

Response by the Scottish Criminal Cases Review Commission to the Scottish Human Rights Commission Consultation Paper

The Scottish Criminal Cases Review Commission (SCCRC) has responded only to points which it considers are material to its functions.

Part A - THE REMIT OF THE COMMISSION

2 – International human rights instruments

The Scottish Criminal Cases Review Commission (SCCRC) would welcome the formation of the Scottish Human Rights Commission (SHRC). It is proposed that the SHRC would offer guidance to public authorities in Scotland on other human rights instruments in addition to the Human Rights Act and the European Convention on Human Rights. The SCCRC recognises the value of such a resource.

The SCCRC notes that Ministers propose that the SHRC should not be empowered to examine individual complaints. Further the SHRC would not be able to support an individual in funding and bringing a case to court. However, the SHRC may be able to decide to investigate an area where a number of people have raised an issue and on which it can consider broad issues of concern as opposed to specific individual circumstances.

Part B - THE FUNCTIONS OF THE COMMISSION

2 – Guidance to public authorities

The SCCRC agrees that the proposed statutory remit of the SHRC should specify that the guidance offered to public authorities should cover all international human rights instruments, but with a particular focus on the Human Rights Act 1998. Such guidance may assist public authorities in determining the best practice in relation to particular issues under the remit of the particular public authority.

5 – Ability to investigate and reporting in relation to law and practice

It is noted that the Scottish Ministers have proposed that the SHRC's remit should not conflict with or duplicate the remit of existing bodies such as the Scottish Prison Complaints Commissioner and the SCCRC. The SHRC would be expected to draw up a memorandum of understanding with other bodies and develop close working relationships to ensure that there is no duplication of effort and to minimise potential conflict.

The SCCRC agrees that conflict between the remit of SHRC and of the SCCRC should be avoided, as should potential duplication of work by these public bodies. The SCCRC is a public authority and as such it would be open to applicants to allege that the SCCRC had violated human rights in the determination of an application to the SCCRC.

The SCCRC believes that the SHRC's role should not include the investigation of whether the determination of a case by the SCCRC has breached an individual applicant's human rights. In addition the SHRC's founding legislation should expressly state this.

The reason for this view is that applicants to the SCCRC already have sufficient means by which to challenge the SCCRC's determinations of applications, namely: (i) applicants can make further representations to the SCCRC within a 21 day period from the interim refusal of an application to the SCCRC; (ii) applicants to the SCCRC are entitled to make further applications to the SCCRC if new grounds for review are identified; (iii) applicants may challenge the decision of the SCCRC by judicial review.

Part 6 – Relationship with the courts

The SCCRC notes that reference is made within the consultation paper to the role of the SHRC within Scotland in relation to courts, and that it is suggested that the existing use of an *amicus curiae* in civil cases in the Court of Session may provide a model for the SHRC to perform its role in a wider range of civil cases.

In addition it is noted that the consultation paper states that while a case can be made for giving the court power to invite the SHRC to give views on civil cases, such a case is more difficult to make in respect of criminal matters. According to the consultation paper this procedure might be considered out of place in an adversarial situation: the prosecutor in a criminal case is required to have regard to the public interest in a way that parties in a civil action are not. Further intervention by the SHRC might also in some cases undermine the position of the accused, calling into question the overall fairness of the trial. In addition, an *amicus curiae* role may be perceived as association with an individual in accordance with whatever side of the argument the SHRC appears to support and therefore too close to supporting an individual case.

For these reasons, the consultation paper considered that if the SHRC is to have a role, this should be restricted to civil matters. The view reached by the consultation paper was that it would be most appropriate for this function to be exercisable only in the Court of Session in civil matters at the appeal stage. However this could also extend to a judicial review where a human rights issue has arisen.

In terms of its own remit, the SCCRC is entitled to investigate alleged miscarriages of justice and to refer deserving cases to the High Court of Justiciary for determination. It is open to an applicant to the SCCRC to apply to the Court of Session for a judicial review of the determination of an application by the SCCRC.

The SCCRC is of the view that if the SHRC is restricted from making representations in connection with appeal hearings at the High Court of Justiciary but is entitled to make representations at a judicial review hearing concerning a determination of an application by the SCCRC, this may lead to a situation where the SHRC is only able to make representations in relation to isolated situations where a decision by the SCCRC is challenged by means of judicial review.

The SCCRC believes that a decision on a human rights issue in a criminal case may impact upon civil law. An example of this is the decision concerning temporary sheriffs by the High Court in *Starrs v Ruxton* 2000 J.C. 208; 2000 SLT 42; 1999 S.C.C.R. 1052. Consequently the SCCRC believes that it may be too restrictive to exclude the SHRC from making representations at a criminal appeal.