



BRITISH INSTITUTE OF HUMAN RIGHTS

Briefing on “Building a fairer Britain: Reform of the Equality and Human Rights Commission”

What does it mean for human rights?

June 2011

For further information about this briefing please contact

Sanchita Hosali

Senior Policy and Legal Affairs Advisor

shosali@bihr.org.uk

020 74590 550

About BIHR: The British Institute of Human Rights (BIHR) BIHR is a national independent human rights charity that is committed to bringing rights to life in the UK. Founded over 40 years ago, we have pioneered work to animate and promote human rights. We work with civil society organisations and the public sector, equipping them to translate human rights principles and laws into living and practical tools for change. Through this work, we aim to realise the potential of human rights to empower people, and to provide a safety net for us all when our rights are compromised. Uniquely, BIHR harnesses its learning from putting human rights into action in everyday situations to underpin its policy positions. Further information about BIHR visit

Why is the consultation on the future of the EHRC important?

The Government is proposing changes to the powers and functions of the Equality and Human Rights Commission (EHRC) which could fundamentally change what the EHRC can do and how it does it.¹ The British Institute of Human Rights has some serious concerns about the reforms.

Whilst some of the right problems with the EHRC have been flagged, some very wrong solutions are being proposed. Worryingly, structural changes which will fundamentally change the nature of the EHRC as an institution are being touted as remedies for what are effectively managerial issues. Aside from a distinct lack of common sense, the proposals fail to appreciate the vital constitutional and democratic role of an independent and robust EHRC in ensuring that Government (and the public sector more broadly) complies with its domestic and international equality and human rights obligations. This requires the EHRC to have certain competencies and a level of independence from Government, both of which we think could be compromised by the current proposals. The proposals are all the more concerning when considered against the backdrop of cuts to other services and mechanisms which help hold the Government and public services to account, such as threats to legal aid, various proposals on the future of equality laws, and the dismantling of national indicators and local area bodies.

We want to alert individuals and groups to the impact the proposed reforms will have on the EHRC's human rights powers and functions. We fear this impact will be easily missed because the consultation creates the impression that the EHRC's human rights remit is safe. We also want to flag up some areas where human rights standards can be used to challenge proposals which appear to focus on equalities functions and powers (but which we think also affect human rights).

We know many individuals and groups share our concerns about the future of the EHRC and the need to have a national equality and human rights body with a robust and independent institutional framework. We are strongly encouraging groups to take action to protect the integrity of the EHRC's powers and functions, and to use or adapt the points set out below in your own responses to the Government's consultation. We encourage those of you who do so to email us copies of your responses at policy@bihr.org.uk.

The consultation – some of the right problems but the wrong solutions

It is fair to say that there has been some criticism of the way the EHRC has exercised its powers and functions and BIHR, like others, have voiced concerns.² The consultation quite rightly identifies some of these issues, but the wrong solutions are being proposed. The issues raised are generally about the EHRC's culture, management, systems and strategy but the proposed solutions are structural and will significantly change the EHRC as an institution. It is important to take stock and learn what has worked and what has not, especially as the EHRC has only been up and running for three years. However the importance of having an institution with robust powers and functions should not be confused with concerns about the way that institution has performed to date.

We believe it is vital to retain an EHRC which:

¹ "Building a fairer Britain: Reform of the Equality and Human Rights Commission", Government Equalities Office, March 2011, available at <http://tinyurl.com/63xqfvy>. The legislative proposals affect the Equality Act 2006 (EA 2006), which sets out the EHRC's powers and functions. The Equality Act 2010 has replaced most of the EA 2006; parts of the 2006 Act about the EHRC framework remain law.

² See for example BIHR's submission to Parliament's Joint Committee on Human Rights call for evidence on the work of the EHRC, <http://tinyurl.com/3ubw6fd>

- brings together work on equalities and human rights rather than artificially separating them
- is able to promote and champion equality and human rights
- is an effective regulator with symmetrical powers allowing it to take a range of advice, information, support, monitoring and enforcement actions in relation to equalities and human rights; and
- is independent of Government.

We are worried that the current proposals will undermine the ability of the EHRC to be an effective, robust and independent national equality and human rights institution.

Below we set out some examples of proposals which we believe are cause for concern.

Human rights functions and powers – they are not safe from reform

On first reading it appears that the consultation will not affect the human rights powers and functions of the EHRC. This is because the Government says it “wants the EHRC to define and fulfil its human rights remit more effectively. By narrowing the overall breadth of the Commission’s remit, we believe we will enhance its capacity to develop and deliver a programme to promote and protect human rights. We do not consider it necessary to amend the duties set out in section 9 [3] of the Equality Act 2006 to achieve this”.

We are worried that this proposal gives the appearance that the Government will not be reforming the EHRC’s mandate on human rights. We think this proposal and others in the consultation will have a significant impact on the EHRC’s human rights work.

Equality and human rights: conceptual and practical links: The first article of the Universal Declaration of Human Rights 1948 asserted that “all human being are born free and equal in dignity and rights” and since then the prohibition of discrimination and recognition of equality has been woven through subsequent human rights laws, including the rights protected by the Human Rights Act. At a practical level human rights provide the scaffolding to bring together the separate equality strands, filling gaps in anti-discrimination law, covering broader forms of ill-treatment and providing an effective and practical framework for dealing with competing issues among different groups based on proportionality and striking a fair balance. Using human rights as an underpinning framework has many advantages; most importantly, it emphasises what unites us, rather than what divides us, focusing on the universal rights which protect us all, dispelling the idea of special privileges or minority concerns. For more information see BIHR’s “Human rights visions of equality” and EDF and BIHR’s “Human rights and equality in the voluntary sector” at www.bih.org.uk

This specific proposal deals with human rights as a discrete issue, separate from equalities. It risks reducing human rights to another “strand” of the EHRC’s work, rather than the underpinning framework for all the EHRC’s work, including its equalities mandate. It is clear from discussions at the time of the Equality Act 2006 that human rights were to have this underpinning and integrative role in the EHRC’s institutional architecture, and this was enshrined in section 9 EA 2006.⁴ Certainly, the Government’s commitment to retaining section 9 EA 2006 is welcome. However, it must also recognise that this means not relegating human rights to a discrete programme divorced from the EHRC’s overall framework. Aside from the legal clarity on the way human rights relate to the EHRC’s work, it does not make sense for the consultation to identify the lack of human rights integration in the EHRC as a problem and then to propose a solution which appears to deal with human rights as an isolated programme.

³ Under section 9 the EHRC’s human rights powers include promoting an understanding of the importance of human rights, encouraging good practice; promoting awareness, understanding and protection of human rights, and encouraging public authorities to comply with their duty under the Human Rights Act not to infringe people’s human rights.

⁴ This is set out in section 9(4) Equality Act 2006.

BIHR is very worried that the Government has not recognised that for the EHRC to deliver its human rights remit it must integrate human rights across its work and not package it off into a discrete programme of work.

In addition, we believe that the proposals as a whole will have a significant impact on the EHRC's human rights powers and functions. For example, proposals which restrict the independence of the EHRC will have a significant impact on the extent to which the EHRC can deliver on its constitutionally and internationally recognised role in holding the Government to account for the human rights (and equalities) obligations to which the Government has agreed. Not having a general duty which places human rights and values front and centre in the work of the EHRC will affect its mission, vision, strategy and ultimately its everyday work. Finally, withdrawing the practical support the EHRC provides through its helpline and grants programmes will have a detrimental impact on the availability of information, advice, and other support services for people whose human rights are being abused or are at risk. This includes some of the most marginalised and vulnerable groups in our society, including older people, people with mental health problems, and disabled people.

We are concerned that the impact of the proposals as a whole on the EHRC's human rights powers and functions have not been considered, and that it will be marginalised and vulnerable people who bear the brunt of this on the ground.

How human rights standards can help

The Paris Principles⁵ set out the criteria for National Human Rights Institutions (NHRI) to be accredited with the United Nations. The EHRC is a NHRI and the consultation makes it clear that the Government wants the EHRC to retain this international status.

The Paris Principles make it very clear that NHRIs need to be independent of Government, having an institutional framework which includes:

- a broad remit to protect and promote human rights,
- not being subject to financial control which might affect its independence
- ensures freedom to consider issues within its remit without seeking approval from higher authorities, and
- provides the power to conduct a range of monitoring, investigatory, information and awareness activities.

We think it is important to remind the Government that they have committed to ensuring that the EHRC retains this status as a NHRI, and this means meeting basic guarantees of independence and accountability for the institution as a whole.

We also think it is important to point out the Human Rights Act (HRA) – our domestically enforceable human rights law - can also be useful in analysing and challenging some of the proposals. For example, viewing the proposals through a HRA lens shows:

- **the proposals may be flawed if the Government has not considered people's human rights from the start.** The HRA makes it unlawful for a public authority to act in a

⁵ Available at <http://tinyurl.com/3ebev4y>

way which is incompatible with the human rights protected under the HRA.⁶ Public bodies include central government departments (like the Government Equalities Office), local government, the NHS, police and regulators like the EHRC.⁷ The HRA duty extends to everything that public authorities do, including decisions about policy development and implementation, such as reforms to the EHRC. This means making decisions, policies and laws which consider people's right from the start. The proposals to cut vital EHRC services such as the helpline and grants programmes may place people's rights at risk, especially those experiencing vulnerability, marginalisation and discrimination. This will leave people without access to advice, support and representation which would enable them to protect themselves and seek accountability when their rights have been infringed,

- **the HRA sets standards which some specific proposals must meet.** For example suggested shared 'back office' services should not infringe people's right to respect for privacy (Article 8), which includes access to sharing of information among public officials

Governance, independence and accountability

The consultation puts forward a number of proposals to clarify the EHRC's relationship with Government. These include a new legal requirement for the EHRC to submit an annual business plan to Parliament, a new legal requirement for the EHRC's Chair and Chief Executive to have regard to using public money efficiently and effectively, clarifying that the Minister can impose a financial sanctions the where EHRC has been found to misspend public money; and clarifying that as a publicly funded body the EHRC is subject to Government public expenditure restrictions.

We have serious concerns about these proposals; whilst they appear, at first glance, relatively uncontroversial, on closer inspection these reforms could have a detrimental effect on the independence and accountability of the EHRC. For example, placing an annual business plan before Parliament risks putting the EHRC at the mercy of political considerations, effectively allowing Government Ministers to control the EHRC's work plan.

We think it is very concerning that the Government is proposing restrictions which will erode the independence of the EHRC (contrary to the Paris Principles) and effectively give the Government control over the very institution which is tasked with ensuring the Government (and public sector in general) meet its obligations under equality and human rights laws.

In addition, the EHRC already has a Framework Agreement on Managing Public Money with the Government and the Treasury, similar to other quangos / regulators. The proposed additional financial and reporting duties on the EHRC beg questions about why the Government thinks its current arrangements with the EHRC are not adequate, and why the EHRC should be treated differently to other similar bodies.

We are worried that extra financial or reporting requirements not only risk the independence of the EHRC, they also appear to be disproportionate and unfair when considered against obligations and mechanisms for other similar bodies.

⁶ The HRA protects the following rights from the European Convention on Human Right the rights to life, not to be tortured or treated in an inhuman or degrading way, to be free from slavery or forced labour, to liberty, to a fair trial, to no punishment without law, to respect for private and family life, home and correspondence, to freedom of thought, conscience and religion, to freedom of expression, to freedom of assembly and association, to marry and found a family, to an effective remedy, not be discriminated against in relation to any of the rights contained in the European Convention, to peaceful enjoyment of possessions, to education, and to free elections.

⁷ It should also be noted that the new definition of public authorities under the Equality Act 2010 specifically refers to the definition of public authorities in the HRA, providing greater consistency of application of equality and human rights law

The General Duty – why it is important

The Government wants to remove completely the EHRC's general duty. This duty, which was subject to much consultation and negotiation during the passage of the Equality Act 2006, says that the EHRC will exercise its functions with a view to:

- encouraging and supporting the development of a society in which people's ability to achieve their potential is not limited by prejudice or discrimination,
- there is respect for and protection of each individual's human rights,
- there is respect for the dignity and worth of each individual,
- each individual has an equal opportunity to participate in society, and
- there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.

We are very worried that the Government does not recognise the importance of the general duty in setting out the difference the EHRC can make to people's lives, clearly outlining the purpose and vision of the organisation.

Helpline and advice services – future provision

The Government will stop funding the EHRC's helpline from 31 March 2012. It will commission a new, equivalent, general information and advice service for citizens from the private sector or civil society.

At a principled level, we are astonished that our national human rights institution and equality regulator will not be able to provide a helpline service to provide advice, information and support to people who need it. This includes individuals, groups, and public sector workers all of whom are unsure about their legal rights and obligations. The EHRC helpline is the national resource for equalities and human rights advice. Further, as the Paris Principles make clear, a NHRI should be able to widely promote and protect human rights, to publicise human rights and efforts to combat discrimination and increase public awareness through information. We also believe the helpline and advice services are an important means of meeting this standard. We believe that the impact of removing the only expert national source of advice and guidance on equality and human rights issues will be felt hardest by people who are experiencing discrimination, marginalisation and vulnerability.

At a practical level, this is again a case of the wrong solution to some very real issues. The issues identified with the helpline include lack of general awareness of its existence and joining up the advice to other EHRC functions (e.g. strategic litigation). These can be resolved through changes to internal management, structures, systems and priorities.

We know there are consultations currently taking place about what this new commissioned service will be - we are dismayed that the Government does not consider it vital that our equality regulator and human rights institution is able to provide information and advice services to those who require it.

We also think it is worrying that:

- the proposed replacement service is described as “general” and for “citizens” - specialist advice and guidance on human rights and equality is vital irrespective of whether the person

requiring it is a citizen. Indeed one of the strengths of human rights is that they belong to and protect everyone

- the Government does not appear to have considered alternative solutions to outsourcing which could deliver an efficient service with enhanced quality, e.g. collaborations with the VCS, additional means of providing advice and information, new internal information systems to link to regulatory functions, and ensuring on-going training and capacity of the advisers.

We think it is vital to remind Government that they have obligations under equality and human rights laws, and this extends to their commissioning processes. If the Government pushes ahead with outsourcing, it is both legally and ethically necessary that human rights and equality standards are placed at the heart of the process. This fleshes out the concepts of value and fairness beyond simplistic financial considerations to encompass basic minimum guarantees.

Grants programmes – individual grantees and the bigger picture

The Government will stop the EHRC's legal grants programme⁸ and the strategic grants programmes⁹ on 31 March 2012. It is proposing a new funding stream to support the VCS in a way that fits with the Government's wider support of the sector and its promotion of social action.

We have serious concerns about the withdrawal of these funding streams because they support the VCS to carry out the work which enables individuals to hold the State, public services and others to account, often without court action. This is vital aspect of a well-functioning democracy and it is inappropriate for these activities to be funded directly by central Government. These services have built up expertise and the trust and confidence of their service users, many of whom have been marginalised and experience disadvantage and vulnerability. Yet, without EHRC funding many organisations will fold or no longer be able to provide these vital educative, advice and information services. The EHRC strategic grant programmes have helped develop and test important practical work on human rights and equalities, taking these issues off the statute books and into people's everyday lives. The grants are an important part of the EHRC's engagement with the VCS, and support its duties to promote awareness and good practice on human rights and equalities, in line with section 9 EA 2006.

We are concerned that without the EHRC grants programme organisations will cease to exist or will stop or reduce services, reducing the availability of specialist advice and support services (particularly concerning if the outsourced helpline is generic), which will in turn:

- leave many people without access to justice and the ability to hold public services and others to account, particularly in light of significant cuts to legal aid, and
- reduce the pool of those able to bid for the outsourced service, losing vital skills, expertise and service-user trust, and unfairly advantaging larger generic providers

We also find it very concerning that there is no recognition of the importance of a funding stream which is independent of Government, acknowledging the need for innovative work which promotes human rights and equalities, and empowers individuals and groups to hold national and local government to account. It is concerning that there

⁸ This programme supports VCS organisations to educate people about their rights; legal advice and advocacy to support advice organisations (e.g. a local Citizens Advice Bureau) to provide legal advice and representation to individuals on equality issues; and capacity and capability building to support umbrella organisations (e.g. Citizens Advice and the Law Centres Federation) to provide training and support to their advisors, caseworkers and lawyers

⁹ This programme supports work to tackle discrimination, and promote good relations and human rights.

no information about the proposed new funding stream, and how a stream administered by Government would be independent.

Some of the right problems and some of the right solutions

We believe that the consultation has missed the opportunity to consider solutions which are appropriate to the problems it has identified, for example:

- clarifying that human rights should be integrated throughout the EHRC's work
- exploring alternative options to outsourcing the EHRC helpline, including collaborations with the VCS
- clarifying the need for a strategic approach to EHRC grant funding, rather than scrapping it

We also believe that the Government has missed the opportunity to consider some of the EHRC's structural problems and put forward proposals which could remedy these and improve the institution's function as an equality regulator and human rights institution, including:

- **The power to fund strategic human rights cases in the same way as equalities cases.** Currently the EHRC can only fund strategic cases on equality issues, whilst these may also include human rights issues; there may be human rights issues which fall outside the ambit of equalities. For example, this might include issues related to ill-treatment experienced by older people in care homes, not covered by equality law, but which are covered by the Human Rights Act.
- **Human rights monitoring powers in line with those it has to enforce the public sector equality duty.** The EHRC has a range of specific powers related to the public sector equality duty, which include investigations, assessments, enforcement actions, advisory powers, and, in the final resort, legal action. We believe that the EHRC should also have similar powers in relation to monitoring the duty the public authorities have under section 6 of the Human Rights Act, as outlined above.
- **The power to advise Government and Parliament on the harmonisation of national legislation with international human rights instruments and principles.** A specific power in this regard would make it clear that the Government has agreed to a range of international human rights standards and show very clearly the practical role of the EHRC, as a NHRI, in ensuring the Government is meeting these obligations.

What next...

We know many of you share our concerns about the future direction of travel for equalities and human rights in the current climate. It is vital that we stand up for an independent and strong national equality regulator and human rights institution, and resist being blind-sided by the distraction of any managerial difficulties which may have troubled the EHRC during its set-up phase. (these are important, but they will not be solved by structural changes to the institutional architecture).

The consultation closes on the **15 June 2011**. If you are responding to the Government consultation we encourage you to raise the issues outlined in this briefing. If you are thinking about responding to the consultation we would urge you to consider doing so. You can find more information about responding to the Government consultation on the future of the EHRC here:

www.equalities.gov.uk/what_we_do/ehrc_reform.aspx You don't have to use the consultation response form or to complete it in its entirety, you can also simply send your comments to

ehrc.reform@geo.gsi.gov.uk Finally, if you do raise any of the above issues in your response please do send a copy to us at policy@bihr.org.uk