



## **BIHR response to the Discrimination Law Review consultation paper 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'**

1. The British Institute of Human Rights (BIHR) is an independent human rights charity with a UK-wide remit. Our focus is on the value of human rights ideas, laws and practice to tackle inequality and promote social justice. We have three main aims: (i) to lead the development of a fresh and ambitious vision of human rights that encompasses the full range of internationally recognised rights and is relevant to everyone in the UK, especially the most marginalised people; (ii) to build the capacity of other organisations to develop their own human rights practice that helps them deliver more effective services and campaigns; and (iii) to influence people with power to make this broader vision of human rights an integral part of their policies and plans. We do a range of policy, research and influencing activities and we develop and deliver practical human rights supports (including information, consultancy and training) for voluntary, community and public sector organisations.

It is on the basis of this work and our special expertise in the interface between human rights and equality that we make the following response to the Discrimination Law Review consultation paper 'A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain'.

2. The Government's progress in forging legislative protections in the field of equality and human rights is undeniable. BIHR recognises the achievements celebrated in the consultation paper and strongly supports the agenda to harmonise and simplify the increasingly complex array of laws designed to challenge discrimination and promote equality in our society. However we believe that the consultation paper has missed a chance to cement and progress new joined up thinking about equality and human rights, and that this has contributed in part to its low ambitions for a single Equality Bill.

## The new integrated equality and human rights agenda

3. Years of 'silo' thinking about equality and human rights in the UK were finally put to rest with the announcement of a new Commission for Equality and Human Rights (CEHR), due to open its doors on 1 October 2007. The Equality Act requires the CEHR to take account of human rights in its work on equality and good relations, thus recognising that human rights provide an underpinning framework for these other areas of work.<sup>1</sup> On a deeper level, the CEHR signifies a recognition, uncontroversial in other parts of the world, that equality is a fundamental human right.
4. The Equalities Review also embodies this new approach to equality and human rights. The framework it proposes for defining and measuring equality pivots on a set of core capabilities based on international human rights standards, spanning the full set of civil, political, economic, social, and cultural rights. Similarly, regional events for the European Year of Equal Opportunities organised by the Department for Communities and Local Government and the CEHR Transition Team have combined traditional equalities perspectives with capacity building, provided by BIHR, about how human rights based approaches can be used to tackle inequality.
5. Meanwhile, on the ground, practitioners in public authorities and in voluntary and community organisations are also drawing the links between equality and human rights, spearheading the development of integrated human rights and equality strategies and impact assessment schemes, and building human rights into new and existing equalities projects. For example, a number of NHS Trusts participating in the 'Human Rights in Healthcare' project, developed by the Department of Health in collaboration with BIHR, are using human rights based approaches to better deliver on their existing equalities objectives.<sup>2</sup> Over the past year we have received an increasing number of requests for human rights consultancy, training and other forms of technical support from equality teams in public authorities and voluntary sector organisations looking to incorporate human rights in their core work.
6. BIHR's conference 'Human Rights Visions of Equality' held in London on 18 June 2007 was an opportunity for equalities experts and others working in central and local government, inspectorates, equality commissions, and a wide range of voluntary and community organisations to reflect upon these developments and to chart the future for integrated work on equality and human rights in the era of the CEHR. A comprehensive report from this conference will be available in late September.

---

<sup>1</sup> See in particular section 9 (4) of the Equality Act 2006.

<sup>2</sup> See 'Human Rights in Healthcare – A Framework for Local Action' available at <http://www.bihhr.org/development/health.html>. Last accessed 29.08.07.

7. BIHR is disappointed that the consultation paper fails to properly locate the Government's plans for a single Equality Bill in this new policy context. Although the consultation paper recognises both that human rights are relevant in an 'equality context' (page 63) and that the CEHR represents a shift because it 'places equality firmly in the context of people's fundamental rights and freedoms' (page 11), this logic is otherwise left behind as the specific proposals unfold.

### **How this new integrated agenda has been neglected and why this makes a difference**

8. Below we explain how the new approach to human rights and equality has been overlooked in the consultation paper and how this has contributed to the narrow scope of the proposals. We focus on the following areas:
  - Benefits of a human rights perspective
  - The role of human rights in protecting against discrimination
  - Human rights and multiple or intersectional discrimination
  - Human rights and a broader vision of equality beyond anti-discrimination
  - A public sector human rights duty

#### **Benefits of a human rights perspective**

9. On a general level, a human rights lens has not been used to mould the general parameters of the single Equality Bill project as envisaged in the consultation paper. For example, a human rights perspective would have cautioned strongly against the proposal to maintain different levels of protection across the six equality 'strands' (race, sex, disability, religion and belief, age, and sexual orientation), and would have promoted instead the importance of parity as a matter of fundamental principle. A human rights perspective would also have demanded recognition that there are other groups who experience discrimination who sit uneasily within these 'strands' or fall outside them altogether, including language minorities, asylum seekers and refugees, homeless people, ex-offenders, and people living in poverty.

#### **The role of human rights in protecting against discrimination**

10. Using a human rights perspective would also have helped to paint a more sophisticated picture of the anti-discrimination landscape in the UK. Specifically, human rights protections against discrimination are neglected in the consultation paper. The Human Rights Act prohibits discrimination in the enjoyment of human rights on 'any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The words 'other status' have been held to cover, among other things, sexual orientation, illegitimacy, marital status, trade

union membership, transsexualism and imprisonment.<sup>3</sup> The Human Rights Act therefore fills gaps in our current anti-discrimination statutes by including additional grounds on which discrimination is prohibited.

11. The failure of the consultation paper to acknowledge the role of human rights in protecting against discrimination in the UK obscures the roots of our anti-discrimination statutes in international human rights treaties (including the International Convention on the Elimination of all Forms of Racial Discrimination, and the Convention on the Elimination of all Forms of Discrimination against Women). It also denies the (actual and potential) importance of the Human Rights Act prohibition of discrimination for older people (currently denied protection against discrimination outside employment), carers and many other groups who fall through the cracks of our anti-discrimination statutes and who will not achieve parity of protection on the basis of the current proposals for a single Equality Bill.
12. Moreover, the consultation paper does not mention Protocol 12 to the European Convention on Human Rights which provides a free-standing protection against discrimination. The UK has not signed or ratified this Protocol, contrary to the trend among other member states of the Council of Europe. Although human rights organisations have lobbied the Government to sign and ratify Protocol 12, awareness of it is otherwise low. This consultation would have been an excellent opportunity to canvass views from a broader range of organisations and individuals about the potential value of Protocol 12 in the UK context.

### **Human rights and multiple or intersectional discrimination**

13. The consultation paper is somewhat sceptical about claims that people are inadequately protected against multiple or intersectional discrimination in Britain. BIHR does not provide advice for individuals or conduct case work. However, anecdotal evidence from our training sessions with the voluntary and community sector suggests there are many victims of multiple or intersectional discrimination who are denied redress under anti-discrimination statutes because they cannot make out a discrimination claim on one of the recognised grounds. For example, when providing training to a local racial equality council, staff shared with us their frustrations because they could not properly 'allocate' harassment of a young disabled Asian man to either the race or disability 'strand'. We have also heard of many people denied legal assistance by the existing equality Commissions because the discrimination they suffered was multiple or intersectional and a 'pure' race, disability or sex claim could not be established.

---

<sup>3</sup> This prohibition of discrimination is contained in Article 14 of the European Convention on Human Rights, made part of domestic UK law by the Human Rights Act. Much of the case law relating to the words 'other status' in the prohibition is drawn from the European Court of Human Rights.

14. Human rights are often helpful in situations of multiple or intersectional discrimination. When confronted with harassment, bullying or other forms of abuse, a human rights perspective takes as its starting point the fact that a human being has been treated badly. Hence severe discrimination against a black woman may be classified in human rights terms as inhuman and degrading treatment or a violation of her right to respect for private life (which includes the right to physical and psychological integrity). There is no need to tease out, artificially, which part of the discrimination relates to her race, and which part to her gender. In other words, a human rights perspective is more holistic, recognising the intersection of different parts of the victim's identity and their relevance to the unacceptable treatment.
15. The consultation paper does not recognise the relevance of human rights to multiple or intersectional discrimination and thus paints an incomplete picture of the different frameworks that can be used to tackle it. Unfortunately, however, there are many situations where human rights remedies will be unavailable for a victim of multiple or intersectional discrimination, for example where the discrimination has occurred in the private sector. We therefore endorse the proposals relating to this issue in the response of the Equality and Diversity Forum to the consultation paper.

### **Human rights and a broader vision of equality beyond anti-discrimination**

16. BIHR has long argued that human rights promote a broader vision of equality beyond discrimination. This was a major theme of our recent conference 'Human Rights Visions of Equality' (see above). In addition to protecting against discrimination, a human rights vision of equality demands realisation of the full set of fundamental human rights required to enable meaningful participation in a democratic society. One consequence of this is a high priority placed on dignity interests, something that anti-discrimination approaches have struggled to protect.
17. The role of human rights in protecting dignity is briefly acknowledged on page 63 of the consultation paper, however the discussion of age discrimination beyond the workplace notes 'evidence that older people are not always treated with dignity and respect, for example in relation to care services, either at home or in residential care' without acknowledging the importance of human rights protections in these situations. Poor treatment of this sort is not always discriminatory, for example everyone in a care home may be treated equally badly. In these circumstances the minimum standards provided by human rights (for example the prohibition of inhuman and degrading treatment), which do not require a comparator, are immensely useful. They will continue to be important even if a single Equality Bill extended the prohibition of age discrimination to goods, facilities and services, which we believe it should.

18. BIHR believes that inclusion of a purpose clause, along the lines suggested by Sarah Spencer and Sandra Fredman, would go some way towards rendering more visible links between a single Equality Bill, extending our anti-discrimination framework, and the broader vision of equality associated with human rights. This is because the suggested purpose clause emphasises a range of core human rights principles in addition to anti-discrimination, including dignity, respect and participation. We feel strongly that this purpose clause should apply to the entire Act, and not only to the public sector duties.

### **A public sector human rights duty**

19. The concept of positive equality duties, requiring positive action by public authorities to promote equality (instead of just remedying discrimination after the fact), is drawn from human rights, though this is rarely recognised. Positive duties to promote and protect human rights have long been a feature of the UK's European human rights obligations, and they travelled into domestic law with the passage of the Human Rights Act in 1998. For example, public authorities are required to take proactive steps to protect rights including the right to life, the right not to be tortured or treated in an inhuman or degrading way, and the right to respect for private and family life. Building on this idea, the Government always emphasised that the Human Rights Act was not about stimulating extensive litigation. Instead the Act was designed to foster a culture of respect for human rights in the UK by encouraging public authorities to place the needs of the individual at the heart of decision-making. This agenda to transform the culture of the public sector was subsequently mimicked in the positive equality duties commencing with the race duty introduced in response to the racist murder of Stephen Lawrence.
20. Positive human rights duties are implicit rather than explicit in the Human Rights Act (and the European Convention on Human Rights). They are articulated most clearly in case law developed by the European Court of Human Rights. For this reason, as our extensive work with public authorities confirms, they are poorly understood even within legal departments of public authorities.<sup>4</sup> Recognising this low awareness, the Joint Committee on Human Rights has recommended that a 'positive' or 'general' human rights duty be imposed on public authorities as a way of focusing attention on their positive human rights duties.<sup>5</sup>
21. BIHR believes that the consultation paper missed an important opportunity to address the need for a public duty in relation to human rights, as recommended by the Joint Committee on Human Rights. This is yet another example of a disconnection between proposals for a single Equality Bill and the new integrated equality and human rights agenda. As a result, different parts of this agenda are

---

<sup>4</sup> See also Frances Butler, *Improving Public Services: Using a Human Rights Approach* (2005), 16-7.

<sup>5</sup> See Joint Committee on Human Rights, *Commission for Equality and Human Rights: Structure, Functions and Powers*, Eleventh Report of Session 2003-04, para 32.

likely to move forward at different speeds and in different ways, creating confusion for practitioners.

## **The 'public authority' definition problem**

22. The consultation paper recognises the problem created by the narrow approach of the courts to the definition of 'public authority' in section 6 of the Human Rights Act, and the potential implications of this for the scope of the public sector equality duties which also hinge on the concept of public authority. This problem has become particularly acute in the context of outsourced residential care for older people and disabled people. In light of a disappointing decision on this matter by the House of Lords in *YL v Birmingham City Council 2007* [UKHL] 27, there is much work taking place by individuals and organisations inside and outside Government aimed at finding a durable solution consistent with Parliament's original intent that the Human Rights Act would provide broad protection for those receiving public services at the hands of private or voluntary sector contractors. BIHR, in common with many other organisations, wants the Government to legislate quickly (perhaps using the upcoming Bill to merge the three existing health and social care inspectorates in England as a vehicle) to resolve this issue. We urge the Government to keep in mind the links between the 'public authority' definition problem as it applies to the Human Rights Act, and the single Equality Bill.

## **Conclusion**

23. Although BIHR welcomes proposals for a single Equality Bill in the consultation paper, we feel that overall it favours consolidation over innovation and that one reason for this is the failure to locate the proposals in the new integrated human rights and equality agenda. We have explained above a number of ways in which the failure to consider the relevance of human rights has led to a narrowing of the Government's recommendations. This is highly short sighted since implementation of a single Equality Bill will take place in the context of existing human rights obligations in law, of emerging evidence that a wide range of organisations are beginning to join up the delivery of their equalities and human rights responsibilities, and of the CEHR with its integrated remit.



Katie Ghose, Director

4 September 2007