The Committee will meet at 9.45 am in Committee Room 1.

1. **Scottish Commissioner for Human Rights Bill**: The Committee will take evidence on the Bill at Stage 1 from—

   - Michael P Clancy, Director of Law Reform, The Law Society of Scotland;
   - Christine O’Neill, member of the Law Reform Committee, The Law Society of Scotland; and
   - Valerie E Stacey, QC, Vice Dean of the Faculty of Advocates.

2. **Scottish Commissioner for Human Rights Bill (in private)**: The Committee will consider the main themes arising from the evidence sessions to date on the Scottish Commissioner for Human Rights Bill, in order to inform the drafting of its Stage 1 report.

Callum Thomson
Clerk to the Committee
Papers for the meeting—

Agenda item 1
Note by the Clerk and SPICe (PRIVATE PAPER) J1/S2/06/2/1
Submission from the Law Society of Scotland J1/S2/06/2/2
Submission from Faculty of Advocates J1/S2/06/2/3
Briefing note by SPICe (PRIVATE PAPER) J1/S2/06/2/4

Documents for information—
The following document is circulated for information:

- Public attitudes to Human Rights in Scotland – Part 2: Further analysis of research conducted by MORI Scotland;
- Letter from John Scott, Closure of the Scottish Human Rights Centre;
- Letter from Scottish Executive, Legal Assistance and Legal Profession (Scotland) Bill; and
- Letter from Scottish Court Service, Transparency of Legal Fees.

Documents not circulated—
Copies of the following documents have been supplied to the clerk:

- Scottish Executive, Vulnerable Witnesses (Scotland) Act 2004 – Guidance on Taking Evidence by a Commissioner;
- Scottish Legal Aid Board, Annual Report 2004-2005; and

These documents are available for consultation in Room T3.60. Additional copies may also be obtainable on request from the Parliament’s Document Supply Centre.

Forthcoming meetings—
Wednesday 18 January, Committee Room 4;
Wednesday 1 February, Committee Room 6;
Wednesday 8 February, Committee Room 1;
Wednesday 22 February, Committee Room 6.
Justice 1 Committee

Scottish Commissioner for Human Rights Bill

Written submission from The Law Society of Scotland

INTRODUCTION

The Law Society of Scotland’s Human Rights Sub-Committee has considered the Scottish Commissioner for Human Rights Bill and has the following comments to make.


The Sub-Committee considers that a Scottish Commissioner for Human Rights would be of benefit to Scotland. In the Paris Principles endorsed by the UN Commission on Human Rights in 1992 (Resolution 1992/54) and by the General Assembly in 1993 (Resolution A/RES/48/134), on the status of national institutions protecting and promoting human rights, it is stated that “A combination of parliament and the judiciary only is imperfect as an apparatus for upholding fundamental rights”. Accordingly, the addition of a Commissioner will help to assist in creating an informed culture of rights in Scotland.

Although human rights issues have come to the forefront of debate in Scotland following devolution, there is currently no body with responsibility for the development of a human rights culture within Scotland. It is inappropriate for the Scottish Executive to wholly assume that responsibility as human rights issues, by their very nature, can involve challenges to the actions of public bodies such as the Scottish Executive. The Sub-Committee considers it important that clear steps are taken to ensure compliance with all of Scotland’s international obligations as required by the Scotland Act 1998 and to ensure that such compliance is proactive rather than reactive. A Human Rights Commissioner would act as an impartial and independent promoter of the development of a human rights culture and would allow public bodies to benefit from independent and objective advice on human rights issues. He or she would also permit the structured consideration of other international obligations with human rights aspects – section 2(2)(b).

The Sub-Committee considers that parliamentarians would also benefit from this kind of body. The Scottish Parliament, like the Executive, is bound by Convention rights both in terms of its legislative capacity, but also because it is a “public authority” in terms of section 6 of the Human Rights Act 1998. At present it is not clear that the Parliament has access to independent and impartial advice on human rights issues. The general duty contained in
section 2, reinforced by the powers to provide information, guidance and education in section 4 of the bill, will enhance this capacity.

SPECIFIC COMMENTS

Section 11 – Power to intervene

The Sub-Committee also is of the view that the provisions of section 11 require further consideration.

The right to intervene is restricted to intervention in civil proceedings before the Court of Session, Sheriff Court and the Land Court. There seems to be no clear rationale for excluding from the definition of "court" the Appellate Committee of the House of Lords, the Judicial Committee of the Privy Council, or the prospective UK Supreme Court.

It has been suggested that any relevant intervention by the Commissioner is likely to be made at a relatively early stage in any litigation and that it would therefore be unnecessary for an intervention to be made at the final appellate stage.

It is not immediately obvious that the Commissioner will always be in a position to intervene at an early stage in a case where his or her intervention might be useful. The Bill does not envisage changes to the Rules of Court to require intimation to the Commissioner of any potential human rights issue arising in a case akin to the requirements under the Scotland Act 1998 for intimation of devolution issues to the law officers. The Sub-Committee acknowledges that it would be impractical and undesirable to impose such a requirement for intimation but in its absence it cannot be assumed that the Commissioner will always be made aware at an early stage of cases in which an intervention might be of benefit to the court. The human rights issue or issues arising may only come into focus in appeal proceedings and there would be merit in extending to the Commissioner the right to seek leave to intervene in those proceedings. The court in question would of course retain the discretion to refuse to grant leave.

There is no right of appeal against a refusal by a court to allow the Commissioner leave to intervene in court proceedings. The Sub-Committee appreciates the desire to ensure that the court retains control over its own proceedings but it is concerned that the absence of a right of appeal might allow the purpose of this provision to be frustrated.

The policy memorandum lodged in support of the Bill does acknowledge the argument that it is "possible that a judge would refuse an intervention in circumstances where it would be preferable to allow it." (Paragraph 76). This acknowledgement is made in the context of a discussion about whether the courts ought to be under a duty to allow an intervention by the Commissioner.

The Sub-Committee does not propose that the Commissioner should have an absolute right of intervention but we are concerned that where a refusal to
allow an intervention is made in circumstances which may be – or appear – wholly unreasonable there ought to be a mechanism by which that refusal can be appealed.

It is not clear why it was thought appropriate to exclude the Commissioner from intervening in children’s hearing proceedings nor are we convinced that the Commissioner should be excluded from intervening in criminal proceedings.

It is not clear either from the Bill that an intervention by the Commissioner at first instance in the Sheriff Court or Court of Session would entitle the Commissioner to participate in any appellate proceedings in the same case. This point should be clarified.

Judicial Review

The Sub-Committee notes that it has recently been accepted by the Department for Constitutional Affairs that the UK Commission for Equality and Human Rights should have the right to raise proceedings for judicial review on its own behalf.

The Scottish Bill does not make provision for any similar such power to be conferred on the Scottish Commissioner. The asymmetry of these provisions could lead to undesirable anomalies including an increase in the scope of the UK’s Commission’s responsibility for human rights protection in Scotland in circumstances where it might be more appropriate for the Scottish Commissioner to be involved. Theoretically, at least, the Scottish Commissioner and UK Commission might co-operate in such a way that the Scottish Commissioner could give consent to the UK Commission taking action within the “devolved” sphere. This action might include petitioning for judicial review. Unless there is a clear and justifiable rationale for the distinction, the Sub-Committee is of the view that the Scottish Commissioner’s powers in relation to court action ought to be equivalent to those of his or her UK counterpart.

Accountability Issues

In terms of accountability the bill provides, in section 12, for an obligation on the Commissioner to lay before Parliament a general report on the exercise of the Commissioner’s functions. Accountability could also be enhanced by regular meetings with the Justice Committees. It might also be expected that the Commissioner would regularly appear before Parliament to fulfil the duty, in terms of section 3, of monitoring and keeping under review law, policy and practice in respect of human rights and recommending changes to the law.

Section 18 – Interpretation

The Sub-Committee notes that the bill defines Parliament as the Scottish Parliament. Accordingly, this will require some amendment to the bill for the
purposes of clarity in respect of section 1(2) and schedule 1, paragraph 3(1)(b).

The Law Society of Scotland
22 November 2005
Justice 1 Committee

Scottish Commissioner for Human Rights Bill

Written submission from the Faculty of Advocates

The Faculty of Advocates has resolved to make the following observations in the Scottish Commissioner for Human Rights Bill. The Faculty notes that the Justice 1 Committee has asked for views on six specific questions. Before addressing the issues raised in those questions, the Faculty notes that it has submitted written responses to the two earlier consultation papers in 2001 and 2003, and reference may be made to them for further details of the Faculty’s views.

Question 1:- Do you think a Scottish Commissioner for Human Rights should be established? If so, why? If not, why not?

1. As indicated in the Faculty's response of June 2001 to the Scottish Executive’s consultation document “Protecting Our Rights: A Human Rights Commission for Scotland?” the question of whether a Scottish Commissioner for Human Rights should be established enters into areas of policy on which it is inappropriate for the Faculty as a body to pass comment. In the appendix to the Faculty’s response, legal considerations relevant to the question were canvassed.

   The Faculty remains of the view that whether or not to establish a commission is essentially a political matter. Nonetheless, given the intention to establish a Great Britain Commission with powers relating to “reserved matters”, and the existence of the Northern Ireland Commission for Human Rights, it would seem anomalous were there not to be an equivalent body in Scotland, addressing devolved issues.

Question 2:- What would such a body add to existing mechanisms for protecting human rights in Scotland?

2. The Faculty notes that the Bill does not include a specific power on the part of the Commissioner to support appropriate legal cases. As the Faculty indicated in its two earlier responses the Faculty is of the view that the Commissioner should have the power to take legal action test cases where other funding is not readily available. The Faculty indicated that the existing statutory and race equalities commissions are so empowered. The Faculty remains of the view that the Commissioner should have an equivalent power.

   The Faculty also stated in its earlier response that it would be desirable for the Commissioner to be able to litigate in his/her own name in exceptional cases. The Faculty acknowledges that any such power might require amendment of the meaning of “victim”, in the Human Rights Act 1998.
The Faculty considers that the reduction in public funding of civil and criminal defence litigation will lead to a reduction in the effectiveness with which the courts are able to guard against human rights violations and to extend the protection of individuals. It is likely that the Commissioner will need to fill the gap left by any reduction in quality of representation.

**Question 3:-** How should the Commissioner be accountable?

3. The Faculty is of the view that accountability would be best achieved by the Commissioner reporting annually to Parliament, with the report being published and made available to members of the public.

**Question 4:-** Do you think that the proposed funding of £1 million per annum will be adequate given the proposed remit of the Commissioner?

4. The Faculty considers that the proposed funding is very modest for the role currently proposed. Clearly, it would require to be considerably increased if a power to initiate litigation were given.

**Question 5:-** What lessons might be learned from other Commissioners/Ombudsmen set up under the auspices of the Scottish Parliament/Scottish Executive?

5. The Faculty has no comment to make on this matter. It notes, however, that under the Scottish Parliamentary Standards Commissioner Act 2002 obstruction is an offence, whereas the position under the Ethical Standards in Public Life (Scotland) Act 2000 is as proposed in the Bill. We are not clear as to the reason for the difference of treatment.

**Question 6:-** Do you have any views on the proposed remit for the Commissioner?

6. The Faculty makes the following comments:

*Clause 11 Power to Intervene*

The Faculty considers it anomalous that the current proposal restricts the power to intervene in civil cases and does not extend to cases in the House of Lords, the Privy Council or the Lands Tribunal for Scotland.

The Faculty considers that the Commissioner might usefully seek to intervene in appellate criminal cases raising matters of principle. This is particularly so in Lord Advocate’s references.

Faculty of Advocates
17 November 2005
SCOTTISH EXECUTIVE

Deputy Minister for Justice
Hugh Henry MSP

Pauline McNeill MSP
Convener
Justice 1 Committee
The Scottish Parliament
Edinburgh
EH99 1SP

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Our ref: LGA/1/37/2

2 December 2005

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Pauline

LEGAL ASSISTANCE AND LEGAL PROFESSION (SCOTLAND) BILL
REFORM OF ARRANGEMENTS FOR HANDLING COMPLAINTS AGAINST THE LEGAL PROFESSION

As you know, the Executive launched a consultation paper on 11 May 2005 entitled “Reforming complaints handling, Building consumer confidence” that sought views on a number of issues concerning the system for handling complaints about lawyers. An analysis of the consultative response was issued on 26 October which indicated strong support for reform of the system. I have now reflected on the responses and am writing to let you know the Executive’s proposals to reform the complaints handling system.

The Scottish Executive will introduce legislation this session which will create a new independent complaints handling body to handle complaints about lawyers. Our policy is that complaints from clients should be dealt with as far as possible by the law firm or practitioner who provided the service in question. The new body, the Scottish Legal Complaints Commission, will act as a gateway to receive those complaints about lawyers which cannot be resolved at source. The new body will take over the handling of complaints about inadequate professional service from the legal professional bodies, the Scottish Legal Services Ombudsman and the Scottish Solicitors Discipline Tribunal. The legal professional bodies and their discipline tribunals will however retain responsibility for professional discipline and the Commission will refer complaints about the conduct of lawyers to those bodies, but will have powers to oversee the way in which conduct complaints are handled. The Commission will be led by a board which will have a non-lawyer majority and a non-lawyer Chair.

The arrangements we propose recognise the strong message from the consultation response that there should be an independent complaints handling body and that its powers should be vested in a board rather than a single officeholder. The new system will build public confidence in the system for
handling complaints against lawyers while the Commission will also have the role of promoting good practice in complaints handling by law firms and practitioners. The Commission will be funded by the legal profession through a general levy on legal practitioners and a levy on complaints.

These proposals will form part of the Legal Profession and Legal Assistance (Scotland) Bill which is scheduled for introduction in February 2006. I understand that the Bill will be scrutinised by the Justice 2 Committee, but I thought it right to let your Committee know about these developments because of your predecessors’ extensive involvement with these issues in the course of the former Justice 1 Committee’s inquiry into regulation of the legal profession from December 2000 to November 2002.

I hope this is helpful.

Yours sincerely,

Hugh Henry

HUGH HENRY
Callum Thomson
Clerk
Justice 1 Committee
Scottish Parliament
Tower 1 T3.60
Committee Office
EDINBURGH
EH99 1SP

Dear Mr Thomson

TRANSPARENCY OF LEGAL FEES.

This letter updates the Committee on the current position with regard to the Agency's consultation on the appropriateness of Scottish Court Service staff undertaking work related to extra judicial audits, also known as "fee assessment" work.

The Agency concluded stage 2 of its consultation at the end of February 2005. There were substantive responses from only 4 bodies, namely:-

Law Society of Scotland
Scottish Law Agents Society
Scottish Legal Aid Board
Society of Sheriff Court Auditors.

Following the end of the consultation meetings have been held with most of the above bodies to further explore issues that were raised in the consultation. A formal meeting with the Public and Commercial Services Union (PCS), which represents staff in the Scottish Court Service was also held.

Of the respondents only the Society of Sheriff Court Auditors is opposed to the proposition that the Agency withdraw from its staff approval to carry out extra-judicial audit work. At a meeting between the Agency and the Society on 24 June 2005, it was suggested by members of the Society that a decision to withdraw approval may be the subject of a legal challenge.

The Board of the Agency is now considering its position with a view to making an announcement in January 2006. In examining the matter the Agency is liaising with colleagues in the Scottish Executive Justice Department so that the Department can consider how any new arrangements might sit against the broader context of other areas of civil justice reform.
I hope this is helpful. If you wish to discuss this matter with me please contact me on 0131 221 6831.

Yours sincerely

Alan Swift
Director of Personnel and Development
Public attitudes to Human Rights in Scotland – Part 2

Further analysis of research conducted by MORI Scotland

Findings from a face-to-face survey of 1,018 adults aged 16+ across Scotland, interviewed in their homes. Sample weighted to be representative of the population profile, and interviews conducted on 27 October – 2 November 2005.

There is a clear relationship between whether people support the idea of a government funded body to inform and investigate human rights in Scotland, and the extent to which people feel there are currently adequate, inadequate or excessive human rights in Scotland. However, this does not mean that views are entirely predictable. Around four in ten (38%) of those who feel that there is excessive protection offered by human rights in Scotland agree that a publicly funded body would benefit Scotland. Furthermore, around one in six (17%) of those who feel that there is insufficient protection disagree that such a body would be of benefit (see table 1)

Table 1: Do you agree or disagree that Scotland would benefit from a government funded body to inform the public about human rights and which could investigate Scottish public bodies on devolved matters?

| Perception of level of protection under human rights in Scotland today | Attitude to benefit to Scotland of proposed new body |
|---|---|---|---|
| Insufficient protection at present | Adequate protection at present | Excessive protection at present |
| Agree would be of benefit | 76% | 65% | 38% |
| Disagree would be of benefit | 17% | 30% | 56% |
| Don’t know | 7% | 5% | 6% |

Meanwhile, the groups most commonly thought would benefit from the establishment of a body to provide information about human rights and to investigate public bodies are immigrants and refugees (25%) and ethnic minorities (23%). Examining responses to this question according to people’s views on whether they feel Scotland would benefit from such a body is illuminating, suggesting that those who are more favourable to the concept of extending human rights protection think of different groups as being the beneficiaries that do those who are more averse.

Table 2: If such a body were to be established, which individuals or groups do you think would be most likely to benefit?

| Groups more likely to be named by supporters | Attitude to establishing a body |
|---|---|---|
| | Agree body would be of benefit to Scotland | Disagree body would be of benefit to Scotland |
| Older people | 27% | 7% |
| Children/young people | 24% | 6% |
| People with disabilities | 22% | 8% |
| Women/men | 21% | 6% |
| Homeless people | 17% | 7% |
| Victims of crime | 15% | 6% |
| Base | (652) | (266) |
On the other hand, there are some groups that are as likely to be named by people regardless of whether they are supportive of the idea of a body to review human rights:

**Table 3: If such a body were to be established, which individuals or groups do you think would be most likely to benefit?**

<table>
<thead>
<tr>
<th>Groups as likely to be named by supporters or opponents</th>
<th>Agree body would be of benefit to Scotland</th>
<th>Disagree body would be of benefit to Scotland</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immigrants/refugees</td>
<td>25%</td>
<td>29%</td>
</tr>
<tr>
<td>Ethnic minorities</td>
<td>25%</td>
<td>25%</td>
</tr>
<tr>
<td>Convicted criminals</td>
<td>8%</td>
<td>12%</td>
</tr>
<tr>
<td><strong>Base</strong></td>
<td><strong>(652)</strong></td>
<td><strong>(266)</strong></td>
</tr>
</tbody>
</table>

This suggests that the impression formed by the term human rights, and their protection in Scotland, is rather different among those who would support the new body – and is more wide-ranging among this group – than is the case among opponents of the body, whose perception of the beneficiaries is rather narrower.
20th December 2005.

To: All members and affiliates

Dear Member,

It is with the deepest regret that we must write to inform you that the Scottish Human Rights Centre has been forced to close down. The forecast gap between our income and expenditure for the rest of this financial year is so great that we would otherwise shortly become insolvent. The Executive Committee, in their role as directors of the company, are therefore obliged to act. We are ceasing all activity that might incur new financial obligations with effect from 22 December 2005. We will request the removal of the company from the Register of Companies and, most regretfully, we have had to issue redundancy notices to the two remaining staff.

How has this come about, at a time when our longstanding campaign to achieve a Scottish Commission on Human Rights is nearing fruition, and at the same time basic human rights are being put in jeopardy in the name of the "war on terror"? The Scottish Human Rights Centre has always been a small organisation with a relatively large national profile. It has always walked a financial tightrope, with several previous lurches into overdraft. The generosity of our members and affiliates and of many of Scotland’s local authorities has rarely been sufficient in itself to ensure full administrative support for the Director, let alone the development of our advice, policy and campaigning work. Additional income from training and research has always been required and its feasibility depended heavily on the availability and skills of individuals.

Much potential funding has been unavailable to us because we do not have charitable status. But charitable status would have removed fundamental freedoms that we required as a campaigning, member-led organisation, preventing us, for example, from advocating any rights that are not already enshrined in international treaties. Sadly the Scottish Human Rights Trust, which we established to work as a close partner with charitable status, decided some years ago to pursue an independent strategy of its own.

These long standing difficulties have recently been compounded by the illness of our Director Rosemarie Mcllwain, whose hard work and contribution to the development of human rights in Scotland has been exceptional. Our financial basis has not proved robust enough to continue to operate with effectively one part-time member of staff and no additional income generating capacity.
The new Scottish Human Rights Commission, whilst a very important development, will not supersede our work, especially in the fields of human rights advice and casework, and of public campaigning to protect and enhance our rights. We are deeply unhappy that our present organisation is not able to survive into the new era to meet that challenge.

Whilst the Scottish Human Rights Centre itself will now shortly be dissolved and its Executive Committee disbanded, many of us individually will be seeking to find new ways to promote human rights in Scotland.*

We thank all members and affiliates for their support. Please take steps to cancel any Standing Order payments that you may make to us.

At the time of writing it is far from certain that we will be able to meet all our outstanding financial obligations, and our creditors are being informed accordingly. If you are able and willing to help the efforts that some of us are making to raise sufficient one-off funds to ensure an orderly settlement of our affairs, please contact John Scott on 0131 552 7346/ johndscott@talk21.com or Peter Taylor on 0141 586 7588/ peter@pdctaylor.com.

Yours sincerely

[Signature]

John Scott
on behalf of SHRC Executive Committee