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Presented by Blackstone Chambers in association with Liberty
Focus on Public Law and Human Rights
18th November 2005

THE NEW EQUALITY AND HUMAN RIGHTS
COMMISSION

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¹ I am grateful to Kate Beattie, Parliamentary Legal Officer of the Odysseus Trust for her contribution to this paper.

Introduction

The Equality Bill 2005, which is in its final stages before the House of Lords, will establish a Commission for Equality and Human Rights (CEHR) and thus fill a gap in human rights protection in the UK. The Human Rights Act 1998, which came fully into force on 2 October 2000, was flawed insofar as it did not provide for a Human Rights Commission to give advice and assistance to alleged victims in bringing proceedings for breaches of Convention rights, to conduct research, to intervene in court proceedings, and to promote a culture of human rights. The position was anomalous because a Human Rights Commission had been created for Northern Ireland, and most other Western countries have longstanding human rights commissions (for example Ireland, India and Canada, among others). This paper considers the most important features of the new Commission and how it may contribute towards the development of a human rights culture in the UK.

Streamlined Enforcement of Equality Laws and Promoting a Human Rights Culture

The CEHR will have a crucial role in promoting a human rights culture in the UK. The CEHR will be under a general duty to exercise its functions with a view to encouraging and supporting the development of a society in which individual human rights, equality and the dignity and worth of each individual are respected.² The CEHR will also have further specific duties relating to equality and diversity,³ human rights,⁴ and the promotion of good relations between the members of different groups in society.⁵

Crucially the CEHR's work will not be limited to human rights as guaranteed by the Human Rights Act. Clause 9 of the Equality Bill defines human rights to include "other human rights". This means that the CEHR will be able to consider human rights guaranteed by other important international human rights treaties, such as the Convention on the Rights of the Child, and can also consider economic, social and cultural rights in addition to civil and political rights.

The CEHR will have a range of powers including, but not limited to:

- Monitoring the law and advising government about the effectiveness of equality and human rights enactments and about the likely effect of a proposed change of law;
- Monitoring progress towards the development of a society characterized by the protection of human rights and equality;
- Provision of information and advice, education and training, and the conduct of research;
- Issuing of codes of practice;
- Conducting inquiries into any matter relating to its duties;
- Conducting investigations and applying for injunctions to prevent breaches of equality and human rights law;
- Providing legal assistance; and
- Bringing and intervening in judicial review proceedings.

² Clause 3, Equality Bill, HL Bill 29.

³ Clause 8, Equality Bill.

⁴ Clause 9, Equality Bill.

⁵ Clause 10, Equality Bill.

A Single Equality Commission combined with Human Rights

The CEHR will provide institutional protection for the first time for people suffering from discrimination on the grounds of sexual orientation, religion or belief and age and will be a “one-stop shop” for those suffering from multiple grounds of discrimination. With the combining of equality with human rights protection, equality work will be able to take account of broader human rights law.

However, the CEHR will not be able to operate effectively unless it is able to operate within a legal framework which provides equal protection from unlawful discrimination to all. There is an urgent need for a comprehensive, coherent and user-friendly Equality Act to replace tangled and incoherent mess of existing equality laws. The Government has announced a Discrimination Law Review, which will work towards a clearer and more streamlined equality legislation framework, and is expected to report to the Prime Minister in summer 2006. The Discrimination Law Review will work alongside the independent Equalities Review, which will investigate the cause of persistent discrimination and inequality in British society.

Independence and Accountability of the CEHR

Following amendments to the Equality Bill in the House of Lords, the CEHR’s independence has been strengthened in several crucial respects. The CEHR will have the status of a non-departmental public body, but with important safeguards to secure its independence. These amendments have dealt with real problems in the Bill as originally drafted about transparency, merit appointment, and unnecessary ministerial interference.

Independence

The Secretary of State is under a new duty to have regard to the desirability of ensuring that the CEHR is under as few constraints as reasonably possible in determining its activities, timetables and priorities.⁶ This duty will further underwrite the CEHR’s independence in determining and implementing its plans activities.

Amendments have also been passed which remove the Secretary of State's direction-making powers in respect of advising on the effect of existing or forthcoming legislation, undertaking inquiries and investigations, and making assessments of performance under the public sector equality duties. The Secretary of State may invite the CEHR to undertake such work, but there are no longer compulsory powers.

In relation to codes of practice, the Secretary of State can only exercise direction-making powers on matters likely to be the subject of forthcoming legislation and that the Secretary of State expects to include in the CEHR’s remit. The Government envisages that such a direction might be made, for example, in relation to the forthcoming Single Equality Act. The Secretary of State would be able to direct the CEHR to start the work to prepare a code of practice while the legislation was making its way through Parliament. Without such a direction, the CEHR would have no powers to do that, as the new legislation would not yet be listed its remit.

⁶ Schedule 1, Part 4, clause 42, Equality Bill.

Appointments to CEHR

The Secretary of State can make appointments only based on merit unless he has some other special reason for doing so. It would be implicit therefore that, were the Secretary of State to invoke some special reason, he would be required to explain that reason clearly.

This will ensure that those appointed to the CEHR will—except in the most exceptional circumstances—have secured those appointments based only on their ability to meet the criteria set out in the Bill; namely, knowledge or experience in the named areas of discrimination, in human rights or in other matters relevant to the functions of the commission.⁷ The functions of the CEHR include knowledge or experience of business, trade unions and the public sector.

Funding

The CEHR will now have funding which is “*reasonably sufficient*” for the purpose of enabling it to perform its functions (rather than “appropriate” funding, as originally provided).⁸ As far as possible Ministers will seek to provide, through the non-departmental public body framework, the funding the Commission for Equality and Human Rights will need to implement its strategic plan. (The Government’s current working assumption is an annual budget of around £70 million when the new commission is fully operational.)

Legal Assistance, Enforcement and Judicial Review

The CEHR’s powers to give legal assistance, to bring judicial review and to bring combined cases have also been clarified by amendments to the Equality Bill in the House of Lords.

Under clause 28, the CEHR may assist an individual who is or may become party to legal proceedings. Assistance may include the provision of legal advice, legal representation, facilities for the settlement of a dispute or any other form of assistance. The CEHR will be able to continue to support a case that relies on a combination of human rights and discrimination law even after the equality aspect has fallen away.

Under clause 30, the CEHR will have capacity to institute or intervene in legal proceedings, whether for judicial review or otherwise, if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function. Following amendments to the Equality Bill in the House of Lords, the CEHR will not have to satisfy the victim test under section 7 of the HRA in order to bring or intervene in proceedings for judicial review. The power of the CEHR to bring judicial review is crucially important, as it will allow the CEHR to continue the important work of the existing equality commissions in this respect. The power of the existing equality commissions to seek judicial review has proved to be valuable, cost effective and proportionate. It has enabled them to obtain from the specialised Administrative Court a declaration as to the law and its application, without the need to support legal proceedings by individuals claiming to be victims of breaches of the Sex

⁷ Schedule 1, Part 1, clause 2, Equality Bill.

⁸ Schedule 1, Part 3, clause 38, Equality Bill.

Discrimination or Race Relations Acts. It is very welcome that the CEHR will have this useful tool for promoting human rights compliance by public authorities.

Injunctions

The CEHR will be able to tackle persistent discrimination by applying for an injunction without the prior need for a court or tribunal ruling or an investigation or the issuing of an unlawful act notice. Instead the CEHR will be able to apply for an injunction where it thinks that discrimination is likely to take place.

Conclusion

In its report on the need for a human rights commission in the UK, the Joint Committee on Human Rights concluded that:⁹

“There is no vision, no administrative framework and scant guidance reaching public authorities to tell them how a culture of respect for human rights might look or how it can be delivered.”

The new Commission for Equality and Human Rights will contribute substantially towards achieving the goal of creating a culture of respect for human rights by providing that vision and the practical means for achieving it. It will also be able to satisfy the unmet need for citizens to be assisted in understanding what their rights are, how those rights must be balanced with those of others, and how to assert their rights without necessarily having recourse to litigation. The Commission will also be a powerful body to counter negative and misleading media reporting and commentary and other political cynicism about the Human Rights Act.

⁹ *Sixth Report of Session 2002-03, The Case for a Human Rights Commission* (3 March 2003) HL Paper 67/ HC 489, page 29.