

Discrimination Law Association

Submission to the Global Alliance of National Human Rights Institutions

Sub-Committee on Accreditations - October 2022 Periodic Review

Equality and Human Rights Commission - Great Britain**1. Introduction**

The Discrimination Law Association is a registered charity, a membership organisation established to promote community relations by the advancement of education in the field of antidiscrimination law and practice.

It is a national association with a wide and diverse membership. The membership currently consists of some 250 members (individuals and organisations). Membership is open to any lawyer, legal or advice worker or other person substantially engaged or interested in discrimination law and any organisation, firm, company or other body engaged or interested in discrimination law. The membership comprises, in the main, but not exclusively, persons concerned with discrimination law from a complainant perspective.

The DLA welcomes the opportunity to contribute to the forthcoming review of the accreditation status of the Equality and Human Rights Commission (EHRC) as a UN National Human Rights Institution (NHRI).

As an association of lawyers, advice workers, academics, students and others involved in the development, application and enforcement of equality and human rights law, we have been a close observer of the EHRC since its establishment in 2007. From time to time in the past we have collaborated with the EHRC in relation to legislative proposals by the UK Government. In 2019 we gave written and oral evidence to the House of Commons Women & Equalities Committee in its inquiry into the use by the EHRC of its enforcement powers.

2. EHRC – lack of an explicit mandate to protect human rights

The EHRC, with specific powers and duties, was established by the Equality Act 2006 (the 2006 Act). As the Sub-Committee on Accreditation (SCA) noted in its initial accreditation of the EHRC in 2008, in relation to the dual fundamental duties of an NHRI -- to promote and protect human rights -- the EHRC lacked “*an explicit mandate to protect human rights*”.

Section 9 of the 2006 Act is headed Human Rights. ¹ Subsection 9(1) specifies the EHRC’s human rights duties:

¹ In this part of the 2006 Act “human rights” means – (a) “the Convention rights” which are defined in section 1 of the Human Rights Act 1998 as the following articles of the European Convention on Human Rights: Articles 2 to 12 and 14; Articles 1 to 3 of the First Protocol as read with Articles 16 to 18; and (b) other human rights. Section 6 of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

“The Commission shall, by exercising the powers conferred by this Part

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- a) promote understanding of the importance of human rights,*
- b) encourage good practice in relation to human rights,*
- c) promote awareness, understanding and protection of human rights, and*
- d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (compliance with Convention rights).*

Section 8 of the 2006 Act is headed Equality and Diversity. Section 8(1) sets out EHRC duties in relation to equality and diversity, with similar promotional duties but also includes as 8(1)(e), that the Commission shall *“enforce the Equality Act 2010²”*.

The SCA report in 2008 accrediting the EHRC with A status includes:

“The Sub-Committee notes the following:

“1) In the current effort to unify the different anti-discrimination and equality legislation, it is important that the views of the EHRC be considered. It recommends that:

“a. the functions of the EHRC be expanded to give it an explicit mandate to protect human rights, including the power to receive and determine complaints on human rights violations.”

In 2008, when there still was a mixed array of equality laws and orders and intense work was underway to draft an acceptable single equality law, it may be that the EHRC had proposed that it should have quasi-jurisdictional competence in relation to human rights violations, involving major revision of the 2006 Act, which, so far as the DLA is aware, was never seriously considered. But, for the purposes of this submission, the important point is SCA concern from the outset regarding the EHRC’s limited statutory capacity to protect human rights.

There has been no change, and the EHRC continues to function as an NHRI lacking enforcement powers in relation to human rights which it has always had in relation to equality.

As the EHRC itself has emphasised, this limit to its powers has prevented it from providing advice and assistance or providing or funding legal representation to individuals or groups who have been victims of human rights violations. The only exception to this restriction is if the breach of human rights which would be the subject of the litigation is also an unlawful act under the Equality Act 2010.

Potentially more significant in terms of the EHRC’s deficient legislative mandate to protect human rights is the exclusion of the EHRC’s power to conduct investigations into an individual or organisation it suspects of having committed an unlawful act,

² The Equality Act 2010 is the comprehensive consolidating act which makes unlawful discrimination by public or private persons because of 9 protected characteristics: race, sex, disability, sexual orientation, religion or belief, age, gender reassignment, pregnancy or maternity, marriage or civil partnership.

which currently applies only to acts unlawful under the Equality Act 2010 and not acts unlawful under s.6 Human Rights Act 1998.

This unique power enables the EHRC to require the person under investigation to provide information, documents in their possession and give oral evidence. If the investigation finds that an unlawful act has been committed the EHRC can require the person to take action to prevent recurrence, ultimately enforceable by court order.³ It was in the race and sex discrimination legislation in the 1970's that Parliament first provided the relevant equality bodies as a more effectively to combat discrimination than to rely on litigation by victims

In our view the relevant provisions of the Equality Act, sections, 9, 20 – 24, 28 and 34 and Schedule 2 all could easily be amended to provide the EHRC with powers in relation to human rights equivalent to its powers in relation to equality.

For fuller details, please refer to these provisions in the Equality Act 2006

<https://www.legislation.gov.uk/ukpga/2006/3/contents>

The DLA submits that to continue to leave unchanged any degree of asymmetry would signal an acceptance of lesser importance of human rights.

Despite the SCA raising the need to strengthen the EHRC's capacity to protect human rights in 2008 no steps have been taken by the UK Government for this purpose. The primary advocate for such change has been the EHRC, with no response from government. This issue was raised in 2020 by the Parliamentary Joint Committee on Human Rights in its report 'Black People, Racism and Human Rights' (November 2020):

In its Conclusion and Recommendations (pages 37 and 38, paragraph 18 (iii)) the JCHR states:

"For the EHRC to be, and be seen to be, an effective enforcer of Black people's human rights:

iii) Government must harmonise the Commission's human rights enforcement powers in line with its powers in relation to equality, so that it can undertake investigations where it is suspected that an organisation has breached the Human Rights Act and provide legal assistance to individuals in Human Rights Act cases." (Paragraph 101)

The Government published its response to the JCHR report in February 2021, and specifically on this issue in paragraphs 59 – 60:

59. The EHRC already has a range of important human rights powers and duties. It is accredited at the United Nations with "A" status by the

³ It was in the race and sex discrimination legislation in the 1970's that Parliament first provided the relevant equality bodies with powers to conduct investigations as more effective means to combat discrimination than to rely on litigation by victims

Global Alliance of National Human Rights Institutions. This means it fully meets the requirements to protect human rights in Great Britain including carrying out inquiries, where appropriate. The 2018 Tailored Review did not recommend that human rights enforcement powers were necessary for the EHRC; and argued that the EHRC should focus on resolving issues of effectiveness and impact.

60... The UK continues to have strong human rights protections within a comprehensive and well-established constitutional and legal system. The protections contained in our domestic legal framework mean that individuals can uphold their rights in a UK court, with legal aid available for cases that are within scope, and for those that aren't funding may still be available through the Exceptional Case Funding scheme. In addition to this, the EHRC continues to have the power to provide legal assistance to victims of discrimination, which can include the provision of legal representation and assistance to individuals in cases with an equality and human rights element.

Contained in the Government's response to the JCHR report was the response of the EHRC; on this issue the EHRC stated:

24. We also agree that the Commission's less extensive enforcement powers in relation to human rights limit our ability to protect Black people's rights effectively. While we can provide legal assistance to individuals in Equality Act 2010 proceedings, we cannot do so in human rights cases unless the claimant is also complaining of a breach of the Equality Act.

25. Similarly, although we have the power to undertake an investigation where we suspect an organisation has committed an unlawful act under the Equality Act 2010, this power does not extend to enabling us to investigate suspected breaches of human rights law. We therefore welcome the Committee's recommendation to Government that it should.

We have seen the SCA report of its recent review of the Australian Human Rights Commission (AHRC) March 2022 deferring for 18 months a decision on re-accreditation primarily on the basis of the AHRC failing to have made sufficient progress in implementing earlier SCA recommendations. What we take from that report is the strong admonition also relevant in relation to the EHRC: *"The Paris Principles require that a NHRI must be legislatively mandated for both the promotion and protection of all human rights."*

In our submission on this issue we would add that the UK is facing a particularly critical time in relation to human rights when to have an NHRI fully legislatively mandated to protect as well as promote human rights will be especially important.

Three major Government bills have become law:

- The Police, Crime, Sentencing and Courts Bill
- The Nationality and Borders Bill
- The Elections Bill

Throughout their consideration by Parliament there was wide concern that each of these measures included provisions likely to breach Convention rights including (taken together):

- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 8: Right to respect for private and family life
- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 3 of the First Protocol : Right to free elections
- Article 17: Prohibition of discrimination in the enjoyment of the above Convention rights

Legal aid in the UK has been reduced by more than 80% since 2012, affecting the access to justice for the most disadvantaged members of community including women, Black and minority ethnic people, disabled people, prisoners, asylum-seekers and refugees, people on low incomes. Many within these groups will be adversely affected as these new laws come into force.

At the same time the Government was consulting on its proposals for reform of our Human Rights Act. More than 12,000 individual responses were submitted to the Ministry of Justice. The DLA, alongside a very large number of human rights and equality NGOs including the British Institute of Human Rights, Justice, NGOs supporting migrants, refugees, children, older people, The Law Society and individual lawyers, academic lawyers and the EHRC submitted detailed responses setting out why the Government's proposals are unnecessary and unwanted; their main impact would be to exclude some groups or make it far more difficult, with additional legal and procedural barriers, to bring human rights claims. Regardless of strong and widespread opposition to the Government's proposals, the recent Queen's speech outlining the legislative programme for the next Parliamentary session includes a Bill of Rights bill.

With the Government's large majority in Parliament the British Bill of Rights could be enacted within the next 12 months. The need for the EHRC to be able to provide advice and assistance, to support claims by victims of human rights violations will be all the greater.

The DLA would therefore urge the SCA to give serious regard to the failure by the UK government since the EHRC's initial accreditation in 2008, to respond to the SCA concern regarding the EHRC's lack of specific mandate to protect human rights. If such mandate were necessary for our NHRI then, in our view it is essential now. As we comment above, to delay further to ensure the EHRC has powers in relation to human rights equivalent to its powers in relation to equality conveys a message that that for the UK government human rights are less important.

3. EHRC – Independence and pluralism ?

A second concern of the DLA relates to the fundamental requirements under the Paris Principles of independence and pluralism: how well is the EHRC meeting these? What are public perceptions and what is the reality?

In its November 2015 report of re-accreditation of the EHRC with A status the first notes by the SCA refer to the selection and appointment of EHRC members. In drafting this submission we have carefully considered Paris Principle B.1 and SCA General Observation 1.8.

The DLA is not able to provide information regarding the procedures that have been followed to appoint EHRC commissioners since 2015. We are unable to comment on whether the clear, transparent, merit-based and participatory process specified in General Observation 1.8 was carried out for every appointment.

We are aware of disquiet amongst organisations working to combat racism in relation to a particular commissioner appointment in 2020; an open letter was sent to the Minister by lawyers, campaigners and anti-racism NGOs objecting to this appointment based on the person's published views on diversity, race and immigration.

The DLA uncertainty relating to the independence of the EHRC stems from the speech by the Minister for Women and Equalities on 17 December 2020 in which she sets out "the Government's new approach to tackling inequality across the UK". We attach the full transcript of her speech. She refers several times to moving "*well beyond the narrow focus of protected characteristics*", while, as mentioned above, a core function of the EHRC is to enforce the Equality Act 2010 the primary focus of which is on eliminating discrimination and advancing equality based on 9 protected characteristics - race, sex, disability, sexual orientation, religion or belief, pregnancy and maternity, age, gender-reassignment and marriage and civil partnership. The Minister then refers to new EHRC Commissioners:

"That is why I am appointing a new chair and a wide variety of commissioners to the Equality and Human Rights Commission to drive this agenda forward.

I am proud we have Baroness Kishwar Falkner, David Goodhart, Jessica Butcher, Su-Mei Thompson and Lord Ribeiro, all of whom are committed to equality and ready to challenge dangerous groupthink."

With this speech having been widely circulated and on public record, we suggest it is inevitable that on occasions when the EHRC omits to challenge publicly government policies or actions which could violate human rights there will be a response that this is the result of commissioners being appointed to "*drive forward*" the Government's agenda.

We refer to the emphasis on pluralism, participation, transparency in General Observation 1.8 and paragraph B.1 of the Paris Principles to promote public confidence in the selection process, the successful candidates and the NHRI.

As external observers, the DLA is not aware of efforts which the EHRC may have made to develop and maintain pluralistic participation in its work and or pluralism in the selection of Commissioners.

We note that Paris Principle B.1 requires “*pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights....*” This should be achieved either by being NHRI members or represented by NHRI members or by “*effective cooperation*”. As we do not believe the current EHRC commissioners include the full list of the “*social forces*” in (a) to (e) in Paris Principle B.1⁴, we turned to the minutes of EHRC Board meetings (publicly available on the EHRC website) for information about EHRC cooperation with these forces.

We looked at minutes for 8 meetings in 2021 and 2 meetings in 2022. Attendance was recorded in three sections: Chair and Commissioners, EHRC officers, and guests. At every meeting as guests there were two people: someone from the EHRC Wales Committee and a representative from the Government Equalities Office (GEO)⁵ The only exception was the meeting on 13 May 2021 for which the minutes record as guests “*for item 11*” Kemi Badenoch Minister for Equalities, her Assistant Private Secretary and her Special Assistant.

Item 11 in the minutes for the 13 May 2021 meeting is the following:

“Kemi Badenoch shared her views on the work of the Commission and the current state of equalities. Discussion included: the importance of the UK Government and the Commission working constructively together; that equality has a new significance and prominence including an increase in pluralised and divisive debates and she was keen that the Commission provides a clear and evidence-based position to help move these divisive debates forward in a constructive and evidence-based way.”

It is not possible to know how the Minister presented these issues; how she might have elaborated what “*working constructively together*” should require from the EHRC. What were the “*pluralised and divisive debates*”? What would moving these debates forward mean in practice: taking a position? Supporting the Government’s position? Sweeping them under the table? Was the EHRC expected to do as she was asking? The minutes do not include any unplanned dialogue between the Minister and commissioners or any question-and-answer session after the Minister had spoken.

⁴ The indicative list includes NGOs “responsible for human rights and efforts to combat racial discrimination”, trade unions and concerned social and professional organisations such as associations of lawyers or doctors; trends in philosophical or religious thought, universities and qualified experts, Parliament, Government departments (in an advisory capacity only)

⁵ The Government Equalities Office (GEO) is within the Cabinet Office. It sponsors the EHRC and may have some responsibility for EHRC compliance with the Framework Document 2019 between the EHRC and the Cabinet Office, which defines in detail the EHRC’s formal relationships with Government departments.

It remains to be seen, whether the Minister's speech at the Board meeting was meant to reinforce the remarks by the Minister for Women and Equalities in December and whether, implicit, was some incentive for the EHRC to comply.

Is the EHRC not sufficiently independent from the government? Is this a reality or merely a perception of some groups, those generally critical of the EHRC? We ask this because, whichever is true, nevertheless we are concerned about the degree of public confidence the EHRC now attracts. Is it perception or is it real that public confidence in the EHRC has fallen? That it is less often heard or seen, less often referred to? If its views are less often reported, or its advice less often sought, why?

We can see no gain to any party - the government, the EHRC, critics of the EHRC or the people of Great Britain - if for lack of visible independence, visible commitment to pluralism, the EHRC as our NHRI loses confidence of the people whose human rights it was established to promote and protect.

1 June 2022