(3)



Subject to the above provisions in relation to meetings, the Accounts Commission has the power to regulate its own proceedings<sup>98</sup>.

#### Removal from membership

The Scottish Ministers may remove a person from membership of the Accounts Commission where that person:

1. is sequestrated or enters into a trust deed with his creditors;
2. is incapacitated by physical or mental illness;
3. has been absent from meetings of the Accounts Commission for a period longer than 6 consecutive months;
4. is otherwise unable or unfit to discharge the functions of a member.

### **3. Functions and Powers of the Accounts Commission**

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#### Primary Functions

The primary functions of the Accounts Commission are as follows<sup>99</sup>:

1. securing the audit of all accounts of local authorities;
2. considering any reports made in relation to such accounts;
3. making recommendations to the Scottish Ministers and to local authorities; and
4. advising the Scottish Ministers on matters relating to the accounting of local authorities<sup>100</sup>.

The Accounts Commission has the power to do all such acts as shall appear necessary or expedient for the exercise of its functions<sup>101</sup>.

In addition, the Accounts Commission has the power to incur such expenses as may be necessary or expedient for the proper discharge of its functions and such expenses shall be met by Audit Scotland<sup>102</sup>.

#### Studies for improving economy etc.

The Accounts Commission also has the power to undertake studies into and make recommendations on the following<sup>103</sup>:

1. the securing of “best value” by local authorities (in this context “best value” means the continuous improvement of the authority’s functions and the maintaining of a balance among the quality of its performance and the cost of that performance<sup>104</sup>);
2. improving economy, efficiency and effectiveness in the provision of services by local authorities; and
3. improving the financial or other management of local authorities.

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<sup>98</sup> LGSA 1973 - Sch. 8 para. 4(4)

<sup>99</sup> LGSA 1973 - s.97(2)

<sup>100</sup> For example, section 101A of the LGSA 1973 (as inserted by Social Security Administration (Fraud) Act 1997 c. 47 s.7(3)) provides that the Accounts Commission or an auditor may refer to the Secretary of State any matter arising from an audit or study if it appears that it may be relevant for the purposes of any of the functions of the Secretary of State relating to social security.

<sup>101</sup> LGSA 1973 - Sch. 8 para. 7

<sup>102</sup> LGSA 1973 - s.98

<sup>103</sup> LGSA 1973 - s.97A(1)

<sup>104</sup> As defined in LGISA 2003 s.1

Furthermore, the Accounts Commission may, at the request of the Scottish Ministers, undertake economy, efficiency and effectiveness studies in relation to the provision of housing benefit and council tax benefit by local authorities<sup>105</sup>.

### Delegation of Functions

The Accounts Commission has the authority to delegate any of the functions outlined above (with a few exceptions), either to a member of staff of Audit Scotland or to another person<sup>106</sup>. The exceptions are as follows<sup>107</sup>:

1. the consideration of reports received by the Accounts Commission;
2. the appointment of an auditor and the decision as to who will audit any specific account; and
3. the decision to undertake any form of study (as described above).

Each of the above noted functions must be performed by the Accounts Commission itself. Furthermore, no delegation of functions by the Accounts Commission shall relieve it of any of its statutory responsibilities<sup>108</sup>.

### Requirement to provide information to the Accounts Commission

The Accounts Commission has the power to require any local authority or related body that is subject to audit under the LGSA 1973 to provide such information or documents as may be required for the Accounts Commission to carry out its functions<sup>109</sup>.

This requirement to provide information also applies to any officer or member of any such body and any person who, by arrangement or agreement, is discharging any function of an authority or related body.

Failure, without reasonable cause, to provide such information when requested is a criminal offence punishable by a fine.<sup>110</sup>

### Publication of information as to standards of performance

Section 1(1) of the LGA 1992 provides that the Accounts Commission shall give directions to such relevant bodies (being those bodies for whom it is responsible for audit) as it thinks fit, requiring the body to publish information relating to their financial activities in any given year or other specified period.

The information published should, in the opinion of the Accounts Commission, facilitate the making of appropriate comparisons between the standards of performance achieved by different relevant bodies in the financial year or other period in question and the standards of performance achieved by such bodies in different financial years or, as the case may be, other periods<sup>111</sup>.

Ultimately, the information should enable the Accounts Commission to ensure that the bodies in question are discharging their obligations under Section 1 (duty to secure best value) and Part 2 (community planning) of the CESA 2015..

### Section 106 of the LGSA 1973

Section 106 provides that the above noted functions of the Accounts Commission in relation to local authorities (i.e. audit; economy, efficiency and effectiveness examinations; requirement to provide information) shall also apply in relation to the following categories of bodies:

1. any committee, joint committee or joint board all the members of which, other than any ex officio members, are appointed by one or more local authorities;

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<sup>105</sup> LGSA 1973 – S. 105A (as inserted by the Social Security Administration (Fraud) Act 1997 s.7(4))

<sup>106</sup> LGSA 1973 - s.97(2AA)

<sup>107</sup> LGSA 1973 - s.97(2AB)

<sup>108</sup> LGSA 1973 - s.97(2AC)

<sup>109</sup> LGSA 1973 - s.97B(1)

<sup>110</sup> LGSA 1973 - s.97B(2)

<sup>111</sup> LGA 1992 - s.1(1)(a)

2. the trustees for any charity, foundation, mortification, or other purpose, where a local authority, or some members of such an authority are the sole trustees;
3. a Transport Partnership created under the Transport (Scotland) Act 2005 (asp 12); and
4. an integration joint board established by order under section 9 of the Public Bodies (Joint Working) (Scotland) Act 2014.

#### **4. Duties and powers of auditors appointed by the Accounts Commission**

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Where an auditor (whether Audit Scotland or otherwise) is appointed by the Accounts Commission and requested to audit the accounts of a local authority, the auditor must satisfy himself of the following<sup>112</sup>:

1. the accounts have been prepared in accordance with any regulations made by the Scottish Ministers and comply with the any other relevant enactments;
2. proper accounting practices have been observed in preparation of the accounts;
3. the local authority in question has made proper arrangements for securing “best value” and is complying with its duties under Part 2 of the Community Empowerment (Scotland) Act 2015 (community planning)<sup>113</sup>;
4. where the authority is required to publish performance information (in accordance with section 1 of the LGA 1992<sup>114</sup>) the authority has made the necessary appropriate arrangements for collecting, recording and publishing the information.

An auditor shall have a right of access at all reasonable times to all such documents relating to the accounts of a local authority which it appears are necessary for him to examine<sup>115</sup>.

Furthermore, he may require from any other person holding or accountable for any such document, such information and explanation as he thinks necessary and, if he thinks it necessary for providing any such information or explanation, to require any such officer or other person to attend before him in person and produce any such documents.

Failure to comply, whether wilfully or negligently, with a requirement imposed by an auditor for the provision of documents, information or explanation is a criminal offence punishable by a fine<sup>116</sup>.

#### **5. The Controller of Audit**

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Section 97(4) of the LGSA 1973 requires that the Accounts Commission appoint a Controller of Audit, subject to the approval of the appointment by the Scottish Ministers<sup>117</sup>.

The Controller of Audit may be, but is not required to be, the Auditor General for Scotland. Where an individual other than the Auditor General is appointed as Controller of Audit that person shall, by virtue of such appointment, be a member of staff of Audit Scotland.

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<sup>112</sup> LGSA 1973 - s.99(1)(a) – (d)

<sup>113</sup> Formerly, the duties of the local authority were to comply with Sections 15 to 17 of the LGISA 2003 which required local authorities to facilitate a process called “community planning” relating to the provision of public services in the local area. This requirement has been amended by Schedule 4 Para 5(b) of the CESA 2015 and local authorities are now required to comply with their duties under Part of that Act. The duties still fall under the umbrella of “community planning” but are greatly developed.

<sup>114</sup> Section 1 of the LGA 1992 provides that the Accounts Commission shall give such directions to local authorities, as it thinks fit, for the publication of information concerning their standards of performance in any financial year.

<sup>115</sup> LGSA 1973 - s.100(1)

<sup>116</sup> LGSA 1973 - s.100(3)

<sup>117</sup> LGSA 1973 - s.97(4)

### Reports to Commission by the Controller of Audit

The Controller of Audit may choose (or may be required by the Accounts Commission) to make a report to the Accounts Commission in respect of any of the following<sup>118</sup>:

1. the accounts of any local authority audited in accordance with the LGSA 1973;
2. any matters arising from such accounts, or the audit of such accounts, which the Controller of Audit considers should be brought to the attention of the Accounts Commission or the public;
3. the performance by a local authority of its duties in relation to “best value” or “community planning”<sup>119</sup>.

Where the Controller of Audit makes such a report, a copy shall be sent to any local authority named in the report and any other person the Controller of Audit thinks appropriate. Upon receiving such a report, the local authority in question shall supply a copy of the report to each member of the authority and make additional copies available for public inspection<sup>120</sup>.

### Action by the Accounts Commission on receipt of Report by the Controller of Audit

On receipt by the Accounts Commission of a Report by the Controller of Audit the Accounts Commission may do any, all or none of the following<sup>121</sup>:

1. direct the Controller of Audit to carry out further investigations;
2. hold a hearing; and/or
3. state its findings.

Where the Accounts Commission chooses to state its findings without holding a hearing, the findings shall be treated for all purposes the same as findings following a hearing. Findings may include recommendations to the Scottish Ministers<sup>122</sup>.

The Accounts Commission shall give a copy of its findings to any member or officer of a local authority who was named in the report which proceeded the hearing and/or to which the findings relate<sup>123</sup>.

### Special Reports by the Controller of Audit

Where the Controller of Audit is of the opinion that any of the following apply in relation to a given account and the local authority in question has not taken adequate steps to remedy the matter, he may make a special report to the Accounts Commission<sup>124</sup>:

1. any item of account is contrary to law;
2. there has been a failure to bring into account any sum which ought to have been brought into account;
3. any loss has been incurred by negligence or misconduct;
4. any sum has been incorrectly debited or credited from an account.

However, prior to any such Special Report being made, a copy of the proposed report must be provided to the local authority in question and to any individual referred to in the report in connection with any negligence, misconduct or item of account which is contrary to law. The local authority and any persons so named must

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<sup>118</sup> LGSA 1973 - s.102(1)

<sup>119</sup> Now under Part 2 of the CESA 2015

<sup>120</sup> LGSA 1973 - s.102(2) and (2A)

<sup>121</sup> LGISA 2003 – s.3

<sup>122</sup> LGISA 2003 – s.4(3)

<sup>123</sup> LGISA 2003 – s.4(4)

<sup>124</sup> LGSA 1973 - s.102(3)

also be provided with the opportunity to make representations to the Controller of Audit on the matters in question<sup>125</sup>.

Where the Controller of Audit proceeds to make a Special Report to the Accounts Commission, a copy of the report must be sent to the local authority in question, any officer of the authority who may be concerned and to any other person who may, in the opinion of the Controller of Audit, be affected by the report<sup>126</sup>.

The Accounts Commission may publish any Special Report made to it and may do so in whatever way, and send copies of the report to whomever, it thinks fit<sup>127</sup>.

#### Action by the Accounts Commission on receipt of Special Reports

On receiving a special report from the Controller of Audit, the Accounts Commission may do any of the following<sup>128</sup>:

1. direct the Controller of Audit to carry out further investigations<sup>129</sup>;
2. hold a hearing<sup>130</sup>;
3. state a case on any question of law arising on the special report for the opinion of the Court of Session;
4. do none of the above.

However, the Accounts Commission must also hold a hearing if requested to do so in writing by the local authority which was the subject of the report, or any named person referred to in the report in connection with any negligence, misconduct or item of account which is contrary to law<sup>131</sup>.

Where any act of negligence or misconduct or item of account is contrary to law, the Accounts Commission can be required to state a case (as outlined above) if directed to do so by the Court of Session<sup>132</sup>.

#### Action on finding of failure, negligence or misconduct

Where, following a hearing, the Accounts Commission finds that any of the following have occurred, it has the power to impose various sanctions or make certain recommendations as specified in subsections 2 and 3 of Section 103F of the LGSA 1973<sup>133</sup>:

1. any item of account is contrary to law;
2. there has been a failure to bring into account any sum which ought to have been brought into account;
3. any loss has been incurred by negligence or misconduct;
4. any sum has been incorrectly debited or credited from an account.

The sanctions which may be imposed are as follows<sup>134</sup>:

1. censuring, but otherwise taking no action against, an officer or member of the authority;
2. suspending, for a period not exceeding one year, the entitlement of a member of a local authority to attend one or more but not all of the following:
  - a. all meetings of the local authority;

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<sup>125</sup> LGSA 1973 - s.102(3A)

<sup>126</sup> LGSA 1973 - s.102(4)

<sup>127</sup> LGSA 1973 - s.103A

<sup>128</sup> LGSA 1973 - s.103B(1)

<sup>129</sup> Further provisions relating to investigations are provided in LGSA 1973 s.103G

<sup>130</sup> The procedure for hearings is laid out in LGSA 1973 s.103C – 103F

<sup>131</sup> LGSA 1973 - s.103B(2)

<sup>132</sup> LGSA 1973 - s.103B(3)

<sup>133</sup> LGSA 1973 - s.103F(1)

<sup>134</sup> LGSA 1973 - s.103F(2)

- b. all meetings of one or more committees or sub-committees of the local authority;
  - c. all meetings of any other body on which the member is a representative or nominee of the local authority;
3. suspending, for a period not exceeding one year, the entitlement of a member of a local authority to attend meetings of the local authority and of any committee or sub-committee thereof and of any other body on which the member is a representative or nominee of the local authority;
  4. disqualifying a member of a local authority for a period not exceeding five years, from being, or from being nominated for election as, or from being elected, such a member.

In the case of a local authority itself, the Accounts Commission may (i) make recommendations to the Scottish Ministers that they make an order directing the authority to make such rectification of their accounts as appears to the Accounts Commission necessary and (ii) include in its findings any recommendations arising from those findings which the Accounts Commission thinks fit<sup>135</sup>.

An officer or member of a local authority who receives a sanction as detailed above has the right to appeal to the sheriff principal of the sheriffdom in which the authority has its principal office<sup>136</sup>.

## **6. Other Statutory Provisions which apply to the Accounts Commission**

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### Public Records (Scotland) Act 2011

This act applies to the Auditor General, the Accounts Commission and Audit Scotland. As listed bodies under the act, each body must<sup>137</sup>:

1. prepare a records management plan setting out proper arrangements for the management of its public records;
2. submit the plan to the Keeper of the Records of Scotland<sup>138</sup>; and
3. ensure that its public records are managed in accordance with the plan as agreed with the Keeper.

### Equality Act 2010

The Accounts Commission and Audit Scotland are both defined as a “Relevant Scottish Authority” for the purposes of the EA 2010<sup>139</sup>. As such, they are bound by the requirements of section 149 of the EA 2010. In particular they must have due regard to various factors including the need to<sup>140</sup>:

1. eliminate discrimination, harassment, victimisation and any other conduct prohibited under the EA 2010;
2. advance equality of opportunity between persons who share certain protected characteristics and those who do not; and
3. foster good relations between persons who share certain protected characteristics and persons who do not.

For the purposes of the EA 2010, the protected characteristics are<sup>141</sup>:

1. age;
2. disability;
3. gender reassignment;

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<sup>135</sup> LGSA 1973 - s.103F(3)

<sup>136</sup> Further details of the appeal procedure are provided in LGSA 1973 s.103J

<sup>137</sup> Public Records (Scotland) Act 2011 - s.1

<sup>138</sup> One of the statutory titles of the Chief Executive of the National Records of Scotland.

<sup>139</sup> EA 2010 - Sch.19(3) para. 1

<sup>140</sup> EA 2010 - s.149(1)

<sup>141</sup> EA 2010 - s.149(7)

4. pregnancy and maternity;
5. race;
6. religion or belief;
7. sex; and
8. sexual orientation.

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended by the Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016/159 (Scottish SI))

These regulations provide further obligations on the Accounts Commission and Audit Scotland as listed authorities under the EA 2010. In particular, the following duties are imposed on the Accounts Commission, Audit Scotland and other listed authorities:

1. To publish a report on the progress it has made to make the equality duty integral to the exercise of its functions so as to better perform that duty. The first report was due by 30<sup>th</sup> April 2013 and at two-yearly intervals thereafter<sup>142</sup>. Such reports must include details of the number of men and women who have been members of the authority during the period covered by the report. Such reports must also include details of the way in which information, provided by the Scottish Ministers on the relevant protected characteristics of the authority's members, has been used and the way in which the authority proposes to use such information in taking steps towards diversity among its members as relevant to the protected characteristics<sup>143</sup>.
2. To publish a set of equality outcomes which it considers will enable it to better perform the equality duty. The first set of equality outcomes was due by 30<sup>th</sup> April 2013 and at four-yearly intervals thereafter<sup>144</sup>. A report on the progress made to achieve the equality outcomes is also required. The first report was required on 30<sup>th</sup> April 2015 and at two yearly intervals thereafter.<sup>145</sup>
3. Where it proposes any new or revised policies or practices, to assess these against the needs mentioned in section 149(1) of the EA 2010 (detailed above)<sup>146</sup>.
4. To take steps to gather information on the number and relevant protected characteristics of its employees and the recruitment, development and retention of such persons as employees of the authority. The authority must use this information to better perform the equality duty and the information must be published in the report to be produced in accordance with regulation 3 (see above)<sup>147</sup>.
5. Where the authority has more than 20 employees, to publish information on the percentage difference among its employees between men's average hourly pay (excluding overtime) and women's average hourly pay (excluding overtime). This information was due initially by 30<sup>th</sup> April 2013 and at two-yearly intervals thereafter<sup>148</sup>.
6. Where the authority has more than 20 employees, to publish a statement specifying its policy on equal pay among its employees and occupational segregation in particular grades of employment and particular occupations within the organisation. An initial statement was due by 30<sup>th</sup> April 2013 and at four-yearly intervals thereafter<sup>149</sup>.
7. To publish the reports and statements specified above in a manner which is accessible to the public<sup>150</sup>.

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<sup>142</sup> EASDSR 2012 - reg. 3

<sup>143</sup> EASDSR 2012 – reg. 6A as inserted by EASDSAR 2016 – reg.4(3)

<sup>144</sup> EASDSR 2012 - reg. 4

<sup>145</sup> EASDSR 2012 - reg. 4(4)

<sup>146</sup> EASDSR 2012 - reg. 5

<sup>147</sup> EASDSR 2012 - reg. 6

<sup>148</sup> EASDSR 2012 - reg. 7 as amended by EASDSAR 2016 – reg. 5

<sup>149</sup> EASDSR 2012 - reg. 8 as amended by EASDSAR 2016 – reg. 6

<sup>150</sup> EASDSR 2012 - reg. 10

The Scottish Ministers must from time to time, take steps to gather information on the relevant protected characteristics of members of a listed authority and provide such information to the relevant listed authority<sup>151</sup>. As listed authorities, Audit Scotland and the Accounts Commission must use such information provided to them by the Scottish Ministers to better perform the equality duty<sup>152</sup>.

### Housing (Scotland) Act 2010

Under the HSA 2010, the Scottish Housing Regulator (the “Regulator”) is required prepare a statement setting out how it intends to perform its functions and to review the statement from time to time. In fulfilment of this obligation the Regulator is required to consult with various bodies, one of which is the Accounts Commission<sup>153</sup>.

In addition, the Regulator must from time to time consult with the Accounts Commission in relation to the performance of the Regulator’s functions in relation to local authority landlords, performance targets for housing services and other matters<sup>154</sup>.

Under section 31 of the HSA 2010, Scottish Ministers are required to set out standards and outcomes which social landlords should aim to achieve when performing housing activities. The document setting out these matters is referred to as the “Scottish Social Housing Charter”. In preparing (and from time to time updating) the Scottish Social Housing Charter, Scottish Ministers are required to consult with a number of bodies, one of which is the Accounts Commission<sup>155</sup>.

### Public Services Reform (Scotland) Act 2010

The Accounts Commission and Audit Scotland are both “listed public authorities” for the purposes of Part 3, sections 31 to 34, of the PSRSA 2010.

Section 31 requires that a listed public authority must publish a statement of expenditure as soon as reasonably practicable after the end of each financial year. The statement must cover any expenditure relating to public relations, overseas travel, hospitality and entertainment and external consultancy<sup>156</sup>.

Each listed public authority must also publish a statement specifying the amount, date, payee and subject matter of any payment in excess of £25,000 for the financial year in question<sup>157</sup>.

Finally, each listed public authority must publish a statement specifying the number of individuals (if any) who, during the financial year in question, received remuneration in excess of £150,000 in relation to their service as a member of the public body or as a member of its staff<sup>158</sup>.

Section 32 provides that each listed public body must publish a statement of the steps that it has taken during the financial year in question to promote and increase sustainable growth through the exercise of its functions and to improve efficiency, effectiveness and economy in the exercise of its functions<sup>159</sup>.

The Scottish Ministers may from time to time issue guidance on the duties to publish statements imposed by sections 31 and 32 of the PSRSA 2010. Each listed public authority is required to have regard for this guidance when publishing the required statements.

Part 8, section 114 of the PSRSA 2010 provides that the Accounts Commission must cooperate with the other bodies listed in Schedule 20<sup>160</sup> to the PSRSA (“scheduled scrutiny authorities”) and, where appropriate, the Scottish Ministers for the purpose of improving the scrutiny functions of each of the respective bodies in relation to:

1. local authorities;

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<sup>151</sup> EASDSR 2012 – reg. 6A(1)

<sup>152</sup> EASDSR 2012 – reg. 6A(2)

<sup>153</sup> HSA 2010 - s.4(4)

<sup>154</sup> HSA 2010 - s.6, s.34 etc.

<sup>155</sup> HSA 2010 - s.33

<sup>156</sup> PSRSA 2010 - s.31(2)

<sup>157</sup> PSRSA 2010 - s.31(3)

<sup>158</sup> PSRSA 2010 - s.31(4)

<sup>159</sup> PSRSA 2010 - s.32(1)

<sup>160</sup> These include, *inter alia*, Food Standards Scotland, Healthcare Improvement Scotland, HM’s Chief Inspector of Prisons for Scotland, Scottish Housing Regulator etc.



2. social services;
3. health services; and
4. policing,

all having regard to efficiency, effectiveness and economy.

The duty to cooperate will not apply in so far as compliance with it would prevent or delay action by a scheduled scrutiny authority in the exercise of its scrutiny functions which that authority considers to be necessary as a matter of urgency.

In complying with its duty to cooperate, the Accounts Commission must comply with any directions given by the Scottish Ministers, and have regard to any guidance provided by the Scottish Ministers.

#### Climate Change (Scotland) Act 2009

Section 44 of the CCSA 2009 provides that all public bodies must, in the exercise of their functions, act as follows<sup>161</sup>:

1. in the way best calculated to contribute to the delivery of the targets set in or under Part 1 of the CCSA 2009<sup>162</sup>;
2. in the way best calculated to help deliver any programme laid before the Scottish Parliament under section 53 of the CCSA 2009; and
3. in a way that it considers is most sustainable.

Section 53 of the CCSA 2009 provides that where the Secretary of State<sup>163</sup> lays a report before the UK Parliament reporting on the impact of climate change, the Scottish Ministers must subsequently lay a programme before the Scottish Parliament. The programme must set out various proposals and objectives for adapting to climate change (including an objective in relation to Scotland's contribution to international climate change adaptation in line with international best practice)<sup>164</sup> and address the risks identified in the report.

The Scottish Ministers must also give guidance to relevant public bodies in relation to their climate change duties and those bodies must have regard to such guidance<sup>165</sup>.

For the purposes of the CCSA 2009, the term public body means any Scottish Public Authority as defined in Section 3(1)(a) of FOISA 2002. Thus, the Auditor General, the Accounts Commission and Audit Scotland must all act in accordance with the act.

Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015/17

These regulations provide that the Accounts Commission, the Auditor General and Audit Scotland are all relevant public authorities for the purposes of section 54 and section 1193 of the Companies Act 2006<sup>166</sup>. Accordingly, the approval of the Scottish Ministers is required for the registration of a company or LLP with a name which gives the impression that the company or LLP is associated with the Accounts Commission, the Auditor General or Audit Scotland<sup>167</sup>. Prior to granting approval the Scottish Ministers must also seek the opinion of the Accounts Commission, the Auditor General or Audit Scotland (respectively) as to whether or not such approval should be granted<sup>168</sup>.

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<sup>161</sup> CCSA 2009 - s.44

<sup>162</sup> Part 1 of the CCSA 2009 deals with the setting of Emission Reduction Targets.

<sup>163</sup> In this context Secretary of State means the UK Secretary of State for Energy and Climate Change.

<sup>164</sup> CCSA 2009 – 53(2A) as inserted by Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 asp 15 (Scottish Act) Pt 4 s.25

<sup>165</sup> CCSA 2009 - s.45

<sup>166</sup> CLBNTDR 2015 – reg 9 & reg 18

<sup>167</sup> CA 2006 - s.54

<sup>168</sup> CLBNTDR 2015 – reg 9(2) & reg 18(2)

In addition a person must not carry on any business in the United Kingdom under a name which gives the impression that the business is associated with the Accounts Commission, the Auditor General or Audit Scotland, without the approval of the Scottish Ministers<sup>169</sup>.

#### Charities Accounts (Scotland) Regulations 2006

Regulation 10(1) of the CASR 2006 requires charities to have their accounts formally audited in certain circumstances<sup>170</sup>. In such circumstances the accounts must be audited by an auditor eligible for appointment as a statutory auditor under the CA 2006 or by an auditor appointed by the Accounts Commission or the Auditor General.

#### Gaelic Language (Scotland) Act 2005

The GLSA 2005 established a body, known as Bòrd na Gàidhlig (the Bòrd), to promote the use and understanding of the Gaelic language in Scotland<sup>171</sup>.

In addition to developing a nationwide Gaelic language plan, the Bòrd also has the power to require Scottish public authorities to prepare and implement Gaelic language plans<sup>172</sup>. These plans set out how the public authority will use the language in connection with the exercise of its functions.

“Scottish public authority” is defined as any public body or office-holder with functions which can be exercised only in, or as regards, Scotland and would therefore include each of the Auditor General, the Accounts Commission and Audit Scotland. To date, no such request has been made by the Bòrd to any of the three bodies, however such a request could be made in the future.

In the event that the Bòrd was to request that the Auditor General, the Accounts Commission or Audit Scotland prepare a Gaelic language plan, it would need to do so by written notice giving the body in question no less than 6 months within which to prepare the plan<sup>173</sup>.

In deciding whether or not to require a public authority to prepare a Gaelic language plan, the Bòrd must have regard to:

1. the most recent national Gaelic language plan (if any);
2. the extent to which the Gaelic language is used by persons in relation to whom the functions of the authority are exercisable, and whether, in the Bòrd's opinion, there is potential for the authority to develop the use of the Gaelic language in connection with the exercise of those functions;
3. any representations made to it in relation to the use of the Gaelic language in connection with the exercise of those functions, and
4. any guidance given by the Scottish Ministers.

#### Freedom of Information (Scotland) Act 2002

Schedule 1 of FOISA 2002 lists the Accounts Commission, the Auditor General and Audit Scotland as Scottish Public Authorities to which the act applies<sup>174</sup>.

FOISA 2002 provides that where a person requests information from a Scottish public authority (for instance Audit Scotland) that person is entitled to be given the information by the authority<sup>175</sup>.

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<sup>169</sup> CA 2006 - s.1193

<sup>170</sup> For instance where the charity has gross income over £500,000.

<sup>171</sup> GLSA 2005 - s.1

<sup>172</sup> GLSA 2005 - s.3

<sup>173</sup> GLSA 2005 - s.3(2)(a)

<sup>174</sup> FOISA 2002 - Sch.1(7) para. 57

<sup>175</sup> FOISA 2002 - s.1(1)

The Accounts Commission, the Auditor General and Audit Scotland are therefore required to provide information requested by a person unless it falls into one of the exempt categories listed in part 2 of FOISA 2002. Information must usually be provided by not later than the twentieth working day after the request is received.

In addition, all Scottish Public Authorities defined in FOISA 2002 are subject to the Environmental Information (Scotland) Regulations 2004 which came into force on 1 January 2005. These regulations implemented Directive 2003/4/EC of the European Parliament on public access to environmental information.

Under the regulations each Scottish Public Authority must take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds. The authority must maintain this information with a view to the active and systematic dissemination of the information to the public and shall make that information progressively available to the public by electronic means<sup>176</sup>.

Furthermore a Scottish Public Authority that holds environmental information shall make it available when requested to do so by any applicant<sup>177</sup>. Such requests and the subsequent responses by a Public Authority are made on broadly the same terms as requests under FOISA 2002. For the purposes of the regulations, "Environmental Information" is broadly defined and can include, for example, policies, plans and programmes relating to the environment; reports on the state of the environment; and data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment.

#### Scottish Public Services Ombudsman Act 2002

The Accounts Commission, the Auditor General and Audit Scotland are each a "listed authority" for the purposes of the SPSOA 2002. As such, they are liable to investigation by the Scottish Public Services Ombudsman ("SPSO")<sup>178</sup>.

The Ombudsman is entitled to investigate any failure in a service provided by an authority or any failure of an authority to provide a service which it was a function of the authority to provide. Such investigations may take place either where a complaint has been made to the Ombudsman or the authority in question has requested the investigation.

Where an investigation uncovers maladministration or service failure, the SPSO will produce a report making recommendations for how the authority in question can address the identified issues. The report must be sent to the authority in question, the Scottish Ministers and, where the investigation was made as a result of a complaint, to the individual or party who made the complaint and the person who is alleged to have taken the actions complained of<sup>179</sup>.

In the event that an authority does not implement the recommendations made in the SPSO's report following a complaint, the SPSO may prepare a further "Special Report" to be laid before Parliament. Following this, Parliament may take such further action as it deems appropriate.

In addition to the investigatory procedures outlined above, section 119 of the PSRSA 2010 amended the SPSOA 2002 with the addition of new sections 16A to 16F which deal with complaints handling procedures ("CHPs").

In particular, section 16A requires each listed authority to have in place a "complaints handling procedure" in respect of actions taken by the authority<sup>180</sup>. The SPSO itself is required to publish a "statement of principles"<sup>181</sup> concerning how CHPs should operate and it is the responsibility of each listed authority to ensure its particular procedure complies with the statement of principles.

The SPSO may also produce model CHPs and specify that such model CHPs apply to particular listed authorities<sup>182</sup>. Where the SPSO provides that a model CHP applies to a particular authority it must notify the authority that the model CHP applies, following which the authority in question must ensure its CHP matches the requirement of the model CHP.

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<sup>176</sup> EISR 2004 - reg. 4

<sup>177</sup> EISR 2004 - reg. 5

<sup>178</sup> SPSOA 2002 - Sch.2(2) para. 18, 19 and 20

<sup>179</sup> SPSOA 2002 - s.15

<sup>180</sup> SPSOA 2002 - s.16A(2)

<sup>181</sup> SPSOA 2002 - s.16A(1)

<sup>182</sup> SPSOA 2002 - s.16B(1)

### Ethical Standards in Public Life etc. (Scotland) Act 2000

Schedule 3 of the ESPLSA 2000 lists the Accounts Commission as one of the devolved public bodies to which the act applies. As such the Accounts Commission is required to have in place a "Members' Code"<sup>183</sup> in line with the model code prepared by Scottish Ministers<sup>184</sup>.

Separately, section 8 of the ESPLSA 2000 provides for the establishment of the Standards Commission for Scotland. The section also specifies that where any function of the Standards Commission affects matters within the functions of the Accounts Commission, the Standards Commission must consult with the Accounts Commission in relation to the exercise of those functions<sup>185</sup>.

The ESPLSA 2000 also makes various amendments to the LGSA 1973. In particular, a new section 103H is inserted into the LGSA 1973 providing protection for certain organisations from actions for defamation<sup>186</sup>.

This section provides *inter alia* that any statement made by (i) the Accounts Commission, (ii) any of its agents or staff of Audit Scotland under section 10(3) of the 2000 Act (requirement to provide assistance and support to the Auditor General and the Accounts Commission); or (iii) the Controller of Audit, shall be absolutely privileged. This principle provides an absolute defence in the event that an action for defamation is brought in relation to any such statement.

### Public Interest Disclosure Act 1998

The PIDA 1998 amended the ERA 1996 by the addition of Part IVA dealing with "Protected Disclosures". A protected disclosure is defined as any disclosure of information made by a worker to one of a range of bodies and organisations ("prescribed persons")<sup>187</sup>. The information must, in the reasonable belief of the worker, be made in the public interest and show one of the following:

1. that a criminal offence has been committed, is being committed or is likely to be committed;
2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
3. that a miscarriage of justice has occurred, is occurring or is likely to occur;
4. that the health or safety of any individual has been, is being or is likely to be endangered;
5. that the environment has been, is being or is likely to be damaged; or
6. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

The Public Interest Disclosure (Prescribed Persons) Order 1999 was amended by the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003 (as amended the Public Disclosure (Prescribed Persons) (amendment) Order 2018<sup>188</sup>) provides that, for the purposes of the PIDA 1998 and the ERA 1996, the Accounts Commission, the Auditor General and Audit Scotland are prescribed persons. A worker may therefore make a protected disclosure to the Accounts Commission, the Auditor General or Audit Scotland in relation to the proper conduct of public business, value for money, fraud and corruption in public bodies<sup>189</sup>.

Section 148 of the Small Business, Enterprise and Employment Act 2015 ("SBEEA 2015") amends the ERA 1996 by the insertion of a new Section 43FA. That section provides that the Secretary of State may make regulations requiring a person prescribed for the purposes of section 43F (i.e. Audit Scotland, the Accounts Commission or the Auditor General) to produce an annual report on disclosures of information made to the person by workers.

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<sup>183</sup> ESPLSA 2000 - s.3

<sup>184</sup> ESPLSA 2000 - s.2

<sup>185</sup> ESPLSA 2000 - s.8(8)

<sup>186</sup> ESPLSA 2000 - s.33

<sup>187</sup> PIDA1998 - s.1

<sup>188</sup> The Public Disclosure (Prescribed Persons) (Amendment) Order 2018

<sup>189</sup> Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003/1993 Sch. 1 para. 1

The regulations must set out the matters that are to be covered in a report, but must not require a report to provide detail that would enable the identification of a worker who has made a disclosure or the identification of an employer or other person in respect of whom a disclosure has been made.

In accordance with the aforementioned power, the Secretary of State has published The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. These regulations come into force on 1 April 2017. From the commencement of the Regulations, Audit Scotland, the Auditor General and the Accounts Commission, as “prescribed persons” will be required to publish annual reports, detailing the protected disclosures which it has received in each 12 month period running from 1 April each year<sup>190</sup>.

The report must contain, without including any information in the report that would identify a worker who has made a disclosure of information, or an employer or other person in respect of whom a disclosure of information has been made:

1. the number of workers’ disclosures received during the reporting period that the relevant prescribed person reasonably believes are qualifying disclosures within the meaning of section 43B of the ERA 1996; and which fall within the matters in respect of which that person is so prescribed;
2. the number of those disclosures in relation to which the relevant prescribed person decided during the reporting period to take further action;
3. a summary of the action that the relevant prescribed person has taken during the reporting period in respect of the workers’ disclosures; and how workers’ disclosures have impacted on the relevant prescribed person’s ability to perform its functions and meet its objectives during the reporting period; and
4. an explanation of the functions and objectives of the relevant prescribed person.

#### Human Rights Act 1998

Each of the Auditor General, the Accounts Commission and Audit Scotland are subject to the terms of the Human Rights Act 1998. As such it is unlawful for any of the three bodies to act in a way which is incompatible with the European Convention on Human Rights unless they are obliged to do so by UK statute.

#### General Data Protection Regulation 2016/679 and the Data Protection Act 2018

The GDPR and the Data Protection Act 2018 (as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419) apply to the Auditor General, the Accounts Commission and Audit Scotland. The Auditor General, the Accounts Commission and Audit Scotland must comply with the provisions of Data Protection Legislation when processing personal data.

The legislation provides that personal data shall only be processed in accordance with the principles set out in Data Protection Legislation and that individuals to whom that personal data relates shall be entitled to exercise certain rights in respect of their data including the right to be advised of the processing taking place and to obtain a copy of their data. The rights of data subjects may be restricted in the circumstances prescribed by Data Protection Legislation, for example, the right to erasure of personal data is not absolute and personal data may continue to be processed where there is a lawful basis for doing so.

Data Protection Legislation permits the processing of personal data by the Auditor General, the Accounts Commission and Audit Scotland where there is a lawful basis for doing so. Due to the nature of work undertaken, the lawful basis for the processing carried out, including sharing of information with other organisations, will often derive from statutory powers conferred specifically on the Auditor General, the Accounts Commission or Audit Scotland.

Data Protection Legislation is relevant for the purposes of determining the personal data which can be accessed by, provided to and used by the Auditor General, the Accounts Commission and Audit Scotland. Audit Scotland carries out data matching exercises in accordance with its statutory powers and processes personal data for

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<sup>190</sup> PPRDIR 2017 – s.3(1)

these purposes. All personal data processed for the purposes of data matching must also be processed in accordance with Data Protection Legislation.

In accordance with Data Protection Legislation, the Auditor General, the Accounts Commission and Audit Scotland have produced and published a privacy notice which provides information as to the processing of personal data carried out.

## **7. Accounts which must be sent to the Accounts Commission for auditing**

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As indicated in the introduction to this section, the Accounts Commission is responsible for the audit of a large number of local and public authorities. Individual responsibility for the audit of each local authority will be assigned either to Audit Scotland or a private firm of auditors by the Accounts Commission.

The precise list of local and public authorities and their assigned auditors is dynamic and for that reason a formal list is not included here. An up to date list can be found on the Audit Scotland website here: <http://www.audit-scotland.gov.uk/about-us/audit-scotland/audit-appointments>.

### Wildlife and Natural Environment (Scotland) Act 2011

The Wildlife and Natural Environment (Scotland) Act 2011 requires that the Accounts Commission as a public body must prepare a biodiversity report within three years of such Act coming into force and thereafter at not more than three yearly intervals. Such report must cover the actions taken by the Accounts Commission in pursuance of its duties under s.1 of the Nature Conservation (Scotland) Act 2004<sup>191</sup>.

### Islands (Scotland) Act 2018

Under s.8 of the Islands (Scotland) Act 2018 the Accounts Commission is required to produce an impact assessment in relation to a policy, strategy or services (including the development, delivery and redevelopment of any of the same) which in its view is likely to have an effect on an island community which is different from its effect on other communities (including other island communities) in the area in which the authority exercises its functions. Any such impact assessment is required to describe the likely significant different effect of the policy, strategy or service (as the case may be) and the extent to which the Accounts Commission considers that the policy, strategy or service (as the case may be) can be developed or delivered in such a manner as to improve or mitigate for island communities the outcomes resulting from it. In any instance where such impact assessment is not prepared the Accounts Commission is required within a reasonable period to provide an explanation of its reasons for not doing so.<sup>192</sup>

Under s.17 of the Islands (Scotland) Act 2018<sup>193</sup> the Accounts Commission is required that in any instance where it produces a map of Scotland that either i) the geographical location of the Shetland Isles is displayed accurately and proportionately in relation to the rest of Scotland or ii) provides information for its reasons not to comply in any instance where it decided not to do so.

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<sup>191</sup> Nature Conservation (Scotland) Act 2004 – s.1

<sup>192</sup> Islands (Scotland) Act 2018 – s.8

<sup>193</sup> Islands (Scotland) Act 2018 – s.17

# Audit Scotland

## 1. Audit Scotland – Introduction

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Audit Scotland was established by Section 10(1) of the 2000 Act which states: “*There is to be a body corporate to be known as Audit Scotland, with the functions conferred on it by virtue of this Act and any other enactment.*”

The Board of Audit Scotland must consist of the Auditor General and the Chairman of the Accounts Commission<sup>194</sup>. The Board will also have 3 other members appointed by the SCPA<sup>195</sup>.

The SCPA was established under section 12 of the 2000 act. It is made up of five MSPs, one of whom is the convener, for the time being, of the Public Audit Committee of the Scottish Parliament<sup>196</sup>.

The 2000 Act requires Audit Scotland to provide “such assistance and support as the Auditor General and the Accounts Commission may require in the exercise of their respective functions”. In particular, Audit Scotland must provide to them, or ensure that they are provided with, the necessary property, staff and services which are required for those functions<sup>197</sup>. In support of this requirement, the Auditor General and the Accounts Commission are able to give directions to Audit Scotland in connection with the exercise of its functions in relation to the respective duties of the Auditor General and the Accounts Commission<sup>198</sup>.

In addition to the services it must provide to the Auditor General and the Accounts Commission, Audit Scotland is also permitted by the 2000 Act to make arrangements with any other public body or office-holder for the provision of audit services by Audit Scotland to that public body or office-holder<sup>199</sup>.

## 2. Management of Audit Scotland

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Schedule 2 of the 2000 Act provides numerous other provisions relating to the powers and management of Audit Scotland.

### Membership of Audit Scotland

The following restrictions are provided relating to membership of the Board of Audit Scotland:

1. Although separately they are entitled to remuneration for their respective positions, the Auditor General and the Chairman of the Accounts Commission are not entitled to any remuneration in respect of their membership of the Board of Audit Scotland<sup>200</sup>.
2. A person who is a member of staff of Audit Scotland or a member of the Accounts Commission is not entitled<sup>201</sup> to be appointed to the Board of Audit Scotland<sup>202</sup>.
3. The appointment of a board member under section 10(2)(c) of the 2000 Act (i.e. an appointee other than the Auditor General or the Chairman of the Accounts Commission) may be for a period not exceeding 3 years<sup>203</sup> and that person may be reappointed for one further period<sup>204</sup>.

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<sup>194</sup> 2000 Act - s.10(2)

<sup>195</sup> 2000 Act - s.10(2)(c)

<sup>196</sup> 2000 Act - s12

<sup>197</sup> 2000 Act - s.10(3)

<sup>198</sup> 2000 Act - s.10(4)

<sup>199</sup> 2000 Act - s.10(5)

<sup>200</sup> 2000 Act - Sch. 2 para. 1

<sup>201</sup> Originally such individuals were entitled to be appointed but with the caveat that they were not entitled to receive any remuneration for their appointment. However, the PSRSA 2010 s.118(8)(a)(i) and (ii) modified the 2000 Act to provide simply that such individuals could not be appointed.

<sup>202</sup> 2000 Act - Sch. 2 para. 2

<sup>203</sup> 2000 Act - Sch. 2 para. 2A (This provision was added by the PSRSA 2010 - s.118(8)(b))

<sup>204</sup> 2000 Act - Sch. 2 para. 2B (Again this provision was added by the PSRSA 2010 - s.118(8)(b))

4. A member appointed under section 10(2)(c) shall be appointed on such terms and conditions as the SCPA<sup>205</sup> may determine. Such a member must hold, and subsequently vacate, their office in accordance with the terms of the appointment and shall be entitled to resign as a member by notice in writing given to the SCPA<sup>206</sup>. Equally, the SCPA may remove such a member if they consider that the member is for any reason unable or unfit to exercise the functions of a member<sup>207</sup>.

#### Appointment of Staff, Remuneration and Pensions<sup>208</sup>

The following provisions are made regarding staff and pension arrangements:

1. Audit Scotland may appoint staff and has discretion to determine the terms and conditions of any such appointment. This includes arrangements for the payment of pensions, gratuities or allowances to, or in respect of, any person who has ceased to be a member of staff.
2. In particular, Audit Scotland may make contributions towards provision for such pensions, gratuities or allowances and it may establish and administer one or more pension schemes.

#### General Powers of Audit Scotland<sup>209</sup>

Schedule 2 paragraph 6 of the 2000 Act provides for the following general powers of Audit Scotland:

1. Audit Scotland may do anything which appears to it to be necessary or expedient for the purpose of, or in connection with, the discharge of its functions.
2. This includes:
  - a. holding property;
  - b. entering into contracts;
  - c. charging for goods and services; and
  - d. borrowing sums in sterling by way of overdraft or otherwise for the purpose of meeting a temporary excess of expenditure.

#### Other Provisions<sup>210</sup>

Schedule 2 paragraph 7 of the 2000 Act provides that:

1. The validity of any act of Audit Scotland is not affected by any vacancy among its members, or any defect in the appointment, or qualification for membership of any member.
2. Audit Scotland has the power to determine its own internal procedures (i.e. in relation to meetings).
3. The SCPA<sup>211</sup> must appoint one of the members of the board of Audit Scotland to preside at the meetings of Audit Scotland. The individual appointed by the SCPA must not be the Auditor General or the Chairman of the Accounts Commission but should be one of the three other board members appointed in accordance with section 10(2)(c) of the 2000 Act.
4. Audit Scotland itself, must then appoint one of the remaining members of the board of Audit Scotland to preside at a meeting in the event that the member appointed by the SCPA is not present. Again, the

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<sup>205</sup> Originally the terms of such appointments were determined by the Auditor General and the Chairman of the Accounts Commission. Notice of resignation was also required to be given to the Auditor General and the Chairman. However, following the enactment of the PSRSA 2010 - s.118(8)(c)(i) and (ii) these aspects are handled by the SCPA.

<sup>206</sup> 2000 Act - Sch.2 para. 3

<sup>207</sup> 2000 Act - Sch. 2 para. 4

<sup>208</sup> 2000 Act - Sch. 2 para. 5

<sup>209</sup> 2000 Act - Sch. 2 para. 6

<sup>210</sup> 2000 Act - Sch. 2 para. 7

<sup>211</sup> Previously the appointment of a member to preside at meetings of Audit Scotland was solely at the discretion of Audit Scotland itself. However following the enactment of the PSRSA 2010 - s.118(8)(e)(i) and (ii) this discretion now lies with the SCPA.



member so appointed must not be the Auditor General or the Chairman of the Accounts Commission but should be one of the three board members appointed in accordance with section 10(2)(c).

Paragraphs 8 and 9 of Schedule 2 of the 2000 Act, concern the transfer of employees, property, rights and liabilities from the Accounts Commission to Audit Scotland following the creation of Audit Scotland in 2000. Given the nature of these provisions in relation to this paper and the time elapsed since their implementation, no further consideration will be given to these sections.

### **3. Audit Scotland – Financial Provisions**

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Section 11 of the 2000 Act provides rules on the financing of Audit Scotland.

#### Charging for Services<sup>212</sup>

Audit Scotland may impose reasonable charges in respect of the exercise of its functions in connection with the following:

1. where Audit Scotland makes arrangements for the provision of services, in connection with the conduct of audits, to any public body or office-holder in accordance with section 10(5) of the 2000 Act;
2. where the account of a public body or office-holder is required to be audited by the Auditor General and the Auditor General appoints Audit Scotland to undertake or assist with the audit<sup>213</sup>;
3. where the Auditor General initiates an examination into the economy, efficiency and effectiveness of a body or office-holder and Audit Scotland undertakes or assists with the examination<sup>214</sup>;
4. where Audit Scotland carries out a data matching exercise in accordance with the requirements of the CJLSA 2010<sup>215</sup>;
5. where the Accounts Commission appoints Audit Scotland to undertake or assist with the audit of the accounts of a local authority in accordance with the LGSA 1973<sup>216</sup>;
6. where the Accounts Commission appoints Audit Scotland to undertake or assist with the undertaking of studies for improving economy in services in accordance with section 97A of the LGSA 1973 or studies of benefit administration at the request of the Scottish Ministers in accordance with section 105A of the LGSA 1973<sup>217</sup>; and/or
7. where the Accounts Commission gives directions under section 1 of the LGA 1992 to a body to publish information relating to its financial activities<sup>218</sup>.

There are certain exceptions to the above and these are as follows:

1. Audit Scotland may not charge in respect of its auditing of an account where the account in question is that of any of the following:
  - a. the Scottish Ministers;
  - b. the Lord Advocate;
  - c. any person to whom sums are paid out of the Fund<sup>219</sup>;
  - d. the account to be prepared by Scottish Ministers for each financial year in respect of payments into and out of the Fund;

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<sup>212</sup> 2000 Act - s.11(1)

<sup>213</sup> 2000 Act - s.21 and s.22

<sup>214</sup> 2000 Act - s.23

<sup>215</sup> The CJLSA 2010 - s.97(3) modified the 2000 Act by the addition of s.26A which provides for Audit Scotland to carry out data matching exercises to assist in the prevention and detection of fraud and other crimes.

<sup>216</sup> The LGSA 1973 Pt. 7 (in particular s.96) provides for the audit of local authorities by the Accounts Commission.

<sup>217</sup> As amended by the Social Security Administration (Fraud) Act 1997

<sup>218</sup> LGA 1992 - s.1 provides that the Accounts Commission may give such directions, as it thinks fit, to relevant public bodies to publish information relating to their activities in a certain period for the purposes of comparing standards of performance between different bodies.

<sup>219</sup> Note: any person to whom sums are paid out of the Fund in a financial year must prepare accounts of their expenditure and receipts for that year (2000 Act s.19(1)).

- e. accounts prepared by holders of offices in the Scottish Administration which are not ministerial offices<sup>220</sup>; and
2. where the Auditor General initiates an examination into the economy, efficiency and effectiveness of a body or office-holder and Audit Scotland undertakes or assists with the examination, Audit Scotland may not charge in respect of its services where the examination is in respect of an office-holder in the Scottish Administration or a body or other office-holder to whom sums are paid out of the Fund.

The charges imposed by Audit Scotland may be determined by reference to particular cases or classes of case<sup>221</sup> and, in determining the amounts of those charges, Audit Scotland must seek to ensure that the total sum received is, taking one year with the other, broadly equivalent to its expenditure in connection with the matter<sup>222</sup>.

#### Payment of Charges<sup>223</sup>

Charges are payable by the body or office-holder whose account is being audited or, as the case may be, in respect of whom the examination is carried out, the study undertaken or promoted or the direction given.

Where a charge relates to an examination, study or direction in respect of more than one body or office-holder each party is to pay such proportion of charges as is determined by Audit Scotland.

#### Charges in Relation to Data Matching Exercises<sup>224</sup>

Charges in relation to data matching exercises may be imposed on either or both of (a) the persons who disclose the data for the data matching exercise or (b) the persons who receive the results of such an exercise.

#### Application of Sums Received<sup>225</sup>

Sums received by Audit Scotland in respect of charges rendered are to be retained by Audit Scotland and applied to meet expenditure in relation to the service for which the charge was rendered. Any other sums received by Audit Scotland should be paid into the Fund, subject to any statutory provisions which allow for such sums to be applied for any other purpose instead of being paid into the Fund.

Any other expenditure of Audit Scotland which is not covered by sums received from charges rendered is payable out of the Fund.

#### Preparation of Annual Financial Proposals<sup>226</sup>

In each financial year, Audit Scotland must prepare proposals for its use of resources and expenditures and send these proposals to the SCPA, which will examine the proposals and report on them to Parliament.

## **4. Access to Documents and Information**

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Section 24 of the 2000 Act provides for access by Audit Scotland, or another auditor, to information relating to public bodies or office-holders.

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<sup>220</sup> Note: holders of offices in the Scottish Administration which are not ministerial offices (within the meaning of section 126(8) of the SA 1998) must, if required to do so by the Scottish Ministers, prepare accounts of their expenditure and receipts for each financial year.

<sup>221</sup> 2000 Act - s.11(2)

<sup>222</sup> 2000 Act - s.11(3)

<sup>223</sup> 2000 Act - s.11(4) and (5)

<sup>224</sup> 2000 Act - s.11(5A)

<sup>225</sup> 2000 Act - s.11(6), (7) and (8)

<sup>226</sup> 2000 Act - s.11(9)

### Access to Documents and Information in relation to Audit of Accounts

For the purposes of the audit of an account of a public body or office-holder, Audit Scotland, or such other auditor as may be appointed, is entitled to the following<sup>227</sup>:

1. To have access at all reasonable times to any document<sup>228</sup> which the auditor may reasonably require which is in the possession or under the control of the body or office-holder who prepared the account.
2. To require from any person holding, or accountable for, any such document any assistance, information or explanation which the auditor reasonably thinks necessary.
3. To require the body or office-holder who prepared the account to provide, at times specified by the auditor, accounts of such of the transactions of the body or office-holder as the auditor may specify.

The auditor is also entitled to have access to any document in the possession, or under the control, of a “relevant person”<sup>229</sup> which the auditor reasonably thinks is necessary for the purposes of the audit. In addition, the auditor may require from such relevant person any assistance, information or explanation which the auditor reasonably thinks is necessary.

### Access to Documents and Information in relation to Examinations

For the purposes of an examination into the economy, efficiency and effectiveness of a public body or office-holder the examiner, whether it be Audit Scotland, or such other examiner as may be appointed, is entitled to the following:

1. To have access at all reasonable times to any document which the examiner may reasonably require which is in the possession or under the control of the body or office-holder in question.
2. To require from any person holding, or accountable for, any such document any assistance, information or explanation which the examiner reasonably thinks necessary.
3. To require the body or office-holder to provide, at times specified by the examiner, accounts of such of the transactions of the body or office-holder as the examiner may specify.

The examiner is also entitled to have access to any document in the possession, or under the control, of a relevant person which the examiner reasonably thinks is necessary for the purposes of the examination. In addition, the examiner may require from such relevant person any assistance, information or explanation which the examiner reasonably thinks is necessary.

## **5. Data Matching Exercises**

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Section 73 of and Schedule 7 to the Serious Crime Act 2007 (“SCA 2007”) provided the national audit agencies in England, Wales and Northern Ireland with the power to match data, and provides statutory provision for an existing data-matching scheme known as the National Fraud Initiative. The National Fraud Initiative is a UK-wide data matching scheme conducted by way of “data matching exercises” for the purpose of assisting in the prevention and detection of fraud.

The application of Section 73 and Schedule 7 to the SCA 2007 was repealed in England by the LAAA 2014<sup>230</sup>. Sch.9 of LAAA 2014 sets out the provisions relating to data matching in England, including the power to conduct data matching exercises, mandatory provision of data, voluntary provision of data, disclosure of results of data matching, publication, fees for data matching, code of data matching practice and powers to amend the Schedule.

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<sup>227</sup> 2000 Act - s.24(1)

<sup>228</sup> For the purposes of s.24 of the 2000 Act the term “document” means anything in which information is recorded in any form.

<sup>229</sup> A “relevant person” means a person or a class that has been specified by the Scottish Ministers in an order made by statutory instrument. In relation to audits and examinations this is currently set out in the Public Finance and Accountability (Scotland) Act 2000 (Access to Documents and Information) (Relevant Persons) Order 2003/530

<sup>230</sup> LAAA 2014 has limited application to Scotland, Wales and Northern Ireland s.48(4)

A data matching exercise involves the comparison of sets of data, for example, the taking of two local authority payroll databases and matching them. Matching exercises may identify fraudulent activity as having taken place and can also reduce the potential burden on local authorities and other data providers by reducing the need for further data collection.

Section 97 of the CJLSA 2010 amends the 2000 Act to provide equivalent provisions enabling the National Fraud Initiative to be carried out in Scotland on a statutory basis.

The main amendment consists of the insertion by section 97(3) of the CJLSA 2010 of new sections into the 2000 Act which provide as follows:

#### Power to carry out Data Matching Exercises

1. Audit Scotland has power to carry out data matching exercises or to arrange for another organisation to do this on its behalf<sup>231</sup>.
2. A data matching exercise can be undertaken for the following purposes<sup>232</sup>:
  - a. assisting in the prevention and detection of fraud;
  - b. assisting in the prevention and detection of crime other than fraud; or
  - c. assisting in the apprehension and prosecution of offenders.
3. Data matching may not be used to identify patterns and trends in an individual's characteristics or behaviour which suggest nothing more than his potential to commit fraud in future<sup>233</sup>. This is designed to prevent Audit Scotland from creating individual "profiles" of future fraudsters.

#### Voluntary Disclosure of Data to Audit Scotland

Any person may disclose data to Audit Scotland for the purposes of a data matching exercise provided the disclosure does not contravene Data Protection Legislation<sup>234</sup>. This could include private sector bodies such as mortgage providers who wish to be part of the exercise. There is no compulsion on any of these bodies to take part in a data matching exercise. Any organisation disclosing information to Audit Scotland must satisfy itself that it has a lawful basis for sharing personal data in this way.

The disclosure of such information will not be a breach of any of the following<sup>235</sup>:

1. any duty of confidentiality owed by a person making the disclosure; or
2. any other restriction on the disclosure of information, however imposed.

However, nothing relating to voluntary provision of data authorises any disclosure which<sup>236</sup>:

1. contravenes data protection legislation as defined in section 3 of the DPA 2018;
2. which is prohibited by any Parts 1 to 7 or Chapter 1 of Part 9 of the IPA 2016<sup>237</sup>; or
3. allows the disclosure of data comprising or including patient data (defined as data relating to an individual which is held for medical purposes, i.e. diagnosis, research etc.)

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<sup>231</sup> 2000 Act - s.26A(1)

<sup>232</sup> 2000 Act - s.26A(3)

<sup>233</sup> 2000 Act - s.26A(4)

<sup>234</sup> 2000 Act - s.26B(1)

<sup>235</sup> 2000 Act - s.26B(2)

<sup>236</sup> 2000 Act - s.26B(3)

<sup>237</sup> 2000 Act – s.23B(3)(b) substituted by IPA 2016 c.25 Sch.10(1) para.8(2) subject to savings specified in IPA 2016 s.270 and Sch.9 paras 7 and 10.

### Power to require disclosure of information

Audit Scotland has the power to *require* the disclosure of such information from certain bodies, as it may reasonably require, to conduct a data matching exercise<sup>238</sup> as follows:<sup>239</sup>:

1. any body or office-holder whose accounts are subject to audit by the Auditor General;
2. any body whose accounts are subject to audit by the Accounts Commission;
3. a Licensing Board continued in existence by or established under section 5 of the Licensing (Scotland) Act 2005; or
4. an officer or a member of any body, office-holder or board mentioned above.

Failure to comply with a requirement for the disclosure of information is a criminal offence. However, Audit Scotland may not require a disclosure of information where such a disclosure would contravene data protection legislation as defined by section 3 of the DPA 2018 or where the disclosure is prohibited by any of Parts 1 to 7 or Chapter 1 of Part 9 of the IPA 2016<sup>240</sup>..

Any disclosure made to Audit Scotland in accordance with section 26C(1) of the 2000 Act does not breach any duty of confidentiality owed by the person making the disclosure or any other restriction on the disclosure of data.

### Disclosure of results of Data Matching by Audit Scotland

Under certain circumstances, information relating to a data matching exercise, including the results of such an exercise may be disclosed by or on behalf of Audit Scotland<sup>241</sup>. However, the following stipulations apply:

1. The disclosure must be for, or in connection with, a purpose for which the data matching exercise was carried out.
2. The disclosure must be to a Scottish audit agency<sup>242</sup> or a related party, or to a UK audit agency<sup>243</sup> or related party.
3. The disclosure must be in pursuance of a duty imposed by a statutory enactment.

Special restrictions are imposed on the disclosure of information if it includes patient data (as defined above)<sup>244</sup>. In effect, information which includes patient data may only be disclosed where the purpose for which the disclosure is made relates to a relevant NHS body. Alternatively, where the disclosure is made to a Scottish or UK audit agency, the function of that agency under which the disclosure is made must relate to a relevant NHS body.

Data disclosed by Audit Scotland, as described under points 1, 2 and 3 above, may not be further disclosed unless the disclosure is<sup>245</sup>:

1. in connection with the purpose or function for which it was originally disclosed;
2. for the investigation or prosecution of an offence; or

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<sup>238</sup> 2000 Act - s.26C(1)

<sup>239</sup> 2000 Act - s.26C(2)

<sup>240</sup> 2000 Act – s.23C(3)(b) substituted by IPA 2016 c.25 Sch.10(1) para.8(3) subject to savings specified in IPA 2016 s.270 and Sch.9 paras 7 and 10.

<sup>241</sup> 2000 Act - s.26D(1)

<sup>242</sup> A “Scottish audit agency” means either the Auditor General or the Accounts Commission.

<sup>243</sup> A “UK audit agency” means the Comptroller and Auditor General, the Secretary of State, the Minister for the Cabinet Office, a local auditor within the meaning of the LAAA 2014, , the Auditor General for Wales, the Comptroller and Auditor General for Northern Ireland, or a person designated as a local government auditor under article 4 of the Local Government (Northern Ireland) Order 2005.

<sup>244</sup> 2000 Act - s.26D(6)

<sup>245</sup> 2000 Act - s.26D(8)

3. in pursuance of a duty imposed by a statutory enactment.

Audit Scotland will only disclose the results of data matching in accordance with Data Protection Legislation and is required by Data Protection Legislation to ensure that any disclosure is made in a format which ensures the appropriate security of personal data using appropriate technical or organisational measures.

Finally, it should be noted that disclosure of information other than as authorised under s.26D is an offence punishable by imprisonment, a fine or a combination of both.

#### Publication of reports on Data Matching

Audit Scotland is permitted to publish a report on its data matching exercises notwithstanding the limitation on disclosure as is provided above<sup>246</sup>. However, a report that is published may not include information relating to a particular person if:

1. the person is the subject of any data included in the data matching exercise;
2. the person can be identified from the information; or
3. the data is not otherwise in the public domain.

Audit Scotland may publish the report in such a manner as it considers appropriate for bringing it to the attention of those members of the public who may be interested<sup>247</sup>.

#### Code of Data Matching Practice<sup>248</sup>

Audit Scotland must prepare and keep under review a code of data matching practice and all those involved in the process of data matching must have regard to the code.

Audit Scotland is required to consult all those bodies or office holders who must provide data, the Information Commissioner's Office and such other bodies as Audit Scotland thinks appropriate before preparing or altering the code of data matching practice. Finally, Audit Scotland has a duty to publish the code from time to time.

#### Other Data Matching Provisions

The SCA 2007 also made amendments to the Audit Commission Act 1998 ("ACA 1998") by the insertion of a new Part IIA. The ACA 1998 was a consolidating act setting out the operational parameters of the Audit Commission (the body responsible for the audit of local authorities in England).

The ACA 1998 was repealed by the Local Audit and Accountability Act 2014 ("LAAA 2014") which came into force in April 2015. The LAAA 2014 moved responsibility for the National Fraud Initiative in England to the Cabinet Office. The relevant provisions in the LAAA 2014 for the purposes of disclosure of results of data matching exercises is Schedule 9 which replicates the provisions of Part IIA of the ACA. Disclosure of results to the Accounts Commission, the Auditor General and Audit Scotland continues to be permitted<sup>249</sup>. Disclosure of the results of a data matching exercise which include patient data may only be disclosed so far as the purpose or function for, or in connection with, which the disclosure is made, relates to a relevant NHS body<sup>250</sup>.

Similar provisions are also made by the Public Audit (Wales) Act 2004 and the Audit and Accountability (Northern Ireland) Order 2003 which provide for the Auditor General for Wales and the Comptroller and Auditor General for Northern Ireland respectively, to conduct data matching exercises. The Accounts Commission, the

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<sup>246</sup> 2000 Act - s.26E(1)

<sup>247</sup> 2000 Act - s.26E(3)

<sup>248</sup> 2000 Act - s.26F

<sup>249</sup> LAAA 2014. Sch.9 para 4(4)

<sup>250</sup> LAAA 2014 Sch.9 para 4(6). The Health and Care Bill 2021-22 proposes to amend the definition of 'relevant NHS body' by substituting 'NHS Commissioning Board' with 'NHS England' to account for the proposed name change. No date is yet confirmed for the commencement of this provision.

Auditor General and Audit Scotland are all bodies to whom such results may be disclosed <sup>251</sup>.

## **6. Auditing Audit Scotland**

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The Auditor General can require the SCPA to appoint a qualified person to audit any account of Audit Scotland which has been sent to the SCPA under section 19(8) of the 2000 Act<sup>252</sup>.

The auditor must examine and certify the account and report on it to the SCPA in a similar fashion to the manner in which an auditor would report on an account to the Auditor General<sup>253</sup>. The SCPA may also initiate an economy, efficiency and effectiveness examination into Audit Scotland, on broadly the same terms as the Auditor General may initiate such an examination into another body or office-holder<sup>254</sup>.

Finally, the SCPA must lay a copy of the account of Audit Scotland, the auditor's report and the results of any examination before Parliament and must publish the account and any reports<sup>255</sup>.

## **7. Other Statutory Provisions which apply to Audit Scotland**

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### British Sign Language (Scotland) Act 2015

This act applies to Audit Scotland, as a Listed Authority in the Schedule to the Act. Each Listed Authority is required to prepare and publish a plan in relation to British Sign Language (an "Authority Plan") which must<sup>256</sup>:

1. set out measures to be taken by the listed authority in relation to the use of British Sign Language in connection with the exercise of the authority's functions;
2. set out timescales by reference to which any such measures are to be taken;
3. where the listed authority has previously published at least one Authority Plan, to state how, when and to what extent measures to be taken by the authority by virtue of the most recently published such plan were taken, and
4. contain such other information (if any) as the Scottish Ministers may by order require.

In preparing an Authority Plan, Audit Scotland must try to achieve consistency between that plan and the most recently published National Plan<sup>257</sup> and have regard to:

1. the extent to which the authority's functions are exercisable using British Sign Language;
2. the potential for developing the use of British Sign Language in connection with the exercise of those functions;
3. any representations made to the authority in relation to using British Sign Language in that connection;
4. the most recently published report under section 4 of the BSLSA 2015<sup>258</sup>; and
5. such guidance, relevant to the preparation (or revision) of Authority Plans, as may be issued by the Scottish Ministers.

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<sup>251</sup> Audit and Accountability (Northern Ireland) Order 2003/418 art. 4D and Public Audit (Wales) Act 2004 s.64D

<sup>252</sup> 2000 Act - s.25(1)

<sup>253</sup> 2000 Act - s.25(3)

<sup>254</sup> 2000 Act - s.25(4)

<sup>255</sup> 2000 Act - s.25(6)

<sup>256</sup> BSLSA 2015 - s.2

<sup>257</sup> Prepared by the Scottish Ministers in accordance with Section 1 of the BSLSA 2015

<sup>258</sup> Progress Reports prepared by the Scottish Ministers

## Procurement Reform (Scotland) Act 2014

As a “contracting authority” in terms of Section 1 of this Act, Audit Scotland is required to comply with the terms of the Act. In particular, Audit Scotland must, when carrying out a “regulated procurement”<sup>259</sup>:

1. treat relevant economic operators (an economic operator who is a national of, or is established in the United Kingdom or Gibraltar)<sup>260</sup> equally and without discrimination;
2. act in a transparent and proportionate manner; and
3. comply with the sustainable procurement duty<sup>261</sup>.

Duties 1 and 2 do not however apply to a ‘higher value regulated procurement’<sup>262</sup> (defined as a regulated procurement to which the PCSR 2015 apply)<sup>263</sup>.

In addition, Audit Scotland is required to prepare a procurement strategy setting out how it intends to carry out regulated procurements, if the sum of the estimated values of the contracts to which its regulated procurements in that year relate will be equal to or greater than £5,000,000<sup>264</sup>.

## Public Records (Scotland) Act 2011

This act applies to the Auditor General, the Accounts Commission and Audit Scotland. As listed bodies under the act, each body must<sup>265</sup>:

1. prepare a records management plan setting out proper arrangements for the management of its public records;
2. submit the plan to the Keeper of the Records of Scotland<sup>266</sup>; and
3. ensure that its public records are managed in accordance with the plan as agreed with the Keeper.

## Equality Act 2010

The Accounts Commission and Audit Scotland are both defined as a “Relevant Scottish Authority” for the purposes of the EA 2010<sup>267</sup>. As such, they are bound by the requirements of section 149 of the EA 2010. In particular they must have due regard to various factors including the need to<sup>268</sup>:

1. eliminate discrimination, harassment, victimisation and any other conduct prohibited under the EA 2010;
2. advance equality of opportunity between persons who share certain protected characteristics and those who do not; and

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<sup>259</sup> Any procedure carried out by a contracting authority in relation to the award of a proposed regulated contract. A regulated contract is any public contract with a value over £50,000 or any public works contract with a value over £2,000,000 (save where such contract is excluded pursuant to Section 4 of the PRSA 2014). It is important to note that PRSA 2014 s.4 has been amended to include ‘a contract of a kind to which the PCSR 2015 do not apply by virtue of reg. 4 or 7 to 18 of those regulations’ as an ‘excluded contract’.

<sup>260</sup> PRSA 2014 s.8(4) as amended by Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020/468 (Scottish SI) Pt 2 Reg.3(2)

<sup>261</sup> As defined in Section 9 of the PRSA 2014

<sup>262</sup> PRSA 2014 s.8(5) as amended by Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020/468 (Scottish SI) Pt 2 Reg. 3(3).

<sup>263</sup> PRSA 2014 s.41(1) as amended by the Public Procurement etc. (EU Exit) (Scotland) (Amendment) Regulations 2020/468 (Scottish SI) Pt 2 reg. 3(6)

<sup>264</sup> PRSA 2014 - s.15

<sup>265</sup> Public Records (Scotland) Act 2011 - s.1

<sup>266</sup> One of the statutory titles of the Chief Executive of the National Records of Scotland.

<sup>267</sup> EA 2010 - Sch.19(3) para. 1

<sup>268</sup> EA 2010 - s.149(1)



3. foster good relations between persons who share certain protected characteristic and persons who do not.

For the purposes of the EA 2010, the protected characteristics are<sup>269</sup>:

1. age;
2. disability;
3. gender reassignment;
4. pregnancy and maternity;
5. race;
6. religion or belief;
7. sex; and
8. sexual orientation.

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (as amended by the Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2016/159 (Scottish SI)

These regulations provide further obligations on the Accounts Commission and Audit Scotland as listed authorities under the EA 2010. In particular, the following duties are imposed on the Accounts Commission, Audit Scotland and other listed authorities:

1. To publish a report on the progress it has made to make the equality duty integral to the exercise of its functions so as to better perform that duty. The first report was due by 30<sup>th</sup> April 2013 and at two-yearly intervals thereafter<sup>270</sup>. Such reports must include details of the number of men and women who have been members of the authority during the period covered by the report. Such reports must also include details of the way in which information, provided by the Scottish Ministers on the relevant protected characteristics of the authority's members, has been used and the way in which the authority proposes to use such information in taking steps towards diversity among its members as relevant to the protected characteristics<sup>271</sup>.
2. To publish a set of equality outcomes which it considers will enable it to better perform the equality duty. The first set of equality outcomes was due by 30<sup>th</sup> April 2013 and at four-yearly intervals thereafter<sup>272</sup>. A report on the progress made to achieve the equality outcomes is also required. The first report was required on 30<sup>th</sup> April 2015 and at two yearly intervals thereafter.<sup>273</sup>
3. Where it proposes any new or revised policies or practices, to assess these against the needs mentioned in section 149(1) of the EA 2010 (detailed above)<sup>274</sup>.
4. To take steps to gather information on the number and relevant protected characteristics of its employees and the recruitment, development and retention of such persons as employees of the authority. The authority must use this information to better perform the equality duty and the information must be published in the report to be produced in accordance with regulation 3 (see above)<sup>275</sup>.
5. Where the authority has more than 20 employees to publish information on the percentage difference among its employees between men's average hourly pay (excluding overtime) and women's average hourly pay (excluding overtime). This information was due initially by 30<sup>th</sup> April 2013 and at two-yearly intervals thereafter<sup>276</sup>.
6. Where the authority has more than 20 employees, to publish a statement specifying its policy on equal pay among its employees and occupational segregation in particular grades of employment and

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<sup>269</sup> EA 2010 - s.149(7)

<sup>270</sup> EASDSR 2012 - reg. 3

<sup>271</sup> EASDSR 2012 – reg. 6A as inserted by EASDSAR 2016 – reg.4

<sup>272</sup> EASDSR 2012 - reg. 4

<sup>273</sup> EASDSR 2012 - reg. 4(4)

<sup>274</sup> EASDSR 2012 - reg. 5

<sup>275</sup> EASDSR 2012 - reg. 6

<sup>276</sup> EASDSR 2012 - reg. 7 as amended by EASDSAR 2016 – reg. 5

particular occupations within the organisation. An initial statement was due by 30<sup>th</sup> April 2013 and at four-yearly intervals thereafter<sup>277</sup>.

7. To publish the reports and statements specified above in a manner which is accessible to the public<sup>278</sup>.

The Scottish Ministers must from time to time, take steps to gather information on the relevant protected characteristics of members of a listed authority and provide such information to the relevant listed authority<sup>279</sup>. As listed authorities, Audit Scotland and the Accounts Commission must use such information provided to them by the Scottish Ministers to better perform the equality duty<sup>280</sup>.

#### Public Services Reform (Scotland) Act 2010

The Accounts Commission and Audit Scotland are both “listed public authorities” for the purposes of Part 3, sections 31 to 34, of the PSRSA 2010.

Section 31 requires that a listed public authority must publish a statement of expenditure as soon as reasonably practicable after the end of each financial year. The statement must cover any expenditure relating to public relations, overseas travel, hospitality and entertainment and external consultancy<sup>281</sup>.

Each listed public authority must also publish a statement specifying the amount, date, payee and subject matter of any payment in excess of £25,000 for the financial year in question<sup>282</sup>.

Finally each listed public authority must publish a statement specifying the number of individuals (if any) who, during the financial year in question, received remuneration in excess of £150,000 in relation to their service as a member of the public body or as a member of its staff<sup>283</sup>.

Section 32 provides that each listed public body must publish a statement of the steps that it has taken during the financial year in question to promote and increase sustainable growth through the exercise of its functions and to improve efficiency, effectiveness and economy in the exercise of its functions<sup>284</sup>.

The Scottish Ministers may from time to time issue guidance on the duties to publish statements imposed by sections 31 and 32 of the PSRSA 2010. Each listed public authority is required to have regard for this guidance when publishing the required statements.

#### Scottish Parliament (Disqualification) Order 2020

The following are disqualified from being a member of the Scottish parliament:

- any member of the Accounts Commission;
- member of Audit Scotland appointed under section 10(2)(c) of the 2000 Act or a member of the staff of Audit Scotland; and
- the Auditor General<sup>285</sup>.

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<sup>277</sup> EASDSR 2012 - reg. 8 as amended by EASDSAR 2016 – reg. 6

<sup>278</sup> EASDSR 2012 - reg. 10

<sup>279</sup> EASDSR 2012 – reg. 6A(1)

<sup>280</sup> EASDSR 2012 – reg. 6A(2)

<sup>281</sup> PSRSA 2010 - s.31(2)

<sup>282</sup> PSRSA 2010 - s.31(3)

<sup>283</sup> PSRSA 2010 - s.31(4)

<sup>284</sup> PSRSA 2010 - s.32(1)

<sup>285</sup> Scottish Parliament (Disqualification) Order 2020/321, Sch. Pt.1

## Climate Change (Scotland) Act 2009

Section 44 of the CCSA 2009 provides that all public bodies must, in the exercise of their functions, act as follows<sup>286</sup>:

1. in the way best calculated to contribute to the delivery of the targets set in or under Part 1 of the CCSA 2009<sup>287</sup>;
2. in the way best calculated to help deliver any programme laid before the Scottish Parliament under section 53 of the CCSA 2009; and
3. in a way that it considers is most sustainable.

Section 53 of the CCSA 2009 provides that where the Secretary of State<sup>288</sup> lays a report before the UK Parliament reporting on the impact of climate change, the Scottish Ministers must subsequently lay a programme before the Scottish Parliament. The programme must set out various proposals and objectives for adapting to climate change (including an objective in relation to Scotland's contribution to international climate change adaptation in line with international best practice<sup>289</sup>) and address the risks identified in the report.

The Scottish Ministers must also give guidance to relevant public bodies in relation to their climate change duties and those bodies must have regard to such guidance<sup>290</sup>.

For the purposes of the CCSA 2009, the term public body means any Scottish Public Authority as defined in Section 3(1)(a) of FOISA 2002. Thus, the Auditor General, the Accounts Commission and Audit Scotland must all act in accordance with the act.

Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015/17

These regulations provide that the Accounts Commission, the Auditor General and Audit Scotland are all relevant public authorities for the purposes of section 54 and section 1193 of the Companies Act 2006<sup>291</sup>. Accordingly, the approval of the Scottish Ministers is required for the registration of a company or LLP with a name which gives the impression that the company or LLP is associated with the Accounts Commission, the Auditor General or Audit Scotland<sup>292</sup>. Prior to granting approval the Scottish Ministers must also seek the opinion of the Accounts Commission, the Auditor General or Audit Scotland (respectively) as to whether or not such approval should be granted<sup>293</sup>.

In addition a person must not carry on any business in the United Kingdom under a name which gives the impression that the business is associated with the Accounts Commission, the Auditor General or Audit Scotland, without the approval of the Scottish Ministers<sup>294</sup>.

## Social Work Inspections (Scotland) Regulations 2006

Audit Scotland is listed as one of the bodies to whom an inspector may disclose information under the Social Work Inspections (Scotland) Regulations 2006<sup>295</sup>.

Where an inspector has obtained information for the purposes of an inspection or investigation and considers that holding that information would assist one of the listed bodies to carry out their functions, the inspector may disclose that information to the person or body in question.

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<sup>286</sup> CCSA 2009 - s.44

<sup>287</sup> Part 1 of the CCSA 2009 deals with the setting of Emission Reduction Targets.

<sup>288</sup> In this context Secretary of State means the UK Secretary of State for Energy and Climate Change.

<sup>289</sup> CCSA 2009 s.53(2A) as inserted by Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 asp 15 (Scottish Act) Pt 4 s.25

<sup>290</sup> CCSA 2009 - s.45

<sup>291</sup> CLBNTDR 2015 reg 9 & reg 18

<sup>292</sup> CA 2006 - s.54

<sup>293</sup> CLBNTDR 2015 reg 9(2) & reg 18(2)<sup>294</sup> CA 2006 - s.1193<sup>295</sup> Social Work Inspections (Scotland) Regulations 2006/531 (Scottish SI) reg. 4

<sup>294</sup> CA 2006 - s.1193<sup>295</sup> Social Work Inspections (Scotland) Regulations 2006/531 (Scottish SI) reg. 4

<sup>295</sup> Social Work Inspections (Scotland) Regulations 2006/531 (Scottish SI) reg. 4

### Gaelic Language (Scotland) Act 2005

The GLSA 2005 established a body, known as Bòrd na Gàidhlig (the Bòrd), to promote the use and understanding of the Gaelic language in Scotland<sup>296</sup>.

In addition to developing a nationwide Gaelic language plan, the Bòrd also has the power to require Scottish public authorities to prepare and implement Gaelic language plans<sup>297</sup>. These plans set out how the public authority will use the language in connection with the exercise of its functions.

“Scottish public authority” is defined as any public body or office-holder with functions which can be exercised only in, or as regards, Scotland and would therefore include each of the Auditor General, the Accounts Commission and Audit Scotland. To date, no such request has been made by the Bòrd to any of the three bodies, however such a request could be made in the future.

In the event that the Bòrd was to request that the Auditor General, the Accounts Commission or Audit Scotland prepare a Gaelic language plan, it would need to do so by written notice giving the body in question no less than 6 months within which to prepare the plan<sup>298</sup>.

In deciding whether or not to require a public authority to prepare a Gaelic language plan, the Bòrd must have regard to:

1. the most recent national Gaelic language plan (if any);
2. the extent to which the Gaelic language is used by persons in relation to whom the functions of the authority are exercisable, and whether, in the Bòrd's opinion, there is potential for the authority to develop the use of the Gaelic language in connection with the exercise of those functions;
3. any representations made to it in relation to the use of the Gaelic language in connection with the exercise of those functions; and
4. any guidance given by the Scottish Ministers.

### Management of Offenders etc. (Scotland) Act 2005

The Management of Offenders etc. (Scotland) Act 2005 (“MOSA 2005”) established eight Community Justice Authorities across Scotland. The task of these authorities was to transform the way councils, the Scottish Prison Service and other local organisations work together to tackle re-offending. The provisions of MOSA 2005 which provided for the establishment of the community justice authorities and their functions (sections 3 to 9) were repealed by section 36(3) of the Community Justice (Scotland) Act 2016 (“CJSA 2016”). Further, CJSA 2016 revoked various ‘Orders to do with community justice authorities’<sup>299</sup>. Following reports published by the Commission on Women Offenders and Audit Scotland, the CJSA established ‘Community Justice Scotland’ (“CJS”) as a new model for community justice services with a focus on local delivery, partnerships and collaboration<sup>300</sup>.

CJS must, as soon as reasonably practicable, after the end of each financial year, prepare a report on the exercise of its functions during that financial year and send a copy of the report to the Scottish Ministers<sup>301</sup>. The Scottish Ministers must lay a copy of each report before the Scottish Parliament<sup>302</sup>. CJS must also, as soon as reasonably practicable after 31 March each year, publish a report setting out its assessment of performance in Scotland as a whole in relation to the achievement of the nationally determined outcomes<sup>303</sup>. As soon as

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<sup>296</sup> GLSA 2005 - s.1

<sup>297</sup> GLSA 2005 - s.3

<sup>298</sup> GLSA 2005 – s.3(2)(a)

<sup>299</sup> CJSA 2016 Sch. 2 part 2, para 6

<sup>300</sup> CJSA 2016 s.3(1)

<sup>301</sup> CJSA 2016 s.11(1)

<sup>302</sup> CJSA 2016 s.11(4)

<sup>303</sup> CJSA 2016 - s.27(1)

reasonably practicable after such a report has been published, CJS must lay a copy of the report before the Scottish Parliament<sup>304</sup>.

When preparing either of the reports specified above, CJS must consult each of the community justice partners<sup>305</sup>, such third sector bodies involved in community justice<sup>306</sup> as it considers appropriate and such other persons as it considers appropriate<sup>307</sup>.

CJS must prepare a statement of accounts in respect of each financial year and send these to the Scottish Ministers<sup>308</sup>. The Scottish Ministers must then send a copy of each statement of accounts to the Auditor General for auditing<sup>309</sup>.

### Freedom of Information (Scotland) Act 2002

Schedule 1 of FOISA 2002 lists the Accounts Commission, the Auditor General and Audit Scotland as Scottish Public Authorities to which the act applies<sup>310</sup>.

FOISA 2002 provides that where a person requests information from a Scottish public authority (for instance Audit Scotland) that person is entitled to be given the information by the authority<sup>311</sup>.

The Accounts Commission, the Auditor General and Audit Scotland are therefore required to provide information requested by a person unless it falls into one of the exempt categories listed in part 2 of FOISA 2002. Information must usually be provided by not later than the twentieth working day after the request is received.

In addition, all Scottish Public Authorities defined in FOISA 2002 are subject to the Environmental Information (Scotland) Regulations 2004 which came into force on 1 January 2005. These regulations implemented Directive 2003/4/EC of the European Parliament on public access to environmental information.

Under the regulations each Scottish Public Authority must take reasonable steps to organise and keep up to date the environmental information, relevant to its functions, which it holds. The authority must maintain this information with a view to the active and systematic dissemination of the information to the public and shall make that information progressively available to the public by electronic means<sup>312</sup>.

Furthermore a Scottish Public Authority that holds environmental information shall make it available when requested to do so by any applicant<sup>313</sup>. Such requests and the subsequent responses by a Public Authority are made on broadly the same terms as requests under FOISA 2002. For the purposes of the regulations, "Environmental Information" is broadly defined and can include, for example, policies, plans and programmes relating to the environment; reports on the state of the environment; and data or summaries of data derived from the monitoring of activities that affect or are likely to affect the environment.

### Scottish Public Services Ombudsman Act 2002

The Accounts Commission, the Auditor General and Audit Scotland are each a "listed authority" for the purposes of the Scottish Public Services Ombudsman Act 2002. As such, they are liable to investigation by the Scottish Public Services Ombudsman ("SPSO")<sup>314</sup>.

The Ombudsman is entitled to investigate any failure in a service provided by an authority or any failure of an authority to provide a service which it was a function of the authority to provide. Such investigations may take

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<sup>304</sup> CJSA 2016 - s.27(4)

<sup>305</sup> Definition of 'community justice partner' set out at CJSA 2016 - s.13

<sup>306</sup> Definition of 'third sector bodies involved in community justice' set out at CJSA 2016 - s.14

<sup>307</sup> CJSA 2016 - s.27(3) & 11(3)

<sup>308</sup> CJSA 2016 - s.12(3)

<sup>309</sup> CJSA 2016 - s.12(4)

<sup>310</sup> FOISA 2002 - Sch.1(7) para. 57

<sup>311</sup> FOISA 2002 - s.1(1)

<sup>312</sup> EISR 2004 - reg. 4

<sup>313</sup> EISR 2004 - reg. 5

<sup>314</sup> SPSOA 2002 - Sch.2(2) para. 18, 19 and 20

place either where a complaint has been made to the Ombudsman or the authority in question has requested the investigation.

Where an investigation uncovers maladministration or service failure, the SPSO will produce a report making recommendations for how the authority in question can address the identified issues. The report must be sent to the authority in question, the Scottish Ministers and, where the investigation was made as a result of a complaint, to the individual or party who made the complaint and the person who is alleged to have taken the actions complained of<sup>315</sup>.

In the event that an authority does not implement the recommendations made in the SPSO's report following a complaint, the SPSO may prepare a further "Special Report" to be laid before Parliament. Following this, Parliament may take such further action as it deems appropriate.

In addition to the investigatory procedures outlined above, section 119 of the PSRSA 2010 amended the SPSOA 2002 with the addition of new sections 16A to 16F which deal with complaints handling procedures ("CHPs").

In particular, section 16A requires each listed authority to have in place a "complaints handling procedure" in respect of actions taken by the authority<sup>316</sup>. The SPSO itself is required to publish a "statement of principles"<sup>317</sup> concerning how CHPs should operate and it is the responsibility of each listed authority to ensure its particular procedure complies with the statement of principles.

The SPSO may also produce model CHPs and specify that such model CHPs apply to particular listed authorities<sup>318</sup>. Where the SPSO provides that a model CHP applies to a particular authority it must notify the authority that the model CHP applies, following which the authority in question must ensure its CHP matches the requirement of the model CHP.

#### Ethical Standards in Public Life etc. (Scotland) Act 2000

The Ethical Standards in Public Life etc. (Scotland) Act 2000 makes various amendments to the LGSA 1973. In particular, a new section 103H is inserted into the LGSA 1973 providing protection for certain organisations from actions for defamation<sup>319</sup>.

This section provides *inter alia* that any statement made by (i) the Account Commission, (ii) any of its agents or staff of Audit Scotland under section 10(3) of the 2000 Act (requirement to provide assistance and support to the Auditor General and the Accounts Commission); or (iii) the Controller of Audit, shall be absolutely privileged. This principle provides an absolute defence in the event that an action for defamation is brought in relation to any such statement.

#### Public Interest Disclosure Act 1998

The Public Interest Disclosure Act 1998 ("PIDA 1998") amended the Employment Rights Act 1996 ("ERA 1996") by the addition of Part IVA dealing with "Protected Disclosures". A protected disclosure is defined as any disclosure of information made by a worker to one of a range of bodies and organisations ("prescribed persons")<sup>320</sup>. The information must, in the reasonable belief of the worker, be made in the public interest and show one of the following:

1. that a criminal offence has been committed, is being committed or is likely to be committed;
2. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
3. that a miscarriage of justice has occurred, is occurring or is likely to occur;
4. that the health or safety of any individual has been, is being or is likely to be endangered;

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<sup>315</sup> SPSOA 2002 - s.15

<sup>316</sup> SPSOA 2002 - s.16A(2)

<sup>317</sup> SPSOA 2002 - s.16A(1)

<sup>318</sup> SPSOA 2002 - s.16B(1)

<sup>319</sup> ESPLSA 2000 - s.33

<sup>320</sup> PIDA 1998 - s.1

5. that the environment has been, is being or is likely to be damaged; or
6. that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

The Public Interest Disclosure (Prescribed Persons) Order 2014(as amended by The Public Disclosure (Prescribed Persons) (Amendment) Order 2018<sup>321</sup>) provides that, for the purposes of the PIDA 1998 and the ERA 1996, the Accounts Commission, the Auditor General and Audit Scotland are prescribed persons. A worker may therefore make a protected disclosure to the Accounts Commission, the Auditor General or Audit Scotland in relation to the proper conduct of public business, value for money, fraud and corruption in public bodies<sup>322</sup>.

Section 148 of the Small Business, Enterprise and Employment Act 2015 (“SBEEA 2015”) amends the ERA 1996 by the insertion of a new Section 43FA. That section provides that the Secretary of State may make regulations requiring a person prescribed for the purposes of section 43F (i.e. Audit Scotland, the Accounts Commission or the Auditor General) to produce an annual report on disclosures of information made to the person by workers.

The regulations must set out the matters that are to be covered in a report, but must not require a report to provide detail that would enable the identification of a worker who has made a disclosure or the identification of an employer or other person in respect of whom a disclosure has been made.

In accordance with the aforementioned power, the Secretary of State has published The Prescribed Persons (Reports on Disclosures of Information) Regulations 2017. These regulations come into force on 1 April 2017. From the commencement of the Regulations, Audit Scotland, the Auditor General and the Accounts Commission, as “prescribed persons” will be required to publish annual reports, detailing the protected disclosures which it has received in each 12 month period running from 1 April each year<sup>323</sup>.

The report must contain, without including any information in the report that would identify a worker who has made a disclosure of information, or an employer or other person in respect of whom a disclosure of information has been made:

1. the number of workers’ disclosures received during the reporting period that the relevant prescribed person reasonably believes are qualifying disclosures within the meaning of section 43B of the ERA 1996; and which fall within the matters in respect of which that person is so prescribed;
2. the number of those disclosures in relation to which the relevant prescribed person decided during the reporting period to take further action;
3. a summary of the action that the relevant prescribed person has taken during the reporting period in respect of the workers’ disclosures; and how workers’ disclosures have impacted on the relevant prescribed person’s ability to perform its functions and meet its objectives during the reporting period; and
4. an explanation of the functions and objectives of the relevant prescribed person.

#### Human Rights Act 1998

Each of the Auditor General, the Accounts Commission and Audit Scotland are subject to the terms of the Human Rights Act 1998. As such it is unlawful for any of the three bodies to act in a way which is incompatible with the European Convention on Human Rights unless they are obliged to do so by UK statute.

#### House of Commons Disqualification Act 1975

The HCDA 1975 provides that members and/or staff of certain public bodies are prohibited from becoming

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<sup>321</sup> The Public Disclosure (Prescribed Persons) (Amendment) Order 2018 – s.2(a)

<sup>322</sup> Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003/1993 Sch. 1 para. 1

<sup>323</sup> PPRDIR 2017 – s.3(1)

members of the House of Commons. All members of the Accounts Commission, members of Audit Scotland and members of staff of Audit Scotland are among those so prohibited<sup>324</sup>.

### Superannuation Act 1972

The Public Finance and Accountability (Scotland) Act 2000 (Transfer of NAO Staff etc.) Order 2000 amended the Superannuation Act 1972 (“SA 1972”) to provide that employment with Audit Scotland shall be included in the kinds of employment to which a scheme established under section 1 of the SA 1972 can apply<sup>325</sup>.

Section 1 of the SA 1972 provides that the Minister for the Civil Service may make, maintain and administer schemes (whether contributory or not) whereby provision is made with respect to the pensions, allowances or gratuities which are to be paid, or may be paid to employees of the organisations specified in the schedules to the SA 1972<sup>326</sup>.

In practice, the provisions of section 1 of the SA 1972 only apply to former members of the National Audit Office (“NAO”) whose employment transferred to Audit Scotland under the above noted order. It is not possible for new members of staff of Audit Scotland to be added to such a scheme.

### Wildlife and Natural Environment (Scotland) Act 2011

The Wildlife and Natural Environment (Scotland) Act 2011 requires that Audit Scotland as a public body must prepare a biodiversity report within three years of such Act coming into force and thereafter at not more than three yearly intervals. Such report must cover the actions taken by Audit Scotland in pursuance of its duties under s.1 of the Nature Conservation (Scotland) Act 2004<sup>327</sup>.

### Islands (Scotland) Act 2018

Under s.8 of the Islands (Scotland) Act 2018 Audit Scotland is required to produce an impact assessment in relation to a policy, strategy or services (including the development, delivery and redevelopment of any of the same) which in its view is likely to have an effect on an island community which is different from its effect on other communities (including other island communities) in the area in which the authority exercises its functions. Any such impact assessment is required to describe the likely significant different effect of the policy, strategy or service (as the case may be) and the extent to which Audit Scotland considers that the policy, strategy or service (as the case may be) can be developed or delivered in such a manner as to improve or mitigate for island communities the outcomes resulting from it. In any instance where such impact assessment is not prepared Audit Scotland is required within a reasonable period to provide an explanation of its reasons for not doing so.<sup>328</sup>

Under s.17 of the Islands (Scotland) Act 2018<sup>329</sup> Audit Scotland is required that in any instance where it produces a map of Scotland that either i) the geographical location of the Shetland Isles is displayed accurately and proportionately in relation to the rest of Scotland or ii) provides information for its reasons not to comply in any instance where it decided not to do so.

### General Data Protection Regulation 2016/679 and the Data Protection Act 2018

The GDPR and the Data Protection Act 2018 (as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419) apply to the Auditor General, the Accounts Commission and Audit Scotland. The Auditor General, the Accounts Commission and Audit Scotland must comply with the provisions of Data Protection Legislation when processing personal data.

The legislation provides that personal data shall only be processed in accordance with the principles set out in Data Protection Legislation and that individuals to whom that personal data relates shall be entitled to exercise

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<sup>324</sup> HCDA 1975 Sch.1(3) para. 1 (as amended by the House of Commons Disqualification Order 2010/762 Sch.1(2) para.6 and Sch.1(3) para. 10)

<sup>325</sup> The Public Finance and Accountability (Scotland) Act 2000 (Transfer of NAO Staff etc.)Order 2000/935 art. 4

<sup>326</sup> SA 1972 - s.1(1)

<sup>327</sup> Nature Conservation (Scotland) Act 2004 – s.1

<sup>328</sup> Islands (Scotland) Act 2018 – s.8

<sup>329</sup> Islands (Scotland) Act 2018 – s.17



certain rights in respect of their data including the right to be advised of the processing taking place and to obtain a copy of their data. The rights of data subjects may be restricted in the circumstances prescribed by Data Protection Legislation, for example, the right to erasure of personal data is not absolute and personal data may continue to be processed where there is a lawful basis for doing so.

Data Protection Legislation permits the processing of personal data by the Auditor General, the Accounts Commission and Audit Scotland where there is a lawful basis for doing so. Due to the nature of work undertaken, the lawful basis for the processing carried out, including sharing of information with other organisations, will often derive from statutory powers conferred specifically on the Auditor General, the Accounts Commission or Audit Scotland.

Data Protection Legislation is relevant for the purposes of determining the personal data which can be accessed by, provided to and used by the Auditor General, the Accounts Commission and Audit Scotland. Audit Scotland carries out data matching exercises in accordance with its statutory powers and processes personal data for these purposes. All personal data processed for the purposes of data matching must also be processed in accordance with Data Protection Legislation.

In accordance with Data Protection Legislation, the Auditor General, the Accounts Commission and Audit Scotland have produced and published a privacy notice which provides information as to the processing of personal data carried out.