The Committee will meet at 9.45 am in Committee Room 4.

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

   Nora Radcliffe, MSP, member of the Scottish Parliament Corporate Body and Huw Williams, Head of Corporate Policy, The Scottish Parliament;

   and then from—

   Robert Brown, MSP, Deputy Minister for Education and Young People, Brian Peddie, Bill Team Leader, Ed Thomson, Policy Officer and John St Clair, Office of the Solicitor to the Scottish Executive, Scottish Executive.

2. **Scottish Commissioner for Human Rights Bill (in private):** The Committee will consider the possible contents 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/S2/06/3/1
Submission from the Scottish Parliament Corporate Body J1/S2/06/3/2
Letter from Convener to Deputy Minister for Education and Young People J1/S2/06/3/3
Letter from Deputy Minister for Education and Young People to Convener (to follow) J1/S2/06/3/4
Finance Committee Report on the Financial Memorandum of the Scottish Commissioner for Human Rights Bill J1/S2/06/3/5

Agenda item 2
Note by the Clerk (PRIVATE PAPER) J1/S2/06/3/6

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

- Note by the Clerk on SSI 2005/657: The Marriage (Approval of Places) (Scotland) Amendment Regulations 2005;
- Letter from Deputy Minister for Justice, Legal Assistance and Legal Profession (Scotland) Bill: Reform of arrangements for handling complaints against the Legal Profession;
- Letter from the Forum on Discrimination, A Media Role for the Scottish Commissioner for Human Rights; and
- Correspondence between Mike Pringle MSP and the Scottish Committee of the Council on Tribunals.

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

- Scottish Social Services Council, Annual Report and Accounts.

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 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 Scottish Parliament Corporate Body

Thank you for your letter of 10 October on behalf of the Justice 1 Committee seeking the Scottish Parliamentary Corporate Body’s (SPCB) views on the Scottish Commissioner for Human Rights Bill which was introduced to the Parliament on 7 October 2005.

As the Committee will be aware, the Parliament has passed legislation establishing similar officeholders (e.g. the Scottish Public Services Ombudsman Act 2002) over the last three years and the SPCB has had a role with regard to setting the officeholder’s terms and conditions of appointment, assisting with the setting up of the new offices, meeting the costs incurred by the officeholders and scrutinising budgets prior to them being approved by the Finance Committee. Drawing on this experience, we offer the following comments:-

General

We agree that in order for the Commissioner to be seen to be independent in the exercise of his/her functions from Scottish Ministers that he/she should be accountable to the Parliament; that the Parliament should undertake the recruitment of the Commissioner under Standing Orders and that the successful candidate should be nominated by the Parliament for appointment by Her Majesty; that the Commissioner’s budget should be determined by the SPCB; and the Commissioner should submit an annual report and other reports to the Parliament.

We do however consider that there may be merit in allowing for a transition period of up to 4/6 months to allow the Commissioner to set-up his/her office including finding office accommodation, recruiting staff and considering his/her policy direction before the remaining provisions of the Act are enacted.

We note that the general function of the Commissioner will be to promote awareness and understanding of, and respect for, human rights and as such, the Commissioner will have a promotional role similar to that of the Commissioner for Children and Young People in Scotland. As human rights covers people of all ages there will be an overlap between the Scottish Commissioner for Human Rights and the Commissioner for Children and Young People and it is envisaged that the relationship between the two Commissioners will be agreed in a Memorandum of Understanding. In light of this, the SPCB considers there should be opportunities for collaboration between the two Commissioners, be it the sharing of information or a shared research project which will result in savings.

We also note that the Commissioner will be able to conduct inquiries and must lay a report of the inquiry before the Parliament. We note that the Financial
Memorandum does not contain financial provision for undertaking such inquiries, and we will ensure this, and similar financial issues, will be highlighted to the Finance Committee who have also invited the SPCB to submit evidence on the Financial Memorandum.

Specific

Section 1(3 and 4) – Scottish Commissioner for Human Rights - provide that up to two deputy Commissioners may be appointed by Her Majesty on the nomination of the Parliament. What is not clear from the proposed legislation is who shall take the decision on how many deputy Commissioners should be appointed. Should it be a matter for the selection panel undertaking the appointment of the Commissioner or will it be for another body, possibly the SPCB to reach that decision. We consider that this should be clarified, possibly on the face of the Bill.

Section 3 – Duty to Monitor law, policy and practice - while it is not directly relevant to the SPCB, it is not clear on the face of the Bill to whom the Commissioner would recommend changes to the law.

Section 4 – Information, guidance, education etc. - we welcome the clarity of the funding element of this clause and note that any fees received by the Commissioner should be used for information, guidance and education etc. thereby reducing the need for additional funding from the SPCB.

Section 9 – Report of Inquiry – we note that inquiry reports are to be laid before the Parliament but this does not apply to an excepted inquiry. It would be helpful to clarify on the face of the Bill what is expected to happen to these excepted inquiry reports.

We acknowledge, as mentioned in the previous paragraph, that inquiry reports are to be laid before Parliament. Once laid, it will be a matter for Parliament as to what happens to such reports. On consideration of the reports the Parliament might wish to take some form of action and the Committee might wish to consider at an early stage whether there needs to be any changes proposed to the existing parliamentary procedures to enable such action to be progressed.

Section 12 – Annual Report - we are content that the Commissioner must lay an annual report before the Parliament and that the SPCB may issue directions to the Commissioner as to the form and content of the report. This is similar to the existing legislation for other office-holders funded by the SPCB.

Schedule 1, paragraph 4(1) – Terms of office and remuneration - we are aware more public appointments are now for a longer single term duration of about 8 years thereby dispensing with the reappointment for a second term. This is in line with best practice and guidance issued by the UK Commissioner for Public Appointments and endorsed by the Commissioner for Public Appointments in Scotland. This might be something the committee might wish to reflect upon.
Schedule 1, paragraph 4(2) – Terms of office and remuneration - we consider that grounds for removal should be set out in legislation such as those in the Commissioner for Children and Young People (Scotland) Act 2003 which provide that the grounds for removal are (i) that the Commissioner has breached the terms of appointment or (ii) that the Parliament has lost confidence in the Commissioner's willingness, ability or suitability to carry out the functions of the office. This provides clarity to the office older.

Schedule 1, paragraph 10 – Location of office - we consider this provision to be very helpful. We will ensure that the Commissioner has considered relevant location policies and the option of co-locating with other office-holders to enable the sharing of services resulting in efficiency savings.

Schedule 1, paragraph 11 – Chief executive and staff – we welcome the provision that enables the SPCB to approve the numbers of staff that might be appointed. In terms of value for money the SPCB will be looking to see whether there is scope for the sharing of staff between those office holders already established to share administrative services such as human resource, finance support staff etc. thereby saving money and this provision will assist with that aim.

Schedule 1, paragraph 12 – Accountable Officer – in line with legislation establishing other office-holders funded by the SPCB we take the view that the SPCB should appoint the Accountable Officer and that as with the other Commissioners, the Accountable Officer should be the Commissioner him or herself who will be accountable to the Parliament for ensuring that the resources are used economically, efficiently and effectively.

The committee might also wish to consider whether or not the Commissioner should be covered by the Freedom of Information (Scotland) Act 2002 and the mechanism to achieve this and also, as a public authority in its own right, whether the office will come under the jurisdiction of the Scottish Public Services Ombudsman and whether or not this needs to be covered by the legislation.

George Reid MSP
Presiding Officer
17 November 2005
Dear Robert

Scottish Commissioner for Human Rights Bill

The Committee has so far held three evidence-taking sessions on the Bill. As you would expect, a number of issues have emerged so far. The Committee agreed that it would be helpful if I were to write to you on these matters in advance of your appearance before the Committee on 18 January. I hope that this approach will allow us to get the most out of that evidence-taking session.

Functions of Commissioner

Perhaps the key issue for the Committee is to establish whether a Commissioner would add value to the existing arrangements in Scotland. Essentially, what is the gap in service provision that this Commissioner would fill? In answering this question, the Committee would be grateful if you could set out the duties/powers that are open to all the statutory commissions, ombudsmen, tribunals etc. in relation to devolved matters which have a locus in the human rights field. Assuming that the Bill is passed by the Parliament, what would you expect the relationship to be between these bodies and the Commissioner?

Relationship with the courts

The Bill, as introduced, limits the power of the Commissioner to intervene in court proceedings in civil cases but specifically excludes intervention in children’s hearing proceedings. In her oral evidence, Scotland’s Commissioner for Children and Young People suggested that as human rights issues arise in children’s hearings

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1 Official Report, Justice 1 Committee, 14 December 2005, cols 2486-7
their exclusion required to be justified. Could you explain the reasons for this exclusion?

Extent of powers

You will be aware that at the meeting on 14 December, a number of organisations argued that the Commissioner should be given greatly enhanced powers including having the power to investigate complaints by individuals; bring legal actions in his/her own name; be able to enforce the findings of inquiries.

Can you set out why you do not think it is appropriate to give the Commissioner these greater powers? What is your response to the view that without such powers this Commissioner is not worth having?

From a different perspective, it could be argued that should a Commissioner be established with the relatively limited powers that are set out in the Bill, what is to prevent the Commissioner from deviating from these terms of reference once he or she is in post?

On a related subject, the Committee notes that the Equality Bill at Westminster obliges the Commission for Equality and Human Rights (CEHR) to prepare a strategic plan identifying the various activities the CEHR will undertake, the priorities it will attach to different activities and an expected timetable for each activity. I also understand that the plan must be reviewed once every three years and must be consulted on. Can you explain why the Executive did not consider that it was appropriate for this obligation to be placed on the Scottish Commissioner?

Definition of Human Rights

Turning to the definition of human rights in the Bill, the Committee recognises that the ECHR is the only human rights instrument that is enforceable through the Scottish courts. One view is that other rights contained in other conventions, treaties or instruments are actually not rights at all – in that they cannot be enforced in Scottish courts. If this is the case, why is there a need for the Scottish Commissioner to promote awareness and understanding of rights that fall under these other instruments? By having this wider definition in the Bill, does this not dilute the promotional work that the Scottish Commissioner could do in relation to ECHR?
Budget

Turning to budgets, there has been a great deal of scepticism about the sufficiency of the proposed annual budget of £1 million. From the financial memorandum it is clear that only £225,000 is projected to be spent on promotion and awareness raising and research. How will inquiries be funded? Furthermore, how would you respond to the view that better value for money would be achieved by distributing the annual £1 million Commissioner budget to the various existing NGOs to allow them to work with public authorities to encourage best practice in relation to human rights?

As ever with legislation, the Committee is working to a tight timetable. I should, therefore, be grateful to receive your response no later than 11 January.

Yours sincerely

Pauline McNeill MSP
Convener, Justice 1 Committee
Thank you for your letter of 23 December about the Scottish Commissioner for Human Rights Bill. You asked for comments on a number of issues, so perhaps it would be helpful if I dealt with each of those in turn.

**Functions of Commissioner**

Human rights affects everyone in Scotland, and all public authorities in Scotland are obliged to take account of human rights in the exercise of their functions. Of course, there is already a wide range of persons and bodies with functions relating to investigations, complaints-handling, promotion of rights etc for whom human rights is relevant in relation to the exercise of those functions. But there is at present no statutory person or body whose express purpose is to promote human rights and in particular by doing so to help secure that human rights are respected across the whole range of public sector activities in Scotland. It is to fill that gap that the Executive has proposed the creation of a Scottish Commissioner for Human Rights.

You asked for details of the duties and powers of all statutory commissions, ombudsmen, tribunals etc in relation to devolved matters that have a locus in the human rights field. There is a large number of such bodies of varying size and width of remit and it would be neither practical nor helpful to attempt a comprehensive assessment of all of them. I therefore attach a table to this letter setting out the main statutory persons and bodies in this area, which I hope will be helpful.

It is also important to note that the role of the Commissioner is envisaged as being essentially proactive, that is the Commissioner’s activities would primarily be driven by priorities determined by the Commissioner him or herself within the framework of his or her general and specific duties and
functions. This contrasts with a complaints-handling role such as that performed by the Scottish Public Services Ombudsman, which is essentially reactive since it is dictated by the need to respond to whatever complaints are raised and is limited to the subjects raised in such complaints. Much of the Commissioner’s work will also be generic or sectoral in nature.

On relations between the Commissioner and other commissions, etc more generally, we have said that the Scottish Commissioner would be expected to enter into a memorandum of understanding with the Commission for Equality and Human Rights (CEHR) to be established by the Equality Bill presently being considered at Westminster, to set out how the Commissioner and the CEHR would work together on matters of mutual interest. Similarly, we would expect the Scottish Commissioner to enter into similar arrangements with other relevant interests such as the Scottish Commissioner for Children and Young People and the Scottish Public Services Ombudsman. The precise form and content of such arrangements would not be dictated by the Executive but rather be for the Commissioner and the other persons or bodies concerned to agree amongst themselves, although the Executive would of course be willing to offer advice and assistance in that connection if asked to do so.

I would stress that none of the other Commissions and similar bodies have a specific remit to look at human rights issues, although these could often arise incidentally in their work.

I would also point out that existing commissioners, ombudsmen etc could themselves be among the beneficiaries of the work expected to be carried out by the Commissioner. Securing the mainstreaming of human rights within their activities is as important for them as it is for public authorities generally, and by working with them to that end the Commissioner should be able to help them fulfil their functions more effectively.

**Relationship with the courts**

As you mention in your letter, the Bill would give the Commissioner power to intervene in court proceedings in civil cases: you queried why children’s hearings are explicitly excluded from this provision. I have noted with interest the evidence on this point given to the Committee by the Commissioner for Children and Young People in Scotland and by the Scottish Children’s Reporter Administration. This is a complex issue and I recognise that there are arguments on either side. Nonetheless, our view remains that exclusion of children’s hearings from the intervention provision is appropriate.

That view does not stem from any belief that human rights issues cannot arise in children’s hearings. We agree with the Commissioner for Children and Young People that it would seem possible that such issues could arise. Instead, the exclusion of children’s hearings from the intervention power stems from the rationale for including the intervention provision on the face of the Bill.

To explain: the intervention provision (section 11 of the Bill) gives the Scottish Commissioner power to intervene in court proceedings. This express provision has been inserted to remove any doubt that the Scottish Commissioner would be able to undertake such intervention. The Scottish Executive wishes to avoid the possibility of a similar situation arising to that which occurred in Northern Ireland, where, in the absence of an express statutory power for the Northern Ireland Human Rights Commission to intervene in court proceedings, the Commission had to take a case to court (eventually reaching the House of Lords) to establish that it did in fact have the capacity to intervene. Section 11 is thus essentially a “for the avoidance of doubt” provision, to ensure that the Scottish
Commissioner would not encounter similar difficulties by being prevented from intervening in a case simply because of questions as to whether it had the ability in law to do so.

Therefore, the aim of section 11 is not to create an entirely new ability to intervene in court proceedings where no such ability currently exists, but rather to ensure that the Commissioner can intervene in circumstances where intervention by third parties in general is already possible. That is the case as regards civil proceedings in the Scottish courts, although it appears to be extremely rare in practice. However, there is at present no scope at all for such intervention in criminal proceedings or in children’s hearings. Creating any such right would be a fundamental and far-reaching change to the nature of such proceedings, especially since it would raise the question of whether third parties in general should be able to intervene in such cases. Accordingly, the Executive remains of the view that it would not be appropriate for the Scottish Commissioner for Human Rights to be given a power to intervene in criminal proceedings or in children’s hearings.

As provided by section 11(8) of the Bill, the explicit intervention power would be without prejudice to the Commissioner’s capacity to intervene in any proceedings under an enactment or the practice of the court or tribunal. Therefore, if a general right for third parties to intervene in criminal proceedings or children’s hearings was to be created at any time in the future the Commissioner would be able to take advantage of it. In its submission to the Committee, the Scottish Children’s Reporter Administration questioned whether this would be sufficiently clear to a court. However, we would expect that if, in such circumstances, the Commissioner was to seek to intervene in a case the relevant court (or tribunal, or hearing) would either already be aware of the terms of section 11(8) or would be made aware of it by the Commissioner in his or her request to intervene.

I would add, if only by way of clarification, that while children’s hearings are indeed classified as civil proceedings under Scots law they do have some aspects that are more akin to those of criminal proceedings. In particular, children’s hearings often deal with offence-related matters and can impose compulsory measures of supervision. Also, criminal cases can be sometimes referred to children’s hearings by the criminal courts for advice or a decision, and so a hearing can play a direct role in the criminal justice process. The European Court of Human Rights has a well-established rule that, in considering whether proceedings are to be considered as civil or criminal for the purposes of the European Convention on Human Rights, the entire purpose and nature of the proceedings should be taken into account and not just their classification under domestic law. Therefore, the fact that children’s hearings are classified as civil proceedings under Scots law would not necessarily be definitive in determining how they should be considered in respect of human rights.

**Extent of powers**

You raised three sets of issues under this heading.

Firstly, you asked for more information on why it was not felt to be appropriate to give the Commissioner powers to investigate complaints by individuals; to bring legal actions in his or her own name; and to enforce the findings of inquiries.

The Bill describes the general duty of the Commissioner as being to promote awareness and understanding of, and respect for, human rights. The Executive therefore sees the Commissioner’s role as essentially being promotional, awareness-raising and advisory in nature. We believe that this is how a Commissioner would best contribute to the creation of a human rights culture in Scotland. Giving the Commissioner the additional functions of either raising legal actions in his or her own
name and/or investigating individual complaints would in our view detract from that key role: experience in other jurisdictions has shown that conferring such functions on human rights institutions can lead to the institution having to devote a substantial and increasing proportion of its resources to such casework activity at the expense of its core activities. Further, giving the Commissioner a function of investigating individual complaints would risk duplicating complaints-handling activity already undertaken by existing bodies or persons such as the Scottish Public Services Ombudsman, as the Ombudsman herself has pointed out in her evidence to the Committee. Rather, we believe that the added value that the Commissioner for Human Rights would provide in this area would be maximised by the Commissioner’s role being focused on promotional, awareness-raising and advisory activities since that is where the greatest gap presently exists.

So far as enforcing the recommendations of inquiries is concerned, that would seem to be inconsistent with the concept as set out in the Bill of inquiries being into policies and practices rather than individual cases. The arguments set out above against giving the Commissioner a complaint-handling role could therefore apply here too. In any case, if the findings of inquiries were to be legally enforceable that could in effect give inquiries a quasi-judicial nature. That would mean inquiries having to be conducted in a much more formal and indeed legalistic way than is presently envisaged, with for instance a likely need for interested parties to be legally represented in inquiry proceedings. That would of course have significant resource implications for both the Commissioner and the public authorities being investigated, one consequence of which might be to reduce the number of inquiries that the Commissioner could hold (since each inquiry would probably take longer and require more resources to conduct). Finally, any recommendations of an inquiry should by the simple fact of being published by the Commissioner carry significant weight and so any public authority affected by such recommendations would be expected to respond to them. The Executive believes that this should be sufficient to secure change where that is necessary without the need for a legal mechanism for enforcement. The Scottish Public Services Ombudsman pointed out in her evidence to the Committee in relation to inquiries conducted by her office that it is up to Parliament to enforce any recommendations that such inquiries may make and to hold people publicly and democratically accountable. I believe that the same principle should apply to the Scottish Commissioner for Human Rights.

It is also important to note that our advice is that the Scottish Parliament could not confer a power on the Scottish Commissioner to raise legal actions in his or her own name, since that would go against section 7(1) of the Human Rights Act 1998 (which provides that an action relating to human rights is only competent if the litigant is a victim or potential victim). Paragraph 1(2)(f) of Schedule 4 to the Scotland Act 1998 precludes the Scottish Parliament from amending the Human Rights Act. Also, section 100(1) of the Scotland Act 1998 states that the Scotland Act does not enable a person to bring an action in court and rely on a breach of Convention rights unless the person is a victim or potential victim of the breach. So it is thought that seeking to disapply the victim test by conferring a power on the Commissioner to raise legal actions arising from alleged breaches of human rights in his or her own name would almost certainly be outwith devolved competence.

The Executive believes firmly that a Scottish Commissioner for Human Rights with the functions and powers set out in the Bill would be able to make a significant contribution to the creation of a human rights culture in Scotland. I appreciate that there have been calls from a number of quarters for the Commissioner to have additional powers; but our proposals have received broad support from a wide range of interests and I have been encouraged to note most of those who have submitted evidence to the Committee have agreed that a Commissioner as proposed would add significant value to the existing arrangements for promoting and protecting human rights in Scotland.
Secondly, you asked what there would be to prevent the Commissioner once he or she was in post from deviating from the terms of reference set out in the Bill. I am not entirely clear what is meant by “terms of reference” in this context; but I think the essential point is that the Commissioner would only have the functions and powers conferred on him or her by the legislation establishing the post of Commissioner. Any extension to those powers or functions could only come about through further legislation to amend the original provisions.

Finally, you asked why the Bill does not include provisions to place the Scottish Commissioner under a statutory duty to prepare a strategic plan, and for that plan to be periodically reviewed and consulted on, similar to those for the Commission for Equality and Human Rights contained in the Equality Bill. The short answer is that there is not thought to be any need for such a provision. Section 12 of the Bill would require the Commissioner to lay an annual report before the Parliament, and section 12(2) provides that this report must include a summary of the action which the Commissioner proposes to take in the next reporting year in pursuance of his or her general duty. In addition, section 12(3) provides that the Commissioner must comply with any directions given by the Parliamentary Corporation as to the form and content of reports. There is nothing in the Bill that would prevent the Parliament asking the Commissioner to produce a strategic plan or similar document if that was felt to be desirable.

I would add that the duty in the Equality Bill to prepare and consult on a strategic plan stems mainly from the equality remit of the proposed GB Commission, and in particular a desire to ensure the Commission would take on board the need to serve each of the equality strands, such as racial equality and disability rights, as effectively as possible and to maintain a focus on the needs of each strand. This was seen as necessary given that the Commission is to take over the functions of each of the existing statutory equality commissions, such as the Commission for Racial Equality. There is felt to be a need to ensure that the needs of all of the groups served by those commissions are fully taken into account. However that is not a consideration for the Scottish Commissioner, who will not have specific functions relating to the statutory equality framework as that is a reserved matter.

**Definition of human rights**

You asked why there is a need for the Scottish Commissioner for Human Rights to promote awareness and understanding of rights under instruments other than the European Convention on Human Rights, and whether this might dilute the Commissioner’s promotional work in relation to the ECHR.

The rights contained in other international instruments do have a bearing on Scottish public authorities in a number of ways. Firstly, as a general principle, in signing and ratifying these instruments the UK has accepted the conditions set out in them. The UK is therefore obliged to uphold them, even if they are not directly enforceable through the courts; and under the Scotland Act responsibility for observing and implementing international obligations is devolved. It is therefore thought appropriate that the Scottish Human Rights Commissioner should be able to promote awareness and understanding of such instruments to help reduce the risk of Scottish public authorities failing to comply with them and so of the UK being found to be in breach of its international obligations.

Although these conventions cannot be enforced in domestic law, Scottish public authorities more generally can have their compliance with them publicly scrutinised. For example, the European Convention for the Prevention of Torture (ECPT) includes provisions to allow a monitoring committee to visit places of detention and make a report on its findings and opinions. The last such
visit to Scotland was in 2003 when the European Committee visited HMP Barlinnie, Helen Street Police Station and the State Hospital at Carstairs. Additionally, some of the instruments include protocols that give rights of individual petition, which allow individuals to make complaints directly to the international committee responsible for overseeing the relevant convention. The UK recently ratified the protocol that gives such a right of petition in relation to the Convention for the Elimination of Discrimination Against Women (CEDAW). The UK is generally not a signatory to similar protocols to other conventions, but this may change in the future. The Commissioner could therefore also have an important role in making public authorities more aware of what they may be called upon to do, in connection with monitoring of compliance with such international human rights instruments.

Indeed, national human rights institutions often participate directly in international monitoring procedures, briefing the relevant monitoring committees and advising State parties on how to meet their obligations between hearings. This is widely recognised as being a key function of such institutions, for instance under the UN’s Paris Principles, and we believe that the Scottish Commissioner should be able to participate fully in such activity. In addition to the general inclusion of international instruments in the Commissioner’s remit, the Bill therefore also includes specific provisions that would allow the Commissioner to play a role in relation to the UN Convention Against Torture, which has one of the most complex monitoring procedures of any of the international conventions, and the ECPT.

Finally, other international instruments can as appropriate be referred to by the courts when considering cases involving the ECHR. For example, during proceedings in the Napier case relating to slopping out in prison, which included consideration of whether Articles 3 and/or 8 of the ECHR had been breached, reference was made to a wide range of such instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the United Nations Body of Principles for the Protection of All Persons Under Any Form of Protection or Imprisonment, the European Prison Rules, and certain Council of Europe Economic and Social Council Resolutions. Therefore, even though such other instruments have no direct legal force in Scotland they can be used to help inform consideration of actual or potential legal issues that may arise under the ECHR; and thus the advice and guidance that the Commissioner would provide could be incomplete if he or she was not able to take those other instruments into account.

Budget

You asked in your letter how inquiries by the Commissioner would be funded, particularly given the figure of £225,000 given in the Financial Memorandum for spending on promotion and awareness-raising. First of all, I would emphasise that the budget lines described in the Financial Memorandum, including the figures given for promotion and awareness raising, are purely illustrative. As explained in the Financial Memorandum, they are only estimates to give an example of how the Commissioner’s budget might look, and to demonstrate why the Executive considers an annual budget in the order of £1 million to be appropriate, rather than to prescribe exactly how such a budget should be spent. The exact structure of the budget will depend on decisions made by the Scottish Parliament and the Commissioner.

We believe that distributing the Commissioner’s proposed £1 million a year budget to existing NGOs to work with public authorities in meeting best practice would be problematic give the scarcity of specialist human rights NGOs in Scotland. The number of Scottish human rights NGOs recently declined further when the Scottish Human Rights Centre, which was one of the most significant
Scottish human rights campaigning organisations, regrettably closed its doors recently due to lack of funds. It is therefore highly questionable whether the NGO infrastructure exists, or could be readily created, to fulfil the role proposed for the Commissioner.

In any case, we do not think that NGOs could perform that role. For instance, many of the more subject-specific NGOs in Scotland, such as those dealing with equality, disability, victim support and so on, do not have thorough knowledge of human rights as described in the ECHR and other instruments. Many voluntary sector bodies themselves have called for better access to specialist human rights advice, which they often find necessary in order to meet legal obligations when providing services in conjunction with public authorities. The Commissioner would provide a means of supplying that need in a co-ordinated and consistent way. Most NGOs exist to serve the interests of particular groups and so could not be expected to provide advice, guidance etc across the board in the same way as the Commissioner would do. There would be a risk of groups who are not represented by strong NGOs missing out in comparison to those who are, whereas a Commission would exist to serve the interests of the public as a whole.

Another point is that an important element of the Commissioner’s functions would be the ability to conduct inquiries. It is proposed to give the Commissioner legal powers to obtain information and to enter places of detention for the purpose of conducting such inquiries. However, it would be neither feasible nor desirable to confer such powers on NGOs, who are by definition unaccountable save to their own members. It is in any case questionable whether any inquiry by an NGO could be perceived as having the same authority and assurance of independence as an inquiry by an independent Commissioner.

Human rights is now an established part of the Scottish legal and social landscape, but specialist advice and guidance is hard to come by in Scotland despite some examples of excellence in the voluntary sector, the legal profession and academia. A statutory Human Rights Commissioner would provide a stable, independent and authoritative source of advice and expertise, backed up by additional powers of inquiry which are not available to NGOs or private practitioners. The Commissioner would therefore supplement and enhance the work of NGOs, and we would expect the Commissioner to work closely with NGOs as well as with public authorities and other relevant interests. To revert to a point made earlier, we believe that this would provide added value to a far greater extent than simply conferring the functions, powers and/or budget proposed for the Commissioner on existing persons or organisations.

I hope this is helpful, and look forward to seeing you and your fellow Committee members on the 18th.

ROBERT BROWN
The following table summarises the remit and powers of the main statutory commissions and other bodies in Scotland that have investigatory, reviewing or complaints-handling functions with a potential locus in relation to human rights. It is not intended to be a comprehensive list of such entities.

<table>
<thead>
<tr>
<th>Body</th>
<th>Remit</th>
<th>Complaints handling role and powers</th>
<th>General inquiries role and powers</th>
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<tbody>
<tr>
<td><strong>Scottish Public Services Ombudsman</strong></td>
<td>The SPSO may investigate complaints about maladministration or service failure by Scottish public authorities. A listed authority may also request an investigation by the SPSO where there has been public criticism of an authority but, as no complaint has been made to the Ombudsman, she cannot investigate.</td>
<td>The SPSO has powers to gather evidence for investigations, which are the same as those for the Court of Session in respect of the attendance and examination of witnesses and the production of documents.</td>
<td>None.</td>
</tr>
<tr>
<td><strong>Scottish Information Commissioner</strong></td>
<td>The Commissioner has a general duty to promote good practice among public authorities in relation to FoI and to enforce the terms of the Act.</td>
<td>Individuals can apply to the Commissioner if they feel that a request for information has not been handled properly by a public authority. The Commissioner may issue a notice to the public authority specifying what steps it should take in order to comply. If the authority refuses to comply with the notice, the Commissioner may refer the matter to a Sheriff who may treat the authority as if they were in contempt of court. The Commissioner may also apply to the Sheriff for a warrant if there are reasonable grounds for suspecting that a public authority is failing to comply with the Act. The warrant authorises the Commissioner or his staff to enter and search the premises and to inspect and seize any documents or other material that might be relevant.</td>
<td>None</td>
</tr>
<tr>
<td>Scottish Commissioner for Children and Young People</td>
<td>The Commissioner has a general function to promote and safeguard the rights of children and young people.</td>
<td>The Children’s Commissioner does not have the power to investigate individual complaints or support individual cases.</td>
<td>The Commissioner may carry out investigations into whether service providers have “regard to the rights, interests and views of children and young people in making decisions or taking actions that affect those children and young people.” The Commissioner may require any person to give evidence or produce documents on any matter within the terms of reference of an investigation.</td>
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<tr>
<td>Care Commission</td>
<td>The remit of the Care Commission is to regulate care services in Scotland. The Commission is under a duty to establish a complaints procedure in relation to the provision of a care service or the exercise by the Care Commission of its functions.</td>
<td>The Commission may enter and inspect any premises that are used to provide cares including care home service, school care accommodation, secure accommodation services and independent health care services which provide overnight accommodation. The Commission may also conduct interviews and inspect and take copies of documents. Any person who obstructs these powers is guilty of an offence.</td>
<td>None.</td>
</tr>
<tr>
<td>Mental Welfare Commission for Scotland</td>
<td>The Commission monitors the operation of the Mental Health (Care and Treatment) (Scotland) Act 2003 and promotes best practice in relation to the Act.</td>
<td>The Commissioner has statutory powers to investigate the cases of individuals being treated under the Act. The Commission has powers to conduct interviews, inspect records, conduct medical examinations, make visits and require people to give evidence.</td>
<td>The Commission does not have any explicit statutory powers to conduct inquiries of a more general nature.</td>
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</tbody>
</table>
| HM Chief Inspector of Prisons for Scotland | The Inspectorate has a statutory basis and reports to Scottish Ministers. HMCIP’s functions include:  
• Inspection of all prison establishments in Scotland;  
• Inspection of all legalised police cells;  
• Inspection of escorts;  
• Thematic inspections and reviews as necessary;  
• Conducting reports on any matter connected with Scottish prisons as directed by the Minister for Justice. | HMCIP is entitled to access any part of an establishment, to see any relevant papers or records held in the establishment or at SPS headquarters, and to speak to any staff member or prisoner privately and in confidence.  
Individual incidents are subject to internal investigation within the SPS and would also be referred to the police if a criminal offence is alleged to have occurred. The Minister for Justice may decide that HMCIP should also investigate an individual incident if that incident is sufficiently serious. | Thematic inspections are at the discretion of HMCIP. It is up to HMCIP to decide whether or not there is an identifiable need for such an inspection. |
| --- | --- | --- | |
| Scottish Prisons Complaints Commissioner | The remit of the Commission is to conduct an independent review of prisoners’ complaints that have not been resolved through the internal grievance system of SPS. | The Commissioner is a creation of administrative policy rather than statute and therefore does not have statutory powers of investigation. | None. |
| Commissioner for Public Appointments in Scotland | The remit of the Commissioner is to establish a code of practice for Ministerial appointments to public bodies and to monitor appointments to ensure that they are made on merit after fair and open competition. | The Commissioner monitors appointments through independent scrutiny of the selection process, annual audit and investigation of complaints. The terms of the 2003 Act place a duty on Scottish Minister to provide the Commissioner with information relating to an appointment, although no legal sanctions are set out in the Act. | None. |
| **HM Inspector of Education** | (HMIE) in Scotland is an Executive Agency. The core business of HMIE is inspection and review. Scottish Ministers have the authority to dispatch HMIE to inspect schools and education authorities. If any person obstructs an inspection, he shall be liable on summary conviction to a fine or to imprisonment. An inspection may relate to those functions generally or to such matters in relation to those functions as may be specified in the request. Education authorities are required to give all reasonable assistance to whoever is carrying out the inspection. | None. |
| **Parliamentary Standards Commissioner** | The Commissioner investigates complaints that an MSP has broken the Code of Conduct. The Commissioner only investigates whether or not the MSP has done what has been complained about and whether that means the Code of Conduct has been broken. Parliament decides what the consequences should be if there is found to be a breach of the Code. | The Commissioner does not conduct general inquiries, give general advice about the Code or proactively advise whether a proposed course of action might breach it. |
| **Scottish Law Commission** | The function of the Commission is to recommend reforms to improve, simplify and update the law of Scotland. They offer independent advice to the Executive, but reform itself must be carried out by the Scottish Parliament or, where appropriate, the UK Parliament. None. | None. |
Finance Committee

Report on the Financial Memorandum of the Scottish Commissioner for Human Rights Bill

The Committee reports to the Justice 1 Committee as follows—

Introduction

1. Under Standing Orders, Rule 9.6, the lead Committee in relation to a bill must consider and report on the bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

2. This report sets out the views of the Finance Committee on the Financial memorandum of the Scottish Commissioner for Human Rights Bill (“the Bill”), for which the Justice 1 Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Background

3. The Committee agreed to adopt level 2 scrutiny in considering the Bill. This involved seeking written evidence from organisations financially affected by the Bill, then taking oral evidence from the Executive Bill Team, before producing this report.

4. The Committee sought and received written evidence from the Scottish Parliamentary Corporate Body (SPCB). This is annexed at the end of this report.

5. At its meeting on 29 November, the Committee took oral evidence from officials of the Scottish Executive. This evidence can be viewed by clicking here.

6. The Committee’s consideration of the Financial Memorandum for the Bill was assisted by its recent evidence sessions and report on Stage 2 of the 2006-07 Budget Process, and in particular, the budget of the Scottish Commissioner for Children and Young People. Evidence of the SPCB when it appeared before the Committee on 15 November can be viewed by clicking here. The oral evidence of Scotland’s Commissioner for Children and Young People, given at the Committee meeting of 22 November, can be viewed by clicking here.

7. The Committee expresses its thanks to those who submitted their views on the Bill to us.
Financial Memorandum

8. The Bill provides for the establishment of a Scottish Commissioner for Human Rights (SCHR) and up to two deputy commissioners. The Commissioner is to be independent in that he or she may establish his or her own priorities and strategic direction, but is to be accountable to the Scottish Parliament in the same manner as other commissioners and ombudsmen established by the Parliament.

9. The Commissioner’s role will be to promote awareness and understanding of, and respect for, human rights. The Bill sets out several functions in respect of this role, including:

- monitoring law, policy and practice;
- providing information, advice, guidance and education;
- carrying out inquiries; and
- intervening in civil court proceedings.¹

10. The Financial Memorandum estimates that the costs of running the Commissioner’s office will be £1 million per annum. This amount is to be transferred from the Executive to the SPCB each year. Additional non-recurrent set-up costs are estimated at £208,000. The specific costs provided in the Financial Memorandum are set out below.² The Financial Memorandum emphasises that the figures are indicative rather than prescriptive, with the structure of the office to be determined by the SPCB and the commissioner.³

<table>
<thead>
<tr>
<th></th>
<th>2006-07</th>
<th>Subsequent years</th>
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</thead>
<tbody>
<tr>
<td><strong>Staff costs</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recruitment of Commissioners (para. 9)</td>
<td>11,000</td>
<td>0</td>
</tr>
<tr>
<td>Commissioners’ salaries (para. 8)</td>
<td>112,000</td>
<td>224,000</td>
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<tr>
<td>Recruitment of staff (para. 11)</td>
<td>100,000</td>
<td>6,000</td>
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<tr>
<td>Staff salaries (para. 16)</td>
<td>175,000</td>
<td>350,000</td>
</tr>
<tr>
<td>Training (para. 18)</td>
<td>10,000</td>
<td>10,000</td>
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<tr>
<td><strong>Sub-total</strong></td>
<td>408,000</td>
<td>590,000</td>
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<tr>
<td><strong>Office costs</strong></td>
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<td></td>
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<tr>
<td>Rent (para. 19)</td>
<td>38,000</td>
<td>75,000</td>
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<td>Acquisition and conversion (para. 19)</td>
<td>88,000</td>
<td>0</td>
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<tr>
<td>Equipment (para. 20)</td>
<td>110,000</td>
<td>8,000</td>
</tr>
<tr>
<td>Running costs (para. 21)</td>
<td>40,000</td>
<td>80,000</td>
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<tr>
<td><strong>Sub-total</strong></td>
<td>276,000</td>
<td>163,000</td>
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<tr>
<td><strong>Functional costs</strong></td>
<td></td>
<td></td>
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<tr>
<td>Travel (para. 22)</td>
<td>18,000⁴</td>
<td>18,000</td>
</tr>
<tr>
<td>Promotion and awareness-raising (para. 23)</td>
<td>175,000</td>
<td>175,000</td>
</tr>
<tr>
<td>Research (para. 25)</td>
<td>25,000</td>
<td>50,000</td>
</tr>
<tr>
<td><strong>Sub-total</strong></td>
<td>209,000</td>
<td>243,000</td>
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</table>

¹ The Bill, ss 2-11
² Scottish Commissioner for Human Rights Bill: Explanatory Notes, page 18
³ Explanatory Notes, page 14
⁴ This is a revised figure, given by Executive officials in evidence, Peddie, Official Report, 29 November 2005, Col 3192
Issues considered by the Committee

11. In considering the Financial Memorandum of the Bill, two key issues were pursued by the Committee: the financial accountability of the Commissioner; and costings in respect of the Commissioner.

Financial accountability versus independence

12. The Finance Committee’s consideration of the Bill occurred at a time when the Committee is increasingly concerned with rising costs associated with the growing number of commissioners and also with the tension between the statutory independence of commissioners and ombudsman and their accountability for expenditure of public funds. In the context of our consideration of the 2006-07 Budget Process, the Committee recently raised questions as to whether there is a need for powers to be written into legislation that will afford the SPCB greater budgetary control over commissioners.

13. As with legislation establishing similar officeholders, funding for the Scottish Commissioner for Human Rights will be made available by the SPCB, which will also scrutinise the Commissioner’s expenditure proposals and budget bids. The Bill departs from the legislation for other commissioners by providing that the SPCB is to approve the Commissioner’s office location and staff numbers. In its submission, the SPCB welcomed this new and stronger accountability mechanism.6

14. The Policy Memorandum, however, appears to outline greater powers for the SPCB than are proposed in the Bill, stating that accountability of the Commissioner to the Parliament will involve the Commissioner’s budget being ‘determined’ by the SPCB.7

15. Given our concerns in this area, and apparent difference between the powers in the Bill and the Policy Memorandum, the Committee asked Executive officials what consideration has been given to providing the SPCB with full budgetary control over the Commissioner. Officials advised that the Executive’s working assumption was that the SPCB does have budgetary control over commissioners:

"we regard the detail of the commissioner budgets as a matter for the corporate body to determine in consultation with the commissioners on the basis of the bids that they put forward.”8

16. However, when representatives of the SPCB appeared before the Committee as part of our consideration of the 2006-07 Budget Process, it was apparent that the SPCB does not consider that it has the power to ‘determine’ commissioners’ budgets. Nora Radcliffe MSP, a member of the SPCB, noted the sensitivities around the SPCB being perceived to be ‘too directive’ with commissioners.9 These

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5 ibid
6 Submission from SPCB
7 Scottish Commissioner for Human Rights Bill: Policy Memorandum, page 17
8 Peddie, Official Report, 29 November 2005, Col 3193
9 Radcliffe, Official Report, 15 November 2005, Col 3093-5
sensitivities were also apparent when the Commissioner for Children and Young People gave evidence to the Committee.\footnote{Marshall, Official Report, 22 November 2005}

17. The Committee is troubled by obvious discrepancy between the views of the Executive, the SPCB and at least one commissioner regarding the powers of the SPCB in respect of commissioners’ budgets. The Committee considers that the financial framework within which commissioners operate needs to be addressed, so that commissioners’ independence is protected, whilst the power of parliamentary authorities to set commissioners’ budgets is strengthened. The exact powers of the SPCB need to be clear to all parties.

18. In its recent report on the 2006-07 Budget, the Committee noted very serious concerns over potential gaps in accountability in respect of all parliamentary commissioners and ombudsman. It recommended that there be a review of the powers of direction in relation to these officeholders in the legislation that set them up. It stated that on the assumption that there is a gap in the legislation with regard to budgetary control over such bodies, then the necessary steps be taken to strengthen the budgetary powers of the SPCB in relation to them.\footnote{Finance Committee, Report on Stage 2 of the 2006-07 Budget Process, page xx}

19. In respect of this Bill, the Committee considers that rather than wait for such a review to occur, proactive steps need to be taken to address the apparent absence of clarity regarding accountability. \textbf{The Committee recommends to the Justice 1 Committee that this issue be raised with the Minister and that steps be taken to clarify in the legislation that the SPCB should have responsibility for setting the Commissioner’s budget.}

Costings

20. The second major issue explored by the Committee concerned the specific costings in the Financial Memorandum.

21. In its submission the SPCB raised a number of concerns about the Financial Memorandum’s estimates. As the budget holder for the Commissioner, the SPCB will be required to meet any shortfall between the £1m annual allocation from the Executive and the actual costs of the Commissioner. The SPCB considers that in its first year the Commissioner’s costs will be within the £1m budget as his or her office will not be fully operational, but that the costings for the second and subsequent years may be less realistic.

22. The SPCB’s specific concerns about the Financial Memorandum’s costings included:

- the estimated Commissioner’s salary is less than that currently paid to other commissioners in Scotland and the basis for the salary levels of deputy commissioners is unclear;
- in comparison with the requirements of other commissioners in Scotland, staff salaries may have been underestimated;
- office acquisition and conversion may not have been fully costed (should it not be possible to co-locate with another Commissioner); and
• no specific provision had been made for the Commissioner to undertake inquiries, or for external consultants or advice, including legal advice.\(^\text{12}\)

23. More generally, the SPCB was concerned that it only had sight of the detail of the Financial Memorandum when the Bill was published.\(^\text{13}\)

24. When the Committee asked about the basis for the commissioner and staff salary costings, Executive Officials explained that their estimates were based on those of comparable bodies around the United Kingdom. They stated that the saw the figure for the Commissioner’s salary as a median figure compared with some other bodies in Scotland and elsewhere in the UK. Similarly, in relation to staff costs they stated:

"We considered the broad staffing structure of comparable organisations in other jurisdictions and thought about how that sort of structure might need to be adapted for the specific roles that we had set out in the bill for the Scottish commissioner for human rights. Our estimate of the staffing that would be necessary in Scotland was based on the fact that the Scottish commissioner will have a slightly different role from those of the Irish and Northern Irish commissioners. For example, the Scottish commissioner will not have the complaints-handling or case-supporting role that the others have. We have scaled back the staffing assumption based on the fact that we do not expect the commissioner to be involved in those particularly resource-intensive roles."\(^\text{14}\)

25. Officials also explained that their office costs were drawn from comparisons with other similar bodies in the UK.\(^\text{15}\)

26. When asked about other aspects of the costings, including the absence of provision for legal advice, versus the clear provision for research, Executive officials explained—

"To be frank, we had a bit of difficulty in drafting the financial memorandum, because the body will have independence over its work programme and the issues that it decides to take up ... one of the difficulties that we faced was that if we had set out in the financial memorandum a more detailed, line-by-line description of what we anticipated its expenditure to be on, say, inquiries or legal fees, that would have created an expectation of how we expected the commissioner to structure his or her work programme ... We set things out rather generally and we deliberately did not go into the detail of how much we expect to be spent on each of the statutory powers, because we did not want to create an expectation that that expenditure would be met."\(^\text{16}\)

27. However, the Committee noted that these difficulties did not appear to have arisen in relation to the proposed budget for research. The Committee is

\(^{12}\) Submission from SPCB  
\(^{13}\) Submission from SPCB  
\(^{14}\) Thomson, Official Report, 29 November 2005, Col 3199  
\(^{15}\) Ibid, Col 3198  
\(^{16}\) Ibid, Col 3201
concerned that there does not appear to be firm basis for several of the assumptions made in the Financial Memorandum.

28. When questioned in evidence about the adequacy of the Executive’s consultation with the SPCB when preparing the Financial Memorandum, Executive officials indicated that some formal discussions had taken place, but that in retrospect it might have been better to provide the SPCB with a draft of the detailed costings at an earlier stage.\textsuperscript{17}

29. Within the context of our comments above in relation to accountability and budgetary powers, the Committee is also concerned that in not consulting adequately with the SPCB over the detail of the Bill, the Executive has further placed the SPCB in an invidious position as the budget holder for the new Commissioner.

30. The Committee considers that as the SPCB will be responsible for the budget of the Commissioner, and will be responsible for meeting any shortfall between the £1m allocated by the Executive and the true costs of the Commissioner, it would have been both important and reasonable for the Corporate Body to have had detailed input into the costings in the Financial Memorandum. This would also have furnished the Executive with ready access to presumably reliable estimates.

31. \textbf{The Committee recommends that in future, the Executive ensure that the SPCB has detailed input into the costings for any bill which will afford the Corporate Body a financial role.} The Committee also recommends that the lead committee pursue with the Minister whether the Executive would meet the entire cost of any financial shortfall that might arise rather than the SPCB having to be responsible.

32. At a broader level, the Committee is also concerned about the incremental growth in the number of commissioners and the potential problems that can arise in the absence of a strategic approach to such bodies. The Committee is aware that in its submission to the lead committee for the Bill, the Scottish Public Service Ombudsman pointed to a potential overlap between its responsibilities and those of the proposed Commissioner.\textsuperscript{18} Such jurisdictional issues are not only a legal and administrative problem: within the context of the Efficient Government initiative, they cannot be financially justified.

33. The Committee is of the view that the Executive has not so far demonstrated that there is a requirement for such a Commissioner or that its remit and responsibilities do not overlap with any other Commissioner or body. If a situation arises where there is an overlap between the remits of Commissioners, the budgets of the bodies concerned must be examined to ensure there is no unnecessary duplication. If there is substantial overlap between the remits of such bodies then Parliament has to decide whether the creation of another Commissioner is appropriate, given the cost, and whether it would be better either to incorporate the functions into the remit of one of the existing commissioners or alternatively to incorporate functions of existing Commissioners as appropriate into

\textsuperscript{17} Peddie, Official Report, 29 November 2005, Col 3200
\textsuperscript{18} Submission to the Justice 1 Committee from the Scottish Public Service Ombudsman
the new one, potentially allowing one or more of these structures to be dispensed with.

**Conclusion**

34. The Committee is concerned that in taking the significant step of preparing a Bill to establish a public body such as the Scottish Commissioner for Human Rights, the Executive does not appear to have fully considered the governance issues associated with the funding and financial oversight of that body. A sizeable number of commissioners and ombudsman have now been established in Scotland, and while they fulfil a very important role, it is critical that all parties – including the Commissioners themselves, the Executive, the Parliament, the SPCB, and the public - have a common understanding of the accountability mechanisms that operate with respect to such bodies. This issue goes beyond the financial aspect of the Bill and has important implications for the principles underpinning the legislation.
SSI Cover Note For Committee Meeting

SSI title and number: The Marriage (Approval of Places) (Scotland) Amendment Regulations 2005, (SSI 2005/657)

Type of Instrument: Negative

Meeting: 3rd Meeting, Wednesday 18 January 2006

Date circulated to members: Friday 13 January 2006

Justice 1 Committee deadline to consider SSI: Not Applicable. Instrument to be considered by Local Government and Transport Committee.

Motion for annulment lodged No

SSI drawn to Parliament’s attention by Sub Leg Committee: No

The above negative instrument is circulated to members of the Justice 1 Committee for information only. The instrument has been made as a result of a commitment made by the Scottish Executive during Justice 1 scrutiny of the provisions of the Civil Partnership Act 2004. Members should consult the Executive note for further details.
Dear 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 information is of interest.

Yours sincerely,

Hugh Henry

HUGH HENRY
A Media Role for the Scottish Commissioner for Human Rights

I am writing to you as the clerk for Justice 1 Committee with regards to the role of the Scottish Commissioner for Human Rights. In response to a letter I sent to MSPs in December 2005 I have been advised to contact you in order for the Parliament’s Justice 1 Committee to include our recommendation in their stage one consideration of the Scottish Commissioner for Human Rights Bill.

The establishment of a Scottish Human Rights Commission is an excellent opportunity to encourage a change in culture in some sections of the media in Scotland.

Reporting on issues relating to asylum-seekers, ethnic minority groups including Gypsy/Travellers, and mentally ill people have been cited as examples in relation to unjust reporting. A frequent and strongly expressed view in Forum on Discrimination events has been that the content and influence of some sections of the media is unjust. There are also wider issues for a democracy, for example the failure to present accurately a fair range of viewpoints.

There is good as well as bad practice in the media and the aim of a media review body would be to highlight the good practice as well as collecting evidence and reporting on the bad. This is not censorship. It is an attempt to change the climate by monitoring media and publicising and debating outcomes.

The U.N.’s Paris Principles on national human rights bodies suggest that a key feature of any commission should be to educate and promote awareness of good and bad practice. The Scottish Commission should have a proactive role in relation to media. While the Human Rights Commission would not be able to take on all of the proposed roles of a Media Commission, it could certainly take on a significant role in relation to media.

We hope that MSPs would seek to specify this when the legislation proceeds through Parliament. In particular, one of the two vice-commissioners could be given a media review role as part of their remit.

The Forum on Discrimination actively promotes the establishment of a Scottish Media Review Commission.

Yours sincerely,

Jalal Chaudry
Convenor of the Forum on Discrimination
Mike Pringle MSP
The Scottish Parliament
EDINBURGH
EH99 1SP

21 December 2005

Dear Mr Pringle

TRIBUNALS DEALING WITH DEVOLVED MATTERS

Thank you for your letter of 16 December. For your information, our new Chair is Professor Alistair MacLeary.

There is a number of tribunals which deal with devolved matters only. Those which are under our supervision and which sit regularly are:-

Additional Support Needs Tribunal
Agricultural Arbiters
Children's Hearings
Crofters Commission (public fact-finding meetings only)
Education Appeal Committees
Mental Health Tribunal for Scotland
NHS Discipline Committees
NHS National Appeal Panel for entry into pharmaceutical lists
NHS Tribunal
Rent Assessment Committees (shortly to become Private Rented Housing Tribunals)
Scottish Charity Appeals Panel (being established)
Valuation Appeal Committees

All of the above tribunals are governed wholly by Scottish primary legislation. Some of them also have parallel tribunals operating in England and Wales under separate but matching Westminster legislation.

There are some tribunals operating in Scotland which have their basis in GB-wide primary legislation but their rules of procedure are governed by separate Scottish secondary legislation. Thus they are not technically dealing with devolved matters only, but they could be included if the parameters are extended to include those areas where Scottish Ministers are required to legislate for the operation of the tribunal. The main ones are:-

Lands Tribunal for Scotland
Pensions Appeal Tribunals for Scotland
Scottish Parking Appeals Service

There are some other tribunals in this category which are technically extant but which have not sat in Scotland in recent years: these include the Dairy Produce Quota Tribunal for Scotland, Forestry Committees and the Meat Hygiene Appeal Tribunal.
There is also a number of other tribunal systems which are not under the Council on Tribunals' supervision and which we do not have detailed knowledge of their procedures: these include the Scottish Solicitors Discipline Tribunal and the Standards Commission for Scotland - the latter is certainly under Scottish primary legislation.

I hope this is helpful.

Yours sincerely,

[Signature]

MRS E M MACRAE
Secretary
The Secretary of the Scottish Committee of the Council on Tribunals
44 Palmerston Place
EDINBURGH
EH12 5BT

16 December 2005

Dear Sir,

I contacted John Elliott who I thought was still the Convenor of the Council but he informed me that he relinquished that post in May so I am writing to you to ask if you could help with an enquiry that I have. I enclose a copy of an extract from the Parliament’s Official Report of the Justice 1 Committee meeting of 7th December, columns 2347/2348. You will see that I asked Brian Peatle of the Scottish Executive Justice Department several questions in relation to tribunals. His statement, and I quote “The tribunals deal with reserved issues such as immigration, social security and employment...” implied that there are no tribunals which deal with devolved issues. Having had a brief conversation with John he was quickly able to identify a number of tribunals which deal with devolved matters.

I would be most grateful if you could provide me with a list of those tribunals that do deal with devolved matters only.

There is no particular rush for this information but I would be grateful if you could possibly provide it by the middle of January.

Thank you for your help with this matter.

Yours sincerely,

Mike Pringle MSP
Justice 1 Committee

40th Meeting, 2005 (Session 2)

7 December 2005

Mike Pringle: I understand why you are not getting involved in children's hearings, but what will be the commissioner's role in regard to tribunals? More cases come in front of the myriad tribunals that we have in Scotland than before any other court. My understanding is that tribunals are almost exclusively civil.

12:00

Brian Peddie: I do not know the figures, but it would not surprise me if you were right about the number of cases. The tribunals deal with reserved issues such as immigration, social security and employment, on which the Great Britain commission would have a role but the Scottish commission could not.

Mike Pringle: Do all tribunals throughout Scotland deal only with non-devolved issues?

Brian Peddie: That is our understanding—all those that we have been able to identify relate entirely to reserved matters.