

Centre for the Study of  
**Human Rights**

The Equalities Review  
22–26 Whitehall  
London  
SW1A 2WH

24 November 2005

Dear Rosie Seymour,

**Equalities Review, Call for Evidence**

Please find enclosed our response to the call for evidence. This is a joint submission from Katie Ghose and Anna Edmundson, from the British Institute of Human Rights (BIHR), and Francesca Klug and Helen Wildbore, from the Centre for the Study of Human Rights, LSE. In submitting a joint response we bring together our different perspectives on equality and human rights in the UK; working at grassroots level and as academics monitoring the law respectively.

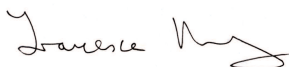
BIHR is an independent national charity which raises awareness and understanding about the importance of human rights in the UK. Our promotion and training activities in the voluntary and public sectors focus on people who get a 'raw deal' from public services including disabled people, older people, people living with mental health problems, and refugees and asylum-seekers. Through this work, BIHR encourages people to make practical use of human rights standards as tools to negotiate better standards of service delivery. The evidence in this submission is informed by BIHR's experience of working at the grassroots level with users, voluntary and community organisations and front line service deliverers.

Francesca Klug is Professorial Research Fellow at the Centre for the Study of Human Rights at the LSE and a member of BIHR's Advisory Board. She is also a member of the Reference Group to the Equalities and Discrimination Law Reviews and a member of the Commission for Equality and Human Rights Steering Group. Helen Wildbore is her Research Assistant.

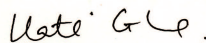
Our joint interest is in human rights, in particular the principles and values that underlie human rights law, and their application to the public sector. In our evidence we focus on how these principles and values can be used to enhance equality outcomes for disadvantaged individuals and groups. We focus our evidence on answering question two of the call for evidence as this is where our expertise lies.

If you require any further information please contact either BIHR or the Centre for the Study of Human Rights at the addresses below.

Yours sincerely,



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# Evidence to the Equalities Review

From the British Institute of Human Rights and The Centre for the Study of Human Rights, LSE

## INTRODUCTION

Our joint interest is in human rights, in particular the principles and values that underlie human rights law, and their application to the public sector. In this evidence we focus on how these principles and values can be used to enhance equality outcomes for disadvantaged individuals and groups. We will be focusing our evidence on answering question two of the call for evidence as this is where our expertise lies.

## WHAT ARE THE BARRIERS TO IMPROVING INEQUALITY?

One of the barriers to building a society where every person has an equal chance to achieve their potential, despite more than thirty years of anti-discrimination legislation, is the tendency in this country to view equality mainly as a matter of discrimination. There is a largely unspoken assumption that if services are delivered, or employment is offered, in a way that demonstrably does not discriminate, directly or indirectly, on the grounds which are covered by anti-discrimination law, then equality is achieved. Whilst it is obviously true that discrimination is a route to inequality, the absence of discrimination does not necessarily address many of the factors involved in enhancing equality, if the latter is understood in terms of maximising opportunities for achieving individual potential.

There is plenty of evidence to suggest that anti-discrimination laws have gone some way towards tackling prejudice and discrimination in the UK and they stand as strong, symbolic statements that discrimination is wrong and will not be tolerated. However, **freedom from discrimination is a far from sufficient means of achieving equality.**

Evidence from our work on human rights, at grassroots levels as well as looking at complainants in the legal process, suggests that for individuals to achieve their potential as they negotiate different aspects to their lives, there are certain outcomes that need to be guaranteed. **The human rights vision of equality extends significantly beyond discrimination, therefore, to encompass fairness of treatment, dignity, respect and access to the fundamental rights which enable participation in a democratic society.**

**The value human rights law puts on equality is not entirely neutral, therefore.** Everyone being treated equally badly is not a human rights concept. "In the field of human rights, discrimination is regarded as particularly objectionable *because it disregards fundamental notions of human dignity and equality before the law* (our emphasis)."<sup>1</sup>

Using **human rights law and values to tackle inequality** is an additional route to improving life chances. **It is not the only route or a complete solution, but it adds value to our anti-discrimination laws and is severely under-used** at present.

## WHAT INTERVENTIONS HAVE WORKED IN TACKLING THOSE BARRIERS?

One of the most important lessons the British Institute of Human Rights (BIHR) has learned from its work in the community for vulnerable or socially excluded people is how a **human rights framework can be used very effectively to reach negotiated solutions to problems** without the need to resort to litigation. Because the **standards** contained in the Human Rights Act 1998 (HRA) are not crafted to particular situations, but are set out in **general terms**, there is a degree of **in-built flexibility** as to how they apply in different circumstances.

The following examples taken from BIHR's experience illustrate how effectively **human rights** can be used as a **tool to empower individuals at risk of discrimination** and ensure they are **treated with fairness, dignity and respect**:

- Following a bereavement, an **older person** was moved from her council house to a smaller flat on the seventh floor of a building. The woman did not want to move because she had **mobility problems** and

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<sup>1</sup> I. R (Carson and Reynolds) v Secretary of State for Work and Pensions [2005] UKHL 37, para 49.

a severe fear of heights but the housing department decided the accommodation was suitable. Her advocate attended one of our training sessions and **used human rights arguments to negotiate with the local authority**. The housing department eventually **provided alternative housing** in a ground floor property so the woman was able to go out and **did not become isolated**.

- A **physical disabilities team** at a local authority decided to provide support workers to facilitate **social activities**. Residents were taken to a number of social events including pubs and clubs. One service user who was **gay** asked for a support worker to accompany him to a gay pub but the manager of the scheme refused on the basis that **none of his staff was prepared to attend a gay venue**. Following training by BIHR an advocate working on behalf of the service user realised that **human rights arguments** based on the right to respect for private life (Article 8) could be used to **challenge practices of this sort**.
- Members of a user-led **mental health befriending scheme** used human rights arguments to challenge a **hospital** which repeatedly **sectioned asylum seekers who spoke little or no English**. They used the right to **liberty** (under Article 5) and the asylum seekers' **rights not to be discriminated against on the basis of their language** (under Article 14) to challenge the hospital's practice of sectioning people without the use of an interpreter.
- A local education authority provides **home to school transport for children with special needs**. Because of budget difficulties transport is **not provided for extra-curricular activities** including school excursions and after school clubs. The parents of a physically disabled child have challenged this policy on the basis that it violates their disabled child's **right to participate in essential social, cultural and recreational activities** under Article 8 (the right to respect for private and family life). The local education authority has accepted the parents' complaint and is reviewing its special needs transport policy.
- A **disabled man** stopped attending his scheduled medical appointments at the local hospital because he felt **humiliated by the hospital's practice of examining him in front of a large group of people** including students. Following training he learnt that Article 3 (prohibition of inhuman or degrading treatment) protected his **dignity** and felt **empowered to use these human rights standards** to question the practice and ask to be seen only by his doctor.
- Staff at a **care home** that was due to be closed attended a BIHR training session on human rights and disabled people and learnt about the **human rights implications of the decision to close the home**. They decided to stop their closure process, which had involved no consultation, and start again by **consulting the residents**, taking their views into account and explicitly **considering the residents' rights to respect for private life** which could encompass, among other things, the **friendships and social relationships** that had been built up over the 5 to 10 years individuals had been living in the home.
- The parents of a **learning disabled patient** who had arranged short term care in a home noticed **unexplained bruising** on their son. When they raised the issue with managers in the home, their concerns were dismissed and they were no longer allowed to visit. After receiving human rights training they used their son's right not to suffer inhuman or degrading treatment (Article 3) and their right to respect for family life (Article 8) to challenge the home. The result was that the ban on them visiting has been rescinded. An **investigation** into the unexplained bruising is ongoing.
- A social worker from the **domestic violence team** at a local authority received training on the 'positive obligations' placed on the local authority to protect the right to life (under Article 2) and right to be free from inhuman and degrading treatment (protected by Article 3). She went on to **use human rights arguments to secure new accommodation for a woman and her family at risk of serious harm from a violent ex-partner**.

## WHERE ARE THE GAPS IN INTERVENTION?

As the previous section has demonstrated, **some of the gaps in the anti-discrimination approach to equality can be filled by current legislation on human rights**. The pursuit of equality is the driving force behind most post-war human rights instruments. The HRA, which has been part of UK law since 2000, is a higher law that works like a Bill of Rights to influence and re-interpret all other laws and policies. Anti-discrimination laws have to be interpreted by the courts compatibly with the HRA which is **based on broad values**, rather than the specific provisions, and their limitations and exclusions, contained in anti-discrimination legislation.

From this set of broad values, principles can be devised which provide **a framework for solving problems**, particularly in a public policy and service delivery context. As the illustrations above demonstrate, this framework can be used, not just by the courts, but by front line workers carrying out public functions – such as carers, social workers, housing, prison and immigration officers – to ensure that services are provided in a manner which, so far as possible:

- **respects the dignity of each individual**, avoiding blanket policies which ignore individual differences.
- is **fair** and **just** in the way that services are administered, with equitable means of redress visibly available.
- provides sufficient **resources** to facilitate **participation in social and community life** by those who are most excluded from these.

As a report commissioned by the Disability Rights Commission and others explains, a human rights perspective on disability assists in the development of general principles which can be used to assess social care practices generally but in particular in relation to the promotion of independent living. These principles include respect, equality, personal autonomy and social inclusion and participation.<sup>2</sup>

The HRA is symbolic and aspirational in its terms, yet it provides a legal framework with which to pursue such goals. **As well as providing individuals with legally enforceable rights, the HRA is intended to influence public policy.** A number of cases have led directly to changes in practice and procedure to comply with a judgment or to deter future legal challenge.

For example, following the murder of Zahid Mubarek his family applied to the courts seeking an inquiry into his death. The court said that where a death occurred in custody the state is under a duty under Article 2 (the right to life) to publicly investigate before an independent judicial tribunal with an opportunity for relatives of the deceased to participate<sup>3</sup>. Following this case the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks and a public inquiry into the murder was established.

Specific examples of human rights **filling the gaps** of anti-discrimination law:

- The HRA prohibits discrimination in the enjoyment of all the rights and freedoms it upholds. It is a **wider prohibition of discrimination than currently covered in anti-discrimination laws**. In effect the HRA prohibits discrimination in relation to *all* the strands given specific protection by the Equality Bill. Discrimination on grounds of race, sex and religion are explicitly prohibited. The HRA covers additional grounds, such as language and national or social origin and 'other status'. This **wide-ranging and open-ended prohibition on discrimination** means it can be used in almost every type of case where individuals face 'status based' differences in treatment by public authorities. The effect has been to create new categories of protection against discrimination, such as discrimination on grounds of sexual orientation, gender reassignment (post-operative), age and disability (including mental and physical health).
- **The HRA can play a vital role in 'plugging some of the protection gaps' in domestic anti-discrimination law.** For example, 'judicial acts' which are exempt under the Race Relations Act or caring responsibilities which are not recognised under the Sex Discrimination Act, can receive protection through the 'right to a fair trial' and the 'right to family life' (respectively) under the HRA. Where there is no legislative protection at all, for example on grounds of age in relation to goods, facilities and services, the HRA can provide protection in a number of areas.

In addition to filling the gaps in anti-discrimination law, **a human rights approach to equality, with its foundational value of dignity, will add value to tackling inequality** through applying the following principles:

- To achieve equality, laws must be fashioned to take account of difference as well as similarity. The European Convention on Human Rights (ECHR) does not require everyone to be treated equally in order to avoid breaching Article 14 (prohibition of discrimination). The European Court of Human Rights allows Member States **to treat groups unequally in certain circumstances in order to 'correct factual inequalities' between them.**<sup>4</sup>
- The European Court of Human Rights has recognised that to avoid discrimination or secure equal rights, it **may be necessary sometimes to treat an individual or group differently precisely because their situation is different** from others.<sup>5</sup>

2. Camilla Parker, 'Independent Living and the Human Rights Act 1998', a paper commissioned by the Disability Rights Commission, The Social Care Institute for Excellence and The National Centre for Independent Living, December 2004.

3. *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.

4. *Belgian Linguistics Case* (No 2) (1968) 1 EHRR 252.

5. *Price v UK* (2001) 34 EHRR 1285.

- Human rights not only trigger a duty on the state not to interfere with them. They can also introduce a secondary duty on a public authority to protect individuals from an interference with their rights by other individuals or a tertiary duty to facilitate the exercise of a fundamental right. This latter requirement on states to “secure” equal access to fundamental rights can create a **‘positive obligation’ on a public body to provide the relevant resources**. Other than in disability discrimination legislation, there is **little recognition of ‘positive obligations’ in this sense in UK domestic discrimination law**.

In some circumstances, a duty to take positive action is the only way to secure an individual’s physical integrity and dignity. For example, a local authority had found that a disabled tenant’s housing was inappropriate and inadequately adapted but it did not move her to suitably adapted accommodation. The council failed in its duty to take positive steps to enable her and her family to lead as normal a life as possible, and to secure her physical integrity and human dignity.<sup>6</sup> The tenant won damages for the breach of her right to respect for private and family life and home under the ECHR.

- **‘Respect’** for fundamental rights means more than ‘acknowledge’ or ‘take into account’, it can imply a ‘positive obligation’ to facilitate a different way of life. For example, ‘respect’ for private and family life and home in the ECHR means more than ‘taking account’ of the Gypsy culture.<sup>7</sup> ‘Respect’ includes the positive obligation to act so as to facilitate the Gypsy way of life.

As unpublished research on attitudes to human rights shows, **users of public services value the principles underlying the HRA**, such as respect, dignity and fairness, and see the **potential for using these principles to achieve more empathetic, respectful treatment** and clearer ground rules for public authorities. In delivering training to public bodies, BIHR has found that whilst some deliverers of services are initially sceptical about the HRA, once they see the relevance to their day-to-day work, they embrace it as a tool to help them solve problems and improve the quality of their services. A human rights approach to equality encourages the development of a culture of respect for the dignity of every individual and facilitates access to the fundamental rights which enables individuals to participate in a democratic society.

**Katie Ghose**  
**Anna Edmundson**

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## **BIHR**

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<sup>6</sup>. *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

<sup>7</sup>. *R (Price) v Carmarthenshire County Council* [2003] EWHC 42 (Admin)