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1. Introduction

As requested this evidence concentrates on differences between *Fairness for All's*² outline proposals for CEHR and the conclusions reached by the Committee in its recent reports,³ with particular focus on promotional and litigation powers, and general inquiries. We note that the JCHR has found a "large degree of agreement between its proposals and those of the government"⁴ and therefore address only briefly other outstanding issues.

2. Promotion

2.1 CEHR's general duty to promote human rights

Promotion is the primary competence required of national human rights commissions by the *Paris Principles*.⁵ We strongly welcome the extensive promotion powers proposed by the White Paper which include, in addition to public education and promoting 'good practice', responsibilities to assist public authorities to comply with their legal obligations, and to work with inspectorates to develop performance measures and operational standards on equalities and human rights.⁶

The White Paper is unclear on the precise legal form of CEHR's promotional remit over human rights. In our view this must at minimum take the form of an express statutory *duty*, rather than a power, to promote human rights, as recommended by the Human Rights Task Force.⁷

¹ Francesca Klug is also a member of the Government's CEHR Task Force.

² *Fairness for All: A New Commission for Equality and Human Rights* (Department for Trade & Industry, in association with the Department for Constitutional Affairs, Department for Education and Skills, Department for Work and Pensions, and the Home Office), Cm 6185 (12 May 2004).

³ *Commission for Equality and Human Rights: Structure, Functions and Powers* Eleventh Report of Session 2003-4 (HL Paper 78, HC 536); *The Case for a Human Rights Commission*, Sixth Report of Session 2002-3, Vol. I (HC Paper 67-1).

⁴ JCHR, *Call for Evidence, Commission for Equality and Human Rights: Structure, Functions and Powers*, 8 June 2004.

⁵ UN Doc. A/RES/48/134 (20 December 1993).

⁶ N.2, paras.3.9-3.17, 7.41-7.55.

⁷ See summary of Task Force discussions at www.womenandequalityunit.gov.uk.

2.2 CEHR's power to promote human rights and the private sector

The White Paper's expression is ambiguous on this issue. Initially it states that "the CEHR will spread good practice and promote support for human rights throughout the public sector, *including to private sector bodies carrying out public functions and services*".⁸ Later, on the other hand, in describing the "public sector" to which CEHR's support will extend, it states that "private enterprises, *contracted to carry out or deliver services to the public* are also subject to some of the legislative framework which applies to the public sector, including the HRA".⁹ This could be interpreted as suggesting that private sector bodies' responsibility for complying with HRA turns on the existence of a contractual relationship with a "pure" public authority and, further, that CEHR's promotional remit will be correspondingly limited.

In drafting the proposed legislation care must therefore be taken to ensure that CEHR's promotional power in this respect "marches in step" with HRA's definition of "public authority", according to its proper and purposive interpretation as identified by the JCHR.¹⁰

2.3 Positive duty to promote human rights

The White Paper heralds the extension of the duty to promote equality from race¹¹ to disability and gender,¹² and the JCHR favours extending this further to human rights. We believe that this issue should be considered by CEHR in the context of its responsibility to keep the working of discrimination legislation and the HRA under review.¹³

2.4 Definition of human rights

The White Paper leaves uncertainty in stating that, "where CEHR uses statutory powers in relation to human rights functions...it will do this in relation to the HRA",¹⁴ whereas as regards promotion, it will be able to rely also on

⁸ N.2, para.3.9, emphasis added.

⁹ Ibid, para.7.38, emphasis added.

¹⁰ The JCHR has recommended that section 6 HRA 1998's definition of public authority should be understood and applied as encompassing any body which "exercises a function that has its origin in governmental responsibilities, in such a way as to compel individuals to rely on that body for realisation of their Convention rights", *The Meaning of A Public Authority Under the Human Rights Act*, Seventh Report of Session 2003-4 (HL Paper 39, HC 382), Conclusion, para.31.

¹¹ Under RRAA 2000.

¹² N.2, paras.7.56-7.58.

¹³ N.2, para.3.34. It is widely anticipated that such a review will also involve recommendations to address current disparities in protection between the different equality and human rights strands within CEHR's remit through a new Single Equality Act.

¹⁴ N.2, para.3.14.

“international agreements on human rights to which the UK is a signatory”.¹⁵ We emphasise again¹⁶ the need for a definition of human rights that encompasses all the UK’s *legal obligations* under international human rights law, with the exception that, in giving compliance advice and assistance, CEHR will need to focus on the HRA, as only this is enforceable in domestic law. Consistent with this approach, CEHR should be empowered to engage in the reporting processes which exist to monitor compliance with international human rights treaties to which the UK is party.¹⁷

3. Litigation Powers

3.1 Support for individual human rights cases

The White Paper excludes the power for CEHR to assist individuals with “free-standing” Human Rights Act cases, in other words, cases where statutory discrimination points are not also being raised.¹⁸ The JCHR contrasts the regime for supporting enforcement of rights under the HRA with that established by anti-discrimination legislation¹⁹. In the former case there is “funding potentially available from the Legal Services Commission.” In the latter, with most litigation occurring in employment tribunals for which legal aid is not available, the statutory equality commissions provide important support for access to justice.

In light, firstly, of the inevitable limits on CEHR’s resources in the context of competing priorities and secondly, the need to focus on promotion and culture-change, the JCHR has also cautioned against including this power. The NIHRC’s experience of facing an overwhelming demand for case work in its early life is seen as salutary.²⁰

¹⁵ Ibid., para.3.13.

¹⁶ See our *Memorandum* submitted to the JCHR’s last inquiry on CEHR and published in its report, n.19 below, Ev.45.

¹⁷ These include a number of treaties targeting discrimination breaching human rights, notably the UN Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women. A UN Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities is being drafted: <http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>.

¹⁸ N.2, para.3.16.

¹⁹ *Commission for Equality and Human Rights: Structure, Functions and Powers* Eleventh Report of Session 2003-4 (HL Paper 78, HC 536), paras.64-66.

²⁰ The JCHR found NIHRC’s casework function to have been “particularly resource-intensive and demanding”, JCHR, *Work of the Northern Ireland Human Rights Commission*, Fourteenth Report of Session 2002-3 (HL Paper 132, HC 142, para.53. According to NIHRC’s 2002 Annual Report, it was able to support only 7 of 54 applications received: *ibid.*

Wider opinion has varied on this question.²¹ For the present time, we support the JCHR's view that CEHR should focus on providing an accessible referral service, building crucial local capacity in the voluntary and private sectors capable of giving high-quality legal advice, and working with the Legal Services Commission to ensure that adequate funding for human rights cases is guaranteed from the outset of CEHR's activity. This should include developing Memoranda of Understanding on the strategic funding criteria for human rights cases.²² In addition, the White Paper states that CEHR will provide "high quality, user-friendly information and advice" to individuals regarding their rights "under discrimination *and* human rights law."²³ As no statutory body is currently obliged to provide advice on human rights, it is important to note this, too, as a significant development.

*We also strongly welcome the White Paper's clear proposal for an express statutory power to intervene in equality or human rights cases.*²⁴ This would allow CEHR to advance the rights protected by HRA by strategic action, without incurring the high financial and other costs of direct litigation. The JCHR observes that the existing Commissions "regard third party interventions as an effective strategic tool in advancing their general aims."²⁵ While the White Paper suggests that interventions should be "of a strategic nature" and "closely tied to the CEHR's core aims", we would observe that these are qualifications which, if established by statute, might arguably intrude into courts' discretion to regulate process.

Finally, we note that in the longer term CEHR would be able to use the review powers proposed by the White Paper²⁶ to identify any absence of protection for vulnerable groups that the above approach to support for individuals might entail.

3.2 "Combined" human rights and discrimination cases

CEHR, the White Paper states, will "continue the practice of the existing Commissions where discrimination cases involve human rights issues", in that it "will be able to draw on human rights arguments" in discrimination cases it supports. This will reflect "the obligation on public authorities to act compatibly

²¹ For example, see evidence submitted by JUSTICE, Liberty, BIHR, the Law Society and others to the JCHR and published in its two reports, n.3 above, and summarised at paras.62 and 65 of *Commission for Equality and Human Rights: Structure, Functions and Powers*.

²² N.19, paras.36-39.

²³ N.2, paras.7.11-7.17, our emphasis.

²⁴ N.2, paras.4.11-4.13.

²⁵ N.19, para.79. The NIHR intervened nine times in 2002-3, while it did not take any cases in its own name (Annual Reports available at <http://www.nihrc.org/>). The DRC intervened in *X & Y v East Sussex County Council* (n.33) and is also doing so in cases relating to withdrawal of medical treatment.

²⁶ N.2., para.3.5.

with the rights enshrined in the HRA and to interpret legislation so that it is compatible with these rights”.²⁷

On the question of whether to maintain CEHR’s support if the statutory discrimination points fall away in a such cases, the White Paper specifically seeks advice.²⁸ Although there is no evidence to suggest that this will be more than a very infrequent occurrence, the credibility of CEHR would arguably be diminished if it did not have the *discretion* to continue to support such cases. We think this argument is reinforced by the existing equality commissions’ expressed frustration at not being able fully to use HRA in their work.²⁹

3.3 Judicial review

The White Paper declines to confer a power for CEHR to seek judicial review in its own name. Correctly, it draws attention to the lack of facility in either the European Court of Human Rights, the European Court of Justice, or our own domestic courts to hear “abstract” test cases.³⁰

Nevertheless, wherever CEHR has “sufficient interest” (as decided by the courts) it will be able, under existing law, to challenge unlawful action by public authorities in relation to discrimination via judicial review, as the existing equality commissions have done. This avenue of challenge is not, however, available to CEHR in relation to ‘free-standing’ human rights breaches as a consequence of the ‘victim test’ set by section 7 HRA 1998.³¹ The real issue arising, therefore, is whether, to create a statutory exception to the scheme of HRA 1998 to permit CEHR this facility.

The JCHR’s report expressed concern that, unless such exception is made, CEHR will be prevented from pre-empting breaches of individuals’ rights where potential violations are uncovered through its own enquiries, an outcome the Committee would find “indefensible”.³²

While the JCHR concludes that there is “no currently identifiable pressing need that would be met by allowing the commission power to initiate proceedings in

²⁷ N.2, para.4.18.

²⁸ N.2, p.16.

²⁹ The Disability Rights Commission has a reserved power under Disability Rights Commission Act 1999 (see s.7(1)(b)) to assist individuals in cases relying on HRA 1998, though this has never been activated by the necessary Ministerial order; the Commission for Racial Equality also asked for the power to use HRA 1998 in its casework: see evidence of the equality commissions in the JCHR’s report, *The Case for a Human Rights Commission: Interim Report*, Twenty-second Report of Session 2001-2 (HL Paper 160, HC 1142), Ev.45 et seq.

³⁰ N.2, para.4.43.

³¹ Under s.7(3) HRA 1998, an applicant for judicial review “...is to be taken to have a sufficient interest...only if he is, or would be, a victim of that act” (s.7(4) provides likewise for petitions in Scotland); s.7(7) defines a “victim” according to the test set by Art. 34 ECHR.

³² N.19, para.91.

its own name *alleging a [past] breach of the rights of an individual*,” it nevertheless suggests that CEHR should be empowered to seek judicial review in relation to “actions, failures to act or policies or rules” of public authorities breaching or threatening breach of human rights. Correspondingly it recommends a power “notwithstanding... sections 7(3) and (4) HRA” in such eventuality.³³ This is a persuasive argument if applied in the context of potential abuses uncovered through CEHR's own enquiries (see below), especially if the power to take judicial review was subject to the limits the JCHR has suggested.

3.4 Alternative dispute resolution

The White Paper advocates conciliation services as a potentially “more accessible and less expensive alternative to litigation and tribunals”.³⁴ It therefore proposes empowering CEHR to facilitate their arrangement in the discrimination context, and for “discrimination cases with a human rights dimension”. “[F]ree-standing” human rights cases are however excluded, “[c]onsistent with the approach proposed for supporting HRA litigation”.³⁵ JCHR, in contrast, has taken the view that “a general power to support alternative dispute resolution...would be a valuable ancillary to the commission’s general duty to promote a culture of respect for human rights”.³⁶ Seen as an alternative to litigation, and provided that any extension of relevant services to include human rights is discretionary, there is merit in this argument.

4. General and named investigations

Like the JCHR, we strongly welcome the proposed power to conduct general investigations cutting across equality and human rights issues of public interest, which exceeds the cumulative powers of the existing commissions both in its human rights and equality dimensions.³⁷ We would identify three further issues in this area.

4.1 General inquiries: power to compel information

CEHR will have a power to carry out general enquiries into any human rights matter touching the public interest whether or not statutory discrimination, or indeed wider equality issues, are also engaged. The goal of such enquiries will

³³ Ibid., para.89.

³⁴ N. 2, para.4.20.

³⁵ Ibid., para.4.22.

³⁶ N.19, para.71.

³⁷ The current commissions lack power to conduct cross-strand equality investigations, which CEHR will have. There is also a welcome new power to develop formal Codes of Practice across all six equality strands, although it is not proposed to extend this to human rights.

be "to develop and promote improved practice in response to particular areas of concern."³⁸ We strongly welcome this power.

The White Paper proposes that if, in the course of a general inquiry, a request by CEHR to provide information is unsuccessful, CEHR will be able "as a last resort" to apply to the Secretary of State for permission to compel the relevant body to comply.³⁹ The JCHR has observed that merely having that power at CEHR's disposal ought to be sufficient to secure wide cooperation. Should CEHR, in spite of this, face obstruction, the JCHR recommends that CEHR's access to information should be enforceable by the courts.⁴⁰ As the JCHR highlights, most general enquiries concerning human rights are likely to concern or implicate government departments or other public authorities, rendering ministerial control of this power inappropriate, and potentially breaching the *Paris Principles*.⁴¹ This argument is persuasive.

4.2 General investigations: follow-up

We would again register,⁴² in line with the JCHR's conclusion,⁴³ our concern that CEHR should be able to address, and if necessary publicly name, individual bodies that it identifies during the course of a general investigation, at least where its own positive obligations as a public authority under s.6 HRA 1998 are in play (for example, where the right to life is engaged). The legal frameworks governing investigations by the existing equality commissions already set close restrictions on disclosure of information received for that purpose.⁴⁴ If carried forward (as the White Paper appears to imply) these, in combination with protection available under HRA 1998 itself, should provide adequate protection for any confidentiality or other pressing interests that identifying an individual might put at stake.

4.3 Named investigations: initiation

We second the JCHR's view that it is unnecessary, and would appear to run contrary to CEHR's independence, to provide that CEHR *must* as opposed to *may*, investigate a matter at the Secretary of State's request.⁴⁵

³⁸ N.2., para.4.3.

³⁹ Ibid., para.4.6.

⁴⁰ N.19, para.60.

⁴¹ N.5, *Methods of Operation*: "(b) Within the framework of its operation, the national Institution shall hear any person and obtain any information and/or documents necessary for assessing situations falling within its competence."

⁴² See our *Memorandum* submitted to the JCHR's last report: n.18, Ev.45, para.4, *Human Rights Investigations*.

⁴³ N.19, para.54.

⁴⁴ See e.g. s.52 Race Relations Act 1976.

⁴⁵ N.2, para.4.5, c.f. n.19, para.55.

4.4 Named investigations: human rights follow-up

The White Paper proposes a power to conduct “named investigations” into serious, unlawful acts of discrimination or harassment (on reasonable suspicion); and into compliance with non-discrimination notices and binding agreements.⁴⁶ Carrying forward existing equality commissions’ powers, during the course of such investigations CEHR will have the competence, enforceable by the courts, to obtain information from the relevant body. CEHR will not, however, have a power to launch named investigations into alleged breaches of *human rights*.

The JCHR’s previous report clearly supported this position, and we concur.⁴⁷ But as that report pointed out, “Most inquiries into equality matters are likely to throw up human rights concerns”. Consequently, the JCHR recommended that where CEHR identified human rights breaches in the course of a formal inquiry, “it should have the power to identify the actual or potential violations occurring and to make recommendations as to changes in practice or in the law which it considered necessary or desirable.”⁴⁸

It is important that human rights matters should not be excluded from CEHR’s follow-up action to named investigations. This would be artificial and would directly contradict CEHR’s general duty to promote human rights. CEHR should therefore be clearly permitted to include reference to human rights concerns in reports and recommendations transpiring from named investigations, notwithstanding that these would be non-binding, unlike the corresponding equality terms. Nor should human rights be excluded from binding agreements, or action plans, *where the named person is in agreement*.⁴⁹

5. Other outstanding issues

5.1 Accountability

We concur with the JCHR’s recommendations for a greater degree of independence and parliamentary accountability and involvement than inscribed in the White Paper at present.⁵⁰ We would also draw the Committee’s attention to *The Abuja Guidelines on the Relationship Between Parliaments, Parliamentarians, and Commonwealth Human Rights Institutions*⁵¹. These

⁴⁶ N.2, paras.4.24-4.39.

⁴⁷ N.19, paras.50-51.

⁴⁸ Ibid., para.54.

⁴⁹ See further our *Memorandum*, n.19, Ev.45, para.4 and *Conclusion*. The proposal to extend the power to enter into a ‘binding agreement,’ which currently only pertains to the DRC, across all six equality strands is another welcome innovation.

⁵⁰ N.19, paras.108-143.

⁵¹ <http://www.britishcouncil.org/governance-national-human-rights-institutions-and-legislatures.doc>.

emphasis the need for strong working relationships between national human rights institutions and parliaments. Of particular interest in this context are guidelines that require, “an appropriate role for parliamentarians in the appointment and removal of human rights commissioners”; that the proposed budget “should be submitted directly to parliament for vetting and approval”; and that “Parliament should ensure that adequate resources and facilities are provided to [the national human rights institution] to enable it to perform its functions effectively.” The Guidelines also recommend that commissions should have the function of providing briefing and training specifically for parliamentarians; we hope JCHR will make clear its support for this.

5.2 Duty to consult stakeholders

A new duty to consult stakeholders on CEHR’s strategic plans is already proposed by the White Paper.⁵² We strongly welcome this. We also note that organisations including Age Concern endorse a wider duty, to involve and facilitate the participation of excluded and vulnerable groups.⁵³ The proposal to establish a CEHR presence in each of the nine English regions, and in Scotland and in Wales, which we strongly welcome, should facilitate such participation.

5.3 Express statutory provision for incidental and ancillary powers

The NIHRC faced early difficulties in establishing the scope of its legal mandate. It was, for example, forced to litigate to determine its ability to intervene in court proceedings on human rights grounds, when this was challenged on the basis that neither its express nor implied powers comprised this capacity. Although the House of Lords⁵⁴ later found in NIHRC’s favour, and an express power to intervene in human rights cases is proposed by the White Paper, precautions should be taken to preclude CEHR’s exposure to similar confusion on other grounds and the costly consequences of this.

As a solution in its own case, the NIHRC proposed that, alongside greater specificity throughout the legal description of its powers, a further, new power should be legislated to confer on it, using express words, all the powers “reasonably incidental to or consequential upon” its other express powers.⁵⁵ The government later accepted this recommendation.⁵⁶ In this light we support bestowing this power on CEHR from the outset.

⁵² N.2, paras.2.10-11.

⁵³ C. Collins, *Public Involvement and the CEHR*, Age Concern Report, June 2004.

⁵⁴ *In Re Northern Ireland Human Rights Commission* (Northern Ireland) [2002] UKHL 25.

⁵⁵ *Report on Effectiveness-NIHRC Report to the Secretary of State required by s69(2) of the Northern Ireland Act 1998* (February 2001), accessible at <http://www.nihrc.org/>.

⁵⁶ N.20, para.62.