



The Scottish
Human Rights
Commission

Consultation Paper



SCOTTISH EXECUTIVE

Making it work together

Foreword

Deputy First Minister and Minister for Justice



I am delighted to publish the Scottish Executive's detailed proposals for a Scottish Human Rights Commission.

Human rights are one of the fundamental building blocks of our society. They are important because they represent a set of common values we can all understand, support and believe in. They apply equally to all of us without distinction and regardless of our personal beliefs, politics, culture or religion.

The Scottish Human Rights Commission has the capacity to make a difference to everyone living in Scotland now and in the future by helping to develop a culture of human rights through both promotion and protection of our rights.

I believe that strengthening our support for human rights through the establishment of a Scottish Human Rights Commission will be an important contribution to a modern Scotland that embraces and celebrates many different cultures. Scotland can also take its place alongside many other countries worldwide who have established successful and respected Human Rights Commissions.

However, I also believe that a successful Human Rights Commission has to be open and accessible to the people of Scotland. So it is very important that we have your views before we go forward.

I hope you will take some time to look at these proposals and look forward to hearing from you.

A handwritten signature in black ink that reads "Jim Wallace". The signature is written in a cursive style and is underlined with a single horizontal stroke.

Jim Wallace MSP

Introduction

Human rights are important to everyone living in Scotland today.

Each of us is entitled to have our basic human rights respected, but equally, we must respect the rights of others. Human rights are those rights which could be described as the most basic and fundamental values on which our society has been built - the rights we all take for granted. This includes things like:

- **the right to life**
- **the right to freely express your views**
- **the right to respect for your private and family life**

Human rights have relevance in many areas of our lives. They also apply equally to everyone in Scotland - you have rights because you are entitled to them as a human being, regardless of your personal circumstances, beliefs, religion or culture. Human rights are therefore something on which we can all find common ground - we should all be able to believe in, rely upon and exercise our rights and responsibilities.

The European Convention on Human Rights (ECHR), several United Nations (UN) Conventions and other international instruments exist to recognise and reinforce our basic human rights and to provide a framework within which governments must act. The ECHR has been in existence since the 1950s, but has been given further force in the UK by virtue of the Human Rights Act 1998 and the Scotland Act 1998.

The Scotland Act places certain requirements on Scottish Ministers and the Scottish Parliament to ensure that they act in accordance with the 'Convention rights' i.e. those rights drawn from certain articles of the ECHR. Under the Human Rights Act, all public authorities in the UK must act in accordance with the Convention rights in everything they do. These statutes provide a framework within which Ministers, the Parliament and public authorities must operate in conducting their activities, the aim of which is to ensure that our human rights are properly protected and that we are able to claim the protection of the 'Convention rights' in our own national courts. In relation to devolved issues, human rights points taken against the Executive have been considered in the Scottish courts since the Scotland Act took effect in May 1999. Human rights cases against other public authorities became competent with the commencement of the Human Rights Act in October 2000.

Before you can claim the protection of your rights, you need to know what they are and how they apply to you.

Following a consultation exercise in 2001, the Scottish Executive announced on 10 December 2001 that we would establish an independent and statutory Scottish Human Rights Commission (the Commission). This means that the Commission would require to be established by legislation. This will be a matter for decision by a future administration for their legislative programme in the next Parliament after the election.

The Scottish Executive believes that this new body will be a key means to ensure that human rights are protected in Scotland and will also help to develop a 'culture' of human rights. By promoting human rights, the Commission will work to ensure that you are more aware of your rights in the future and that you understand how they apply to you and to your family.

The first consultation informed the decisions about what the key functions of the Commission should be.

Those functions are as follows:

- **Promotion, education and awareness-raising**
- **Guidance to public authorities**
- **Advising the Scottish Parliament on legislation after introduction**
- **General monitoring and reporting in relation to law and practice**
- **Investigating and reporting on generic or sectoral human rights issues in relation to public policy**

This consultation is seeking views on some more detailed issues in relation to the Scottish Human Rights Commission.

The paper has three main parts:

- A - The Remit of the Commission;**
- B - The Functions of the Commission;**
- C - The Structure of the Commission.**

The paper addresses each key issue in turn, sets out the options and states the Executive's preferred approach. Each section finishes by seeking 'Your View' on specific issues.

In considering the options and deciding on a preferred approach the Executive has considered the following factors:

- **Responses to the first consultation paper**
- **The views produced by the Scottish Human Rights Forum**
- **International guidance including:**
 - **The United Nations ‘Paris Principles’ - guidance drawn up by the United Nations on national human rights institutions**
 - **The Commonwealth Secretariat’s guidance on national human rights institutions - best practice guidance drawn up by an expert group representing all regions of the Commonwealth**
- **International examples of human rights institutions**
- **Examples of similar Scottish bodies**
- **The appropriate way forward for Scottish circumstances**

Scottish Executive officials have also met with a range of interested parties in formulating our proposals:

- **The Scottish Human Rights Forum (incorporating a wide range of interested organisations from the public and voluntary sectors)**
- **The Human Rights and Equality Unit, Northern Ireland Office and their counterparts in the then devolved authority in Northern Ireland**
- **Officials from the government of the Republic of Ireland (the Department of Foreign Affairs and the Department of Justice)**
- **Commissioners, Irish Human Rights Commission**
- **Chief Commissioner and Chief Executive, Northern Ireland Human Rights Commission**
- **Human Rights Policy Department, Foreign and Commonwealth Office**
- **Human Rights Unit, Lord Chancellor’s Department**
- **Brian Burdekin, Special Advisor on National Institutions to the United Nations High Commissioner for Human Rights**
- **Officials from the New Zealand Human Rights Commission**
- **The Institute for Public Policy Research (IPPR)**
- **The Scottish Public Services Ombudsman**
- **The Scottish Prison Complaints Commissioner**

The UK Government is currently consulting on options for the structure of the UK’s equality machinery in the consultation paper “Equality and Diversity: Making it happen”. The paper notes the links between institutional support for equality and for human rights. There will need to be consideration in due course of the relationship between any new equality machinery and the Scottish Human Rights Commission.

We hope that you find this paper helpful and informative. Your views will be important in shaping the Executive’s policy and helping to develop a body which can provide an effective range of services to people living in Scotland.

Responses

You are invited to respond in writing, and to make any other points you consider relevant, to:

**The Scottish Human Rights Commission Consultation
Human Rights & EU Co-ordination Unit
Scottish Executive Justice Department
2nd Floor West
St Andrew's House
Regent Road
Edinburgh
EH1 3DG**

Fax (0131) 244 8325

E-mail - humanrights@scotland.gsi.gov.uk

Please reply by Friday 6 June 2003

For further information, or if you would like this document in another format or language, please contact Kelly Young. We will try to accommodate your needs.

Tel - (0131) 244 5733

E-mail - humanrights@scotland.gsi.gov.uk

Or consult our website <http://www.scotland.gov.uk>

Copies of responses received will, as is normal practice, be made available to others on request, unless respondents indicate that all or part of their response is confidential. In the latter case, confidentiality will be strictly respected.

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PART A - THE REMIT OF THE COMMISSION

1

The Devolved Remit

The Scottish Executive has already announced that the Scottish Human Rights Commission will be a devolved body. This means that the Commission will not deal with those issues which are reserved to the UK Parliament and UK Ministers. Decisions on the establishment of the Scottish Human Rights Commission can therefore be made by Scottish Ministers and the Scottish Parliament.

The exact nature of the Commission's devolved responsibilities will have to be clearly defined in legislation. We think that one potential way forward would be for the Commission to draw the definition of its devolved remit from the Scotland Act. This would distinguish between reserved and devolved issues and reflect the transfer of responsibility for observing and implementing international human rights obligations (relating to devolved matters) to Scottish Ministers.

The Scottish Commission would not have a formal relationship with Westminster or with UK Ministers. However, committees at the Westminster Parliament have power to call any body or person in the UK to give evidence. This extends to devolved bodies and will extend to the Scottish Human Rights Commission.

We also envisage that it should be possible for the Commission to establish an informal relationship (limited to devolved matters) with UK Departments, for example with the Lord Chancellor's Department (LCD) and the Foreign and Commonwealth Office (FCO). This might be relevant:

- **Where the LCD seeks comments on draft reports to bodies like the UN on the UK's compliance with international obligations;**
- **Where the FCO seeks comments on the UK's position on human rights. This could include issues in various international fora e.g. the European Union, the Commonwealth and the UN;**
- **Where the LCD seeks comments on the UK's general position on international human rights instruments;**
- **Where a Whitehall Department is conducting a consultation exercise on a change to UK law on a reserved issue that would affect human rights in Scotland.**

2 International Human Rights Instruments

The Scottish Executive has already announced that the Commission will have a remit covering the full range of international human rights instruments. However, we need to consider whether this is appropriate for all of the Commission's key functions.

In addition to the ECHR, the UK is party to a wide range of other international human rights instruments including various UN Conventions and the EU Charter of Fundamental Rights. Although these instruments have not been given further force in the UK (as the ECHR has), the UK is still bound by them.

Under the Scotland Act, Scottish Ministers are responsible for observing and implementing international human rights obligations (relating to devolved matters). In addition, it is open to the Committees at the Scottish Parliament to call the Executive to account on observance and implementation of these obligations.

To reflect the binding nature of international human rights agreements and to reflect the position under the Scotland Act, we believe that it is appropriate for the Commission's remit in relation to international human rights instruments to extend to all of its key functions. Within this remit it should be for the Commission to determine its priorities. In the short term, it is more likely that there would be a focus on the ECHR. However, it will be open to the Commission to do the following:

- **To hold Scottish Ministers to account by monitoring or investigating compliance with international human rights instruments and publishing its reports and recommendations;**
- **To offer guidance to public authorities in Scotland on other human rights instruments, in addition to the European Convention on Human Rights and the Human Rights Act;**
- **To offer advice and information to MSPs;**
- **To promote and raise awareness of a range of international instruments in Scotland.**

3 Children

The Scottish Parliament's Education, Culture and Sport Committee conducted an investigation into whether a Commissioner for Children and Young People should be established in Scotland. A Bill was subsequently introduced into the Scottish Parliament on 4 December 2002. We have considered the implications for a Scottish Human Rights Commission if a Children's Commissioner were to be established.

One option would simply be to remove children from the remit of the Human Rights Commission. We are not in favour of this, since we feel it is incompatible with a Commission having a broad remit. Excluding children could also lead to gaps in the protection of the rights of children who are included not just in the terms of the UN Convention on the Rights of the Child but also in other international instruments. Alternatively, we could consider whether it would be possible to insert wording into draft legislation which would help to establish the boundaries between the two bodies.

It will be equally important, however, to ensure that the two bodies can work together in practice. We would expect a **memorandum of understanding** to be drawn up covering the issues where both bodies might have an interest. We also feel that it would be sensible for both bodies to consider the advantages of co-location and the potential for sharing resources that this might bring.

Preferred Approach

- **The Commission should have a formal relationship only with Scottish Ministers and the Scottish Parliament, reflecting its devolved remit. However, it should be able to develop an informal relationship with UK Departments where appropriate;**
- **The Commission's remit in relation to each of its key functions should extend to the full range of international human rights instruments but it would be for the Commission to establish its own priorities within this remit;**
- **Children should not be specifically excluded from the Commission's remit but the Commission would be expected to establish workable practical arrangements with a Commissioner for Children and Young People should one be established. This should include considering whether there is scope for co-location and sharing resources.**

Remit

Your View

- Is it appropriate for the Commission to have the flexibility to establish an informal relationship with UK Departments?
- Should the Commission's remit in relation to each of its key functions extend to the full range of international human rights instruments? This means that promotional, guidance, monitoring and investigatory activities could be carried out in relation to the range of instruments to which the UK is party.
- Should children be retained within the remit of the Commission provided workable practical arrangements could be established with the proposed Commissioner for Children and Young People? Should this be reflected in legislation?

PART B - THE FUNCTIONS OF THE COMMISSION

1

Promotion, education and awareness-raising

Promotion, education and awareness-raising of human rights issues will be a key means of developing a real and reliable human rights culture in Scotland

What does this function mean?

Promotion, education and awareness-raising means increasing general human rights awareness so that everyone is aware of their rights, their responsibilities and what human rights mean in practice in the context of day-to-day life in Scotland. The Scottish Executive believes that this function will play an essential role in developing a human rights culture.

Many international human rights commissions contain a clause in their legislation to ensure effective promotion and education. The Commonwealth guidelines for national human rights institutions state that the promotion of rights should be a key role for a human rights commission. A human rights commission should have the power to provide information, education, strategic advice and training on human rights issues. Developing this function is in keeping with international standards.

How this function might work

The Commission should be able to decide on its own workload and priorities. The Commission will have to work to ensure that all sections of the community are targeted in terms of promotion, education and awareness-raising. Although it will be for the Commission to decide on its workplan, we envisage that some or all of the following types of activities could be carried out under promotion, education and awareness-raising:

- **Running topic-based awareness-raising campaigns for members of the public (The New Zealand Human Rights Commission has run campaigns on racial harassment and sexual harassment. The Australian and Northern Ireland Human Rights Commissions have focused on campaigns for children and young people)**
- **Producing written guidance on human rights issues and maintaining a website**
- **Participating and speaking at key events**
- **Organising a major human rights conference**
- **Developing the Commission's library into a resource for lawyers, academics, researchers and members of the public**
- **Cultivating media interest in the impact of the Commission's promotional and education work**
- **Celebrating important human rights anniversaries**

Functions

- **Conducting human rights training**
- **Producing educational materials on human rights for schools and workplaces**
- **Engaging with schools to promote human rights projects**

Whilst the Commission should be in a position to undertake promotion, education and awareness-raising activities, it is possible that it may not have all the in-house expertise necessary to carry out every activity itself. The Commission will want to focus on areas where it perceives the greatest need. Some human rights commissions are able to commission work from other sources or to offer financial support to others who are promoting specialist human rights activities. The alternative would be to employ a greater number of staff who, between them, are able to provide all the expertise the Commission will need. In our view, it is unlikely that the Scottish Commission will be in this position. There may therefore be merit in giving the Commission the power to buy in expertise where it feels that is appropriate. This is also consistent with allowing the Commission to determine its own priorities.

Preferred Approach

- **The Commission should decide on its own workload and priorities;**
- **The Commission should be in a position not only to undertake promotion, education and awareness-raising activities but also to commission or offer financial support for such activities.**

Your View

- **Should the Commission be able to commission or offer financial support for promotion, education and awareness-raising activities where appropriate?**

2 Guidance to public authorities

Public authorities have specific duties under the Human Rights Act 1998. The Commission will be able to advise them of their responsibilities to ensure that they can meet these duties and therefore provide a better service to the public

What does this function mean?

Guidance to public authorities will be a function specific to the Scottish Human Rights Commission. This is not included in the functions of any other national human rights institution. It addresses obligations that public authorities have under the Human Rights Act 1998. Under that Act, it is unlawful for public authorities to act in a way which is incompatible with the Convention rights.

The Scottish Executive Central Research Unit conducted research in November 2001 on how Scottish public authorities had responded to their duties under the Human Rights Act. The research concluded that public authorities in many cases did not understand the Act or their responsibilities in relation to it and that a higher level of central information and guidance was necessary. Many of the respondents only had a partial knowledge of the Act. There was the perception that human rights correspond to the general principle of 'fair treatment' as opposed to specific knowledge of the Human Rights Act. The research indicated that more specialist work needed to be done with public authorities in order to clarify their duties and help to avoid the need for challenges in court. The inclusion of this function is therefore specific to Scotland, and is an important function of a body set up to fulfil the specific needs of Scottish people.

How this function might work

We believe that it is important that the Commission should be able to decide on and prioritise its own workload. However, within this function, the Commission could decide to carry out some of the following activities:

- **Running training courses for public authorities**
- **Issuing guidance on the definition of a public authority in light of human rights case law**
- **Running awareness-raising campaigns on particular issues**
- **Running a best practice forum for public authorities**
- **Running an advice line for public authorities on their duties under the Human Rights Act**

Functions

Public authorities should also be encouraged to audit their practices to ensure human rights compliance. The Commission could offer guidance on how to go about conducting an audit.

In accordance with our approach to the broader remit of the Commission, we feel that it is also important that this function covers 'human rights' in general and not just the Human Rights Act. This will allow the Commission to offer guidance and support in relation to a range of international human rights instruments. However, since the statutory duties of public bodies under the Human Rights Act are a particular concern and hold a special position, we consider that the Commission's statutory remit should focus in particular on the duties outlined in that Act.

Preferred Approach

- **Guidance to public authorities should cover 'human rights' in general and not just the Human Rights Act, in line with our general approach on remit;**
- **However, the statutory remit should focus in particular on the Human Rights Act.**

Your View

- **Do you agree that the statutory remit should specify that the guidance offered to public authorities should cover all international human rights instruments, but with a particular focus on the Human Rights Act?**

3

Advising the Scottish Parliament on legislation after introduction

The Commission, as an expert body, will be able to provide advice to the Scottish Parliament which should add to the effectiveness of human rights scrutiny during the passage of a bill

What does this function mean?

The Scottish Executive views providing advice to the Scottish Parliament on legislation after introduction as a key function of the Commission. Many international human rights commissions can advise their Parliaments on legislation.

There are effective and comprehensive mechanisms currently in place in Scotland to ensure that legislation complies with the human rights obligations enshrined in the Scotland Act. It is the formal responsibility of Scottish Ministers to certify that a Bill is within the competence of the Scottish Parliament (this includes compliance with the ECHR) at or before its introduction in the Scottish Parliament. The Presiding Officer of the Scottish Parliament is also required to give his view on whether a Bill is within competence. In addition, human rights points must be covered in the policy memorandum that accompanies all Executive Bills introduced to the Scottish Parliament. Moreover, the Advocate General, the Lord Advocate or the Attorney General may refer a bill to the Judicial Committee of the Privy Council for a decision on competence: so consideration of legislative competence does not end on introduction.

In accordance with the views already expressed by Ministers, this function is to be limited to advice on 'legislation after introduction' to preserve the existing arrangements for consideration of competence. We intend that this function should be clearly defined in legislation and should be sufficient to cover the following:

- **All 'Public Bills' - that is Executive, Member's and Committee Bills**
- **Scottish Statutory Instruments.**

How this function might work

We need to consider the mechanisms by which the Commission might offer advice to the Scottish Parliament. We present the Executive's views here to contribute to the discussion: however, the way forward would, of course, be a decision entirely for the Scottish Parliament to take once a Commission has been established. There are two main possibilities:

- **Establishing a specialist Human Rights Committee in the Scottish Parliament**
- **Lead Committee scrutiny at Stages 1 and 2**

One option would be to establish a separate Human Rights Committee in the Scottish Parliament to conduct human rights scrutiny and to have the primary relationship with the Commission. This committee might be similar in form to the Joint Committee on Human Rights (JCHR) at Westminster.

One potential advantage of a separate Human Rights Committee would be that there would be one point of contact for a Commission. The committee itself could also develop specialist skills. It might therefore be able to bring a strong focus to human rights work in the Scottish Parliament. However, setting up a Human Rights Committee would also have resource and staffing implications for the Scottish Parliament. Creating another committee could place undue pressure on staff and MSP resources. There is also the question of whether establishing such a committee might lead to duplication with the work of the Commission.

The majority of Bill scrutiny in the Scottish Parliament takes place in committees, with the general principles being considered at Stage 1 and detailed amendments considered at Stage 2. Lead committees currently consider human rights issues to some extent at Stage 1. This seems to be a logical point at which the Commission should provide advice. Advice given at Stage 1 would feed easily into the evidence the committee gathers for the Stage 1 report to the Scottish Parliament and would allow human rights consideration to take place early in the legislative process.

Although this is expected to be an important function for the Commission, the Scottish Executive does not envisage the Scottish Parliament adopting a practice of waiting for the Commission's comments before proceeding to the next stage of a Bill - the Commission would be expected to provide its advice on the general principles of the Bill at Stage 1. Whilst it will be open to the Commission, as it is to any other body, to comment on Stage 2 and 3 amendments, that should not in any way delay the progress of the Bill.

How legislation is brought to the Commission's attention

We have also considered how legislation should be brought to the Commission's attention. There are two options:

- **The Scottish Parliament could be asked to consider amending standing orders to include a new duty to send all legislation introduced to the Commission;**
- **The Commission could monitor legislation introduced as part of its own administrative procedures.**

The Northern Ireland Act conferred a statutory duty on the devolved Assembly¹ to refer all devolved legislation to the Northern Ireland Human Rights Commission for comment - the Commission then decides what to comment on. Something similar could be proposed for the Scottish Commission. This would require amendment to the standing orders of the Scottish Parliament and would be for the Parliament to decide. Creating a binding requirement is likely to mean that a greater proportion of the Commission's resources would be taken up in considering and then prioritising every piece of proposed legislation introduced to the Parliament. We feel that prioritising from the outset would be more effective and that the Commission should be able to decide on its own priorities. On balance we propose that the Commission should develop its own procedures to ensure that it monitors legislation as it is introduced.

Relationship with the Scottish Parliament

In keeping with the independence of the Commission, it should not be established as a Parliamentary 'advisory' body in the sense that this would imply some sort of different or exclusive relationship with the Scottish Parliament above that of any other body. The Commission should not be under the direction of the Parliament. In addition, Parliamentary committees should not be under any obligation to ask for or take into account advice given by the Commission.

Committees should certainly be encouraged to call for advice and evidence from the Commission when it is relevant. When a human rights issue arises, it is extremely likely that they will call on the Commission. In addition, we feel that it should be open to the Commission to provide evidence on legislation after introduction without any specific request from the Scottish Parliament. This is in keeping with the current arrangements in relation to proposed legislation. In practice, therefore, the Commission would be able to submit written evidence; could ask to submit oral evidence (but it would be for the Scottish Parliament to take the decision); and could be specifically invited to give evidence.

¹ The Secretary of State for Northern Ireland suspended the Northern Ireland Assembly and the Executive with effect from midnight on 14 October 2002.

Functions

As part of the Bill process, it seems likely that most contact would be with committees. However, individual MSPs should also be able to ask the Commission for advice as part of the Bill process e.g. in relation to an amendment they wish to put down at Stage 2 or Stage 3.

In addition to the Commission's relationship with the Scottish Parliament in respect of this function, we anticipate that the Commission should be able to engage at all levels with the Parliament. The Commission should be able to answer any query it receives from MSPs and the Scottish Parliament Information Centre (SPICe) researchers. This means that all levels of the Scottish Parliament should be able to treat the Commission as an expert body and request its advice, observations and evidence on human rights issues outwith the specific function of providing advice on legislation after introduction.

Preferred Approach

- **We are not in favour of asking the Scottish Parliament to consider establishing a separate Human Rights Committee;**
- **The Commission should put its own procedures in place to ensure that it is in a position to monitor legislation as it is introduced;**
- **The Commission should not act on the direction of the Parliament and there should be no duty on Scottish Parliament committees to ask for or to take the Commission's advice into account;**
- **MSPs should be able to treat the Commission as an expert body and request its advice, observations and evidence on human rights issues going beyond the specific function of providing advice on legislation after introduction.**

Your View

- **Do you agree that we should not ask the Scottish Parliament to consider establishing a separate Human Rights Committee?**
- **Do you agree that the Commission should monitor legislation introduced as part of its own administrative procedures?**
- **Do you agree that the Commission should not act on the direction of the Scottish Parliament?**
- **Do you agree that MSPs should be able to call on the Commission as a source of expert advice outside the confines of advising on legislation?**

4 General monitoring and reporting in relation to law and practice

The Commission can take proactive measures to review and assess law and practice and to publicise breaches of human rights

What does this function mean?

The Scottish Executive views general monitoring and reporting on law and practice as a key function for a Scottish Human Rights Commission. The power to monitor law and practice and publicise its findings will give the Commission more force.

The UN 'Paris Principles' and the 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 international human rights commissions.

The phrase 'law and practice' is clearly intended to cover existing pieces of legislation which are on the statute book and existing practices (which may be administrative or linked to legislation). Obviously existing law has already been through a rigorous process of scrutiny either in the UK Parliament or in the Scottish Parliament. In addition, the Executive has carried out a comprehensive audit of our law, practices and procedures. Nevertheless, the Commission may wish to consider human rights issues in relation to existing law and practice.

The monitoring role would also extend to policy proposals put forward by the Executive once these have been published. Comments might be made in response to publication of a consultation paper, draft legislation or an announcement. The Commission would be free to publish and discuss its comments, which would then be widely available.

How this function might work

We believe that it is important that the Commission should be able to decide on and prioritise its own workload. However, within this function, the Commission could decide to carry out some of the following activities:

- **Conducting an ongoing examination of key Scottish statutes for human rights compliance**
- **Monitoring key human rights cases and investigations**
- **Making submissions on international human rights instruments**
- **Conducting specific reviews into the human rights of certain vulnerable or disadvantaged classes of people**

Relationship with the Scottish Executive and the Scottish Parliament

Although it makes sense for the Scottish Commission to be in a position to offer advice, opinions and recommendations to the Executive and Parliament, this is not the same as acting as an 'advisory' body. We do not feel that it would be appropriate for the Commission to be under any obligation to monitor issues at the request of the Scottish Executive or the Scottish Parliament. It should be entirely for the Commission to decide how to fulfil this function. The Commission should have power to prepare, submit and publish its advice, reports, recommendations, opinions and proposals in whatever way it determines to be appropriate.

Equally, we do not see the Commission having any special relationship in terms of advising the Scottish Executive on developing policy. The Commission would be free to comment on proposals in the public domain. It would be for the Scottish Executive to decide in appropriate circumstances if the Commission could make an earlier contribution to policy development.

We have also considered whether there should be a statutory duty on Scottish Ministers to take the Commission's advice on law and practice into account. The Republic of Ireland Commission has taken this route. Scottish Ministers seek and receive advice from a variety of sources and a duty to accept advice from the Scottish Human Rights Commission would put it on a different footing to other organisations. Ministers should consider the advice of the Commission alongside other advice they receive. However, the Commission's position as an expert and independent body would mean that this advice should be given due weight.

Preferred Approach

- **The Commission should decide on its own priorities and workplan, producing reports on human rights activities which may be submitted to Scottish Ministers or to the Scottish Parliament, but not be under any obligation to monitor issues at the request of Scottish Ministers or the Scottish Parliament;**
- **The Commission should have power to prepare, submit and publish its advice, reports, recommendations, opinions and proposals in whatever way it determines to be appropriate;**
- **The Commission should have no special policy advisory role, but might be invited to contribute to the policy development process in appropriate circumstances in line with established procedures;**

Functions

- There should be no specific duty on Scottish Ministers to take the Commission's advice into account; however, there should be a close working relationship between the Commission and Ministers that will make this unnecessary in practice.

Your View

- Do you agree that the Commission should not be subject to direction from the Scottish Executive or Scottish Parliament in carrying out this function?
- Do you agree that the Commission should have no special policy advisory role but might be invited to contribute to the policy development process in appropriate circumstances in line with established procedures?
- Do you agree that Scottish Ministers should develop a close working relationship, which would give due weight to the Commission's views, but should not be under a statutory duty to take the Commission's advice into account?

5

Ability to investigate and report on generic or sectoral human rights issues in relation to public policy

By investigating and reporting the Commission can shine a spotlight on particular areas of policy which give rise to concern

What does this function mean?

Following the earlier consultation, the Executive has decided that the Commission will be able to investigate and report on generic or sectoral human rights issues in relation to public policy.

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.

The investigatory function goes much further than the general monitoring and reporting role. Investigations will 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. Investigations will necessarily be advertised and will be high profile, may involve evidence taking in public and will result in recommendations that are put firmly in the public domain.

Individual complaints v generic and sectoral issues

Ministers have already decided that the Scottish Commission will not be empowered to take on individual complaints. Although taking on individual cases can help to develop case law, we considered that the emphasis should be on building a human rights culture in Scotland.

A generic investigative role is directed at broader issues that may involve a larger number of people. For example:

- **The first investigation conducted by the Northern Ireland Human Rights Commission was "In Our Care: Promoting the Rights of Children in Custody".**

Functions

- **The Australian Human Rights and Equal Opportunity Commission has conducted an inquiry into rural and remote education.**

The Commission would not be able to support an individual in funding and bringing a case to court. However, the Commission may decide to investigate an area where a number of people have raised an issue and on which it can consider the broad issues as opposed to specific individual circumstances.

It is also important to bear in mind in this context that we propose that the Commission should be able to serve as an expert body advising MSPs and others.

How this function might work

In order to examine how this function might work we have considered:

- **How investigations are initiated**
- **Public and private bodies**
- **Relationship with existing bodies with investigatory powers**

We propose that the Commission should be able to initiate an investigation in response to an expression of concern raised with it or on its own initiative. This should not be done in response to formal requests from the Scottish Executive or the Scottish Parliament. In addition, in line with our approach to the monitoring role, there should be no duty on the Scottish Executive or Scottish Parliament to take the Commission's views into account: but these views would be expected and entitled to carry some weight.

Human rights instruments are directed at governments and public bodies: they do not apply to private bodies. However, we feel that the Commission should be able to offer guidance and awareness raising to private bodies as appropriate and this might be charged for. In addition, whilst wholly private bodies carrying out private functions would be excluded, private bodies carrying out public functions would fall within the Commission's remit.

The Scottish Executive does not want the Commission's remit to conflict with or duplicate the remit of existing bodies such as the Scottish Prison Complaints Commissioner and the Scottish Criminal Cases Review Commission. The appropriate wording will be thoroughly explored as part of the draft legislation process. However, the Commission would be expected to draw up a memorandum of understanding with other bodies and develop close working relationships to ensure there is no duplication of effort and to minimise potential conflict.

Powers to support the investigatory function

We have considered two issues:

- **Powers to access information**
- **Enforcement powers**

In order to develop the best model for Scotland, we have looked at international examples. There are four potential models:

- **Ability to conduct investigations but without special powers to support that function. The Northern Ireland Human Rights Commission follows this model.**
- **Wide powers to support an investigation i.e. power to require production of information, documents and testimony and in some cases to search, enter and remove items from premises but no power to enforce its findings. The Australian Commission follows this model. The new Irish Human Rights Commission has these powers and enforcement is through the courts who will make an order to enforce compliance and can award a fine or short prison sentence for non-compliance.**
- **Wide powers to investigate and, in addition, power to seek resolution by mediation, and power, where mediation fails, to refer complaints to a Human Rights Tribunal for resolution and awarding of a remedy. The Canadian Commission follows this model.**
- **Wide powers to investigate and, in addition, powers for the Commission itself to secure redress. The South African Commission has power to 'take steps to secure appropriate redress'. The Ugandan Commission, if satisfied that there has been an infringement, has power to order the release of a detained person, payment of compensation or any other legal redress.**

It is equally important to look at the powers that have been made available to other statutory bodies in the UK and particularly, in the Scottish context:

- **Two of the equality bodies (the Commission for Racial Equality and the Disability Rights Commission) can conduct investigations and obtain documents and evidence.**
- **The Public Services Ombudsman for Scotland has the same powers as the Court of Session regarding attendance and examination of witnesses and production of documents.**
- **The Scottish Parliamentary Standards Commissioner also has powers to call for documents and testimony to support an investigation which can be used in the same circumstances as the powers of the Scottish Parliament under section 23 of the Scotland Act.**

Functions

- **The Scottish Information Commissioner has wide powers to issue enforcement notices where a Scottish public authority has failed to comply with provisions in Part 1 of the Freedom of Information (Scotland) Act. This includes powers to enter and search premises.**

Access to Information

There are international precedents which point to giving the Commission some powers to access information. There are also some similarities between the role of a human rights commission and the role of existing commissioners and ombudsmen. In the broadest sense they are about an open, responsive and accountable Scotland.

One potential option for the Scottish Human Rights Commission would be to give it similar powers to those held by the Scottish Public Services Ombudsman to require the provision of information, documents and testimony. This model seems more relevant than the model used by the Parliamentary Standards Commissioner, which draws parallels to the Scottish Parliament's own powers. The Commission could also be given the ability, like the Ombudsman and the Scottish Information Commissioner, to apply to the Court of Session where a body refuses to comply with these provisions. This would ensure that enforcement of access is very much identified as a court function and the Commission does not appear to take on a 'court-like' role.

The alternative is not to give the Commission any special powers. If a Commission is a respected organisation it can publicise any refusal to co-operate with it. It could also be argued that giving the Commission additional powers would put it more in the position of a 'court-like' body and that this should be avoided. Moreover, such powers might be seen to bring the investigatory role more into conflict with the guidance role. On the other hand, this is not seen as inconsistent in the context of the Ombudsman or with the Scottish Information Commissioner, who has a duty to promote the Freedom of Information (Scotland) Act alongside extensive enforcement powers.

It might also be suggested that the Commission should not need any special powers following the passage of the Freedom of Information (Scotland) Act. That legislation applies to all information held by Scottish public authorities. However, the scope of that Act in relation to 'public authorities' is different to the definition of 'public authority' in the Human Rights Act. This could be problematic for a human rights commission whose investigatory role will be closely linked to the statutory duties on public bodies expressed in the Human Rights Act.

Functions

On balance, taking into account both international examples and the powers of existing Scottish bodies, we propose that the Commission should have powers of access to information and that those powers should be based on the powers given to the Scottish Public Services Ombudsman.

Enforcement

There is also the question of whether the Commission should have enforcement powers to back up the findings from its investigations. This means that the Commission could apply a sanction if, following a report of an investigation, the body concerned did not take action in relation to the Commission's recommendations.

There are only a couple of examples of other human rights commissions with enforcement powers and the UNHCR acknowledges that this is less common. Evidence given by the existing ombudsmen to the Scottish Parliament during the examination of the Scottish Public Services Ombudsman Act indicated that they did not think it was appropriate for an unelected body to have power to enforce decisions and this was a role for Scottish Parliament and the Scottish Executive. The Minister for Public Services also took this approach in relation to the Scottish Public Services Ombudsman. Enforcement powers could undermine the independence of the Commission and could be too closely identified with a 'court-like' role.

Of course, we do not want to establish a Commission whose advice is routinely ignored, but reasonable alternatives to enforcement do exist:

- **The Commission could be required to publish a report following each completed investigation;**
- **Bodies who have been investigated could be required to offer a written response to the Commission within a set time limit. Such responses could be made public;**
- **The Commission could be empowered to hold an investigation in public or in private, as it deems appropriate.**

We are in favour of these alternatives.

Preferred Approach

- **The Commission should be able to act in response to an expression of concern of contravention of human rights that has been raised with it or on its own initiative;**
- **The Commission should have powers of access to information based on the powers given to the Scottish Public Services Ombudsman. Those powers would be defined fully in legislation;**

Functions

- The Commission should not have enforcement powers;
- There should be a statutory requirement on the Commission to publish a report following each completed investigation;
- Bodies who have been investigated could be required to offer a written response to the Commission within a set time limit. Such responses could be made public;
- Investigations may be held in public or in private.

Your View

- Do you agree that the Commission should have access to information powers based on the powers given to the Scottish Public Services Ombudsman?
- Do you agree that the Commission should not have enforcement powers?
- Do you agree that, as an alternative to enforcement powers:
 - The Commission should publish a report following each investigation
 - Bodies investigated should offer a written response within a stipulated time limit
 - Investigations may be conducted in public or private?
- Do you have any suggestions for other alternatives to enforcement powers?

6

Relationship with the courts

The Commission could offer its expertise to the courts

What does this function mean?

Since the Scottish Commission will not be able to take on individual cases or complaints or to take test cases forward in its own name, we undertook to consider whether there would be any scope or merit in the Commission having a relationship with the courts.

The Commission might be able, through its expertise, to assist the courts in certain cases where human rights issues arose. It will be closely involved in examining human rights law as it develops in Scotland and it may be useful to the courts to have access to such expertise in those circumstances where this was seen to be helpful.

Where a court has an issue before it relating to human rights and takes the view that it would be useful to have background material or other information from the Commission, it could request this information in writing and might also request an oral intervention. This information would supplement information received by the court in the normal way and would not in any way be a substitute for submissions made by the parties to a process.

How this function might work

Amicus Curiae

The Commonwealth Guidance views national human rights bodies as performing a role complementary to that of the courts although the distinction between the two should be maintained. They should be accorded official status as a 'friend of the court' i.e. amicus curiae. The role of an amicus curiae is to assist the court and to address the court on issues which it requires to decide. The amicus curiae would not, however, represent the view of one or any party in a particular case.

The Australian Human Rights and Equal Opportunity Commission has the power to appear as amicus curiae but only in cases of unlawful discrimination. The Irish Human Rights Commission has power to act in an amicus curiae role expressly provided for in legislation. A court decision has recently confirmed that the Northern Ireland Human Rights Commission also has the power to take on this role (2002 UKHL25). The European Court of Human Rights has procedure which will allow third parties to make submissions to the court.

In Scotland the amicus curiae is not widely used and is restricted almost exclusively to situations where, in a particular case, either there is only

Functions

one party or one of the parties has failed to intervene. This happens most frequently in appeals in the Court of Session where one of the parties has lost interest and does not wish to pursue the case. This does not take place in criminal proceedings. A person acting in this capacity does not fulfil an advocacy role on behalf of any of the parties but presents legal arguments to the court to enable it to consider all the issues relevant to its decision.

Although the *amicus curiae* procedure is not often used in Scotland, the House of Lords has accepted that it is a way in which human rights issues can be brought to the court by a Human Rights Commission in appropriate cases. It is also recognised internationally and is used by the European Court of Human Rights.

However, we have to consider how this role would fit with Scotland's legal system.

Scope

In Scotland, the existing use of an *amicus curiae* in the Court of Session (for civil cases) may provide a model for its use in a wider range of civil cases. However, whilst a case can be made for giving the court power to invite the Commission to give views on civil cases, such a case is more difficult to make for criminal matters. There will always be at least two parties to a criminal prosecution, given the public interest in securing conviction for the commission of crimes and the justice interest on the part of the accused person in defending themselves against accusation. Human rights points have been and will be raised from time to time in criminal cases. However, experience since this became possible in Scotland in 1999 suggests that parties are willing and able to bring all relevant human rights issues before the court themselves. It is therefore less likely that it would be appropriate to call on the Commission.

In addition, this procedure might be considered out of place in an adversarial situation - the prosecutor in a criminal case is required to have regard to the public interest in a way that parties in a civil action are not. Commission intervention might also in some cases undermine the position of the accused, calling into question the overall fairness of the trial. In addition, an *amicus curiae* role may be perceived as association with an individual in accordance with whatever side of the argument a Commission appears to support and therefore too close to supporting an individual case.

For these reasons, we consider that if the Commission is to have a role, this should be restricted to civil matters.

If it is sensible to enable the courts to approach the Commission for assistance in civil cases, we need to consider which courts should be able to do this and how it can be achieved.

Functions

The most useful interventions can often be made at the appeal stage. Issues have been fully explored at first instance or earlier in the case if it has been a tribunal case. The Court of Session will then consider any human rights issues in depth and it is at this point that intervention by the Commission may be most useful. We therefore take the view that it would be most appropriate for this function to be exercisable only by the Court of Session in civil matters at the appeal stage. However this could also extend to a judicial review where a human rights issue has arisen.

Procedure

Given the way in which the amicus curiae procedure has operated in Scotland, we do not think this is necessarily the most appropriate procedure for Commission intervention.

In one sense the role of the Commission would be to act as an expert assessor. This would suggest that the court itself should take the initiative in inviting the Commission to assist it. It also suggests that this would be perceived quite clearly as a matter where the court was calling on the Commission as acting in the public interest, rather than on behalf of any particular party or to put arguments which would favour one party or another.

There are procedural rules in relation to judicial review in Scotland which could be adapted to cover this type of intervention, and we think this could be an appropriate way forward for the Scottish Human Rights Commission.

Preferred Approach

- **The Commission should be able to assist the court in Scotland;**
- **This should be restricted to civil matters in the Court of Session at appeal stage (and to judicial review where a human rights issue has arisen);**
- **The procedural arrangements should be similar to those for intervention in judicial review;**
- **The Commission should not become or represent any party to a case.**

Your View

- **Do you agree that the Commission should be able to assist the court in Scotland?**
- **Do you agree that the Commission could be invited to intervene by the Court of Session at appeal stage or in a judicial review?**

PART C - THE STRUCTURE OF THE COMMISSION

1

Accountability

The independence of the Commission will be a key factor in its success and should be reflected in the arrangements for accountability

The independence of the Commission will be important for its standing and its success. To be independent, the Commission must be in control of its own strategic direction and priorities (within the limits set by the statutory remit). This should apply across all of its functions. It should not be subject to external control or direction.

Accountability in this context is about ensuring that the Commission is answerable for the public funds it will spend and for the way it carries out its statutory functions. Since this is a public body, there must also be an appointments process that can offer guarantees of independence and impartiality.

Accountability arrangements would encompass the following:

- **Scrutiny of the Commission's performance**
- **The appointments process for Commissioners**
- **Funding and auditing arrangements**

The formal arrangements governing the accountability of the Scottish Commission will appear in legislation.

Options

There are essentially two main options for the accountability of the Commission:

- **Accountability to the Scottish Parliament**
- **Accountability to Scottish Ministers**

Many international human rights commissions are accountable to their Parliament by way of an annual report. The Northern Ireland Human Rights Commission is accountable to the Secretary of State for Northern Ireland.

Structure

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 the following:

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

Commissioner and Ombudsman bodies 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 and the Scottish Parliamentary Standards Commissioner.

Accountability to the Scottish Parliament would involve the following:

- **Budget determined by the Scottish Parliament Corporate Body (SPCB) and funds transferred from the Scottish Executive to the SPCB;**
- **Appointments made by the SPCB. The Scottish 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;**
- **An annual report to the Scottish Parliament. Provision could be made for additional ad-hoc reports. The report could also be the subject of a full debate in the Scottish Parliament (this would be for the Parliament to decide).**

The traditional accountability model (to Scottish Ministers) does not in any way compromise independence. However, we believe that it may imply a closer relationship to government than we envisage for the Scottish Commission. It may sit less well with the need for the Commission to be, and to be perceived to be, an independent body that can hold Scottish Ministers to account.

Accountability to the Scottish Parliament may be seen to be a more appropriate, more open and more accessible model. MSPs would have an opportunity to hold the body publicly to account. In addition, recent procedures put in place for other Commissioners and Ombudsmen have established this as an acceptable and workable model.

Structure

Accountability to the Public

We believe it is important that the Commission should also be accountable to members of the public and the public bodies it will serve. We think this can be achieved by making the processes and procedures used as open and inclusive as possible.

Options might include the following and should ensure more effective delivery of services:

- **An independent evaluation of effectiveness**
- **Seeking public input into reviewing effectiveness**
- **Publication of a strategy document**
- **Holding public meetings**

Preferred Approach

- **Accountability should be to the Scottish Parliament, following the model established for other Commissioners and Ombudsmen;**
- **The Scottish Parliament Corporate Body would oversee the funding arrangements (although funds would originate from the Scottish Consolidated Fund) and the appointment process;**
- **An annual report should be presented to the Scottish Parliament with the facility to make additional ad-hoc reports;**
- **The Commission should also be accountable to the public by making the processes and procedures it uses as open and inclusive as possible.**

Your View

- **Do you agree that the Commission should be accountable to the Scottish Parliament?**
- **Do you have any views on how the Commission could best be made accountable to the public?**

2 Membership and staff

An effective Commission will need Commissioners who can provide a vision and steer its direction and staff with expertise who can manage and carry out day-to-day activities

The Commissioners

The Scottish Human Rights Commission will need Commissioners to advise on strategy and direction and to represent the Commission as its public face, both within Scotland and further afield.

Options

We have considered three possible options:

- **Commissioners who are representative of society;**
- **Commissioners who are appointed to cover specific subject areas;**
- **Commissioners who have a legal or human rights background.**

The Paris Principles recommend that both staff and commissioners should be representative of civil society, vulnerable groups and ethnic groups. Some commissions emphasise the importance of wide representation. This can result in a large number of commissioners - perhaps 10-12. This type of body could be seen as less responsive, the line between the roles of commissioners and staff may become blurred and payments to a large number of commissioners may put pressure on the budget.

Other commissions appoint commissioners to cover specific rights areas. One commissioner might represent each broad area. 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.

Other models may emphasise the importance of commissioners having a legal or human rights background. This may be seen as more important where the 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 are there, in our view, to provide the expert technical knowledge in support of commissioners, who should themselves focus on taking a strategic approach.

Structure

We feel that it would make sense for ‘broad representation of Scottish society as a whole’ to be **one of** the factors considered in making Commissioner appointments. Extending this consideration to staff would also be helpful. We do not propose anything more restrictive, because we do not feel that the Commission or Scotland would benefit from making numerous Commissioner appointments. In addition, we would not want 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.

Numbers

In addition to the type of Commissioner appointments to be made we also need to consider the appropriate number. This is linked to three options:

- **Full-time appointments**
- **Part-time appointments**
- **A mix of full and part-time appointments**

Various combinations can be found. The Northern Ireland Commission has one full-time Chief Commissioner and 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.

There might be some logistical and decision-making problems with models that use both full and part-time commissioners. A completely full-time or completely part-time model could be more straightforward. However, it may be preferable to have a full-time Chief Commissioner.

We believe that keeping numbers small and manageable makes sense both for ease of strategic control and decision making and to put less pressure on resources. This consideration has informed our whole approach to the type of Commissioner appointments that should be made. We believe that a small number of full-time Commissioners would be an effective option for Scotland. A suitable approach might involve 3 or 4 full-time Commissioners (including the Chief Commissioner).

Staff

It is important that a core professional staff supports the Commission. Ideally, key staff should have relevant human rights experience, although this need not necessarily entail legal expertise. The Commission could also be empowered to ‘buy in’ legal advice or appoint a full-time legal adviser. In keeping with the procedure followed for most national commissions and for the Scottish Information Commissioner, Scottish Public Services Ombudsman and Scottish Public Appointments

Structure

Commissioner, we believe that the Commission should have the authority to determine and appoint its own staff and that this should be covered in legislation.

A Chief Executive should head the staff. The Chief Executive would be expected to take responsibility for planning and financial management and for the day-to-day running and performance of the Commission. We believe that it will be essential to avoid confusion between the roles of Chief Commissioner and Chief Executive. We would expect that the Chief Executive would have previous experience of running a business or organisation. We would intend to explore possibilities for defining these key roles in legislation.

Preferred Approach

- **‘Broad representation of Scottish society as a whole’ should be one of the factors considered in making Commissioner appointments. This should be extended to staff;**
- **A small number of full-time Commissioners (3 or 4 to include the Chief Commissioner) would be preferable to other options;**
- **The Commission should have power to appoint its own staff, including a Chief Executive. We would seek to define the key roles of Chief Executive and Chief Commissioner in legislation.**

Your View

- **Do you agree that representation of Scottish society should be a factor to be considered in making Commissioner and staff appointments?**
- **Do you agree with our approach that a small number of full-time Commissioners, perhaps 3 or 4, would be preferable to other options?**
- **Do you agree that the Commission should have the power to determine and appoint its own staff?**

3 Accessibility

To be effective, the Commission should be accessible to the Scottish people

Accessibility in relation to the Commission is about both geographical location and about the accessibility of services.

Factors which might be weighed in determining geographical location include the following:

- **Accessibility to the public - central to where the majority of the population live and accessible to appropriate transport links**
- **Accessibility to the Scottish Parliament and Scottish Executive and other relevant bodies**

Options

There are two options:

- **Scottish Ministers could decide on the location of the Commission**
- **The Commission itself could decide on location - by the Commissioners once they have been appointed**

The established practice in Scotland does vary. The location of some traditional NDPBs and of bodies closely associated with the Scottish Executive and Executive Departments is decided by Scottish Ministers. However, the Scottish Public Services Ombudsman and the Scottish Information Commissioner have responsibility for establishing their own location.

We feel that it would be more appropriate for an independent body to determine its own location. The Commissioners could then take the decision about the best way to decide on location and the weight that should be given to the various factors involved. We would ask the Commission, as part of this process, to consider the possibilities for co-location with other similar bodies, including the proposed Children's Commissioner. The current consultation by the UK Government on future statutory equality machinery may also be a relevant factor to be considered.

The challenge for the Commission once it is established will be to ensure that within its resources it can develop procedures to help ensure its accessibility.

A Human Rights Commission by its very nature can be expected to have dealings with marginalised and vulnerable groups. We would like to see

Structure

the Commission developing procedures that will make its services accessible to those groups. This could include innovative methods of communication and offering some services in a number of languages.

These decisions will be for the Commission itself to take but it might consider the following:

- **Forming alliances with other Non-Governmental Organisations (NGOs) (in areas where there is not a continued presence)**
- **Creating an interactive Internet site**
- **Conducting away meetings**
- **Employing a travelling development worker who could travel around Scotland, creating a network and liaising with community based organisations**

The experience of the Scottish offices of existing equality bodies may be a relevant factor to consider in this respect.

Preferred Approach

- **The Commission should be responsible for deciding its own location;**
- **However, the Commission should consider the potential for co-location with other similar bodies;**
- **The Commission should develop appropriate procedures to make its services as accessible as possible.**

Your View

- **Do you agree that the Commission should be responsible for deciding its own location?**
- **Do you have a view on the ways in which the Commission could make its services more accessible to the public?**

4 Funding

The Commission should be adequately resourced in order to carry out its statutory functions

Annual Budget

It will be important to ensure that the Commission is adequately resourced to carry out its functions and to perform an effective role. Against this, we also need to be realistic about the funds available for a Commission compared to other competing priorities.

The detailed budget for the Commission will depend on the final decisions about its structure, membership and other issues. However, we believe that a realistic annual budget would be around £1,000,000.

In addition, to the annual budget, the Executive will need to determine and set aside an adequate sum to cover set-up costs for the Commission. We are not in a position at the moment to estimate what those costs might be but they would cover the establishment and operation of the Commission's office including sourcing accommodation and recruiting staff.

Charging for services

Some commissions can charge for some of the services they provide. This would not be appropriate for functions for which the Commission receives public funds. However, there are some services the Commission might possibly provide which would go beyond those provided for by public funding and which might be suitable for generating additional income. One example might be offering a full human rights auditing facility to public bodies or offering selected services (e.g. training) to private bodies and businesses.

Charging has the advantage of providing additional income to supplement the annual budget. However, it might also be considered to have the capacity to compromise the Commission's independence. It might be perceived that where the Commission has worked for a public authority on a consultancy basis, for example auditing its practices, it might not be as objective and independent in subsequent scrutiny than if it had not carried out such work. Any provision for charging would therefore have to be carefully defined in order to ensure that confidence in the Commission's independence is not eroded.

We believe in principle that it should be possible for the Commission to charge for some services without compromising its independence, provided that this was specified carefully in legislation: but will want to take careful account of views before deciding how to proceed.

Structure

Preferred Approach

- A realistic annual budget of around £1m supplemented by a proposal that the Commission should be able to charge for some additional services to be outlined in legislation;
- Separate provision would be made for set-up costs.

Your View

- Should the Commission's budget be supplemented by the power to charge for some services, which would be additional to its publicly funded activities and specified in legislation? If so, which services? To what extent do you think that this would be compatible with maintaining the Commission's perceived independence?

Responses

You are invited to respond in writing, and to make any other points you consider relevant, to:

**The Scottish Human Rights Commission Consultation
Human Rights & EU Co-ordination Unit
Scottish Executive Justice Department
2nd Floor West
St Andrew's House
Regent Road
Edinburgh
EH1 3DG**

Fax (0131) 244 8325

E-mail - humanrights@scotland.gsi.gov.uk

Please reply by Friday 6 June 2003

For further information, or if you would like this document in another format or language, please contact Kelly Young. We will try to accommodate your needs.

Tel - (0131) 244 5733

E-mail - humanrights@scotland.gsi.gov.uk

Or consult website <http://www.scotland.gov.uk>

Copies of responses received will, as is normal practice, be made available to others on request, unless respondents indicate that all or part of their response is confidential. In the latter case, confidentiality will be strictly respected.

**Scottish Executive Justice Department
February 2003**

ANNEX A

The Convention rights (the article numbers correspond to the European Convention on Human Rights)

- The right to life (Article 2)
- Freedom from torture and inhuman or degrading treatment or punishment (Article 3)
- Freedom from slavery, servitude or forced or compulsory labour (Article 4)
- The right to liberty and security of person (Article 5)
- The right to a fair and public trial within a reasonable time (Article 6)
- Freedom from retrospective criminal penalties and no punishment without law (Article 7)
- The right to respect for private and family life, for home and for correspondence (Article 8)
- Freedom of thought, conscience and religion (Article 9)
- Freedom of expression (Article 10)
- Freedom of assembly and association (Article 11)
- The right to marry and found a family (Article 12)
- Prohibition of discrimination in the enjoyment of Convention rights (Article 14)
- The right to peaceful enjoyment of one's possessions (Article 1, Protocol 1)
- The right to education (Article 2, Protocol 1)
- The right to free elections (Article 3, Protocol 1)
- The right not to be subjected to the death penalty (Protocol 6)

The Convention rights can be framed into two broad categories: **absolute and qualified:**

- **Absolute rights** are those rights, which under no circumstances can be infringed in the interest of the state. These rights include the right to protection from torture, inhuman and degrading treatment and punishment (Article 3), the prohibition on slavery and enforced labour (Article 4), and the protection from retrospective criminal penalties (Article 7).
- **Qualified rights** are those rights which are subject to limitations and exceptions, they include the right the right to liberty (Article 5), the right to respect for private and family life (Article 8), the right to freedom of expression (Article 10), religion (article 9) assembly and association (Article 11), the right to the peaceful enjoyment of property (Protocol 1, Article 1) and to some extent the right to education (Protocol 1, Article 2). Interference with these rights is permissible only if what is done:
 - is specifically authorised by the law;

- pursues a legitimate aim of social policy. The sorts of aims which are legitimate are the interests of public safety, national security, the protection of health and morals and the economic well-being of the country and the protection of rights and freedoms of others;
- is necessary in a democratic society. This means that the interference must be compliant with the “principle of proportionality” and, therefore, any restriction of the Convention rights must be proportionate to the legitimate aim pursued.

This formulation of rights is designed to create a balance between the rights of the individual and society.

ANNEX B

Summary of the Human Rights Act 1998

Below is a summary of some of the main provisions of the Human Rights Act 1998:

Section 1: specifies which of the Convention rights are covered by the Human Rights Act.

Section 3: requires legislation to be interpreted as far as possible in a way, which is compatible with the Convention rights.

Section 4: allows the higher courts to make a 'declaration of incompatibility' where they find that primary legislation is incompatible with a Convention right. The continuing validity and enforcement of the legislation is not affected by such a declaration.

Section 6: defines a public authority and makes it unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is required to do so by primary legislation or inevitably incompatible secondary legislation.

Section 7: victims may rely on the Convention rights in legal proceedings in UK courts and tribunals or institute separate proceedings. Separate proceedings must be brought within one year (or less) of the date on which the act complained of took place or after a longer period if the court or tribunal judges that to be fair under the circumstances.

Section 8: the court may grant such relief as it considers just and appropriate, provided that it otherwise has power to do so.

Section 10: the relevant Minister may by order amend incompatible legislation following a declaration of incompatibility or a finding of the European Court of Human Rights if he is satisfied that there is a compelling reason to do so.

Section 19: requires that when legislation is introduced into either House of the Westminster Parliament and before second reading, the Minister responsible must make a written statement that he considers the Bill is compatible with the Convention rights or that he is unable to make a statement of compatibility but wishes Parliament to proceed with the Bill anyway.

ANNEX C

Summary of the 'Paris Principles' - Principles relating to the Status of National Institutions

General Assembly Resolution 48/134

Four main areas are covered:

A. Competence and responsibilities

B. Composition and guarantees of independence and pluralism

C. Methods of operation

D. Additional principles concerning the status of commissions with quasi-jurisdictional competence

Brief description of main areas:

A. Competence and Responsibilities

1. A national institution shall promote and protect human rights
2. A national institution shall be given as broad a mandate as possible, set out in legislation or the constitution
3. A national institution shall have the following responsibilities:
 - a) To advise government, parliament or other bodies on human rights and submit and publicise its opinions, recommendations, proposals and reports. These may relate to:
 - (i) Any legislative or administrative provisions or those relating to judicial organisation
 - (ii) Any situation of violation of human rights
 - (iii) Reports on the national situation on human rights
 - (iv) Drawing the government's attention to human rights violations and making proposals on the positions and reactions of the government
 - b) To promote and ensure the harmonisation of national laws and practices with international human rights instruments

- c) To encourage ratification and implementation of international instruments
- d) To contribute to the reports which states must submit to the United Nations on their obligations under international human rights instruments
- e) To co-operate with the United Nations in the areas of the promotion and protection of human rights
- f) To assist in formulating programmes for the teaching of and research into human rights
- g) To increase public awareness of human rights through information, education and the media and to combat all forms of discrimination

B. Composition and Guarantees of Independence and Pluralism

1. The plurality of society should be reflected in the membership of the organisation
2. It should have adequate funding to conduct its activities and be independent of government
3. The appointment of members should be in an official act to ensure a stable mandate

C. Methods of Operation

Within the framework of its operation, the national institution shall:

1. Consider any questions falling within its competence on the proposal of its members or of any petitioner
2. Hear any person and obtain any information and any documents necessary for assessing situations
3. Address public opinion directly to publicise its opinions and recommendations
4. Meet on a regular basis with all members
5. Establish working groups and set up local or regional sections to assist in discharging its functions
6. Consult with other bodies responsible for the protection and promotion of human rights

7. Develop relations with non-governmental organisations devoted to promoting and protecting human rights

D. Additional Principles concerning the Status of Commissions with Quasi-jurisdictional Competence

A national institution may be authorised to hear and consider complaints and petitions concerning individual situations. Individuals or any other representative organisations may bring cases before it. The functions entrusted to them may be based on the following principles:

1. Seeking an amicable settlement within the limits prescribed by the law
2. Informing the party of the available remedies and promoting access to them
3. Hearing any complaints or petitions
4. Making recommendations to the competent authorities

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