



Joint Committee on Human Rights (JCHR): The Equality Bill call for evidence

Submission of the Scottish Human Rights Commission (SHRC)

17 June 2009

Statement of purpose:

On 4 June 2009 the Joint Committee on Human Rights issued a call for evidence on the human rights compatibility of the Equality Bill, which had been published by the UK Government on 27 April 2009.

SHRC submitted the current evidence including a consideration of the place of human rights and equality in UK law, the relation of the Equality Bill and the Human Rights Act, and responses to several of the questions which JCHR asked the Solicitor General on the compatibility of specific provisions of the Bill with international human rights law.

Preliminary Comments

We are pleased to contribute to the consideration by the Joint Committee on Human Rights (JCHR) of the Equality Bill, which will have significant implications for the realisation of all human rights in Scotland. We echo many of the concerns raised by JCHR in its request to the Solicitor General for further information. In order to be concise, following some preliminary comments, we will make only brief comments on areas where we have additional suggestions.

Equality and non-discrimination are at the core of the realisation of all human rights. They are central to UN and Council of Europe human rights treaties, and form part of domestic human rights law through the Human Rights Act 1998 and the Scotland Act 1998. The UK's traditional approach to non-discrimination and equality as distinct from human rights is inconsistent with international law, incoherent in practice and poorly serves those whose rights are most frequently overlooked. Unfortunately the current Equality Bill continues this approach of two parallel and occasionally contradictory standards. It is not surprising, therefore, that the UK has frequently been criticized internationally for its approach to non-discrimination. Most recently, in May this year, the UN Committee on Economic, Social and Cultural Rights (CESCR) expressed its concern, "that the proposed Equality Bill does not provide protection from all forms of discrimination in all areas related to the Covenant rights".¹

Since its inception, on 10 December 2008 the Scottish Human Rights Commission has spoken to a wide range of people in public, private and non-governmental bodies across the length and breadth of Scotland in a series of 18 consultation and many other bilateral meetings. We have discovered many examples of good practice where bodies have adopted a human rights-based approach through which they seek to realise equality as well as human rights duties. We are currently evaluating the experience The State Hospital at Carstairs, which has sought to deliver all duties through a human rights-based approach, in order to learn lessons which can be applied elsewhere.

¹ CESCR Concluding Observations on the UK, 22 May 2009, UN Doc. E/C.12/GBR/CO/5, para 16.

The benefits of a unified human rights-based approach to the delivery of human rights and equality duties are increasingly documented.² In our work so far we have been stuck by the high level of good will towards an integrated approach which would ensure simplification and coherence whereas at present there is unhelpful duplication. In relation to mental health, for example, it would link the right to health with discrimination on the grounds of disability or health status, and in relation to social care it would link age based discrimination with the right to freedom from degrading treatment, to provide a more holistic and workable framework for public authorities.

The present proposal for the Equality Bill would create general equality duties for certain, listed public authorities in relation to certain internationally recognized grounds of discrimination. Under the Human Rights Act all public authorities, as well as other bodies to the extent that they carry out public functions, must prohibit, prevent and eliminate discrimination in the realisation of human rights for a non-exhaustive and evolving list of grounds of discrimination.

Duplication and uncertainty should be avoided either through amendments of the Equality Bill itself or, at least, in the specific duties and guidance to be developed in the coming months by the UK and Scottish Governments.

Responses to specific questions

PART 1 – Socio-economic inequalities

Question 1.

Discrimination on the grounds of “social origin, property...or other status” is prohibited in international human rights law.³ CESCR recently clarified that “individuals or groups must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society.”⁴ As a state party to the International Covenant on Economic, Social and

² See for example the British Institute for Human Rights, BIHR response to the Discrimination Law Review consultation paper “A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain”, 4 September 2007; and Department of Health, *Human Rights in Healthcare Learning Event*, 21 April 2008.

³ ICESCR Article 2(2) and ICCPR, Article 2(1).

⁴ UN CESCR, General Comment No. 20, 10 June 2009, UN Doc. E/C.12/GC/20, para 35.

Cultural Rights (ICESCR), the UK is therefore required to immediately take steps to prevent, diminish and eliminate discrimination on this as well as other grounds.⁵

In addition, its general obligations under the ICESCR require the UK to take steps to achieve progressively the full realisation of economic, social and cultural rights for everyone, without discrimination. Such steps may include a duty on public authorities to monitor the realisation of these rights (including through collecting appropriately disaggregated data) and adopting temporary special measures where appropriate (see later under “positive action”). Such a duty, properly constructed, could be an important (although not sufficient) element of ensuring the progressive realisation of economic, social and cultural rights in the UK.

However, we do not believe that the socio-economic duty, as currently proposed, would be an adequate legislative measure either to prohibit discrimination on grounds of social or economic status, or to enhance the realisation of economic, social and cultural rights. The current proposal is vague and the “inequalities” in question are not spelt out and can be defined by public authorities themselves, meaning that implementation will not be uniform.

PART 2 – Equality – Key concepts

Other Protected Characteristics

Question 7.

Whereas the Equality Bill includes a limited number of prohibited grounds of discrimination, international human rights law, including the European Convention on Human Rights includes a non-exhaustive and evolving list of prohibited grounds of discrimination in the realisation of human rights. In addition to those grounds recognized in the Equality Bill, other prohibited grounds of discrimination under human rights treaties to which the UK is a party include (but are not limited to): association with/belonging to a national minority, birth, descent, language, marital status, political or other

⁵ Ibid, para 8(b).

opinion, social origin. Human rights bodies have interpreted “other status” to include, *inter alia*, gender identity, health status, place of residence, and economic and social situation.⁶

The “protected characteristics” in the Equality Bill do not encompass all internationally prohibited grounds of discrimination. This is likely to create confusion as bodies look to comply with duties under the Human Rights Act which extend beyond the grounds recognized in the Equality Bill.

PART 11 – Advancement of Equality

Public sector equality duty

The Commission is engaging with the Scottish Government to ensure proper consideration of human rights in the development of specific duties of Scottish public authorities. As with all other legislation public authorities must interpret the Equality Bill, so far as possible, in line with the duties under the Human Rights Act 1998. In considering the best way to enable this to happen, we will be holding a workshop with representatives of Scottish public authorities during the Scottish Government’s consultation.

Procurement

Question 65.

The UK Government Equalities Office states that the Equality Bill allows public bodies to use procurement to advance equality, and allows Ministers to set out how public authorities should go about doing this.⁷

As noted in our submission to JCHR’s consultation on business and human rights, we believe that better use could be made of public procurement law to both prevent the UK’s public sector from purchasing in a way which is detrimental to respect for human rights and to encourage private sector businesses to satisfy the terms of public contracts in compliance with

⁶ Most recently this was authoritatively interpreted in UN CESCR, General Comment No. 20, 10 June 2009, UN Doc. E/C.12/GC/20

⁷ Government Equalities Office, *A Fairer Future: the Equality Bill and other action to make equality a reality*, April 2009, p 12.

human rights norms. It is our view that the duty of public authorities to protect human rights (including the right to non-discrimination and equality) is obligatory, and not optional. We consider that the development and promotion of guidelines which would enable public authorities to ensure human rights are protected in procurement processes would be a useful step to ensuring this happens.

We feel that the way this is framed in the current Bill and explanatory memorandum is unhelpful. We are concerned that an *option* to promote equality in procurement could lead to confusion with the *obligation* to protect human rights (including non-discrimination in the realisation of human rights). In addition, the current draft Equality Bill appears to limit references to equality in procurement largely to labour policies of contractors. Under the Human Rights Act conversely, public authorities should ensure the respect, protection, promotion and fulfillment of human rights in procurement of public services.

Positive action measures

Under international human rights law temporary special measures (or positive action measures) are not prohibited, and in some cases they are required. As the Human Rights Committee has stated in consideration of the obligations under the International Covenant on Civil and Political Rights (ICCPR):

*“where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State **should** take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.”⁸*

⁸ Human Rights Committee, General Comment no. 18, para 10 (emphasis added). For a similar view expressed in relation to the ECHR, see *D.H. and others v Czech Republic*, Grand Chamber, Application no. 57325/00, 13 November 2007.

In giving effect to the duty under the Equality Bill consideration should be given to when such measures may be required, and to the requirement that they be time-bound and cease when the objective is achieved.

Additional comments

Definition of direct and indirect discrimination

The definition of discrimination included in the Bill differs from that in international human rights law. While the Bill considers discrimination to be less favourable treatment based on a protected ground, under international human rights law discrimination is “any distinction, exclusion, restriction or preference based on a prohibited ground which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights ...”⁹

Currently, the explanatory memorandum to the Bill states that, “it is not discrimination to treat a disabled person more favourably than a person who is not disabled”. This statement could give the misleading impression that all favourable treatment of persons with disabilities is permissible. Under international human rights law any preference which is not reasonably and objectively justified is discriminatory.

In addition, it is not currently explicit in the Bill that there is a duty to treat differently people whose circumstances are significantly different. As the International Court of Justice has stated,

*“The principle of equality before the law does not mean...absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means...relative equality, namely the principle to treat equally what are equal and unequally what are unequal”.*¹⁰

This is an important principle which has been reiterated by the European Court of Human Rights:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States

⁹ Article 1 of ICERD and ICEDAW; Human Rights Committee, General Comment No. 18, para 6; UN CESCR General Comment No. 20, para 7.

¹⁰ *South West Africa Cases (Second Phase)*, ICJ Rep 1966, p. 6, 305-06.

without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”¹¹

“reasonable adjustments” and “reasonable accommodation”

In addition to concerns raised by JCHR in relation to the definition of disability under the Equality Bill, which we echo, we note that the duty to make reasonable adjustments for people with disabilities in the Bill is narrower than the obligation of reasonable accommodation under the CRPD. Under CRPD the UK is required to take all appropriate steps to ensure reasonable accommodation where necessary to ensure the equal enjoyment of human rights by persons with disabilities. Reasonable accommodation relates to appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case.¹²

The equivalent duty to make reasonable adjustments under the Equality Bill extends only to situations where person with a disability faces a “significant disadvantage in comparison to non-disabled people”. This is a far more limited requirement than the obligation under the CRPD, and reflects a test included in Protocol 14 to the ECHR with the intention of raising the bar for admissibility of petitions to the ECHR.¹³

Final comments

We hope that these comments are useful and would welcome an invitation to provide oral evidence if the Committee feels that would be valuable.

¹¹ *Thlimmenos v Greece*, Application No. 34369/97, 6 April 2000, para 44.

¹² CRPD, Article 2 and 5(3).

¹³ Protocol 14 amends Article 34 of the ECHR to include the “significant disadvantage” test in order “...to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights...”.