The Scottish Human Rights Commission (the Commission) is a statutory body created by the Scottish Commission for Human Rights Act 2006. The Commission is a national human rights institution (NHRI) and is accredited with ‘A’ status by the International Co-ordinating Committee of NHRIs at the United Nations. The Commission is the Chair of the European Group of NHRIs. The Commission has general functions, including promoting human rights in Scotland, in particular to encourage best practice; monitoring of law policies and practices; conducting inquiries into the policies and practices of Scottish public authorities; intervening in civil proceedings and providing guidance, information and education.

1. Introduction

The Scotland Act 1998 is one of the most important pieces of legislation to have affected the Scottish legal system over the past half century and together with the Human Rights Act 1998 provides the modern constitutional framework for Scotland. The Scottish Human Rights Commission (the Commission) welcomes the opportunity to submit evidence to the new Scottish Parliament’s Scotland Bill Committee in respect of the proposed amendment to the Scotland Bill (the Bill), in particular clause 23 of the Bill (Implementation of international obligations).

The Commission considers that there may be more pragmatic ways to deal with the effective implementation of international obligations in Scotland than those proposed by the UK Government under clause 23 of the Bill. There are safeguards that could be put in place to ensure better ‘observance and implementation of international obligations’ by Scottish Ministers (and the Scottish Parliament). Introducing a provision that strengthens existing mechanisms for legislative scrutiny could help to ensure the effective implementation of the full spectrum of human rights in Scotland. This submission will focus on this matter.

It is important to note that while the Commission encourages the incorporation of existing UK international human rights obligations into the national legal order, a more immediate, practical and achievable approach to human rights protection and realisation is needed. For this, the Commission is currently undertaking a project to map the state of human rights in Scotland, which will lead to the development of the first Scotland’s National Action Plan for human rights.

In relation to the role of the UK Supreme Court in considering matters relating to the conduct of criminal proceedings in Scotland, the Commission has previously emphasised the importance of the existence of a right of appeal to the Supreme Court in all cases (including criminal cases) in which an issue of the interpretation and application of Convention rights arises.

The Supreme Court is best placed to provide consistent, authoritative interpretation of the European Convention on Human Rights, as it relates to “Convention rights” under domestic law. Such a right of appeal is vital in order to safeguard the

1 Clause 23 of the Scotland Bill (amended) enables UK ministers to intervene to implement international treaty obligations relating to devolved matters.
development of that consistent jurisprudence and to ensure equal levels of human rights protection across the jurisdictions. The key point at issue is the recognition of the need to have a consistent level of protection throughout the United Kingdom of fundamental human rights enshrined in international legal obligations.2

2. Strengthening Human Rights Scrutiny in the Legislative and Policy Process

2.1 General principles
Parliaments have a fundamental role to play in guaranteeing and protecting human rights at the national level.3 The role of Parliaments has increasingly been recognised as crucial in achieving a more effective national implementation of human rights. Traditionally this has been seen as the responsibility of the judiciary but this shared responsibility of all branches of the State is progressively being exercised by Parliaments. In the case of the Scottish Parliament this is most notable in the requirement that the Scottish Parliament should not act in a manner which is incompatible with Convention rights (and Community law).4

National Parliaments are also gradually playing a more proactive role in making human rights effective in the national legal system. To ensure respect and compliance with human rights throughout the legislative process the legislatures have developed scrutiny mechanisms. However, current practice demonstrates that modest systematic attention is given to human rights issues during the policy and legislative processes in Scotland at least in terms of public scrutiny by parliamentarians. There is a risk that legislative scrutiny can be carried out without adequate analysis of the human rights implications of proposed legislation.

There are a variety of parliamentary mechanisms which could strengthen the consideration of human rights issues during and after the legislative process. A parliamentary committee specially designated to address human rights issues and to make sure that human rights are treated as cross-cutting issues in parliament is one of those mechanisms.5 A good example of this is found in the Westminster Parliament where the Joint Committee of Human Rights scrutinises all Government Bills for their human rights implications and compatibility, reviews the UK's implementation of adverse human rights judgments and conducts inquiries into the human rights implications of UK policies. In the absence of such a human rights committee in Scotland there is a need to find other ways by which the Scottish Parliament engages with human rights issues in a proactive manner. In this

2 The Commission has made a number of submissions to the Advocate General during his original consultation on this issue. See our submission at http://scottishhumanrights.com/ourwork/publications.
3 Parliaments should exercise their oversight role to help ensure effective national implementation of the Convention, including the judgments of the European Court of Human Rights as well as taken into account other human rights obligations. The Parliamentary Assembly of the Council of Europe, for example, “invites all national parliaments to introduce specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries” PACE Resolution 1516 (2006), Implementation of judgments of the European Court of Human Rights, adopted by the Parliamentary Assembly on 2 October 2006, at para 22.1.
4 Section 29 Scotland Act 1998.
5 In South Africa for example members of parliament are included in the national delegation to the international monitoring mechanisms so that they can better understand the recommendations that are given by these bodies as well as ensuring that parliament plays an active role in ensuring that these recommendations are also followed up and implemented at the national level. Strengthening the Parliament as a Guardian of Human Rights, Seminar organised by the Inter-Parliamentary Union and the United Nations Development Programme with the support of the Office of the United Nations High Commissioner for Human Rights, Geneva, 15-17 March 2004.
submission, the Commission will focus on two: the introduction of human rights impact assessments and how to enhance the current model of legislative scrutiny.

2.2 The Current model

2.2.1. Pre-legislative scrutiny
Enhancing consideration of human rights issues during the policy and legislative processes that lead up to the enactment of legislation is an integral aspect of constitutional governance in a democratic society. In this respect, pre-legislative scrutiny plays an important role to refine and amend legislation before it is presented to Parliament. Efficient pre-legislative scrutiny could include, for example, consultations with experts and practitioners in policy areas of legislation or seeking advice from outside bodies on the detail of legislation which may not be available inside the Scottish Parliament/Government. Consulting on draft legislation has a number of benefits such as improving the quality of legislation, drawing the wider public more effectively into the Parliamentary process and reducing the need for substantial amendment during the passage of legislation. The Commission recommends greater pre-legislative consultation and engagement so that some of the potential problems with the draft legislation could be ironed out at an earlier stage.

2.2.2. Legislative scrutiny
The Commission is aware of the current mechanism for legislative scrutiny under the role of Scottish Ministers, the Presiding Officer and the Scottish Law Officers. It considers that the current mechanisms can be strengthened so as to ensure a more transparent, effective and systematic protection of human rights by ensuring that all relevant information is presented to the decision maker and full scrutiny is undertaken. This would assist parliamentarians to better analyse human rights issues and hold the government to account. It would also help to improve a more collaborative and evidence-based approach to the legislative process as well as increasing the access to and influence of outside stakeholders. Three key concerns are briefly explored below.

First, the current provisions do not require the Presiding Officer to provide reasons why she considers that a Bill would be within the legislative competence of the Parliament. The Commission considers that the legislative process should be as open and transparent as possible. The quality and quantity of information available to members of Committees and the public is vital for the effective protection of human rights. The Presiding Officer should therefore be required to give reasons for

---

6 The Select Committee on Modernisation of the House of Commons found that “Parliamentary scrutiny at the pre-legislative stage can play an important role in improving the law, even where there has already been lengthy and extensive external consultation by Government.” The Legislative Process. House of Commons. First Report 2005-6. Published on September 2006 p.13 available at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmmodern/1097/1097.pdf
7 Ibid
a positive statement of legislative competence as well as for a negative one.\footnote{11 Rule 9.3 Standing Orders of the Scottish Parliament, 4th Edition, 2011} Similarly, the Law Society of Scotland has argued:

\begin{quote}
\textit{“for greater transparency and detail in the giving of reasons – especially by the Presiding Officer – for making a statement that a Bill is within legislative competence. Fuller reasons have the potential to inform public debate about the powers of the Scottish Parliament and the appropriateness of proposed legislation.”}\footnote{12 SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND to the Scottish Parliament’s Scotland Committee available at \url{http://www.scottish.parliament.uk/s3/committees/scotBill/documents/69.LawSocietyofScotland.pdf}}
\end{quote}

Second, legislative amendments introduced during stages 2 and 3 of proposed legislation are not subject to a legislative competence statement. While a Bill on introduction is accompanied by a written statement which states that its provisions would be within the legislative competence of the Parliament, after stage 1 there is no analogous procedure. It is important to note that a Bill can be significantly amended during the legislative process. The Commission considers therefore that the scrutiny given to proposed legislation during the Committee Stages of the Bill could also be strengthened. The Commission recommends that any amendments ought to be subject to a statement of legislative competence.

Third, the Commission is concerned that there has in the past been unnecessary resort to emergency procedure which has reduced the possibility of adequate scrutiny of the compliance of legislation with human rights. For example, the Commission recently expressed concerns about the use of emergency legislation procedures in relation to the Criminal Procedure (Legal Assistance, Detention and Appeals) Scotland Bill in which there was little debate and scrutiny.\footnote{13 For the full content of this letter see \url{http://www.scottishhumanrights.com/news/latestnews/article/cadderlegislationcomment}} In this context, legislative scrutiny also plays a key role, although as always this requires parliamentarians to be fully informed of the human rights implications of the proposed legislation. The Commission recommends that, other than in exceptional circumstances which need to be more fully defined, subject to a higher threshold test than at present and so which properly justify the use of emergency procedures, legislation should be considered under normal parliamentary procedure with full scrutiny.

2.2. 3. Post-enactment scrutiny

The Commission would like to stress the potential benefits of greater post-legislative scrutiny and the inadequate and unsystematic nature of the scrutiny currently carried out. The purpose of post-legislative scrutiny is to address the effects of the legislation in terms of whether the intended policy objectives have been met by the legislation and, if so, how effectively.\footnote{14 Post-legislative Scrutiny – The Government’s Approach. Presented to Parliament by the Lord Privy Seal, Leader of the House of Commons and Minister for Women and Equality, March 2008.} In other words, how the legislation is working out in practice. In the context of emergency procedure, the Hansard Society has
argued that "emergency legislation should automatically be subject to post-legislative review".\textsuperscript{15}

A more systematic post-legislative scrutiny can also improve the focus on implementation of policy aims and identify the good practice so that lessons may be drawn from the successes and failures revealed by the scrutiny work.\textsuperscript{16}

2.3. Human Rights Impact Assessments (HRIA)

The Commission considers that scrutiny mechanisms in the process leading to the enactment of legislation should not be the single existing rights-protecting machinery in the constitutional governance of Scotland. A useful model for strengthening the work already performed by the Scottish Parliament is the introduction and implementation of HRIA for legislation.

HRIA is defined as “a means of either ensuring the human rights implications of a policy are considered when that policy is being developed (ex ante); or of assessing the impact of policy or practice on the rights of those affected once the policy is implemented (ex post).”\textsuperscript{17} The Commission is currently developing and seeking to pilot HRIA guidance to public authorities. HRIA will draw on internationally agreed definitions of human rights as set out in various international conventions and/or domestic law (i.e. Human Rights Act 1998). The aim of a HRIA, in this specific context, would be to assess legislation and to systematically integrate consideration of human rights impacts into the legislative cycle.

While there is some practice in the use of HRIA in relation to policy in the UK\textsuperscript{18} there is however very little practice in their use in relation to the passage of legislation.\textsuperscript{19} HRIA can take a variety of forms and can be integrated with other impact assessments which weigh up the various impacts of the Bill. For example, the EU Commission has adopted a model of integrated impact assessment (IIA) to assess its policy-making and formulation of legislative proposals. The integrated model includes assessment of economic, environmental and social impacts.\textsuperscript{20}

HRIA can also be developed in advance by the Government departments and agencies prior to introducing a legislative initiative into the Scottish Parliament. In this way, the work of the Committees can be robustly and systematically informed of likely human rights impact of the proposed bill. HRIA would accompany and supplement the existing competence statements with a reasoned analysis of the impact of proposed legislation on human rights. HRIA would not only provide a legal analysis of the human rights impact of a specific piece of legislation, but would also

\textsuperscript{15} In evidence to House of Lords’ Constitution Committee Fast-track Legislation: Constitutional Implications and Safeguards, printed 17 June 2009, pp 4, 6-7.
\textsuperscript{16} Ibid.
\textsuperscript{19} In 2008, The Scotland’s Commissioner for Children and Young People (SCCYP) completed a full assessment of the Vulnerable Groups (Scotland) Bill.
\textsuperscript{20} Ibid, p. 35
help Parliamentarians to consider the social-impact of the Government’s legislative proposals. The Commission recommends the development of HRIA as vital part of the process of parliamentary scrutiny.

An additional virtue of HRIA is that they can give a post-enactment review and evaluation of the operation of passed laws. This has not been explored extensively in Scotland or the UK, but will provide a key mechanism to assess the policy objectives, practices and outcomes of passed legislation as well as contributing to the development of a ‘culture of human rights’.

3. Conclusion

The Scotland Act and the Human Rights Act both brought about major constitutional changes which affect how public administration needs to engage with human rights. The Scotland Bill will further develop the constitutional framework of Scotland. In this response the Commission suggests a number of practical ways to ensure better ‘observance and implementation of international obligations’ by Scottish Ministers. The two proposals in conjunction have the potential to provide an additional layer of scrutiny to legislation and implementation of policy, at a timely point in the current constitutional journey of Scotland.

There are many advantages of strengthening the existing mechanisms for human rights scrutiny in the legislative and policy processes: it will formalise and integrate human rights analysis to ensure that parliamentarians have the adequate amount and quality of information for decision-making; it will reduce the need for substantial amendment during the legislative process at the Committee stages; it will draw the wider public more effectively into the Parliamentary process and it will reduce the burden of ensuring human rights compliance, which currently rests in practice with the courts.

The Scottish Human Rights Commission
6 September 2011

---