

SCOTTISH COMMISSION FOR HUMAN RIGHTS ACT 2006

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Section 1: Establishment

8. [Section 1](#) establishes a corporate body to be known as the Scottish Commission for Human Rights. Further detail about the Commission is contained in schedule 1 to the Act

Section 2: General duty to promote human rights

9. Subsection (1) stipulates that the general duty of the Commission is to promote human rights, and particularly to encourage best practice in relation to human rights. This duty is clarified in subsection 3 as being to promote awareness and understanding of, and respect for, human rights.
10. Subsection (2) defines the phrase “human rights” in two parts. “Convention rights” means all Articles and Protocols of the European Convention on Human Rights listed in section 1 of the Human Rights Act 1998. This includes the right to life and the prohibition of torture, slavery and forced labour, amongst other rights. “Other human rights” are (non-Convention) human rights contained in any international instrument (e.g. an instrument enacted by the United Nations, the Council of Europe or the European Union) which have been ratified by the UK.
11. Subsection (4) stipulates that the Commission’s priority is the Convention rights and human rights of those groups in society whose human rights are not, in the Commission’s opinion, otherwise being sufficiently promoted. Convention rights are important because, as a result of the Human Rights Act 1998 and the Scotland Act 1998, they are directly enforceable through the domestic courts.

Section 3: Information, guidance, education, etc.

12. Subsections (1)(a) and (b) provide that the Commission may, in pursuing the general duty set out in section 2(1), publish or otherwise disseminate information or ideas and provide advice or guidance.
13. Under these subsections, the Commission could, for example, publish information leaflets, internet resources, or educational materials; send group emails; make presentations at conferences; set up awareness-raising campaigns; issue guidance material; or offer advice through correspondence or by telephone.
14. As detailed in subsection (1)(c), the Commission could, for instance, conduct research. The Commission could also conduct statistical research on court cases with human rights aspects.
15. Subsection (1)(d) provides that the Commission can provide education and training.

16. Subsection (2) states that the Commission can charge reasonable fees for providing any of the services described in the previous subsection. Any fees paid to the Commission must be put towards the costs of the activities listed in paragraphs (a) to (d) of subsection (1).

Section 4: Monitoring of law, policies and practices

17. The Commission is empowered by section 4 to review any area of the law of Scotland and the policies and practices of any Scottish public authorities. This function allows a process of reviewing and reporting, and the Commission is free to choose which issues it examines, provided that those issues are within its remit. The term 'Scottish public authority' is defined in Section 19.
18. Section 4 also empowers the Commission to recommend changes to the law and to the policies and practices of public authorities. These recommendations are not legally binding and there is no obligation upon public authorities to seek guidance from the Commission, nor is there any compulsion upon public authorities to implement the Commission's recommendations.
19. Subsection (2) requires the Commission to consult the Scottish Law Commission before undertaking any such review of the law.

Section 5: Power to co-operate etc. with others

20. This section empowers the Commission to consult, act jointly with, co-operate with or assist any other person. Subsection (2) further states that the Commission must ensure so far as practicable that activity undertaken does not unnecessarily duplicate the work of other statutory agencies with shared interests or remits that overlap with that of the Commission.

Section 6: No power to assist in claims or legal proceedings

21. Section 6 prohibits the Commission from providing assistance, including advice, guidance or grants, to any person making a claim or engaged in legal proceedings.

Section 7: Strategic Plans

22. The Commission is required by subsection (1) to lay a strategic plan before the Parliament once every four years detailing its proposals for fulfilling the Commission's general duty. Subsection (7) defines such periods as beginning with the day on which section 2, which describes the Commission's general duty, comes into force, and each subsequent period of four years thereafter.
23. In terms of subsection (2) the plan must set out the Commission's objectives and priorities for the period. It must also provide details of any areas of the law the Commission intends to review, and any other activities relating to the Commission's general duty, alongside a timetable for these activities.
24. Subsection (3) requires the Commission, before laying the strategic plan before the Parliament, to provide draft copies to the Parliamentary corporation and any other person that the Commission considers appropriate, and to invite them to submit comments.
25. Subsection (4) requires the Commission to arrange for the publication of each plan laid before the Parliament.
26. Under subsection (5) the Commission can review the strategic plan at any time and lay a revised plan for the period before the Parliament. Subsection (6) provides that in that event the provisions in subsections (3) to (5) about consultation, publication and review will apply in relation to that revised plan.

Section 8: Power to conduct inquiries

27. Subsection (1) states that the Commission can conduct inquiries into the policies or practices of a particular Scottish public authority, Scottish public authorities generally or Scottish public authorities of a particular description. Section 9 establishes certain restrictions upon these powers.
28. Subsection (4) sets out the procedure before starting an inquiry, requiring the Commission to draw up terms of reference and a summary of the procedure to be followed. The Commission must give notice of the proposed inquiry and its terms of reference and procedure to the relevant Scottish public authorities, and publicise such details in a manner that the Commission feels is appropriate to bring them to the attention of others affected by the inquiry.
29. ‘Relevant Scottish public authority’ is defined in subsection (7) to mean any public body which the Commission believes is likely to be required to give evidence or provide other information, or which has members, officers or staff who are likely to be so required.
30. Subsection (5) states that inquiries should be conducted in public but reserves to the Commission the ability to hear evidence in private.

Section 9: Restrictions as to scope of inquiry

31. Section 9 sets out various restrictions on the power of the Commission to conduct inquiries.
32. Subsection (1) states that the Commission cannot question the findings of any court or tribunal while conducting an inquiry, including in his or her final report.
33. The remit of the Commission restricts inquiries to the general policies and procedures of public authorities, as opposed to individual cases. However, an inquiry into the policies and practices of a particular Scottish public authority may be conducted if it is the only body exercising the functions being investigated, as set down in subsection (2)(a).
34. Additionally, inquiries may be initiated into the policies and practices of a particular Scottish public authority if the specific subject matter of the inquiry is to assess compliance with particular human rights (as defined in subsection (6)). The Commission, as previously stated, cannot conduct an inquiry into an individual case, although this does not bar the Commission from taking the relevant policies and practices into account during an inquiry.
35. Subsection (5) establishes similar rules for investigating the management and operation of institutions such as prisons, hospitals, schools, colleges and care homes. The Commission may only launch an inquiry into an individual institution if the institution in question is the only one of its kind in Scotland, or if the subject matter of the inquiry is to assess compliance with particular human rights (as defined in subsection (6)) at that institution.
36. Subsection (6) details the particular human rights referred to in subsections (2)(b) and (5)(b). These are contained in two of the international human rights instruments to which the UK is signatory. These instruments relate to the prevention of torture and degrading treatment. Subsections (2)(b) and (5)(b) give the Commission power to conduct inquiries into particular public authorities and institutions to ensure compliance and good practice in relation to these instruments. Provision is also made for further human rights instruments to be added to the list in subsection (6) by an Order in Council. Such an Order would be subject to affirmative procedure in Parliament.

Section 10: Evidence

37. Subsections (1) and (2) permit the Commission to require any Scottish public authority or member, officer or staff member of such an authority to give oral evidence, produce documents or to provide any other form of information deemed relevant to an inquiry.
38. Subsection (3) allows the Commission to consider information freely volunteered by public authorities or members of the public, provided that information is relevant to the inquiry.
39. Subsection (4) states that those required to give evidence by the Commission are not required to answer any question, produce any document or provide any information which those persons would be entitled to refuse to (as the case may be) answer, produce or provide in proceedings in a court in Scotland.
40. Subsection (5) amends the Legal Aid (Scotland) Act 1986 to provide that disclosure by the Scottish Legal Aid Board to the Commissioner of information obtained by Board in the exercise of its functions will not be a criminal offence
41. Further provision in relation to the requirement to provide evidence is made in Schedule 2.

Section 11: Places of detention – powers of entry, inspection and interview

42. This section empowers the Commission to enter places of detention during the conduct of an inquiry. In terms of this Act, ‘places of detention’ means any premises, vehicle or other place where a person can be detained on the authority or consent of a Scottish public authority. Subsection (3) clarifies this point by defining a person as being detained in a place “if he or she is imprisoned there or otherwise deprived (to any extent) of his or her liberty to leave the place”.
43. Specifically, subsection (1) empowers the Commission to inspect such places of detention and to conduct private interviews with any person detained there, subject to that person’s consent. Subsection (4) states that an interview is “in private” if it is conducted outwith the hearing of anyone involved in the management or control of, or working at, the place of detention. Schedule 3 makes further provision in relation to these powers.

Section 12: Report of inquiry

44. Upon completion of an inquiry, subsection (1) requires the Commission to lay a report of its findings before the Parliament. Section 16(1) further stipulates that such reports must be published by the Commission.
45. Subsection (2) states that the report must include the Commission’s findings and any resultant recommendations. Subsection (3) prohibits reporting upon the activities of a specified or identifiable person, unless the Commission considers that it is necessary to do so in order for the report to adequately reflect the results of the inquiry.
46. If the Commission chooses to exercise the capacity to identify individuals then it must furnish those persons with a draft of the proposed report and provide them with an opportunity to make representation concerning the proposed report. The Commission must consider any such representations before proceeding with publication.
47. The contents of the Commission’s reports are otherwise left to the judgement of the Commission.

Section 13: Confidentiality of information

48. This section states that neither the Commission, nor any agent of the Commission, past or present, shall disclose any information obtained in the course of the Commission’s activities unless such a disclosure is authorised by subsection (3).

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49. Subsection (3)(a) authorises disclosure of information provided that it is made with the consent of the person who provided it. Subsections (3)(b) and (c) further allow disclosure of information if the Commission deems it necessary for the furtherance of his or her functions or if it is made for the purposes of civil or criminal legal proceedings.
50. Subsection (2) identifies information that is subject to these rules. Information which has been obtained by or on behalf of the Commission for the purposes of an inquiry should not be disclosed unless at least one of the conditions described above are met. But subsection (2)(b) states that information which has previously been in the public domain is not covered by these restrictions.
51. As stated in subsection (4), a person who knowingly discloses information that should not be made public in terms of this section commits an offence. Subsection (5) details the penalties that can be imposed for an unauthorised disclosure of information.

Section 14: Power to intervene

52. This section describes the process by which the Commission may intervene in civil proceedings before a court, with the exception of children's hearing proceedings. The Commission may only make a submission to the court on an issue arising in proceedings which the Commission considers are relevant to its general duty and raise a matter of public interest.
53. Such interventions can only be made with leave of or at the invitation of the court – the Commission has no power to intervene in proceedings without the court's permission.
54. When applying for leave to intervene, the Commission must inform the court of the issue arising in the proceedings which the Commission believes to be relevant to its general duty. The Commission is further required to provide the court with a summary of the submission that it intends to make.
55. If the Commission is invited to intervene, then the court must set out the issue arising in the proceedings upon which the court seeks a submission. The court may only grant leave for or invite the Commission to intervene if it is satisfied that such an intervention is likely to assist the court.
56. Further rules relating to the procedure to be followed in an intervention can be made by the Court of Session in an Act of Sederunt.
57. As stated in subsection (8), this section is without prejudice to any capacity of the Commission to intervene in any proceedings before any court or tribunal in terms of any existing enactment or the practice of the court or tribunal.

Section 15: Annual report

58. In addition to issuing reports upon the completion of its inquiries, the Commission must also provide the Parliament with an annual report.
59. The report will include a summary of any inquiries that the Commission has conducted in the past year and a summary of any other activities undertaken.
60. Subsection (3) obliges the Commission to comply with any directions given by the Parliamentary corporation regarding the form and content of the report. As with reports on inquiries, the Commission must publish the annual reports.

Section 16: Publication of reports

61. Subsection (1) requires the Commission to arrange for the publication of all reports submitted to the Parliament. It is likely that any reports would be published in either electronic format or hard copy.

62. Subsection (2) enables the Commission to publish any other report relating to its functions.

Section 17: Protection from actions for defamation

63. Subsection (1)(a) provides the Commission with absolute privilege for all reports of inquiries, and any other statements and communications in relation to those inquiries. The provision of absolute privilege places a bar on a person's right to pursue an action of defamation in respect of such statements made by the Commission.
64. Subsection (1)(b) provides the Commission with qualified privilege for any other statement made in pursuance of the purposes of the Act, and subsection (1)(c) confers the same protection upon any statement made to the Commission for the same purposes. Under qualified privilege the Commission can make statements without fear of action provided that such statements are not motivated by malice or intent to injure. 'Statement' has the same meaning as in the [Defamation Act 1996 \(c.31\)](#) and therefore includes words, pictures, visual images, gestures or any other method of signifying meaning.

Section 18: Giving of notice

65. This section sets out the processes that the Commission must follow when giving notices.
66. Any notice to be given to any person under any provision of the Act must be given in writing, and must be either delivered in person or sent by registered post, recorded delivery, email or some other means which the person giving the notice considers likely to cause it to be delivered on the same or the following day. In the case of an individual, notice should be served at the person's usual or last known address, or the person's place of business or work. In any other case, notice should be served at the person's registered or principal office.
67. If notice is given by electronic means such as email, it will be treated as being in writing if it is received in a form which is legible and can be subsequently used for reference. Unless evidence to the contrary is provided, notice given by a means described in subsection (2)(c) is presumed to be delivered on the next working day following the day on which it is sent. In the Act "working day" means any day apart from a Saturday, a Sunday or an official bank holiday in Scotland.

Section 19: Meaning of "Scottish public authority"

68. This section defines "Scottish public authority". Any body, office or office holder who is a part of the Scottish Administration is considered a Scottish public authority. Also included is any Scottish public authority (within the meaning of the Scotland Act 1998) with mixed, i.e. devolved and reserved functions, or no reserved functions.
69. Additionally, any other person defined as a public authority within the meaning of the Human Rights Act 1998 is considered a "Scottish public authority" but only insofar as the functions of that person relate to Scotland and do not relate to reserved matters.

Section 21: Preparation for the Commission

70. This section allows the Parliamentary Corporation to do anything that it considers necessary or expedient in preparation for the establishment of the Commission. This includes determining the initial location of the Commission's office premises.
71. The provisions in this section will empower the Parliamentary Corporation to acquire property and make payments on behalf of the Commission. Any such property or debts will be transferred to the Commission by Order in Council when that body assumes its general duties.

Section 19: Short title, Crown application and commencement

72. This Act will bind the Crown and, excepting sections 21 and 22, will come into force on such a day as Her Majesty may by Order in Council appoint.
73. Such an Order in Council may appoint days for different purposes and contain transitional and transitory provision.

Schedule 1: The Scottish Commission for Human Rights

74. [Schedule 1](#) makes detailed provision concerning the status, independence, remuneration, terms of appointment and general powers of the Commission. The Schedule also details various administrative and procedural matters.
75. [Paragraph 1\(1\)](#) states that the Commission is to be composed of a member appointed to chair the Commission and not more than four other members. The chair shall be appointed by Her Majesty on the nomination of the Scottish Parliament, and other members will be appointed by the Parliamentary corporation.
76. [Paragraphs 2 and 3](#) state that the Commission, in the exercise of its functions, is not subject to the direction or control of any member of the Parliament, the Scottish Executive or the Parliamentary corporation. This is qualified because certain other provisions (section 15(3) and paragraphs 8(2)(b), 10, 11(1), (2) and (3)) give the Parliamentary corporation some control over the Commission, including the form of the Commission's annual report and the location of the Commission's principal office, and subsection (1) of paragraph 15 requires that the Commission comply with such directions as the Scottish Ministers may give regarding accounts and accounting records.
77. [Paragraph 4](#) deals with circumstances which would disqualify a person from appointment and holding office as a member of the Commission. No person may become a member if that person is a member of the House of Commons, the Scottish Parliament or the European Parliament. Persons who have held any of these offices in the previous year are also disqualified. For a prospective chair of the Commission, this means the year preceding the date of nomination, whereas any other member of the Commission would be disqualified if they had held such a post in the year preceding the proposed date of appointment.
78. [Paragraph 5](#) lists details of terms of office and remuneration for Commission members, stating that each may hold office for a period of up to five years and is eligible for reappointment when that period expires. A member of the Commission may be appointed for two terms of up to five years each but may not be reappointed for a third period.
79. [Paragraph 5](#) also provides that the chair of the Commission can be removed from office by Her Majesty at his or her request, or if one of two conditions is met. A member of the Commission can be removed from office by the Parliamentary Corporation under the same conditions, or at his or her request.
80. The first condition, in sub-paragraph (4), states that a member of the Commission may be removed from office if the Parliamentary corporation is satisfied that the office holder has breached his or her terms of appointment and the Parliament resolves that the member should be removed.
81. The second condition, in sub-paragraph (5), states that the Parliament may remove a member of the Commission from office if it resolves that it has lost confidence in him or her. In both cases, if passed on division, such a resolution must be voted for by not less than two thirds of those voting.
82. [Paragraph 5](#) also contains details regarding the members of the Commission's salaries, to the effect that each is entitled to such remuneration and allowances as are determined

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by the Parliamentary corporation. Other terms and conditions of holding office are to be determined by the Parliamentary corporation.

83. [Paragraph 6](#) makes provision for financial matters including payment of pensions, allowances and gratuities to persons who have ceased to be members of the Commission. The Parliamentary corporation has responsibility for arranging such payments. The pensions, allowances or gratuities arranged under this section may be in compensation for loss of office.
84. [Paragraph 7](#) states that the Commission may regulate its own procedure, including any quorum. Sub-paragraph (2) establishes that, if the chair of the Commission is not present at a meeting, then any other member of the Commission may chair the meeting.
85. The validity of any acts of the Commission is unaffected by any procedural defects in the appointment of members of the Commission, or by any vacancies in the membership.
86. [Paragraph 8](#) empowers the Commission to do anything which appears necessary or expedient for the purpose of, or in connection with or conducive to, the exercise of his or her functions. Paragraph 8 also confers upon the Commission the specific power to enter into contracts and, with the consent of the Parliamentary corporation, to acquire and dispose of land.
87. The Commission can delegate any function to any person it authorises to act upon its behalf. The Commission still retains ultimate responsibility for carrying out its functions, whether delegated or not.
88. [Paragraph 10](#) states that the Commission's choice of location for its office is subject to the approval of the Parliamentary corporation.
89. [Paragraph 11](#) allows the Commission to appoint staff on such terms and conditions as the Commission determines. The number of staff and their terms and conditions are subject to the approval of the Parliamentary corporation.
90. Sub-paragraph (3) makes provision for payment of pensions, allowances or gratuities to former staff. As read with sub-paragraph (4) this gives authority to the Commission to make arrangements, which may include pensions, allowances and gratuities made in compensation for loss of employment. Approval of such arrangements must be obtained from the Parliamentary corporation.
91. [Paragraph 12](#) allows the Commission to make arrangements with any other public body or office holder to share staff, premises, services and other resources. The Commission is required to take any advantages conferred by such arrangements into account when considering its requirements.
92. [Paragraph 13](#) requires the Parliamentary corporation to designate a member of the Commission or its staff as the accountable officer and states that he or she is accountable to the Parliament for exercise of those functions. It is the duty of the accountable officer to ensure that the finances of the Commission are kept in good order and that the resources of the Commission are used economically, efficiently and effectively. If the accountable officer is required to act in a manner that he or she considers inconsistent with these responsibilities, the accountable officer must obtain written authority from the Commission and send a copy of this to the Auditor General for Scotland.
93. In terms of paragraph 14, the Parliamentary corporation is responsible for payment of the salary etc. of each member of the Commission, and any expenses of the Commission unless such expenses are met by sums received under section 3(3)
94. [Paragraph 14](#) also requires the Commission to prepare budget proposals before the start of each financial year and send these proposals to the Parliamentary corporation for approval. The Commission may revise these proposals during the year in question and send the revised proposals to the Parliamentary corporation for approval. The

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Commission is required to state in the budget that any proposal or revised proposal complies with the duty to consider sharing services in paragraph 12.

95. The Parliamentary corporation is not required to pay any expenses incurred by the Commission which exceed or are not covered by these proposals, although it has power to do so.
96. The financial year of the Commission begins with the date upon which the Commission is established and ends on 31st March next following that date. Thereafter, the financial year will run for 12 months until 31st March in the following year.
97. [Paragraph 15](#) requires the Commission to keep proper accounts and accounting records, prepare annual accounts for each financial year and send copies of the annual accounts to the Auditor General for Scotland. The Commission must comply with any directions given by the Scottish Ministers in relation to these requirements.
98. The Commission must make a copy of the audited accounts available, free of charge, to anyone who requests them.
99. By virtue of paragraphs 16 and 17, the Commission is subject to the jurisdiction of the Scottish Public Services Ombudsman and the Scottish Information Commissioner.

Schedule 2: Inquiries: Supplementary provision as to evidence

100. [Paragraph 1](#) expands upon the ability of the Commission to require a person to give evidence. Where oral evidence is required, the Commission must give notice specifying the time and place the person should attend. In cases where persons are requested to provide documents or other information, the Commission must specify the documents (or type of documents or other information) requested and the date by which they should be produced. In all cases, the Commission is required to inform the person in question of the matters to which the request relates.
101. Any person required to give any form of evidence to the Commission may apply to the sheriff for cancellation of any requirement imposed by the notice. The sheriff may allow this only if he or she is satisfied that the requirement is unnecessary – i.e. it is unconnected to the matter being investigated, undesirable for reasons of national security or considered by the sheriff to be otherwise unreasonable.
102. [Paragraph 3](#) empowers the Commission to administer an oath to any person giving evidence and to require any such person to take an oath.
103. The fourth paragraph allows the Commission, following the service of a notice under paragraph 1, to refer uncooperative or obstructive persons to the Court of Session. The Commission could take this action where a person refuses or fails to comply with any requirement specified in the notice without reasonable excuse including failing to attend at a hearing, where a person refuses to take an oath when so required or to answer questions relevant to the matter at hand, or where a person deliberately destroys, conceals, alters or withholds documents.
104. On hearing any evidence or representations on a report of obstruction, the Court of Session may make such an order for enforcement as it deems necessary or deal with the matter as if it were a contempt of the court.
105. In accordance with paragraph 5, the Commission can pay allowances and expenses to any individual giving information of any kind in response to a notice under paragraph 1, subject to the approval of the Parliamentary corporation.

Schedule 3: Places of detention: powers of entry, inspection or interview

106. [Schedule 3](#) expands upon the powers of entry, inspection and review granted to the Commission in section 11 and sets out procedures for the exercise of these powers.

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107. The Commission may delegate these powers to another person, but paragraphs 1 and 2 provide that, before their exercise, anyone who is entitled to exercise the powers must produce written evidence of that entitlement, if required to do so,
108. [Paragraph 3](#) allows the Commission to report any person intentionally obstructing the Commission or authorised person from exercising this power to the Court of Session. After hearing any evidence or representations on the matter, the Court of Session may make such an order for enforcement as it sees fit or may deal with the matter as a contempt of court.