SCOTTISH COMMISSIONER FOR HUMAN RIGHTS BILL
MEMORANDUM ON DELEGATED POWERS

Purpose

1. As required under Rule 9.4A, this Memorandum has been prepared by the Scottish Executive to accompany the Scottish Commissioner for Human Rights Bill, introduced in the Scottish Parliament on 7 October 2005. It details the provisions in the Bill that confer powers to make subordinate legislation. It describes the persons upon whom the powers are conferred, the form in which the powers are to be exercised, the parliamentary procedure to which the powers are to be subject and why it is considered necessary to delegate the powers. It does not form any part of the Bill and has not been endorsed by the Parliament.

2. A Policy Memorandum, Explanatory Note and Financial Memorandum are printed separately as SP Bill 48–PM and SP Bill 48–EN.

Background to the Bill

3. The Bill seeks to support the aims set out in the Policy Memorandum by creating the office of the Scottish Commissioner for Human Rights. The Bill aims to continue the process of establishing a culture of respect for human rights in Scotland that started with the creation of the Scottish Parliament itself. The responsibilities of the Commissioner will include promotion, education and awareness raising on human rights issues, monitoring and reporting in relation to human rights law and practice and investigating general human rights issues in relation to public policy. The Bill confers upon the Commissioner powers to assist him or her in investigating and monitoring, in taking evidence, requiring information, making interventions in civil court cases and entering places of detention in support of inquiries.

Delegated powers

Section 6(6)(d) Restrictions as to scope of inquiry

- Power conferred on: Her Majesty
- Power exercisable by: Order in Council
- Parliamentary Procedure: Draft of the Order must be laid before and approved by resolution of the Parliament

4. Section 6(6)(d) confers upon Her Majesty the power to specify international conventions, treaties or other international instruments in addition to those already specified in those subsections for the purposes of subsections (2)(b) and (5)(a) of section 6. The effect of any such addition would be to empower the Commissioner to conduct an inquiry into whether the human rights specified in such added conventions, treaties or instruments are being respected by a particular Scottish public authority or at a particular institution.

Justification for taking this power

5. In general, the Commissioner’s power under section 6 of the Bill to conduct inquiries will not allow him to inquire into the policies and practices of a particular Scottish public authority or institution. This is because such inquiries are intended to be generic and/or sectoral in nature. However, it is wished to enable the Commissioner to participate in
monitoring of UK compliance with international human rights instruments as part of arrangements agreed between the UK and the relevant international institutions. This is because such an institution might wish the Commissioner to carry out compliance monitoring on its behalf instead of, or in addition to, monitoring by the institution itself.

6. At present such monitoring is conducted under the United Nations Convention Against Torture and the European Convention for the Prevention of Torture. Both of those are already specified in section 6(6) of the Bill, and so the Commissioner would be able to conduct inquiries as part of monitoring compliance with those conventions. However, it is possible that the UK might in future ratify other international instruments that have similar monitoring mechanisms, and that it might be wished for the Commissioner to have a role in monitoring compliance with those instruments. The power in section 6(6)(d) would allow the Commissioner to conduct inquiries as part of monitoring compliance with such other instruments.

7. It would have been possible to give the power to specify additional international instruments to the Scottish Ministers. However, the Commissioner is to be independent, and be seen to be independent, from the Scottish Executive and Ministers. Section 6(6)(d) therefore confers the exercise of this power on Her Majesty, with parliamentary scrutiny being delivered through the requirement for any draft Order to be approved by the Parliament. This is felt to be in keeping with international best practice on the accountability of national human rights institutions. Since exercise of the power will effectively extend the Commissioner’s powers, affirmative procedure is considered appropriate.

Section 11(7) – Power to intervene

| Power conferred on:                              | The Lords of Council and Session |
| Power exercised by:                             | Act of Sederunt under section 5 of the Court of Session Act 1988 |
| Parliamentary procedure:                        | None |

8. Section 11 would allow the Commissioner to intervene in civil cases with the leave of the court or by the invitation of the court. Section 11(7) provides that procedures for any such intervention, including the particular form that any submission by the Commissioner should take, may be prescribed by Act of Sederunt.

Justification for taking this power

9. The ability to intervene in civil proceedings is seen as a significant power of the Commissioner. While such an ability might anyway exist as being implicit in the Commissioner’s functions, the absence of an explicit intervention power in the case of the Northern Ireland Human Rights Commission resulted in the NIHRC being refused leave to intervene in a particular case. The NIHRC then raised legal proceedings, which eventually went to the House of Lords, to assert its power to intervene (in which it was successful). It is therefore thought appropriate to make explicit provision in the Bill to enable intervention by the Scottish Commissioner. Acts of Sederunt are the normal means by which procedural rules regulating various civil legal procedures in Scotland are laid down, and so are the appropriate means for prescribing any procedures that may be thought necessary to govern how the Commissioner would exercise his or her power of intervention in particular kinds of
proceedings. As is the usual practice any such Act of Sederunt will not be subject to parliamentary procedure.

Section 19 – Short title and commencement

Power conferred on: Her Majesty
Power exercisable by: Order in Council
Parliamentary procedure: None

10. Section 19 provides for Her Majesty by Order in Council to appoint a day when the provisions of the Bill shall come into force. Such an Order may appoint different days for different purposes and include such transitional provision as Her Majesty considers necessary or expedient in connection with the coming into force of the provisions.

Justification for taking this power

11. This power is required to ensure effective commencement of the Bill and to ensure that nothing in this Bill, when enacted, shall affect any legal proceedings already commenced, or any application made to the court, before the Act comes into operation. It was thought inappropriate to confer the power on the Scottish Ministers because of the need to ensure independence from the Executive (see paragraph 7 above). As is the usual practice any such commencement orders will not be subject to parliamentary procedure.