



Discrimination Law Association

DISCRIMINATION LAW ASSOCIATION
response to
Fairness for All: A new Commission for Equality
and Human Rights

Summary

The Discrimination Law Association has focused on those aspects of 'Fairness for All' on which we have relevant knowledge and experience. The following includes some of our main comments and recommendations:

- A single equality act should precede any legislation to establish a CEHR.
- The first priority for government should be to put in place arrangements for adequately resourced support for equality on grounds of religion or belief and sexual orientation. This would remove any urgency in the establishment of the CEHR. A single equality act could then be developed incorporating appropriate institutional arrangements to support the new legal framework.
- Adequate resources will be key to the success of a CEHR. There must be no regression, proportionately, in the resources made available for the enforcement and promotion of equality and human rights. Any evidence of 'cost-cutting' would harm both the effectiveness of the CEHR and the support it hopes to receive from national and local stakeholders.
- A commission to enforce and promote equality and human rights must be directly accountable to Parliament rather than to a government department. This is necessary to enable the CEHR to fulfill its role of public watchdog free from any form of pressure or interference. It is important to ensure that equality and human rights are mainstreamed across all departments and not the preserve of only one. It would also provide for financial independence from government as recommended by the JCHR.
- The structure of the CEHR must not lead to an identikit model of discrimination. Instead it must allow the CEHR to be alert to the ways that different areas of law or social policy impact in different ways on different groups and to apply its powers in ways that are appropriate for each of the grounds of discrimination.
- We support the establishment of a disability committee, and, based on equally cogent arguments in relation to the other grounds, we recommend the establishment of similar standing committees for all of the equality grounds and for human rights. The views of committees should feed into the Board, which would retain final authority.
- Law enforcement should be central to the work of the CEHR. It is a vital tool in achieving change; cases supported by the existing commissions have often had an

impact well beyond their particular facts. Having regard to the needs of complainants and their ability to secure a just outcome, support for individual cases should be on wider criteria than is proposed; and the CEHR should have powers to support complaints in which the Human Rights Act or other laws are engaged jointly with discrimination legislation. We attach draft legislative provision relating to the support of individual cases.

- We make detailed recommendations to clarify and strengthen the powers of the CEHR to conduct investigations. We also recommend additional powers for the enforcement of public authorities' equality duties.

Introduction

1. The Discrimination Law Association ('DLA') is a membership organisation established to promote good community relations by the advancement of education in the field of anti-discrimination law and practice. It achieves this by, among other things, the promotion and dissemination of advice and information; the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others and of the necessity for a complainant-centred approach to anti-discrimination law and practice. With this in mind the DLA seeks to secure improvements in discrimination law and practice in the United Kingdom, Europe and at an international level.
2. The DLA is a national association with a wide and diverse membership. The membership is growing and currently consists of over 400 members. 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, persons concerned with discrimination law from a complainant perspective.

3. The membership of the DLA has considerable experience in working in the field of discrimination law and in working with the statutory commissions. We are, therefore, well placed to comment on the White Paper, 'Fairness for All'. This response has been prepared by a team of DLA members including leading practitioners, policy workers and academics.

General principles

4. The response of the DLA to 'Fairness for All' has focused on those aspects of the White Paper on which we felt best able to comment. Our response is based on the following general principles:
 - a) The effective operation of a single equality commission requires comprehensive equality legislation that provides equivalent rights to equal treatment on all grounds.
 - b) There must be no regression from the current levels of protection, including powers of the existing commissions, and no regression in the investment of resources in combating discrimination and promoting equality and human rights.
 - c) A commission to enforce and promote equality and human rights should have maximum independence from government and should be directly accountable to Parliament.
 - d) From the outset a single equality commission must be based on a recognition of different experience of groups defined by each of the grounds. Its structure should enable it to respond or to initiate action, that properly reflects the needs of the groups concerned.
 - e) As all stakeholders – workers, employers, service users and service providers – will perceive the CEHR as a law enforcement agency, the CEHR should itself, confidently, positively and unapologetically, take on law enforcement as its primary function.

A single equality act should precede establishment of a single equality commission

5. We know from 'Fairness for All' ¹ that in the earlier consultation 'Making it Happen' there was "much support for a harmonised legal framework for equality but strong views from business that the regulatory burden of such legislation would not be welcome". The DRC, and now the CRE, have argued that a single equality act should precede the establishment of a single equality body. The Joint Committee on Human Rights recommended that "*the arrangements which are now to be put in place should be regarded as transitional, until Parliament enacts a single, comprehensive Equality Act... the enactment of such legislation should be given a high priority.*"

6. 'Fairness for All' makes a good case for the need to tackle multiple discrimination but even the best resourced single equality body cannot enforce legal rights against discrimination that do not exist. Using the examples in the White Paper,² homophobic bullying in schools or discrimination faced by Muslims and other minority religious groups in education, housing, criminal justice and local authority services will, under current anti-discrimination laws, fall outside the enforcement powers of the CEHR.

7. While the business community may dread further regulation, it is difficult to appreciate what benefit they derive from legislation that is inconsistent between different grounds or, in the case of the RRA or the SDA, inconsistent within grounds of race or sex.

¹ para 75(f) p. 124
² p. 14

8. A single equality act, harmonising laws in respect of each of the protected grounds, is necessary for the effective functioning of a single equality commission. Without such legislation we are concerned that a 'hierarchy' of grounds is likely to emerge which it will be difficult not to replicate within the work of the commission. This would significantly undermine support for the work of such a Commission and create undesirable tensions within it.
9. So far as the DLA is aware, the main urgency for the establishment of a CEHR – that would not be open for business until at least the beginning of 2007 – is to provide effective institutional support for equality on grounds of sexual orientation and religion or belief, and after 2006, age. We would urge the government to consider the introduction now of alternative (temporary) arrangements that could offer immediate support for work in relation to the legislation outlawing discrimination on grounds of sexual orientation and religion or belief, in particular to provide necessary resources for advice and legal representation for individual complainants. The DLA considers it wholly unacceptable to defer for another two and a half years any formal arrangements to support cases challenging the widespread, and widely reported, discrimination faced by Muslims in Britain today.
10. Once these urgent needs have been at least partially met, the government can properly turn to the development of effective comprehensive equality legislation. It will be able to draw on the work that has been done in Northern Ireland, where there is now consultation on a Single Equality Bill, as well as legislation now in place in other EU member states, including the Republic of Ireland, and other jurisdictions such as Canada or Australia. The functions and powers of a single equality body could then be developed alongside what would be agreed as the legal framework for equality.

Sufficient resources are essential

11. A fundamental concern of the DLA is that a CEHR should be well-resourced to carry out the major responsibilities it is to be given. It has been repeatedly stated that the new CEHR is not an economy measure. If this assertion is to be validated, very careful consideration must be given to the allocation of resources. This is a major key to the success, or otherwise, of this “bold and innovative plan”.
12. We would be concerned if the introduction of a single Commission was accompanied by any cost cutting exercise. To do so would convey a message that equality and human rights are ‘cheap and easy’ and not worth major investment. Rather than gain support of national and local stakeholders, the CEHR will lose support if it does not have resources to live up to its promise. It is our view that the level of funds currently available to the commissions has operated as a severe restraint on effective action.
13. The Race Directive³ in Article 13 requires the setting up of a commission or similar body/bodies. Article 6 requires that the implementation of the Directive ‘shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by the Member States...’ thus no regression in the existing provision is permitted.

³ Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43/EC.

14. Any diminution of the provision made in respect of the provisions for race equality protection will be in breach of the UK Government's obligations under the Race Directive. Moreover, if there is to be equality between the different grounds at least similar level of provision will be required for each of them as well as comparable provision for the CEHR's work in relation to human rights. This is likely to represent a far greater increase in expenditure than is suggested in the Partial Regulatory Impact Assessment of the CEHR.⁴

Independence and accountability

15. It is important to ensure that the legislation establishing a commission to enforce and promote equality and human rights strikes the appropriate balance between accountability and independence. The standards of the Paris Principles should be the benchmark for ensuring this balance is achieved.
16. We welcome the government's recognition that to be effective the CEHR will 'need to establish itself as a voice that is independent of the government of the day'. We do not believe that this can be achieved if, as the government proposes, the CEHR operates within the standard framework for the relationship between government departments and an NDPB. The traditional model for an NDPB, in which the body is accountable to a government department, is not satisfactory:

⁴ 'Fairness for All' p.115

- a. Firstly, unlike other NDPBs, a key role of the CEHR will be as a public watchdog over government, to ensure that the executive and its public bodies are complying with their duties in relation to equality and human rights. The Stephen Lawrence Inquiry Report highlighted the existence of institutional racism in the police service and other public services. Tackling racial and other forms of institutional discrimination in public bodies will be a key task of the new CEHR. The CEHR will most likely find itself investigating executive bodies and supporting cases in politically sensitive and controversial areas. Full independence from the executive is essential to allow it to fulfil this role free from any form of pressure or interference.
 - b. Secondly, equality and human rights should be mainstreamed into policy making process of all government departments and should not be the preserve of one or more designated departments only.
17. An important element of institutional independence from government is to ensure financial independence from government. We do not agree with the government's view that funding should be provided by a grant in aid provided by the Secretary of State of the sponsor department.
 18. The DLA strongly supports the principles of the model proposed by the JCHR⁵ In particular it is important to ensure that the CEHR has statutory guarantees of independence from both the executive and parliament; that its system of funding is independent of direct ministerial control and that there is direct reporting to Parliament and not to the executive.

⁵ Joint Committee on Human Rights, Eleventh Report, April 2004, paras 126 – 137.

One size will not fit all

19. We note the long lists of benefits of a single equality commission listed in 'Fairness for All', and, in general, do not disagree. However, as we said in the DLA response to 'Making it Happen', we are concerned that an over-generalised approach would make a single equality commission incapable of responding to strand-specific issues. Discrimination on different grounds is experienced differently, often takes different forms and can have different origins. Different areas of law or social policy have greater impact on some strands than others, for example policing is highly relevant to race and, more recently, religion, but less relevant to disability, while transport policies may affect disabled people more than people within other groups. A single commission must be able to address the specific needs of each of the equality grounds, and listen to and learn from the experience of relevant groups. Different legal, promotional and investigatory strategies may have to be adopted for different grounds at different times. Fundamentally, a single equality commission must continuously guard against operating on the basis of an identikit model of discrimination, that is both seriously inaccurate and dangerously misleading.

20. Thus whilst a unified structure would have the benefit of, for example, tackling instances of genuine multiple discrimination, the danger of a completely unified structure is that it may leave untackled any issues that are specific to any of the grounds. A black woman may be discriminated against as a *black woman*; she may, however, be discriminated against as a black person *or* a woman – these characteristics must be capable of being subject to independent recognition and support. There is a risk that in attempting to standardise procedures and practice across the different grounds of discrimination their distinctive features and different needs can be overlooked. It will be essential for the CEHR's structure to enable it to be alert to the different ways in which different grounds interact with government and civil society and to apply its powers appropriately in respect of each form of discrimination.

Governance and structure

21. The governance and structural arrangements for a single commission must be open to the perspectives of the groups that identify with each of the grounds and should be capable of developing specific policies and strategies in relation to the needs of each ground. This will often mean that the decision-making process will need to involve members of the different groups, both to provide relevant experience and to meet the expectations of these groups.

22. However, the commission will also have to co-ordinate its work across the different equality grounds and its human rights functions. Its governance and internal structures need to be capable of addressing multiple forms of discrimination to link equality issues with human rights. Strategies or legal precedents in one area may impact on other areas. Dividing the work of a single commission into separate self-contained 'silos' could result in an absence of appropriate co-ordination, unnecessary duplication of resources and a loss of focus. Existing arrangements have been criticised for this, and the establishment of a single commission does offer an opportunity to co-ordinate work across the grounds and human rights, where this is appropriate.

23. We comment below on the proposals in 'Fairness for All' for a disability committee. Different but equally cogent arguments can be made for the establishment of similar standing committees for the other five major equality grounds, along with one for human rights. The DLA therefore strongly recommends that the enabling legislation should require the CEHR Board to establish committees for each of the grounds and human rights, delegating to such committees decision-making powers in relation to policy, enforcement and promotional strategies and priorities and monitoring performance of the CEHR in relation to their areas of expertise, supported by policy teams. In effect, they would play a similar role in setting policy for each ground as do the individual commissioners in the Australian HREOC, with the central commission playing a co-ordinating and oversight role.
24. To avoid some of the internal tensions that have arisen in Australia, it is important that the CEHR Board retain final authority, especially in resource allocation, and that individual commissioners are encouraged to become involved with the work of a number of the specialist committees. It is also important that the need for different resources to be allocated to different issues at different times be recognised, and that the role of the Board in taking these strategic (and often difficult) decisions is well established.
25. It will also be very important to build on the experience of the Equality Commission for Northern Ireland. Certainly in relation to the internal structure of the organisation, lines of responsibility, authority for decision-making and allocation of resources and the competing demands of the different equality grounds and human rights, there are valuable lessons from NI that must not be ignored.

Proposed disability committee

26. DLA welcomes the proposal to establish a disability committee with powers delegated to it by the CEHR Board in relation to policy, strategy and monitoring. We believe that this is the most appropriate way to maintain, and to develop expertise concerning disability discrimination and to strengthen the effectiveness of the CEHR in this area. The disability committee should also have a role in developing a human rights strategy. When the Board delegates decision-making powers to the disability committee, this should include a duty to consult with all relevant stakeholders.
27. 'Fairness for All' recognises that disability discrimination has some distinct features, such as the duty to make reasonable adjustments. The DRC has played a key role in increasing understanding of this duty, which has been at issue in more than one-third of all DDA employment claims. The momentum begun by the DRC needs to be kept going in the CEHR.
28. There are very few specialists in the UK with a good understanding of disability discrimination in legal, social and psychological context. The disability committee can serve as a focus for the expertise, and encourage more people to become active in fighting disability discrimination.
29. We agree with the suggestion that membership of the disability committee reflects the other strands. It is vital for the success of the disability committee and the CEHR overall that a strategic approach is developed to ensure that disability is included in all strategies. The involvement of one or more commissioners will ensure that views are fed into the Board and vice versa.

30. DLA believes that the Committee should at least have the following functions:
- Maintaining and further developing a strategic workplan on disability equality
 - Developing expertise in the legal and advice sector
 - Scrutiny of CEHR Board papers to ensure proper regard is given to disability issues
 - Developing a disability impact assessment tool to assess the activities of the CEHR on their impact on disabled people.
31. As stated above, the DLA believes that there are comparable reasons to establish committees with the same status and remit in relation to all six grounds of discrimination and human rights. We agree that the Board should not be made up of separate champions; careful planning will be needed to ensure maximum input from each of the committees without creating de-facto champions.

Law enforcement

32. One of the DLA's general principles in responding to 'Fairness for All' is the centrality of law enforcement within the functions of the CEHR. We state this at the outset as the impression given throughout the White Paper is that legal enforcement is not a matter of the first importance for the government. If so, this would be highly retrogressive.
33. The DLA is very aware of the gains already achieved through the current commission acting as key law enforcement agencies. By supporting applicants through assistance with questionnaires, providing advice over telephone advice lines, or by supporting litigation the commissions have made it clear that unlawful discrimination will be met with a strong and dissuasive response.

34. Accordingly The DLA urges the Government to ensure that the CEHR has a strong and effective role as a law enforcement agency and to rebut this impression.
35. This will require adequate resources and it will require the Government ensuring that the legal enforcement budget of the CEHR is considerably in excess of the current legal enforcement budgets of the existing commissions who have been forced to cut back on this part of their role over a number of years.
36. To regard law enforcement as a tool to be used by the CEHR only as a last resort would represent a major departure from the position that obtained when the EOC and CRE were set up. Moreover it would give exactly the wrong message to those who are victims of inequality if the establishment of the CEHR were, in fact, a backdoor means to reducing support for such people. It would also be a breach of the requirements of the Race Directive which does not permit regression in the enforcement of anti-discrimination protection.
37. The DLA considers it is essential that the government makes quite clear in a public statement, as soon as possible, whether or not it intends that those with reasonable complaints of discrimination should be assisted where necessary to bring their complaints to the relevant court or tribunal.
38. An important associated point is the need for the government to state to make clear (and to state plainly in legislation) who bears the ultimate obligation under Article 6 ECHR to provide assistance where it is necessary to ensure equality of arms for the enforcement of anti-discrimination rights. This is an issue which has already arisen in relation to the Equality Commission for Northern Ireland. Is a complainant to seek support from the CEHR or the Legal Services Commission where it is plain that the case cannot be brought without legal assistance? The LSC has indicated that they do not consider the establishment of the CEHR will affect the volume of cases they currently fund.

Supporting Individual Cases

39. The DLA notes the approach that it is intended that the CEHR should take in relation to the support of individual cases⁶ although this is described differently in different sections of the White Paper.⁷ Our concern is that this approach is too narrow. It is also likely to inhibit the overall effectiveness of the CEHR.
40. The approach of the Equality Commission for Northern Ireland and also some of the GB commissions in the past was that cases which had a deterrent effect were also supported. Such cases may not be particularly concerned with issues of principle nor affect large numbers of people directly, but they operate as a warning that undesirable practices will lead to severe consequences. Their effect is therefore much wider than the individual concerned through the publicity that can be generated and any follow-up work by the commission to reinforce and spread the message.
41. Secondly the proposed approach in the White Paper does not address need. The DLA is concerned that 'Fairness for All' does not acknowledge that some people with a real need for protection against unlawful discrimination are not capable of presenting their own cases. For example:-
- Firstly certain disabled people must have expert support – people with learning or communication difficulties need the support of the DRC (or its successor) to take cases.
 - Secondly in cases of acute harassment (whether on racial, sexual or other protected grounds) complainants cannot be expected to conduct their own cases. Even with the most accessible tribunal they are likely to break down emotionally as they recount the facts or are cross-examined.

⁶ Fairness for All para 4.16

⁷ See for example, paras 1.22, 3.30, 7.11 – 7.20, 7.33 – 7.34.

42. The DLA do not see these two points as defining a closed class of need. There are other persons who will need assistance if equality rights are to be enforced. The current commissions have some experience of this — the CEHR should be set up on the basis that this is an essential consideration.
43. The DLA wish to emphasise that encouragement without effective access to the courts is not enough. There are good reasons to conclude that promotion, education and exhortation by themselves will not effect substantive change.
44. A good example of the limitations in this respect can be found in the developments in relation to age equality. In 1999 the government published a voluntary Code of Practice for Age Diversity in Employment which aims to encourage employers to remove unnecessary age limitations. Research published by the Employers Forum on Age indicated that this was having little effect on the way employers were running their businesses⁸. Even the government's own research has shown that although knowledge of the Code is widespread only one in four employers have adopted the guidelines⁹.
45. Direct experience of legal casework is essential if the CEHR is to develop and retain a clear appreciation of how discrimination works in practice and the barriers faced by individuals in a variety of situations. Such an appreciation is essential both for the credibility of the CEHR and for its ability to know how it can be most effective in its work to achieve meaningful change.

⁸ *Report on a survey of senior decision makers in small and medium enterprises*, Employers Forum on Age, 1999 and *Employing Older Workers*, IRS/EFA, IRS Management Review, issue 21, April 2001.

⁹ *Age Diversity: Summary of Research Findings*, Select Committee Report on Ageism, March 2001.

46. There are many cases that the commissions have supported which have had an impact well beyond the individual case; examples are included in Appendix 1. Such cases may have:
- Defined the extent of the law/legal duties;
 - Exposed practices or an organisation to independent public, judicial scrutiny;
 - Provided new insights into how inequality works in practice and therefore what form remedial action should take;
 - Acted as a signal deterrent, for the particular respondent, who will have faced financial cost, inconvenience and perhaps adverse publicity, and for other employers or service providers, who recognise the need to eradicate similar discriminatory practices. (Legal follow-up work by the commissions has been effective in using individual cases as a deterrent in a wider, sectoral context.)
 - Provided a basis for formal investigation by the commissions.
47. The need to support cases must be recognised. Research over the years has consistently demonstrated that without skilled legal representation applicants to courts and tribunals are far less likely to succeed.
48. Thus, recent research into disability discrimination cases in the employment tribunal found that having a legally qualified representative made a significant difference to an applicant's chance of success: an applicant who was represented by a friend or relative had a 11.8% chance of success, an applicant who represented him/herself had a 13.7% chance of success compared to those represented by a barrister (28.9%) or a law centre representative (27.3%)¹⁰.

¹⁰ *Monitoring the Disability Discrimination Act 1995 (Phase 2), Final report*, Incomes Data Services, Sarah Leverton, 2001

49. For the DLA, which is concerned with discrimination law from the perspective of the complainant, access to skilled representation is a vitally important point. Trade unions can be an important source of advice and assistance in cases concerning discrimination in employment, but victims of discrimination who are not members of trade unions are likely to turn to the equality commissions to support their cases, especially as public funding (legal aid) is not normally available for employment tribunal cases. Some solicitors' firms and law centres can offer 'legal help' (but not representation) to complainants whose income and capital are within the statutory limits.

Powers of the CEHR to support cases under the HRA and other legislation

50. One of the specific questions in 'Fairness for All' is whether the CEHR should be able to continue support for cases which have drawn on both discrimination and human rights arguments after the discrimination element of the case has fallen away. The DLA response to this is, unequivocally, Yes. We were surprised that this question was asked but no other questions regarding the powers of the CEHR to support cases, since it is not exceptional for discrimination to occur in a context where other legislation may also apply. The need to support cases that raise issues of discrimination in other types of proceedings was anticipated in the DRC Act, which permits regulations that would enable the DRC to support other types of proceedings in which a person's disability is a relevant matter.¹¹ Thus, again, the issue of non-regression could arise.

¹¹ DRC Act 1995, s.7(1)(b).

51. Most frequently complaints of discrimination or harassment are likely to be combined with complaints under the Employment Rights Act 1996, for example unfair dismissal. That this is not exceptional was confirmed in the annual report for 2003-4 of the Employment Tribunal Service which noted, *“The trend for applications made to Employment Tribunals to cover more than one jurisdiction, for example, unfair dismissal and sex discrimination, has continued. In 2003-04 ...an average of 1.7 complaints per application.”*¹²

There are also likely to be cases that include discrimination or harassment and matters that are regulated under legislation concerning housing or education. Where protection against discrimination applies to all functions of public authorities, as it does under the RRA, and will under the DDA, there could also be proceedings under anti-discrimination legislation and under common law, for example, an action against the police for discrimination or harassment and false imprisonment.

52. Drawing on the experience of DLA members, we strongly recommend that the CEHR should be able to support the whole of a case where discrimination is one element. The existing commissions appear to have reached different views regarding their powers under current legislation. Therefore it is essential that legislation establishing the CEHR should state plainly that the CEHR may provide advice and assistance to complainants, or prospective complainants, in relation to proceedings under any of the anti-discrimination measures, where these proceedings also relate to matters falling under other legislation or within the scope of the common law.

¹² ETS Annual Report 2003-04 page 4

53. A separate question is what powers the CEHR should have to support discrimination cases under the Human Rights Act 1998. We note that 'Fairness for All' proposes that "it will not have powers to support free standing human rights cases."¹³ Such a rigid line could be unduly restrictive in relation to the ability of the CEHR to challenge discriminatory acts by public authorities, not all of which will be within the scope of anti-discrimination legislation. For example, if a Muslim wanted to challenge his arrest and detention by the police on grounds of direct religious discrimination, he would need to rely on the HRA. The DLA recommends that the CEHR should be able to assist individuals in proceedings under the HRA where their complaint alleges discrimination on one of the protected grounds in the enjoyment of rights under the European Convention on Human Rights. This was a recommendation added to the CRE's Third Review of the RRA in 1998, and the DRC Act allows scope to achieve this by regulations, although no such regulations have yet been made.
54. We attach as appendix 2 suggested draft text defining the powers of the CEHR to assist individual complainants that incorporates our recommendations in paragraphs 39 to 53 above.

¹³ paragraph 4.18 page 42

Unique law enforcement powers of the commission

Power to conduct investigations

55. Whatever its ultimate structure a Commission established to eliminate discrimination and promote equality of opportunity and human rights must be, and must be seen to be, an effective law enforcement agency. The white paper proposes that the CEHR should have powers to carry out “general inquiries” and “named investigations” ; as described these powers appear to conflict with the principle of non-regression since they represent a reduction from the existing powers of the CRE, EOC and especially the DRC. For this reason, and because we doubt that as proposed, they would contribute to an effective law enforcement role of the CEHR we recommend that the government should reconsider its proposals.
56. Very simply, the DLA recommends that the DRC Act, Section 3 and Schedule 3 should be the starting point in drafting the investigation powers of the CEHR. These provisions were drafted after detailed consultation with the CRE and EOC and reflect, at least to some extent, the views of the two commissions as to how the power to conduct formal investigations could be a more effective tool. By following the DRC model, the CEHR would be able to begin an investigation either into the activities of one or more named persons or into the operation of a policy or practice more generally without an initial suspicion of discrimination. This would remove the strict distinction in the White Paper between general inquiries and named investigations, for which no reasons are given. Again without explanation the White Paper provides that any general inquiries by the CEHR could not target individual bodies¹⁴; no such restriction applies to the CRE, EOC or DRC, and to adopt the DRC model would remove this regressive restriction.

¹⁴ The white paper implies that the CRE formal investigation into race equality in prisons was a general investigation while, in fact, it was a ‘named-person’ investigation into HMP Brixton, HMP and YOI Parc and Feltham YOI.

This would ensure that its investigation powers would be available to the CEHR where there were concerns regarding compliance by a public authority with any statutory duties to promote equality.

57. 'Fairness for All' appears to add a '*public interest*' test for the initiation of general inquiries which is not part of current legislation. No guidance is offered as to whether this goes beyond the general obligation of the CEHR to act reasonably and in accordance with its fiduciary duties, and if so, how '*public interest*' is meant to be assessed. If it is the intention to create an additional pre-condition, this would be another regressive requirement that should not form part of the proposed legislation.
58. We recognise that often from the outset, or once an investigation has begun, the CEHR will have grounds to believe that a person named in the investigation has committed or is committing unlawful discrimination or harassment and the CEHR wishes to include an investigation into the activities in question. The CEHR should then formally notify the person or persons that the terms of reference of the investigation have been suitably amended. If, as the DRC Act provides, an investigation can proceed with or without a suspicion of discrimination, the DLA is not convinced that it is necessary at this initial stage to allow the respondent opportunity to make representations, having regard to the low level of suspicion described by the House of Lords in the Hillingdon case: the House of Lords stated that for this purpose,
- "... that there should be material before the Commission sufficient to raise in the minds of reasonable men, possessed of the experience of covert racial discrimination that has been acquired by the Commission , a suspicion that there may have been acts by the person named or racial discrimination of the kind which it is proposed to investigate."*¹⁵

¹⁵ *LB Hillingdon –v- CRE [1982]IRLR424*

59. If the CEHR's suspicion is not borne out by its investigation then there are no consequences for the respondent; if, however, the investigation produces evidence that the respondent has acted in breach of any of the anti-discrimination laws, then the CEHR may proceed to use its further powers to require the unlawful acts to cease. At that later stage it would, of course, be appropriate and necessary, and consistent with human rights standards, for the respondent to have full opportunity to make representations to challenge either the CEHR's findings or the action which the CEHR seeks to require or both.
60. The CEHR should be able to embark on an investigation of any institution or organisation or group of organisations in relation to any issue that is relevant to its statutory duties. Like the current commissions, this would enable it to investigate matters outside the scope of the anti-discrimination legislation where this could be shown to be within the CEHR duty to promote equality of opportunity or good relations between relevant groups and/or to promote human rights.¹⁶ As a public body the CEHR would be expected to act reasonably and within its statutory and fiduciary duties; in this regard as in any other, the CEHR would be vulnerable to judicial review if it used its powers inappropriately or unreasonably.
61. So far as the DLA is aware, the power in existing legislation for the Secretary of State to request one of the commissions to carry out a formal investigation has never been used. As we have recommended above that the CEHR, with its far broader remit, should report directly to Parliament and not to a designated Secretary of State, we recommend that decisions to initiate investigations should be made by the CEHR and that the government, through any one of its ministers, should have no role in such decisions.

¹⁶ see *Home Office –v- CRE* [1981] 1 AllER 1042

62. In most of their investigations the CRE and the EOC have been able to obtain evidence from respondents on a voluntary basis, but this has not always been true. The power to require respondents to provide relevant information is an essential part of the investigation process, and, as in the DRC Act (Schedule 3 para. 4) the CEHR must have powers to require any person named as a subject of a CEHR investigation to provide written information, documents and to attend to give oral evidence. Whether or not an investigation is based on a suspicion of discrimination, there should be no requirement on the CEHR to obtain authority from the Secretary of State in order to require the production of evidence. To require this would be wholly contrary to the principle of independence which the JCHR has so strongly recommended, and which the DLA fully endorses.
63. We agree that where the CEHR finds evidence of unlawful discrimination or harassment, it should be able to serve a notice requiring the unlawful conduct to cease. The CEHR notice should also prescribe a timetabled schedule of changes to policies and/or practices that the respondent is expected to carry out. The DLA is satisfied that by the time the CEHR is in a position to serve a non-discrimination notice it will have a very good understanding of the way the respondent conducts its affairs and what changes are required to secure non-discrimination in the future. Therefore we do not endorse the proposal in the White Paper¹⁷ that it should be the respondent who prepares the action plan that can be enforced. The procedures under the DRC Act and regulations¹⁸, which the White Paper appears to adopt, could, in a 'worse case' scenario add up to one year between the service of the non-discrimination notice and the date when the respondent was obliged to take any steps to implement any change.

¹⁷ Fairness for All, paragraph 4.31

¹⁸ Disability Rights Commission (Time Limits) Regulations 2000 SI 879

Power to enter into legally binding agreements

64. The DLA welcomes the proposal in 'Fairness for All' that the CEHR should be able to enter into legally binding agreements with named persons as is currently provided in the DRC Act. The legislation should make clear that while the CEHR would undertake not to begin or pursue a formal investigation in relation to the unlawful acts that are the subject of the agreement or to issue a non-discrimination notice in respect of such acts, an agreement would not prevent the CEHR from taking any other form of law enforcement action or supporting individual cases against the respondent where it considered that it was appropriate to do so.

Power to enforce compliance with public authority statutory duties

65. The duty on public authorities to promote race equality has the potential to bring about substantive and lasting change, as public authorities are expected to go beyond a minimum level of non-discrimination to a positive promotion of race equality in carrying out their various functions. The DLA therefore strongly welcomes the proposals to impose comparable duties on public authorities to promote equality on grounds of disability and sex; we urge the government to adopt the additional measures that are needed so that public authorities would also be expected to promote equality on grounds of religion or belief, sexual orientation and age.
66. This important duty will not have the major impact we envisage if public authorities fail to comply. The DLA is concerned that, overall, the mechanisms to enforce the race equality duty may not be adequate. The development of the CEHR provides an opportunity to consider whether further powers are needed.

67. As stated in 'Fairness for All', under the RRA the CRE has direct powers to take enforcement action -- service of a compliance notice and ultimately seeking enforcement by the county/sheriff court -- where the authority has not complied with any relevant specific duty¹⁹, which could be the publication of a race equality scheme or implementing arrangements for ethnic monitoring of the workforce. Non-compliance with the 'general duty' to promote race equality can be enforced by the CRE or any person or group with a legitimate interest by applying for judicial review.
68. 'Fairness for All' omits to mention that the CRE currently could also use its powers to conduct a general formal investigation to inquire into compliance with the general race equality duty by one or more public authorities. Such an investigation would clearly be for a "purpose connected with the carrying out of ...[the CRE's] duties"²⁰. During or at the conclusion of such investigation the CRE could make recommendations regarding compliance but could not require any particular action to be taken.
69. In our view, the main defect in relation to the duty to promote race equality lies not in the statutory enforcement mechanisms but in the Orders imposing specific duties. The RRA permits such orders to impose specific duties "*for the purpose of ensuring the better performance ... of their [general] duties under subsection (1)*"²¹. Most major public authorities, however, have as their main specific duty the publication of a race equality scheme with certain required contents, but no specific duties to act to promote race equality. Therefore, compliance can be measured merely by evaluation of a document.

¹⁹ Race Relations Act 1976 (Statutory Duties) Order 2001 and Race Relations Act 1976 (Statutory Duties) (Scotland) Order 2002.

²⁰ Race Relations Act 1976, Section 48(1).

²¹ Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, section 71(2)

The DLA therefore welcomes the far more action-based specific duties for disability equality that are currently the subject of public consultation²². We also recommend that the government (UK and Scottish) make further Orders imposing revised specific duties under the RRA, which would move authorities to active compliance with their general race equality duty.

70. A basic problem faced by the CRE, which the CEHR will also face, is how to know which authorities are complying with their equality duties. In some instances there may be individuals or groups that raise with the commission their own concerns regarding a particular authority, but there is no certainty that this will happen. We appreciate that it was always intended that the main mechanism for enforcement would be the established audit and inspection agencies, for example the Audit Commission or HM Inspectorate of Constabulary, and we are not recommending otherwise. It appears, however, that public authorities, and the users of public services, look to the CRE to ensure compliance with the race equality duty. We therefore recommend that legislation establishing the CEHR, and any earlier legislation imposing disability equality, should give the commission an additional powers to require production of information and to issue directions for compliance with the general duty.
- a. The commission should be able to serve a notice requiring a public authority to provide to the commission by a specified date information to demonstrate their compliance with the general duty, including compliance with relevant specific duties. If an authority fails to provide the specified information on time then the commission should have the power to apply to the county/sheriff court for an order requiring production of the information in question by specified date. Once the commission has this information it would know if there were grounds for enforcement action.

²² Delivering Equality for Disabled People, DWP, July 2004, para. 3.13 page 22

- b. Where the commission has evidence that a public authority, in relation to certain functions or across all functions, is failing to comply with the general duty, the commission should have a power to issue directions stating measures the authority is expected to take, by specified dates, to demonstrate compliance with its general duty to promote equality. Directions could include, for example, proper implementation of the arrangements for impact assessment, consultation and monitoring or the arrangements to ensure access to information and services that should be set out in the authority's race equality scheme. Authorities should be able to appeal against all or any of the directions. If an authority fails to comply with the directions, the commission should be able to apply to the county/sheriff court for an order requiring compliance.

Role of the CEHR in relation to 'community cohesion'

71. The DLA notes the current consultation by the Home Office, "Strength in Diversity: towards a community cohesion and race equality strategy" which continues until 17 September 2004. We regret that 'Fairness for All' was published before the outcome of that consultation was known. The government's approach to race equality must be taken into account in developing the role, powers and duties of the body that will have statutory responsibility for promoting race equality. The Home Office consultation appears to assume that the role of the Home Office and the CRE will continue unchanged (there is one reference to 'Fairness for All'), and does not seek views on institutional arrangements.
72. The DLA agrees that the statutory duty of the CEHR should encompass the promotion of good relations between people of different racial groups, religions or beliefs, sexual orientations or age and between men and women and disabled people and non-disabled people. This duty is relevant to certain important functions of the CEHR including conducting investigations, scrutinising and commenting on policies and legislation and carrying out or supporting research. Although the results of the Home Office consultation cannot yet be known, the DLA is not persuaded, that

the CEHR should be expected to assume major responsibility for “community cohesion”. We recognise that discrimination can create or reinforce disaffection and hostility, however we consider that other factors such as poverty and income inequality are likely to be far more significant, often coupled with local factors such as economic stagnation, disparities in health or education or access to local services.

73. In our view, building community cohesion should be a matter for the whole of government, and the CEHR will, indeed, have a contribution to make, but most of these critical factors fall well outside its proposed scope.
74. The DLA is not aware whether the CRE recently announced negative response to the proposals for a CEHR relates to any anticipated dilution of its role in this area. It will be essential to ensure that the establishment of a single equality commission does not lead to any reduction in the resources invested in the promotion of ‘community cohesion’. It would be possible to comply with the requirement of non-regression by vesting the CEHR with whatever level of involvement the CRE currently has. Alternatively, and preferably in our view, some of these responsibilities could be allocated to one or more other public authorities - perhaps a combination of central government departments, including the Home Office, Treasury, DTI, ODPM and public bodies working at local level, that may be more suitably placed to influence the factors that affect the quality of community life.

CEHR as a source of expertise

Expertise on equality and human rights

75. The DLA welcomes the recognition in 'Fairness for All' ²³ that the CEHR will have a major role as a centre of legal expertise on discrimination and human rights law and on the impact or potential impact of laws or policies on groups protected under the equality legislation. It is essential that that role is properly valued. While the White Paper proposes to give the CEHR power to advise ministers or comment on current or proposed law there is no obligation on ministers to seek the views of the CEHR.
76. While currently for each new piece of legislation, ministers must issue a statement of compatibility with the ECHR, there is not a comparable obligation in relation to compatibility with the anti-discrimination laws. Further, while the obligation of public authorities in NI to conduct impact assessments has led to equality-proofing of at least some legislation, the duty on public authorities in GB to promote race equality does not appear to have led to the same concerns in the drafting and promoting of new legislation in Westminster.
77. The DLA recommends that as a minimum the regulatory impact assessment that is published when any new bill is introduced in Parliament must refer to its equality impact in respect of all of the grounds within the current anti-discrimination legislation. For this purpose Ministers would be expected to seek the views of the CEHR.
78. The knowledge and experience of the CEHR should also be called upon by the UK government in the development of wider national and European policies. The CEHR would be able to assist the government to appreciate the likely impact of proposed policies on equality and human rights.

²³ Fairness for All paragraphs 3.34 – 3.38

Expertise on the effects of discrimination, harassment and hate speech

79. The CEHR will begin with the collective knowledge and expertise of the current commissions and should quickly extend its experience to all relevant grounds. This expertise will, of course, not be restricted to matters of law but will include a good understanding of the effects that discrimination, harassment, hate speech and other forms of hate crime can have on its victims.
80. The Home Secretary has announced that he is again looking at a new criminal offence to protect against incitement to religious hatred parallel to the current provisions in Part III of the Public Order Act 1986 in relation to race. While the DLA welcomes this move - indeed it was probably the first organisation in the UK to call publicly for such law after, after 11 September 2001 – it does not underestimate the difficulty of making the current law work. For example, over the last 3 years more than 80 cases of incitement to racial hatred were referred to the CPS for prosecution yet of only 4 prosecutions a mere 2 ended with a conviction.
81. One difficulty is to provide persuasive evidence of the effect of speech in a particular context. Both the CPS and the CRE have been advised that the CRE could provide expert evidence in relation to this. However unless there were legislative change it would still be open to the judge to refuse to permit such evidence to be called. The DLA therefore suggest that the CEHR is specifically empowered to provide expert evidence of the likely effect of race or religious hate speech in a specific context in any case in which proceedings for incitement has been authorised by the Attorney General.

Next steps: legislation and transition: further input from the DLA

82. As we stated at the outset, in our view the urgent duty on government is to establish effective, adequately resourced, arrangements so that individuals who are experiencing discrimination on grounds of religion or belief and sexual orientation can receive skilled legal advice and assistance. Plans to support complainants of age discrimination should also be developed. Once such arrangements are in place, the priority should be the development of a single equality act which would incorporate appropriate institutional arrangements. All of the work that has gone into the proposals for the CEHR would remain highly relevant.
83. The DLA is concerned that at the stage when there is a new structure and transition from current arrangements will need to take place, none of the work of the existing commissions should be impeded. A flexible and/or gradual move to new structures may be appropriate. In any case, we consider it essential that there is careful planning and clear information available to anyone concerned - especially for complainants and potential complainants - on how the existing and impending work of the commissions is to be maintained.
84. The DLA had sought to be represented on the Task Force, as we believed that the development of proposals for a CEHR would benefit from the input of discrimination law practitioners with experience across all of the protected grounds. We were not invited to participate in that capacity. In the light of the problems we have identified within the proposals in the White Paper, we remain of the view that the DLA can offer unique expertise, and we hope to be able to play a more direct role in the development of a single equality act and institutional arrangements to promote and enforce equality and human rights.
85. The DLA would be pleased to expand on any of the comments or recommendations in this response.

Appendix 1

- *Singh v. Chief Constable of Nottinghamshire Constabulary*: Following the decision in this first case brought by a serving black police officer the Home Secretary addressed all chief constables in relation to discrimination at work and new issued new Home Office directions. Policy on recruitment to the CID was changed. Over the longer term it influenced HMIP race equality thematic inspections.
- *Marshall v. Southampton and South West Hants AHA* tested the limits of the Sex Discrimination Act against the requirements of EC law. The case established that difference in treatment of men and women in relation to retirement ages is unlawful. Of even wider application, the case successfully challenged the statutory limit for compensation for sex discrimination in the employment tribunal. Now tribunals are expected to award compensation appropriate to the circumstances of each case.
- MOD pregnancy dismissal cases: The EOC also used EC law to bring to an end the practice of the Armed Forces to dismiss a woman when she became pregnant. It is estimated that well in excess of 5,000 women were unlawfully dismissed; some 500 women brought proceedings and the MOD paid out nearly £60 million in compensation. The case also established that the Armed Forces could not be exempt from the anti-discrimination legislation, opening the door to many other sex and race discrimination complaints.
- Part-time workers exclusion from unfair dismissal protection: In an application for judicial review the EOC overturned the statutory provision that applied different conditions and/or excluded part-time workers from protection (and compensation) for unfair dismissal.
- Nightclubs' race-based admission rules: The CRE supported a number of complaints that Birmingham nightclubs were refusing to admit Asians; after several successful settlements, local publicity and a BBC report, Birmingham City Council amended its licensing criteria to take account of clubs' equality practice.
- Defining 'ethnic group': CRE support for individual cases, or litigation in its own name has resulted in decisions that define "ethnic group" as including Sikhs (*Mandla –v- Lee* - Sikh pupil prohibited from wearing a turban), Romany Gypsies (*CRE –v- Dutton* – 'no travellers' sign as a discriminatory advertisement) Irish Travellers (*O'Leary –v- Allied Domeq Inns Ltd.*), enabling those groups to use the RRA for protection against discrimination in any circumstances within the scope of the Act.
- 'Racial grounds' is wider than the race of the complainant: *Showboat Entertainment Centre Ltd. –v- Owen* white employee who was dismissed because he refused to carry out discriminatory instruction to exclude young black men is protected as dismissal was "on racial grounds".

- Intention or motive is not relevant: In *R –v- Birmingham City Council ex parte EOC*, the EOC challenged the Council’s arrangements for admission to grammar schools, involving a higher pass mark on the ‘11 plus’ exam for girls as there were fewer grammar school places for girls than for boys. The Court ruled out permanently employers defending discrimination because of customer preference, to save money or avoid controversy. In *R –v- Commission for Racial Equality ex parte Westminster City Council* - it was held to be unlawful racial discrimination to remove a black worker to avoid industrial action

- *Johnson –v- Prison Service*: series of cases concerned with harassment, discrimination and victimisation of an auxiliary prison officer: led to action within Prison Service seeking to tackle racism and discrimination and CRE formal investigation into Brixton and Parc prisons.

- Less favourable treatment on grounds of pregnancy is direct sex discrimination without the need to refer to a “sick man” comparator: In *Webb –v- EMO Air Cargo (UK) Ltd* the dismissal of a pregnant woman on fixed term contract was held to be discrimination. The continuing high rate of discrimination against pregnant women has prompted the current EOC general formal investigation on pregnancy.

- Discrimination against mothers with children cannot be justified as an ‘economic necessity’: In *Hurley v Mustoe* the employer sought to argue that women with children were inherently unreliable, hence it was an economic necessity not to employ them. It established the important principle that economic necessity could not provide a justification for discrimination.

Assistance in relation to proceedings

(1) Where an individual applies to the Commission for assistance in relation to any proceedings to which this section applies, the Commission may grant the application on any of the following grounds-

- that the case raises a question of principle;
- that the case has or is likely to have a special significance in respect of any aspect of the Commission's powers or duties;
- that it is unreasonable to expect the applicant to deal with the case unaided (because of its complexity, because of the applicant's position in relation to another party or for some other reason);
- that there is some other special consideration which makes it appropriate for the Commission to provide assistance.

(2) This section applies in relation to any case in which an allegation (referred to in this section as the primary allegation) is made, of discrimination contrary to

- Any provision of the (here name the relevant Acts and regulations)
- Any provision of the laws of the European Union which prohibit discrimination or pay inequality
- Any provision of the Human Rights Act 1998 provided that reliance is also placed on Article 14 of the European Convention on Human Rights as set out in schedule 1 to that Act, in relation to discrimination based on race, sex, status as a transsexual, disability, sexual orientation, religion or belief, or age.

(3) This section also applies in relation to any case in which an allegation of a breach of any provision of the Human Rights Act 1998 is made provided that

- The allegation arises out of the same or substantially the same facts as those which give rise to the primary allegation, and
- The Commission is satisfied that it is necessary or particularly convenient that the primary allegation and any such allegation of a breach of the Human Rights Act 1998 are heard together at the same time

(4) This section also applies in relation to any case within the jurisdiction of the County Court or Sheriff Court or the Employment Tribunal provided that

- The allegation arises out of the same or substantially the same facts as those which give rise to the primary allegation, and
- The Commission is satisfied that it is necessary or particularly convenient that the primary allegation and any such allegation are heard together at the same time.

(5) Subject to the next sub-section, the Commission shall not continue to assist where it ceases to assist in relation to the primary allegation, or if there is more than one primary allegation, then all such allegations.

(6) The Commission may continue to assist in relation to a case under the Human Rights Act 1998 where it has discontinued assistance in relation to the primary allegation (or if more than one then all such allegations) if but only if it remains satisfied that the assistance was rightly granted in the first place for the primary case and the case under the Human Rights Act 1998 meets the criteria set out in subsection 1.

(7) If the Commission grants an application, it may provide or arrange for the provision of legal advice; arrange for legal or other representation (which may include any assistance usually given by a solicitor or counsel); seek to procure the settlement of any dispute; provide or arrange for the provision of any other assistance which it thinks appropriate.

(8) It may make this provision on such terms as it sees fit, including an obligation on the person assisted to repay any part or all of the cost of the assistance provided, though it may not make such a stipulation unless there are special reasons for making it.

(9) The Commission may recover the cost of assistance in any case in which a litigant who it has assisted might personally recover any or all of the costs of the litigation, from any person from whom the person assisted might be able to recover such costs.

(10) The Commission may authorise any employee of the Commission to exercise such of its functions under this section as it may determine.

6th August 2004