

"FAIRNESS FOR ALL"? AN ANALYSIS OF HUMAN RIGHTS POWERS IN THE WHITE PAPER ON THE PROPOSED COMMISSION FOR EQUALITY AND HUMAN RIGHTS

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In May 2002 the government announced what it described as "the most significant review of equality in over quarter of a century".¹ The immediate cause and context for the review was the insertion of Art.13 of the EC Treaty in 1997, leading to the adoption of both the Race Directive and the Framework Directive concerning discrimination in employment on grounds of race, sexual orientation, religion or belief, disability and age.²

This raised the question of what institutional support, if any, would be provided for the new equality strands of age, religion and belief and sexual orientation.³ Additionally, the equality review's terms of reference included "the relationship between possible new arrangements for promoting equality and those for promoting and protecting human rights more widely".⁴ Published in October 2002, the Department for Trade and Industry's consultation document on future options for Britain's equality institutions recognised a range of views on institutional support for human rights following the introduction of the 1998 Human Rights Act (HRA), without advocating any particular route forward.⁵

In parallel, the Joint Committee on Human Rights (JCHR) initiated its own inquiry into *The Case for a Human Rights Commission*, publishing a report in March 2003.⁶ The JCHR concluded that "an independent commission would be the most effective way of achieving the shared aim of bringing about a culture of respect for human rights".⁷ Given emerging government proposals for a single equality body, the JCHR's preferred option was a single commission integrating protection for equality and human rights.⁸

On October 30, 2003 the Secretary of State for Constitutional Affairs, Lord Falconer, announced to Parliament the government's intention to set up such a body. He reported that:

"In the light of [the] consultation the Government have concluded that a single body represents the best option for realising its vision for a fairer, more inclusive and prosperous Britain. Many respondents also highlighted the potential role a new body might play in providing support for human rights as

well as equality. The Government also considered carefully the sixth report of the Joint Committee on Human Rights ... We have therefore decided that the new body's remit should cover the promotion of human rights together with its equality responsibilities.”⁹

The government proposed "the Commission for Equality and Human Rights" (CEHR) as the new body's working title. Patricia Hewitt M.P., Secretary of State for Trade and Industry and Minister for Women, appointed a Task Force in December 2003 with terms of reference including advice to government on CEHR's role, functions, priorities and activities. The Task Force comprised representatives of the three existing equalities commissions, the three "new" equality strands, and human rights.¹⁰

In May 2004, the DTI, in association with four other government departments, published a White Paper, informed by, though not in all respects following, the Task Force's advice.¹¹ A White Paper with "green tinges", the document includes a number of consultation questions. This Analysis will discuss the human rights powers and functions proposed in the White Paper,¹² drawing comparisons where appropriate with recommendations made by the JCHR's recent report on CEHR's structure, functions and powers.¹³

White Paper: summary of proposals

The White Paper states that the CEHR's duties and powers in relation to eliminating discrimination "will closely reflect" those of the current equality Commissions.¹⁴ However the White Paper aims to adopt a more "strategic approach" to supporting individuals' claims under anti-discrimination legislation.¹⁵ One aspect in which this differs from the existing commissions' powers is the exclusion as a statutory ground of support that it would be "unreasonable" in the circumstances "to expect the applicant to deal with the case unaided".¹⁶

Certain powers and duties *beyond* those of existing Commissions are proposed. These include a duty to consult stakeholders on strategic plans; a power for the CEHR to develop formal Codes of Practice addressing discrimination across *all* six equality strands¹⁷; and to enter into a "binding agreement" with a named person or organisation to improve practices or eliminate discrimination over an agreed timescale.¹⁸ It is also proposed to establish a CEHR presence in each of the nine English regions, in Scotland and in Wales.

Fairness for All also announces the government's intention to introduce a "public sector duty" to promote equality of opportunity between women and men, mirroring the existing "positive" duty on race and proposed duty to promote equality on grounds of disability.¹⁹ While strongly welcomed by the Equal Opportunities Commission and other equality organisations, this development further accentuates disparities in legal protection against discrimination across the six strands--which the

White Paper does not propose to rectify. It is widely assumed, however, that legislative harmonisation, most likely through the vehicle of a Single Equality Act,²⁰ will be a priority for the new body under its responsibility to review discrimination and human rights law.²¹

Definition of human rights

The White Paper's view is that the CEHR will need to distinguish clearly between what is required by law ("compliance") and what is to be encouraged as good practice.²² In its work to improve compliance, it is envisaged that the CEHR "will have at its legal core the rights and obligations set out in the HRA". In its "public awareness" and promotional role, on the other hand, the CEHR will also be able to rely on unincorporated "international agreements on human rights to which the UK is a signatory".²³

The CEHR's legislation will require careful drafting if it is to reflect this distinction, while at the same time avoiding unnecessary restriction of the scope of the CEHR's human rights promotional remit, in breach of the UN's *Paris Principles on National Institutions for the Protection and Promotion of Human Rights*.²⁴ In giving advice and assistance on *compliance* with legal obligations, the CEHR will clearly need to focus on the incorporated human rights of the HRA 1998, as only these are directly accessible in *domestic* law. Otherwise, the CEHR should, so far as applicable, undertake to *promote* implementation across the full range of the United Kingdom's wider obligations in *international* law, on the basis of the human rights treaties to which it is party.²⁵

Duty to promote human rights

Promotion is the primary competence required of national human rights commissions by the *Paris Principles* and, launching the White Paper, Lord Falconer stated that "promotion will be the focus of the Commission's human rights role".²⁶ Although the Task Force proposed that promoting human rights should be established as an express statutory "duty" of the CEHR, this issue was not directly addressed by the White Paper.²⁷ What is clear is that the goal of promotion will be to mainstream "good human rights practice as a way to improve service provision".²⁸ Thus it is envisaged that the CEHR would develop "a databank of good practice case studies" and "sector-specific toolkits" to tackle areas of particular challenge for equality and human rights, and describe raised practice standards in relevant fields as required.²⁹ The promotion function will therefore embrace, but extend far beyond, "promoting public awareness and understanding of human rights" through schools and other public education initiatives.³⁰

Smart compliance

Alongside "good practice" promotion, CEHR's compliance function will involve sharpening public authorities' "awareness of their legal obligations".³¹ By working with inspectorates and standard-setting agencies like the Audit Commission and Prisons Inspectorate, it is envisaged that CEHR will help develop and promote performance measures and operational standards on equalities and human rights.

Research by the Audit Commission has shown that public authorities' awareness and implementation of human rights is stalling. By 2003, less than half of local authorities had completed human rights audits of their policies.³² There is still no national body legally charged with advising all public authorities--from schools and prisons to housing authorities and healthcare trusts--on the implications of evolving HRA case law. With a few notable exceptions,³³ follow-up to new decisions is minimal, so that any resulting benefits typically remain confined to those individuals directly involved. The CEHR will be empowered to promote compliance by "dissemination of relevant court case results",³⁴ responding swiftly to court decisions, and electronically distributing advice on new legal principles via networks of relevant public and private authorities.³⁵ It should also be able to facilitate "cross-sector learning" by acting as a new single source of expert advice.³⁶

Working with the private sector

The JCHR has found that undue narrowness in judicial interpretations of the category of "hybrid" public authority under s.6 of the HRA 1998³⁷ is undermining effective and consistent human rights protection; the resulting uncertainty this continues to cause amongst central and local government, it finds, is especially detrimental to the welfare of vulnerable public service users.³⁸ Rather, in the Committee's view, Parliament should be understood as having intended, "[a]s a matter of broad principle", that the HRA's definition of "public authority" should encompass 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 human rights".³⁹ The JCHR recommends this definition as the basis for a range of urgent measures including the development by relevant government departments of "guidance on the protection of human rights through contract", to address current "gaps and inadequacies" in human rights protection in the private delivery of public services.

The White Paper, in relation to the CEHR's human rights promotion function, states the government's expectation "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*".⁴⁰ Later, however, in describing the "public sector" to which the CEHR will offer support, 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".⁴¹

This potentially read as suggesting that whether a private sector body has legal human rights responsibilities hinges on the issue of whether it has a contractual relationship with a "core" public body, with the further implication that the CEHR's human rights guidance and promotion remit could be correspondingly restricted. The White Paper therefore leaves a significant ambiguity (even if an inadvertent one) over the precise extent of the CEHR's powers in relation to private service provision. Whether in the draft legislation itself, or accompanying explanatory material, care ought to be taken to resolve this in line with the JCHR's purposive approach to s.6 of the HRA.

Inquiries and investigations

CEHR will have a power to carry out general inquiries 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 inquiries will be "to develop and promote improved practice in response to particular areas of concern".⁴²

The proposed model derives from existing commissions' general investigations. At present these may focus on particular sectors, as have recent investigations by the CRE into race discrimination in prisons and by the EOC into pregnancy dismissal and occupational segregation. The CEHR will additionally have competence to examine issues cutting across different equality strands and human rights.

The CEHR will be able to initiate general inquiries either independently or at the request of the Secretary of State, and to recommend changes to policies, practices or legislation based on their findings. As with existing commissions, there will be a power to compel evidence from third parties, but only on authorisation from the Secretary of State. As the JCHR highlights, most general inquiries 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*.⁴³ As an alternative, the JCHR recommends that, in the face of obstruction, the CEHR's access to information should be enforceable by the courts.⁴⁴ The lack of powers to compel production of evidence is recognised as having seriously undermined the effectiveness of investigations by the Northern Ireland Human Rights Commission (NIHRC).⁴⁵

General inquiries cannot target individual bodies. This contrasts with named investigations, which existing Commissions may initiate on "reasonable suspicion" of the occurrence of unlawful discrimination within a specific organisation.⁴⁶ *Fairness for All* proposes extending this power to the new equality strands⁴⁷ but not human rights. The JCHR does not oppose this particular "red line". Contrasting the "open texture of human rights law" with "more tightly defined" antidiscrimination legislation, it emphasises "the importance of not allowing CEHR any implicit or explicit adjudicative function",⁴⁸ lest the Commission "supervene the courts" in determining rights

violations in individual cases.⁴⁹ However this remains distinct from the evidence of *systematic* human rights abuse which can be unearthed by general enquiries.

The Committee further proposes that when a *general inquiry* discovers specific practices breaching Convention rights it should have the power "to identify the actual or potential violations occurring" and make recommendations addressing them, reinforced by judicial review powers.⁵⁰ Arguably, in light of its own obligations as a public authority to comply with s.6 of the HRA 1998,⁵¹ the CEHR should likewise be empowered to make recommendations relating to human rights abuse revealed during *named investigations* into discriminatory practices. If, for example, in the course of examining the legality of "Do Not Resuscitate" notices under the Disability Discrimination Act, individual hospitals were found to be breaching standards required to protect the right to life, the CEHR might have a positive obligation to report this finding and make appropriate recommendations.⁵²

Advice, litigation and interventions

Using a variety of communication channels, including "a website, help-line and materials in a variety of accessible formats [and] languages", the CEHR will provide "high quality, user-friendly information and advice" to individuals regarding their rights "under discrimination *and* human rights law".⁵³ Currently no statutory body is obliged to provide advice on human rights. The CEHR will also establish a "second-tier support service for front-line advisers in partner organisations" such as Citizens Advice Bureaux or trade unions.⁵⁴

The CEHR will be empowered to support individuals bringing cases under all six strands of equality legislation, including representation in courts or tribunals.⁵⁵ Like the existing commissions, the CEHR will also have an *implicit* power to support what the White Paper calls "combined discrimination and human rights cases", where the HRA 1998 is cited in the course of antidiscrimination litigation.⁵⁶ A number of recent landmark cases in the equalities field have either owed their success wholly to argument under the HRA or have been substantially influenced by it.⁵⁷ One of only five stated consultation questions in the White Paper asks whether the new body should additionally have an *explicit* power to continue support for such "combined cases" if the founding equality argument fails.⁵⁸ While this scenario is unlikely to arise frequently, the JCHR's view is that it would be "quite wrong", for the CEHR to have to abandon a case "where the facts continued to disclose a breach of human rights".⁵⁹ Beyond this, the White Paper concludes that individual support for freestanding human rights cases is not required.⁶⁰ In its rationale, the need for additional powers is obviated by the scheme of the HRA 1998, under which Convention rights can be raised and enforced in any court or tribunal, and all such judicial bodies are explicitly required to act compatibly with human rights.⁶¹

The JCHR likewise contrasts the regime for supporting enforcement of rights under the HRA with that established by anti-discrimination legislation.⁶² In the former case

there is "funding potentially available from the Legal Services Commission".⁶³ 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. Cautioning against the risk of the CEHR being overwhelmed by individual cases, based on the experience of other commissions, the JCHR concludes that there is not "for the time being" a need for "any express new power for CEHR to support individual free-standing cases under the HRA".⁶⁴

Opinion amongst those submitting evidence to the JCHR inquiry divided on this issue. The Law Society and British Institute of Human Rights, for example, broadly favour the CEHR supporting individual cases, whereas others, including Justice and Liberty, warn against diluting the Legal Service's Commission's responsibility for such support: Liberty, for instance, would seek to avoid the outcome that " ... the existence of a litigation function in the commission [is] used as a justification for further inroads into the ability of private practitioners and non-governmental organisations to take cases".⁶⁵

There is greater unanimity, however, on the value of commissions intervening in cases to further a *strategic* mandate. The JCHR observes that the existing commissions "regard third party interventions as an effective strategic tool in advancing their general aims".⁶⁶ Although such interventions are at the court's discretion and do not necessarily require explicit statutory authorisation, the White Paper signals that the CEHR will be granted an express power to seek leave to intervene, with the intention "to put beyond doubt the body's capacity in this area".⁶⁷ The power would extend "in support of the full breadth of CEHR's remit, covering both equality and human rights".⁶⁸ Like the powers to conduct general inquiries and to provide advice, human rights interventions would not require simultaneous engagement of anti-discrimination provisions. However, it is suggested that interventions should be "of a strategic nature" and "closely tied to the CEHR's core aims", qualifications which, if established by statute, might arguably intrude into courts' discretion to regulate process.

The CEHR will also be empowered to enforce the new public sector duties against public sector bodies failing to discharge them, under the model of the Race Relations (Amendment) Act and through judicial review.⁶⁹ That existing commissions may have "sufficient interest" to bring judicial review proceedings in their own name has been accepted in the courts.⁷⁰ This avenue of challenge is not, however, available to the CEHR in relation to "free-standing" human rights breaches as a consequence of the "victim test" set by s.7 of the HRA 1998.⁷¹ In other words, the CEHR will be able to apply for judicial review of acts or omissions of public authorities on any other relevant public law grounds, and raise Convention points in the course of doing so, but will not have standing to apply for judicial review on HRA grounds alone.

The JCHR's report records its concern that this lacuna might prevent the CEHR from pre-empting breaches of individuals' rights where potential violations are uncovered through its own inquiries, which the Committee would find "indefensible".⁷² It

therefore recommends for the CEHR a power "notwithstanding ... the Human Rights Act" to seek judicial review "where it has reasons to believe" that policies, actions or omissions "have resulted, or are likely to result, in a violation of Convention rights".⁷³ On conciliation services, the White Paper advocates these as a potentially "more accessible and less expensive alternative to litigation and tribunals".⁷⁴ It therefore proposes empowering the 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 again excluded, "[c]onsistent with the approach proposed for supporting HRA litigation."⁷⁵ On this occasion the JCHR is not similarly convinced; its conclusion is instead 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".⁷⁶

Reviewing the Human Rights Act

CEHR will have "responsibility to keep the working of discrimination legislation and the Human Rights Act under review",⁷⁷ comprising both monitoring the effectiveness of the relevant statutes and making recommendations to the Secretary of State for change.⁷⁸ It will additionally be able to advise Ministers generally, including in the devolved administrations, and to make proposals relating to any aspect of its remit. In this context *Fairness for All* anticipates the CEHR becoming "a centre of legal expertise on discrimination and human rights law".⁷⁹ It is also explicitly stated that responsibility for human rights scrutiny of proposed new legislation will remain with the JCHR; but caution is due in relation to any statutory reflection of this caveat, given that the JCHR's permanence cannot, regrettably, be guaranteed.

"Promoting good relations" and other powers

The CEHR will have "a statutory duty to promote good relations among the different communities protected by discrimination legislation and between those communities and the wider society".⁸⁰ The CRE alone amongst the current commissions has a duty to promote good relations between "different racial groups".⁸¹ In implementing this duty the CRE has funded and supported a network of Race Equality Councils.⁸²

It is intended that the "extended good relations function" will involve the CEHR at both local and community levels, providing it with the capacity "to assist in the process of mediating conflicts between communities".⁸³ In this area the CEHR's human rights remit is expected to play a significant role, "providing tools and concepts to help find solutions in areas where rights may conflict".⁸⁴ The CEHR will have the power to award grants to local groups with "a good relations or equality remit delivered by voluntary or community organisations".⁸⁵ It is also intended that the CEHR will be "well-placed to promote networks of community and voluntary organisations working on equality and human rights issues".⁸⁶

Additional powers proposed for the CEHR include a research function to build "a strong evidence base" on "barriers to equality, respect for human rights and full participation in society",⁸⁷ providing advice and training to partnership organisations, and educational and outreach activities.⁸⁸

Devolution issues

Proposals in this area proceed by recognising that "distinct political and legal contexts for equality and human rights have evolved in Scotland and Wales" since devolution. In addition to Scottish and Welsh CEHR offices, the legislation will provide for each devolved jurisdiction both a dedicated committee, undertaking a mix of delegated and advisory decision-making, and a separately appointed representative Board member.⁸⁹ Substantial challenges will be encountered in effectively co-ordinating CEHR's remit and activities with those of the relevant devolved bodies, for example, the Scottish Executive's proposed Scottish Human Rights Commission (SHRC). In this regard the White Paper suggests developing detailed "Memoranda of Understanding" between CEHR and appropriate organisations.⁹⁰

Structure and accountability

Issues on which there is ongoing debate among "stakeholders" and other affected groups include CEHR's governance and structure.⁹¹ It is not proposed to set a requirement in statute for separate equalities or human rights commissioners or committees, excepting specific arrangements for devolved areas as discussed above, and for disability (subject to a five-year review).⁹² The CEHR's Board will, however, have the power to establish committees to support or assist any of its functions, which may be advisory or have delegated powers⁹³; this will also allow the board to appoint strand-specific or other committees as discretion requires.

Fairness for All proposes that CEHR should operate within the "standard framework" of executive non-departmental public bodies.⁹⁴ No decision has yet been made about which government department will sponsor the new Commission. An annual report will be presented to both Houses of Parliament -- which "could" be scrutinised by a Select Committee.⁹⁵

In light of the Paris Principles' emphasis on independence in substance as well as in principle, in relation to both appointments procedures and arrangements for and adequacy of financing,⁹⁶ the JCHR favours an alternative template. This "best practice" model of independence would dispense with direct ministerial control of funding⁹⁷ and establish a new statutory committee to approve and oversee the CEHR's budget (voted directly by the House of Commons) and strategic plan. The committee would also recommend Commissioners for appointment, through a

process involving Parliament.⁹⁸ The JCHR additionally favours extending its own terms of reference to include scrutiny of CEHR's performance.⁹⁹

Conclusion

The JCHR has concluded that "*clear and sufficient* powers are necessary for a Human Rights Commission to carry out its work effectively".¹⁰⁰ Some of the human rights powers proposed in *Fairness for All* manifestly need further clarification.¹⁰¹ The exclusion of support for free-standing human rights cases could be taken as evidence that the proposed powers are insufficient as well as unclear. This is perhaps to underestimate the potential added value of a Commission that could provide a coherent approach to addressing the causes, as well as the consequences, of discrimination *and* human rights abuses. The strategies suggested embrace a range of mechanisms, including offering leadership and partnership to human rights advocates and NGOs, in addition to public authorities, and at a local level as well as centrally. It is envisaged that through this approach the CEHR will become a "strong and authoritative champion for equality and human rights".¹⁰² Resources, effective leadership, and a strategy that is focused and innovative, yet still commanding broad community support, will ultimately determine whether this is achieved.¹⁰³

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¹ Barbara Roche M.P., Minister for Women, Foreword to Equality and Diversity: Making It Happen (2002) (www.womenandequalityunit.gov.uk/equality/project/making_it_happen/making_it_happen.doc).

² Council Directive 2000/34 [2000] O.J. L.180/22, implemented by the Race Relations Act 1976 (Amendment) Regulations 2003; and Council Directive 2000/78 [2000] O.J. L.303/16. The Employment Equality (Sexual Orientation) Regulations (SI 2003/1661) and the Employment Equality (Religion or Belief) Regulations (SI 2003/1660) were introduced in 2003. Legislation prohibiting age discrimination in employment will be in place by December 2006. The Directive's requirements on disability discrimination are to be met by further amendment of the Disability Discrimination Act; the Sex Discrimination Act 1975 and Equal Pay Act 1970 addressed sex discrimination to the extent required by Art.141 of the EC Treaty.

³ As few contemplated establishing three equality commissions in addition to the three already existing, debate mainly centred on either incorporating the new equality "strands" of age, religion and sexual orientation within the Disability Rights Commission (DRC), Commission for Racial Equality (CRE) or Equal Opportunities Commission (EOC) respectively, or establishing a single commission combining all six strands.

⁴ Women and Equality Unit, n.1 above, p.1.

⁵ *ibid.*

⁶ Joint Committee on Human Rights, Sixth Report, The Case for a Human Rights Commission, Vol.I (2002-03 HL 67; HC 489); Vol.II (2002-03 HL 67-II; HC 489- II).

⁷ *ibid.* para.99.

⁸ *ibid.* para.203.

⁹ Hansard, HL, col.WA54 (October 30, 2003).

¹⁰ For the Task Force's full membership and terms of reference see www.womenandequalityunit.gov.uk. The Scottish Executive Equality Unit established a Scottish Equalities and Human Rights Reference Group to similar purpose.

¹¹ Fairness for All: A New Commission for Equality and Human Rights, DTI in association with the Department for Constitutional Affairs, Department for Education and Skills, Department for Work and Pensions, and the Home Office, Cm.6185 (May 2004). A summary of Task Force discussions to April 1, 2004 is available at www.womenandequalityunit.gov.uk.

¹² We do not here consider in detail its proposals on governance and structure of the CEHR.

¹³ Joint Committee on Human Rights, Eleventh Report, Commission for Equality and Human Rights: Structure, Functions and Powers (2003-04 HL 78; HC 536).

¹⁴ Fairness for All, n.11 above, para.3.28; legislation governing the "new" strands, however, addresses discrimination in employment and training only, and does not extend to goods and services provided by public or private sector bodies.

¹⁵ "When deciding which cases to support, the CEHR will need to pay particular attention to those which fulfil the following criteria, whether they: raise a question of principle; affect large numbers of people, flag up the need for legislative change", n.11 above, para.4.16.

¹⁶ See Sex Discrimination Act 1975, s.75 and like provision made by Disability Rights Commission Act 1999, s.7(2)(b) and Race Relations Act 1976, s.66(1)(b))

¹⁷ Currently each commission can only issue codes of practice relating specifically to the terms of its legislation.

¹⁸ At present only the DRC enjoys a similar power: Disability Rights Commission Act 1999, s.17.

¹⁹ Race Relations Amendment Act 2000, s.2 (amending Race Relations Act 1976, s.71(1)) and Draft Disability Discrimination Bill, cl.8, Cm.6058-I (December 2003).

²⁰ The Northern Ireland Equality Commission has developed detailed proposals for a Single Equality Act within the Northern Ireland legislative context: see documents at www.equalityni.org/publications/recentpubdetails.cfm?id=10. For a legislative model addressing Great Britain, see www.odysseustrust.org/equality.html.

²¹ n.11 above, para.3.34, and see further below.

²² *ibid.* para.3.23

²³ *ibid.* paras 3.13-3.14.

²⁴ UN Doc.A/RES/48/134 (December 20, 1993), Principle 2: "A national institution shall be given as broad a mandate as possible". Under Principle 3(b), a Commission has responsibility to "promote and ensure the harmonisation of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation".

²⁵ In line with the intention of HRA 1998, s.2, through which treaties such as the UN Convention on the Rights of the Child are now frequently cited in court decisions interpreting ECHR rights: see e.g. *R. v Secretary of State for the Home Department Ex p. Howard League For Penal Reform* (No.2) [2002] EWHC Admin 2497, [2003] 1 F.L.R. 484.

²⁶ www.dca.gov.uk/speeches/2004/lc120504.htm.

²⁷ In a number of instances the White Paper lacks clarity over whether functions will be established as statutory powers or duties.

²⁸ n.11 above, para.3.11.

²⁹ *ibid.* paras 7.51 and 7.54.

³⁰ *ibid.* para.3.13.

³¹ *ibid.* paras 3.15 and 7.45.

³² Audit Commission, Human Rights: Improving public service delivery (2003).

³³ e.g. *R. (on the application of X and Y) v East Sussex CC* [2003] EWHC 167 (Admin) (February 10, 2003, unreported) where the DRC intervened and followed up on the case.

³⁴ n.11 above, para.3.16.

³⁵ Contacting, for example, prison governors in this way could have been appropriate following *R. (on the application of P & Q) v Secretary of State for the Home Department* [2002] EWCA Civ 1151, [2001] 1 W.L.R. 2002 (a decision concerning the Prison Service's mother and baby unit policy) and, likewise, local housing authorities after *R. (on the application of Bernard) v Enfield LBC* [2002] EWHC Admin 2282, [2003] U.K.H.R.R. 148.

³⁶ n.11 above, paras 3.39, 7.42 and 7.52.

³⁷ HRA 1998 includes as a public authority "any person certain of whose functions are functions of a public nature", except in relation to their "private" acts: s.6(3)(b) and (5).

³⁸ Seventh Report, The Meaning of Public Authority Under the Human Rights Act (2003-04 HL 39; HC 382), paras 13-44 (referring inter alia to Poplar Housing & Regeneration Community Association v Donoghue [2001] EWCA Civ 595, [2002] Q.B. 48 and Heather v Leonard Cheshire Foundation [2002] EWCA Civ 366, [2002] 2 All E.R. 936) and Conclusion, para.29.

³⁹ *ibid.* Conclusion, para.31.

⁴⁰ *ibid.* para.3.9.

⁴¹ n.11 above, para.7.38, emphasis added.

⁴² *ibid.* para.4.3.

⁴³ n.24 above, 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".

⁴⁴ n.13 above, para.60. Enforcement of the South African Human Rights Commission's power is exercisable subject to consultation with the Attorney-General.

⁴⁵ Joint Committee on Human Rights, Fourteenth Report, Work of the Northern Ireland Human Rights Commission (2002-03 HL 132; HC 142), para.65.

⁴⁶ Hillingdon LBC v Commission for Racial Equality [1982] A.C. 779, which arguably narrowed the scope to conduct formal investigations beyond parliamentary intention in the Race Relations Act and Sex Discrimination Act. Whether the DRC Act 1999, s.4 similarly restricted the DRC's formal investigation power is also controversial: it has been argued, including by the DRC itself, that this section's different wording confers on the DRC the power to initiate named investigations without first possessing evidence sufficient to ground "reasonable suspicion". The CEHR's new legislation provides an appropriate opportunity to resolve this uncertainty, by promulgating new statutory wording that categorically reflects the DRC's interpretation of the named investigation power, so including less adversarial investigations, and extending across all strands.

⁴⁷ In relation to employment but not goods and services.

⁴⁸ n.13 above, paras 50 and 51.

⁴⁹ *ibid.* para.54.

⁵⁰ *ibid.* and see further below.

⁵¹ HRA 1998, s.6(1) makes it unlawful for a public authority to act incompatibly with a Convention right.

⁵² n.13 above, Memorandum from Francesca Klug and Claire O'Brien, Ev.45, para.4 and Conclusion.

⁵³ n.11 above, paras 7.11-7.17 (our emphasis).

⁵⁴ *ibid.*

⁵⁵ *ibid.* para.4.16

⁵⁶ Consistently with existing commissions' obligations under HRA 1998, ss.3 and 6, and victims' rights to rely on the HRA in s.7.

⁵⁷ See e.g. Mendoza v Ghaidan [2002] EWCA Civ 1533, [2003] Ch. 380; R. (on the application of Bernard) v Enfield LBC, n.35 above; R. (on the application of SG) v Liverpool CC and Secretary of State for Health, extending the definition of "nearest relative" under the Mental Health Act 1983 to same-sex partners (App. CO1220/02, October 21, 2002, unreported); Bellinger v Bellinger [2003] 2 A.C. 467.

⁵⁸ n.11 above, para.4.19.

⁵⁹ n.13 above, para.76.

⁶⁰ n.11 above, para.3.16.

⁶¹ HRA 1998, s.6(3)(a).

⁶² n.13 above, paras 64-66.

⁶³ *ibid.* para.64.

⁶⁴ *ibid.* para.68.

⁶⁵ *ibid.* para.65. Evidence from a consortium of national human rights NGOs and centres on the guiding "principles" and "framework" of an HRC also omits mention of litigation support as a necessary CEHR function: Ev.75.

⁶⁶ *ibid.* para.79. The NIHRIC intervened nine times in 2002-03 (including R. (on the application of Amin) v Secretary of State for the Home Department [2003] UKHL 51, [2004] 1 A.C. 653) while it did not take any cases in its own name. The DRC has intervened in R. (on the application of X and Y) v East Sussex CC, n.33 above, and, most recently, participated as an interested party in R. (Burke) v General Medical Council [2004] EWHC 1879 (Admin), a case concerning competent patients' advance directives to refuse or consent to withdrawal of artificial nutrition and hydration.

⁶⁷ *ibid.* para.4.12. The NIHRC had to litigate all the way to the House of Lords to establish its implied statutory power to intervene (*R. v Greater Belfast Coroner Ex p. NIHRC* [2002] UKHL 25, [2002] H.R.L.R. 35) with significant disruption to its activities as a result.

⁶⁸ n.11 above, paras 4.11-4.13. At para.4.41 the White Paper states that an express power to act as *amicus curiae* at courts' request is not proposed.

⁶⁹ *ibid.* paras 7.59-60; cf. n.19 above.

⁷⁰ See e.g. *R. v Secretary of State for Employment Ex p. EOC* [1995] 1 A.C. 1.

⁷¹ Under HRA 1998, s.7(3), 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) makes similar provision for petitions in Scotland); s.7(7) defines a "victim" according to the test set by Art.34 ECHR.

⁷² n.13 above, para.91.

⁷³ *ibid.* para.92.

⁷⁴ n.11 above, para.4.20.

⁷⁵ *ibid.* para.4.22; see text to nn.58-61 above.

⁷⁶ n.13 above, para.71.

⁷⁷ n.11 above, para.3.34.

⁷⁸ As, for example, the JCHR has in its report on The Meaning of Public Authority under the Human Rights Act, n.38 above.

⁷⁹ n.11 above, para.3.34.

⁸⁰ *ibid.* para.6.3

⁸¹ Under Race Relations Act 1976, s.43(1)(b) the CRE has the duty "to promote ... good relations between persons of different racial groups generally ... "; note this duty is distinct from the "good relations" duty on all public bodies under the Race Relations (Amendment) Act.

⁸² The White Paper, n.10 above, states at para.6.8 that "current levels of support for race equality work at the local level will ... be protected for the foreseeable future".

⁸³ *ibid.* para.6.4.

⁸⁴ *ibid.* para.6.5, cf. n.13 above, Memorandum from Francesca Klug and Claire O'Brien, Ev.45, Annex, Human Rights: a framework for resolving disputes in the community?, F. Klug and C. O'Brien.

⁸⁵ *ibid.* para.6.6

⁸⁶ *ibid.* para.6.13.

⁸⁷ *ibid.* para.3

⁸⁸ *ibid.* paras 3.40 and 7.15

⁸⁹ *ibid.* paras 9.1-9.6.

⁹⁰ The Scottish Human Rights Commission and Commissioner for Children and Young People, Wales' proposed Older People's Commissioner, and others: *ibid.* para.9.11.

⁹¹ *ibid.* Ch.5.

⁹² *ibid.* paras 10.12-10.21.

⁹³ *ibid.* para.5.14.

⁹⁴ *ibid.* para.5.19

⁹⁵ *ibid.* para.5.20

⁹⁶ n.24 above, Principles 4-6.

⁹⁷ As criticised in the case of the NIHRC by the Council of Europe: Opinion 2/2002 of the Commissioner for Human Rights [2002] Comm.D.H. 16 (Strasbourg, November 13, 2002).

⁹⁸ n.13 above, paras 126-137.

⁹⁹ *ibid.* paras 138-142.

¹⁰⁰ n.46 above, para.60 (emphasis added).

¹⁰¹ In particular, as discussed, with regard to the definition of human rights, the scope of the CEHR's mandate on human rights findings in the private sector and uncertainty over the CEHR's ability to address adverse human rights findings in the course of formal investigations.

¹⁰² n.11 above, para.1.16.

¹⁰³ It is envisaged that annual expenditure "is likely to be rather higher than that of the existing Commissions" given the CEHR's broader mandate, but this "will depend" on the degree to which additional costs are offset by economies of scale, n.10 above, App.B, paras 46-47.