

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Liberty's briefing on the multi departmental consultation – 'Equality and Diversity, Making it happen'.

February 2003

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Introduction

1. Liberty welcomes the opportunity to respond to the consultation Equality and Diversity, Making it happen.¹

Part 1: General Approach

2. Liberty considers believes that the following priorities ought to inform any decision on the appropriate structural option for our equality institutions and on how any future organisation should tackle some of its most important priorities².
3. **Independence.** We consider that any new Commission/s *must* be independent of Government. The priorities of any new Commission/s will need to be informed by the experience of those who constitute them and not the immediate exigencies of politicians. It can be noted in this regard that the Race Directive (2000/43/EC) requires Member States to designate a body or bodies for promotion of equal treatment on the protected grounds (Article 13). The competence of such body/bodies must include the giving of *independent* assistance; conducting *independent* surveys and *independent* reports and making recommendations on any issue relating to racial discrimination. We consider that any new Commission/s should be required to report to Parliament (not to a particular, and as at the moment different department depending on the strand³).
4. **Strategic Enforcement.** The Sex Discrimination Act 1975 (SDA) and the Race Relations Act 1976 (RRA) (and later the DDA) were intended by Parliament to introduce not merely remedies for individual wrongs but strategic powers in the EOC and CRE to tackle entrenched and widespread

¹ Karon Monaghan at Matrix Chambers drafted this response. It is based on the Discrimination Law Association (DLA) response to the consultation as Liberty agrees with the majority of the views expressed by the DLA. However, any comments relating to the role of Human Rights within a Single Equality Commission are those of Liberty and do not necessarily reflect the opinion of either Karon Monaghan or the DLA.

² See, foreword 'Making it Happen'.

discriminatory practices and barriers. This aim was achieved through the Formal Investigation (FI) powers found in parts VI and VII of the SDA and RRA respectively. There is no doubt that these powers were intended to perform a very significant role in Government's anti discrimination strategy embodied in the Acts (see White Papers: 'Equality for Women' (1974) cmd. 5724 and 'Racial Equality' (1975) cmd. 6234). By the unpredicted decisions of the House of Lords in its judicial capacity, restricting the scope of their FI powers⁴; the limited financial resources available to the Commission's (and the expense of conducting FIs) and the reluctance of some of the leading personalities in the Commissions to undertake FIs they became less centrally relevant. You can compare, for example, the apparent reluctance of the EOC to undertake as FIs as compared to the CRE which undertook no less than seventeen FIs in its first 18 months of operation⁵ (although the EOC did argue that a lack of funds was a reason for this). We consider that an individualistic model of achieving justice in the field of anti discrimination is inadequate and expensive, particularly in tackling entrenched and widespread discriminatory practices. For these reason, we believe that any new structure should ensure that there are real and effective powers and *resources* in any Commission/s to take strategic action by the initiation of formal investigations and the taking of coercive action to eliminate discriminatory practices.

5. We also consider that any Commission/s should have express powers to (and should be encouraged to) tackle discrimination *linked* to the protected grounds (and not limited by the unlawful acts created by the applicable legislation). This would permit the Commission/s to tackle underlying factors which contribute to disadvantage (e.g. domestic violence and women; immigration and race etc). This might be linked to, amongst other things, a broad statutory duty/duties similar to those imposed by the RRA (which extend wider than necessary merely to prevent acts made unlawful by the RRA⁶).

³ Currently the DWP has responsibility for disability; the DTI has responsibility for sex discrimination and the HO for race.

⁴ Hillingdon LBC v CRE [1982] AC 779; R v ex parte Prestige Group PIC [1984] ICR 472.

⁵ June 1977 – January 1979 and a total of 63 to the end of 1999: C McCrudden, D Smith and C Brown, *Racial Justice at Work* (London: PSI, 1991).

6. Consistent schemes and powers. As we have previously remarked⁷, the current schemes lack any consistency. The SDA and the RRA have wide coverage but with the RRA having wider coverage than the SDA, outlawing as it does discrimination by public authorities in the exercising of their public functions⁸. The DDA has least coverage, not covering for example the actions of public authorities⁹ or education¹⁰. Of course – if the draft Regulations are enacted – there will be further differences as between the protection afforded these strands and the new strands. Further, and in particular as to strategic enforcement, the SDA and DDA do not include the wide (and enforceable by the CRE) statutory duties imposed upon public authorities¹¹. Importantly too, the DRC (but not the EOC and the CRE) has power to accept legally binding undertakings¹²; this was the only proposal in the CRE’s Second Review that the government accepted, but has still failed to give effect to in the RRA. In our view, any desire to create a joint Commission of any sort should follow a Single Equality Act harmonising the laws in respect of each of the protected grounds. If this does not happen first a ‘hierarchy’ of grounds is likely to emerge and it will be difficult not to replicate this in any work by a Single Commission. In our view, this will lead to an unacceptable (in political and principled terms) relegation of the least protected grounds in the work of any such Commission. It is likely to undermine support for the work of such a Commission and create undesirable tensions within it.

7. Acknowledging differences in the protected strands. In respect of each of the protected grounds, there are different underlying factors causing or contributing to objectionable discrimination. There are too, in respect of specific grounds, overlaps with other and different areas of law and social policy. Thus for example immigration law and policy is highly relevant to

⁶ See Section 71 *et seq* of the RRA.

⁷ See, DLA responses to ‘Towards Equality and Diversity: Implementing the Employment and Race Directives’ (2001) and ‘Equality and Diversity: The Way Ahead’ (2002).

⁸ Section 19B RRA as amended by the RR(A)A. There are other differences, making the RRA wider than the SDA, see e.g. Section 19A and planning.

⁹ Unless falling within the scope of the other limited provisions.

¹⁰ Though see SENDA. There are other acts made unlawful by the SDA and RRA which are not made unlawful by the DDA, see e.g. qualifying bodies.

¹¹ See, Sections 71 *et seq* and subordinate legislation thereunder.

¹² Section 5, Disability Rights Commission Act 1999.

racial discrimination but of limited, if any, significance to age and disability. Similarly, pension law and policy and the related issue of retirement ages, is highly relevant to sex and age discrimination¹³ but of limited, if any, relevance to racial discrimination. Thus whilst a unified structure would have the benefit of, for example, tackling multiple discrimination, the danger of a completely unified structure is that an over generalised approach to the different strands emerges – reflecting the demands of each of them – leaving strand specific issues untackled. A black woman may be discriminated against as a *black woman*; she may, however, be discriminated against as a black person *or* a woman – these characteristics must be capable of being subject to independent recognition and support.

8. Participation. Liberty believes that any new structure should seek to include a presence at local community level. The CRE have for many years funded or part funded Racial Equality Councils that have a presence at local level. This provides grass roots contact ensuring that the CRE is kept properly and truly informed of the priorities; tensions and concerns of local communities on the issues relating to racial discrimination. We consider that any vision on future structure *must* include provision for grass roots involvement. There must be provision for involving NGOs and Trades Unions, for the same reasons.

9. Resolving Friction Transparently. We are moving into new territory as far as anti discrimination law and practice is concerned. There will soon be completely new protection against sexuality, age and religious discrimination. There will be inevitable frictions between protections that have not required resolution before. It matters to us all how the obvious tensions between for example religion and gender and sexuality are resolved. In a liberal democracy we should have those resolved publicly, if necessary through litigation within the public and adversarial nature of trial proceedings which allow each interest to be independently and vigorously defended. If there is a

¹³ With the former also of relevance to sexuality discrimination.

completely unified body with responsibility for all grounds, those tensions will be dealt within such an institution inevitably out of the public eye. This is a matter of considerable concern to Liberty. As we explain in the following section, we believe that human rights can do much to ease potential friction between strands.

10. **Human Rights.** Liberty believes that that any new Equality Commission's must be able to address human rights issues. There is an obvious overlap between the anti discrimination legislation and human rights (most explicit in Article 14, Schedule 1 of the Human Rights Act 1998 but prominent in others of the Convention rights). A human right remit is also important to offer at least a level of protection to those groups such as trans people who regularly experience discrimination but who are not referred to in the consultation. The consultation does not invite views on the extent to which human right issues should fall within the remit of a single equality body. If the government takes the view that human rights should form part of the single body this is a subject that may have to be revisited at a later date. Liberty believes that a statutory body covering the whole range of human rights issues is vital whether this be part of the work of the equalities body or through the setting up of a separate Human Rights Commission.

11. Liberty strongly supports the arguments put forward by Sarah Spencer in her paper for the Institute for Public Policy Research¹⁴. We do not propose to going over the points made in that paper again other than to re-iterate the view taken in respect of the potential for clashes functions. As mentioned above there is the possibility of tension between differing equality strands. Human rights have frequently been subject to conflict between the rights contained in different articles of the Human Rights Act. For example, there is an inherent tension between Article 8 (the Right to Respect for Privacy and Family Life) and Article 10 (the Right to Freedom of Expression). Human rights litigation and practice has evolved so that compromise and reconciliation can be found

¹⁴ 'Should the Single Equality Commission be able to protect human rights?' presented at a seminar organized by JUSTICE on 27 November 2002.

to resolve these conflicts. This will assist with the successful operation of the Commission.

12. The Consultation paper identifies Government's priorities in paragraph 3.6. We consider that those priorities are not inconsistent with those we express above. Any structure which meets the priorities we have identified will be capable of meeting the Government's priorities of,

- **Raising awareness and stimulating debate on key barriers.**

As we have observed, if this is to be achieved publicly, the interests of those affected by the particular strands must be *separately* represented. We must acknowledge that tensions will have to be addressed and in a healthy and mature democracy this must be done inclusively and publicly.

- **Mainstreaming.** Harmonising the protection against discrimination on

each of the protected grounds will make mainstreaming less complex and more effective. The introduction of coherent statutory duties and consistent related enforcement powers will make mainstreaming more likely a reality. A major flaw in the approach to all current discrimination legislation is that it concentrates on remedying the results of discrimination rather than strategically tackling the roots.

Discrimination happens in the workplace because people bring their beliefs and attitudes with them to work. This is why, for instance, ET's are still just picking up the pieces after, for example, sex discrimination, and it is the reason why the simple existence of the SDA, DDA and RRA plus policing bodies has failed to address (for instance) the disparity in earnings by women and men. The key priority is therefore to educate, champion good examples and persuade. Simply using the stick to beat people with achieves defensive compliance by employers and employees in an atmosphere of resentment. This is the real underlying challenge of mainstreaming.

- **Providing Advice and Guidance.** Again harmonising the protection against discrimination on each of the protected grounds will

make the issuing of advice and guidance easier and more readily comprehensible to employers and service providers. This will assist in ensuring discrimination is properly tackled and will not leave employers and service providers vulnerable to claims they cannot foresee because of the complexity of the legislation with which they are faced.

- **Informing and Supporting Individuals.** We agree information and support to individuals is critical. A structure which permits a person discriminated against on multiple grounds to receive advice and support about such discrimination whilst acknowledging the differences between grounds will best achieve this priority.
- **Flexible Approaches.** We consider that there may be a role for conciliation and mediation in appropriate cases, in particular in those cases that require speedy resolution if fair resolution is to be achieved at all (e.g. education cases where speedy resolution is usually crucial).
- **Effective Means of tackling multiple discrimination.** We consider that any new structure must allow for discrimination (both individual and more widespread) on multiple grounds to be tackled effectively. This is important because the experience of discrimination on multiple grounds (e.g. disabled women and reproductive rights) is often peculiar to persons sharing those multiple characteristics and is lost by a focus on singular grounds.
- **Fostering Strong Local Networks.** As we have said above, we consider local and grass roots involvement will be crucial to the effectiveness of any new Commission/s. The Racial Equality Councils provide a model for this involvement.
- **Working in Partnership.** We consider, as we have stated, that links should be established with interested groups. We also consider that any Commission should use its resources (including financial resources) to develop and support equality work by NGOs.
- **Effective, streamlined arrangements.** A Commission/s working across the strands with harmonised powers and with the input of grass roots organisations is likely to be effective and streamlined. These objectives can be strengthened by joint working in appropriate areas and

sharing (cross strands) appropriate skills (legal; media; accounting etc) which will be necessary in any Commission and will be improved by knowledge of working all areas.

13. We note that the Consultation Paper makes no specific proposals for funding the new strands. Such provision would have to be made. We would be concerned if the introduction of a single Commission was accompanied by any cost cutting exercise. It is our view that the level of funds currently available to the Commissions is a severe restraint on effective action. This leads on to a major concern that we are aware of among women's groups that in a single Commission, gender will not be accorded a proper level of funding compared to race and disability. At present the EOC receives less than a fifth of the annual funding of both the DRC and CRE. Notably, however, there were over 25,000 ET's on sex discrimination grounds last year, compared to around 4-5,000 each on race and disability grounds. It is important that the gender and the "new" discrimination areas (sexuality, age and faith) do not receive an even smaller slice of the Commissions' budget.
14. If a single Commission is the eventual aim of Government (rather than a Commission for each strand, which appears unlikely), then we consider that it should meet the priorities that we have identified above. This can be best achieved by one Commission with departments within it representing autonomously the particularly strands protected by existing and new legislation. We consider that our priorities (and indeed those priorities of Government set out above) are most likely to be met by an Overarching Commission.
15. An Overarching Commission would and should allow for, apart from that which we have identified above,
 - joint work, for example in respect of joint guidance (already done by the EOC, CRE and DRC – see for example 'Equality Standard for Local Government' (2001)).

- The tackling of multiple grounds of discrimination, by individual cases (where an individual is discriminated against on multiple grounds) and joint FIs (where an institution discriminates on multiple grounds).
 - Appropriate prioritising. We consider that there should be a majority in number of ‘generic’ Commissioners in any such Commission, able to prioritise particularly strands appropriately without resources being applied on a purely partisan basis.
 - Regional presences. We consider that the need to mainstream and the need to ensure appropriate inclusion of interested bodies will require a regional presence of a Commission.
16. Finally and very importantly, any new legislative scheme must include arrangements for representative or class actions.¹⁵
17. We would wish to make detailed observations about the organisation of any Commission/s and its role for example in training, both expert lawyers and policy makers – but these matters of detail fall outside the scope of the general consultation exercise.
18. Given our broad and inclusive membership we hope and expect that we will be consulted on the structural arrangements at every stage.

Part 1: Specific Questions

Section 1: You or your organisation

Q1 Which country are you in?

England & Wales.

Q2 In what capacity are your responding?

On behalf of an organisation.

¹⁵ See Article 12 of the Race Directive and Article 14 of the Employment Directive.

Q3 If responding on behalf of an organisation: what sector is the organisation in?

Voluntary

Q4 If responding on behalf of an organisation: how many people does it employ?

20

2: Questions in the Consultation Document

Q5 Role and contribution of equality institutions

Are the priorities set out on page 10 of *Equality and Diversity: Making it Happen* the key priorities for our equality institutions?

See above.

A Single Equality Body

Q6 Do you think that a single equality body for Great Britain is a good approach?

We have addressed this question by identifying first the priorities that we consider should inform the answer to such a question. We consider that a Single Commission, if completely unifying the grounds, is unlikely to meet those priorities. See further above.

Q7 If you agree that a single equality body should be established, what powers do you consider it should have?

See above.

A Single Gateway

Q8 Do you think that a single gateway structure would be a good approach?

As stated above, we have addressed this question by identifying first the priorities we consider should inform the answer to such a question. Whilst we consider that a Single Gateway Structure could meet many of those priorities in due course, there would first need to be a harmonising of the protections and duties applicable to the various protected grounds put in place first. A Single Gateway Structure does carry the danger that there will be a lack of coherence in the methods of addressing the various grounds and an inability to effectively address multiple discrimination. See further above.

An Overarching Commission

Q9 Do you think that a structure based on an overarching Commission would be a good approach?

As stated, we have addressed this question by identifying first the priorities we consider should inform the answer to such a question. If Government is set on a single structure then an Overarching Commission is most likely to meet the priorities that we have identified, in due course. Firstly, as we have stated, a Single Equality Act and a harmonising of the protections and duties applicable to the various protected grounds must be put in place. There must, of course be adequate funding for such a Commission. There further needs to be structures for each of the new grounds otherwise there will be gaps under the arch.

Q10 Do you think that there are other organisational models that might work as well or better than those set on in this consultation paper?

See above.

Q11 Do you have a clear preference for one of these three options?

If a single commission is to be chosen over separate Commissions for each strand, then an Overarching Commission

Q12 The government intends to establish any new equality machinery on a GB wide basis, reflecting the devolution settlement. What arrangements need to be in place to meet the distinctive economic, political, legal and cultural circumstances in Scotland and Wales?

We recognise that there are separate considerations arising out of the devolution settlement which must be decided in light of the arrangements chosen by Scotland and Wales. However, we consider that the priorities we have identified apply equally.

Q13 Delivering Services at a Local and Regional Level

We would welcome your view on the type of services that need to be delivered at a local or regional level

Activity	Local	Regional	Both	Neither
Advice and guidance to individuals			X	
Advice and guidance to businesses			X	
A 'gateway' or focal point into the work of any new equality institution			X	
Promotion of equality to local employers and service providers			X	

Do you have views on the best methods and routes for delivering all these services at either a local or regional level? Please specify.

See above.

Enforcement and Promotion

Q14 Do you agree that any new institution should carry out both enforcement and promotion activities?

Yes. We consider that competence in both these areas is essential to effective involvement in both.

Liberty

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