



House of Lords
House of Commons
Joint Committee on
Human Rights

Commission for Equality and Human Rights: Structure, Functions and Powers

Eleventh Report of Session 2003–04



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*Report, together with formal minutes and
appendices*

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JOINT COMMITTEE ON HUMAN RIGHTS

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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Lord Judd
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The Reports and evidence of the Joint Committee are published by The Stationery Office by Order of the two Houses. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/commons/selcom/hrhome.htm. A list of Reports of the Committee in the present Parliament is at the back of this volume.

Current Staff

The current staff of the Committee are: Paul Evans (Commons Clerk), Nicolas Besly (Lords Clerk), Murray Hunt (Legal Adviser), Róisín Pillay (Committee Specialist), Duma Langton (Committee Assistant) and Pam Morris (Committee Secretary).

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Summary

In March 2003 the Joint Committee on Human Rights published a report recommending the establishment of an integrated commission charged with the promotion of all the various “strands” of equality and the promotion and protection of human rights. In October 2003 the government announced its intention to proceed with the establishment of a “Commission for Equality and Human Rights”. It is hoped that legislation will be passed in time to allow it to begin operating in 2006.

The JCHR warmly welcomes this decision. This report considers in more detail the functions, powers and structure of the proposed commission so far as they relate to human rights, and in it the Committee makes recommendations which it expects the government to take into account in formulating the White Paper prefiguring the legislation. They are directed at ensuring that the new body can discharge its role effectively.

Functions

The Committee recommends that the new body should have a widely drawn remit in respect of the promotion of a culture of respect for human rights, going beyond the Convention rights incorporated into UK law by the Human Rights Act. It recommends that the commission should have a role in reporting on the UK’s discharge of its international human rights obligations.

The commission’s role should be focused on achieving strategic change through promotion, advice, the spreading of best practice and the raising of public awareness. It should not, for the most part, be directly involved in the resolution of individual cases.

The key role of the new commission will be working with the public sector to give practical effect to a culture of respect for human rights in the policy and practice of providers of public services. The Committee recommends that this should be achieved through close co-operation with the bodies charged with regulating, auditing and inspecting the quality of public services. It proposes a general statutory duty on public authorities to promote human rights.

The commission should also be able to guide and advise the private sector on the development of a culture of respect for human rights.

The Committee recommends that the commission should have a duty to build the capacity of the private and voluntary sectors to advise and assist individuals in understanding and asserting their rights.

It recommends that the commission should promote alternative dispute resolution as a way of avoiding litigation and pre-empting violations of rights.

The commission should have a general duty to promote good relations between communities and groups within Great Britain based on respect for the values of human rights so as to encourage the peaceful resolution of disputes.

Powers

The Committee recommends that the commission should be able to conduct public inquiries into matters of public policy relating to human rights. It recommends ancillary powers needed to make these inquiries effective.

It proposes that the commission, in addition to the power to assist as a friend of the court or to intervene as a third party in significant cases raising questions of public interest relating to human rights, should have an exceptional power to seek judicial review on compliance by public authorities with their duties under the Human Rights Act.

Structure

The commissioners should be appointed with the involvement of Parliament, and should not be chosen as “champions” of particular strands of the commission’s responsibilities.

The Committee recommends special arrangements to guarantee the independence of the commission as a constitutional watchdog, while also securing its democratic accountability. These include a special relationship between the commission and Parliament.

The future

The Committee concludes that the arrangements which are now to be put in place should be regarded as transitional, until Parliament enacts a single, comprehensive Equality Act. It recommends that the enactment of such legislation should be given a high priority.

1 Introduction

The proposed Commission for Equality and Human Rights

1. In March 2003 we published our report on *The Case for a Human Rights Commission*.¹ We found that the development of a culture of respect for human rights in this country was in danger of stalling, and that there was an urgent need for the momentum to be revived and the project driven forward. We concluded that this task could not be undertaken by the courts alone, or developed solely by an agency within government.² We found the case for the establishment of a human rights commission in Great Britain³ compelling, and concluded that—

... an independent commission would be the most effective way of achieving the shared aim of bringing about a culture of respect for human rights.⁴

2. In the background to our report was the Government’s decision in principle to move towards the establishment of what was then called the “single equality body”,⁵ which would combine the functions of the three existing anti-discrimination commissions (the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission) with responsibilities relating to the three new “strands” of anti-discrimination legislation (relating to age, sexual orientation and religion or belief).⁶ We concluded that where the work of the new commission was focused on legal remedies for discrimination in employment and the advancement of the economic status of disadvantaged groups, the relevance of human rights dimension to its work might be only peripheral. But where, as increasingly there must be, there is a focus by the new body on access to public services, the human rights dimension (for example the right to life, the right to education, the right of access to information, the right to privacy, the right to be free from degrading treatment) would be fundamental.

3. We also noted that disadvantaged and marginalised groups are among the people whom the Human Rights Act was supposed most directly to benefit. While some issues which any new body would confront would principally engage discrimination issues, others would clearly engage human rights questions, and many would engage both. In the light of this, we considered the options for the institutional relationship between a human rights commission and the proposed new equality body, and expressed a preference in our report last year for there to be an integrated human rights and equality commission.⁷ The new

1 Sixth Report, Session 2002–03, *The Case for a Human Rights Commission*, HL Paper 67-I and II, HC 489-I and II; see also Twenty-second Report, Session 2001–02, *The Case for a Human Rights Commission: Interim Report*, HL Paper 160, HC 1142.

2 Sixth Report, Session 2002–03, op cit., para. 99.

3 There is already a Human Rights Commission in Northern Ireland, see our Fourteenth Report of Session 2002–03, *Work of the Northern Ireland Human Rights Commission*, HL Paper 132, HC 142.

4 Sixth Report, Session 2002–03, op cit., para. 99.

5 See *Towards Equality and Diversity: Implementing the Employment and Race Directives*, Cabinet Office, Department of Trade & Industry, Home Office and Department for Work and Pensions, December 2001. See also Twenty-second Report, Session 2001–02, op cit., paras 7 to 12. *Equality and Diversity: Making it happen*, Cabinet Office, Department of Trade & Industry, Home Office and Department for Work and Pensions, October 2002.

6 Being introduced following implementation of the “Employment” and “Race” Directives; 2000/43/EC and 2000/78/EC.

7 Sixth Report, Session 2002–03, op cit., para. 203.

commission, we believed, would have the ability to adopt a more holistic approach where human rights would provide a framework within which to persuade public authorities to promote and protect human rights standards and treat all people with dignity, fairness and respect.

4. On 30 October 2003 the Government announced that it had decided to proceed with the single equality body, and to give it a human rights dimension as well as an equality remit. This body has been given the provisional title of the “Commission for Equality and Human Rights” (CEHR). The government’s written statement announced that, alongside its equality functions, the new commission would—

... promote a culture of respect for human rights, especially in the delivery of public services.⁸

This report

5. This report looks at the functions, powers and structure of the proposed new commission principally from the human rights perspective. **We warmly welcome the Government’s decision to establish a Commission for Equality and Human Rights. The task now is to design a body which will be effective. This report is our further contribution to that work. We seek to ensure that while the body is fully equipped to build on the work of the anti-discrimination commissions over the last thirty years, it is also equipped to take on the important new task of promoting and protecting human rights. Human rights must not be allowed to be the poor relation of the equality strands, or have a purely titular significance in the design of the new commission. At the same time, responsibility for the broad human rights agenda must not weaken the effectiveness of the commission’s work in promoting equality of opportunity and using its strategic law enforcement powers to combat unlawful discriminatory practices and procedures.**

6. In our report last year we concluded that—

The commission we propose should not be seen as another inspectorate, advisory body, regulatory authority or enforcement agency. Nor should it be a body with an adversarial or litigious approach to its mission.

Its principal purpose should be to foster a culture of respect for human rights through raising awareness of the need to promote human rights in public authorities in the delivery of services, and through making individuals conscious of their rights and guiding them in asserting those rights.

In connection with this function it should be able to conduct and commission research and provide financial or other assistance for educational activities in connection with promoting understanding and awareness of human rights. It would need to offer guidance to, and promote best practice in, public authorities in relation to human rights.

The commission should have the function of improving knowledge and understanding of human rights issues amongst those who help individuals in asserting their rights. It should be able to do this through close collaboration with non-governmental organisations and those who provide advice services in the voluntary sector and professionally. It should not itself be driven by the task of handling individual complaints.

The commission should have the power to conduct inquiries into questions of public policy engaging human rights, on its own initiative. It should have the necessary powers to make this role effective.

Alternative dispute resolution procedures might provide a remedy for violations or potential violations of rights in appropriate circumstances. The commission could facilitate the use of such procedures. It could also mediate and conciliate on its own account in situations of broader conflict which engage human rights issues.

The commission should be involved in the reporting processes under the various international human rights instruments. It should also help to raise awareness of the obligations under these instruments more generally.

The commission could play a valuable role in assisting the courts in determining human rights questions. In order to do this we conclude that it will be essential for the commission to have power to act as a friend of the court or as a third party intervener. It may need other powers in relation to litigation, such as supporting strategic cases and seeking judicial review, to underpin its primary promotional function.⁹

7. We discuss our further thoughts on the functions to be given to the new body in section 2 below. In section 3 we further consider the nature of the powers we believe it needs to fulfil these functions.¹⁰ In section 4 we elaborate our thoughts about some of the outstanding structural issues which we touched on in our report last year.¹¹ In each section we make recommendations.

8. In considering these matters, we take as our starting point the UN's "Paris Principles", which set out an internationally-agreed template for the design of independent national human rights institutions.¹² **We believe that the wise and timely decision of the Government to proceed with the establishment of the Commission for Equality and Human Rights provides an opportunity to make the UK an example of best practice in the design of an independent and effective human rights commission.**

9. The Government's statement of 30 October 2003 did not go into any detail about the design of the new commission, but announced the establishment of a Taskforce to develop the idea over the following year. Its terms of reference are to meet over a period of twelve months to—

9 Sixth Report, Session 2002–03, op cit., Summary, page 8.

10 Ibid., paras. 119 to 129.

11 Ibid., paras. 168 to 232.

12 Commission on Human Rights Resolution 1992/54 of 3 March 1992, annex: General Assembly Resolution 48/134 of 20 December 1993, see Appendix B to our Sixth Report of Session 2002–03, op cit.

Advise Government on the role, functions, priorities and activities of the proposed Commission for Equality and Human Rights, in furtherance of the government’s statement of 30 October on future arrangements for equality institutions in Great Britain;

Provide such advice in preparation for a White Paper;

Provide ongoing policy advice, including assessment of responses to the White Paper, on the range of issues described above.¹³

The Taskforce met for the first time in December 2003, and is expected to make its first report shortly.

10. The Government has indicated that it will publish a White Paper on the proposed CEHR “in the Spring” (of 2004), with a view to introducing legislation in the 2004–05 Session. The recommendations of this report on the structure, functions and powers of the proposed new commission should be regarded as a further instalment of work in progress. We will continue to examine the implementation of this decision as the process unfolds.

2 Functions

A free-standing human rights remit

11. The most fundamental issue about the powers and functions of the CEHR from our perspective is the nature of its human rights remit. The Paris Principles provide that—

A national [human rights] institution shall be given as broad a mandate as possible...¹⁴

12. The Government’s statement of 30 October implied a free-standing power for the new commission to promote human rights, and this has been clarified by Ministers subsequently. In the Lords debate on our Report on 16 January 2004, Lord Falconer of Thoroton said—

... human rights include but go beyond equality issues. That is to be reflected in the new body: therefore, human rights will not be a seventh strand but will inform and support the six equality strands. *It will be a free-standing subject for the body to promote whether or not there is a linked equality issue.*¹⁵

Responding to a debate on “women, equality and human rights” in the House of Commons on 4 March 2004, the Deputy Minister for Women and Equality, Jacqui Smith MP, said—

We are not only drawing together the existing equality commissions along with the new equality legislation, but are adding the promotion of human rights to the mix. In fact, we are putting human rights at the heart of the new politics of equality ... The new body will be able to work to embed a culture of respect for human rights in public services and help public bodies to understand their obligations under the Human Rights Act. It will help to improve public service delivery by supporting the move away from a one-size-fits-all approach to public services, and human rights values will help the new body to balance one person's rights against another's.¹⁶

13. We agree that a commitment to human rights should be mainstreamed throughout the commission’s work. The right to equality of treatment is a fundamental human right. As the Audit Commission put it in their submission—

Human rights is the bedrock of the six equality strands and will help fill the unmet needs of groups and communities that do not neatly fall within the “six strands”.¹⁷

A person is not protected by the right to life because she is a woman. Inhuman and degrading treatment is not forbidden only in relation to people with disabilities. Forced labour and slavery are not prohibited only for those with a particular religion or belief. Liberty and security, the right to a fair trial and the entitlement to due process are not the concerns of a minority in society. A person is entitled to respect for his or her private and

14 Sixth Report, Session 2002–03, op cit., Annex A, para. 2.

15 HL Deb, 16 January 2004, cols 765–766, emphasis added.

16 HC Deb, 4 March 2004, col 1141.

17 See Appendix 2, para. 18.

family life not only on account of his or her sexual orientation. Freedom of conscience is not a particular right of one age group rather than another. Freedom of assembly is not an issue only for particular ethnic groups. The right to enjoy one's own property in peace, to vote in free elections and to be educated are the concerns of everyone, although disparities and inequalities in access to these rights exist. Human rights are the concern of all of us because of our common humanity. **It is essential that the new commission is given a free-standing power to promote and protect human rights, and is not limited in performing this function only to circumstances in which human rights are engaged in the context of unlawful discrimination.**

14. Having regard to the Paris Principles, we consider that the mandate should be expressed in the legislation as broadly as possible, and should give as much discretion as possible to the new body in the decision as to how to interpret it. **We recommend that that the new body should be given the general duty “to promote understanding and awareness, and to help secure the protection, of human rights in Great Britain”.**

International obligations

15. In our report last year we made clear that we believed that the human rights which the commission promotes should go beyond the Convention rights incorporated into UK law by the Human Rights Act. The Paris Principles propose that a national human rights institution should—

... promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

... encourage ratification of the above mentioned instruments or accession to those instruments, and to ensure their implementation;

... contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions pursuant to their treaty obligations, and, where necessary, to express an opinion on the subject, with due respect for their independence ...¹⁸

16. We discussed at some length how the culture of respect for human rights, that it was hoped the Human Rights Act would nurture, could be encouraged and developed. In seeking to build a culture of respect for human rights, it would we believe be a mistake to divide into separate watertight compartments Convention rights, which are justiciable and enforceable in courts of law, and other, unincorporated fundamental human rights, including, for example, some of the rights protected by the two UN International Covenants and in the United Nations Convention on the Rights of the Child.¹⁹

17. The Human Rights Act respects the constitutional doctrine of parliamentary supremacy, because it allows the courts only to declare that legislation is incompatible with Convention rights, not to over-rule it. This, and the unincorporated status of the other

¹⁸ See Sixth Report, Session 2002–03, *op cit.*, Annex A, paras 3(b), (c) and (d).

¹⁹ See for example our Tenth Report of Session 2002-03, *UN Convention on the Rights of the Child*, HL Paper 117, HC 81.

main human rights instruments, means that Parliament remains the only body which can decide whether and how to give legislative effect to those rights. So although legislation will sometimes be the most appropriate form of promotion or protection, those goals will also be advanced in different ways in the delivery of public services and through voluntary action.

18. In the Lords debate on 16 January Lord Falconer commented—

Several noble Lords asked whether the mandate of the body would go beyond the mainstream rights referred to in the ECHR. The Government have not decided that the new body would be strictly confined to the ECHR. We are in listening mode on that point as on others ... I can certainly see the argument for addressing human rights defined in a broad inclusive sense, but I have also made it clear that, inevitably, priority would have to be given to those rights covered by the ECHR.²⁰

Our terms of reference are to “consider matters relating to human rights in the United Kingdom” with no further qualification. We have consistently interpreted this remit to include those rights embodied not only in the European Convention on Human Rights, incorporated into UK law by the Human Rights Act, but also those contained in the other international human rights treaties to which the UK is a party.²¹ **We would be deeply disappointed if the CEHR were not to be given a mandate which allowed it to promote respect for human rights “in a broad inclusive sense”.**

19. We also consider it essential that the new commission should be involved in the work of accounting to the appropriate organs of the UN for the UK’s compliance with these international human rights instruments. We have ourselves begun a programme of reviewing the concluding observations of the UN committees on the periodic reports of the UK under the various treaties.²² However, we believe it would be valuable to have input into the process of *preparing* (rather than responding to) the reports themselves from an independent human rights institution, as the Paris Principles propose. Some submissions suggested that the commission should submit the report relating to the UK on its own account. We do not think that this would be appropriate—it is the government which is under an obligation to implement the international treaties and should therefore make the report in each case. But the report from the executive will be improved where it has been audited by and includes commentary from an independent human rights commission.

20. To exclude the new commission from having regard in its work to these other texts would in any event be absurd, given its equality responsibilities. For the body concerned with racial and sex equality to be disbarred from commenting on compliance with the Convention on the Elimination of all forms of Racial Discrimination and the Convention on the Elimination of all forms of Discrimination against Women would be a nonsense.

20 HL Deb, 16 January 2004, col 768.

21 The most significant of these are: The UN Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights (1976); the International Covenant on Economic, Social and Political Rights (1976); the Genocide Convention (1951), the Convention on the Elimination of All forms of Racial Discrimination (1969) the Convention on the Elimination of Forms of Discrimination against Women, the Convention against Torture and all forms of inhuman and degrading treatment; and the UN Declaration of the Rights of the Child.

22 See Tenth Report, Session 2002–03, *UN Convention on the Rights of the Child*, HL Paper 117, HC 81; in 2003–04 we have been considering the International Covenant on Economic, Social and Cultural Rights; in 2004–05 we will be considering the International Convention on the Elimination of all forms of Racial Discrimination.

Equally, it would be very strange for it to be unable to consider the international standards set by economic and social rights in the context of its broad equality work.

21. In the Lords debate on 16 December Lord Falconer remarked that the Government is in “listening mode” on this question. **We recommend that the duty to promote understanding and awareness, and to help secure the protection, of human rights in Great Britain which we have proposed above requires no further qualification defining what is meant by “human rights”. We further recommend that the commission should be given a duty to assist in the promotion of international co-operation in the field of equality and human rights.** If, however, the Government did choose to offer a definition of human rights in the legislation setting up the commission, then we would recommend a definition crafted along the following lines—

‘Human rights’ include the Convention rights (within the meaning of the Human Rights Act 1998) and the provisions promoting and protecting human rights and equality contained in the treaties, conventions and covenants to which the UK is a party.

22. Lord Falconer expressed the view in his evidence to us on 8 December 2003, and again in the House of Lords on 16 December, that the new body should “give priority to” the rights enacted into domestic law by the Human Rights Act. We believe that, so far as the protection of rights is concerned, this is appropriate and should be ensured by the duty which the CEHR will fall under, as a public authority, to act in compliance with the Convention rights. In promoting human rights, the commission will need to think in a wider sense about what those rights are and how they can best be realised in the practices of public authorities.

Working with public authorities

23. We agree with the emphasis laid by the Government on the duty of the new commission to promote a culture of respect for human rights, especially in the delivery of public services. The written statement of 30 October 2003 indicated as a key priority for the new commission the function of—

Mainstreaming equality and human rights in the public sector and public service delivery.²³

Promotion, not enforcement, or to put it another way, prevention rather than cure, will be its key task in relation to human rights. It is the state which is bound by the international human rights instruments, and the Human Rights Act places directly enforceable obligations on public authorities, not on individuals.²⁴ But the obligations of public authorities go beyond non-interference with rights—they are also required to take active steps to protect people’s rights against interference by others, and to enhance the individual’s capacity to take advantage of their rights. The idea of such positive obligations is rooted in Article 1 of the European Convention on Human Rights, which requires every

²³ HC Deb, 30 October 2003, cols 18–20WS.

²⁴ For a detailed discussion of the obligations placed on public authorities by the Human Rights Act see our Seventh Report of Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39, HC 32.

state to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.

24. The key to the effective protection of rights lies in creating a culture in public life in which these fundamental principles are seen as central to the design and delivery of policy, legislation and public services. The Audit Commission, which has been at the forefront of developing a human rights awareness in local authorities,²⁵ takes the view that—

... the new commission's human rights remit must include the championing and promoting of human rights in the public sector. This should be the core activity of the new commission. Our recent research into how public authorities are responding to their human rights duties highlights the fact that the impact of the Act is in danger of stalling, and that the pressure of other improvement activities is taking precedence over human rights ...²⁶

In their decision making and their service delivery central government, local authorities, schools and other places of education, health service providers, prisons, police forces and other organs and agencies of the state should ensure full respect for the rights of all those involved. This focus on public authorities will be, we believe, fundamental to the approach the new commission should take to its duty to promote a culture of human rights in Great Britain. **We recommend that the commission should be given a duty to work with public authorities to assist and guide them in the development of policies and practices which enhance respect for human rights in the delivery of public services.**

A strategic approach

25. The new body will not be the product of a merger of the existing anti-discrimination commissions. It will be a new start. It need not inherit all the culture and working practices of the pre-existing bodies. We believe it should generally regard itself as an enabler rather than a doer. We said in our report last year—

Although there will be room for a general consciousness raising function, aimed at the general public ... we are not convinced that this should be the highest priority, given the expense and the relatively diffuse effect of such campaigns, the outcomes of which are notoriously difficult to measure ... The more immediate need ... will be to work through existing mechanisms, with the aim of mainstreaming human rights into their ways of thinking, and achieving a cascade effect ... the regulatory and inspectorate bodies in the public sector do not profess expertise in human rights ... a human rights commission [can] make a positive contribution to enabling such organisations, and through them the front line services, to develop a more rights-based approach to their work—to develop a new relationship between the state and its citizens ... In overseeing the promotion of a culture of human rights, a commission would have to be able to work effectively through regulatory and representative bodies for different sectors of public activity.²⁷

25 See for example its report *Human Rights: Improving public service delivery*, 2003.

26 See Appendix 2, para. 11.

27 Sixth Report, Session 2002–03, op cit., paras.107, 108, 134 and 135.

26. Many of the submissions we received emphasised that human rights and equality are often best promoted through existing regulators and inspectorates. Professor Francesca Klug and Claire O’Brien describe this as “harnessing the multiplier effect”.²⁸ The Audit Commission argues that—

... The ability to disseminate good practice and provide advice on the most taxing human rights issues facing public services needs to form a key part of this promotional role ... we believe this will have the most impact if it works through existing public sector regulators and inspectorates and their performance management and assessment mechanisms ...²⁹

27. The new commission would be failing in its mission if it were to become the exclusive provider of human rights advice and advocacy. We believe it would be helpful to spell this out in its terms of reference. **Its founding legislation should state that, in connection with its general duty relating to human rights, the Commission for Equality and Human Rights should be able to—**

- a) **conduct and commission research;**
- b) **undertake and support educational activities;**
- c) **promote the development of human rights awareness in the bodies which advise, inspect and audit public authorities;**
- d) **give guidance and advice to any public authority, and publish that advice if it thinks fit;**
- e) **offer advice to Ministers and to Parliament, and publish that advice if it thinks fit;**
- f) **assist and support others in activities which advance its general duty.**

A positive duty

28. In our report of last year we considered whether it would be appropriate to impose a positive obligation on public authorities to promote human rights, comparable to the positive duty to promote race equality imposed on public authorities by section 2 of the Race Relations (Amendment) Act 2000.³⁰ We decided that, on the evidence then available to us, it was unlikely to be useful to impose a statutory duty on public authorities to produce a strategy for promoting human rights within their organisations and in the work they do. We have revisited that conclusion in the light of the evidence which is now available, both of the limited extent to which public authorities have proactively engaged with human rights in their decision-making processes and of the apparent success of the positive duty to promote race equality in improving the quality of decision-making and service delivery. In its statement announcing the decision to proceed with the integrated commission the government noted that in working to mainstream equality and human rights in public sector service delivery—

28 See Appendix 17, para. 1, iv.

29 See Appendix 2, para. 12.

30 Sixth Report, Session 2002–03, op cit., paras. 136–7.

Key tools will be the promotion and enforcement of the Race Relations Amendment Act statutory duty on public bodies to promote equality of opportunity, the planned disability duty, awareness of the duties under the Human Rights Act and working to encourage good practice in equality and human rights generally.³¹

29. We have been struck by the findings of the Audit Commission in its 2003 survey that 57 per cent of all organisations have not reviewed their policies and practices for human rights compatibility at all; 55 per cent have no ongoing monitoring arrangements; and 61 per cent have no arrangements for ensuring that their contractors comply with human rights requirements.³² This reinforces the concern we have expressed that the statutory requirement to act compatibly with human rights³³ is not enough on its own, and that there is a case for Parliament to declare through legislation its endorsement of a more positive approach to the protection of human rights on the part of public authorities.

30. We also now have some evidence of the impact of the positive equality duties which already exist. In July 2003 the CRE published the results of its research into the practical impact of the new positive duty to promote race equality.³⁴ This research found that 84 per cent of respondents to the survey had undertaken the first steps in assessing their functions in the light of the need to promote and secure race equality. Between 83 per cent and 99 per cent had produced a race equality scheme or policy, and the rest were preparing one. Almost 70 per cent felt that their work to date on the positive duty had produced positive benefits, including increased awareness of race equality in policy making and service delivery, and this figure rose to 89 per cent in central government and 83 per cent in higher education.

31. A recent report of the Equality and Diversity Forum has also drawn together the evidence of the impact of similar positive duties in Northern Ireland, Scotland, Wales and Greater London.³⁵ It concludes that the evidence indicates that the implementation of these positive duties can have a real and valuable impact on the practical consideration which is given to equality concerns in policy making, decision making and service delivery. The study found that, by compelling the taking of adequately implemented procedural steps, positive duties create a climate of openness to new diversity initiatives and ensure a greater focus upon the proactive promotion of equality. Experience showed that they were highly effective engines of change and the study therefore concludes by calling for the imposition of a general positive duty on public authorities across all the equality grounds. The Fawcett Society's Commission on Women and the Criminal Justice System has also recently called for the imposition of a similar positive duty on all public bodies to promote sex equality and to have regard to the need to eliminate unlawful sex discrimination in carrying out all their functions.³⁶

31 HC Deb, 30 October 2003, cols 18–20WS.

32 Audit Commission, *Human Rights: improving the delivery of public services*, 2003.

33 Under section 6 of the Human Rights Act.

34 Commission for Racial Equality (2003), *Towards Racial Equality: An evaluation of the public duty to promote race equality and good race relations in England and Wales* (2002).

35 Coln O'Connell (2003), *Taking equal opportunities seriously: the extension of positive duties to promote equality*.

36 Fawcett Society, *Women and the Criminal Justice System*, March 2004.

32. We were clear in our report last year that there is a need for greater focus by public authorities on their positive obligations to protect human rights. We are now persuaded by the evidence that imposing a “positive” or “general” duty on public authorities to promote human rights will be an effective way of advancing this. It would provide a firm statutory foundation for the framework within which the new commission would operate, giving it a very clear role in the articulation of guidance for the implementation of the duty. Requiring public authorities to assess all of their functions and policies for relevance to human rights and equality, and in the light of that assessment to draw up a strategy for placing human rights and equality at the heart of policy making, decision making and service delivery, would be an effective way of achieving the mainstreaming of human rights and equality which will be one of the commission’s principal purposes.

Working with the private sector

33. The emphasis throughout this report is on promoting a culture of respect for human rights in the public sector. As we discussed in our recent report on the meaning of “public authority” under the Human Rights Act,³⁷ increasingly the services on which people rely for the protection of their rights at moments when they are most vulnerable are delivered by private or voluntary sector bodies. The government’s announcement on 30 October last proposed that a key role for the new body would be—

Working in partnership with business and public sector organisations, meeting the requirement expressed strongly by business and others for a single, accessible source of advice and guidance covering the breadth of legislative obligations as well as advice and support on good practice.³⁸

Many of the submissions to us on this inquiry argued for the commission to have the power to assist private providers of care and other public services to safeguard individuals’ human rights by offering appropriately targeted advice and guidance. **We do not believe the commission should be disbarred from promoting and assisting the development of human rights awareness beyond the public sector.**

Supporting the voluntary sector

34. We applaud the work that had been done by the Audit Commission and others to encourage public authorities to absorb human rights thinking into the provision of public services. This will undoubtedly improve the quality of those services, which will benefit the people who use them, many of whom are vulnerable and marginalised. We are concerned, however, about the lack of awareness about human rights among voluntary sector organisations which represent the sort of people whom we believe the Human Rights Act is supposed to protect. The approach to building a culture of human rights needs to be bottom-up as well as top-down. There is little evidence that this is happening. The survey

37 Seventh Report, Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL 39, HC 382.

38 HC Deb, 30 October 2003, cols 18–20WS.

done for the British Institute of Human Rights, for example, revealed that, “many policy staff in voluntary organisations simply do not see the Act as relevant to their work”.³⁹

35. We believe that the commission, in partnership with the voluntary sector, should concentrate on building up knowledge and awareness about human rights among voluntary groups so that they can use these principles in negotiations with public authorities on behalf of their constituents and in their policy and campaigning work. We see this as an essential part of the systemic work needed to develop a culture of respect for human rights and as complementary to advising individuals on their human rights and how to assert them.

Supporting individuals

36. We made clear in our report last year that the new body should not have any adjudicative role in the handling of individual complaints of violations of human rights. It should not become a human rights ombudsman. However, we do believe it should have the capacity to assist others in developing services to help individuals understand and assert their rights.

Advice and assistance

37. The new commission, as part of its general promotional and educational duties, should be able to assist members of the public, and legal and other professionals, in understanding what their rights are and how they may seek to vindicate them. A key task proposed in the government’s statement of 30 October 2003 was—

Improving support for individuals through better and more accessible provision of services, particularly advice and information.⁴⁰

A recent study of the impact of the Human Rights Act in South Wales commented—

It’s one thing to give people rights. It’s another to make them real ... The Human Rights Act 1998 is lucidly and simply drafted, and both it and the Convention rights scheduled to it are reasonably easy to understand. But the extent to which it is owned by the people who most need its help is limited, and perhaps the chief limiting factor is their need for legal aid and advice ... If they have any access to legal advice it will be either a hard-pressed local law centre or a small practitioner who is probably a generalist struggling to make ends meet ... So the shortfalls revealed in this snapshot of the Cynon Valley are not surprising. It is likely, too, that they are typical of other economically deprived areas of Britain. But for anyone concerned with human rights they are depressing, because they illuminate a gap between law and life which negates much of what the Human Rights Act is about.⁴¹

39 Jenny Watson, *Something for Everyone: the impact of the Human Rights Act and the need for a commission*, BIHR, 2002, page 7.

40 HC Deb, 30 October 2003, cols 18–20WS.

41 R Costigan, J Sheehan, P A Thomas, *The Human Rights Act 1998: An Impact Study in South Wales*, Cardiff Law School, Cardiff University, February 2004.

38. The need to make the Convention rights real in the lives of those whom they could most help is clear. However, in line with our general view that the new commission should not be involved in individual cases, we consider that it should have only the power to assist those (such as NGOs, advice centres and Citizens Advice Bureaux) who provide such services directly, and to guide enquirers to such sources of advice. Several submissions emphasised the need to build capacity through advice organisations such as law centres, through advocacy groups, and through community-based associations, and the government indicated in its statement of 30 October last year that a key task for the new body would be—

Developing partnerships with a range of bodies at regional and local level, including statutory, voluntary and business organisations, to deliver local, accessible information and advice to individuals, public sector bodies and businesses.⁴²

The Law Centres Federation pointed out that—

Many people who have been described as socially excluded are the most vulnerable in society and more likely to have experienced discrimination and the denial of fundamental rights. It is these very people that need legal help and advice and yet are the people who are least likely to seek help and probably the least likely to seek redress from what might be perceived as a remote and impersonal central body ... It is important that there are legal services at the grassroots level able to take up local issues.⁴³

39. How it discharges and resources this function, otherwise than through direct provision, should be a matter for the commission to decide. We reiterate our conclusion in our report last year that **the commission should have the function of improving knowledge and understanding of human rights issues amongst lawyers and others who offer advice to citizens and building local capacity in these functions. It should be able to do this through funding education and research, and funding the development and provision of advice services provided in the voluntary sector. It should not undertake such advice functions directly itself.**

40. Litigation is not always the best means of resolving disputes over competing rights or forestalling further violations. The courts now encourage ADR to avoid unnecessary litigation. In the section on powers below, we consider further the question of how the commission should support individuals and in particular the encouragement of alternative dispute resolution techniques in appropriate circumstances. We believe that this function fits with the strategic approach which the commission will need to take to its work and would contribute to a wider understanding of and respect for human rights.

42 HC Deb, 30 October 2003, cols 18–20WS.

43 See Appendix 18.

Supporting Communities

41. At a strategic level, too, we would hope that the commission would develop the stature which might enable it to be used, as a respected and independent authority on human rights, in occasionally mediating in critical and sensitive situations in which human rights issues arise in wider conflicts within and between communities and groups of people in this country. In the written statement of 30 October announcing the decision to establish the commission, the government proposed that one of the functions of the new body would be—

Promoting community cohesion through providing support to local initiatives to promote dialogue and understanding between different communities and groups, where relevant drawing upon the balance between rights and responsibilities contained in the Human Rights Act.⁴⁴

42. We agree with this aim. This will be a function relevant to many of the “equality” strands of the commission’s remit, within a human rights framework. **We recommend that the commission be given a general duty to promote good relations and the peaceful resolution of disputes based on respect for human rights between different groups and communities in Great Britain.**

44 HC Deb, 30 October 2003, cols 18–20WS.

3 Powers

43. We now turn to the question of the powers that the commission will require to discharge its general duty in relation to human rights effectively. These can be broadly divided into: inquiry powers, which we believe will be necessary to underpin its ability to promote awareness of human rights within public authorities and best practice in the protection of those rights by public authorities; and powers relating to litigation which, for the most part, will relate to the promotion and protection specifically of the Convention rights and common law rights. Before examining these, we briefly touch on the powers of the proposed commission in relation to equality matters, as distinct from human rights generally.

Equality powers

44. In our report last year we expressed our concern that the new body might be deprived of some of the powerful tools which the current anti-discrimination commissions have to enforce equality protection.⁴⁵ Lord Falconer, in his oral evidence to us on 8 December, was unambiguous on this point—

The commission will have all of the enforcement rights that all the current anti-discrimination bodies have.⁴⁶

He confirmed this later in his evidence—

... assume that they get all the powers from the equality commissions. Those powers will be transferred over to the new commission.⁴⁷

45. **We welcome the explicit commitment from the Government that the new body will have all the enforcement powers of the existing anti-discrimination commissions.** Of course, those powers are different in relation to each area of discrimination (sex, race and disability), and the powers associated with the three new “strands” (age, sexual orientation and religion or belief) are as yet undefined. In oral evidence we pursued the issue of why the Government is so unwilling to take the opportunity of the establishment of the new commission to rationalise the law in a single Equality Act. Lord Falconer argued—

A [single] equality Bill would involve a great deal of detailed thought and consultation, and a process by which you would draw in as many people as possible to [design] a sensible Bill. There would then be a quite legitimate, complicated and pretty intense parliamentary process, which would take a long time. If we do that, that will be where the political and policy energy goes. It would be a process of years, not a process of months ... It is a bitter choice, but we have made the choice in the direction of trying to make improvements where we can, and giving impetus to the commission and to the mainstream equality and human rights ... Do I think that if we spent a lot of time trying to get legislative slots, covering the whole of the equality stuff, that would make

45 Sixth Report, Session 2002–03, *op cit.*, para. 203.

46 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 61.

47 *Ibid.*, Q 65.

a difference? I do not think it would. I think the critical thing is to give it political will and political drive.⁴⁸

46. Almost every submission we received regretted the lack of a programme to develop a single equality Act, and several argued that the decision to proceed with the new body before the legislation had been rationalised and consolidated was either wrong in principle or unworkable.⁴⁹ We recognise that it is not always possible to find the political and other resources to secure a neatly rational approach to legislative and institutional change. Nonetheless, we would urge that the time is found to address this issue before too long. **We look forward not only to rationalisation of the existing equality legislation, but to the “levelling-up” of the laws relating to discrimination on all the grounds which are now identified, particularly by the extension of anti-discrimination provisions for the “new strands” beyond employment and training into the areas of the provision of education, goods and services and by the widening to all areas of discrimination of the concept of “positive duties” requiring public authorities to promote equality of opportunity and treatment. We recommend that legislation to accomplish this, preferably within a single Equality Act, be introduced and enacted with all deliberate speed.**

47. The introduction of the “positive” or “general” duty in relation to the promotion of racial equality, introduced in the Race Relations (Amendment) Act 2000,⁵⁰ and the promised positive duty in relation to disability,⁵¹ both of which were discussed above, provide a crucial link between the equality and human rights aspects of the new commission. Increasingly, the attention of the equality commissions is turning to the public sector, the world of “public authorities”, and it is to public authorities, the various manifestations of the state, that the duty to respect human rights applies. We now examine how the new commission would use what we believe would be a crucial tool in developing a positive conception of a culture of respect for human rights in public authorities—public inquiries.

Public inquiries

48. In our report last year we argued that the new body we proposed should be empowered to conduct inquiries into matters of public policy and practice relating to human rights (with the power to have access to information needed for an effective inquiry). The Paris Principles propose that a national human rights institution should be able—

To submit to Government, Parliament and any other competent body on an advisory basis, either at the request of the authorities concerned or through the exercise of its

48 Ibid., QQ 96 and 98.

49 See Appendices.

50 “Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—(a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups.” (section 71(1) of the Race Relations Act 1976, inserted by section 2 of the Race Relations (Amendment) Act 2000).

51 “Every public authority shall in carrying out its functions have due regard to—(a) the need to eliminate discrimination that is unlawful under this Act; (b) the need to eliminate harassment that is unlawful under this Act; and (c) the need, where opportunities for disabled persons are not as good as those for other persons, to promote equality of opportunity between disabled persons and other persons by improving opportunities for disabled persons.” (section 8 of the Draft Disability Discrimination Bill, Cm 6058-I, December 2003).

power to hear matters without higher referral, opinions, recommendations, proposals and reports on ... any situation of violation of human rights which it decides to take up ... [on] the national situation with regard to human rights in general, and on more specific matters ... [and on] situations in parts of the country where human rights are violated ...⁵²

49. Without this ability the CEHR will not be able effectively to guide and advise public services, Parliament and central government. It needs to be able to establish a credible evidential basis for the advice it provides. Sometimes this will be achievable through research, but sometimes it will need the added weight of a general inquiry with public access, public evidence, and the possibility of challenge to the claims of witnesses—a weight which the government recognises is added when it establishes inquiries such as the Laming,⁵³ Hutton⁵⁴ and Bichard⁵⁵ inquiries, to name only the most recent. The central task of “promotion” of human rights does not just mean effective public relations, advertising and education, but also effective, credible inquiries backed up by necessary investigative powers.

50. Several submissions we received proposed that this power should be on all-fours with the investigatory powers of the existing anti-discrimination commissions, and include a power to undertake “belief” inquiries into suspected violations of rights by individual named public authorities (which could encompass individual persons in theory).⁵⁶ We are not yet persuaded that this is either necessary or desirable. Other submissions contrasted the nature of the law on human rights compliance, which pervades all the actions of the state in sometimes unpredictable ways, and the more tightly defined nature of unlawful acts of discrimination. The Human Rights Act established mechanisms for enforcing compliance with the Convention rights through the courts and Parliament. The courts are developing their jurisprudence in interpreting the rights and establishing the thresholds at which a violation can occur—a novel undertaking and one which inevitably is still getting to grips with the open texture of human rights compared to anti-discrimination legislation.

51. Taking these considerations into account, we are not convinced that the investigatory powers of the new body should include “belief investigations” and the equivalent of non-discrimination notices etc., at least in the first phase of its work. For the time being at least, the investigatory power of the new body in relation to free-standing human rights matters should be more circumscribed. **We do not recommend that the power of public inquiry into matters of public policy engaging human rights should be used to investigate individual cases.** We remain convinced of the importance of not allowing the CEHR any

52 Sixth Report, Session 2003–03, op cit., Annex A, paras. 3(a)(ii), (iii) and (iv).

53 Into the death of Victoria Climbié.

54 Into the circumstances surrounding the death of Dr David Kelly.

55 Into the circumstances surrounding the appointment of Ian Huntley to work in a school in Soham, Cambridgeshire.

56 The EOC and the CRE have the power to conduct two main types of formal investigation. There is the power to conduct general investigations into issues within their mandate. These do not result in findings of unlawful discrimination or non-discrimination notices, and the power to obtain information by compulsion requires the Secretary of State’s consent. There is also the power to conduct a so-called “belief investigation”, where the EOC or CRE reasonably suspects that named persons have committed acts of unlawful discrimination. Here they have the power to obtain evidence by compulsion (subject to control by the courts), and may make findings of unlawful discrimination. They may also issue non-discrimination notices which are legally binding unless they are successfully appealed against in the courts. The Commissions are able to bring proceedings for persistent discrimination if, during the period of five years from the issuing of a non-discrimination notice, a named person has committed further unlawful discriminatory acts.

implicit or explicit adjudicative function. The power is intended to enable the commission, when it chooses, to examine evidence of systemic or systematic human rights abuses occurring. Examples of the kind of inquiries which might be undertaken might include—

- our own current inquiry into deaths in state custody (Articles 2 and 3 ECHR);
- evidence of systematic abuse of people in care (Articles 3 and 8 ECHR);
- exploitation of immigrant workers (Article 4 ECHR);
- immigration detention (Article 5 ECHR);
- handling of allegations of abuse against teachers and social workers, etc. (Article 6 ECHR);
- freedom of the press and intrusive reporting (Articles 8 and 10 ECHR);
- public order and the management and control of marches, parades and demonstrations (Articles 10 and 11 ECHR and Article 1 of Protocol No. 1 ECHR);
- civil rights of people with learning disabilities (Articles 3, 6, 8, 12 and 14 ECHR and Articles 2 and 3 of Protocol No. 1 ECHR).

Any of these are topics that might be addressed by a select committee, and several of them have.⁵⁷ The CEHR would, however, bring a distinctively rights-based approach to such work. The conclusions of a public inquiry conducted by the commission should feed into the political process, enabling Parliament, central government and public authorities in general to adapt law, policy and practice to ensure where necessary better protection of human rights.

52. On the question of public inquiries, Lord Falconer told us in his oral evidence—

... we are not ... keen for [the commission] to be able to litigate solely on human rights issues; but it would be able, in the context of the equality and human rights issues, to do investigations.⁵⁸

We agree with the Government that this inquiry power is desirable, and we believe that inquiries have the potential to be a powerful counterweight to litigation. In theory, at least, any individual can bring a claim for breach of the Human Rights Act but only a statutory institution with supporting powers can conduct inquiries. **We emphasise that the power to conduct public inquiries which we propose should be a novel, free-standing power in relation to matters of public policy which engage human rights, not dependent on equality issues being engaged and the use of the existing anti-discrimination powers**

57 See for example the Second Report from the Health Committee, Session 2003–04, *Elder Abuse*, HC 111-I, which comments at paragraph 13, “ ... there is no single definition of elder abuse which would satisfy every test. Nevertheless, we consider that the reference to the violation of an individual’s human and civil rights by another person or persons provides a useful foundation. The proposed Commission on Equality and Human Rights, ... could be an important step in offering further protection to older people whose human rights are infringed by abuse ... However, we are concerned that ... in respect of human rights it will only have promotion, but no enforcement, powers ... we urge the Government to enable the Commission ... to promote and enforce both equality and human rights on an equal basis.”.

58 Minutes of Evidence taken before the Joint Committee on Human Rights, 8 December 2003, HL Paper 45, HC 106-I, Q 61.

that will be vested in the new commission. However, the distinction between human rights and equality inquiries, while important, will be likely in practice to become blurred. Most inquiries into equality matters are likely to throw up human rights concerns, and often a human rights inquiry might reveal unlawful discrimination. This power is likely to need reviewing in the light of experience in operating the integrated commission.

53. When giving evidence to us on 8 December, the Secretary of State for Constitutional Affairs was asked—

In the investigative role of human rights generally, is it common ground that whatever the detail, the commission will have to have the power to get the information effectively to carry out an effective investigation?⁵⁹

Lord Falconer of Thoroton responded—

We need to consider the extent to which it should have coercive powers in that respect, and the extent to which those coercive powers should either be dependent upon court-sanctioned activity or minister-sanctioned activity. All of those issues are up for discussion in the context of the consultation ... I think there is an issue about the scope in respect of which those investigatory powers can be used—equality and human rights only, equality only or whatever. I do not want to give a misleading answer. I do not want to suggest there will be a new sort investigation to be conducted. All I can say at the moment is that the same powers that are in the anti-discriminatory bodies will be transferred over; precisely how much wider, in terms of scope such investigations will take place, needs to be considered in the consultation processes I have outlined.⁶⁰

54. As we have said above, the existing formal “belief” investigation and linked enforcement powers of the anti-discrimination commissions should not be assumed to be the template for the novel inquiry power that we propose in relation to free-standing human rights issues. In particular, we do not believe they should involve the powers to issue the human rights equivalents of “anti-discrimination” orders, and subsequently take action to enforce them. This would effectively enable the commission to supervene the courts in determining what was and was not a violation of rights, and in our view the scheme of the Human Rights Act does not contemplate this. In cases where the rights in question went more broadly than the Convention rights, it would clearly be inappropriate to grant enforcement powers to the commission. **Where the commission did, in the course of an inquiry, identify practices which appeared to have led, or appeared likely to lead, to breaches of the Convention rights, it should have power to identify the actual or potential violations occurring and to make recommendations as to changes in practice or in the law which it considered necessary or desirable.**⁶¹ However, we consider that the absence of direct enforcement powers does raise a question about the commission’s ability to seek judicial review on questions relating to the conduct of particular public authorities and their compliance with the Convention rights. We discuss this further below.

59 Ibid., Q 67.

60 Ibid., QQ 61 and 67.

61 Were it to make its reports on these matters through Parliament, as we suggest below it should, the protection of privilege should go some way to avoiding questions of defamation.

55. The anti-discrimination commissions can be directed by the Secretary of State to undertake formal investigations. **Because the duty to act compatibly with the Convention right is imposed by the Human Rights Act on public authorities (including Ministers and their departments) we do not consider it appropriate for a power of ministerial direction to be applied to inquiries into matters of public policy engaging human rights. It should be open to a Minister to ask the commission to undertake such an inquiry, and to make his request publicly, but not to require an investigation.**

56. It is important that the human rights inquiry function is properly underpinned by appropriate powers to prevent an inquiry being rendered ineffective through deliberate obstruction, making the commission nothing more than a paper tiger. The Paris Principles require that—

... within the framework of its operation, the national institution shall ... hear any person and obtain information and any documents necessary for assessing situations falling within its competence.⁶²

However, a difficulty arises because in most cases the subjects of any inquiry will be public authorities or central government. Because of this, we would hope that these will be powers of last resort and need to be used only very occasionally, if at all. But by the same token, it would not be appropriate to require the sanction of a Secretary of State for the exercise of these powers, as is the case with the anti-discrimination commissions at present. In our report on the work of the Northern Ireland Human Rights Commission we noted—

In a number of instances in its work, the Commission has been refused information by public bodies. It has encountered difficulties in obtaining permission from the Northern Ireland Office, from Juvenile Justice Centres, and from voluntary organisations, to interview detainees at the centres and to obtain access to documents. The Commission has also said that it has had difficulty obtaining information from the Ministry of Defence and the (then) Royal Ulster Constabulary on the use of plastic baton rounds; from the Prison Service on the death of a prisoner; and about the Key Persons Protection Scheme, which the Commission wished to audit for compliance with Article 2 of the ECHR.⁶³

57. We were reluctant in our report on the NIHRC to accept the proposition that the Commission should use judicial review to enforce disclosure of material necessary to its investigations. The obvious solution is to give the CEHR the same powers in relation to human rights inquiries as it would have in relation to general investigations in its equality work.⁶⁴

62 Sixth Report, Session 2002–03, *op cit.*, Annex A, para. 3(b).

63 Fourteenth Report, Session 2002–03, *op cit.*, para. 64.

64 For example under paragraphs 4 and 5 of Schedule 3 to the Disability Rights Commission Act 1999:

“4.—(1) For the purposes of a formal investigation the Commission may serve a notice on any person requiring him—(a) to give such written information as may be described in the notice; or (b) to attend and give oral information about any matter specified in the notice, and to produce all documents in his possession or control relating to any such matter.

(2) A notice under this paragraph may only be served on the written authority of the Secretary of State unless the terms of reference confine the investigation to the activities of one or more named persons and the person being served is one of those persons.

(3) A person may not be required by a notice under this paragraph—(a) to give information, or produce a document, which he could not be compelled to give in evidence, or produce, in civil proceedings before the High Court or the

58. As we saw in relation to the NIHRC, there will be circumstances in which a human rights inquiry will make it necessary for the Commission to enter certain premises. It should have the right of reasonable access to any public authority premises.

59. The Law Society proposed that the commission should have the power “to conduct investigations, following allegations of systematic abuse, not only in public bodies, but also non-Governmental bodies, to promote human rights in situations where victims are inhibited to come forward”.⁶⁵ We have discussed the meaning of “public authority” under the Human Rights Act, in relation to the notion of “functional public authorities” in some detail in a recent report.⁶⁶ We consider that the power of inquiry should extend to any body which is exercising a “public function” within the meaning of section 6(3)(b) of the Human Rights Act as far as relevant to that function. Although we attach importance to the promotional function of the commission in relation to human rights extending to the private and voluntary sectors, we do not consider that the investigation power should extend to purely private bodies, except where this is incidental to this power being exercised in respect of public authorities.

60. We recommend that the Commission for Equality and Human Rights should have the power—

- **to conduct public inquiries into matters of public policy engaging questions of human rights relating to the policies and practices of public authorities;**
- **subject to judicial supervision, to have the same process as the EOC and CRE to obtain access to information relevant to the terms of the inquiry;**
- **to hold public hearings in relation to any such inquiry and require the attendance of witnesses;**
- **to publish its findings and to make recommendations,**
- **to give guidance or provide advice to any public authority on any matter arising from any such inquiry, and to publish that advice if it thinks fit.**

Court of Session; or (b) to attend at any place unless the necessary expenses of his journey to and from that place are paid or tendered to him.

5.—(1) The Commission may apply to a county court or by summary application to the sheriff for an order under this paragraph if—(a) a person has been served with a notice under paragraph 4; and (b) he fails to comply with it or the Commission has reasonable cause to believe that he intends not to comply with it.

(2) An order under this paragraph is an order requiring the person concerned to comply with the notice or with such directions for the same purpose as may be contained in the order.”

65 See Appendix 19, Ev 63.

66 Seventh Report, Session 2003–04, *The Meaning of Public Authority under the Human Rights Act*, HL Paper 39, HC 382.

Litigation and related powers

61. As we stressed in our report last year, we do not want the commission to become a major litigant in the human rights field. It should be most focused on promoting a culture of respect for human rights in public authorities through other means than law enforcement. However, recourse to the courts for vindication and redress is fundamental to the protection of human rights, and in our report last year we were undecided on whether the commission should have powers—

- a) to provide assistance to individuals to take cases relating to human rights questions;
- b) to be able to take cases in its own name;
- c) to be able to seek judicial review in its own name.

The decision of the House of Lords in relation to the NIHRC⁶⁷ indicates that third-party intervention and *amicus* functions would be held to be implicit, whether the statute made them explicit or not.⁶⁸

62. The respondents to our original consultation last March were largely in favour of the new body having the full panoply of powers suggested. The BIHR⁶⁹ strongly supported giving the power to the commission to take test cases. The Law Society⁷⁰ favoured the involvement of the commission in funding individual cases. However, JUSTICE believed that this responsibility should lie exclusively with the Legal Services Commission. It also considered that it would be—

... prudent to allow the human rights body to develop its role by way of *amicus* briefs and third party interventions. Should these powers prove inadequate, further litigation functions could be added at a later stage.⁷¹

Liberty commented that—

The lack of any public body with an educational or informational role has left a gap between human rights litigation in the courts and public awareness ... it is crucial that debate around litigation powers does not detract from the wholehearted support which the commission should receive.⁷²

63. We assume that the undertaking that the existing powers of the anti-discrimination powers will be transferred to the new body means that Ministers have decided that, for the three new anti-discrimination “strands” which are to be provided for,⁷³ the proposed Commission for Equality and Human Rights should have broadly the same powers to initiate proceedings and assist individuals in test cases as do the existing equality commissions. We therefore consider in this section the arguments for and against the awarding of free-standing human rights litigation powers to the new commission.

67 *In Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25.

68 See Fourteenth Report, Session 2002–03, *op cit.*, paras 60–62.

69 See Appendix 4.

70 See Appendix 19.

71 See Appendix 16.

72 See Appendix 20, paras. 1 and 5.

73 i.e. sexual orientation, religion or belief and age.

Support in bringing individual human rights cases

64. The principal argument against the commission being granted new powers to support individuals in bringing free-standing human rights cases is that this would risk it becoming overwhelmed by a host of individual cases. Our own experience of human rights commissions abroad indicates that this fear is well-founded. The pressure of dealing with such applications could drain resources from promotional work, and might tend to skew the attention of the commission in the direction of litigation in individual cases and away from promotion. It is argued that the existing arrangements for public access to justice under the Human Right Act, with funding potentially available from the Legal Services Commission, are sufficient.

65. Liberty, for one, expressed concern about the availability of legal aid, and measures taken by the government to reduce its cost. However, it went on to say—

We would not want the existence of a litigation function in the commission to be used as justification for further inroads into the ability of private practitioners and non-governmental organisations to take cases. The commission cannot be a conventional regulator, as the range of potential human rights actions is too broad and too varied to allow any strategy to successfully replicate the work of existing litigators.⁷⁴

66. The power of the existing commissions to support individual cases derives from their more specialised enforcement functions and the need to provide support in strategic cases for individuals going to employment tribunals or the county or sheriff court. It would certainly be possible to restrict the power to support individual free-standing human rights cases by the imposition of statutory criteria.⁷⁵ However, we noted in our report last year on its work the problems which arose in the Northern Ireland Human Rights Commission in relation to the support of individual cases.⁷⁶ In particular, we noted the difficulty in reconciling the need for a strategic approach with the obligation to treat all applicants equally. To give fair consideration to all the applications made for assistance in order to identify the small proportion which satisfy the criteria would be likely to be extremely resource-intensive. Even after this sifting process, it is likely that availability of resources would allow only a small proportion of the eligible cases to be funded.

67. We also noted that in Northern Ireland a dual source of potential assistance in taking a case led to confusion—

Under current regulations, applicants to the Legal Aid Department will be refused consideration of their application for legal aid if there is the possibility of funding from another source, such as the Human Rights Commission. The result is that applicants must first apply for assistance to the Human Rights Commission, knowing that their application will be refused on the grounds that they are eligible for legal aid. Applicants must then revert to the Legal Aid Department. This lengthy process causes

74 See Appendix 20, para 6.

75 For example, section 7(2) of the Disability Rights Commission Act 1999 states, so far as is relevant: "Where the individual concerned 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: (a) that the case raises a question of principle; (b) 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); (c) that there is some other special consideration which makes it appropriate for the Commission to provide assistance."

76 Fourteenth Report, Session 2003–04, *op cit.*, paras. 53–59.

difficulties for applicants, in particular in urgent cases. As one solicitor’s firm noted, the product of this situation is that—

... for an Applicant who is eligible for legal aid, they are placed in a worse position in a case with a human rights dimension, than they were in prior to the establishment of the Human Rights Commission.⁷⁷

This is clearly an unacceptable outcome.

We concluded—

...the Northern Ireland Commission’s experience tends to confirm our view that, in general, it is impractical for human rights commissions to have a leading role in providing legal assistance to individuals bringing human rights claims.⁷⁸

68. That remains our view and, accordingly, **we conclude that there need not, for the time being, be any express new power for the CEHR to support individual free-standing cases under the Human Rights Act.** An individual case should be eligible for CEHR support only where it is founded on an allegation of discrimination in relation to one or more of the six strands.

69. In a sense, the *quid pro quo* for this restriction is the clear duty which, in the previous section, we have suggested should be given to the commission to educate and inform those who do provide advice and assistance to those who most need it. This “capacity building” work will, we believe, be a central and vital element in the commission’s human rights work (as well as, of course, in its equality work). In particular, its legal expertise should both be of the highest expert quality and effectively disseminated at minimum cost to those bodies which can use it and to those organisations which can channel it closer to the front line.

70. We also believe that this expertise should be brought to bear on decisions about the funding of strategic cases. **We recommend that the Legal Services Commission and the CEHR should develop a memorandum of understanding which allows consultation to take place on the formulation of criteria for strategic funding of human rights cases and for the Public Interest Advisory Panel of the Legal Services Commission to seek advice from the CEHR on the application of these criteria in particular cases.**

Alternative dispute resolution

71. An additional *quid pro quo* for the restriction on support for individuals bringing human rights cases is, as we have suggested, promoting alternative methods of resolving disputes in suitable cases. Not every claim of breach of the Human Rights Act needs adjudication by the courts, as judges, among others, have noted.⁷⁹ Care needs to be taken to ensure that claimants do not forego their right of access to a court and the commission needs to consider the practicalities in detail. **We consider that a general power to support alternative dispute resolution approaches to allegations of breaches of human rights by**

77 Ibid, para. 58.

78 Ibid, para. 57.

79 Woolf LJ in *Frank Cowl & ORS v Plymouth City Council (2001)* [2001] EWCA Civ 1935.

public authorities would be a valuable ancillary to the commission’s general duty to promote a culture of respect for human rights. As with the DRC,⁸⁰ it should be explicitly disbarred from providing such services itself—otherwise it would be a route by which it might again be drawn into individual cases and start developing an ombudsman-style role which would be at odds with the strategic role which we believe it should have.

“Mixed” cases

72. However, the existing commissions already make use of the Human Rights Act in a variety of situations. This has come about for two main reasons. First, the Human Rights Act affects the interpretation of all legislation⁸¹ including the legislation under which the commissions operate. The commissions are under a duty to interpret and give effect to all legislation compatibly with the rights in the Human Rights Act, including their parent legislation. They may seek interpretations more favourable to disadvantaged persons than might be the case on a strict reading of a piece of legislation.

73. Second, the rights guaranteed by the Human Rights Act may be relied upon, by victims of the incompatible act, in any legal proceedings.⁸² This applies in principle, for example, to all anti-discrimination cases funded by the commissions where the person being supported is also the victim of a human rights violation. And, in practice, the Human Rights Act will often be relevant in anti-discrimination cases, for example where the discrimination relates to the enjoyment of the Convention rights, because the rights include a widely drawn guarantee of non-discrimination in the enjoyment of other Convention rights (Article 14). The rights guaranteed include those concerning the fairness of legal proceedings (Article 6), the protection of privacy and family life (Article 8), freedom of religion and belief (Article 9), freedom of expression (Article 10), freedom of association (Article 11), the right to private property (Article 1 of the First Protocol) and the right to education (Article 2 of the First Protocol). When such issues arise in proceedings in which the commissions are engaged, reference to the human rights involved can strengthen the arguments being made on behalf of the victim of discrimination.

74. There is not (nor does there need to be) a specific human rights power in the commissions’ founding legislation for any of this to happen. Though their powers and duties are each cast in somewhat different terms, all appear sufficient to allow this basic use of the Human Rights Act. In addition, like any statutory body, the commissions have an implied power to do anything ancillary to their powers. They are also, as public authorities for the purposes of the Human Rights Act, themselves under a duty to act compatibly with Convention rights, including the positive obligation in appropriate circumstances to take steps to protect Convention rights.⁸³

80 Section 10 of the Disability Rights Commission Act 1999 (inserting a new section 28 in the Disability Discrimination Act 1995) provides for the Disability Rights Commission to support conciliation services in relation to disputes under Part III of the 1995 Act, but explicitly bars it from providing such services itself.

81 See Human Rights Act, s 3.

82 See Human Rights Act, s 7(1)(b).

83 We note that, even before the Human Rights Act was enacted, the Northern Ireland Fair Employment Commission supported a test case before the European Court of Human Rights, successfully relying upon the ECHR to secure a right of access to court in the determination of allegations of religious discrimination, *Tinnelly & Son Ltd and McElduff v UK* (1998) 27 EHRR 249.

75. As a result, although the existing commissions have power only to fund specified types of case, the Convention rights are becoming an important and natural feature of their litigating environment.⁸⁴ Such “mixed” equality and human rights cases are inevitable, and a number of important commission cases have been determined by the court or tribunal wholly on the basis of the Human Rights Act.⁸⁵ We welcome these developments. In our view it would therefore be perverse to seek to prevent the new commission, which will contain a specific human rights function, from being able to rely directly on the Human Rights Act. It would also run contrary to the general scheme of the Human Rights Act, which has an impact on all legislation and all public authorities.

76. The new commission should therefore be able to use the Human Rights Act in any anti-discrimination case when the facts indicate a relevant breach of human rights. The CEHR must be able to fund “mixed” cases. But where the case fails in relation to its founding anti-discrimination argument but is left with an argument based on the Convention rights which is relevant to the new body’s strategic interests, it would we believe be quite wrong for the commission to be required to abandon support for a case where the facts continued to disclose a breach of human rights (for example where someone had successfully defended the anti-discrimination part of a case on the basis that he or she had meted out bad treatment to everyone indiscriminately). More importantly, the new commission must be able to address some instances of discrimination which are not covered by any of the six strands. **We consider that a power to invoke the human rights dimension should be considered to be implicit in the new commission’s litigation and enforcement powers relating to its equality functions—if this is in doubt, then the legislation should be so framed as to ensure that the CEHR can rely confidently upon the Human Rights Act in relation to the Convention rights related to those functions.**

Assisting and intervening in the courts

Third-party intervention and amicus

77. **It is self-evident that the new commission should be able to seek to intervene in proceedings relating to human rights in the higher courts, or with the permission of the court to act as a friend of the court.** Under section 3 of the Human Rights Act the courts are required to “so far as it is possible”, to give effect to legislation “in a way which is compatible with the Convention rights”, and section 2 of the Act requires any court or tribunal to have regard to the Strasbourg jurisprudence in doing so. The courts need to know about the wider policy background to the cases before them. One important reason for this is the sharper focus, following the Human Rights Act, on questions of proportionality and the balancing of rights. Addressing these fully might require:

84 See for example *Pearce v Mayfield School* [2001] EWCA Civ 1347 [2002] ICR 198 in which Hale LJ held that abuse of a teacher on grounds of sexual orientation though not sex discrimination might have been a breach of Articles 8 and 14 of the ECHR (see also the judgments of the House of Lords in [2003] UKHL 34 at [2003] ICR 937); and see also the intervention of the Disability Rights Commission in *R. (on the application of A and B) v East Sussex County Council* [2003] EWHC 167 (Admin) in which the Administrative Court held that free-standing human rights issues arose under Articles 3 and 8 of the ECHR in the application of the Manual Handling Regulations to the treatment of disabled persons.

85 See for example *Mendoza v Ghaidan* (discrimination on grounds of sexual orientation in housing); *R (SG) v Liverpool CC* (discrimination on grounds of sexual orientation under the Mental Health Act); *Av Chief Constable W Yorks* (discrimination against transgender person in employment context); *Bernard v LB Enfield* (ill treatment of disabled person by local authority)

- information on the number of others likely to be affected and other relevant statistical and factual material;
- information on conflicting rights and interests which might need to be balanced in the interests of justice;
- advice on the general public significance of the case in terms of equality and human rights issues.

78. These are all perspectives that parties to a case might not have—or want to introduce—but which could be highly relevant to the interests of justice and to the public interest more generally. The courts may, at their discretion, allow third parties to intervene. The decision whether to allow such an intervention involves balancing the possible value of the assistance against considerations of delay, expense and impact on existing parties.⁸⁶ The frequency of such interventions and the legal costs involved are relatively low.⁸⁷

79. The existing commissions already operate in this way, under their general and implied powers. They regard third party interventions as an effective strategic tool in advancing their general aims. They have also made some interventions in free-standing human rights cases, and courts have expressed their appreciation for the assistance they have given in such cases.⁸⁸ The Northern Ireland Human Rights Commission and, it is proposed, a Scottish Human Rights Commission, will be able to intervene in free-standing human rights cases which have UK-wide implications. **The CEHR will become an authoritative national resource of knowledge and expertise on equality and human rights, and this resource needs to be made available to assist the courts, where a case raises wider policy interests engaging questions of human rights.**

80. The ECHR makes explicit provision for third party interventions in human rights cases heard in Strasbourg,⁸⁹ and we would expect the commission might take this opportunity. It would not normally be necessary to make express legislative provision for third party interventions in the UK courts by a statutory body. However, given the asymmetry which will exist between the CEHR's powers in relation to its various functions, it would seem sensible to clarify the position regarding third party interventions. Expressly providing for the CEHR to intervene in relation to “pure” human rights cases should not create a significant burden for the new body: they would be likely to form only a small part of the overall litigation strategy and could in any case be made only on the relatively rare occasions where the court considered that it would be in the interests of justice. It should not be drawn into a large number of cases, a situation which would only arise if it failed to maintain a suitable strategic balance in its work. If express provision were made in the legislation to allow the commission such functions, it might, however, be desirable to make

86 See Lord Woolf in *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 at para. 32.

87 Trends in allowing such interventions appear to show some increase in recent years (in 2002 there were 14 such applications in HoL and 8 granted; in 1997, 4 applications and 4 granted).

88 See for example DRC intervention in *R v East Sussex County Council ex parte A, B* (which used Arts 3 and 8 on the back of s2(1)(c) of the DRCA 1999. It is understood that the DRC has also intervened using HRA arguments in challenges to the law on late abortions and as regards policy to withdraw medical treatment.

89 Art 36(2): “The President of the Court may, in the interests of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.”

specific provision empowering it only to intervene in cases which raised an important matter of principle concerning human rights and public policy.

Taking cases in its own name and judicial review

81. In our report last year we declared ourselves undecided on whether the proposed commission should be able to initiate “representative” cases in its own name or seek judicial review in its own name on questions relating to human rights. In general, in order to gain the permission of the court to apply for judicial review, the applicant is required to demonstrate a “sufficient interest” in the cause of action. Like the right to make third-party interventions, the right to seek judicial review is not normally expressly conferred on statutory bodies. This is because it is taken to be implicit, provided the body can show “sufficient interest” and is acting in pursuit of its functions in some way.

82. The existing commissions have sought judicial review on a number of occasions.⁹⁰ Although the anti-discrimination legislation in general specifies that the remedies are available only to the individual victim of an act of discrimination, the Acts specifically preserve the right to seek judicial review of an allegedly unlawful act.⁹¹ In contrast, in section 7 of the Human Rights Act (which provides for remedies in relation to an unlawful act by a public authority under section 6 of the Act) subsection (3) states—

If the proceedings [under section 7(1)] are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.⁹²

83. This is known as the “victim test”. It reflects Article 34 of the Convention, governing the admissibility of applications to the Strasbourg Court, which states—

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation ...

The victim test is designed to avoid abstract, theoretical “victimless” human rights cases and those brought by unrelated third parties. It has the effect of preventing the existing commissions from asserting directly the Convention rights through the courts, even where these are relevant to their proper purposes.⁹³

84. The decision definitely to proceed with an integrated commission throws into starker relief the oddities and inconsistencies of the powers it will have in relation to the different “strands” of its responsibilities. In judicial review relating to the Convention rights, the court is able to focus directly upon the issue of concern and provide a remedy which

90 See for example *R. v SofS for Employment, ex p. EOC* [1995] 1AC 1, “It would be a very retrograde step now to hold that the EOC [should not be allowed to] agitate in JR proceedings questions related to sex discrimination which are of public importance and affect a large section of the population”.

91 Sex Discrimination Act 1975, s 62(2) and Race Relations Act 1976, s 53(2).

92 Section 7(4) reproduces this provision for Scotland.

93 In exceptional cases, the courts will permit a non-victim with a sufficient interest to seek a declaration that a proposed course of action by the State, based on statute, is unlawful as being incompatible with the Convention rights. In such exceptional cases the court can make use of the interpretative power under s.3 Human Rights Act, and can make a declaration of incompatibility under s.4: *Rusbridger and Toyne v AG* [2003] UKHL 38. However in that case the House of Lords stressed such an action will only be permitted in exceptional cases: Lord Hutton para. 36, Lord Rodger para. 58; Lord Walker para. 61.

addresses it directly. Typically, judicial review proceedings would consider the legality, fairness or proportionality of a statutory rule or an administrative practice or decision. Though there is no power to overturn an Act of Parliament, the court can quash regulations, order practices to cease, or order the public authority to act in some way, unless the authority is required by statute to act in the way it has. If the victim test remains unaltered, the consequence would be that the new body would be able to seek judicial review of the actions or omissions of a public authority on all grounds of illegality except incompatibility with human rights.⁹⁴

85. The CEHR would therefore be prevented from seeking a definitive ruling from the court in circumstances where its findings about the incompatibility with human rights of particular rules or practices or omissions in the delivery of public services are rejected or ignored by the public authority or authorities concerned. For example, if the commission were to find, following a general investigation, that the policies or practices of all or some NHS Trusts trammelled the ability of doctors to decide about the treatment of terminally-ill patients according to their clinical judgement, in a way which threatened a violation of the right to life under Article 2, it would have no route of recourse to the courts to determine whether its judgment was upheld and to obtain a declaratory judgement or other public law remedy.

86. In relation to allegations of acts which are unlawful under the anti-discrimination legislation, it might be possible to overcome that difficulty by finding an individual victim to take a case and then seek to intervene as a third party.⁹⁵ We do not think it would be satisfactory, however, to have the statutory body whose remit includes the promotion and protection of human rights reduced to seeking to protect those rights by cumbersome, indirect and opaque legal manoeuvres.

87. The counter-argument is that giving the CEHR the power to rely on the Convention rights in proceedings where it is unable to identify (or, more likely, persuade to participate in the action) any victims or potential victims would involve a more extensive approach to the Convention rights than either the Human Rights Act envisages or the Strasbourg Court has entertained.⁹⁶ Nor do the UK courts entertain academic or theoretical argument, divorced from consideration of the facts. But against this it could be argued that the right of individual application to the European Court of Human Rights is designed principally for the provision of individual redress, as a court of last resort, whereas the national system is the first line of defence which should properly be concerned not only with individual redress but also with matters of principle and systemic violations. In particular, the

94 Section 3 of the Human Rights Act, which requires legislation always to be read compatibly, and not only in cases brought under section 7, is one way of bringing human rights points into ordinary judicial reviews. But it will not be useful in all cases.

95 See for example the DRC might apply to intervene in proceedings to argue that a particular practice was contrary to the human rights of disabled persons (e.g. a particular medical practice in relation to “do not resuscitate” policies or abortion, or contrary to a private and family life under Article 8).

96 Although it could be argued that giving the new Commission power to rely on Convention rights in a representative capacity is not wholly inconsistent with the Strasbourg approach to the victim requirement. The Court does frequently assert that challenges to the state of the law in the abstract are impermissible as a reason for not entertaining a challenge, but it is also well established that it will entertain such challenges: for example in *Dudgeon* and other cases involving the criminalization of homosexuality, individuals have been allowed to challenge the state of the law, even though they have never been prosecuted, on the basis that it might be applied to them in future (see also *Sutherland v UK*: age of consent).

bringing of rights home through incorporation of the Convention rights in domestic law should be able to prevent violations before victims emerge.

88. This question is not of significance only to the “pure” human rights dimension of the commission’s work. For example, the Human Rights Act, as the Disability Rights Commission has pointed out, has particular significance for disabled people. That disabled people have the same human rights as other people is not a proposition that they have been able to assume is taken for granted by society as a whole. The withdrawal or restriction of medical services, the abuse and degrading treatment of disabled people in institutional care, and prejudiced judgements about the parenting ability of disabled people are just some of the areas where the Human Rights Act could help disabled people assert their right to live fully and freely, on equal terms with non-disabled people.

89. We consider that the main role of the commission (in line with its general duty relating to human rights) will be to forestall future potential breaches of people’s rights rather than seek redress for past individual breaches. For this reason we do not consider that the case is yet made for the new body to be able to initiate in its own name “test cases” or representative cases for example seeking exemplary damages or other remedies for past breaches.⁹⁷ **We conclude therefore that there is no currently identifiable pressing need that would be met by allowing the commission power to initiate proceedings in its own name alleging a breach of the rights of an individual.** However, we consider that it would be a glaring omission if the independent statutory body charged with the special duty to protect and promote human rights were prevented from seeking judicial review of actions, failures to act or policies or rules which it believed to be in continuing breach, or to threaten a breach, of the Convention rights.

90. From the commission’s perspective, judicial review would differ from third party interventions not least because the case would be initiated by the commission itself and not be under the control of others. In our report last year we commented⁹⁸ that it was “strongly arguable” that the position of the new commission as a statutory and publicly accountable body, responsible for promoting human rights in the public interest, placed it in a special category, distinct from all other third parties in human rights cases. We believe that the CEHR could reasonably be expected to exercise any such power sparingly. We do not believe this one exception to the general application of the victim test could be expected to “clog up the courts”⁹⁹ with test cases. It is also worth bearing in mind that the court must give permission for a judicial review application to proceed, and it will be well placed to ensure that the courts are not burdened with hypothetical cases, or cases where there are alternative effective remedies. Furthermore, the commission will be accountable to government and Parliament, as well as to the courts, for the way in which it exercises its powers.

97 This conclusion should not be taken as responding to the TUC’s argument for the CEHR to have “representative action powers for employment cases in line with those in the current Civil Procedure Rules.” (Appendix 30, para. 5.1). We have not considered this argument in this report.

98 Sixth Report, 2002–03, *op cit.*, para. 53.

99 *Ibid.*, para. 159.

91. Moreover, we are now more persuaded that account should also be taken of the preventative benefits of permitting judicial review of this kind—*before* individuals are victimised. In the long run it could help forestall more demand on court resources which would be required to deal with less well-informed and more partial challenges. The bringing of one focused claim by a body such as the commission might actually prevent the courts from being unduly burdened.¹⁰⁰ And, as we have said above, an inquiry power without the long-stop of any enforcement mechanism (or route to test the findings in the courts) would, we believe, be very damaging to the credibility of the commission. Finally, and perhaps most importantly, we have now concluded that there is a wider public interest in ensuring that public authorities comply with the law. It would be an indefensible situation in which a commission set up for the express purpose of promoting and protecting human rights was able to identify what it believed were threats to those rights, and no steps were available to it to remove those threats.

92. We recommend that the commission should have a power, notwithstanding the provisions of section 7(3) and (4) of the Human Rights Act, to seek judicial review of the policies or actions or omissions of a public authority where it has reason to believe that such policies or actions or omissions have resulted, or are likely to result, in a violation of the Convention rights.

93. We consider that it would be desirable to achieve this aim by amending section 7 of the Human Rights Act itself (to allow only the new commission to bring cases in which there is no individual victim), rather than conferring an express power on the CEHR in its parent statute. The latter approach requires the Human Rights Act to be read alongside later legislation impliedly amending it, which may be thought to be inconsistent with its status as a constitutional statute setting out in one place the legal regime for the vindication of fundamental rights. However, it would also be possible to achieve this objective through a provision in the new commission's founding legislation.¹⁰¹

¹⁰⁰ See for example the section 55 cases. See also the judgment of Otton J in *R v Her Majesty's Inspectorate of Pollution and Anor., ex parte Greenpeace Ltd* (No. 2) (1994) 4 AllER 329, citing similar reasons for holding that Greenpeace had sufficient interest to bring a judicial review about a nuclear reprocessing plant.

¹⁰¹ For example: "Nothing in sections 7(3) and 7(4) of the Human Rights Act 1998 shall prevent the Commission from bringing a claim for judicial review in respect of an act, or potential act, made unlawful by section 6 of that Act where to do so would further its objects of protection and promotion of human rights."

4 Structure

Equality and human rights

94. The principal structural issue we raised in our report of March 2003—the question of the institutional relationship between the protection of equalities and the promotion of human rights—has been resolved. The commission is to be an integrated human rights and equality body.

95. A number of those who submitted evidence to us remain opposed to this decision in principle, but their opposition is largely to the integration of the equalities strands rather than their being joined with human rights.¹⁰² Others (a larger group) argue that it is illogical to establish the new commission before the equality legislation it will be required to enforce and promote is rationalised.

Transitional arrangements

96. In our report last year we recommended the establishment of a non-statutory “UK Advisory Council on Human Rights” to prepare the way for the new commission.¹⁰³ We recognise that the Taskforce could be seen as a reasonable, if partial, response to this recommendation.

Local relationships

97. We discussed above the need for the new commission to take a light-touch, rather than heavy-handed, approach to its work. A number of submissions¹⁰⁴ expressed concern that the commission could drain energy from local community groups by becoming a monopolistic but remote provider of advocacy and advice on matters relating to human rights and equality. We acknowledge the strength of these arguments, but we also acknowledge that there will always be a tension between building up a central body of expertise and empowering local activism in contexts which take account of the particularities of specific circumstances.

98. We reiterate our belief that the mission of the new commission should take full account of the need to assist others in the work of the promotion of equality and the promotion and protection of human rights. Some submissions argue that this requires a network of local offices, others seem to imply that it should be a small central contracting service giving grant in aid to local providers. We have recommended above that the body must have power to make grants to build local capacity across the strands of its remit. What the precise regional structure of the commission should be is a matter on which we do not have any settled view—we will await the proposals of the White Paper before making further comment.

102 See for example the Mayor of London (Appendix 21), the 1990 Trust (Appendix 32).

103 Sixth Report of Session 2002–03, *op cit.*, para. 220.

104 See Appendices.

99. However, we do recognise that there is a special need to recognise the implications of the devolution settlement. In our report last year we said that there are four basic criteria to be met by any institutional design brought forward—

It must enable the special circumstances of the separate jurisdictions of the UK to be recognised

It must provide for co-ordination at UK-wide level.

It must avoid overlap of responsibilities and duplication of effort.

It must provide clear lines of democratic accountability.¹⁰⁵

As long as these criteria are satisfied, we see no reason to be over-anxious about having tidily symmetrical institutional arrangements in every part of the UK. Asymmetry is one of the inevitable consequences of devolution, and local arrangements will reflect different needs, priorities and judgements.

Devolution and the Scottish and Welsh dimensions

100. The Scottish dimension of the new body will depend to a great extent on the proposals of the Scottish Executive which emerge from the latest round of consultations on the proposed Scottish Human Rights Commission. We recognise that the relationship with the Scottish Human Rights Commission is a matter on which the Scottish Parliament and Executive should take the lead. The National Assembly for Wales has already indicated its belief that there should be a clear Welsh dimension to the institutional arrangements, but appears broadly to have accepted a GB-wide model. There is already a close relationship between the National Assembly's Equal Opportunities Committee and the anti-discrimination commissions. This will no doubt have to be recast. For our part, we would be pleased to have the opportunity to work with partner committees in the Scottish Parliament and the National Assembly.

Northern Ireland

101. The Committee for the Administration of Justice in Northern Ireland wrote to us expressing concern that the new arrangements for Great Britain might affect those in Northern Ireland, where there are separate bodies: a single Equality Commission and Commission for Human Rights.¹⁰⁶ We agree that there are strong arguments in favour of leaving the current arrangements undisturbed. These arrangements are anyway grounded in the Belfast Agreement, and would require wider agreement to be unpicked.¹⁰⁷ For the time being we anticipate no change in the arrangements for the Equality Commission and the Human Rights Commission in Northern Ireland.

¹⁰⁵ Sixth Report, Session 2002–03, op cit., para. 215.

¹⁰⁶ Appendices 8 and 9.

¹⁰⁷ We reported on the *Work of the Northern Ireland Human Rights Commission* in our Fourteenth Report of Session 2002–03, HL Paper 132, HC 142, published on 15 July 2003.

Governance

102. We touched on “governance” issues only briefly in our report last year, in particular the nature of the “board” of the commission (whether executive or non-executive), the number of commissioners and distribution of functions among them. We commented—

In general, there are two basic models for the allocation of functions within a human rights commission—commissioners with designated areas of responsibility (race relations, gender issues, disability, human rights, etc.) or commissioners with designated functions (complaint handling, advice services, litigation, etc.). We saw both models at work in the course of our inquiry, and heard advocates and critics of both models. In general, it could be said that commissions tended to appear to evolve from the former to the latter model over time.

From a human rights perspective, in a fully integrated commission covering anti-discrimination matters and human rights protection and promotion, we are inclined to favour the latter model, emphasising as it does the fundamental point that human rights do not belong especially to any particular group, and that there is no hierarchy of rights. However, we recognise that it may be necessary, at least in the medium term, to find a compromise between these two models ...¹⁰⁸

103. The majority view amongst those who responded on this point appeared to favour, with different qualifications, a functional approach to the governance of the new commission rather than a strand-specific approach. A particularly strong case was made, however, for the need to retain a requirement for people with disabilities to be adequately represented—there is at present a statutory requirement that half the commissioners on the DRC are persons who are, or have been, disabled.¹⁰⁹ It was also argued that an explicit requirement for representation amongst the commissioners for Scotland and Wales would be desirable.

104. These factors will complicate the process of appointing a board of commissioners, making it unfeasible to take a narrowly “meritocratic” approach to its composition. On the other hand, as we said in our report last year, we would not favour a statutory obligation to make the commissioners representative of society in some broadly defined way, and nor would we favour a system of appointment which tended to identify individual commissioners as “champions” of one or other strand of the commission’s remit. Because the reality of individual identity is inevitably complex, the perceived special allegiances of an applicant cannot be the sole criterion to apply in determining appointments. The best guarantee of an effective commission is the commitment of the commissioners to the application of the clear and established standards and principles of universally recognised human rights and the advancement of equality between all persons. A perfectly representative human rights commission would be of little assistance to the people of Great Britain if its work were not directed by the professional skill, expertise and practical experience of its commissioners and staff.

¹⁰⁸ Sixth Report, 2002–03, op cit., paras. 231 and 232.

¹⁰⁹ Disability Rights Commission Act 1999, Sch 1, para 2(2).

105. We recommend that the legislation should provide that commissioners are appointed on a basis that *must* have regard to their experience, knowledge and expertise in matters relating to the commissions functions and powers and *should* have regard to the importance of achieving a balance between representatives of different parts of the United Kingdom and between representatives of those who have particular experience or understanding of discrimination of different kinds.

106. We consider that the commission will need to consider whether it should establish consultative committees to represent the different strands of its activities. We are not yet persuaded that this would best be set down as a statutory requirement relating to specified groups which experience discrimination.

107. We consider that a commission of no fewer than nine and no more than sixteen commissioners would be appropriate. We should emphasise that we would envisage their qualifications as being grounded in their capacity to work together in enabling the commission to combine its functions into an overall strategy of securing compliance with the anti-discrimination legislation and in promoting a culture of respect for human rights.

Independence and accountability

108. In our report last March, we concluded that—

... the standard model of NDPB accountability is [not] a sufficiently outward and visible guarantee of independence from the Government to be appropriate to a national human rights commission (or indeed the proposed single equality body, whether or not integrated with a human rights commission).¹¹⁰

We also commented—

On the whole we would tend to favour a form [of appointment] which requires a duty to consult Parliament on the appointment of commissioners as a guarantee of independence and democratic accountability, so long as this was a statutory duty.¹¹¹

As a guarantee of independence, Parliament should be directly involved in the setting of any commission's budget.¹¹²

109. The majority of respondents to our consultation agreed that the new commission should report to Parliament rather than Government, and most cited the Paris Principles in support of this position. We now examine possible structures to achieve this.

¹¹⁰ Sixth Report, Session 2002–03, op cit., para. 230.

¹¹¹ Ibid., para. 223.

¹¹² Ibid., para. 225.

The traditional non-departmental public body model

110. The government clearly expect to establish the new commission, on much the same statutory basis as the present anti-discrimination commissions, as a non-departmental public body (NDPB). The general structure of these bodies is that they—

- are established by statute;
- have boards whose members are appointed by a Secretary of State, usually for fixed terms which may be renewable, and who can be dismissed only on specified grounds;
- are accountable to that Secretary of State for the propriety of their use of public money, and usually require his or her agreement to establishment numbers and sometimes to the acquisition of property, but are not usually required to seek agreement to specific budget lines and are able to decide their own policies within their statutory remit, sometimes with provisions for Ministers to give them directions;
- negotiate their budgets with their sponsoring Department, and have their funds voted by Parliament as part of that Department's Estimate;
- are required by statute to make an annual report, which the Minister is required by statute to lay before Parliament along with their audited accounts.

111. The Government argues that the NDPB model has served perfectly satisfactorily for the anti-discrimination commissions, and they see no reason to abandon it. The main argument for adopting the traditional model for the CEHR is that it works, and is tried and tested. Lord Falconer also advanced the argument in his evidence that there were advantages to the present commissions being on the inside—essentially that they were nearer to the levers of influence. We recognise some force to this argument, but do not consider that it outweighs the other objections. Nonetheless, we hope that in whatever structure emerges, there will be a Cabinet Minister who recognises a special duty of care towards the new body.

112. So far as the power of appointment being vested with Ministers is concerned, the Government contends that the “Nolan principles” (in essence open advertisement and transparent appointment procedures) have addressed this problem of a lack of independence. It is always debatable whether Ministers holding the purse-strings has led to actual inappropriate pressure (or just even just an instinctively deferential attitude by boards), but there is always a risk that this may be so. These are well-rehearsed objections to the use of the NDPB model in particular or general circumstances. But, in contesting the assumption that this model is satisfactory, we identify some particular distinguishing features which we believe make it inappropriate, in its traditional form, to the proposed Commission for Equality and Human Rights.

The alternative models

113. We referred, in our report last year, to two possible alternative models of accountability: the Parliamentary Commissioner for Administration (PCA) and the National Audit Office (NAO). These are now briefly described. We then go on to consider a third and more recent model—the Electoral Commission.

114. The PCA is appointed by the Crown under Letters Patent on the advice of the Prime Minister, and can be dismissed only on a joint address from the two Houses.¹¹³ She has the status of an officer of the House of Commons. Her office is funded on the Cabinet Office Vote. She is, however, required under her statute to report to the House of Commons, and the House has since 1967 appointed a select committee to “examine” these reports (currently the Public Administration Committee), although the Committee has no power of adjudication over the cases considered by the commissioner or of direction over her activities.

115. The NAO operates under a more complex arrangement, and is the purest current example of parliamentary accountability almost fully separated from the executive. Under the terms of the National Audit Act 1983, the chief executive of the NAO, the Comptroller & Auditor General (C&AG) is appointed by a resolution of the Commons on a motion which must be moved jointly by the Prime Minister and the Chairman of the Public Accounts Committee (PAC). He has the status of an officer of the House of Commons. The C&AG is answerable to a statutory non-executive board, the Public Accounts Commission, also established under the 1983 Act. This comprises the Chairman of the PAC (*ex officio*), the Leader of the House of Commons (*ex officio*), and seven backbenchers appointed by the House. The Commission examines the budget of the NAO as presented to it by the C&AG and, after consulting the Treasury, presents the Estimate (with any changes it considers it appropriate to make) to the Commons for its approval. It also appoints the accounting officer for the NAO (invariably the C&AG) and it appoints auditors. It elects its own chairman, who is one of the backbench members, and one of its members answers written and oral PQs in the Commons about the work of the Commission (but not of the PAC itself). It does not have power of direction over the C&AG, who is fully independent and can only be dismissed by resolution of the House. The Commission is required by the 1983 Act “from time to time [to] present to the House of Commons a report on the exercise of its functions”.¹¹⁴ In practice it does this annually.¹¹⁵

116. The Electoral Commission is established under the Political Parties, Elections and Referendums Act 2000. It provides for between five and nine electoral commissioners to be appointed by the Queen in response to an address from the House of Commons, one of whom is nominated to be Chairman of the Commission.¹¹⁶ The Commission appoints its own staff (who are not civil servants), including a chief executive,¹¹⁷ and negotiates its budget with the Speaker’s Committee appointed under the same Act.¹¹⁸ That Committee is

113 Parliamentary Commissioner Act 1967.

114 Under section 2(3) of the National Audit Act 1983.

115 See Eleventh Report from the Public Accounts Commission, HC (2001–02) 1251.

116 Political Parties, Elections and Referendums Act 2000, s 1.

117 *Ibid.*, Schedule 1, para. 11.

118 *Ibid.*, s. 2 and Schedule 1, para. 14.

modelled to some extent on the Public Accounts Commission. It comprises the Speaker of the House of Commons, the Chairman of the Home Affairs Committee, the Home Secretary (all *ex officio*), a local government Minister (nominated by the Prime Minister), and five other backbench Members of Parliament appointed by the Speaker.¹¹⁹

117. There is growing interest in designing accountability mechanisms for constitutional watchdogs which, like the C&AG, offer regular opportunities to account to Parliament, while preserving independence from both the legislature and the executive. The Government have announced plans to make the both the House of Lords Appointments Commission and the Judicial Appointments Commission for England and Wales and for the proposed UK Supreme Court statutory bodies. The Public Administration Select Committee has argued for the Commissioner for Public Appointments to become an “Officer of Parliament”.¹²⁰ It is also worth noting that in Scotland the Parliament has recruited and will employ the new Commissioner for Children and Young People, and the proposed Scottish Human Rights Commission will, the Executive agree, be likely to be accountable to the Scottish Parliament.

118. All three of these UK alternatives to the traditional NDPB model can be seen as part of a wider attempt to find a model which provides a greater degree of independence from government. These have been categorised as “officers of Parliament”, although as yet this designation is not widely recognised in statute. A recent House of Commons Library research paper identified the key characteristics of this model—

- parliamentary involvement in appointment and dismissal
- a statutory committee which is responsible for budget approval and oversight
- a specific select committee to which the Officer is bound to report
- staffing independent of the civil service.¹²¹

119. The New Zealand House of Representatives has established an Officers of Parliament Committee, which approves the budget and organises the appointment of all the officials falling under this designation.¹²² In the Canadian Parliament, there are five officials accorded this status in the standing orders of the House of Commons.¹²³

119 *Ibid.*, s. 2 and Schedule 2.

120 Public Administration Committee, Fourth Report of Session 2002–03, *Government by Appointment: Opening up the Patronage State*, HC 165-1.

121 House of Commons Library Research Paper 77/03, Summary of Main Points.

122 There are three: the Controller and Auditor General, the Ombudsman and the Parliamentary Commissioner for the Environment. House of Commons Research paper, *op cit.*

123 Auditor General, Chief Electoral Officer, Privacy Commissioner, Information Commissioner and Official Languages Commissioner. See House of Commons Research paper, *op cit.*

Is the CEHR a special case?

120. There are a number of features of the proposed Commission for Equality and Human Rights which, we believe, make it necessary to think about its accountability structure in a different way from that applied to the standard quango, including the existing anti-discrimination commissions.

121. First and most fundamental is the nature of the relationship between human rights and the State. It is, as we have stressed several times in this report, the State itself which is bound by the Convention and other human rights treaties. Most NDPBs are dealing with non-state actors (ie principally the various regulators of things such as the water suppliers, the railway operators, the energy industry, the telecommunications industry or the broadcast media) or what might be termed common property (for example the national heritage in the form of museums and galleries, the built environment, the natural environment, etc.). Even the existing anti-discrimination commissions have traditionally been involved as much, if not more, with the private rather than the public sphere. Some other bodies do have a custodial relationship with organs of the State, though generally with more or less arms-length governmental bodies (the police, the education authorities, the NHS, etc.). Those like the National Audit Office, the Civil Service Commissioners, the Parliamentary Commissioner for Administration or the Electoral Commission, which deal directly with issues of propriety or maladministration in central government more often do not follow the traditional NDPB model. We consider that the proposed commission has a character more like these constitutional watchdogs.

122. Second, whatever the reality of the independence of well-respected bodies like the discrimination commissions, their accountability structure does not give the appearance of full independence, and may accordingly not be judged fully to comply with the Paris Principles. And although their independence from government influence is asserted, it is impossible to gauge the extent to which the retention of direct financial control by government inhibits these bodies either directly, through resource constraints, or consciously or unconsciously on the part of Ministers in limiting their ability to undertake activities they believe to be necessary to their statutory purposes.¹²⁴

123. Third, the nature of the constitutional settlement could be argued to indicate that, on the matter of the protection of fundamental rights and freedoms, Parliament should be involved more fully than it is with a typical regulator or enforcement body. It is clear that very few NDPBs have developed a close working relationship with Parliament—a situation for which the fault almost certainly lies on both sides. The establishment of this new body represents an opportunity, we believe, for an assertion of Parliament's confidence in its own paramount constitutional role.

124. Fourth, and pragmatically, the nature of the new commission will mean that it has responsibilities ranging across those of all Government departments. To avoid bias and turf wars, it is imperative to situate it outside the machinery of government. The EOC has

¹²⁴ Although the House of Commons approves the Estimates for all such bodies in some form, the principle that it is for the Crown to propose expenditure, and for the Commons to approve or reduce that request, means that in practice arguments for increased resources could not be put forward in the course of agreeing such Estimates.

been assigned to four different departments in the period since 1997.¹²⁵ This clearly militates against the development of an effective working relationship.

125. Finally, as a new “independent national human rights institution”, the Commission for Equality and Human Rights would present an opportunity for the UK to demonstrate its commitment to the Paris Principles and the exhortations of the Council of Europe by designing a “best practice” model of independence.

Our template for the new commission

126. We remain convinced, and indeed have become more convinced, that the Commission for Equality and Human Rights should be modelled not on the standard NDPB but on the constitutional watchdogs described above. Research undertaken for the Constitution Unit has identified eight principles for the design of such bodies. These are:

- statutory guarantees of independence from both the executive and parliament;
- a system of funding independent of direct ministerial control;
- independent staffing arrangements;
- statutory involvement of a parliamentary body in approving, overseeing its budget and strategic plan;
- parliamentary involvement in key appointments, which should be for a fixed term;
- dismissal only with parliamentary approval;
- direct reporting to parliament, both through a designated committee and through questions;
- extra-parliamentary accountability.¹²⁶

127. We consider that the models of the PCA, the NAO/C&AG and the Electoral Commission, described above, contain all these essential elements in one place or another. **We recommend that the statutory design of the Commission for Equality and Human Rights should adopt and adapt the arrangements for guaranteeing the independence and accountability used for the Parliamentary Commissioner for Administration, the National Audit Office and the Electoral Commission.** It should include the following elements.

128. The Chair of the Commission should be defined in statute as an “officer of Parliament”. There should be between eight and fifteen additional commissioners, certain of whom might be designated as deputy chairs of the commission. Dismissal of a commissioner within the fixed term of appointment should be effected only by a joint

¹²⁵ The Department for Education and Employment, the Cabinet Office, the Office of the Deputy Prime Minister and the Department of Trade and Industry.

¹²⁶ Oonagh Gay and Barry Winetrobe, *Officers of Parliament: Transforming the Role*, University College London, Constitution Unit, April 2003.

address of both Houses, or otherwise only on the recommendation of the statutory committee recommended below.

129. However, the commission should not be a creature of Parliament instead of a creature of the executive. As the authors of the Constitution Unit research comment—

Little will be gained for the public or the polity in general if dependence by officers on government was simply replaced by a similar dependence on parliament ... The parliamentary connection should, in principle, enable key aspects of independence, such as appointment, financing and reporting, to be more open and transparent than if these were matters for government.¹²⁷

There should be no power of direction or veto over the commission, in relation to the promotion and protection of human rights, either by Ministers or by Parliament.

130. **The commission should be funded by moneys voted by the House of Commons directly, not through the voted expenditure of a ministerial department.** The adequate funding of the commission, having regard to the need for efficiency, economy and effectiveness in the use of its resources, will of course be essential to guarantee its independence. It will require more funding than the combined budgets of the existing commissions.

131. **The commissioners and staff of the commission should not be crown servants (although they should have a statutory guarantee of broadly equivalent terms and conditions).**

132. **There should be a statutory committee appointed to approve and oversee the commission's budget, and the strategic plan which it should be required by statute to present.**

133. This statutory committee should include, for example, the chair of the parliamentary committee charged with considering the reports of the commission, the Secretary of State for Constitutional Affairs or his or her deputy, Ministers representing other departments with a stake in the commission's work, a person appointed by the Lord Chief Justice, a person appointed by the presiding officer of each of the Scottish Parliament and the National Assembly for Wales, and persons appointed by the presiding officers of each House, the majority of whom should be members of one or the other House.

134. **The statutory committee should recommend commissioners for appointment whom the Secretary of State for Constitutional Affairs would recommend for appointment by Her Majesty. There should be consultations with a parliamentary committee,** as described below, but we do not think it is necessary or feasible to make appointments on the basis of a joint address from both Houses, since there is no obvious way to reconcile differences of view between the two Houses.

127 Ibid.

135. **The commission should be required to make an annual report to Parliament, which should be laid before each House by its Clerk. The commission should be empowered to lay other reports before Parliament as it thinks fit, including those arising from general inquiries on matters of public policy relating to human rights. Representatives of the statutory committee should be able to answer parliamentary questions on the statutory committee’s work, but not that of the commission.**

136. **There should be a statutory duty on the commission to consult on its strategic plan.**

137. **There should be a committee of both Houses charged with considering the reports of the commission.**

The relationship with Parliament

138. We noted in our report last year that the level of both formal and informal engagement between the existing anti-discrimination commissions and Parliament was low.¹²⁸ We drew attention to the models of the Parliamentary Commissioner for Administration and the National Audit Office as means of overcoming this.

139. Virtually all the submissions we received argued for the new body to have some form of direct reporting relationship with a parliamentary committee, and most indicated that this should be the JCHR in its current or a revised form.¹²⁹ The TUC argued for a separate equality committee of the House of Commons.¹³⁰ We think this would tend to produce an institutional fissure between the equality and human rights strands of the new commission which would be difficult to negotiate effectively. As Professor Sarah Spencer points out, this raises the question of whether the JCHR should have a stronger equality mandate.¹³¹

140. We believe that it will be important for the new commission to develop such a parliamentary relationship. It should not be a “supervisory” relationship but it should be one that emphasises the democratic accountability of the new body, and helps to “mainstream” equality and human rights not only in the executive branch of the constitution but also in the legislative branch. It is Parliament that should be giving effect to many of the recommendations of the new body.

141. **We recommend to each House that, when the legislation creating the new commission has been enacted, our terms of reference should be amended by inserting after paragraph (2)(a), as an additional matter which the committee may consider:**

“(b) the expenditure, administration and policy of the Commission for Equality and Human Rights, any reports of the commission which are laid before Parliament, and any matters connected with those reports;”¹³²

128 Sixth Report, Session 2002–03, op cit., para. 227.

129 See for example the Law Society (Appendix 19), the Disability Rights Commission (Appendix 10), Age Concern (Appendix 1, para. 5.3), RADAR (Appendix 25, para. 8.4), the Equal Opportunities Commission (Appendix 12).

130 See Appendix 30, para. 4.1.

131 See Appendix 29, para. 18.

132 For example Standing Order No. 152B of the House of Commons.

142. If this expansion of our remit were agreed to by each House, we would wish to consider whether it would also be desirable to enlarge the Committee (to, for example, nine members of each House) and grant it the power to appoint two or more sub-committees.

143. Although in many circumstances the matters under consideration by the new commission will relate to reserved matters under the devolution settlements, we would expect the commission to respond positively to any request for co-operation from committees of the National Assembly for Wales or the Scottish Parliament.

5 Conclusion

144. We reiterate our welcome for the government's decision to proceed with the establishment of the new Commission for Equality and Human Rights. We look forward to the forthcoming White Paper, which we hope will take full account of the recommendations we have made in this report. They are intended as a constructive contribution to designing an effective new body.

145. It is unlikely that it will be possible to get the design of the new body right in every detail at this stage. Not only will it be necessary to respond to the lessons of experience, it will be inevitable, we believe, that the disparities and inconsistencies between the laws relating to the different strands of equality protection will make a wholesale revision of equality legislation unavoidable.

146. Therefore, **we recommend that the legislation establishing the commission should impose on it duties:**

- a) **to keep under review legislation relating to human rights and the implementation of the Human Rights Act in practice, and from time to time report its findings and recommendations to Parliament and the Secretary of State for Constitutional Affairs, and**
- b) **to review its own functions and powers, and to report to Parliament and the Secretary of State for Constitutional Affairs, periodically, on any proposals it has for modifications to the legislation under which it is itself established.**

Conclusions and recommendations

The Commission for Equality and Human Rights

1. We warmly welcome the Government's decision to establish a Commission for Equality and Human Rights. The task now is to design a body which will be effective. This report is our further contribution to that work. We seek to ensure that while the body is fully equipped to build on the work of the anti-discrimination commissions over the last thirty years, it is also equipped to take on the important new task of promoting and protecting human rights. Human rights must not be allowed to be the poor relation of the equality strands, or have a purely titular significance in the design of the new commission. At the same time, responsibility for the broad human rights agenda must not weaken the effectiveness of the commission's work in promoting equality of opportunity and using its strategic law enforcement powers to combat unlawful discriminatory practices and procedures. (Paragraph 5)

2. The wise and timely decision of the Government to proceed with the establishment of the Commission for Equality and Human Rights provides an opportunity to make the UK an example of best practice in the design of an independent and effective human rights commission. (Paragraph 8)

Functions

3. It is essential that the new commission is given a free-standing power to promote and protect human rights, and is not limited in performing this function only to circumstances in which human rights are engaged in the context of unlawful discrimination. (Paragraph 13)

4. We recommend that the new body should be given the general duty "to promote understanding and awareness, and to help secure the protection, of human rights in Great Britain". (Paragraph 14)

5. We would be deeply disappointed if the CEHR were not to be given a mandate which allowed it to promote respect for human rights "in a broad inclusive sense". We recommend that the duty to promote understanding and awareness, and to help secure the protection, of human rights in Great Britain which we have proposed above requires no further qualification defining what is meant by "human rights". We further recommend that the commission should be given a duty to assist in the promotion of international co-operation in the field of equality and human rights. (Paragraphs 18 and 21)

6. We recommend that the commission should be given a duty to work with public authorities to assist and guide them in the development of policies and practices which enhance respect for human rights in the delivery of public services. (Paragraph 24)

7. Its founding legislation should state that, in connection with its general duty relating to human rights, the Commission for Equality and Human Rights should be able to—

- conduct and commission research
- undertake and support educational activities
- promote the development of human rights awareness in the bodies which advise, inspect and audit public authorities
- give guidance and advice to any public authority, and publish that advice if it thinks fit
- offer advice to Ministers and to Parliament, and publish that advice if it thinks fit
- assist and support others in activities which advance its general duty. (Paragraph 27)

8. There is a need for greater focus by public authorities on their positive obligations to protect human rights. We are now persuaded that imposing a “positive” or “general” duty on public authorities to promote human rights will be an effective way of advancing this. It would provide a firm statutory foundation for the framework within which the new commission would operate, giving it a very clear role in the articulation of guidance for the implementation of the duty. Requiring public authorities to assess all of their functions and policies for relevance to human rights and equality, and in the light of that assessment to draw up a strategy for placing human rights and equality at the heart of policy making, decision making and service delivery, would be an effective way of achieving the mainstreaming of human rights and equality which will be one of the commission’s principal purposes. (Paragraph 32)

9. We do not believe the commission should be disbarred from promoting and assisting the development of human rights awareness beyond the public sector. (Paragraph 33)

10. We believe that the commission, in partnership with the voluntary sector, should concentrate on building up knowledge and awareness about human rights among voluntary groups so that they can use these principles in negotiations with public authorities on behalf of their constituents and in their policy and campaigning work. We see this as an essential part of the systemic work needed to develop a culture of respect for human rights and as complementary to advising individuals on their human rights and how to assert them. (Paragraph 35)

11. The commission should have the function of improving knowledge and understanding of human rights issues amongst lawyers and others who offer advice to citizens and building local capacity in these functions. It should be able to do this through funding education and research, and funding the development and provision of advice services provided in the voluntary sector. It should not undertake such advice functions directly itself. (Paragraph 39)

12. We recommend that the commission be given a general duty to promote good relations and the peaceful resolution of disputes based on respect for human rights between different groups and communities in Great Britain. (Paragraph 42)

Powers

13. We welcome the explicit commitment from the Government that the new body will have all the enforcement powers of the existing anti-discrimination commissions. However, we look forward not only to rationalisation of existing equality legislation, but to the “levelling-up” of the laws relating to discrimination on all the grounds which are now identified, particularly by the extension of anti-discrimination provisions for the “new strands” beyond employment and training into the areas of the provision of education, goods and services and by the widening to all areas of discrimination of the concept of “positive duties” requiring public authorities to promote equality of opportunity and treatment. We recommend that legislation to accomplish this, preferably within a single Equality Act, be introduced and enacted with all deliberate speed. (Paragraphs 45 and 46)

14. We do not recommend that the power of public inquiry into matters of public policy engaging human rights should be used to investigate individual cases. We emphasise that the power to conduct public inquiries which we propose should be a novel, free-standing power in relation to matters of public policy which engage human rights, not dependent on equality issues being engaged and the use of the existing, anti-discrimination powers that will be vested in the new commission. (Paragraphs 51 and 52)

15. Where the commission, in the course of an inquiry, did identify practices which appeared to have led, or appeared likely to lead, to breaches of the Convention rights, it should have power to identify the actual or potential violations occurring and to make recommendations as to changes in practice or in the law which it considered necessary or desirable. (Paragraph 54)

16. Because the duty to act compatibly with the Convention right is imposed by the Human Rights Act on public authorities (including Ministers and their departments) we do not consider it appropriate for a power of ministerial direction to be applied to inquiries into matters of public policy engaging human rights. It should be open to a Minister to ask the commission to undertake such an inquiry, and to make his request publicly, but not to require an investigation. (Paragraph 55)

17. We recommend that the Commission for Equality and Human Rights should have the power —

- to conduct public inquiries into matters of public policy engaging questions of human rights relating to the policies and practices of public authorities;
- subject to judicial supervision, to have the same process as the EOC and CRE to obtain access to information relevant to the terms of the inquiry;
- to hold public hearings in relation to any such inquiry and require the attendance of witnesses;
- to publish its findings and to make recommendations;
- to give guidance or provide advice to any public authority on any matter arising from any such inquiry, and to publish that advice if it thinks fit. (Paragraph 60)

18. We conclude that there need not, for the time being, be any express new power for the CEHR to support individual free-standing cases under the Human Rights Act. (Paragraph 68)

19. We recommend that the Legal Services Commission and the CEHR should develop a memorandum of understanding which allows consultation to take place on the formulation of criteria for strategic funding of human rights cases and for the Public Interest Advisory Panel of the Legal Services Commission to seek advice from the CEHR on the application of these criteria in particular cases. (Paragraph 70)

20. We consider that a general power to support alternative dispute resolution approaches to allegations of breaches of human rights by public authorities would be a valuable ancillary to the commission's general duty to promote a culture of respect for human rights. (Paragraph 71)

21. We consider that a power to invoke the human rights dimension should be considered to be implicit in the new commission's litigation and enforcement powers relating to its equality functions—if this is in doubt, then the legislation should be so framed as to ensure that the CEHR can rely confidently upon the Human Rights Act in relation to the Convention rights related to those functions. (Paragraph 76)

22. It is self-evident that the new commission should be able to seek to intervene in proceedings relating to human rights in the higher courts, or with the permission of the court act as a friend of the court. The CEHR will become an authoritative national resource of knowledge and expertise on equality and human rights, and this resource needs to be made available to assist the courts, where a case raises wider policy interests engaging questions of human rights. (Paragraphs 77 and 79)

23. We conclude that there is no currently identifiable pressing need that would be met by allowing the commission power to initiate proceedings in its own name alleging a breach of the rights of an individual. (Paragraph 89)

24. We recommend that the commission should have a power, notwithstanding the provisions of section 7(3) and (4) of the Human Rights Act, to seek judicial review of the policies or actions or omissions of a public authority where it has reason to believe that such policies or actions or omissions have resulted, or are likely to result, in a violation of the Convention rights. (Paragraph 92)

Structure

25. We recommend that the legislation should provide that commissioners are appointed on a basis that *must* have regard to their experience, knowledge and expertise in matters relating to the commissions functions and powers and *should* have regard to the importance of achieving a balance between representatives of different parts of the United Kingdom and between representatives of those who have particular experience or understanding of discrimination of different kinds. (Paragraph 105)

26. We recommend that the statutory design of the Commission for Equality and Human Rights should adopt and adapt the arrangements for guaranteeing the independence and accountability used for the Parliamentary Commissioner for Administration, the National Audit Office and the Electoral Commission. (Paragraph 127)

27. The Chair of the commission should be defined in statute as an “officer of Parliament”. There should be between eight and fifteen additional commissioners, certain of whom might be designated as deputy chairs of the commission. Dismissal of a commissioner within the fixed term of appointment should be effected only by a joint address of both Houses, or otherwise only on the recommendation of the statutory committee we recommend. (Paragraph 128)

28. There should be no power of direction or veto over the commission, in relation to the promotion and protection of human rights, either by Ministers or by Parliament. (Paragraph 129)

29. The commission should be funded by moneys voted by the House of Commons directly, not through the voted expenditure of a ministerial department. (Paragraph 130)

30. The commissioners and staff of the commission should not be crown servants (although they should have a statutory guarantee of broadly equivalent terms and conditions). (Paragraph 131)

31. There should be a statutory committee appointed to approve and oversee the commission’s budget, and the strategic plan which it should be required by statute to present. (Paragraph 132)

32. The statutory committee should recommend commissioners for appointment whom the Secretary of State for Constitutional Affairs would recommend for appointment by Her Majesty. There should be consultations with a parliamentary committee. (Paragraph 134)

33. The commission should be required to make an annual report to Parliament, which should be laid before each House by its Clerk. The commission should be empowered to lay other reports before Parliament as it thinks fit, including those arising from general inquiries on matters of public policy relating to human rights. Representatives of the statutory committee should be able to answer parliamentary questions on the statutory committee’s work, but not that of the commission. (Paragraph 135)

34. There should be a statutory duty on the commission to consult on its strategic plan. (Paragraph 136)

35. There should be a committee of both Houses charged with considering the reports of the commission. (Paragraph 137)

36. We recommend to each House that, when the legislation creating the new commission has been enacted, our terms of reference should be amended by inserting after paragraph (2)(a), as an additional matter which the committee may consider: “(b) the expenditure, administration and policy of the Commission for Equality and Human Rights, any reports of the commission which are laid before Parliament, and any matters connected with those reports;” . (Paragraph 141)

The Future

37. We recommend that the legislation establishing the commission should impose on it duties:

- to keep under review legislation relating to human rights and the implementation of the Human Rights Act in practice, and from time to time report its findings and recommendations to Parliament and the Secretary of State for Constitutional Affairs, and
- to review its own functions and powers, and to report to Parliament and the Secretary of State for Constitutional Affairs, periodically, on any proposals it has for modifications to the legislation under which it is itself established. (Paragraph 146)

Formal Minutes

Tuesday 20 April 2004

Members Present:

Jean Corston MP, in the Chair

Lord Bowness	Mr Paul Stinchcombe MP
Lord Campbell of Alloway	Mr Shaun Woodward MP
Lord Judd	
Lord Lester of Herne Hill	
Baroness Prashar	

The Committee deliberated.

* * * * *

Draft Report [Commission for Equality and Human Rights: Structure, Functions and Powers], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 146 read and agreed to.

Resolved, That the Report be the Eleventh Report of the Committee to each House.

Ordered, That certain papers be appended to the Report.

Ordered, That the Chairman do make the Report to the House of Commons and that Baroness Prashar do make the Report to the House of Lords.

[Adjourned till Wednesday 28 April at a quarter past Four o'clock.]

List of Written Evidence

1. Age Concern England	Ev 1
2. Audit Commission	Ev 4
3. British Humanist Association	Ev 7
4. British Institute of Human Rights	Ev 14
5. British Psychological Society	Ev 17
6. Children's Law Centre	Ev 23
7. Commission for Racial Equality	Ev 24
8. Committee on the Administration of Justice	Ev 24
9. Further memorandum from the Committee on the Administration of Justice	Ev 26
10. Disability Rights Commission	Ev 26
11. Further memorandum from the Disability Rights Commission	Ev 29
12. Equal Opportunities Commission	Ev 31
13. Further memorandum from the Equal Opportunities Commission	Ev 33
14. Dr M A Fazal	Ev 36
15. Help the Aged	Ev 39
16. JUSTICE	Ev 42
17. Memorandum from Francesca Klug and Claire O'Brien	Ev 45
18. Law Centres Federation	Ev 56
19. Law Society	Ev 62
20. Liberty	Ev 66
21. Mayor of London	Ev 67
22. National AIDS Trust	Ev 71
23. Human Rights NGOs Framework Response	Ev 73
24. PARITY	Ev 75
25. RADAR	Ev 76
26. Rights of Women	Ev 80
27. Scottish Human Rights Centre	Ev 83
28. Further memorandum from the Scottish Human Rights Centre	Ev 85
29. Sarah Spencer	Ev 86
30. Trades Union Congress	Ev 89
31. Values into Action	Ev 90
32. 1990 Trust	Ev 93