

EQUALITY DUTIES AND THE IMPLICATIONS OF THE ESTABLISHMENT OF THE COMMISSION FOR EQUALITY AND HUMAN RIGHTS

Equality Duties and the Commission for Equality and Human Rights: An International Perspective

Thank you for the invitation to contribute to debate on this important topic. When Professor Celia Wells first asked me if I would speak at this conference three years ago she promised it that it would be in Cardiff and coincide with the Rugby World Cup. Unlike most of my judicial colleagues (at least on the Supreme Court of Queensland) I am not a follower of rugby so was delighted when she told me that the conference would be following her to the elegant, if not Rugby free, city of Durham.¹ I thought the contribution I could most usefully make to this topic is to draw on my experiences in Australia and elsewhere.

My experiences in Australia derive from being a Hearing Commissioner for the national body, the Human Rights and Equal Opportunity Commission (commonly known as HREOC), and being the first member and then the first President of the Anti-Discrimination Tribunal set up in my home State of Queensland I also co-edited the first Equal Treatment Bench Book produced in Australia. This was not produced by an external body for the Court but was produced by the Supreme Court of Queensland itself.

My practical experience elsewhere is with reference to South Africa and Iraq. In South Africa,² I advised judges, government and non-government organisations on the practical implementation of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* which was mandated by s 9³ of the inspirational Constitution of the Republic of South Africa and the following year I addressed judges and magistrates, who would themselves be sitting on Equality Courts and also educating other judges and magistrates, at a National Seminar for Equality Court Educators in Magaliesburg in April 2001. The problem faced in South Africa was that the

1 I note that the University of Durham was founded by Act of Parliament in 1832, 175 years ago, whereas the Durham County Rugby Football Union was not established until 1867, 44 years later. However in 2004, the University did give an honorary doctorate to a Rugby playing graduate describing him as “one of England’s most consistent performers in the England team who beat Australia in the Rugby World Cup in 2003.”

2 <http://www.sclqld.org.au/qjudiciary/profiles/rgatkinson/publications/>

3 Section 9 provides:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Constitution ensured equal rights and the Constitutional Courts had given effect to them in a number of important cases but there was no day to day method for ordinary people to vindicate those rights. The effect of this was that in spite of all the changes many old discriminatory practices survived. A judge of the High Court of one of the provinces told the group of his own recent experience of finding rental accommodation which he had booked refused to him when he turned up in person and the lessor saw that he was black.

My experience with regard to the Iraqi judges was as a lecturer at a week long seminar on international human rights law organised by the International Bar Association in conjunction with the United Nations.⁴ That is a topic in itself and I would be happy to answer questions on it. Suffice to say, that they appeared hungry to learn about international human rights law and how it could be implemented domestically, but impatient of foreign occupation and extremely concerned for the safety of themselves and their families.

So it is those experiences, as well as what I have read about the Commission for Equality and Human Rights (CEHR), that inform what I will say to you today, which I have called, perhaps rather too ambitiously, *Equality Duties and CEHR: An International Perspective*.

CEHR commences operation next month in October 2007,⁵ aptly in the European year of equal opportunities for all.⁶ The establishment of the Commission comes at a time when reviews into human rights and discrimination have been undertaken in an attempt to address the inequality which persists in the United Kingdom, as it does elsewhere in the world.⁷

I express guarded optimism that the establishment of CEHR will be a significant step towards the increased protection of human rights in the United Kingdom. Its progress will be very important to the growth of knowledge of how to create institutions which foster the protection of human rights and promote a human rights culture.

One of the major international concerns since the end of the Second World War has been the development of effective instruments and bodies to promote equality.⁸ CEHR is the most recent development in equality law and is designed to address growing concerns about intractable inequality in society and the complicated array of legislation that had been developed to protect the human rights of citizens of the United Kingdom.⁹

Examples abound of the intractable nature of inequality and the serious problems it causes and the often inadequate response to addressing these problems.¹⁰ In Australia, Aboriginal and

⁴ <http://www.sclqld.org.au/qjudiciary/profiles/rgatkinson/publications/>.

⁵ Commission for Equality and Human Rights Website at www.cehr.org.uk visited 16 August 2007.

⁶ Ibid.

⁷ Aileen McColgan, "Reconfiguring Discrimination Law" [2007] *Public Law* 74.

⁸ RG Atkinson "Are Anti-Discrimination Statutes a Model for a Bill of Rights?" (1999) 19 *Aust. Bar Review* 18 at 19.

⁹ G Moon and R Allen, "Dignity Discourse in Discrimination Law: A Better Route to Equality" (2006) 6 *European Human Rights Law Review* 610-612.

¹⁰ An example of one group that faces routine discrimination in the United Kingdom is the Romany or gypsy peoples. A striking example of intolerance towards these people was the situation involving the bonfire society in a small Sussex village in October 2003. This involved the burning of an effigy of a gypsy

Torres Strait Islander peoples continue to face social inequity. The most recent response of the Australian government, sending in the troops and other emergency measures, has been dramatic but very controversial.

HREOC's submission to the Senate Legal and Constitutional Committee on the Northern Territory National Emergency Response Legislation ("NTNER measures") welcomed the recognition by the government of the serious, broad ranging social and economic disadvantage in many Indigenous communities and that this recognition has presented an historic opportunity to deal with a national tragedy. HREOC strongly supported the aims of the NTNER measures, namely to improve the well-being of certain communities in the Northern Territory and to protect children. But it also warned that action must be consistent with rights and stressed that the legislation and action taken under it must seek to achieve its goals consistently with the fundamental right to racial equality. HREOC opposed the NTNER measures being exempted, as they are, from the Racial Discrimination Act.¹¹

HREOC submitted that the NTNER measures have a number of significant actual and potential negative impacts upon the rights of Indigenous people which are discriminatory. The laws generally must therefore be justifiable as a 'special measure' taken for the advancement of Indigenous people to be consistent with human rights principles. If the NTNER measures are not 'special measures', they submitted, they should not be enacted. Australia, of course, does not have a Human Rights Act or Bill or Charter of Rights to protect or provide a yardstick for the protection of fundamental rights.

Both the UK and Australia have witnessed the alienation suffered by and discrimination against minority religious and ethnic groups which boiled over in Sydney in the Cronulla riots.

Even the most privileged groups in Australia are not exempt from discrimination. The distinguished High Court judge, The Honourable Justice Michael Kirby has recently drawn attention to the inequity of the fact that because this life partner is also male he will be unable to benefit, as other judges' spouses do, from the judicial pension on the death of the judge.¹²

I give these examples, not to suggest that Australia, the home of the "fair go" is a more unequal or unfair society than others, for I do not believe it is; but to emphasise from my own experience how intractable the problem of inequality is and the care and thought, skill and diligence, that must be exercised in addressing it rather than exacerbating it.

caravan with a mother and children standing at the windows of the van. The word `pikey` was written on the side of the effigy of the van. Whilst the effigy was being burned, some participants were shouting "burn, burn": S Spencer, "Gypsies and Travellers: Britain's Forgotten Minority (2005) 4 *European Human Rights Law Review* 335 at 338.

¹¹ See Northern Territory National Emergency Response Bill 2007 ('NTNER Bill') clause 132; Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 ('the Social Security Bill') clause 4; and Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 ('FaCSIA Bill') clause 4.

¹² The HREOC Same-Sex: Same Entitlements Inquiry found that 58 federal laws breached the human rights of more than 20,000 same-sex couples in Australia. The Inquiry recommended that omnibus legislation be introduced to remove that discrimination: http://www.hreoc.gov.au/media_releases/2007/55_07.html.

Reasons for the creation of CEHR

The British response to systemic inequality was to implement the *Human Rights Act*. Yet, notwithstanding that, there is evidence that little systemic change was being made. For example, Lord Lester and Kate Beattie observed:¹³

“In December 2002, a study by the British Institute of Human Rights concluded that ‘there is no serious attempt from either government or the voluntary sector to use the Human Rights Act to create a human rights culture that could in turn lead to systemic change in the provision of services by public authorities’.

The study found that: ‘The Act has simply not had an impact in the [voluntary sector], leaving many vulnerable people open to abuses of their rights. Yet without an independent body of some kind to promote the Human Rights Act and the principles that it upholds this situation is unlikely to change.’¹⁴

In its report on the need for a Human Rights Commission in the United Kingdom, the JCHR [Joint Committee on Human Rights] concluded that ‘there is no vision, no administrative framework and scant guidance reaching public authorities to tell them how a culture of respect for human rights might look or how it can be delivered’.¹⁵

In 2003, the Audit Commission reported that 58 per cent of public bodies had not adopted a strategy for human rights and had no clear corporate approach, demonstrating no improvement on the findings for 2002.¹⁶ In 2005, it appeared that the situation had not changed significantly. In a report on behalf of the Institute of Public Policy Research for the Department for Constitutional Affairs, Frances Butler found that ‘the Human Rights Act has not yet been of sufficiently demonstrable value in improving standards in public services as the Government has intended when the Act was passed’.¹⁷ In particular there is ‘insufficient awareness of the legal principle of ‘positive obligations’ to protect human rights which requires public authorities to adopt a pro-active approach to human rights”.

There was, therefore, a recognition that a change to human rights protection in the United Kingdom was needed in an attempt to create a more equal society.

Equality

¹³ Lord Lester of Herne Hill, QC, and K Beattie, “The New Commission for Equality and Human Rights” [2006] *Public Law* 197, 198-199.

¹⁴ British Institute of Human Rights, “Something for Everyone: the Impact of the *Human Rights Act* and the Need for a Human Rights Commission” London, 2002 at 8 BIHR’s Report focussed on the voluntary sector’s work with children, disabled people, older people and asylum-seekers.

¹⁵ JCHR, Sixth Report, *The Case for a Human Rights Commission* (2002-03 HL 67; HC 489), p.29. The government has recently issued guidance to public authorities in relation to contracting for services: *Guidance on Contracting for Services in the light of the Human Rights Act 1998* (Office of the Deputy Prime Minister, London, 2005).

¹⁶ Audit Commission, *Human rights: improving public service delivery* (London, 2003), para.12.

¹⁷ Institute for Public Policy Research, *Improving Public Services: Using a Human Rights Approach* (London, 2005), p.37.

The establishment of CEHR, through the enactment of the *Equality Act 2006* (UK), focuses on the promotion of equality throughout British society.¹⁸

The promotion of equality can be seen to be in accordance with the aims of international human rights instruments generally, such as the *International Covenant on Civil and Political Rights* (1966) (ICCPR)¹⁹ and the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR).²⁰ Even aspirational international law instruments such as the *Universal Declaration of Human Rights* (1948) (UDHR) promote equality. Article 7 is the clearest statement of that; but articles 1, 2 and 10 also express that ideal, although often now in language which betrays an era of less substantive equality especially for women.²¹

Both the South African and Australian systems for the protection of human rights also aspire not just to end unfair discrimination but to promote equality.²² Additionally the European

¹⁸ This is demonstrated by the general duty set out in s 3 of the *Equality Act*:
“General Duty The Commission shall exercise its functions under this part with a view to encouraging and supporting the development of a society in which:

- (a) People's ability to achieve their potential is not limited by prejudice or discrimination;
- (b) There is respect for and protection of each individual's human rights;
- (c) There is respect for the dignity and worth of each individual;
- (d) Each individual has an equal opportunity to participate in society; and
- (e) There is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights.”

Section 8 is similar and focuses on the promotion of equality and equal opportunities and respect for, and understanding of, diversity.

¹⁹ For example, article 26 of the *International Covenant on Civil and Political Rights* (1966) (ICCPR) provides for equality before the law:

Article 26 All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Additionally, article 14 of the ICCPR provides for equality before the law with a particular focus on criminal proceedings; article 23 provides for equality between spouses; article 25 provides for equality in participation in public life; and, importantly, article 27 recognises the rights of ethnic, religious and linguistic minorities.

²⁰ This can be seen from the preamble of the ICESCR and also particularly article 3 of the covenant. However, the use of words such as "all" throughout the articles show that the covenant is fundamentally based on the notion of equality.

²¹ **Article 1** All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2 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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7 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.

Article 10 Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

²² For example, see s 31, 34 and 35 of the *Human Rights and Equal Opportunities Act 1986* (Cth) (*HREOC Act*). The *Anti-Discrimination Act 1991* (Qld) also refers to the promotion of equality and prevention of

Convention on Human Rights (1950) specifically supports equality through the reference the UDHR in its preamble.²³

Formal vs Substantive Equality

Since the UDHR declared that all peoples are created equal in article 1 placing the focus of international law on the concept of equality,²⁴ there has been continuing academic debate surrounding the concept of equality.²⁵

There are two main approaches to the concept of equality. The traditional approach which has been propounded historically in international law is the formal equality approach. Formal equality essentially involves providing people with the same rights and level of access without taking into account the differences that occur between individuals.²⁶ A system based on formal equality does not take into account the fact that individuals have different needs so that making something apparently available to all people on equal terms does not mean that all people have equal access to it. If members of the public are allowed to access an open court, for example, but the building is not wheelchair accessible or there is no Braille signage, there will be formal equality but not substantive equality. A witness in a case before me when I sat as President of the Queensland Anti-Discrimination Tribunal once memorably described steps for someone with a mobility impairment as the equivalent for the able bodied of finding locked glass doors at an entrance. One can see what is going on and where one wants to go but one is prevented from entering.²⁷

On the other hand, substantive equality recognises the differences between individuals. It recognises that requirements which are facially neutral may in fact be devastatingly discriminatory. This well accepted proposition was dealt with in the High Court of Australia in *Waters v. Public Transport Corporation*.²⁸ As McHugh J. said at 402:

“discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.”

Indirect discrimination occurs when a requirement or condition is imposed equally but has an

Unfair Discrimination (See long title of Act; s 6 - Purpose of act - Anti-Discrimination Act 1991 (Qld). The South African equivalent of the *Equality Act 2006* (United Kingdom) is called the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA). This Act clearly promotes equality as can be seen particularly from the preamble to the Act.

²³ Moon and Allen, op cit, at 621.

²⁴ Evadne Grant, “Dignity and Equality” (2007) 7 *Human Rights Law Review* 299, 300.

²⁵ Ibid; Loenen, “Towards a Common Standard of Achievement? Developments in International Equality Law”, [2001] *Acta Juridica* 197; Eric Engle, “Universal Human Rights: A Generational History” (2006) 12 *Annual Survey of International and Comparative Law* 219.

²⁶ Grant, op cit, 328.

²⁷ *Cocks v The State of Queensland* [1994] QADT 3; (1994) EOC 92-612; <http://www.austlii.edu.au/au/cases/qld/QADT/1994/3.html>.

²⁸ (1991) <http://bar.austlii.edu.au/au/cases/cth/HCA/1991/49.html>

adverse or more adverse impact on persons with different attributes.²⁹

Academic writing on the subject has recognised that human rights can only be enhanced by the promotion of substantive equality. Evadne Grant, for example, has noted:

“In particular, it has been argued that formal equality is concerned with consistency of treatment rather than the quality of treatment and that, because it ignores structural equality, it fails to address entrenched economic and social disadvantage. Fredman has proposed that a substantive approach to equality should seek to promote four broad aims: namely to break the cycle of disadvantage experienced by some groups within society; to promote respect for dignity by providing redress for stigma and stereotyping; to positively affirm the identity of individuals within society; and to facilitate full participation in society.”³⁰

The South African Constitution and South Africa’s Constitutional Court are fundamentally based on the notion of substantive equality.³¹ The equality provision in the South African Constitution 1996 (SA), s 9, promotes substantive equality. The *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA), mandated by s 9(4) of the Constitution continues this theme with prohibitions against unfair discrimination and the establishment of equality courts to oversee this. The use of the phrase “unfair discrimination” could be seen to reflect further support for the promotion of substantive equality in South Africa. It impliedly recognises that some discrimination is fair - ie particularly affirmative action measures as established³² - and this realization recognises the differences between individuals and that measures must be taken to give some groups the same opportunities as those who were not historically subject to systemic discrimination.³³

One of the factors to be considered in determining whether or not discrimination is unfair is said in s 14(3)(a) be whether the discrimination impairs or is likely to impair human dignity. The leading case in the South African Constitutional Court which has provided the framework for the

²⁹ As Dawson and Toohey JJ. observed at p. 392:

“Both direct and indirect discrimination ... entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.” See also per Mason C.J. and Gaudron J. at p. 357-358.

³⁰ Grant, op cit, 328.

³¹ Grant, op cit, 300.

³² *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA) s 14.

³³ Section 14 provides, *inter alia*:

- “(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that the discrimination is fair the following must be taken into account:
- (a) The context;
 - (b) The factors referred to in subsection (3);
 - (c) Whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection (2)(b) include the following:
- (a) Whether the discrimination impairs or is likely to impair human dignity; ...”

development of a dignity discourse in South Africa³⁴ is *Harksen v Lane*.³⁵ Goldstone J held:³⁶

“What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or have been associated with, these attributes and characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity.”

Evadne Grant has analysed *Harksen v Lane* as setting out a threefold approach based on substantive equality as justified by a dignity discourse.³⁷ This threefold approach has been applied in subsequent South African cases and involves the consideration of historical disadvantage; the need for corrective action; and the impact of the discrimination on the dignity of the person.³⁸ However, it has been contended that South Africa perhaps could and certainly should do more to move towards a system based on substantive equality,³⁹ a difficult task given its history.⁴⁰

In the UK the significance of dignity in advancing substantive equality has been specifically recognised. In *Ghaidan v Godin-Mendoza*⁴¹ human dignity was recognised as a key concept for deciding whether a law which distinguished between heterosexual and homosexual persons did not comply with the right to equality guaranteed in the European Convention on Human Rights. When discussing whether a gay man could succeed to a tenancy of his deceased partner, Baroness Hale of Richmond observed:⁴²

"Such a guarantee of equal treatment is ... essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR1, 37, para 65. Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the

³⁴ Grant, op cit, 315.

³⁵ 1998 (1) SA 1 (CC); 1997 (11) BCLR 1489 (CC).

³⁶ At para 49.

³⁷ Grant, op cit, 319

³⁸ Grant op cit, 320-322.

³⁹ B L Jacobs *The Post-apartheid City in the New South Africa: a Constitutional "Triumph"?* (2006) 18 *Pace International Law Review* 407, 447.

⁴⁰ An example from my own observation is the difficulty experienced by the Vista Universities, which were set up during the Apartheid era near townships and chronically underfunded, in attracting a diversity of students.

⁴¹ [2004] UK HL 30.

⁴² Op cit at [132].

majority. Democracy values everyone equally even if the majority does not."

The argument that dignity justifies substantive equality has been criticised on two bases: the indeterminacy of dignity and the individualistic nature of dignity⁴³. These criticisms are closely interrelated in that the criticism that a dignity discourse is too individualistic is probably what really makes it indeterminate.⁴⁴ The criticisms can really be unified into a single criticism of that it is too subjective and relates to the feelings of individuals in groups rather than the groups themselves. However, I think it would be difficult to find a way of compassionately valuing the different experiences of individuals without accepting their inherent dignity and thus promoting substantive equality. There is no doubt in my mind that dignity is quite properly one of the many justifications for the promotion of substantive equality.

Overview of the structure and duties of CEHR and other national human rights institutions

A single body

Like HREOC and the various State anti-discrimination bodies in Australia and the South African Human Rights Commission (SAHRC), CEHR is charged with the protection and enforcement of human rights.⁴⁵ CEHR and HREOC represent single national human rights institutions and are established in accordance with the Paris principles.⁴⁶ SAHRC is also a national human rights institution. However, other Commissions, such as the Commission for Gender Equality⁴⁷ and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, also support human rights protection in South Africa.⁴⁸ Their position is enshrined in the Constitution.

From late 2001, the British government made it clear that it was considering unifying the three existing commissions: the Commission for Racial Equality, the Equal Opportunities Commission and the Disability Rights Commission⁴⁹ - article 13 of the EC treaty being the precursor for this.⁵⁰ Following recommendations from the Joint Committee on Human Rights (JCHR), a single body with jurisdiction over all human rights and discrimination issues was established.⁵¹ The arguments in favour of that relate to efficiency and to better securing services for the public.⁵²

⁴³ Grant, op cit, 301.

⁴⁴ Grant, op cit, 326.

⁴⁵ *Equality Act 2006* (United Kingdom) s 10; *HREOC Act 1986* s 11; preamble to the *Anti-Discrimination Act 1991* (Qld); South African Constitution 1996 (SA) s 184; and *South African Human Rights Commission Act 1994* (SA) s 9.

⁴⁶ Caroline Evans "Human Rights Commissions and Religious Conflict In The Asia-Pacific Region" (2004) *53 International and Comparative Law Quarterly* 713.

⁴⁷ South African Constitution 1996 (SA) s 187.

⁴⁸ Ibid, s 185.

⁴⁹ Gauthier de Beco, "National Human Rights Institutions in Europe" (2007) *7 Human Rights Law Review* 331, 339; McColgan, op cit, 74.

⁵⁰ Francesca Klug, Claire O'Brien, "Fairness For All? An Analysis Of Human Rights Powers In The White Paper On The Proposed Commission For Equality And Human Rights" (2004) *Public Law* 712.

⁵¹ Ibid; Lester and Beattie op cit, 197.

⁵² The following five points are made in support of a single commission on the interim website for CEHR:

* CEHR will act as a "single source of information and advice" because experts are all in the one

The efficiency argument is threefold: first it is suggested that it will be a better use of resources to have a single commission rather than creating more human rights commissions; second, as an enforcement body for the new grounds of discrimination was necessary, it was considered more efficient to unify the commissions;⁵³ and third, a single commission will prevent overlapping work and will be able to carry best practice into all the human rights target areas.⁵⁴ CEHR has also been designed as a single point of advice for people wanting to avoid discrimination or for victims of discrimination.⁵⁵

Internationally single commissions have been successful – Australia, New Zealand, Canada, the USA and Ireland all have single national human rights bodies.⁵⁶

This does not, however, mean that all well-functioning institutions will be replaced. CEHR will not take over the responsibility of assessing the compatibility of draft legislation with human rights treaties, a responsibility already vested in the JCHR.⁵⁷

Additionally, the British government has recognised that certain rules affect people with disabilities more than others and established a specialised disability committee within CEHR, which will direct the work of CEHR on achieving equality for people with a disability.⁵⁸ At least half the members of the disability committee must themselves have disabilities and CEHR must ensure that the Committee has the autonomy and resourcing to perform its functions.⁵⁹

Another area of discrimination specifically recognised is race discrimination. CEHR will maintain the currently established “race equality councils” pursuant to s 10(4) of the *Equality Act*. It has been argued that the special committees - disability and the “devolved” committees - are practical as special approaches will be necessary in these areas.⁶⁰ However, it has also been argued that care should be taken not to establish too many committees within CEHR.⁶¹

A division of responsibilities within a single Commission is what occurs with HREOC in Australia which is administered by the President, who is the Chief Executive Officer. He or she is assisted by the Human Rights, Race, Sex, Disability and Aboriginal and Torres Strait Islander

place;

- * Single contact point for individuals, the public and businesses;
- * It will promote awareness of equality issues which will help businesses avoid costly litigation;
- * It will deal with multi-level discrimination as some people face more than one level of discrimination; and
- * It will provide the elderly with a national body to address age discrimination.

⁵³ Colm O’Cinneide “The Commission for Equality and Human Rights: a new institution for new and uncertain times” (2007) 136 *Industrial Law Journal* 141, 142.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 142, 143.

⁵⁷ Department of Trade and Industry, *Fairness For All: A New Commission for Equality and Human Rights*, White Paper, May 2004, Cm 6185 in Gauthier de Beco, op cit, 340.

⁵⁸ O’Cinneide, op cit, 144.

⁵⁹ *Ibid.*, 145.

⁶⁰ *Ibid.*, 146.

⁶¹ *Ibid.*

Social Justice Commissioners.⁶² This structure has the dual advantage that there can be advocacy for specific groups but that is done within the context of advocacy of equality for all. This is particularly significant as discrimination is often multi-layered and based on more than one prohibited ground.

Another concession to a unified approach to human rights protection was made by the decision to establish separate committees for Welsh and Scottish issues.⁶³ Certainly, the promotion of human rights in Australia has not, suffered because, as a federation, it has human rights bodies in each of the States and Territories as well as the Commonwealth. Rather, in my view, it has been enhanced.

Structure

Established by s 1 of the *Equality Act*, CEHR is a non-departmental public body.⁶⁴ CEHR is accountable to the Secretary of State for the relevant department and commissioners are appointed by the Secretary of State.⁶⁵ The JCHR which was established to advise the government on the formation of CEHR was critical of this model as it viewed it as incompatible with the Paris principles which provide guidelines on the structure and duties of national human rights bodies.⁶⁶ Nevertheless the independence of CEHR is a major focus of its establishment. Government ministers cannot request that CEHR carry out particular activities as they could with its predecessor.⁶⁷

HREOC is an “independent statutory organisation” that reports to the “federal parliament through the Attorney-General”.⁶⁸ Established in 1986 by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (HREOC Act), HREOC replaced the Human Rights Commission established in 1981. It has jurisdiction over federal legislation relating to human rights, whereas the State anti-discrimination commissions enforce State anti-discrimination legislation. HREOC addresses age, sex, race and disability discrimination⁶⁹ and is narrower than CEHR in its scope because CEHR also covers religious discrimination.

The Anti-Discrimination Commission in Queensland, like other State commissions, is an “independent statutory authority” which administers the *Anti-Discrimination Act 1991* (Qld).⁷⁰ The grounds of discrimination it covers are comprehensive. It covers discrimination on the basis of sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, and association with, or relation to, a

⁶² At present the positions of Human Rights Commissioner and Commissioner responsible for Disability Discrimination are filled by the same person; the Aboriginal and Torres Strait Islander Social Justice Commissioner is also acting as Race Discrimination Commissioner; and the President is also acting as Sex Discrimination Commissioner and Commissioner responsible for Age Discrimination.

⁶³ O’Cinneide, op cit, 146.

⁶⁴ CEHR website.

⁶⁵ O’Cinneide, op cit, 158.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ HREOC website at www.hreoc.gov.au/info_sheet.html visited 16 August 2007.

⁶⁹ *HREOC Act* s 11.

⁷⁰ Anti-Discrimination Commission website at www.adcq.qld.gov.au.

person identified on the basis of any of the above attributes.⁷¹

The SAHRC is also an independent body established by statute.⁷² Like CEHR, its duties are broad. Unlike other national bodies considered here, departments of the South African Government must report to the SAHRC with relation to the progress they are making on human rights issues.⁷³ This is important in monitoring South Africa's compliance with its constitutional bill of rights.⁷⁴

Appointment process

All appointments are made by the respective governments. The Commissioners of CEHR are appointed under schedule 1 part 1 s 2 of the *Equality Act 2006*. They must have knowledge and experience in areas relevant to the Commission's functions⁷⁵ and are appointed by the Secretary of State. The fact that the Act specifies that the Commissioners must have knowledge and experience relevant to CEHR's functions would appear to go further than the legislation establishing HREOC and the ADCQ.

The HREOC Commissioners are appointed by the Governor-General under s 8B and the President under s 8A of the *HREOC Act*. They must be suitably qualified but those qualifications are not defined other than that the person be considered by the Governor-General to have appropriate skills and knowledge for the position.⁷⁶ In practice, the President has often been a distinguished retired judge. The first, President of the Human Rights Commission, HREOC's predecessor, Dame Roma Mitchell, was the first female Supreme Court Judge appointed in Australia. The present incumbent is the Honourable John von Doussa, a highly respected former Federal Court Judge. Being a distinguished and conservative jurist has not, however, prevented the President from being subjected to bitter and political personal attacks. Sir Ronald Wilson, a former High Court Judge, was subject to vituperative attacks after the publication of HREOC's *Bringing Them Home Report* on the experiences of the stolen generations, Aboriginal and Torres Strait Islander children who were removed from their families.

Under the *Anti-Discrimination Act (Qld) (ADA)*, the Commissioner of the ADCQ is appointed by the Governor-In-Council⁷⁷ on terms set out by the Governor-In-Council.⁷⁸ While the ADA does not set out any qualifications for the appointment of a Commissioner, it provides limited circumstances in which the Commissioner can be dismissed,⁷⁹ supporting the independence of the Commission. The situation is similar in South Africa.⁸⁰

⁷¹ *Anti-Discrimination Act 1991 (Qld)* s 7.

⁷² South African Constitution 1996 (SA) s 184.

⁷³ *Ibid*, s 184(3).

⁷⁴ See Chapter 2 of the South African Constitution 1996 (SA).

⁷⁵ *Equality Act 2006 (UK)* s 2.

⁷⁶ *HREOC Act* s 8B.

⁷⁷ *Anti-Discrimination Act 1991 (Qld)* s 238.

⁷⁸ *Ibid*, s 239.

⁷⁹ *Ibid*, s 242.

⁸⁰ See particularly SAHRCA 1994 (SA) s 3.

Funding

May I mention a practical question. Unlike the Australian, Queensland and South African systems, under the *Equality Act*, CEHR must be given sufficient funding to carry out its functions.⁸¹ Neither the *Anti-Discrimination Act* nor the *HREOC Act* provide a guarantee that these bodies will be resourced. The South African legislation also does not provide for the adequate resourcing of the SAHRC or the Equality Courts. Experience in that country, in particular, has shown that without adequate resourcing the protection of guaranteed rights is a hollow promise.

Duties

CEHR has all the powers and duties of the three Commissions it replaces.⁸² These include the promotional, investigative, inquiry, case support and positive duty enforcement powers as well as the ability to give information and advice, issue codes of practice with ministerial approval, arrange for the provision of conciliation services in discrimination cases and bring actions to prevent discriminatory advertising and instructions to discriminate.⁸³ In addition to having jurisdiction over the United Kingdom's anti-discrimination law, the Commission is also responsible as the national human rights body for the promotion of human rights,⁸⁴ including rights contained in international human rights instruments.⁸⁵ The British government hopes CEHR can work with UN Committees to assess the United Kingdom's compliance with international human rights law.⁸⁶

In addition to the duties of the existing human rights protection bodies, CEHR now has greater enforcement mechanisms and covers more grounds of discrimination.⁸⁷ In addition to the grounds of discrimination previously covered, CEHR covers sexual orientation, gender and religious belief.⁸⁸

The duties of the national human rights bodies considered here can be broken down into two broad categories: reporting and investigating systemic human rights issues; and resolving specific complaints. All the bodies considered here must take international human rights law into account as part of their duties.⁸⁹ For example, all legislation establishing the relevant bodies specifically refers to the country's international law obligations and the human rights body's role in achieving them.⁹⁰

⁸¹ *Equality Act 2006* (UK) s 38.

⁸² O'Conneide, op cit, 154.

⁸³ Ibid.

⁸⁴ *Equality Act 2006* (UK) s 10.

⁸⁵ *Equality Act 2006* (UK) s 9.

⁸⁶ Lester and Beattie, op cit, 201.

⁸⁷ O'Conneide, op cit 13.

⁸⁸ Ibid.

⁸⁹ This power is given to HREOC under s 46(c)(4) of the *Human Rights and Equal Opportunity Act 1986* (Cth). See also Michael Legg, "Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations", (2002) 20 *Berkeley Journal of International Law* 387.

⁹⁰ The *HREOC Act* has the ICCPR as a schedule to it, although the ICCPR is not expressly incorporated into Australian law. (Michael Kirby, "International Law - The Impact On National Constitutions" (2006) 21 *American University International Law Review* 327, 338. CEHR protects the human rights covered by

Reporting and investigating systemic issues

CEHR has been given the following duties under the *Equality Act*.

- Working to promote good relations between groups in society and reduce hostilities;⁹¹
- Monitoring and reporting on the effectiveness of United Kingdom human rights protection;⁹²
- Monitoring the societal progress towards section 3 outcomes mentioned above;⁹³
- Education, advice and publication in relation to human rights and discrimination issues;⁹⁴
- Issuing codes of practice in relation to certain enactments;⁹⁵
- Conducting inquiries and investigating suspected breaches of United Kingdom human rights law;⁹⁶
- Co-operating with people interested in human rights protection either in or outside the United Kingdom;⁹⁷
- Entering into agreements about the prevention of human rights violations;⁹⁸ and
- Assessing public sector compliance with human rights obligations.⁹⁹

CEHR is required to produce a strategic plan every three years and to take into account the views of its stakeholders in relation to the contents of the plan.¹⁰⁰ It has been given the power to report on the compliance of public authorities with their human rights obligations and can issue compliance notices if a public authority is failing to comply with its obligations or failing to promote human rights.¹⁰¹ This is regarded as significant in that it requires public authorities to go beyond their strict legal obligations and to take steps to promote human rights.¹⁰² Requiring the Commission to report on the government rather than the government reporting to the Commission on its compliance, as required in South Africa, may be a better system in that the Commission's reports may be more independent than those from the government and hence more

international conventions (s 9(2) *Equality Act*; “Convention Rights” defined in s 1 *Human Rights Act 1998* (United Kingdom)). On the other hand, it is not expressly mentioned in the *Anti-Discrimination Act 1991* (Qld) whether international law must be considered. However, international instruments are referred to in its preamble in which the State parliament states in principle support for the HREOCA and international instruments. While the *Equality and Prevention of Discrimination Act 2000* mentions South Africa's International obligations in its preamble. Section 3 of the *Equality and Prevention of Discrimination Act* provides that international law obligations should be taken into account in the interpretation of the Act. In this way, it can be seen that South Africa, the United Kingdom and Australian systems all promote, albeit imperfectly, compliance with their international human rights obligations.

⁹¹ *Equality Act 2006* (UK) s 10, s19.

⁹² *Ibid*, s 11.

⁹³ *Ibid*, s 12.

⁹⁴ *Ibid*, s 13.

⁹⁵ *Ibid*, s 14.

⁹⁶ *Ibid*, ss 16 and 20.

⁹⁷ *Ibid*, s 18.

⁹⁸ *Ibid*, s 23.

⁹⁹ *Ibid*, ss 31 and 32.

¹⁰⁰ O’Cinneide, *op cit*, 147.

¹⁰¹ *Ibid*, 154.

¹⁰² *Ibid*.

objective.

CEHR can also enter into enforceable agreements with employers and other bodies, a power previously only held by the Disability Rights Commission (DRC).¹⁰³ This may encourage bodies to take actions to avoid the harmful publicity of an investigation.¹⁰⁴

As Lord Lester and Kate Beattie have noted:

"CEHR will be able to conduct inquiries into any matter relating to its wide-ranging duties concerning human rights, equality and groups.¹⁰⁵ This is a powerful tool, particularly as it will allow CEHR to cut across different equality strands in a way which was not open to the separate equality commissions. If in the course of an inquiry CEHR begins to suspect that a person may have committed an unlawful act, it may commence an investigation under s. 20."¹⁰⁶

CEHR has broad powers with relation to anti-discrimination law, including the ability to conduct "named" investigations into bodies suspected of violating anti-discrimination law. The test for CEHR to conduct named investigations of bodies has been loosened to a "suspicion" test rather than a "reasonable suspicion" test.¹⁰⁷ Once this test is satisfied, CEHR can then investigate a body to test for discriminatory practices.¹⁰⁸ It has been posited that the effect of this should be that decisions to investigate will not be overturned judicially unless they are irrational as opposed to merely unreasonable.¹⁰⁹ This should avoid situations such as the Commission for Racial Equality having to wait 10 years to launch a "named investigation" into the army because it was difficult to gather information to satisfy the reasonable suspicion test as propounded in *R v CRE, ex parte Hillingdon Borough Council*.¹¹⁰

In contrast, CEHR's powers with respect to human rights are not as broad as the powers it has with relation to discrimination.¹¹¹ CEHR can carry out general compliance audits of human rights instruments and can bring actions against public authorities for failing to comply with the Human Rights Act.¹¹² CEHR cannot, however, launch named investigations with relation to the protection of human rights, only with relation to anti-discrimination issues.¹¹³ However, the Commission can assist where both anti-discrimination and human rights issues are involved.¹¹⁴ This distinction may be problematic. As O'Conneide notes: "This distinction between the Commission's enforcement powers in respect of anti-discrimination and human rights may yet give rise to confusing and potentially unworkable distinctions".¹¹⁵

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ *Equality Act 2006* (UK) s 16.

¹⁰⁶ Lester and Beattie, op cit, 204.

¹⁰⁷ O'Conneide, op cit, 155.

¹⁰⁸ *Equality Act 2006* (UK) s 20(2).

¹⁰⁹ O'Conneide, op cit, 155.

¹¹⁰ *R v CRE, ex parte Hillingdon Borough Council* [1982] AC 779.

¹¹¹ O'Conneide, op cit, 155.

¹¹² Ibid, *Equality Act 2006* (UK) s 30(3).

¹¹³ O'Conneide, op cit, 155.

¹¹⁴ Ibid, 156.

¹¹⁵ Ibid, 155-156.

Specific complaint Resolution

The following CEHR duties to fall under this area:

- Giving financial grants to a person to assist them in human rights protection;¹¹⁶
- Presenting a person with an unlawful act notice requiring the establishment of an action plan to prevent future human rights breaches;¹¹⁷
- Applying for injunctions to restrain an unlawful act;¹¹⁸
- Applying to restrain unlawful advertising;¹¹⁹
- Arranging for the conciliation of disputes;¹²⁰
- Assisting an individual to commence and continue legal actions to protect their human rights;¹²¹ and
- Bringing and intervening in judicial review on its own behalf.¹²²

CEHR can support representative class actions. This has been criticised by the employment lawyer, Charles Wynn-Evans:

“The possibility of representative and class actions in discrimination claims is resisted, as raising the possibility of employers being targeted by ‘organisations pushing an underlying agenda that is only loosely connected to the litigants’ specific claims’ and as potentially separating the claimant's interests from the conduct of the relevant litigation, to the detriment of the settlement of claims, as well as the prospects of partnership between employers and employees.”¹²³

There has however been beneficial strategic use of representative or class actions in Australia and elsewhere. In *Cocks v The State of Queensland*,¹²⁴ the applicant, who was reliant on a wheelchair, made a representative complaint on behalf of the 10 per cent of the population who were unable to use steps because of a mobility impairment with regard to access to an important public building that was then being constructed. The Anti-Discrimination Tribunal ordered access be provided for all, regardless of disability, to the grand front entrance to the Convention and Exhibition Centre.

Despite initial controversy, CEHR can now conduct judicial review proceedings in its own name.¹²⁵ Under s 30 of the *Equality Act*, CEHR can intervene in and initiate court proceedings if the Commission considers the matter relevant to its work. It does not have to satisfy the victim test in section 7 of the *Human Rights Act 1998* (UK) which gives CEHR a broad scope to

¹¹⁶ *Equality Act 2006* (UK) s 17.

¹¹⁷ *Ibid*, s 21, see s 22 for action plans.

¹¹⁸ *Ibid*, s 24.

¹¹⁹ *Ibid*, s 25.

¹²⁰ *Ibid*, s 27.

¹²¹ *Ibid*, s 28.

¹²² *Ibid*, s 30.

¹²³ Charles Wynn-Evans, “Bonfires of Red Tape?” 36 *Industrial Law Journal* 238, 241

¹²⁴ (1994) EOC 92-612.

¹²⁵ Lester and Beattie, *op cit*, 202; O’Cinneide, *op cit*, 154.

intervene in or initiate proceedings. Under s 24, CEHR can apply to the court for an injunction in order to prevent a person committing a violation of UK human rights law.¹²⁶ As Lord Lester and Beattie note, this power may not be as useful as it first appears:

"However, while welcoming the simplified procedure, the EOC expressed concern that CEHR can only apply for an injunction to a county court (or in Scotland to a sheriff), and cannot apply to a tribunal where there is evidence that applications are more successful¹²⁷." ¹²⁸

Comparative duties

The duties of the Australian, Queensland and South African systems can be similarly divided between systemic human rights duties and individual complaint resolution.

HREOC

The duties of HREOC are generally defined in s 10A(1) of the *HREOC Act* which provides:

"10A Duties of Commission

- (1) It is the duty of the Commission to ensure that the functions of the Commission under this or any other Act are performed:
 - (a) with regard for:
 - (i) the indivisibility and universality of human rights; and
 - (ii) the principle that every person is free and equal in human rights; and
 - (b) efficiently and with the greatest possible benefit to the people of Australia."

The functions of HREOC are set out in s 11 of the *HREOC Act*. Essentially, HREOC conciliates complaints,¹²⁹ conducts inquiries into human rights issues and can report to the Minister on human rights issues generally and Australia's compliance with international human rights treaties.¹³⁰

The duty to conduct inquiries into human rights issues and to report on these issues is a duty involving the systemic protection of human rights. For example, in 1997, HREOC published its findings from an inquiry it conducted into the removal of Indigenous children from their families - the stolen generations. These findings were published in the "Bringing Them Home" report, the recommendations of which have led to changing attitudes towards Indigenous peoples.¹³¹ The report led to increased funding for indigenous communities dealing with the effects of the stolen generation. It also led to initiatives such as National Sorry Day - the first National Sorry

¹²⁶ *Equality Act 2006* (UK); Lester and Beattie, op cit, 204 s 24.

¹²⁷ Equal Opportunities Commission (UK), *Equality Bill: 19th October Lords Report Stage* (October 2005).

¹²⁸ Lester and Beattie, op cit, 204.

¹²⁹ *HREOC Act* Part IIB.

¹³⁰ For its powers including the power to conduct inquiries, see *HREOC Act* s 13.

¹³¹ Bringing Them Home Report education module from HREOC website at www.hreoc.gov.au/education/bth/downloads/resources/about_inquiry.doc visited Thursday 9 August 2007.

Day being held in 1998.¹³² Essentially, the report highlighted the trauma experienced by Indigenous peoples removed from their families as well as the long-term consequences of loss of family and cultural identity and heritage. However many of its recommendations were not taken up by government and there was a marked antagonism to its publication.

The duty to resolve complaints through conciliation is a duty involving individual complaints resolution. If a person wishes to use the federal legislation, they apply to HREOC (ie make a complaint) and HREOC will determine whether it has jurisdiction to hear the dispute.¹³³ If so, then the matter proceeds to conciliation,¹³⁴ the results of which are not published.¹³⁵ Conciliation was adopted as it is a relatively inexpensive method of dispute resolution. Professor Rosemary Hunter has argued that the use of conciliation was a concession to employers as it is seen as a less threatening method of alternative dispute resolution.¹³⁶ If the dispute is not resolved in conciliation, then the dispute will be terminated¹³⁷ and the matter will need to go through the federal court system for a binding determination.¹³⁸ This is a result of a decision of the High Court of Australia with regard to the Constitution which permits federal judicial power to be exercised only by courts and not by quasi-judicial or administrative bodies.¹³⁹

In South Africa, the *Equality and Prevention of Discrimination Act* provides for the establishment of many traditional courts as equality courts.¹⁴⁰ A broad range of stakeholders, including the South African Human Rights Commission, can bring cases before the Equality Court.¹⁴¹ However as those courts are under-resourced and struggling with, and even overwhelmed by, their normal workload, that capacity may not translate into an effective remedy.

The United Kingdom, Australia and South Africa all rely on the court system as the ultimate method for the enforcement of human rights disputes.

In the United Kingdom, CEHR can support individuals to bring cases before the traditional courts.¹⁴² CEHR's capacity to fund individuals to take cases to court - a recognition that some people are unable to fund court action even if they have a cause of action - should provide an opportunity for all, including people who are financially disadvantaged, to raise human rights issues in court.¹⁴³ HREOC, while being able to intervene in proceedings as a friend of the court,

¹³² Ibid.

¹³³ *HREOC Act*; Rosemary Hunter, 'Alternative Resolution Of Employment Discrimination Claims: American and Australian Experiences: Proceedings of the 2001 Annual Meeting, Association Of American Law Schools Section On Employment Discrimination Law' [2001] *Employee Rights and Employment Policy Journal* 603, 612, *HREOC Act* s 46P.

¹³⁴ *HREOC Act* s 46PF.

¹³⁵ R Hunter, op cit.

¹³⁶ Ibid, 612-3.

¹³⁷ *HREOC Act* s 46PH.

¹³⁸ *HREOC Act* s 46PO; Hunter, op cit, 613.

¹³⁹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁴⁰ *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA) s 16.

¹⁴¹ Ibid, s 20.

¹⁴² *Equality Act 2006* (UK) s 28.

¹⁴³ Grant, op cit, 319; Moon and Allen, op cit, at 615; see also the judgment of Sachs J in *National Coalition for Gay and Lesbian Equality v Minister for Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

cannot fund individuals to bring proceedings to court.¹⁴⁴ This will tend to make CEHR a much more effective body.

The Anti-Discrimination Commission - Queensland

The primary focus of State anti-discrimination commissions such as the ADCQ is on individual complaint resolution. However, the Commission may also initiate investigations where it perceives there may be possible contraventions of the Act, complaints of contraventions of the Act come to the attention of the Commission in the course of conciliation or the matter is in the public interest.¹⁴⁵ This duty gives some effect to systemic human rights protection.

As mentioned, the Commission's primary focus is on individual complaint resolution. A person, an entity, or their agent may complain to the Commission if they perceive that the *Anti-Discrimination Act 1991* (Qld) has been contravened.¹⁴⁶ The complaint must be in writing, sent by post to the Commissioner, giving sufficient particulars for the Commission to decide whether to investigate and containing an address for service of the complaint.¹⁴⁷ There is a one year time limit from the date of the act occurring to lodge a complaint¹⁴⁸ unless reasonable cause is shown.¹⁴⁹ The Commissioner must accept or reject the complaint within 28 days of receiving it.¹⁵⁰

The Anti-Discrimination Tribunal is authorised to make interim orders in situations where there is an application to it by the Commission or the complainant or where there is concern about interference in the conciliation process before the Commission or with a final order of the tribunal.¹⁵¹ The Commission conciliates complaints, whereas the tribunal can make final binding orders.

Once a complaint has been accepted by the Commission, the Commission must attempt to resolve the complaint by conciliation, if it believes it is possible to do so.¹⁵² If resolved by conciliation, the terms are recorded in writing and signed by the parties¹⁵³ and the complaint is delivered to the tribunal, then the order is enforced as if it were an order of the Anti-Discrimination Tribunal.¹⁵⁴ If the complaint remains unresolved after conciliation, it may be referred to the Anti-Discrimination Tribunal.¹⁵⁵

¹⁴⁴ *HREOC Act* s 46PV; HREOC website www.hreoc.gov.au/infosheet.html.

¹⁴⁵ *Anti-Discrimination Act 1991* (Qld) s 155.

¹⁴⁶ *Ibid*, s 134.

¹⁴⁷ *Ibid*, s 136.

¹⁴⁸ *Ibid*, s 138(1).

¹⁴⁹ *Ibid*, s 138(2).

¹⁵⁰ *Ibid*, s 141.

¹⁵¹ *Ibid*, s 144; *Cocks v State of Queensland* is an example of a case that started by way of an application for an urgent interim order to prevent an imminent concrete pour.

¹⁵² *Ibid*, s 158.

¹⁵³ *Ibid*, s 164(1).

¹⁵⁴ *Ibid*, s 164(3).

¹⁵⁵ *Anti-Discrimination Act 1991* (Qld) s 164A.

If a complaint proceeds before the Anti-Discrimination Tribunal, it may make any of the orders set out in s 209 of the ADA. These include compensation orders, public and private apologies (s 209(1)). The model of using specialist tribunals is the preferred model of the various State bodies in Australia.

South Africa

Section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA) provides for the prevention of all unfair discrimination. Hate speech is also prohibited.¹⁵⁶

Section 13 sets out how unfair discrimination is made out. A complainant has to prove that discrimination did take place; the defendant must disprove that the discrimination was on one of the prohibited grounds. Further, the defendant needs to prove that the discrimination was fair. Fairness is defined in s 14. Essentially, unfair discrimination is not discrimination to benefit disadvantaged groups in order to protect persons disadvantaged by unfair discrimination. The fairness test does not apply to hate speech.¹⁵⁷

Under s 20, individuals, interest groups, the South African Human Rights Commission and the Commission for Gender Equality can bring actions before Magistrates and High Courts known under the Act as Equality Courts. Section 21 defines the powers of equality courts including the awarding of damages and the granting of injunctions to prevent prohibited conduct.

Interestingly, under s 28, if discrimination on a prohibited ground is found to have been relevant in a criminal offence, this must be taken into account in sentencing.

There is also a focus on promoting human rights. Section 24, for example, places an obligation on the State and all persons to promote human rights. The State must raise awareness, provide programs and actions plans and education (s 25).

Width of powers and duties

Essentially, the duties of CEHR appear to be much broader than the duties of the Australian human rights bodies and the South African human rights system. For example, along with having a duty to advise the government on human rights issues, CEHR can conciliate complaints but can also perform a more activist role and can enter into agreements to protect human rights with industry bodies and launch its own investigations. Further, it can support individuals to pursue court actions in order to enforce their human rights. On the other hand, HREOC and ADCQ are more limited in scope. They are mainly conciliation-focussed and cannot support individuals to enforce their rights to the same extent as CEHR.

The approach promised in the new British legislation is much more interventionist than the Australian approach. It relies more on advocacy and while CEHR does have the power to conciliate cases, it appears that the majority of the objective determination of human rights disputes is left to the court with CEHR having the power to support individuals and groups to

¹⁵⁶ *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* (SA) s 10.

¹⁵⁷ *Ibid* s 15

bring judicial actions. The power of CEHR to launch "named" investigations and to enter into agreements with employers also appears to be more interventionist and activist than the Australian bodies.

On the other hand, the HREOC and ADCQ are expected to play a more objective role. The main work of these bodies appears to be conciliation although HREOC does conduct inquiries within certain guidelines.

An example of the non-interventionist approach given to the HREOC is that the HREOC, because of the *Migration Act 1958* (Cth), is expressly prohibited from contacting detainees, despite its being well recognised that the conditions for those detained in Australia are in need of improvement.¹⁵⁸ HREOC can only respond to complaints made in writing by detainees.¹⁵⁹

The Future

As Sarah Spencer notes, the establishment of CEHR will help to focus attention on the human rights issues:

“Public bodies in Britain were slow to wake up to the challenge that the Human Rights Act presents. That was in no small part due to the lack of any statutory body to promote awareness of the Act and a lack of guidance on compliance and good practice. This is now to be rectified with the establishment of a Commission on Equality and Human Rights in 2007.”¹⁶⁰

Lord Lester and Beattie have commented:

“CEHR should contribute substantially towards achieving the goal of creating a culture of respect for human rights by providing the necessary vision and the practical means for achieving it. CEHR will also be a powerful body to counter negative and misleading media reporting about the *Human Rights Act* and will operate as an advocate for human rights to the public and to government at all levels. Once coupled with a well-designed single equality act, Britain will at last be in a position to combat discrimination and address human rights violations effectively.”¹⁶¹

It appears that there is a lot of support for CEHR. It remains to be seen how CEHR will function in practice but it is likely that it will be a much more effective body in promoting substantive equality. The duties of CEHR are broad - broader than those of the HREOC, ADCQ and SAHRC. Provided that the s 38 *Equality Act* provision for adequate funding is complied with, CEHR should make a positive contribution to the protection and promotion of human rights in Britain and be a model for what can be achieved elsewhere.

¹⁵⁸ Adrienne McEntee, “The Failure of Domestic and International Mechanisms to Redress the Harmful Effects of Australian Immigration Detention” (2003) 12 *Pacific Rim Law and Policy Journal* 263, 278.

¹⁵⁹ *Migration Act 1958* (Cth) s 193(3)(a).

¹⁶⁰ Spencer, op cit, 341.

¹⁶¹ Lester and Beattie, op cit, 207-8.