SCOTTISH COMMISSIONER FOR HUMAN RIGHTS BILL

POLICY MEMORANDUM

INTRODUCTION

1. This document relates to the Scottish Commissioner for Human Rights Bill introduced in the Scottish Parliament on 7 October 2005. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 48–EN.

Policy context

2. Since the Second World War, human rights have assumed ever-increasing importance in both the international and domestic contexts. A major step forward in this process was the enacting of the European Convention on Human Rights (ECHR) in 1950, in which the United Kingdom played a major part. Indeed, the UK was one of the first countries to ratify the ECHR, in 1951. The ECHR laid down a number of fundamental rights, such as the right to life and freedom of expression, which the signatory countries bound themselves to respect and so created a Europe-wide framework of rights and freedoms.

3. A wide range of other international human rights instruments has also developed. For instance, a number of instruments have been enacted through the United Nations, such as the UN Convention Against Torture (UNCAT). Another example is the European Convention for the Prevention of Torture (CPT), which came into existence under the auspices of the Council of Europe. At the same time, the generally-recognised concept of human rights has expanded to include issues such as property rights and also to reflect developments in society.

4. A further step in this process took place in 1998 when the ECHR was incorporated into Scots law through the Human Rights Act 1998 and the Scotland Act 1998. The Human Rights Act requires public authorities to comply with the ECHR, while the Scotland Act provides that actions of the Scottish Minister and Acts of the Scottish Parliament that do not comply with the ECHR are unlawful.

5. The incorporation of the ECHR into Scots law meant that the rights set out in it could be enforced through the Scottish courts. Incorporation made it significantly easier for individuals to seek legal redress for alleged breaches of their human rights under the ECHR, which in turn
meant that ensuring compliance with the ECHR became a major issue for Scottish public authorities. This led to suggestions that Scotland should follow the example of a number of other countries by establishing a human rights commission to improve awareness of, and compliance with, human rights.

6. In March 2000 the Lord Advocate and the then Minister for Justice stated that the Executive was considering the establishment of a human rights commission. This was followed by a formal announcement in June 2000 that the Executive would launch a public debate on the issues involved. Public consultations were held in 2001 and 2003, and the Partnership Agreement of 2003 that set out the Executive’s programme for the period to 2007 included a commitment to establish a human rights commission for Scotland. It is that commitment that the Bill is intended to deliver.

7. The Executive’s belief in the desirability of having a human rights commission for Scotland has been reinforced by the substantial and increasing attention given to human rights in the media and elsewhere. While this has raised the public profile of human rights issues, unfortunately some of the comment has been ill-informed and has created misleading impressions in the minds of people as to what “human rights” actually means, especially in the legal context. The Executive believes that a human rights commission could have a significant impact in dispelling those impressions and, by helping people to understand better what human rights are really about, create a better perception of how “human rights” can benefit them both individually and collectively as well as empowering them by enabling them to assert those rights more effectively. At the same time, a commission should help ensure that public authorities respect human rights not just through monitoring and reporting on compliance but by improving authorities’ awareness of human rights requirements and providing advice on how these might best be met.

8. It should be noted that although previous discussion, and in particular the Executive’s public consultation exercises, has referred to creation of a human rights commission the Bill would establish a Scottish Commissioner for Human Rights (SCHR). The difference does not affect the key issues around the functions, powers and accountability of the proposed officeholder.

The Great Britain Commission for Equality and Human Rights

9. Since the Executive published its proposals to create a human rights commission for Scotland, the UK Government has announced its intention to create a Commission for Equality and Human Rights (CEHR) for Great Britain. That intention is to be implemented by the Equality Bill that is presently before the Westminster Parliament, although the CEHR is not expected to become operational before October 2007. The CEHR is to assume the responsibilities of the existing statutory equality bodies, such as the Equal Opportunities Commission, in relation to enforcing legal requirements under existing and proposed equality legislation and also promoting equality more generally. However, the CEHR is also to have a new role of promoting human rights. The CEHR’s functions and powers in respect of human rights are to be similar to that proposed for the SCHR; but the CEHR’s human rights role in Scotland will be restricted to reserved human rights issues, that is ones for which the UK Government is responsible, while the SCHR will deal with devolved human rights issues.
10. Notwithstanding the plans to create the CEHR, the Executive still believes it right to proceed with creation of a separate Scottish human rights commissioner. The main reasons for this belief are:

- the legal obligations in relation to human rights placed on Scottish public authorities, and in particular on the Scottish Executive and Ministers but also on the Parliament, are more onerous than south of the Border: it therefore seems right to have a distinctive Scottish commissioner to reflect that different legal framework;

- the CEHR will be a non-departmental public body accountable to the UK Government. In contrast, the SCHR is to be independent, accountable to the Scottish Parliament and not to the Executive. This reflects the common practice for officeholders with comparable roles in Scotland, such as the Scottish Information Commissioner, the Commissioner for Children and Young People and the Scottish Public Services Ombudsman. It is an approach favoured by the Executive because it ensures that such bodies can be clearly seen to be independent. Dispensing with a separate Scottish human rights commissioner and having all human rights issues, devolved as well as reserved, dealt with by the CEHR would mean that this would be lost; and

- since the Scottish Parliament has responsibility for devolved human rights issues it seems right that the officeholder responsible for promoting awareness of and compliance with human rights in the devolved context should be accountable to it, and that the Parliament rather than Westminster should be able to legislate in respect of that officeholder.

11. A point that has been made repeatedly by stakeholders and others following publication of the CEHR proposals is the need to ensure that the CEHR and SCHR will work closely together so as to avoid confusion and unnecessary duplication. This need has been recognised from the outset by the Executive and the UK Government. The CEHR proposals therefore include an explicit expectation that it and the SCHR will enter into a memorandum of understanding to set out how they will co-operate on matters of mutual interest and work together generally.

**Consultation**

12. The proposals embodied in the Bill have been developed over a lengthy period and with significant public involvement. In March 2001 the Scottish Executive published its consultation paper, *Protecting Our Rights: A Human Rights Commission for Scotland?* (The consultation document is available on the internet at [http://www.scotland.gov.uk/consultations/justice/porhr-00.asp](http://www.scotland.gov.uk/consultations/justice/porhr-00.asp); while the responses are also available at [http://www.scotland.gov.uk/Topics/Justice/Civil/17838/10723](http://www.scotland.gov.uk/Topics/Justice/Civil/17838/10723). This included a declaration that the Executive was committed to establishing a “human rights culture” in Scotland, and sought views on whether an independent human rights commission should be established in order to improve protection of human rights in Scotland. It also posed a number of questions about what any such commission ought to look like such as: what its functions should be, whether it ought to have a statutory basis, what its relationship with existing statutory bodies should be, and to whom it should be accountable.
13. The consultation paper described the main arguments that had been advanced for establishing a human rights commission for Scotland as being that:

- proposals for legislation required more scrutiny in relation to their implications for human rights;
- there needed to be more guidance for public authorities and to the public in general on human rights and responsibilities in connection with them;
- there should be a sustained campaign to raise awareness of human rights; and
- the different legal and political environment in Scotland, especially post-devolution, meant that there should be a specifically Scottish body to meet these needs.

14. About 70 responses were received from a wide range of interested parties including local authorities, equality organisations, human rights lawyers, academics, charities, lobby groups, professional organisations (such as police and sheriffs) and legal organisations. A small number of private individuals also responded. More than 75% of the responses supported the creation of a human rights commission for Scotland, and wanted it to be statutory and accountable to the Scottish Parliament. There was also broad consensus that a commission should conduct pre-legislative scrutiny of proposals, provide guidance to public authorities and conduct promotion, education and awareness-raising work. However, there was less agreement on what its other roles might be, whether creation of a commission would require the remits of existing bodies to be reconsidered, the number of commissioners it should have and who should appoint commissioners.

15. Following consideration of the responses, the Executive announced in December 2001 that a human rights commission would be established. A second consultation paper, *The Scottish Human Rights Commission*, was launched in February 2003 with a one-day conference, *Establishing our Rights*, in Edinburgh, to allow further discussion of how the Commission could operate in Scotland. The consultation paper set out a number of decisions that the Executive had already taken on what the Commission would look like and sought views on some more detailed issues. 58 responses were received to the second consultation from local government, the non-profit sector, the legal profession, the police, academics, religious groups, professional organisations and private individuals.


**BILL PROVISIONS**

17. The fundamental purpose of the Bill is to create a “Scottish Commissioner for Human Rights”. The Commissioner is to be appointed by the Queen on the nomination of the Scottish Parliament and will be accountable to the Parliament, as explained more fully in the Accountability to Parliament section of this Memorandum.
This document relates to the Scottish Commissioner for Human Rights Bill (SP Bill 48) as introduced in the Scottish Parliament on 7 October 2005

18. The general function of the SCHR is to promote awareness and understanding of, and respect for, human rights. The SCHR is therefore to be a promotional, not an enforcement, office that will work through increasing awareness of human rights with the aim of securing compliance with those rights, not through directing or otherwise requiring as a matter of law public authorities to take or refrain from taking specific measures or actions. The SCHR will also not be empowered to investigate individual complaints: although such complaints may prompt the SCHR to conduct an inquiry in relation to a particular issue, it will not be for the SCHR to reach a view as to whether an individual’s human rights have (or have not) been breached in a particular case. The Executive believes that the existing ability of individuals to seek redress through the courts for alleged breaches of human rights is sufficient to enable them to assert their rights, without adding a separate enforcement mechanism.

Remit – Definition of “human rights” and devolved nature of remit

Policy objectives

19. The SCHR will be a devolved officeholder with a general duty to promote awareness and understanding of, and respect for, human rights. The SCHR’s remit will not be confined to the ECHR but will include all international human rights instruments that the UK has ratified. The Commissioner is to be able to have regard to all such instruments in exercising all of his or her functions.

20. However, the SCHR is to be required in exercising his or her functions to have special regard to the ECHR (“the Convention rights”) because the ECHR is the only international human rights instrument that is enforceable through the Scottish courts. Issues around the ECHR will therefore be of primary concern to the SCHR, although his or her remit will extend to other international human rights instruments that the UK has ratified.

21. Having said this, paragraph 7(2) of Schedule 5 to the Scotland Act 1998 requires Scottish Ministers to observe and implement “international obligations” as well as their specific obligations under the ECHR and Community law. “International obligations” includes other international human rights instruments to which the UK is a party. These include instruments such as the Universal Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Civil and Political Rights, and the International Convention on Economic, Social and Cultural Rights.

22. Some of these other instruments can have a direct impact on Scottish public authorities. For example, the European Convention for the Prevention of Torture requires state parties to allow a committee of experts to visit places of detention in order to assess conditions and practices. The last visit of the European Committee for the Prevention of Torture (ECPT) to Scotland was in May 2003 and it included visits to HMP Barlinnie, Helen Street Police Station in Glasgow and the State Hospital at Carstairs. Similarly, the UN Committee Against Torture (UNCAT) can hold examinations of state parties’ record in complying with the terms of the UN Convention. The last UNCAT examination took place in November 2004 and was attended by a representative of the Scottish Executive. Another example is that the UK recently signed a protocol which gives individuals the right to petition directly the UN Committee for the Elimination of Discrimination Against Women, and similar moves are proposed for other international instruments.
23. Therefore, while the ECHR is the only international human rights instrument which is directly enforceable in the Scottish courts these other international instruments do place different types of obligations and responsibilities on Scottish public authorities. In particular, authorities’ compliance with these other international standards can be assessed by international committees who, although they have no enforcement powers, regularly publish their findings and so non-compliance can have significant implications for authorities not least in terms of public perception.

24. Even those international instruments which do not involve some kind of monitoring mechanism have considerable value. In ratifying them, the UK Government has accepted the standards they describe as something worth aspiring to. The Scottish Executive shares the commitment to meet these international human rights standards. The SCHR’s remit therefore includes “other human rights” in order to help Scottish public authorities meet and maintain these international standards.

**Alternative approaches**

25. Some of the responses to the consultation argued that the SCHR’s remit should include reserved matters. As an Act of the Scottish Parliament, a Scottish Commissioner for Human Rights Act cannot create an office with a remit which is wider than the Parliament’s legislative competence. In general, the Scottish Parliament therefore cannot create a commission with a remit that covers reserved matters. An Act of the Westminster Parliament would be required to give the SCHR a remit which covers all reserved matters.

26. Regarding the definition of human rights used in the Bill, many national human rights institutions around the world have remits which are based on rights set out in their enabling legislation or a constitutional document such as a Bill of Rights. There is no direct equivalent to this in either the UK generally or Scotland in particular. Of course, the ECHR is an enforceable part of domestic law through the Human Rights Act and the Scotland Act. However, the Executive believes that it would not be appropriate to restrict the SCHR’s remit to human rights as set out in the ECHR, since this would have prevented the SCHR from drawing on the standards set out in other international instruments, some of which relate to areas not covered by the ECHR. Also, including other international instruments in the SCHR’s remit will allow the Commissioner to participate where appropriate in the monitoring processes associated with organisations such as the UN and the Council of Europe. The Executive therefore believes that the remit set out in the Bill strikes the right balance through being clear and specific but not unduly limited.

**Consultation**

27. A number of those who replied to the second consultation pressed for the SCHR’s remit to include reserved matters. However, as stated above it would not be possible for the Scottish Parliament to pass legislation creating an office with a remit that includes reserved matters.

28. Most of the consultation responses supported the view that the SCHR should not just focus on advice-provision on Human Rights Act compliance, but should encourage a positive human rights culture. The remainder disagreed or were unsure. Poor understanding and knowledge of general human rights amongst public bodies were seen as a reason for
concentrating guidance efforts on the Human Rights Act, although the majority of responses agreed that other international human rights instruments should be included in the SCHR’s remit to secure a fuller reflection of current international best practice. A small minority of the responses argued for the SCHR’s remit to be restricted to the ECHR on account of it being the only instrument fully incorporated into Scots law.

**Monitoring function (reviewing law, policy and practice)**

**Policy objectives**

29. The Executive views general monitoring and reporting on law and practice as a key function for the SCHR. The UN’s “Paris Principles” and Commonwealth Secretariat’s guidance on national human rights institutions set out best practice guidance for establishing national human rights institutions. They suggest that national human rights bodies should review law and practice on an ongoing basis. The general obligation to review law and practice exists in the remits of several human rights commissions in other jurisdictions.

**Domestic legislation**

30. The phrase “law and practice” is intended to cover existing pieces of legislation which are on the statute book and existing practices which may be administrative or linked to legislation. Existing law will already have been through a rigorous process of scrutiny either in the UK Parliament or the Scottish Parliament. In addition, the Scottish Executive carried out a comprehensive audit of law, practices and procedures in advance of the Human Rights Act 1998 taking effect. However, the thresholds of human rights compliance change according with the changing views of society and this is reflected in developing jurisprudence both in the domestic courts and at the European Court of Human Rights in Strasbourg. It would therefore be beneficial to allow the SCHR to consider human rights issues relating to existing law and practice in the light of such developments.

31. The monitoring role extends to policy proposals put forward by the Executive once these have been published. The Bill does not, however, create a mechanism which gives the SCHR special access to the Executive’s policy-making process. While it is to be hoped that the SCHR will develop a constructive working relationship with the Executive, giving the SCHR formal, privileged access to the Executive would jeopardise the Commissioner’s perceived independence from Scottish Ministers. The SCHR will however be free to comment in response to the publication of a consultation paper, draft legislation or an announcement. The Commissioner will be free to make his or her comments widely available by publishing and discussing them.

32. The 2003 consultation paper said that advising the Scottish Parliament on legislation after introduction would be a key function of the SCHR. That was supported by the response to the consultation, and remains the Executive’s view. However, the Executive believes that the Parliament’s existing legislative procedures are sufficient to allow the SCHR to perform this function, and so there is no specific provision for this set out in the Bill.

**Monitoring key human rights cases and investigations**

33. Monitoring legislation at the Parliamentary stage may not provide a complete picture of how well legislation will operate in practice. Some kind of monitoring of human rights cases
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may be valuable in identifying where there may be weaknesses or gaps in the law. A study on the use of human rights legislation in the Scottish courts, commissioned by the Executive from Glasgow, Strathclyde and Stirling Universities, provided useful information on the incidence and nature of human rights challenges. It highlighted a number of difficulties involved in identifying exactly what constitutes a “human rights case” and procedural difficulties in gathering data on cases in the lower courts in particular. The Bill does not specify how intense the SCHR’s monitoring of human rights cases should be. It will be up to the SCHR to decide how to approach the function of monitoring the law.

**Monitoring international human rights standards**

34. The UK is party to a number of international human rights instruments. Some of these involve monitoring mechanisms in which the state party is asked to report on its compliance with the terms of the convention or treaty or attend hearings before a monitoring committee. It is common practice for NGOs and other organisations to submit reports to the committees alongside the state party’s report or in advance of the hearing so that the committee can benefit from a wide range of views on the state’s compliance. It would be helpful if the SCHR could be involved in this process by making his or her own views known to the monitoring committees. The SCHR will be independent from both government and the NGO community and will therefore be able to provide a helpful alternative perspective on the issues being considered.

35. Monitoring committees invariably publish a list of comments, observations and recommendations following the report or hearing. Progress against these recommendations forms the basis of the next reporting cycle. As an independent human rights expert, it is envisaged that the SCHR could play a useful role in advising the Executive on addressing the recommendations and monitoring its progress against them.

36. Many of the international monitoring committees encourage national human rights commissions to develop a working relationship with them. This can be of benefit to both the monitoring committees and the state parties as the commissions can monitor and inform the state party of developments in international human rights standards and practice stemming from the activities of the monitoring committees.

**Alternative approaches**

37. In the second consultation document, the Executive presented two options for how new legislation could be brought to the attention of the SCHR:

- the Scottish Parliament could consider amending standing orders to include a new duty to send all legislation that is introduced to the SCHR;
- as part of its own administrative procedures, the SCHR would be expected to monitor legislation and decide on his or her own priorities.

38. The first of these would ensure that all legislation would benefit from the SCHR’s scrutiny as part of the legislative process. However, amending the Parliament’s standing orders in this way could create an expectation that the SCHR is obliged to offer a view on all legislation before the Parliament. The SCHR may prefer to prioritise his or her workload by commenting only on those proposals that the Commissioner feels raise particularly important human rights
issues. Additionally, the Executive does not favour an approach which could interfere with the legislative process and therefore prefers the second approach. It will still be possible for the SCHR to offer a view on any legislative proposal by giving evidence to committees in the same way as any other person or organisation.

Consultation

39. The majority of the consultation responses agreed that the SCHR should monitor legislation as part of his or her own procedures rather than making it a mandatory part of the legislative process. Many also thought that the Commissioner should be able to determine the degree of priority attached to this role and be involved at earlier stages in the development of potential legislation. Of those who offered further comment, many recommended that the SCHR should automatically be notified of all legislation going through parliament, but should not be under a statutory requirement to comment. The Law Society of Scotland was concerned that “any bureaucratic failure to inform the Commission of the introduction of a Bill should not affect the Bill’s validity once it becomes an Act.”

40. Those who did not support this proposal did so because they feared that the SCHR would be overwhelmed by this task, given the volume of legislation generated. One local authority argued that current arrangements were sufficient and the SCHR’s involvement in the process would create a layer of unnecessary bureaucracy.

Guidance function (information, guidance, education, etc.)

Policy objectives

41. Increasing general awareness so that everyone in Scotland understands their rights, responsibilities, and the meaning of human rights will be central to the critical role the SCHR will play in supporting the development of a human rights culture. The SCHR will decide on his or her own priorities and work-plan, but the Bill sets out a specific function for the SCHR to disseminate information, conduct research, and provide guidance, education and training. It is hoped that one benefit of such activity will be to improve awareness of the benefits of human rights among groups, such as older people, who may in the past not necessarily have seen themselves as being able to benefit from those rights.

42. Providing guidance to public authorities on their obligations under the Human Rights Act 1998, which makes it unlawful for them to act in any manner that is incompatible with ECHR, will be a central and specific function of the SCHR. Research undertaken in 2001 by the Scottish Executive Legal Studies Research Team revealed that many public bodies had only partial knowledge of the Act and did not understand their duties under this legislation. There existed a perception that human rights entailed a general principle of “fair treatment” as opposed to the specific legislative provisions in the Human Rights Act. These findings pointed to the need for a central source of information and guidance. There are also indications that knowledge and understanding of human rights among the private sector and society in general can be equally patchy, although there is less research information about these groups. The quality and nature of media coverage of human rights issues may be of significance in this regard.

43. Again, the Scottish Executive has stressed that the SCHR should set his or her own priorities and workload in relation to this element of its remit. However, it believes that the
SCHR’s statutory duties should include the provision of guidance on all aspects of human rights in general, albeit with an express focus on the Human Rights Act given its direct relevance in legal terms for public bodies. The Bill therefore makes specific reference to the Convention rights as set out in the Human Rights Act in describing the SCHR’s general duty to promote human rights.

Charging for services

44. The Executive expects that the SCHR will be able to fulfill his or her statutory function to provide information, guidance and education from its core funding. However, the Executive proposes that the SCHR should also be able to charge reasonable fees in connection with providing these services in certain circumstances. This has been done in similar situations in the past. For instance, the Scottish Information Commissioner staged a number of events in 2004 in advance of the Freedom of Information (Scotland) Act 2002 coming into force. Attendance fees for these events were charged at variable rates for private companies, public authorities and non-profit organisations. The SCHR may choose to charge fees on a similar basis to help cover the costs of staging similar significant events.

45. It may be appropriate to charge fees in other situations. For example, should the SCHR provide information, guidance or training to private companies over and above the Commissioner’s statutory duties, he or she could reasonably charge fees for these services rather than pay for them out of public funds. An ability to charge for services need not compromise the independence of the SCHR or create a conflict of interest in relation to the Commissioner’s powers of inquiry. The Commission for Racial Equality is an example of a statutory body that can charge fees for providing advice to both public and private bodies on their obligations, in this case under the Race Relations (Amendment) Act 2000. Its ability to charge fees for such services does not jeopardise its statutory powers of investigation into those bodies.

46. It is important to note that the ability to charge fees is intended to be an option for the SCHR to use if he or she considers it appropriate, not as an expectation that the SCHR should raise his or her own funds in place of the budget allocation from the Parliament.

47. The SCHR may wish to contract externally for services and resources, for instance for delivery of training, in those areas where it is not possible to provide these in-house or where to do so would be less effective, and the Bill would enable him or her to do that. Some human rights commissions in other jurisdictions are able to commission work from other sources or to offer financial support to others who promote specialist human rights activities. Other Scottish statutory bodies, such as the Commissioner for Children and Young People and the Scottish Information Commissioner, have the ability to enter into contracts specified in their enabling legislation.

Alternative approaches

48. It would have been possible to prohibit the SCHR from charging for services, on the grounds that it could compromise his or her independence to do so. However, other statutory bodies can and do charge for services without adversely affecting their independence. The Children and Young People’s Commissioner and the Scottish Information Commissioner are two examples of such bodies.
49. The alternative to allowing the SCHR to contract externally for services would be to employ a larger number of staff to provide all the fields of expertise that the SCHR may want to utilise. Allowing the SCHR to contract externally for some services will give the SCHR a greater degree of flexibility in deciding his or her priorities.

Consultation

50. The second consultation paper asked whether the SCHR should be able to commission or offer financial support for promotion, education and awareness-raising activities. The vast majority of the responses to this question supported the proposal. The volume of comments supplied in relation this question illustrates the centrality of awareness-raising as a role for the SCHR in fostering a human rights culture. A few bodies pointed out that the SCHR would probably need to contract externally to best use resources, access additional expertise and combine efforts with other organisations, but warned that the SCHR should not become more of a commissioning body than anything else. NGOs, in particular, stated that the SCHR’s efforts in this area should tie-in with work, and exploit existing knowledge and expertise, in their sector.

51. A few respondents noted that training should not just be offered to public authorities but to trade unions, private contractors as they increasingly provide public services, and the wider public, as appropriate. Many of the comments underlined the importance to the SCHR of flexibility and the power to set his or her own priorities and to balance obligations in fulfilment of the SCHR’s function in this area. The issue of applying the SCHR’s activity to private bodies was a recurrent theme brought out in responses from varied consultees. It was suggested that the SCHR should be able to charge for the delivery of training to public and private bodies.

52. There was less consensus in the responses on the issue of whether the SCHR should be able to charge for services. About half agreed that the SCHR should, while over a third thought that the SCHR should not. The main reasons given for not allowing the SCHR to charge for services were that to do so could compromise his or her independence and risk the SCHR taking on work to raise income to the detriment of his or her statutory functions. However, those who agreed argued that it would allow the SCHR to act with greater flexibility and provide services to the private sector without placing a significant burden on the Commissioner’s core funding.

Inquiries

Policy objectives

53. The power to conduct inquiries will allow the SCHR to examine areas where failures to comply appear to be occurring in a broad area of public interest and on which there may be a general level of ‘complaint’ by the public. Inquiries will be advertised and will result in published observations and recommendations.

54. The SCHR will be able to initiate an inquiry on his or her own initiative or in response to concerns that have been brought to him or her, albeit not as formal requests from the Scottish Executive or the Scottish Parliament. Neither the Executive nor the Parliament will be under a duty to take the views of the SCHR into account, although they will carry due weight. Nor will they be able to direct the SCHR to conduct an inquiry into a particular issue, although they would of course be able to suggest that such an inquiry might be appropriate.
55. Examples of human rights bodies elsewhere and of existing ombudsmen and commissioners in this country support the proposal that the SCHR should have powers to access information. Based on the precedent of the Scottish Public Services Ombudsman, the SCHR will be given powers to require the provision of information, documents and testimony. The SCHR will have the power to apply to the Court of Session should a body refuse to comply with such powers.

56. There are international models for human rights bodies with inquiry powers. The UN ‘Paris Principles’ state that a human rights commission should be able to submit its opinions, recommendations, proposals and reports in relation to any violation of human rights which it decides to take up; it should be able to draw the government’s attention to rights violations, making proposals and commenting on the government’s position. In addition, it should be empowered to hear any person and obtain any information or documents necessary for assessing situations falling within its competence. The Commonwealth Secretariat’s guidance on national human rights institutions states that a Commission should be able to independently investigate individual and systemic violations of human rights and submit recommendations to government.

57. The use of inquiries is an established part of international human rights monitoring mechanisms. The European Committee for the Prevention of Torture is able to visit state detention facilities to observe conditions and make recommendations to the state party. The UN Committee Against Torture does not undertake visits, but it does hold public examinations of states’ compliance with the Convention. In both cases, the committee publishes a report of its findings and recommendations. They have no further enforcement powers. This is largely because they are intended to encourage best practice through constructive dialogue with states and publication of shortcomings rather than quasi-judicial enforcement.

**Access to places of detention**

58. The consultations did not propose that the SCHR be given a statutory power of access to places of detention. However, several of the responses to the consultation did argue that some kind of right of access to premises could be valuable. The power of the European Committee for the Prevention of Torture (ECPT) to enter places of detention was cited as a particular model for the SCHR to follow.

59. Having considered the matter further, and taking account of the consultation responses, the Executive now proposes that the SCHR should have a legal power to obtain access to places of detention for the purposes of an inquiry. There are a number of arguments for conferring such a power on the SCHR. By their nature, places of detention are capable of giving rise to significant human rights issues, as has been shown by the large number of cases in the domestic courts and at the European Court of Human Rights relating to places of detention (especially prisons).

60. Many if not most of those issues are likely to relate to the physical conditions in which persons are held in places of detention. It is felt that use of the powers to obtain documents or other evidence provided for in relation to inquiries would not be sufficient to enable the SCHR properly to ascertain conditions in specific places, since a full picture of conditions can only be obtained by physical inspection. However, by definition places of detention are not open to the public and so there would be the possibility of the SCHR being denied entry to a place of
detention even though he or she would view obtaining such entry as necessary e.g. as part of an inquiry into prison conditions. A legal power to enter places of detention would therefore allow the SCHR to fully exercise his or her functions in relation to such places.

61. It is hoped that the SCHR would seldom, if ever, have to exercise the right of access in practice. At present bodies such as the Prisons Inspectorate are given access on an informal basis when requested even though they have no such power and this rarely, if ever, gives rise to any problems. However, given the overarching nature of the SCHR’s remit and the importance of the SCHR as a driver for change in public sector policy and practice in relation to human rights, the Executive believes that the SCHR should have a statutory power of access to call upon if required. This would also send a clear message that the SCHR is an important office with a key role in securing compliance with human rights.

62. It is also relevant that it has been proposed that all the human rights commissions in the UK should be nominated as “national preventive mechanisms (NPMs)” under the Optional Protocol to the UN Convention Against Torture (OPCAT). This would involve the SHRC having a monitoring role under the Convention in relation to places of detention. OPCAT is unlikely to come into effect before the end of 2007, but legal powers of access will give the SHRC the necessary powers to ensure that he or she can act as an NPM effectively.

63. Many national human rights institutions do not have a power of access to places of detention, and the two consultation papers did not propose that the SCHR should have such a power. However, the experience of the Northern Ireland Human Rights Commission suggests that such a power may be useful. The Northern Ireland Act 1998 did not give the NIHRC any legal powers of access to places of detention, but the NIHRC believes that this has hampered its ability to fulfil its functions adequately. The NIHRC raised an action for judicial review following the Northern Ireland Office’s decision to deny it access to the Juvenile Justice Centre at Rathgael. The action has since been settled by the NIO agreeing to give the NIHRC access, and the UK Government subsequently announced in December 2004 that the NIHRC will be given a legal right of access to information including access to places of detention. The Bill giving the NIHRC these powers has not yet been published. The conferring on the SCHR of an explicit power of access should avoid such difficulties.

Alternative approaches

64. It would have been possible to give the SCHR a general power of access to premises, rather than just to places of detention. However, the power of access to places of detention has been proposed specifically to support the SCHR’s inquiry role. Access to other types of premises, such as offices of public authorities, would not fulfil the same purpose. It is hard to conceive of any situation where conditions in the offices of, say, an NHS board would be of interest to the SCHR. The information held in those offices may be of interest, but the Bill gives the SCHR legal powers to obtain documents and compel testimony from witnesses, which will allow the SCHR to gain access to the information without the need to enter premises. A broader access to premises would only be useful in allowing the SCHR to force his or her way into an office or other place to seize documents or other material itself. We do not think that this would be an appropriate power for the SCHR, and that the power of access to information in relation to inquiries is sufficient.
65. Some human rights institutions in other jurisdictions are essentially complaints handling bodies, whose principal role is to investigate, resolve or support human rights challenges. The SCHR will not be empowered to investigate individual cases or support individual cases through the courts. The intention is to create a Commissioner who can successfully promote a human rights culture in Scotland. Allowing the SCHR to investigate individual complaints would probably lead to demands that he or she spend an increasing amount of time and effort on that task, so distracting the SCHR from his or her other promotional roles. In any case, the Human Rights Act 1998 and Scotland Act 1998 already provide a mechanism whereby individuals who feel that their Convention rights have been breached may defend those rights through the domestic courts.

66. It has also been suggested that the SCHR should be able to raise legal actions for alleged breaches of the Convention rights in his or her name. However, the Executive believes that the same objections apply here as to the SCHR handling individual complaints. In any case, under the Human Rights Act (and thus the Scotland Act) a legal action for an alleged breach of a Convention right can only be brought by a victim of that breach. The SCHR would not meet that “victim test”; and that test could only be removed by amending the Human Rights Act which would be outwith devolved competence and so could only be done at Westminster.

67. Another option would have been to give the SCHR enforcement powers to apply sanctions, if, following a report of an inquiry, the body concerned did not act on his or her recommendations. Having again looked at existing bodies and ombudsmen, and with concerns that the SCHR should be independent yet not be perceived as acting like a court, the Executive proposes that the SCHR should not have such enforcement powers. This would not mean that its recommendations and advice could go unheeded, for the SCHR will be able to conduct inquiries in public and the reports of inquiries will be published. Any recommendations of an inquiry will thus be in the public domain and so capable of generating pressure on the relevant authorities to conform, and the Executive believes that this is the best model as the courts are the most appropriate forum for deciding legal disputes.

Consultation

68. There was near universal support in the second consultation for giving the SCHR the ability to conduct inquiries. There was broad support for the SCHR being able to compel the production of evidence in one form of another, with many consultees pointing out that evidence from other jurisdictions suggests that such powers rarely need to be used in practice simply on account of the existence of the authority.

69. On the issue of enforcement powers, about half of the respondents agreed that the SCHR should not have enforcement powers. A substantial minority thought that the Commissioner should have such powers. However, there appeared to be some disagreement over the definition of “enforcement powers” and whether it should include powers in relation to the conduct of investigations as well as or instead of powers to enforce decisions arising from such investigations. Those who supported the proposal noted that enforcement should remain a matter for the courts, and that an enforcement role could be at odds with the SCHR’s advisory role. Others argued that enforcement powers would be necessary to ensure the SCHR’s credibility and he or she should have enforcement powers similar to those of the equality bodies.
70. There was broad support for the proposal that the SCHR should be required to publish a report after each inquiry. Those who opposed this proposal did so with reference to the possibility that the SCHR will not have enforcement powers or the ability to require a specific remedial action, which raised questions about the efficacy or worthiness of a published report. Only one of those who commented on whether bodies which had been investigated should supply a written reply within a stipulated period did not agree.

71. There was general agreement that inquiries should be conducted in public, in order to foster and maintain public confidence, unless there were pressing reasons for holding the inquiry, or part of the inquiry, in private. The vulnerability and safety of the parties involved would be the main justifications for a private option. For example, one children’s charity argued that, although investigations should generally take place in public, special measures should be put in place for children and young people in giving evidence.

Relationship with courts

Policy objectives

72. The SCHR will be closely involved in examining human rights law as it develops in Scotland, and he or she may also keep in touch with relevant developments in other jurisdictions and in relation to international human rights instruments generally. The Executive considers that it would be helpful to allow the courts access to the SCHR’s expertise in considering cases where human rights issues arise. This would supplement information received by the courts in the normal way and would not in any way be a substitute for submissions by the parties to a case.

73. The Bill therefore gives the SCHR power to intervene in civil proceedings before a court. Such intervention may be at the Commissioner’s request, in which case it is to be entirely at the discretion of the court as to whether to allow any such intervention in a particular case, or at the court’s own request. In either case, the court must first be satisfied that intervention by the SCHR is likely to be of assistance to it. The SCHR’s power will be simply to make a submission to the court where allowed by the court: it will be for the court to decide what, if any, account to take of any such submission. This should enable the court to obtain the benefit of advice from the SCHR where that would assist the court in its consideration of a particular case, while not placing the court under any obligation to allow such an intervention or to follow whatever advice the SCHR may offer.

74. The SCHR’s ability to intervene will only apply to civil proceedings (excluding children’s hearings) and he or she will not be able to intervene in criminal cases.

75. The other statutory human rights bodies in the UK do or will have capacity to advise the courts. The House of Lords has held in re Northern Ireland Human Rights Commission that the Northern Ireland Commission has the “capacity to make submissions on human rights law and practice applicable in Northern Ireland if so permitted or invited by courts or tribunals concerned with issues of such law and practice.” Additionally, the Equality Bill provides the GB Commission on Equality and Human Rights with the capacity to intervene in legal proceedings.
Alternative approaches

76. Some of the responses to the second consultation suggested that the SCHR should not just be allowed to make submissions to the courts, but that the courts should be under a duty to hear any such submissions. They argued that the courts are as likely as any other public authority to be unaware of human rights issues and it was therefore possible that a judge would refuse an intervention in circumstances where it would be preferable to allow it. However, the purpose of the SCHR is essentially to be promotional and awareness-raising officer. It would not be appropriate for such an officer to interfere with the independence of the courts. The Executive therefore prefers to leave it to the court to decide whether or not to allow an intervention in any given case.

77. Some national human rights institutions have the ability to take test cases in their own name. However, as mentioned above the Human Rights Act contain a “victim test” which mean that the only person who can take a human rights case is the victim of the alleged breach. It is not possible for a person who is not the victim of a breach to raise a case under the Human Rights Act or section 57 of the Scotland Act. The Human Rights Act and the Scotland Act would need to be amended to allow an organisation such as the SCHR to take human rights test cases. As Acts of the Westminster Parliament, it would not be within the competence of the Scottish Parliament to do this, so such a provision cannot be included in this Bill.

Consultation

78. The responses to the consultation generally agreed that the SCHR should be able to advise the courts, but many also pressed for the SCHR to be given the power to take test cases in his or her own name. Those who disagreed with the proposals did so on the grounds that existing mechanisms for appeal and judicial review provide the courts with sufficient opportunity for the courts to address human rights issues and involvement in a case could lead to challenges to the neutrality and credibility as an impartial provider of advice and guidance.

79. Some consultees argued that the SCHR should be able to intervene in criminal as well as civil cases on the grounds that important human rights issues arise in criminal cases as frequently as they do in civil ones, if not more so. While that is true, there is no scope at present in criminal procedure for anyone other than the prosecution or the defence to make submissions to the court. The Executive believes that it would be neither desirable nor practical to allow the SCHR to intervene in criminal cases.

Relationship with other commissions

Policy objectives

80. Human rights affect all areas of public policy and it is inevitable that the SCHR will come into regular contact with other statutory bodies and officeholders. These will include the GB CEHR, the Commissioner for Children and Young People in Scotland and HM Inspector of Prisons among others. The relationship between the SCHR and the CEHR has already been dealt with above, so the remainder of this section deals only with the relationship between the SCHR and other Scottish bodies or officeholders.
81. The Commissioner for Children and Young People (Scotland) Act was passed in 2003 and in 2004 Professor Kathleen Marshall was appointed as the first commissioner with a remit to promote and safeguard the rights of children and young people. Because human rights covers people of all ages, there will be overlap between the SCHR and the Commissioner for Children and Young People. As with the CEHR, it is proposed that the relationship between the two commissioners be agreed by them in a memorandum of understanding.

82. The SCHR is likely to be interested in issues which fall at least partly within the remit of other bodies such as HM Inspector of Prisons, HM Inspector of Constabulary and the Care Commission. The Executive envisages that, as with the Children’s Commissioner, the relationship with these bodies would best be managed through memoranda of understanding.

**Alternative approaches**

83. An alternative to basing the relationship of the SCHR with the Children’s Commissioner on a memorandum of understanding would have been to remove children from the remit of the SCHR. However, this would be incompatible with the intention to create a commissioner with a broad remit. Excluding children from the SCHR’s remit could lead to gaps in the protection of the rights of children: the Commissioner for Children and Young People must have regard for the rights set out in the UN Convention on the Rights of the Child (CRC), but children are also entitled to the rights described in other international human rights instruments which are not specified in the Children’s Commissioner’s remit. A possible solution would have been to draft legislation in a way that set out the boundaries between the two bodies, with the Children’s Commissioner having responsibility for the rights described in the CRC and the SCHR responsible for all other rights. Such an arrangement would risk becoming unnecessarily complicated. Basing a relationship between the two bodies on a memorandum of understanding will be more likely to result in practicable working arrangements. It would also be more in the spirit of granting the two commissioners a degree of independence by allowing them to decide between them how best to manage their relationship.

**Consultation**

84. The relationship with the Commissioner for Children and Young People was specifically mentioned in the second consultation paper. Almost of the consultees agreed that children should be retained within the remit of the SCHR and that the relationship between the two commissioners should be set out in a memorandum of understanding.

**Accountability to Parliament**

**Policy objectives**

85. The independence of the SCHR will be important for his or her standing and success. To be independent, the SCHR must be in control of his or her strategic direction and priorities, within the limits set by the statutory remit. This should apply across all of the SCHR’s functions. The SCHR should not be subject to external control or direction in his or her work programme. However, the SCHR must be accountable for the public funds he or she will spend and the manner in which the SCHR carries out his or her statutory functions. Since the SCHR will be a public officeholder, there must also be an appointments process that can offer guarantees of independence and impartiality.
86. Other commissioners and ombudsmen recently established in Scotland have been made accountable to the Scottish Parliament. This is the case for the Commissioner for Public Appointments in Scotland, the Scottish Public Services Ombudsman, the Scottish Parliamentary Standards Commissioner, the Scottish Information Commissioner, and the Commissioner for Children and Young People. The SCHR will follow this model as the need to be, and be perceived to be, independent from Scottish Ministers will be important to ensure his or her credibility.

87. Accountability to the Scottish Parliament will involve the following:

- the SCHR’s budget being determined by the Scottish Parliamentary Corporate Body (SPCB);
- the Scottish Parliament being responsible for appointing the Commissioner and deputy Commissioners. The Parliament would manage the selection process and establish a selection panel. A nomination would be put forward for approval by resolution of the Parliament. If approved, it would be submitted to Her Majesty the Queen for formal appointment; and
- the SCHR submitting an annual report and reports of his or her inquiries to the Scottish Parliament. Additional ad-hoc reports could also be submitted from time to time. All of these reports could be the subject of debate in the Scottish Parliament, at the discretion of the Parliament.

Alternative approaches

88. Traditional accountability arrangements for Non-Departmental Public Bodies (NDPBs) involve accountability to Scottish Ministers. The definition of an NDPB is “a body that carries out certain functions on behalf of government with a degree of independence from Ministers.” Under this model Scottish Ministers would retain a greater degree of control over the organisation. This would involve:

- Budget determined by Scottish Ministers;
- Appointments made by Scottish Ministers;
- Annual report made to Scottish Ministers; and
- Sponsorship (monitoring role) fulfilled by the Scottish Executive.

89. This model would not necessarily compromise the SCHR’s independence in practice, but it may imply a closer relationship to government than would be appropriate for this kind of office and so not give the appearance of independence that the Executive and others feel to be important for an office of this nature. Accountability to the Scottish Parliament is a more appropriate and accessible model. MSPs will have the opportunity to hold the body publicly to account. Recent procedures put in place for other Commissioners and Ombudsmen have established this as an acceptable and workable model.
Consultation

90. A considerable majority of the responses to the second consultation agreed that the SCHR should be accountable to the Scottish Parliament, several alluding to the need for independence from the Executive.

Structure – number of Commissioners, etc.

Policy objectives

91. The policy objective is to appoint commissioners who will have a range of expertise and experience allowing them to offer the best possible advice and guidance on human rights issues while being effective and manageable. While broad representation of Scottish society as a whole should be one of the factors considered in making commissioner appointments, it is not intended that commissioners should be appointed principally in order to ensure that particular groups are represented. In addition, it would be preferable not to restrict membership to legal or human rights experts. This could be one of the factors to be weighed up as part of the appointment process, but need not be specified in legislation.

92. Other models emphasise the importance of commissioners having a legal or human rights background. This may be seen as more important where a commission has a strong legal focus on individual cases and investigation. However, it could be argued that the staff can provide the necessary expertise. Staff can provide the expert technical knowledge in support of commissioners, who should themselves focus on taking a strategic approach.

93. Keeping numbers small and manageable would make strategic control and decision making more straightforward and put less pressure on resources. This consideration has informed the decision to provide in the Bill for one Commissioner supported by up to two deputy Commissioners.

94. The policy presumption is that the post of Commissioner will be a full-time appointment. There is however a degree of flexibility within the Bill as to the full- or part-time nature of commissioner posts: the Commissioner or a deputy Commissioner will be able to hold another office or other employment if the SPCB agrees.

Alternative approaches

95. The Paris Principles recommend that the membership of national human rights institutions should reflect many different aspects of civil society by including representatives of NGOs, professional associations, trade unions, universities, parliament and others.

96. Some commissions emphasise the importance of this kind of wide representation. This can result in a large number of commissioners – perhaps 10 or 12. Various combinations can be found. The Northern Ireland Human Rights Commission has one full-time Chief Commissioner and 9 to 12 part-time Commissioners. The Republic of Ireland has one full-time commissioner and 14 part-time commissioners. New Zealand has a Chief Commissioner, a full-time Commissioner for race relations, a full-time commissioner for equal opportunities and five part-time commissioners.
97. While a large commission does have its attractions, this type of body could be seen as less responsive and payments to a large number of commissioners may put additional pressure on the budget. Furthermore, some institutions with a large number of Commissioners have found that the line between the role of commissioners and staff can become blurred and it can be difficult to maintain a common strategic direction.

98. Other commissions appoint commissioners to cover specific rights areas. Whilst this approach ensures good coverage of key areas, it may not be straightforward to decide on the appropriate subject areas and could again result in a large number of commissioners which could make decision making difficult.

99. Ensuring broad representation of civil society among the commissioners is not necessarily an overriding priority in Scotland. Unlike other states, the SCHR is not being established as part of wider initiatives to overcome deep discord between different communities, as in Northern Ireland or South Africa. The Scottish Executive’s priority is to ensure that the commissioners include suitably expert and experienced individuals who can devote their energies to improving human rights standards throughout Scotland, rather than representing the views of any given section of society. To that end, the model set out in the Bill provides for up to 3 commissioners, 1 Commissioner and up to 2 Deputy Commissioners, which will be enough to allow for some diversity in the appointments, but small enough to ensure effective decision-making and action.

Consultation

100. This was one of the areas of greatest dissent in the responses to the second consultation. Two fifths of the consultees agreed with the approach described in the consultation; the same number disagreed, offering alternative models and generally arguing for more part-time commissioners; and the remaining fifth said that they did not know whether the proposed approach was preferable or not.

101. Those who favoured having three or four full-time commissioners usually did so on the grounds that a small number of commissioners would be more likely to facilitate consistent decision-making and would be logistically more practicable.

102. A similar proportion of respondents, from across the board of types of organisations, recommended a range of different models, many opting for a larger number of part-time commissioners. Doubt about whether three of four full-time commissioners would serve the aim of being representative of Scottish society was raised repeatedly.

103. However, no single suggested approach recurred across the responses as a predominant, favoured model. Suggestions included:

- a single, full-time chief commissioner and 8 to 12 part-time commissioners;
- a full-time chief commissioner with 2 full-time deputies and up to 6 part-time commissioners; or
- 4 full-time commissioners and up to 20 lay commissioners who would receive only expenses.
104. Representatives from the academic and legal sector, professional bodies, and local government were amongst those who advocated a flexible approach in deciding on Commissioner numbers. Many thought that a mix of full-time and part-time individuals would be apt, depending on the priorities set by the SCHR, the type of applications received, and the way in which the SCHR’s role could evolve over time.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT, ETC**

**Equal opportunities**

105. The Bill will create a Commissioner with responsibility for actively promoting a culture of mutual respect for human rights. The Commissioner’s activity will help to improve the delivery of public services in a way that ensures that people are treated with the respect they deserve, regardless of their gender, race, religion, age, disability or sexual orientation. This will be particularly beneficial for those in society who are most vulnerable or disadvantaged.

106. A large number of equality organisations responded to the Executive’s consultations on the proposals to create a human rights commission. These included Age Concern Scotland, Children 1st, Children in Scotland, Disability Agenda, the Disability Rights Commission, Scottish Ethnic Minorities Research Unit, the Equal Opportunities Commission, Help the Aged, HIV Scotland, the National Autistic Society, Save the Children, the Scottish Association for Mental Health, Stonewall Scotland and Youthlink Scotland.

107. The majority of these groups supported the proposal to establish a human rights commission in Scotland, and most broadly agreed with the proposals that were set out in the consultation papers. Many useful comments were made which have been considered by the Executive in drafting the Bill.

**Human rights**

108. The Scottish Commissioner for Human Rights will be a public authority for the purposes of the Human Rights Act 1998. The Executive is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights.

109. The primary duty of the SCHR is to encourage best practice and compliance with human rights among public authorities in Scotland. Particular emphasis is placed on the importance of the obligation on public authorities to comply with the terms of ECHR under the Human Rights Act 1998. However, the Bill also includes other international human rights instruments which the UK has ratified in the SCHR’s remit. This will allow the SCHR to draw on wider sources of human rights standards and practice in fulfilling his or her functions.

**Island communities**

110. There are no apparent implications for island communities.
Local government

111. No additional duties will be placed on local government by this Bill. Under the terms of the Human Rights Act 1998 all public authorities are required to comply with ECHR in everything that they do. The SCHR will be able to offer advice and guidance to local authorities on how best to ensure compliance with human rights legislation. This may result in local authorities being less susceptible to human rights challenges, although it is also possible that increased public awareness of human rights as a result of the SCHR’s activities could lead to an increase in human rights cases.

Sustainable development

112. The Bill has no implications for sustainable development.
This document relates to the Scottish Commissioner for Human Rights Bill (SP Bill 48) as introduced in the Scottish Parliament on 7 October 2005

SCOTTISH COMMISSIONER FOR HUMAN RIGHTS BILL

POLICY MEMORANDUM


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