



JUSTICE

Equality and Diversity:

Making it happen

A JUSTICE RESPONSE

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EQUALITY AND DIVERSITY: MAKING IT HAPPEN

1. JUSTICE is a British-based law reform and human rights organisation concerned to advance justice, human rights and the rule of law. It is also the British section of the International Commission of Jurists.
2. JUSTICE works both on issues relating to equality and human rights. It has very much supported the government's commitment to the extension of rights in both fields. We recognise the enormous difficulty of the challenge of changing culture and 'bringing rights home'. We commend the government's courage in implementing legislative change of the magnitude of the Human Rights Act, on the one hand, and the Race Relations (Amendment) Act, on the other.

Summary

3. JUSTICE regards the case for a single equalities body of some kind as overwhelming, particularly in the light of the need to accommodate sexual orientation, religion and belief and in due course, age. However, we wish to debate the optimum form and extent of such a commission, particularly in relation to its relationship with a remit over human rights. We have taken as a starting point that, as a question of practicality, the only viable form of single body would be one which fully integrated the functions of the existing commission. The real question is: what further functions are required to make the single equality body work as well as is possible?
4. The link between equality and human rights is raised, but not resolved, in the consultation paper. We consider that this needs to be examined further before rational decisions can be made about the form of any single equality body. The danger of not doing so will be that anomalies and inconsistencies might be built into its design that will subsequently impede its effectiveness or hinder developments that would otherwise be desirable. Any new body must be created within the context of a coherent theoretical framework.
5. Furthermore, JUSTICE considers that a similar level of consideration must be given to the domestic legal structure within which any single equality body should operate. A study of anti-discrimination laws in 2000¹ concluded:
The first and most obvious defect of the present framework is that there is too much law. At present, there are no less than 30 relevant Acts, 38 Statutory Instruments, 11 Codes of Practice and 12 Directives and Recommendations directly relevant to discrimination...

¹ *Equality : a New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hepple et al [2000], Hart, p21.

6. Current equality law is piecemeal and variable. The introduction of the three new equality strands will make the situation even worse because any single equality body will have to deal with even more variance in the fields in which equality duties can be enforced. So, too, will the government's proposed amendment of Race Relations Act by secondary legislation.
7. Thus, JUSTICE argues that the discussion of an integrated single equality body must also take place in the context of an acknowledgement that its creation will make even more evident the case a coherent and integrated supporting legislative framework. JUSTICE has, therefore, very much supported the work undertaken on a Single Equality Act, in particular by Lord Lester of Herne Hill QC.
8. The question of the 'architecture' appropriate for a single equality body logically follows consideration of the above. The paper considers various different ways in which the remit of a single equality body might be drafted. It also considers the very practical question of the department to which the body should report. JUSTICE considers that there is a strong argument that this should be the Lord Chancellor's Department because of its constitutional responsibilities and the fact that it has an overall human rights remit.
9. This submission follows the arguments above and deals with issues in the following three sections:
 - the nature and the consequences of the link between human rights and equality;
 - the need for harmonisation of the framework for equality legislation;
 - 'architectural' issues relating to the form of a single equality body.

Appended is a completed questionnaire as drafted for the consultation. However, JUSTICE wishes to add the following recommendations following from the analysis above outside of the specific questions raised in the consultation:

To be most effective, a single equality body should:

- A. be seen within the context of integrally linked legislation, both international and domestic, on human rights and equalities.**
- B. be based upon a rationalisation of existing equalities legislation.**
- C. facilitate an integrated approach to human rights and equality. At the minimum, the body must have an unfettered right to promote equality through all relevant legislation, including that relating to human rights.**
- D. report to the most appropriate government department. In our view, the constitutional and human rights' responsibilities of the Lord Chancellor's Department present a good case for that role.**

Equality and human rights

10. The consultation paper recognises at paragraphs 9.2-9.8 that the human rights and equalities are 'complementary'; reflected together in 'the government's vision

of a society based on fair and equal treatment for all and respect for the dignity and value of each person'; manifest 'common principles'; and have 'common threads [that] have implications for any institutional support arrangements'. The paper, however, states only that the government 'will consider these issues further' and 'will continue to give [them] consideration'. This, however, is unsatisfactory because the danger of procrastination in working through these common threads is that decisions may be made on a single equality body which lead to unnecessary and artificial distinctions.

11. For historical reasons, domestic legal and political culture has tended to distinguish sharply within the UK between equality and human rights. Equality rights are increasingly seen as related to social protection and social advantage, essentially re-distributive in their nature. They are about widening access to the goods of society, including jobs, goods, facilities and services, education and other social benefits such as housing, policing and social services, in a fair way. This is achieved by targeting disadvantage rather than aiming at neutrality. By contrast, human rights are often equated with the more deeply established tradition within domestic legal and political culture of civil liberties. They relate to fair treatment in the way that the State can interfere in an individual's life - whether in relation to the right to that life, the prohibition of torture, the right to liberty and security or a fair trial, the right to a private or family life, to hold a religion or belief or to freely express one's opinions. These rights cover a much wider sphere and involve a variety of different principles.
12. The sharpness of such a distinction would not be understood in many other countries. As the consultation document indicates, the Human Rights Commissions in New Zealand and Canada actually cover equalities' issues as well as those relating to human rights and Australia has an expressly combined Human Rights and Equalities Commission.
13. The distinction is also unclear at the level of the government's vision of what it wants to achieve. The consultation document states this to be
An equal, inclusive society where everyone is treated with respect and where there is opportunity for all.²
This is striking similar in meaning to that used in the Charter of the United Nations which prefigured the major international human rights conventions to which it ultimately gave birth. The UN was formed:
To reaffirm faith in fundamental human rights, in the dignity and worth of the person, in the equal rights of men and women ... To achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.³

² Para 1.1

³ UN Charter, Preamble and Article 1

14. The impact of the UN's commitment to human rights is refracted in domestic legislation through the Human Rights Act that incorporates the European Convention. This includes one of the specific points of intersection between human rights and equalities law in the form, albeit somewhat limited, of Article 14. This makes provision for the protection from discrimination but only from discrimination in relation to the enjoyment of other rights in the Convention. It is not 'free-standing' and does not protect individuals from discrimination generally. It does not, therefore, provide a universal guarantee of equality. JUSTICE argues that the UK government should extend this obligation in the way envisaged by an additional protocol to the convention, Protocol 12, which would give a free-standing right to non-discrimination⁴.
15. Implementation of protocol 12 would firmly unite human rights and equalities law and would provide a non-discrimination provision at constitutional level that accurately reflects the government's commitment as set out in its overall vision in the consultation document. However, even article 14 in its current form provides a measure of human rights structure for non-discrimination.
16. The European Union Charter of Fundamental Rights and Freedoms asserts a similar free-standing provision of non-discrimination to Protocol 12. It states that 'Everyone is equal before the law'⁵ and that:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.⁶
17. Further confluence between human rights and equalities legislation is reflected in the new EC Race and Employment Directives. The preamble to both acknowledges that the right to equality before the law and protection against discrimination for all persons is a fundamental human right recognised by the Universal Declaration of Human Rights and all the human rights legislation that has followed. A further convergence of definitions and standards can be expected. For example, the Employment Directive makes provisions in respect of 'religion or belief' which will have to be interpreted by the courts in the light of Article 9 of the European Convention. The courts themselves will not wish to be interpreting several separate self-contained systems of law. The move towards an integration of standards is likely to prove irresistible.
18. In any event, all UK equality law has to be applied subject to the Human Rights Act 1998. The courts must take into account ECtHR jurisprudence and all legislation must be interpreted and given effect to in a way that is compatible with ECHR rights so far as possible. All public authorities, such as a Single Equality Commission, must act in a way that is compatible with Convention rights. Hence

⁴ Reference

⁵ Article 20

⁶ Article 21

any new commission has to apply the relevant human rights norms. There will be an increasing read-over of convention rights into discrimination law. The European Court of Justice has recognised that, in interpreting EC law, it must give effect to the ECHR and that fundamental rights form an integral part of the general principles of human rights law⁷. It has specifically stated:

the Community cannot accept measures which are incompatible with observance of the human rights thus recognised and guaranteed.⁸

19. The expansion of equality law means that the courts and, indeed, any Single Equality Commission, will have an increased need to balance different interests and to make a proportional judgement in the same way as is required under the Human Rights Act. For example, a balance will need to be reached between conflicting rights in the area of religion or belief and issues of gender and sexual orientation. These involve judgements about human rights of freedom of belief, of expression and of family life. Thus, they are integrally located within a human rights framework.
20. The new developments in discrimination law will bring a much greater focus on this conflict of rights. These rights may include differing equality rights or the conflict between equality rights and other fundamental rights such as freedom of expression, religious rights, or rights in relation to privacy. Human rights jurisprudence has a central place in the resolution of these conflicts.
21. Thus, equality is firmly embedded at an international and theoretical level in concepts of human rights. It is, however, undoubtedly true that, in the UK, equality law has been vastly more developed than that relating to human rights. The latter barely existed at a domestic level before the implementation of the Human Rights Act. The focus of much equalities work has reflected the employment concerns of the trade unions which have, in many cases, led to the development of laws relating to such matters as equal pay and equal opportunity. The practical consequence is that many of those involved in the equalities movement see themselves and their work as having a social and economic dimension not reflected in the civil liberties which they perceive as at the heart of the European Convention on Human Rights which the Human Rights Act incorporates within domestic law.
22. The necessary unity of approach can be tested practically as well as theoretically. A single equality body may well find that it begins investigating issues from equalities perspective that subsequently rise to a consideration of human rights issues. For example, the body might well begin an inquiry into age or race discrimination which ultimately would be better seen as a human rights issue relating to privacy, right to family life or freedom from cruel or inhuman treatment. The body must have full powers to continue its investigation under the most

⁷ *ERT case no 260/89* [1991] I-2925, *Johnson v Chief Constable of the Royal Ulster Constabulary* [1987] ICR 83.

⁸ *Wachauf v Federal Republic of Germany, case no C-5/88* [1989] ECR 2609.

helpful legislation.

Harmonisation of domestic legislation

23. The task of a single equality body will be made immeasurably more difficult if powers relating to different strands of its concern are different. Logically, a single equality body should follow single equality legislation. The fragmentary nature of UK anti-discrimination legislation is, as noted above, a concern. Reporting on the UK government's performance under the International Covenant on Economic, Social and Cultural Rights, the relevant UN Committee in May 2002 urged the government to:
- to take more effective steps to combat de facto discrimination, in particular against ethnic minorities and people with disabilities, especially in relation to employment, housing and education. The Committee strongly recommends that the state party enact comprehensive legislation on equality and non-discrimination in UK Law...
24. Similarly, the UN Human Rights Committee has acknowledged the need for comprehensive legislation in the UK in the field of race, religion and belief. In considering the fifth report on the UK's obligations under the International Covenant on Civil and Political Rights in October 2001 the Committee observed:
- While acknowledging the numerous separate initiatives taken by the State party to combat racial discrimination, the Committee notes the absence of comprehensive legislation to this end.
25. In this context, the Equal Treatment Directive (in relation to sex discrimination), as well as the new Race and Employment Directives, provide that Member States should ensure that:
- any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished.
- This really requires the incorporation of a general principle of equality, so that there is an over-riding principle of UK domestic law that no unjustified discrimination is permissible.
26. The work of a Single Equality Commission would be greatly simplified if a Single Equality Act was introduced with common provisions. Both the Disability Rights Commission and the Commission on Racial Equality have called such a provision to be a pre-requisite for a Single Equality Commission. JUSTICE agrees that this is logically correct. Discrimination laws are unnecessarily complex and inconsistent between the different strands⁹ even before any human rights aspects are considered. For example, the government is currently proposing that measures to counter discrimination on grounds of age, sexual orientation and religion or belief are confined to the employment field, while sex, race and disability discrimination provisions cover goods and services and in the field of

⁹ For a full list of the areas of inconsistency see *Equality : a New Framework, Report of the Independent review of the Enforcement of UK Anti-Discrimination Legislation*, Hepple, Coussey & Choudhury, Hart Publishing, 2000, Appendix 3.

race there is a duty for public authorities to promote race equality as well. This will inevitably create an inequality between the different strands.

A Single Equality Body: architecture

27. The case for a Human Rights Commission is so strikingly similar to that made by the consultation paper for a single equality body that the arguments need to be considered.
28. Paragraphs 3.5 of the consultation paper accepts the existing powers of the three commissions, listing them as spreading awareness; giving advice and information to individuals; giving advice and guidance to business to business and advice giving organisations; promotion of good practice; support for complainants; investigation; and enforcement. These are exactly the major functions that are required of a Human Rights Commission and for exactly the same reasons – institutional support of the kind that only a statutory body can provide is necessary for the effective promotion of a human rights as it is for equalities.
29. There is international support for this approach. The UN's 1993 Paris Principles¹⁰ set out the general desirability of each country having an independent, expert national body 'with competence to promote and protect human rights'.¹¹ More specifically, the General Assembly advised that such a body should be able to:
 - Publicize human rights and equalities by increasing public awareness, especially through information, media, education and training;
 - Scrutinize domestic legislation and make recommendations as to its conformity with human rights standards;
 - Promote the harmonization of domestic legislation with international human rights instruments, and the ratification and effective implementation of those instruments;
 - Submit to the Government opinions, recommendations, proposals and reports on any matter concerning the promotion and protection of human rights, including the investigation of particular thematic issues or violations.
30. At present, the Joint Parliamentary Committee for Human Rights is able to carry out the scrutiny of legislation. As important as the Committee's work is, however, it cannot be regarded as – nor was it ever intended to be – an effective substitute for a permanent statutory body exercising a range of human rights powers.
31. In particular, ministers have stressed that the most effective protection of human rights comes not through litigation and the intervention of the courts but through the development of a human rights culture. This requires cultivation through education, training, promotion and publicity best undertaken by a credible statutory body.
32. A human rights culture needs the effective institutional support offered to

¹⁰ GA Res 48/134 of 20 December 1993.

¹¹ Clause 1.

equalities, to which it should be integrally linked in any event. We note with concern the evidence of a continuing gap in the provision of effective public education concerning the Human Rights Act, particularly in relation to public authorities. A study of voluntary sector agencies by Jenny Watson for the British Institute for Human Rights concluded that there was massive ignorance of human rights and that 'in many cases, individual members of staffing in public services have no understanding of their responsibilities under the Human Rights Act'.¹²

33. The costs of such ignorance are well-known. First, lack of public knowledge of the Human Rights Act – whether by public authorities or the public itself – limits the effectiveness of the Act. Secondly, decisions of public authorities taken in ignorance of the Act may result in litigation that is “unnecessary, slow, tedious and repetitive”.¹³
34. The BIHR report also highlights the shortcomings of considering the right to equality outside the more general framework of human rights and provides concrete and practical examples of the link. The ill-treatment of residents in a care home may not only constitute discrimination on the basis of age, but also (depending on the circumstances) amount to possible interference with the right to a private life (Article 8 ECHR) and even the right to be free of cruel and inhuman treatment (Article 3).
35. Similarly, if it is considered valuable for various bodies and the public to have a single contact (cf. consultation paper, paras 8.2-8.4) when seeking authoritative advice and information in relation to their obligations under equalities legislation, it must be similarly valuable for the same contact to provide information and advice on human rights.
36. The logic of the argument above is that that, as in New Zealand, Canada and Australia, the opportunity is taken to establish a commission with an explicit remit that incorporates both human rights and equalities.
37. However, it must be acknowledged that there are practical difficulties enough in combining the three existing commissions into one body. Lessons need to be learnt from the Northern Ireland experience of combining the different strands of equality into a single Equality Commission. Many of the consequential problems of this are still being resolved three years after its formation.
38. The government might feel that it was too great a step to add human rights as well. In that case, JUSTICE would accept that two bodies might be established as in Northern Ireland – a Human Rights and an Equalities Commission. Even in that event, the Equalities Commission should be given full powers to act under all

¹² P9 *Something for Everyone: the impact of the Human Rights Act and the Need for a Human Rights Commission* BIHR, 2002.

¹³ Baroness Shirley Williams, HL, 24 November 1997, cols 844, cited in Spencer, “Should the Single Equality Commission be able to protect human rights?” (IPPR, December 2002).

legislation, including human rights, to achieve its end of the promotion of an equality agenda.

39. The government might wish to retain its agnosticism on a Human Rights Commission while advancing its equalities agenda. This would, in JUSTICE's view, miss a vital opportunity. However, if delay was envisaged on the Human Rights Commission then the appropriate course would, in any event, be to establish an Equalities Commission with wide human rights powers. This would allow maximum flexibility when the government came to a decision on a Human Rights Commission. A separate body could be created or additional resources given to the Equalities Commission to extend its role into matters which related solely to human rights, such as civil liberties' questions.
40. On a point of greater detail, paragraph 3.6 of the consultation paper sets out a new emphasis that the government wishes to see in the work of a single equality body:
- Raising awareness and stimulating debate;
 - Mainstreaming;
 - Providing advice and guidance;
 - Informing and supporting individuals;
 - Flexible approaches to enforcement;
 - Effective means of tackling multiple discrimination cases;
 - Fostering local networks;
 - Working in partnership.
41. We would accept these priorities – with one addition - as far as they go, subject to the paragraph below, provided that the proposals are construed appropriately. Thus, we take the goal of encouraging 'flexible approaches to enforcement, with more emphasis on conciliation and other modern dispute resolution techniques' not to preclude court enforcement where necessary. Similarly, we take 'effective, streamlined arrangements making the best use of resources' at face value, not to be code for cuts in the overall budget nor to be an excuse for reducing the powers to conduct Formal Investigations. Government must accept that there will be transitional additional costs in creating an Equalities Commission and that the opportunity for cuts in resources should be resisted.
42. Our addition would come in terms of adding a priority related to developing an approach to non-discrimination which maximised the effectiveness of human rights legislation.
43. There is a danger that a single equality body might lead to a loss of ownership by interest groups and to orientate the commission as 'an organ of government'.¹⁴ There is some understandable concern within the existing Commissions as well as the representatives of the new strands that specific areas will be marginalized

¹⁴ As argued positively by Professor Bob Hepple and noted in discussions by Dr Clare Collins in her paper *Single Equality Body: Issues Paper: a paper for the equality and diversity forum*.

or will lose focus in any combined body. We welcome the Government's acceptance in the consultation document that 'there must be no loss of focus' and that 'the interests of each group must carry equal weight'¹⁵. This will require attention and the organisation must be established which will facilitate such a result. There will be difficulties. Each Commission will have evolved its individual practices and procedures for every aspect of their work. In any Single Equality Commission, these will need to be unified into a single system. Sufficient time, resources and finance will need to be put aside for the process of transition and it may be that involving an organisation that specialises in change management could be beneficial.

44. There is a real difficulty in deciding which government department should have responsibility for the new equalities body. The existing commissions report to different departments. We would suggest that serious consideration be given to allocating this role to the Lord Chancellor's Department. The role would sit within its constitutional and human rights responsibilities.

February 18th 2003.

¹⁵ *Equality and Diversity : making it happen*, 2002, para 7.6.