


Response Proforma – Respondent Information Form

 <p>Note That This Form Must Be Returned With Your Response To Ensure That We Handle Your Response Appropriately</p>

1. Name/Organisation

Organisation Name

Scottish Human Rights Commission

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ *Please tick as*

Surname

Forename

2. Postal Address

Optima House, 58 Robertson St, Glasgow,

Postcode G28DU	Phone	Email



Submission to Consultation on “Public Sector Equality Duty Specific Duties”

The Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The

Scottish Human Rights Commission
Optima House, 58 Robertson Street, Glasgow, G2 8DU.

T: 0141 243 2721
W: scottishhumanrights.com

Commission is a public body and is entirely independent in the exercise of its functions. The Commission's mandate is to promote and protect human rights for everyone in Scotland. We are a national human rights institution, established according to the United Nations Principles relating to the Status of National Institutions (The Paris Principles), one of over 80 in the world and three in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

1 . Introduction

The Scottish Human Rights Commission (the Commission) welcomes the opportunity to comment on the "Public Sector Equality Duty Specific Duties" consultation document (the consultation). The Commission focuses its response specifically on human rights and the importance of linking these with equality when considering the specific duties that should be placed on Scottish public authorities to assist their delivery of the general duty under the Equality Bill.

While the Commission recognises central Government progress in forging legislative protection in the field of equality and human rights, we nonetheless believe that the Equality Bill represents a missed opportunity to strengthen the conceptual, legal and practical link between equality, non-discrimination and human rights.¹

Since, at least, the development of the Universal Declaration of Human Rights (UDHR) over 60 years ago, equality and non-discrimination has been the cornerstone of international human rights law. Article 1 of the UDHR states, *"All human beings are born free and equal in dignity and rights."* Article 2 expands on this *"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*²

All subsequent core UN human rights treaties place the prohibition of discrimination on an increasingly broad range of grounds,³ and the promotion

¹ See Scottish Human Rights Commission, *Joint Committee on Human Rights (JCHR): Equality Bill call for evidence, submission of the Scottish Human Rights Commission (SHRC)*, 17 June 2009, http://www.scottishhumanrights.com/content/resources/documents/SHRC_submission_to_JC_HR_on_Equality_Bill_FINAL.doc

² Article 7 further provides that, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

³ 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 opinion, social origin. Human rights bodies have interpreted "other

of equality at their heart.⁴ The European Convention on Human Rights includes a prohibition of discrimination on any grounds in the realisation of Convention Rights (Article 14). Consequently, the advancement of equality and the prohibition and elimination of discrimination, on any ground, are fundamental postulates of human rights and a central element of human rights law.

In contrast to clearly established international practice, the United Kingdom (UK) has taken a piecemeal approach to legislating equality and human rights. The Equality Bill represented an opportunity to reverse this unfortunate trend by linking its duties more explicitly to public sector duties under the Human Rights Act. While the opportunity was missed at the UK level, the Scottish Government in its consultation on specific duties for Scottish public authorities recognised the clear link between equality and human rights (2.15-2.18). The present consultation, therefore, represents an opportunity to explore how best Scottish public authorities can move towards an integrated approach to human rights and equality through the development of specific duties which enable this to happen.

To explore the possibilities for linking human rights and equality through the specific duties, the Commission undertook two consultation events in Glasgow, together with the Equality and Human Rights Commission in October 2009. These events brought together diverse representatives of civil society and public authorities to discuss the proposed Specific Duties, and to gauge feedback on proposals to take a human rights approach to the delivery of specific equality duties, including through the development of non-statutory guidance. In addition, the Commission has obtained key findings from its evaluation of the human rights based approach taken by The State Hospital,⁵ on its practice of integrating human rights and equality duties, and has begun a process of engagement with a number of local authorities which are also attempting to take an integrated approach to human rights and equality. Each of these initiatives suggests strongly to the Commission that an integrated approach to equality and human rights can and should improve the delivery of both the general equality duty and the public authority duty under

status” to include, inter alia, gender identity, health status, place of residence, and economic and social situation (Most recently this was authoritatively interpreted in UN CESCR, General Comment No. 20, 10 June 2009, UN Doc. E/C.12/GC/20).

⁴ See, among others, Article 2, International Covenant on Economic, Social and Cultural Rights; Articles 2 and 26, International Covenant on Civil and Political Rights; Article 2, Convention on the Rights of the Child; Articles 1 and 2, International Convention on the Elimination of all forms of Racial Discrimination; Articles 1 and 2, International Convention on the Elimination of all forms of Discrimination Against Women; Article 1, Convention Against Torture and other cruel, inhuman or degrading treatment or punishment; Article 1, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Articles 2, 3, 4, 5, 6, 23, 24, 25, 27, 28, 29, 30, Convention on the Rights of Persons with Disabilities.

⁵ Scottish Human Rights Commission, *Human Rights in a Healthcare Setting: Making it Work, an evaluation of the human rights based approach at The State Hospital*, SHRC, 10 December 2009.
<http://www.scottishhumanrights.com/content/resources/documents/HRHCSFINALVERSION.pdf>

Scottish Human Rights Commission
Optima House, 58 Robertson Street, Glasgow, G2 8DU.
T: 0141 243 2721
W: scottishhumanrights.com

the Human Rights Act. This in turn helps drive effective institutional and cultural change and most importantly makes a positive difference to people's lives.

The commission would like to submit three key comments to the consultation:

1. Firstly, the importance of linking human rights and equality is fundamental to ensuring the delivery of both. Human rights law and standards fill the gaps emerging from an approach relating solely to equality, ensuring dignified treatment for everyone, irrespective of whether it is possible to draw a connection to a protected characteristic (prohibited ground of discrimination). The Commission provides practical examples to demonstrate the strength of an integrated approach.
2. Secondly, a single integrated approach makes sense for public authorities: it is coherent, it increases the effectiveness of public service delivery and it reduces the administrative burden associated with multiple parallel duties.
3. Thirdly, the Commission would like to highlight, in its concluding remarks, the importance of issuing non-statutory guidance for all Scottish public authorities on how to take human rights into account when delivering equality duties.

2. Legal Framework

- Scotland Act 1998
- Human Rights Act 1998
- European Convention on Human Rights
- Protocol 12 to the European Convention on Human Rights
- European Community Law
- Universal Declaration of Human Rights and core UN human rights treaties ratified by the UK.

3. Taking a human rights-based approach to equality duties: plugging the gaps in the current framework.

Linking human rights and equality considerations in practice provides enormous practical benefits to both rights holders (everyone) and duty bearers (particularly public authorities). It will ensure that both considerations of the prohibition, prevention and elimination of all forms of discrimination and the respect, protection and fulfilment of all basic rights and freedoms of everyone inform decisions.

As Scottish Government guidance makes clear, *“Under the Human Rights Act, all public authorities in Scotland, whether reserved or devolved, must act in accordance with the Convention rights in everything they do: this includes private bodies that are carrying out public functions.”*⁶ Decisions which are made solely on the basis of equality and without reference to human rights, on the other hand risk missing crucial considerations such as the prevention of degrading treatment or the promotion of autonomy for everyone, and risk of non-compliance with the HRA

A public authority does not comply with the HRA if the decisions it makes and the services it provides, although non-discriminatory, do not respect dignity and rights of every individual. This is a clear risk that the current framework of duties emphasises equality and non-discrimination in isolation from human rights. To illustrate this with a common example of decision making in the current economic climate: a local authority may be considering the relocation of residents from a series of care homes into one central institution. Weighing the impact of this option in terms of equality would assess the discriminatory impact on the grounds of age and perhaps other grounds such as disability. The result may well be neutral. However a consideration on human rights grounds would engage Article 8 of the Convention⁷ and the HRA as relocation would have an impact on the residents’ right to respect for private, home, and family life.

An approach which assessed the human rights impact, via an integrated *human rights and equality impact assessment*, would assess not only the discriminatory impact, but also whether the impact on the human rights of residents (i.e. emotional and physical) and their families (e.g. in maintaining family contact) was legal, necessary and a proportionate means of achieving a legitimate aim. The outcome of the decision making process may well be quite different. In any event the consideration of human rights impact would highlight consequences of the decision which an equality impact assessment alone would not, and therefore allow an authority to fully consider necessary steps to mitigate adverse impacts (which may in this case include emotional support for those to be moved and the provision of transport for visiting family members).

A further important aspect of the HRA is that it incorporates into domestic legislation the right to protection from direct and indirect discrimination on *any ground* in relation to Convention rights (Article 14). This provides an important additional protection against discrimination in the exercise of human rights for discrimination on grounds other than those related to a “protected characteristic” in the Equality Bill. Linking these two in policy (through duties) and practice (through guidance, training etc) will better serve efforts to achieve both the fulfillment of human rights and the elimination of discrimination.

⁶ <http://www.scotland.gov.uk/Topics/Justice/law/human-rights/Europeanconvention>

⁷ Article 8 of the ECHR “Everyone has the right to respect for his private and family life, his home and his correspondence ”

4. Taking an integrated approach makes sense: experiences and views

As mentioned above, the Commission is involved in a number of projects with public authorities that have piloted approaches to linking equality and human rights in practice. For example, the Commission has undertaken an independent evaluation of the experience of a Special NHS Health Board (The State Hospital) which has sought to adopt a human rights culture since 2002.

The findings from that evaluation include the following:

- **Adopting a human rights-based approach was better for everyone:** it resulted in mutual respect between staff and patients. This had led to increased staff and patient engagement, increased work-related satisfaction amongst staff and increased understanding amongst patients over their care and treatment;
- **Taking a human rights-based approach reduces risks:** by proactively adopting a human rights based approach an organisation can reduce its risks of having to react to critical media comment, negative public perceptions or legal proceedings, when its policy and practice is shown to breach human rights.
- **Human rights are the foundation for other duties:** taking a human rights-based approach at The State Hospital made delivering on other duties a less daunting process. It laid the foundations for the integration of new equality, freedom of information and mental health duties. In particular The State Hospital experience demonstrates that human rights can provide a bedrock for implementing equality duties. The evaluation also shows the importance of maintaining a clear link to the HRA in practice - since the HRA was enacted all relevant legislation has to be read through the lens of human rights.

The experience of The State Hospital provides clear lessons for the integration of human rights into other public authorities in the health and social care sectors as well as others.⁸

In addition to the evaluation of the experience of The State Hospital, the Commission, on the basis of its mandate and expertise, is also beginning to work with local authorities which have proactively sought to integrate human rights and equality duties in practice. The Commission has also begun to develop an understanding of how human rights may be integrated into procurement and impact assessment tools and processes and is partnering in the development of a measurement framework based on human rights indicators.

Others too have found that taking a human rights-based approach to public service delivery improves outcomes. The UK Ministry of Justice Human

⁸The results of the evaluation are available here: <http://www.scottishhumanrights.com/research/ourpublications/article/healthcareresearch>

Rights Insight Project (the Project), for example, found that human rights improve the public's experience of public services.⁹ On the linkage between equality and human rights, the Project considered case studies from Australia, Canada, the Council of Europe, the European Union, Ireland and Northern Ireland and found that:

*"It is clear from the examined case studies and particularly from the policy work and case law of the Council of Europe that there is a tendency for a linkage of human rights and equality legislation. The Northern Ireland Act 1998, for example, which formalises this link, has proved to be an extremely important tool for cultural change both in public services and the NI community."*¹⁰

Likewise the Equality and Human Rights Commission and the Office for Public Management has found in England and Wales that the benefits of integrating human rights into the operations of public authorities and other bodies include:

*"establishing some non-negotiable service standards that apply to everyone; providing a framework for making better decisions; strengthening advocacy; helping to reenergise staff and re-connect them with core public service values; managing organisational risk; and enhancing organisational reputation and distinctiveness."*¹¹ They also found that human rights should be integrated into decision making, both at the corporate and practical levels, and that this should be advanced through integrated (equality and human rights) tools.¹² They conclude, by achieving the following conclusion: *"the research suggests that one area in which new guidance and support would be particularly appreciated is in integrating human rights with equality and diversity."*¹³

During the Government consultation, the Commission, together with the Equality and Human Rights Commission in Scotland, conducted two consultation events in Glasgow in October 2009. The events included a wide array of representatives of public authorities and civil society.

The evidence from these events demonstrates:

- there is a real need to simplify the array of public sector duties.
- everyone would like to better understand what human rights are and what obligations exist.
- a disconnected agenda between equality and human rights is likely to amplify the gap between these two public duties, undermine delivery of each, and create further confusion for practitioners

⁹ See Human Rights Insight Project, Ministry of Justice Research Series 1/08 January 2008, p 75. <http://www.justice.gov.uk/publications/docs/human-rights-insight-full.pdf>

¹⁰ Ibid, p 70.

¹¹ *The Impact of a Human Rights Culture on Public Sector Organisations: lessons from practice*, Equality and Human Rights Commission and Office of Public Management, 2009, p 8. http://www.equalityhumanrights.com/uploaded_files/the_impact_of_a_human_rights_culture_on_public_sector_organisations.pdf

¹² Ibid, p 10.

¹³ Ibid. p 12.

- human rights should be the over-arching concept within which equality is advanced, and should be mainstreamed into public authorities' and other service providers' thinking.
- there is a need and a desire for guidance on how to deliver on equality duties in accordance with the HRA.
- human rights need to be part of procurement processes, however establishing how to assess compliance represents a challenge.

These stakeholder events highlight the unfamiliarity of human rights and associated legal obligations, in particular the positive human rights duties of public authorities, despite more than 10 years of the HRA. Stakeholders also pointed out the huge perceived benefits of non-statutory guidance to clarify what human rights really mean, and how they can and should be integrated with specific equality duties.

5. Conclusions

There is a clear link between equality and human rights. The Human Rights Act 1998 introduces into UK law the rights and freedoms set out in the European Convention on Human Rights. The norms in the Act, and other international human rights instruments, reflect the belief that everyone is entitled to a wide range of rights and freedoms including protection from discrimination and the promotion of equality in law and in practice.

The evidence which the Commission has gathered and continues to gather strongly indicates the value of linking human rights and equality in practice, including promoting a human rights-based approach to the delivery of specific duties under the forthcoming Equality Act.

This consultation provides a clear opportunity to take a first step to establishing this link in practice in Scotland. The Commission believes, and its consultation findings reinforce, that non-statutory guidance on linking human rights with specific equality duties would be enormously beneficial both to public authorities and to the general population. Such guidance would clarify what human rights are and how Scottish public authorities should fully take into account duties under the HRA when implementing their specific duties under the forthcoming Equality Act.

The Commission looks forward to working with the Scottish Government, Scottish public authorities, and others, to develop such non-statutory guidance to ensure that it benefits from the rich experience of those in Scotland who have long sought to promote equality, and in some cases already attempted to link this to human rights.

End.