

Independent Living and the Commission for Equality and Human Rights

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Disability Rights Commission



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*Background paper prepared on behalf of
the Disability Rights Commission*

1. Introduction

‘I will not go through all the preamble, but say categorically that we would expect the commission [for Equality and Human Rights] to continue the DRC's work on independent living and to work collaboratively with the proposed office for disability issues. That is an absolute expectation. We expect the commission to continue with that work. I hope that is a sufficiently positive and adequate reassurance that promoting independent living is part of the CEHR's remit under existing provisions...’

(Constitutional Affairs Minister Baroness Ashton of Upholland, Lords Committee Stage, Day 1. Wednesday 6 Jul 2005)

Baroness Aston’s unequivocal statement to the House of Lords during the debate on the Equality Bill provides a firm commitment on the part of the Government to ensuring that the promotion of independent living will be included in the Commission of Equality and Human Rights’ activities. This perhaps reflects the recognition that independent living is of crucial importance to the Government realising its vision for disabled people:

‘By 2025, disabled people in Britain should have full opportunities and choices to improve their quality of life and will be respected and included as equal members of society.’¹

¹ Life Chances report. The report outlined a series of recommendations, all of which have been accepted by the Government and are to be taken forward by the Office of Disability Issues (ODI) <http://www.officefordisability.gov.uk/report/>. See also ODI’s first annual report: <http://www.officefordisability.gov.uk/publications/report/>.

This vision was set out in the Prime Minister's Strategy Unit report, *Improving the Life Chances of Disabled People*, ('the Life Chances Report'). The report stressed that the 'centrepiece' of the Government's strategy for disabled people must be the promotion of independent living.

Purpose of paper

This paper is intended to be used as the basis for further discussion on how the Commission for Equality and Human Rights (the CEHR) might take forward the work to promote independent living and, in particular, ensure that disabled people have access to the services and support necessary to achieve independent living. The paper seeks to demonstrate why such work is of central importance for disabled people and why independent living is so crucial to the CEHR attaining its vision of a society in which every individual has the chance to achieve their potential, free from prejudice and discrimination². It does so by exploring the relationship between independent living and the role of the CEHR, in particular the purpose and scope of the CEHR's duties on human rights, equality and diversity, and good relations between different groups in society (referred to in this paper as the 'key duties').

Although its focus is on independent living and disabled people, the paper aims to raise issues which will be of relevance to other groups, for example, older people and individuals who provide support to their relatives and/or friends ('carers').

2. The Importance of Independent Living

What is 'independent living'?

The Disability Rights Commission (DRC) describes independent living as:

'...all disabled people having the same choice, control and freedom as any citizen – at home, at work and as members of the community. This does not necessarily mean disabled people 'doing everything for

² CEHR's vision, April 2006: www.cehr.org.uk/content/CEHR-Vision-England-April_06.doc

themselves’, but it does mean that any practical assistance people need should be based on their own choices and aspirations.’

The Life Chances Report stresses that independent living is not just about disabled people being able to live in their own homes (although this is part of it for many disabled people), rather the core of independent living is that disabled people *‘are expected to have the biggest say in what they do and how they live their lives, and to take responsibility for their lives’*. Thus the emphasis of independent living is on disabled people making decisions about their lives:

‘It means ensuring that disabled people have the same freedom to choose as every other citizen and are supported in that choice, in order that they may lead the lives they want to lead.’³

Independent living is underpinned by the social model of disability which recognises that people with impairments and long-term health conditions are disabled by the physical and attitudinal barriers within today’s society. The goal of independent living is that disabled people have the same opportunities as non-disabled people to participate in community life. For example, disabled people are able to work, enjoy leisure activities, develop friendships and become parents.

Barriers to independent living

Although progress has been made over the last ten years or so, for example the introduction of the Disability Discrimination Act 1995 and subsequent legislation to widen the scope of disability anti-discrimination law, there remain significant barriers to disabled people’s equal participation in society. When introducing the Disabled Persons (Independent Living) Bill for its second reading in the House of Lords, Lord Ashley of Stoke highlighted the substantial challenges facing many disabled people:

‘Disabled people historically have been regarded as second-class or even third-class citizens. As the Prime [Minister](#) has said, one in five British adults is disabled and they can find themselves cut off from

³ Lord Ashley of Stoke, June 2006 DRC:
http://www.drc-gb.org/your_rights/independent_living_bill.aspx accessed 20th June 2006

*the opportunities others enjoy. Disabled people are more likely to live in poverty, to have fewer educational opportunities and to experience prejudice and abuse. Most have low expectations. Only 50 per cent of disabled people of working age are in employment compared with 80 per cent of the non-disabled. That one-fifth of our population is, incredibly, an underclass. We need to elevate our objective from providing subsistence to comprehensive rights of equality and independence.*⁴

The policy and legislative framework for the provision of health and social care⁵ is an area of particular concern, creating significant barriers to independent living:

*'Support for disabled people is fragmented, resulting in confusion and stress. Deserving people are being denied proper support. In fact, 70 per cent of our councils now offer services only to people whose needs are judged substantial or critical, so that the social security net is full of holes and those who should be included are inevitably excluded. The rights they have are strictly limited. Rights to services mainly mean help with being washed and fed rather than comprehensive rights which enable independence.'*⁶

The Disabled Persons (Independent Living) Bill seeks to address such criticisms and introduce a legislative framework for the delivery of community-based support by local authorities, health services and other agencies that promote and facilitates independent living. It aims to:

⁴ Lord Ashley, 14th July 2006:

www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60714-0963.htm

⁵ The National Health Service and Community Care Act 1990 requires local social services authorities to carry out an assessment of an individual's needs for 'community care services' (a wide range of services including accommodation) and then 'having regard to the results of that assessment' decide whether such services should be provided. See Jenny Morris, '*Independent living and community care: a disempowering framework*', *Disability & Society*, Vol. 19 No. 5, August 2004, 427 for an analysis of the barriers to independent living in the current system.

⁶ Lord Ashley, Second Reading Debate, 14th July 2006. See also the DRC's briefing on the Bill: www.drc-gb.org/Docs/DRCBriefingIndependentLivingBillJune06.doc

‘...deliver stronger rights and entitlements to independent living for disabled people based on the principles of freedom, control, choice and dignity...

...It means rights to practical assistance and support to participate in society and live an ordinary life.’⁷

Why is independent living important?

The issues addressed by the Disabled Persons (Independent Living) Bill are of crucial importance because access to appropriate personal care is an essential means of achieving independent living. However, as the Life Chances report emphasises, personal care is only one part of a range of areas that must be addressed⁸. The concept of independent living embraces all aspects of life, such as education, employment, transport and leisure. The existence or absence of barriers to engaging in these areas of life will determine whether disabled people are able to be active citizens. Both the Council of Europe and the European Commission⁹ highlight the importance of independent living as a means to ensuring the full participation of disabled people in society. For example, the Council of Europe’s Disability Action Plan:

‘...acknowledges the basic principle that society has a duty towards all of its citizens to ensure that the effects of disability are minimised through actively supporting healthy lifestyles, safer environments, adequate health care, rehabilitation and supportive communities.’¹⁰

The promotion of independent living can address the barriers to active citizenship, by for example ensuring the provision of a wide range of supports such as communication aids, advocacy and suitable housing. Mobility can be enabled by transport, assistance and equipment while health services can help a person live independently, work, be a parent and participate in the local community.

⁷ Disability Rights Commission, briefing, Thursday 8th June 2006

⁸ Life Chances report, 4.1, page 58

⁹ See COM(2003)650final, Equal opportunities for people with disabilities: A European Action Plan: http://ec.europa.eu/employment_social/news/2003/oct/en.pdf

¹⁰ Council of Europe, Committee of Ministers Recommendation Rec(2006)5

The concept of independent living also demonstrates the need for a shift in societal attitudes – away from a paternalistic approach of regarding disabled people as vulnerable and needing to be protected - and towards the recognition that disabled people are equal members of society and have much to contribute. Too often disabled people are regarded as ‘passive recipients of care’ rather than individuals with aspirations and the potential to achieve. The recent report of the joint investigation of the Commission for Social Care Inspection and Healthcare Commission into the provision of services for people with learning disabilities living in Cornwall Partnership NHS Trust’s ‘assessment and treatment centres’ is a stark reminder of the potential for such attitudes to deteriorate into poor practice and lead to severe human rights violations. The investigation revealed ‘unacceptable restrictions’ on the residents, ‘years of abusive practices’, including physical restraint and illegal and excessive use of medication to control challenging behaviour, with some residents suffering from ‘serious and prolonged abuse’. The report concluded that:

‘...institutional abuse was widespread, preventing people from exercising their rights to independence, choice and inclusion.’¹¹

3. The Role of the Commission for Equality & Human Rights (CEHR)

The purpose of the CEHR will be to:

‘...reduce inequality, eliminate discrimination, strengthen good relations between people and protect human rights’.¹²

The CEHR will undertake the responsibilities and powers of the three existing equality Commissions (the Disability Rights Commission, the Equal Opportunities Commission and the Commission for Racial

¹¹ Commission for Social Care and Healthcare Commission, *Joint Investigation into the provision of services for people with learning disabilities at Cornwall Partnership NHS Trust*, July 2006:

www.healthcarecommission.org.uk/db/documents/cornwall_investigation_report.pdf

¹² Purpose of CEHR: <http://www.cehr.org.uk/content/purpose.rhtm> (accessed 15th August 2006)

Equality¹³). It will also work to promote equality and challenge discrimination in the additional areas of sexual orientation, age and religion or belief. The CEHR will cover England, Scotland and Wales.

The CEHR and the ‘outcomes for society’

The White Paper *‘Fairness for All: A New Commission for Equality and Human Rights’* stressed that the ethos of CEHR would be to make a difference to everyone, ‘whatever their identity, wherever they work and wherever they live, with a focus on outcomes so that the CEHR ‘delivers real improvements in our day-to-day lives’¹⁴. This is reflected in section 3 of the Equality Act 2006 (the Act) which sets out the outcomes for society that CEHR is required to work towards¹⁵. It states that the CEHR *‘shall exercise its functions...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.’*

These outcomes are the rationale for the CEHR, ‘combining work in equality, human rights and good relations between different groups in society’¹⁶.

The strong connection between the work of the CEHR and independent living can be seen by comparing the ‘outcomes for society’ that the CEHR is required to work towards with the principles of independent living in Table 1 below.

¹³ The CEHR will come into being in October 2007 and will take on the work of the DRC and EOC. It will not take on the work of the CRE until 2009.

¹⁴ White paper 1.6

¹⁵ Explanatory Notes, paragraph 19

¹⁶ *ibid*

Table 1: The CEHR Outcomes and Independent Living Principles

CEHR Outcomes	Independent Living (IL) Principles
People's ability to achieve their potential is not limited by prejudice or discrimination.	IL seeks to enable disabled people to achieve their potential. It challenges assumptions that disabled people are by definition 'vulnerable' or 'at risk' and the perception that disabled people are passive recipients of care.
There is respect for and protection of each individual's human rights.	IL is underpinned by, but also promotes, human rights. It is an essential means of ensuring that disabled people's human rights are respected and fulfilled. For example, IL aims to ensure that with the necessary support disabled people are able to exercise their right to live in their own homes. Without such support, disabled people may have no choice but to move to a care home where their human rights are at risk of infringement (by unnecessary restrictions, such as less contact with their family and friends, but in some cases by serious violations, such as physical abuse).
There is respect for the dignity and worth of each individual.	IL requires that disabled people are treated as individuals and receive the support that they need in order for them to exercise the same level of choice and control about their lives as non-disabled people.
Each individual has an equal opportunity to participate in society.	IL shifts the provision of support away from giving the bare minimum of care to the goal of facilitating disabled people's social inclusion and participation in every-day activities such as working, developing friendships, and engaging in public and community life.
There is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality	IL is founded on values of choice control freedom and equality. One of its core features is inclusiveness: disabled people being able to live and work amongst non-disabled family members, neighbours and the wider community. IL seeks to ensure that all disabled people – whatever their impairment

and human rights.	and support needs – are treated with respect and have the opportunity to benefit from independent living.
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The barriers to the ‘outcomes for society’ and independent living

‘...society still sees its best response to disability as care, welfare and charity – rather than equal rights, opportunities and citizenship.’ (Bert Massie, 30th January 2006¹⁷)

The outcomes for society described by the Equality Act 2006 set ambitious and far-reaching goals for the CEHR. However, for many of the estimated 10 million disabled people living in the UK¹⁸, such outcomes will remain worthy aspirations, far removed from their day to day reality, unless the support and assistance they receive are based upon, and driven by, the model of independent living. Without independent living, many disabled people will continue to be marginalised and excluded from society.

Table 2 sets out examples some of the existing key barriers to independent living and suggests why the barriers to independent living also represent significant and serious barriers to achieving the outcomes for society prescribed by the Equality Act 2006.

Table 2 CEHR Outcomes and the Barriers to Independent Living

CEHR Outcomes	Examples of Barriers to Independent Living	Impact on Outcome
People’s ability to achieve their potential is not limited by prejudice or discrimination	The health & social system assumes dependency: the assessment of need and provision of support is based on policies and legislation that focus on dependency and risk rather than on enabling people ¹⁹ . Health inequalities: disabled people die earlier, often from preventable illness, experience unequal access to health	Disabled people’s ability to achieve their potential is limited by misplaced assumptions, stigma, prejudice and discrimination.

¹⁷ DRC Achieving equality and social justice a future without disability?

¹⁸ Quoted in ‘Achieving equality and social justice – a future without disability? Source: Family Resources Survey 2002/3 DWP

¹⁹ Life Chances Report, page 60

	services, including cancer screening, immunisation and primary health care generally ²⁰ .	
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There is respect for and protection of each individual's human rights	<p>There is a perverse incentive towards institutionalisation²¹: More disabled people are being required to move into residential care, against their wishes, because appropriate housing and support is not available²². There are limited opportunities to review such decisions.</p> <p>Abuses within institutional settings: a recent report found there to be 'widespread institutional abuse' of people with learning disabilities at an NHS Trust in Cornwall²³.</p>	Disabled people face serious violations of their human rights.
There is respect for the dignity and worth of each individual	<p>The health and social care system hinders an individualised approach: people are expected to fit into services, rather than services enabling them to be active citizens²⁴.</p> <p>Poor quality of life in institutional settings: Many disabled people</p>	The health and social care system hinders an individualised approach, thus undermining the dignity and worth of disabled people and in

²⁰ DRC, Changing Britain for Good – Putting disability at the heart of public policy, page 54.

²¹ See discussion in *Independent Living and the Human Rights Act 1998*, pages 20 - 29

²² The numbers of people placed in residential care has increased (a 40% increase between 1997 and 2002 for those with mental health support needs), see:

www.performance.doh.gov.uk/HPSSS/TBL_C7.HTM

²³ Commission for Social Care and Healthcare Commission, *Joint Investigation into the provision of services for people with learning disabilities at Cornwall Partnership NHS Trust*, July 2006:

http://www.healthcarecommission.org.uk/db/documents/cornwall_investigation_report.pdf

²⁴ Life Chances Report, page 64

	who are placed in residential care have a low quality of life and some experience serious abuse ²⁵ .	some cases leads to abuse.
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²⁵ See for example the recent report of the investigation into abuse of people with learning disabilities in an NHS Trust in Cornwall (footnote 23 above). It is estimated that 500,000 older people are victims of abuse in the UK at any one time (Frances Butler, Rights for Real, Age Concern, April 2006 at 35).

<p>Each individual has an equal opportunity to participate in society</p>	<p>Inadequate provision of assistance: to participate in leisure activities, work, relationships, or looking after children/other family members²⁶.</p> <p>Inflexibility of care: <i>'...personal assistance to get up in the mornings may not be reliably available at the time someone needs it in order to go out to work. This may lead to the person losing their job (or not being able to seek employment).'</i>²⁷</p>	<p>Disabled people's opportunities to participate in society are often thwarted due to limited focus of assistance and support and inadequate response to need.</p>
<p>There is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights</p>	<p>Negative attitudes towards disabled people: <i>'successive studies have shown disturbingly high rates of physical and verbal harassment disabled people, and in particular people with learning disabilities, experience in their daily lives.'</i>²⁸</p> <p>A lack of confidence in disabled people's ability: <i>'Our historic approach to disability has institutionalised low expectations. These in turn have institutionalised exclusion and fostered inescapable dependency, compounding the low expectations which create such problems.'</i>²⁹</p>	<p>Disabled people have to contend with negative attitudes and low expectations of their ability.</p>

²⁶ Life Chances Report, 69

²⁷ Life Chances Report 64

²⁸ DRC, Achieving equality and social justice a future without disability? 30th January 2006, 15

²⁹ DRC Achieving equality and social justice a future without disability? 30th January 2006, 9 – 10

Links between the Key Duties of the Commission for Equality and Human Rights and Independent Living

As Table 2 demonstrates, the barriers to independent living and achieving the desired outcomes for society present a significant challenge to the CEHR in its work to promote independent living. However the CEHR has a range of duties and powers which can be applied in order to address these issues. The CEHR's duties in relation to equality and diversity, human rights and good relations are set out in sections 8 to 10 of the Act ('the key duties'). Table 3 compares these key duties (discussed in more detail below) with the core principles of independent living: respect, choice and control (personal autonomy) and participation.

Table 3: Independent Living Principles and the Key Duties

IL Goal	Potential of Equality Duty	Potential of Human Rights Duty	Potential of Good Relations Duty
Respect	Disabled people have equal opportunities to achieve their potential.	Disabled people are recognised as 'holders' of rights rather than the passive recipients of care.	Disabled people are valued as equal members of society.
Choice & Control	Disabled people can arrange their lives in the way that they think best helps them achieve their life goals.	Disabled people are able to make decisions that impact on their lives, with support if necessary.	Paternalistic assumptions about disabled people's 'vulnerability' and low expectations of their ability are challenged and addressed.
Participation	Disabled people have equal opportunities to participate in public life.	The right of disabled people to develop relationships and participate in family and community life	Ignorance and prejudice against disabled people is addressed through activities which encourage positive

		is respected and promoted.	attitudes and seek to eliminate harassment.
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4. Human Rights: A framework for the CEHR's Activities

'Every one of us is part of a minority of some sort. Every one of us is capable of being marginalised, excluded abused. We need protection, and fortunately we have it. Our human rights heritage is not something to apologise for or to hide from, still less to compromise. It is something to shout about.'³⁰

The New Statesman's robust defence of human rights in the heated debates in the media about the purpose and validity of the Human Rights Act 1998 illustrates the importance of human rights in today's society. They will also play a central role in the work of the CEHR. This is because the CEHR's duties regarding human rights provide the framework within which the CEHR must operate.

The CEHR is required to promote understanding and awareness of human rights, encourage good practice in relation to human rights and encourage public authorities to comply with their duties under the Human Rights Act 1998 (the HRA)³¹. However, the provisions of the Equality Act 2006 make clear that the human rights duties will have a direct impact on the CEHR's duties in relation to equality and diversity and good relations. For example section 9 states that the CEHR '*shall take account of any relevant human rights*' when fulfilling duties in relation to equality and diversity) or good relations³².

Furthermore, as a public authority, the CEHR will be subject to section 6 of the HRA which makes it unlawful for a public authority to act in a way that is incompatible with the European Convention on Human Rights (referred to in the Act as 'the Convention') unless required to do so by legislation. The HRA incorporates into the UK a

³⁰ New Statesman, Leader, '*Stop the ugly attack on our human rights*' 22nd May 2006

³¹ Section 6 HRA provides that it is unlawful for public authorities to act in a way that is incompatible with the European Convention on Human Rights unless required to do so by legislation.

³² Section 9(4). Section 9(5) also suggests that the CEHR's human rights duties overarch its work on equality and diversity and good relations. It states that a reference to human rights '*does not exclude any matter by reason only of its being a matter to which section 8 ['Equality and diversity'] or section 10 ['Good relations'] relates*'³².

range of civil and political rights that are set out in the Convention³³. Thus in all its activities (not just in exercising its human rights duties) the CEHR must ensure that it complies with the Convention unless legislation requires it to do otherwise.

Complementarity of human rights and equality

Unlike many other jurisdictions, the human rights and equality models have traditionally been treated as 'almost entirely separate spheres' in the United Kingdom³⁴. More recently, however, with the introduction of the HRA, the opportunities arising from the connections between these two areas of work are being identified and explored. For example, all three equality commissions have relied on articles under the Convention to support challenges to discriminatory practices³⁵.

The crucial role that human rights standards play in the pursuit of equality has been emphasised by experts in both fields. Sarah Spenser points out that the HRA can provide some protection from discrimination on grounds beyond the six strands (race, gender, disability, age, religion and belief, and sexual orientation)³⁶; can address several grounds of discrimination together and can cover issues affecting disadvantaged groups that are not strictly discrimination issues. Last, but not least, on her list is the very significant area in which the HRA complements an equality focus. This is where everyone is treated equally badly. In such cases there is no discrimination and in those cases:

'...it is protection from ill treatment per se that is needed, which is what the human rights standards provide.'

³³ Schedule 1 of the Human Rights Act 1998 sets out the Convention rights included in the Act. They include the right to life (article 2), the right to liberty (article 5), the right to a fair trial (article 6) and the right to private and family life (article 8).

³⁴ Sarah Spenser, *Partner Rediscovered: Human Rights and Equality in the UK* in Colin Harvery (ed) *Human Rights in the Community: Rights as Agents for Change*, Hart, 2005, 29

³⁵ *Ibid*, 36

³⁶ See article 14 ECHR

Similar comments are made from a human rights perspective. The Centre for the Study of Human Rights at the London School of Economics and the British Institute of Human Rights, in their joint submission to the Equalities Review stated:

‘The human rights vision of equality extends significantly beyond discrimination, therefore to encompass fairness of treatment, dignity, respect and access to the fundamental rights which enable participation in a democratic society.

The value human rights law puts on equality is not entirely neutral, therefore. Everyone being treated equally badly is not a human rights concept.

They added, quoting from *R(Carson and Reynolds) v Secretary of State for Work and Pensions*³⁷:

*‘In the field of human rights, discrimination is regarded as particularly objectionable **because it disregards fundamental notions of human dignity and equality before the law** [their emphasis].’*

Positive action to promote human rights and equality

Although the human rights and equality models have developed along separate lines, a common aspect to both models is gaining recognition. In some cases positive action will be required in order to achieve equality and ensure respect for human rights.

Positive Obligations and Human Rights

In the human rights context, Convention rights are not just about States refraining from interfering with individuals’ rights. The European Court of Human Rights considers that the obligations on States can also extend to taking action in order to protect the rights of individuals³⁸. Thus articles 2, 3, 5 and 8 of the Convention have all

³⁷

[2005]

UKHL

37

www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050526/cars-1.htm

³⁸ See *Storck v Germany* (Application no. 61603/00) 16 June 2005): ‘..the responsibility of a State is engaged if a violation of one of the rights and freedoms defined in the Convention is the result of non-observance by that State of its obligation under Article 1.

been found, in certain circumstances, to require States *‘not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties.’*³⁹

In a recent case concerning the lawfulness of the local authority’s policy to prohibit staff from manually handling two sisters with profound physical and learning disabilities, the judge highlighted the positive obligations inherent to Article 8 of the Convention (the right to family and private life):

*‘...the “physical and psychological integrity” protected by Article 8 is the right of the disabled to participate in the life of the community and to have... access to the appropriate range of recreational and cultural activities. This is matched by the positive obligation of the State to take appropriate measures designed to ensure to the greatest extent feasible that a disabled person is not “so circumscribed and so isolated so to be deprived of the possibility of developing his personality”’*⁴⁰.

In considering its human rights duties the CEHR will need to take into account ‘other human rights’, some of which will also entail positive obligations. For example, the Committee responsible for overseeing States’ compliance with the International Covenant on Economic, Social and Cultural Rights has issued a General Comment in relation to disabled people, outlining the issues it wishes to be included in State reports⁴¹, such as:

‘...the obligation in the case of [disabled people] is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities to achieve the

Article 1 requires States to *‘secure those rights and freedoms in its domestic law to everyone within its jurisdiction’*.

³⁹ Ibid

⁴⁰ *R on the application of A and B (by their litigation friends and X and Y) v East Sussex CC and the Disability Rights Commission (interested party) (no 1)* [2002] EWHC 2771 (Admin), paragraph 99. See also *Price v the United Kingdom* (2001) 34 EHHR 1285 and *Botta v Italy* (1998) 26 EHHR 241

⁴¹ Persons with disabilities: 09/12/94

*objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources need to be made available for this purpose and that a wide range of specially tailored measures will be required.*⁴²

Substantive equality

Increasingly it is recognised that the traditional, ‘formal’ concept of equality - that likes should be treated alike – is an inadequate mechanism for achieving true equality. One of the main criticisms is that it fails to address the entrenched disadvantages and deeply seated prejudices that often give rise to unequal treatment⁴³. While the concept of ‘equality of opportunity’ is considered to be a more helpful approach to achieving equality, it can be interpreted in a variety of ways which undermines its usefulness⁴⁴. Thus a further explanation of ‘equality of opportunity is required’. Sandra Fredman suggests that a ‘substantive sense of equality of opportunity’:

*‘...requires measures to be taken to ensure that persons from all sections of society have a genuinely equal chance of satisfying the criteria for access to a particular social good. This requires measures such as education and training, and family friendly measures. It may go even further, and challenge criteria for access themselves, since existing criteria of merit may themselves reflect and reinforce existing patterns of disadvantage.’*⁴⁵

Thus, true equality of opportunity - ‘substantive equality’ – will in some circumstances require additional steps to be taken ‘in order to deliver genuinely equal chances for fair participation’⁴⁶.

Such an approach accords with the concept of independent living. It is underpinned by the social model of disability which illustrates that the barriers to participation in society are caused by society’s failure

⁴² General Comment 5, International Covenant on Economic, Social & Cultural Rights: www.ohchr.org/english/bodies/cescr/comments.htm

⁴³ See Sandra Fredman EOC 2002, DRC submission to Discrimination Law Review

⁴⁴ DRC submission to the Discrimination Law Review

⁴⁵ Sandra Fredman, Discrimination Law, 2002. See also DRC’s submission to the Discrimination Law Review, 1.4.1

⁴⁶ DRC’s submission to the Discrimination Law Review, 1.4.1

to accommodate the needs arising from individuals' impairments, rather than the impairments themselves. Thus disabled people are disabled by society's failure to respond appropriately, or at all, to their individual and collective needs. A core feature of independent living is therefore the recognition that any meaningful concept of equality must extend beyond equal treatment and must not only seek to eliminate the inherent barriers to equal opportunities but also, in some cases, extend to providing additional resources to address the lack of opportunity.

The Disability Equality Duty

As from December 2006 public authorities will be under a duty to promote equality of opportunity for disabled people. The Disability Discrimination Act 2005 amends the Disability Discrimination Act 1995 (DDA 1995), so that when exercising their functions public authorities must have 'due regard' to the need to:

- eliminate discrimination that is unlawful under the DDA 1985
- eliminate harassment of disabled people that is related to their disabilities
- promote equality of opportunity between disabled persons and other persons
- take steps to take account of disabled person's disabilities, even where that involves treating disabled persons more favourably than other persons
- promote positive attitudes towards disabled persons
- encourage participation by disabled persons in public life

The Code of Practice on the Duty to Promote Disability Equality ('the Code')⁴⁷ stresses that the overarching goal of the disability equality duty is to promote equality of opportunity and points out that the delivery of true equality of opportunity may require the provision of additional services⁴⁸.

⁴⁷ Available on the DRC's website: http://www.drc-gb.org/PDF/DED_Code_Dec05_pdf.pdf

⁴⁸ See paragraphs 2.16 and 2.17

Disability and the positive approach to human rights and equality

The idea that disability is a human rights issue is, shockingly, a relatively new concept⁴⁹. As Anna Lawson points out, recognition of the link between disability and human rights is a significant paradigm shift:

*‘Disability, has not always been regarded as a human rights issue. It has been treated as a medical problem calling for medical solutions in the cure of individuals concerned and responses from welfare or charitable organisations. Conceiving it as a human rights issue focuses attention instead on the physical, social, attitudinal, legal and other barriers which prevent disabled people from participating in the life of their communities.’*⁵⁰

Similarly anti-disability discrimination legislation and the Disability Rights Commission are relative new-comers to the equality legislative framework. However, a disability focus on human rights and equality suggests how these models might develop to the advantage not only to disabled people but also to other marginalised and/or socially disadvantaged groups. Nick O’Brien, Legal Director of the DRC argues that the reasonable adjustment requirements under the Disability Discrimination Act 1995 (DDA) provide a ‘uniquely positive accent’ so that:

*‘employers and others do not just, in some crudely symmetrical and neatly rationalistic way, treat disabled people the same as everyone else but that they take positive steps...to achieve substantive equality for disabled [people]’.*⁵¹

⁴⁹ See for example: Vienna Declaration and Programme of Action on Human Rights 1993, Gerard Quinn, Theresia Degener, et. al. (2002) [*Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*](#), Office of the United Nations High Commissioner on Human Rights, Geneva

⁵⁰ The Human Rights Act 1998 and Disabled People: A Right to be Human? in Colin Harvey (ed) *Human Rights in the Community, Rights as Agents for Change*, (Oxford and Portland Oregon, Hart Publishing, 2005) 135

⁵¹ London School of Economics presentation, 9th March 2006

Thus the 'reasonable adjustment' provisions recognise that for disabled people equality is not about treating people the same, rather they accept that 'different treatment is actually the path to real equality'. This approach will be enhanced with the introduction of the disability equality duty (discussed above). O'Brien points out that the race equality duty and the soon to be introduced gender equality duty⁵² recognise the need for more positive provisions in order to make an impact in these areas of discrimination. He argues that in order to achieve 'substantive equality' it will be necessary to interpret anti-discrimination law within a human rights framework. Furthermore such an approach will not only benefit disabled people, it will provide pointers for all seriously disadvantaged social groups to the sort of strategies that might help and takes us beyond negative freedom, such as freedom from discrimination, to:

'...something more ambitious, about dignity and equal worth, about positive freedom to flourish and participate'.

The benefits of promoting independent living

In order to realise the outcomes for society outlined by the Act, it is essential that independent living becomes integral to the planning and delivery of public services and the development and implementation of policy and practice. Such an approach would not just benefit disabled people. Other groups such as older people and individuals who provide support and assistance to disabled people on an informal (unremunerated) basis, (referred to as 'carers' in this paper) face similar problems.

For example, reports such as '*Rights at Risk – Older People and Human Rights*' identify serious concerns that older people are receiving no, or inadequate, services which can result in unsafe or unsanitary living conditions, extreme distress and adversely affect the person's mental or physical health (and in some cases lead to premature death)⁵³. *Rights at Risk* also points out:

⁵² Due to come into force on 6th April 2007

⁵³ Tessa Harding, '*Rights at Risk – Older People and Human Rights*, Help the Aged 2005

*'The capacity of some older people to pursue interests or maintain a social or recreational life beyond the four walls of their home is frustrated by the lack of services to support such life-enhancing activities...'*⁵⁴

Thus, the promotion of independent living would have a positive impact on the experience of older people. Similarly, the promotion of independent living will also assist those relatives and friends who provide support to disabled and older people. Without appropriate services, disabled people and their relatives and friends are placed in an untenable situation in which it is assumed that the relative or friend will provide care and support. Such situations not only adversely affect disabled people, it can also have significant repercussions for carers. A report by Carers UK describes how many carers in trying to manage their caring responsibilities find that they lose friendships, opportunities to participate in community life and develop health problems. Furthermore individuals taking on caring responsibilities might have to reduce the hours they work or give up their job altogether⁵⁵. This raises an issue relevant to gender equality given that 58% of carers are women⁵⁶. Carers UK points out that not only are women less likely to continue in employment after they take on their caring responsibilities than men, but given that the peak age for taking on such responsibilities is in the fifties:

'...it is likely that many of these women will also have had a traditionally female career which involved periods out of the labour market whilst bringing up a family. The combination of these two factors leaves many women who care facing poverty in retirement because of the impact of caring on their pensions.'

Independent Living: wider policy implications

Potentially the promotion of independent living has yet further implications. The DRC argues that addressing the experiences of disabled people is central to meeting Britain's main public policy

⁵⁴ Page 15

⁵⁵ Missed Opportunities, Carers UK, 2003, quoted in Carers UK, *'Whose rights are they anyway? Carers and the Human Rights Act'* 2006, 19

⁵⁶ See www.statistics.gov.uk/StatBase/Expodata/Spreadsheets/D7396.xls

goals (economic prosperity, full employment, an end to child poverty, better health, less crime). For example, full employment cannot be achieved unless greater opportunities are provided for those disabled people who form 40% of the people out of work. Child poverty cannot be effectively tackled unless we consider how to help the one million disabled parents who are out of work and whose children are living in poverty.⁵⁷

The promotion of independent living can help to address these issues. For example, by providing assistance in a manner and at a time that will enable a disabled person to travel to work could make the difference between that person being able to be in full-time employment or losing his or her job.

5. The Meaning and Scope of the Key Duties of the Commission for Equality and Human Rights

The Human Rights Duties

Section 9(1) of the Equality Act 2006 (the Act) sets out the CEHR's duties in relation to 'human rights':

'The Commission shall, by exercising the powers conferred under this part –

- a) promote understanding of the importance of human rights,*
- b) encourage good practice in relation to human rights,*
- c) promote awareness, understanding and protection of human rights, and*
- d) encourage public authorities to comply with section 6 of the Human Rights Act 1998 (c.42) (compliance with Convention rights).'*

⁵⁷ DRC *'Changing Britain for Good: Putting disability at the heart of public policy'* January 2006

While section 9(1)(d) is specific to public authorities compliance with the Convention, the Explanatory Notes to the Act points out that the duties under section 9(1)(a) – (c) are not so limited, stating that the CEHR:

‘...will, for example, also be able to provide encouragement to the voluntary and commercial sectors to adopt appropriate human rights standards as the basis of the relationship with their clients and customers in the provision of services.’

This is welcome given the restrictive interpretation applied by the courts to the definition of ‘public authorities’⁵⁸. This was described by the Joint Committee on Human Rights as a ‘serious gap’ because it means that many of those receiving services that are being provided by private and voluntary sector bodies undertaking functions on behalf of public bodies (such as local authorities) are excluded from the HRA’s protection⁵⁹. The CEHR will not be so confined and will therefore be able to work with a wide range of organisations, whether or not they are ‘public authorities’ within the meaning of the HRA, such as voluntary organisations, private employers and providers of goods and services, in addition to general public awareness raising activities.

Broad scope of ‘human rights’

As discussed above, the CEHR human rights duties must underpin all its activities. Furthermore, although the CEHR is expected to have ‘particular regard’ to the Convention, the scope of ‘human rights’ extend beyond these rights. This is clear from the definition of ‘human rights’ and the description of the key duties. The Act divides ‘human rights’ into two groups⁶⁰. The first group are the rights under Convention that are included in the HRA. The second group are

⁵⁸ See for example, *R on the application of Heather and Callin v Leonard Cheshire Foundation and HM Attorney General* [2002] EWCA Civ 366, 5 CCLR June 2002 317 ,

⁵⁹ Joint Committee of Human Rights, 7th Report 2003-04, www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/3902.htm. The Joint Committee argued that the fact that some organisations were not considered to be public authorities, even where they stood ‘in the shoes of the State’, was contrary to the Convention’s jurisprudence which makes clear that ‘the State cannot evade its responsibility to safeguard Convention rights by delegation to private bodies or individuals’.

⁶⁰ See section 9(2)

described as 'other human rights' but no further details are given. There are numerous human rights instruments that might fall within this second group at both European and international levels⁶¹.

The specific human rights duties are described in Section 9(1). Sub-paragraphs (a), (b) and (c) require the CEHR to promote understanding of the importance of, encourage good practice in relation to, and promote understanding and protection of, 'human rights' (namely the Convention rights included in the HRA and 'other human rights' which will include the second, wide-ranging, group of human rights instruments).

Sub-paragraph 9(1)(d) differs significantly from the first three sub-paragraphs as it refers to the Convention rights alone. It requires the CEHR to encourage public authorities to comply with their duty under section 6 of the HRA, namely to comply with Convention rights unless legislation prevents them from doing so. However even in this area the human rights discourse can extend beyond the Convention rights given that the European Court of Human Rights and national courts⁶² may seek guidance from other relevant human rights instruments when considering cases under the Convention.

The significance of a broad human rights framework

The CEHR will need to ensure that its work is informed and shaped by the extensive range of European and international human rights instruments that will be relevant to its duties and powers. These will include the six core United Nations (UN) treaties⁶³ (such as the

⁶¹ See for example, Council of Europe *Human Rights in International Law, Collected Texts*, 2nd Edition, November 2000 which includes some of the key human rights texts.

⁶² See for example *Hirst v the United Kingdom* (2004) and *R (on the application of A and B) v East Sussex CC* (2003) 6 CCLR 194.

⁶³ These are the International Covenant on Civil and Political Rights (1966); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Elimination of All Forms of Racial Discrimination (1965); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and the Convention on the Rights of the Child (1989). The scope of these treaties in relation to disability are considered in a study undertaken on behalf of the United Nations: G. Quinn and T. Degener et al, *Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability*, United Nations, 2002; available online: www.ohchr.org/english/issues/disability/study.htm

International Convention on Economic, Social and Cultural Rights) and other Council of Europe human rights instruments, such as the European Social Charter⁶⁴. The UK Government has ratified these legally binding instruments and although such treaties have not been incorporated into UK domestic law⁶⁵, the UK Government has to demonstrate compliance with the treaty obligations. Compliance with the UN treaties is monitored through periodical reports being submitted to the relevant treaty body⁶⁶. Thus the CEHR's involvement would not be about creating new rights for citizens but overseeing compliance with existing rights, for example through raising public awareness about such rights. The CEHR will be able to report to international bodies about the UK's compliance (or otherwise) with its international human rights obligations⁶⁷.

The CEHR should also be guided by 'soft law' (non-binding, but considered influential, instruments) such as the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities ('the UN Standard Rules')⁶⁸.

Table 4 sets out some of the main European and international human rights instruments and gives some examples of how they are relevant to independent living.

⁶⁴ See Council of Europe *Human Rights in International Law, Collected Texts*, 2nd Edition, November 2000 which includes some of the key human rights texts.

⁶⁵ The UK operates a 'dualist' approach which means that ratifying a treaty is not enough for it to become part of UK domestic law it must be incorporated into domestic legislation. For example, the HRA incorporated most of the Convention rights into UK law when it came into force in October 2000.

⁶⁶ See Michael O'Flaherty, *Human Rights and the UN: Practice Before the Treaty Bodies*, 2nd Edition, Kluwer Law International, 2002. For the reporting procedure for the European Social Charter see:

http://www.coe.int/t/e/human_rights/esc/3_reporting_procedure/1_State_Reports/default.asp#TopOfPage

⁶⁷ See Section 18 of the Act and the Explanatory Note, paragraph 65

⁶⁸ <http://www.un.org/esa/socdev/enable/dissre00.htm>

Table 4: International Human Rights and Independent Living

Instrument	Legally Binding?	Relevance to IL
Universal Declaration of Human Rights	No but widely accepted & so a 'yardstick for measuring the conduct of States' ⁶⁹	Range of civil & political rights and economic, social and cultural rights, such as: right to life and liberty, the right to marry and found a family, the right to work and the right to an adequate standard of living. Article 1: <i>'All human beings are born free and equal in dignity & rights...'</i>
UN International Covenant on Civil & Political Rights	Yes.	Includes: right to life; right to liberty; right to marry and found a family; right to take part in the conduct of public affairs; right to vote. Key principle of equality: <i>'sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetrate discrimination...'</i> ⁷⁰
UN International Covenant on Economic, Social & Cultural Rights	Yes.	Includes: right to work, right of everyone to achieve the highest attainable standard of physical and mental health. In relation to disabled people, the obligation is to <i>'...take positive action to reduce structural disadvantages and to give appropriate preferential treatment...in order to achieve the objectives of full participation and equality within society for all [disabled people].'</i> ⁷¹
UN Convention	Yes.	Article 23: recognition that all disabled children <i>'should enjoy a full and</i>

⁶⁹ Basic Facts about the United Nations, United Nations 1998.

⁷⁰ CCPR General Comment 18, Non-discrimination, 37th Session 1989

⁷¹ CESCRC General Comment 5, Persons with disabilities, 11th Session 1994

on the Rights of the Child		<i>decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'</i>
UN Draft Convention on the Rights of Persons with Disabilities	Adopted by the UN in December 2006. Will be legally binding, subject to sufficient number of signatories ⁷² .	Article 3 sets out the general principles, including: ' <i>Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons</i> '; Article 19 provides for the recognition of ' <i>the equal right of all persons with disabilities to live in the community...</i> '
UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities	No but used as guide to interpretation of legally binding treaties	Participation is a core theme. Preconditions for participation include the need to ' <i>ensure the development and supply of support services...to assist [disabled people] to increase their level of independence in their daily living and to exercise their rights</i> ' (Rule 4). Target areas for participation include education (Rule 6), employment (Rule 7) and family life and personal integrity (Rule 9). States should ' <i>create the legal bases for measures to achieve the objectives of full participation and equality for [disabled people].</i> ' (Rule 15)

European Convention on Human Rights	Yes.	Includes a range of civil and political rights such as the right to liberty, right to private and family life and the right to marry and found a family. In some circumstances obligations may extend beyond refraining from interfering with rights to requiring States to take positive
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⁷² Open for signature on 30th March 2007:
www.un.org/esa/socdev/enable/dmopsig30mar.htm

		action to protect such rights, for example assisting disabled people with their housing ⁷³ .
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European Social Charter (1961)	Yes. (The UK government has not ratified the Revised European Social Charter (1991))	Includes: right to work, the right to a fair remuneration, right to vocational training and the right of the family to social, legal and economic protection. Article 15 provides the right of <i>'physically and mentally disabled people to vocational training, rehabilitation and resettlement'</i> . The wording in the Revised Social Charter which the UK government has yet to ratify is much stronger – <i>'The right of persons with disabilities to independence, social integration and participation in the life of the community.'</i>
European Union Charter of Fundamental Rights	No, but this may change if the EU Constitution is accepted by member states.	Article 26: <i>'The Union recognises and respects the right of persons with disabilities to ensure their independence, social and occupational integration and participation in the life of the community.'</i>

The importance of economic, social and cultural rights

The promotion of economic, social and cultural rights will be as important as ensuring respect for civil and political rights if the CEHR is to realise the outcomes for society set out in section 3 of the Act. Civil and political rights include rights such as the right to liberty and the right to private and family life. Economic, social and cultural rights cover rights such as the right to work and the right to an adequate standard of living. Increasingly the indivisibility (interdependence) of

⁷³ Marzari v Italy (1999) 28 EHRR CD 175. See discussion in DRC's paper on Independent Living and the Human Rights Act 1998 (2004) www.drc-uk.org/docs/10_675_ILHRfinal.doc

economic, social and cultural rights alongside civil and political rights is being recognised⁷⁴.

Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) refers to 'achieving progressively the full realization of the rights' under this treaty, governments are required to take concrete and targeted steps to meet their obligations. Furthermore, the obligation to guarantee that the rights under the ICESCR will be exercised without discrimination takes immediate effect.⁷⁵ That the ICESCR can be a useful benchmark for measuring progress in related socio-economic areas was highlighted by the Joint Committee for Human Rights in its report on the ICESCR. The Committee recommended that the Government use the ICESCR as a means to measure progress in poverty reduction. Looking ahead to the establishment of the CEHR, the Committee commented:

*'The Covenant standards of economic and social rights present an opportunity to the Commission to draw together its work in promoting and achieving equality in public services and the workplace on the one hand, and in promoting and protecting human rights.'*⁷⁶

The Equality and Diversity and Diversity Duties

Section 8 of the Act states:

The Commission shall, by exercising the powers conferred by this Part –

- (a) promote understanding of the importance of equality and diversity,*
- (b) encourage good practice in relation to equality and diversity,*
- (c) promote equality of opportunity,*
- (d) promote awareness and understanding of rights under the equality enactments,*
- (e) enforce the equality enactments,*

⁷⁴ See, for example discussion in chapter 2, Sandy Ruxton & Razia Karim, *Beyond Civil Rights, Developing Economic, Social and Cultural Rights in the United Kingdom*, Oxfam and Justice, 2001.

⁷⁵ See Committee on Economic Social and Cultural Rights, General Comment 3, paragraphs 2 & 3.

⁷⁶ www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/183/183.pdf

- (f) *work towards the elimination of unlawful discrimination, and*
- (g) *work towards the elimination of unlawful harassment.*

The scope of the CEHR's equality and diversity duties are wide. Although key aspects of the CEHR's work under section 8 will be in relation to the existing 'equality enactments'⁷⁷ its responsibilities extend beyond this. The CEHR must also promote understanding of the importance of, and encourage good practice in relation to, equality and diversity, '*whether or not this relates to compliance with the equality enactments*',⁷⁸ and 'promote equality of opportunity'. When promoting 'equality of opportunity', the CEHR will be able to '*promote the favourable treatment of disabled persons*'⁷⁹.

Definitions

The Act provides definitions of 'equality' and 'diversity' but in vague terms ("diversity" means the fact that individuals are different⁸⁰ and "equality" means equality between individuals'), whereas "equality of opportunity" is not defined in the Act. With the concurrent investigations into equality and anti-discrimination law (the Equality Review and Discrimination Law Review) and consideration of what a Single Equality Act might look like, there has been much debate around issues such as the meaning of 'equality', 'diversity' and 'equality of opportunity'. These are likely to be useful points of reference for the CEHR in scoping its objectives and activities.

Equality of Opportunity

⁷⁷ See section 8(1)(d) – (g)). The 'equality enactments' are defined in section 33 as: the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, Part 2 of the Equality Act 2006 (discrimination on grounds of religion or belief and discrimination on grounds of sexual orientation), the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003.

⁷⁸ Explanatory Notes, paragraph 27

⁷⁹ Paragraph 28 of the Explanatory Note states that this ensures that the CEHR's work '*is consistent with the requirements of the Disability Discrimination Act 1995*'.

⁸⁰ Robin Allen QC commented: '*It needs to be said explicitly that **diversity** is really still a social aim rather than a well-defined legal concept.*' – '*Dealing with difference in Equality Law (How should we address diversity in equality law?)*', Equality and Diversity Forum Seminar Series, Seminar 3 – 9th January 2006

‘Equality of opportunity’ is not defined in the Act. The Code on the Duty to Promote Disability Equality⁸¹ which provides guidance to public authorities on their duties to promote disability equality (including the promotion of equality of opportunity⁸²) refers to the Life Chances report’s vision – that disabled people are to *have full opportunities and choices to improve their quality of life and will be respected and included as equal members of society*⁸³. It states that the objective of promoting equal opportunity:

‘... is that disabled people should have full opportunities and choices to improve the quality of their lives, and be respected and included as equal members of society. If such equality were achieved this would mean, at a very basic level, that disabled people who rely on additional assistance for their daily living, such as getting up and dressed, would have the same ability to determine the time at which they get up and go to bed as non-disabled people.’⁸⁴

Developing concepts on ‘equality’ and ‘equality of opportunity’

One of the criticisms levelled against the concept of ‘equality of opportunity’ is that it can be interpreted in a variety of ways. In her paper for the Equalities Review Tania Burchardt argues that while equality of opportunity is not without its limitations, a broad interpretation of this approach, such as the ‘capability model’ can address these⁸⁵. This model, which is based on Amartya Sen’s work⁸⁶, considers the substantive freedoms enjoyed by individuals, in other words ‘What people are able to do or be in their lives?’. This may be limited by lack of personal resources but, crucially, also the context in which the individual is living. It accommodates variations in need and also diversity of values and preferences because it focuses on the substantive freedom that individuals have to achieve valuable

⁸¹ www.drc-gb.org/PDF/DED_Code_Dec05_pdf.pdf

⁸² See 49A(1)(c) Disability Discrimination Act 1995 (introduced by section 3 Disability Discrimination Act 2005)

⁸³ Paragraph 1.5

⁸⁴ Paragraph 2.7

⁸⁵ Tania Burchardt, *Foundations for Measuring Equality: A discussion paper for the Equalities Review*, January 2006

⁸⁶ Amartya Sen, *Development as Freedom*, 1999, Oxford University Press

objectives rather than the outcomes themselves – individuals may choose whether or not to make use of these opportunities.

The capability model has been adopted by the Equalities Review⁸⁷. However the approach taken by the Equalities Review team has been widely criticised⁸⁸. In their submission to the Cabinet Office Equality Review and to the Discrimination Law Review, Sandra Fredman and Sarah Spenser suggest that the way that the capabilities model has been adapted is ‘misleading’⁸⁹. They describe the capabilities model as referring to:

‘an individual’s capacity to achieve the ‘functionings’ and goals that s/he values. As social, economic and physical constraints do not operate evenly through the community, however, some individuals might require more or different resources in order to achieve the goals or ‘functionings’ that they value. The focus on capabilities aims to ensure that policy-makers frame policies in such a way that individuals are able to make real choices and act on them.’

However they are concerned that the term:

‘...may suggest an emphasis on individual capacity rather than removing external barriers to equality; and it may seem to ignore the qualitative dimension of equality – equality of dignity and respect – particularly important in relation to services.’

Accordingly they suggest that the aims of equality should be made explicit. Drawing on the capabilities model the equality duties should seek to achieve:

- **Equal Life Chances** (aiming to break the cycle of disadvantage associated with discrimination and the pursuit of equal outcomes for example, equal pay.)

⁸⁷ See the Interim report: www.theequalitiesreview.org.uk/publications.aspx

⁸⁸ See for Mayor of London’s response, June 2006:
<http://www.london.gov.uk/gla/publications/equalities/equality-review-response.pdf>

⁸⁹ Delivering Equality: Towards an Outcome-Focused Positive Duty, June 2006
www.edf.org.uk/news/Delivering%20equality%20submission%20030606-final.pdf

- **Equal dignity and worth** (addressing stigma, harassment, humiliation, degrading treatment and violence.)
- **Accommodation and affirmation** (moving beyond identical treatment in meeting needs, to accommodate and affirm different identities, aspirations and needs, such as reasonable adjustment for disability.)
- **Equal participation in society** (an equality goal in its own right as well as a prerequisite to good relations, for example meaningful consultations and transport for older people.)

The Good Relations Duties

Section 10 of the Equality Act provides:

‘The Commission shall, by exercising the powers conferred by this part –

- a) promote understanding of the importance of good relations –

 - i. between members of different groups*
 - ii. between members of groups and others,**
- b) encourage good practice in relation to relations –

 - i. between members of different groups, and*
 - ii. between members of groups and others,**
- c) work towards the elimination of prejudice against, hatred of and hostility towards members of groups*
- d) work towards enabling members of groups to participate in society.’*

Definition

The Act does not define ‘good relations’. The Equality and Diversity Forum suggests that it should be interpreted broadly:

‘Good relations, it seems are about how people treat each other: on a continuum from positive attitudes in interactions through to positive

*behaviour (or negative attitudes through to violent behaviour). Good relations rest on an overarching principle: that individuals and communities should behave with acceptance and respect towards those who have different attributes and who hold different views or values.'*⁹⁰

Application

The good relations duty applies to 'groups'. A 'group' means a 'group or class of persons who share a common attribute' in respect of age, disability, gender, gender reassignment (proposed, commenced or completed), race, religion or belief, and sexual orientation⁹¹. The Explanatory Note to the Act states: 'smaller groups who may share an attribute in addition to the one in which the group is defined, such as Muslim women, or Black and minority ethnic lesbians and gay men, or young disabled people' will also be included. It also points out that the CEHR's work with groups can also apply to communities⁹².

The CEHR is to have 'particular regard to the importance' of exercising these powers in relation to 'groups identified by reference to race, religion or belief'. When promoting good relations between disability groups and others, the CEHR will be able to promote or encourage the favourable treatment of disabled people⁹³.

Scope of the CEHR's activities

It is not clear how the CEHR will be expected to carry out these duties. The Equality and Diversity Forum (EDF) argues that while the origins of the race relations duty⁹⁴ was in response to public disturbances, there is no reason for the CEHR to focus on the 'more viable manifestations of poor relations' such as rioting to the exclusion of other, more private aspects of poor relations such as domestic violence or elder abuse. Furthermore, when read alongside

⁹⁰ EDF paper April 2006

⁹¹ Section 10(2)

⁹² Paragraph 34, explaining section 10(2) and 10(3).

⁹³ Section 10(5)

⁹⁴ See the Race Relations Act 1976. This was amended by the Race Relations (Amendment) Act 2000 which introduced a duty on public authorities to 'have due regard to the need...(b) to promote equality of opportunity and good relations between persons of different racial groups.' (See s71 Race Relations Act 1976)

the outcomes set in section 3 of the Act, the good relations duty's scope has the potential to extend far beyond the public spaces; in fact the government

*'...has set a far more ambitious objective: to change the way in which individuals perceive and treat each other, whether in public institutional or private spaces.'*⁹⁵

The EDF points out that the extension of the community relations role into institutional settings accords with the duty on public bodies to promote good race relations:

'That duty extends, for instance, to hospitals where it is relevant to the relations between patients and staff, and to schools where it covers the relationship of pupils towards one another.'

The potential breadth of the good relations duty is underpinned by the additional powers set out in the Act. Section 19 provides that the CEHR may 'make, co-operate with or assist in arrangements' for monitoring crime affecting certain groups or designed to prevent or reduce such crime. It can also become involved in activities such as social, recreational, sporting and civic, which are designed to involve members of groups⁹⁶.

Links Between the Key Duties

As discussed above, the CEHR's work must be undertaken within a human rights framework. However, as the Equality and Diversity Forum notes, the human rights, equality and diversity and good relations duties are closely connected and need to be considered together:

'...the separate "pillars" of equality, human rights and good relations in the Act should not be viewed in isolation from one another...A society in which human rights are respected and individuals are

⁹⁵ EDF paper pages 7 – 8: www.edf.org.uk/news/EDF%20GoodRelationsPaper27.04.06.doc

⁹⁶ Section 19 and Explanatory Notes, paragraph 66

treated equally would be less likely to suffer from the conflicts and tensions that lead to “bad” relations.’⁹⁷

The promotion of independent living is a good example of why these ‘pillars’ should not be treated in isolation. Tables 2 and 3 show how all three pillars are of direct relevance to independent living. In developing its strategy for addressing the barriers to independent living the CEHR will need to include a range of activities across the spectrum of the equality, human rights and good relations duties.

6. Conclusion

This paper has sought to show the clear links between independent living and the CEHR’s roles and responsibilities. Independent living and the CEHR have similar goals while the barriers to independent living will also prevent the CEHR from achieving its goals. Thus, taking action to address the barriers to independent living will further the CEHR’s work in realising its goals. Furthermore such work has the potential to benefit not only disabled people but many others who are marginalised and struggle to get the support they need so that they can engage in the day to day activities of life which others take for granted.

Camilla Parker

August 2006, revised January 2007

⁹⁷ EDF ‘*The CEHR’s Duty to Promote Good Relations: A discussion paper from the Equality and Diversity Forum*’ April 2006

Annex: *The CEHRs duties and powers*

Duties

In addition to its general duty (section 1) and specific duties in relation to equality and diversity, human rights and good relations (sections 8 – 10), the Equality Act 2006 provides that the CEHR is required to:

- Prepare a strategic plan (section 4): publish and lay before Parliament a strategic plan which sets out the activities that it plans to carry out, the timetable for these activities and the priorities for these activities (or the principles on how these priorities should be determined). This plan must be reviewed at least once every three years. If the plan is revised the revised plan must be published.⁹⁸
- Consult on the preparation and review of the strategic plan (section 5): with interested parties and take account of any representations made.
- Monitor the law (section 11): keep the equality and human rights enactments under review and provide advice and recommendations on the law and proposed changes to the law. The CEHR is required to monitor the effectiveness of the equality and human rights enactments.
- Monitor what progress has been made towards the achievement of the desirable outcomes set out in section 3 (section 12): this includes a requirement to publish a progress report every three years. *‘To meet its obligations under this duty the CEHR will need to evaluate available evidence in order to identify desired outcomes for society and the indicators by reference to which progress can be measured. The CEHR will be required to consult widely on which of these should be priorities for the CEHR to monitor’.*⁹⁹

Powers

The CEHR also has a range of powers including:

⁹⁸ Explanatory Note to the Act, paragraph 20 and 21

⁹⁹ The Explanatory Note to the Act, paragraph 39

- The provision of information and advice, undertaking research and providing training and education (section 13).
- Issuing codes of practice in relation to specified areas of discrimination legislation and to promote equality of opportunity (section 14).
- Conducting inquiries in matters relating to its duties in respect of equality and diversity, human rights and good relations (section 16). The Explanatory Notes to the Act states: *'This could be thematic (for example into the causes of unequal outcomes), sectoral (looking at inequality in, for example, the uptake of health screening services or at the employment of disabled people in particular sectors e.g. the retail sector) or relate to one or more named parties.'*¹⁰⁰
- Making grants to others in pursuance of its duties in respect of equality and diversity, human rights and good relations (section 17).
- Co-operate with others interested in human rights within the UK or elsewhere (section 18).
- Make, co-operate with or assist in arrangements in relation to monitoring crimes affecting members of certain groups and undertake activities to reduce crimes within or affecting members of those groups. The CEHR can also arrange social, recreational, sporting, civic, educational or other activities designed to involve members of groups. (Section 19)
- Provide legal assistance to individuals in certain circumstances (section 28)
- Institute or intervene in legal proceedings where the proceedings are relevant to any of the CEHR's functions (section 30).

¹⁰⁰ Paragraph 56