

Justice Committee

Police and Fire Reform (Scotland) Bill

Written submission from the Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission is the national human rights institution (NHRI) for Scotland with a mandate to promote and protect human rights for everyone in Scotland. The Commission is one of three NHRIs in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission. In June 2010 the Commission was accredited with “A” status by the International Coordinating Committee of NHRIs and in May 2011 the Commission was elected to chair the European Group of NHRIs.

I. Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit comments to the Justice Committee on the Police and Fire Reform (Scotland) Bill (the Bill).

As stated in previous submissions,¹ the Commission believes that the development of a single police force and oversight structures in Scotland is a unique opportunity to embed human rights into the new police structure to better ensure that the police comply with their obligations under section 6 of the Human Rights Act 1998.² The Commission agrees with the overall purpose of the Bill which is to create a modern, statutory framework for policing in Scotland with appropriate accountability arrangements.

In this submission the Commission will focus on the scrutiny and oversight arrangements proposed in the Bill, in particular the overarching ethical framework, the mechanisms for police complaints and investigations and the oversight role of the new Police Authority. In line with our general duty, the Commission will highlight examples of best practice and provide recommendations for strengthening the framework of police accountability in Scotland.³

2. Relevant human rights principles

There are a range of international Conventions and Codes which recognise that the primary purpose of policing includes the protection of human rights, for example:

- Article 2 of the United Nations Code of Conduct for Law Enforcement

¹ Letter to Cabinet Secretary for Justice on the Single Police Service for Scotland, 31 October 2011.

² Section 6 of the Human Rights Act 1998, requires all public authorities – including the police – to act in a way which is compatible with the individual rights and freedoms contained in the European Convention on Human Rights (ECHR).

³ The Commission acknowledges the contributions from Jane Gordon (former Human Rights Advisor for the Northern Ireland Policing Board) in informing this submission.

Officials⁴ states that in the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.

- The European Code of Police Ethics 2001 states that the main purposes of the police in a democratic society governed by the rule of law includes the requirement to protect and respect the individual's fundamental rights and freedoms as enshrined, in particular, in the European Convention on Human Rights (ECHR).⁵
- The Human Rights Act 1998 (HRA) requires all public authorities – including the police – to act in a way which is compatible with the individual rights and freedoms contained in the ECHR.⁶ Article 2 and 3 of the ECHR are particularly relevant in this context.

In relation to police accountability mechanisms, there are also a number of international instruments that recognise the importance of current monitoring and measurement based on human rights indicators against which police policies are assessed. The Commission would like to mention two:

1. The European Code of Police Ethics, which requires accountability mechanisms, based on communication and mutual understanding between the public and the police, to be promoted.⁷
2. The 2011 Laxenburg Declaration, which reiterates the need to ensure transparency, accessibility, accountability, legitimacy, impartiality and integrity in all systems created for police oversight and specifically promotes respect for the rule of law and human rights through and within all police oversight activities. It also calls for strong civil society participation in police oversight.⁸

In other jurisdictions the benefits of introducing human rights into every day policing have been highlighted. For example, the former Northern Ireland Police Ombudsman, Dame Nuala O'Loan, reported that adopting a human rights based approach to policing in Northern Ireland made a significant difference, observing that '[w]hen human rights are factored into everyday policing, things change':

People are now coming forward to help police in a way that has not happened in the past. Complaints of abuse of force, intimidation and harassment by police officers fell over seven years from 52% to 36% of complaints... People and police officers are safer, and suffer less injury. Part of this can be attributed to wider political events; however much of the

⁴ Adopted by General Assembly resolution 34/169 of 17 December 1979.

⁵ Appendix to Recommendation Rec (2001)10 on the European Code of Police Ethics adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies (the European Code of Police Ethics).

⁶ Human Rights Act 1998, s.6.

⁷ Recommendation Rec(2001)10 adopted by the Committee of Ministers on 19 September 2001 at the 765th meeting of the Ministers' Deputies.

⁸ Adopted by the key representatives of the national Police Oversight Bodies and national Anti-Corruption Authorities of the Member States of the Council of Europe and the European Union at the Eleventh Annual Professional Conference of the European Partners Against Corruption, including the EU's Anti-Corruption Contact-point Network, in Laxenburg, Austria, 22 to 25 November 2011.

*improvement is clearly the result of the introduction of human rights-compliant policing in a context of real leadership and of strong accountability mechanisms.*⁹

3. The Bill

3.1. Human rights reference

The Commission believes that a good starting point for new legislation creating a Police Service of Scotland, a Police Authority and oversight mechanisms is to ensure that human rights are explicitly articulated in the legislation. Regrettably, there are no references to human rights in the Bill despite the distinct human rights obligations for the police under the HRA. Moreover, the Scotland Act 1998 makes clear that any decisions by both the Scottish Government and the Scottish Parliament in relation to policing must be in compliance with Convention rights.

The Commission notes that Section 32 of the Bill includes a statement of policing principles to which the Scottish Ministers, the Police Authority and the Chief Constable must have regard when setting the strategic direction for the Police Service. The policing principles define the core statutory purpose of policing and are designed to embed a model of policing based on partnership between the police and local communities. These principles offer an opportunity to define the fundamental values and principles of the Scottish Police Service.¹⁰

Recommendation 1: *A commitment to upholding human rights should be explicitly included in the policing principles of the Scottish Police Service.*

3.2. Overarching ethical framework

Ethical standards are the cornerstone of good governance. The Commission is concerned that the Bill makes no provision for a code of ethics for the Scottish Police Service to inform and guide the conduct of police officers. The Commission is aware that the current Scottish Police Code of Ethical Practice refers to human rights and human dignity,¹¹ and therefore considers that a common ethical framework for the police service in Scotland should have statutory basis. The Police (Northern Ireland) Act 2000¹², which exemplifies best practice in this area, requires the Northern Ireland Policing Board (the Policing Board)¹³ to issue - following consultation- a code of ethics for the Police Service for Northern Ireland (PSNI) laying down standards of conduct and practice for police officers and making officers aware of the rights and obligations arising out of the ECHR.¹⁴ Police officers must be guided by the Code of

⁹ Dame Nuala O'Loan, *The Guardian, My Lessons for the Police*, 26 June 2009, available at: <http://www.guardian.co.uk/commentisfree/2009/jun/26/human-rights-police-northern-ireland>

¹⁰ The Police principles, Sec 37, will inform the strategic policing objectives and the delivery of the policing purpose and plan.

¹¹ See *Conduct During Working Hours* at

http://www.acpos.police.uk/Documents/Policies/PS_Code_of_Ethics_8July2009.pdf

¹² Section 52 of the Act.

¹³ Established under the Police (Northern Ireland) Act 2000, s.2.

¹⁴ This follows a recommendation by the Patten Report that a new Code of Ethics, integrating the European Convention on Human Rights into police practice, replaces the existing, largely procedural code: Patten Report, para.4.8.

Ethics in carrying out their duties.¹⁵ The Police Ombudsman also uses the Code of Ethics to classify complaints made against the police.¹⁶

It is important that the Police Service, the Police Authority and the Police Investigation and Review Commissioner share a common ethical base and that this is evident in every aspect of policing.¹⁷ A code of ethics provides a common ethical framework and is a valuable tool in to ensure that the police service complies with its obligations under the HRA.

Recommendation 2: *The Bill should include a provision requiring the Scottish Police Authority to issue a code of ethics for the Police Service laying down standards of conduct and practice for police officers based on human rights principles and ECHR obligations.*

3.3. Police oath

The Bill includes an updated declaration for constables upon appointment.¹⁸ The declaration affirms certain core principles and values which will guide them in the conduct of their duty. However, the new police oath makes no reference to human rights. In Northern Ireland, the PSNI attestation includes explicit references to “fundamental human rights and according equal respect to all individuals and their traditions and beliefs...according to law.”¹⁹

Recommendation 3: *The new police oath should contain an explicit commitment to upholding and protecting human rights and fundamental freedoms.*

3. 4 Police Authority

The Bill proposes to establish a body corporate to be known as the Scottish Police Authority, whose functions are listed in Section 2 of the Bill. Section 2(3) states that:

“The Authority must try to carry out its functions in a way which is proportionate, accountable and transparent and which is consistent with any principle of good governance which appears to it to constitute best practice.”
(emphasis added)

The Commission believes that the reference to ‘try’ should be deleted from this provision as the Police Authority, a public authority, is required to act in compliance with ECHR rights.

¹⁵ Police (Northern Ireland) Act 2000, s.32(4). The PSNI Code of Ethics has been fully integrated into the work of PSNI Professional Standards, incorporated within the new annual appraisal process and referenced in PSNI training materials. Further, all misconduct charges are worded to reflect the Code of Ethics and all outcomes of misconduct hearings are reported with reference to the specific article of the Code which was breached

¹⁶ See, for example, Northern Ireland Policing Board, Human Rights Annual Report 2008, pp.78-79.

¹⁷ Canada is in the process of adopting a Values and Ethics Code for the Public Sector. Once the Code is in force all federal public sector employees, including members of the Royal Canadian Mounted Police, will be required to adhere to the Code as a term and condition of employment.

¹⁸ Bill, s.10(1) “I do solemnly, sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable with fairness, integrity, diligence and impartiality, according to law.”

¹⁹ Police (Northern Ireland) Act 2000. s.38

Section 33 of the Bill provides that the Scottish Ministers may determine the strategic police priorities for the Police Authority -relating to the policing of Scotland or the carrying out of the Police Authority's functions-, having regard to the policing principles. Additionally, Section 5(1) of the Bill provides that the Police Authority must comply with any specific or general direction given by the Scottish Ministers. As a result, Scottish Ministers have a comprehensive power to direct the Police Authority. The Explanatory Notes to the Bill state that this is 'a normal feature of public bodies created by the Scottish Ministers and is used very rarely'.²⁰

It is the Commission's view that the Scottish Ministers should only retain the power to set principles and broad overall objectives for policing and the Policing Authority should have the independence and power to set its own strategic policing priorities. The power given to Scottish Ministers in the Bill may pose a significant challenge to the independence of the Police Authority and the integrity of the police accountability framework.

Recommendation 4: *The Police Authority should have the independence to set its own strategic policing priorities.*

Sections 17, 34, 35 and 40 of the Bill enumerate the oversight powers of the Police Authority. While the Bill strengthens the oversight role of the Police Authority in relation to the current arrangements, the powers are not comprehensive to secure full efficiency and effectiveness.

In Northern Ireland, the Policing Board has an explicit obligation to monitor the performance of the PSNI in complying with the HRA.²¹ The Policing Board's reports assess information from internal documents, external reports, operational observations, informed testimony, and commissioned surveys covering every aspect of policing where human rights are involved. The reports make recommendations about matters that require attention and track the implementation of recommendations made in previous annual reports.²² In consequence, the statutory oversight duties of the Northern Ireland Policing Board are more extensive than those proposed for the Scottish Police Authority.

It is important to note that the Northern Ireland Policing Board's human rights monitoring process has been defined as 'a model for the evaluation of the human rights performance of a police service.'²³ Subsequently, the statutory duty to monitor the performance of the police in complying with the HRA was extended to all police authorities in England and Wales.²⁴

²⁰ Explanatory Notes, para.88.

²¹ Police (Northern Ireland) Act 2000, s. 3(3)(b)(ii). In December 2003, the Policing Board published a human rights monitoring framework and The Board has published human rights annual reports assessing the compliance with the Human Rights Act since 2005.

²² Office of the Oversight Commissioner, Report 19, May 2007, p.23.

²³ Office of the Oversight Commissioner, Report 19, May 2007, p.22.

²⁴ Pursuant to the Police Authorities (Particular Functions and Transitional Provisions) Order 2008 which came into force on 14 March 2008.

Recommendation 5: *The Bill should include a provision requiring the Scottish Police Authority to monitor the performance of the Police Service in complying with the HRA.*

In addition, the Northern Ireland Policing Board has a power to require the Chief Constable to report on any policing matter relating to the performance of his functions or those of the police service²⁵ and the related power to order an inquiry into any matter upon which it has received a report if it considers the matter, or any related matter in the report, is grave or there are exceptional circumstances.²⁶ The power is circumscribed by the ability of the Chief Constable to refer to the Secretary of State the Board's request for a report or proposal for an inquiry on the grounds that the request or proposal concerns national security, sensitive personal matters, ongoing court cases, or matters which would prejudice the prevention or detection of crime.²⁷ In these cases, the Secretary of State is required to make a determination, within 30 days, whether the Chief Constable should provide a report to the Board or whether the Board should conduct the inquiry.

The Commission suggests that consideration should be given to proposing the inclusion of additional powers for the Police Authority to require the Chief Constable to report on any policing matter relating to the performance of his functions or those of the police service and to order an inquiry into any matter upon which it has received a report if it considers the matter, or any related matter in the report, is grave or there are exceptional circumstances.

3.5 Independent Complaints and Investigation Mechanism

The Commission has previously expressed that there are a number of principles that an effective accountability framework must consider. The key principles include: independence, transparency, competence, promptness, public scrutiny and victim participation.²⁸ This means that an effective accountability framework includes both internal accountability mechanisms, such as codes of conduct and professional standards as well as external accountability mechanisms, such as an independent police authority, an independent police complaints body and measures to facilitate public scrutiny. All of these mechanisms offer an important protection against impunity and ensure public confidence.²⁹

The Commission welcomes the establishment of the Police Investigations and Review Commissioner as a new independent investigation mechanism. The Commission considers that it is important in order to satisfy the procedural obligation under Articles 2 and Article 3 of the ECHR that the independence of the Police Investigations and Review Commissioner is strongly guarded and the Commissioner

²⁵ Police (Northern Ireland) Act 2000 s. 59.

²⁶ Police (NI) Act 2000 s.60.

²⁷ Police (Northern Ireland) Act 2000, s. 59(3).

²⁸ Letter to Cabinet Secretary for Justice, 31 October 2011.

²⁹ See also Opinion of the Commissioner for Human Rights concerning Independent and Effective Determination of Complaints against the Police, March 2009, CommDH(2009)4, 12 March 2009).

is given adequate investigatory powers of disclosure of all relevant documents and other materials and the attendance of individuals as witnesses.³⁰

In Northern Ireland, the Police Ombudsman has an additional power to make reports to the Chief Constable and the Policing Board on matters concerning police practices and policies which the Ombudsman identifies from investigations.³¹ This power has been used to positive effect by the Ombudsman, providing the opportunity to conduct more general reviews to remedy systemic or repeated failings.³² The Commission notes that this would be a useful additional tool for the Police Investigations and Review Commissioner.

Recommendation 6: *The Police Investigations and Review Commissioner should be given adequate investigatory powers of disclosure and attendance of witnesses.*

3. 6 Independent Custody Visiting

The Commission is a member of the UK's National Preventative Mechanism (NPM) designated in accordance with the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). The Commission welcomes *Chapter 16* of the Bill and in particular the specific reference to OPCAT in section 90 and the objective of establishing a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.³³

The placing of independent custody visiting in Scotland on a statutory footing in Section 91 is in line with OPCAT and best practice guidance, it also brings Scotland into line with the rest of the UK. This change would allow for independent custody visitors to be designated as part of the NPM.

The Commission welcomes the provisions in section 92 relating to the Subcommittee on the Prevention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. These provisions mirror those in OPCAT and are clear that the only time an objection may be made to a visit is in the very limited circumstances where there are urgent or compelling grounds of public safety, natural disaster or serious order that may prevent the visit.

The Commission is concerned, however, that at section 91(4) there is a much wider discretion given to refusing access to a detainee by independent custody visitors. Rather than setting out the grounds on the face of the legislation it will be for Scottish Ministers to determine the grounds upon which visits can be refused through issuing

³⁰ The Scottish Ministers may by regulations make provisions regarding the investigations by the Commissioner.

³¹ Police (Northern Ireland) Act 2000 s. 63.

³² See, for example, the Police Ombudsman's report, *Police Identification in Northern Ireland: A Report under section 60A of the Police (Northern Ireland) Act 2000*, March 2006. The Report made a number of recommendations related to improving police identification.

³³ OPCAT is an international human rights treaty which was ratified by the UK in 2003 and is designed to strengthen the protection of people deprived of their liberty. It acknowledges that such people are particularly vulnerable to ill-treatment, and advocates that efforts to end ill-treatment focus on prevention through a system of regular visits to places of detention.

guidance. While the guidance setting out the grounds for refusal will be laid before Parliament, it will not be subject to any form of Parliamentary scrutiny. It is essential that in defining these grounds that they are drawn as narrowly as possible to ensure that the objective of OPCAT is not undermined.

The Commission recommends that further consideration be given to how the grounds for refusal should be developed.

The determination in relation to whether the grounds under section 91(4) are met is currently delegated to a constable of the rank of inspector. Given that the purpose of independent custody visiting is to prevent torture and other cruel, inhuman or degrading treatment or punishment while in police custody, the Commission is concerned that the decision to refuse access is being taken at an operational level, without any provision for authorisation or oversight. This would give the authority, for refusal of a visit, to the constable who is directly responsible for the treatment of the detainee. In order to meet the objectives of OPCAT further consideration should be given to the procedure for refusing access.

In addition, the Commission notes that while there is specific reference to OPCAT in the Police and Fire Reform (Scotland) Bill the Scottish Government is currently proposing to abolish prison visiting committees in favour of some form of advocacy service. The Commission welcomes the creation of a new advocacy service for prisons, but considers that this should run alongside the human rights protections that are currently provided by prison visiting committees. The Commission welcomed the Scottish Parliament debate on this issue on 2 February 2012³⁴ to which the Commission submitted a briefing to all MSPs.³⁵ While the role of prison visiting committees does not come within the scope of this bill, the Commission considers it important that there is a consistent approach to OPCAT and the protection of the human rights of all of those deprived of their liberty in Scotland.

Moreover the Commission endorses the submission that the NPM has submitted to the Committee and reiterates that in implementing *Chapter 16*, regard should be had to OPCAT itself as well as guidelines on NPMs published by the SPT³⁶. In particular, governance arrangements for custody visiting in Scotland should ensure that independence, both actual and perceived, is maintained. The following points should be addressed to ensure the effective operation of independent custody visiting:

- custody visiting must be adequately resourced as required by Article 18 of OPCAT and set out in paragraph 11 of the SPT Guidelines;
- the terms of office of custody visitors should be specified (paragraph 9, SPT Guidelines);
- custody visiting should enjoy financial and operational autonomy (paragraph 12, SPT Guidelines);
- there should be a follow-up process between the police authorities and/or government and custody visitors to ensure recommendations are addressed (paragraph 13); and

³⁴ See <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=6780&mode=pdf>

³⁵ See <http://scottishhumanrights.com/news/latestnews/article/prisonvisiting2012>

³⁶ SPT, *Guidelines on national preventive mechanisms* CAT/OP/12/5 (9 December 2010), available at http://www2.ohchr.org/english/bodies/cat/opcat/docs/SPT_Guidelines_NPM_en.doc

- custody visitors should take into account human rights standards when carrying out visits (paragraph 36, SPT Guidelines).

4. Conclusion

The Commission believes that a focus on human rights needs to be integrated into and made explicit in the proposed Bill - human rights are not an additional benefit to policing, they are essential to achieving the fundamental purpose of the police. In this submission, the Commission makes six specific recommendations relative to the Bill – and its subsequent effective implementation. These are:

Recommendation 1: *A commitment to upholding human rights should be explicitly included in the policing principles of the Scottish Police Service.*

Recommendation 2: *The Bill should include a provision requiring the Scottish Police Authority to issue a code of ethics for the Police Service laying down standards of conduct and practice for police officers based on human rights principles and ECHR obligations.*

Recommendation 3: *The new police oath should contain an explicit commitment to upholding and protecting human rights and fundamental freedoms.*

Recommendation 4: *The Police Authority should have the independence to set its own strategic policing priorities.*

Recommendation 5: *The Bill should include a provision requiring the Scottish Police Authority to monitor the performance of the Police Service in complying with the HRA.*

Recommendation 6: *The Police Investigations and Review Commissioner should be given adequate investigatory powers of disclosure and attendance of witnesses.*

The Commission has also provided some specific suggestions that should be addressed to ensure the effective operation of independent custody visiting.

The Commission would be pleased to answer any queries that the Committee may have in relation to this policy submission and welcomes the opportunity to discuss this further.

Scottish Human Rights Commission
6 March 2012